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CAPITOL TAX PARTNERS

2021 Tax Legislative and Regulatory Outlook

The events since we last provided an outlook have added to the complexity of analyzing the upcoming year in tax legislation and regulation.[1] From the continued onslaught of the COVID-related health and economic crises to the unrest in the Capitol (both political and literal), resulting in a second impeachment of President Trump, the current atmospherics do not suggest a collegial legislative year is in the offing, but the political situation is highly uncertain given the events of the past two weeks.

On January 20, President-elect Joe Biden moves into the White House, which will signal a new political landscape anchored by Democratic control in the House and Senate. The first priority for the new Administration and the Democratic-held Congress will be to provide additional COVID-related relief. This means increased funding for vaccinations, testing, and contact tracing; providing economic relief to individuals and businesses impacted by the crisis, including extension of supplemental unemployment benefits; and reopening the economy. A pressing question regarding this first step is whether Congressional Democrats, with the help of President-elect Biden, will find, or even try to reach, a bipartisan agreement on a relief package. Initial indications are that the incoming Administration would prefer to seek a bipartisan approach. After completing the first step, President-elect Biden and Congressional Democrats intend to shift to a larger package addressing job creation and stimulus, including infrastructure.

Democrats have the backstop of being able to attempt to use the budget reconciliation process twice during 2021 to accomplish their tax and spending agendas, which would only require a simple majority vote in the Senate. Choosing the budget reconciliation path is tricky, however, as complete Democratic unity and a tiebreaking vote in the Senate by Vice President-elect Kamala Harris would be needed to pass a partisan bill. As an early indication of the potential difficulty in this route, Sen. Joe Manchin (D-WV) has already expressed some concern over additional stimulus checks. Thus, although not impossible, the uncertainty of success with reconciliation is another reason for Democrats to seek to work with Republicans, at least at the outset of the new Administration. Republicans will certainly seek ways to be at the table during initial COVID relief negotiations, as there are several priorities, such as liability protection, that were not included in the December package.

The following outlook provides background related to the December COVID-relief package and an overview of the relevant legislative and regulatory items that may arise this year.

[1] For the previous Capitol Tax Partners legislative outlook, see “2020 Post-Election Outlook,” November 11, 2020.

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Lame Duck Overview

Recap

Despite its name, the lame duck session was anything but lame. Congress passed a $900 billion COVID-relief package along with a $1.4 trillion omnibus government funding measure and other miscellaneous items,[2] only to be held up by an announcement via Twitter by President Trump[3] that he was intending to veto the package due to his expressed concerns over “measly” $600 stimulus checks[4] and excessive spending in the omnibus package. Reversing his veto threat, the President announced on December 27, one day before a seven-day continuing resolution was set to expire, that he intended to sign the legislation, which he did later that day.[5]

At the outset of the COVID pandemic in March and April, Congress was able to quickly pass four legislative packages.[6] Efforts to reach a subsequent deal, however, stalled due largely to disagreements on the overall size of the relief package, state and local funding relief, and liability protections for reopening businesses, schools, and healthcare facilities.[7]

After months of failed negotiations between Congressional leadership and the Administration, a bipartisan, bicameral group of legislators[8] were able to jump start negotiations by coming to an agreement in principle on a $908 billion COVID-relief package. The agreement was announced on December 1, 2020, and included topline numbers on several items, including state and local funding, an unemployment insurance plus-up, enhanced Paycheck Protection Program (PPP), transportation, and liability protections.

After announcing the agreement in principle, the bipartisan group gained support from rank-and-file members in both chambers. House Speaker Nancy Pelosi (D-CA) and Senate Democratic Leader Chuck Schumer (NY) also suggested in a joint statement that the $908 billion agreement

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[2] H.R. 133, “Consolidated Appropriations Act, 2021.” The Omnibus overwhelmingly passed the House and Senate on December 21, 2020. In the House an appropriations bill covering Defense, Homeland Security, Commerce-Justice-Science, and Financial Services-General Government passed by a 327-85 vote and a separate bill including the remaining appropriations bills and the COVID relief package passed 359-53. The Senate passed the bill by a final vote of 92-6.

[3] President Donald J. Trump tweet, December 22, 2020, 7:15 P.M.

[4] “I simply want to get our great people $2000, rather than the measly $600 that is now in the bill. Also, stop the billions of dollars in ‘pork’.” President Donald J. Trump tweet, December 26, 2020, 9:10 A.M.

[5] Statement from President Donald J. Trump, December 27, 2020. https://www.whitehouse.gov/briefings-statements/statement-from-the-president-122720/.

[6] P.L. 116-123, Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020. H.R. 6074, March 6, 2020; P.L. 116-127, Families First Coronavirus Relief Act. H.R. 6201, March 18, 2020; P.L. 116-136, Coronavirus Aid, Relief, and Economic Security Act. H.R. 748, March 27, 2020; and P.L. 116-139, Paycheck Protection Program and Health Care Enhancement Act. H.R. 266, April 24, 2020.

[7] For detailed background on the year’s pre-election negotiations, see the Capitol Tax Partners 2020 Post-Election Tax Outlook, November 11, 2020.

[8] The group was initially led by the House Problem Solvers Caucus and Sens. Susan Collins (R-ME), Joe Manchin (D-WV), Mitt Romney (R-UT), Bill Cassidy (R-LA), Mark Warner (D-VA), Lisa Murkowski (R-AK), Jeanne Shaheen (D-NH), and Angus King (I-ME).

should be used as "the basis for immediate bipartisan, bicameral negotiations."[9] The bipartisan group later released legislative text of the agreement as two bills.[10]

The bipartisan package only included one tax item, which was a clarification that expenses attributable to forgiven PPP loans may be deducted as business expenses.

After the bipartisan group released their negotiated agreement, House and Senate leadership took control of the negotiations, which eventually led to the passage of the Consolidated Appropriations Act, 2021.[11] The package included over $900 billion of COVID relief, as well as government funding for the remainder of the fiscal year and various other items. The final bill included $600 economic impact payments (EIPs) for eligible individuals and underage dependents but did not include liability protections or substantial state and local relief.

Among the non-tax COVID-relief items included in the bill were an additional $284 billion for PPP and an expansion of eligibility, including allowing certain businesses to receive a second round of forgivable loans. The bill also extended federal unemployment insurance benefits by $300 for 11 weeks. Additionally, several industries, such as airlines and airports, motorcoach operators, and live venue operators received specific allocations of COVID relief money.

The final legislative package also included several COVID-relief tax items (in addition to EIPs), including:

- Extension and expansion through June 30, 2021 of the employee retention credit,
- Clarification that expenses attributable to forgiven PPP loans are deductible,[12]
- Allowing taxpayers to lookback to their 2019 income to determine eligibility for the child tax credit (CTC) and earned-income tax credit (EITC),
- Extension through 2021 of $300 above-the-line charitable contribution (increased to $600 for joint filers), and
- Flexible spending arrangement carryover and other relief.

[9] "Pelosi, Schumer Joint Statement on Need for Bipartisan Coronavirus Relief Negotiations," December 2, 2020. https://www.speaker.gov/newsroom/12220-5.
[10] Bipartisan COVID-19 Emergency Relief Act of 2020 provided $748 billion of relief without state and local funding or liability protection; Bipartisan State and Local Support and Small Business Protection Act of 2020 provides $160 billion of state and local funding if an agreement were reached on liability protections. For a press release, summaries, and legislative text, see https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-lawmakers-share-text-of-bipartisan-covid-19-emergency-relief-bills.
[11] H.R. 133, signed by the President on December 27, 2020.
[12] After the Coronavirus Assistance, Relief, and Economic Security (CARES) Act passed, Treasury released several pieces of guidance clarifying that expenses attributable to forgiven PPP loans would not be deductible because the loan and subsequent forgiveness does not give rise to income. See Notice 2020-32, Revenue Ruling 2020-27, and Revenue Procedure 2020-51, relying on the principles of section 265 that says that no deduction is allowed if the expense is allocable to income not subject to income tax.

Treasury's position was not widely supported by Congress and, at least according to the staff of the Joint Committee on Taxation (JCT), was not the intent of Congress. See Wall Street Journal, Richard Rubin, "Congress Seeks to Fix $120 Billion Tax Snafu in PPP Loans," July 29, 2020.

The legislative package also contained a robust tax extenders title and non-COVID disaster-related tax relief. The extenders package was negotiated by the tax-writing committees to create various buckets of extenders, including permanent items, long-term extensions, and short-term extensions, of various expiring provisions.

The provisions permanently extended include:

- Reduction of the medical expense deduction floor to 7.5 percent,
- Energy efficient commercial buildings deduction (section 179D), with modifications,
- Short-line railroad track maintenance credit, and
- Reduced excise tax rates for certain small producers of beer, wine, and distilled spirits.

Several other expiring provisions that have strong Congressional support were extended through 2025, which is the same time that several key TCJA provisions expire.[13] The following are some of the expiring provisions that were extended through the end of 2025:

- Look-through treatment for payments of dividends, interest, rents, and royalties between related controlled foreign corporations,
- Work opportunity tax credit,
- New markets tax credit,
- Exclusion from gross income of discharge of a qualified principal residence indebtedness,
- Exclusion for certain employer payments of student loans,
- Employer credit for paid family and medical leave,
- Expensing of certain qualified film, television, and live theatrical productions,
- Extension of carbon oxide sequestration credit, and
- Oil spill liability trust fund rate.

Other expiring provisions were extended only through the end of 2021, aligning with TCJA provisions related to deductions for business interest expense and research and experimentation expense. The total extenders package reduced revenues by $103 billion during the ten-year budget window, with a little over $50 billion of that attributable to permanently extending certain provisions.[14]

In addition to the extenders package, the bill contained several other tax provisions, including:

- Allowing full deductibility of business meals for expenses incurred before January 1, 2023,
- Allowing individuals to pay back payroll taxes deferred under Notice 2020-65 through December 31, 2021, rather during the first quarter of 2021,
- Adopting permanently the four percent floor on the low-income housing credit rate,

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[13] Some notable TCJA 2025 provisions scheduled to expire or come into effect include a rate increase in the base erosion anti-abuse tax (BEAT), as well as sunsetting of the section 199A passthrough business income deduction, decreases in individual tax rate brackets, an increase in the standard deduction amounts, the imposition of the state and local tax deduction cap, and an increase in the estate and gift tax exemption threshold, among others.
[14] JCX-24-20, December 21, 2020, "Estimated Budget Effects of The Revenue Provisions Contained In Rules Committee Print 116-68, The 'Consolidated Appropriations Act, 2021.'"

- Providing a 30-year alternative depreciation period for certain residential rental properties,
- Providing a 30 percent investment tax credit (ITC) for offshore wind facilities,
- Adding waste energy recovery property to qualifying technologies for purposes of the ITC,
- Delaying the phasedown of the solar ITC,
- Amending the minimum rate of interest for purposes of determining life insurance contract eligibility, and
- Narrow provisions impacting defined benefit and contribution plans.

Unfinished Items

Congressional Democrats and President-Elect Biden have described the 2020 bill as a "down payment" for additional COVID relief early next Congress, citing an interest in providing state and local funding relief and additional EIPs.[15] Senate Democratic Whip Dick Durbin (D-IL) said he's "not giving up on funding for state and localities" and conceded that "while the fight continues over these issues, we must provide some emergency relief for the American people before we go home for the holidays."[16] Also, the bill contains several deadlines that end during the first quarter of 2021, which provide the impetus for Congress to at least consider additional COVID-related legislation.

It was not only Democratic priorities that were left out of the deal. Although Senate Republican Leader Mitch McConnell (KY) had called liability protection a redline for any COVID deal, he allowed the COVID relief package to pass without those protections, saying that he will insist a subsequent deal will include them.[17] Many Republicans may resist any further COVID relief. Leading up to the bill, Congressional Republicans had indicated that they did not want subsequent COVID relief after the December bill. The state of the economy and pandemic will likely determine Republican interest in a subsequent package.

There were several tax items that had bipartisan support and were part of previous bipartisan negotiations but did not make it in the final package. This includes a safe and healthy workplace tax credit, credits for COVID-related fixed costs, and temporary remote workers state tax clarity.

As discussed more fully below, multiemployer pension reform was part of negotiations during December, but members were not able to reach an agreement on how to move forward on it. Additional retirement security provisions, such as those included in Ways and Means Committee Chairman Richard E. Neal (D-MA) and Ranking Member Kevin Brady's (R-TX) "SECURE 2.0" legislation, were held up by a deal not being reached on multiemployer pensions.

[15] New York Times, Thomas Kaplan, Annie Karni and Emily Cochrane, "Biden, Calling Stimulus Bill a 'Down Payment,' Urges More Relief," December 22, 2020. https://www.nytimes.com/2020/12/22/us/politics/biden-coronavirus-stimulus-bill.html.
[16] Washington Post, Tony Romm and Jeff Stein, "Aid to states and cities likely to be cut out of stimulus deal, leaving governors and mayors on the ropes," December 19, 2020. https://www.washingtonpost.com/us-policy/2020/12/19/stimulus-cuts-city-state-aid/.
[17] The Hill, Jordain Carney, "McConnell says he'll 'insist' liability protections are in any 2021 coronavirus deal," December 21, 2020.

2021 Legislation

With full control in Washington, Democrats intend to quickly pursue an additional COVID relief and stimulus package to address the health and economic crises. After attempting to pass a COVID deal, Democrats will likely pursue other policy priorities, such as health care, green energy, infrastructure, and pension reform. Although unlikely to pursue tax increases or other tax priorities on their own, it is possible that the priorities listed above will include tax provisions, both to implement their preferred policies and to pay for others.

Because Democrats will govern with historically narrow margins, passing legislation will be particularly challenging and will require bipartisanship or special legislative procedures. Democrats have indicated they would explore using the budget reconciliation process, or even explore waiving the filibuster. Those processes require only a simple majority in the Senate but still may be difficult to achieve or use.[18]

Because of the narrow Democratic majorities, Republicans may have a strong negotiating position on legislation with bipartisan support, such as retirement reform, infrastructure and improving domestic manufacturing incentives for critical industries. Top Republican tax priorities will include defending and improving the TCJA and extending the TCJA's key provisions.

In addition, legislative solutions may emerge from bipartisan subgroups of Members or Senators. For example, as discussed above the Problem Solvers Caucus, co-chaired by Reps. Josh Gottheimer (D-NJ) and Tom Reed (R-NY), and a "Gang of Eight" Senators played a significant role in crafting year-end legislation in 2020.

Additional COVID Relief and Stimulus

Democrats have indicated that additional COVID relief and economic stimulus will be one of the first items attempted in the new Congress.

After passing the December bill, Senate Democratic Leader Schumer said, "The bill today is a good bill. Today is a good day. But it is certainly not the end of the story, and it cannot be the end of the story. Anyone who thinks this bill is enough doesn't know what's going on in America. Anyone who thinks this bill is enough hasn't heard the desperation in the voices of their constituents, has not looked into the eyes of the small business owner on the brink of ruin."[19]

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[18] As we stated in our November outlook and discussed more fully below, "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."
[19] The Hill, Jordain Carney, "McConnell says he'll 'insist' liability protections are in any 2021 coronavirus deal," December 21, 2020.

During that December 20 press conference, Speaker Pelosi said that more is needed on COVID relief and that she expects President-elect Biden to bring "his values, his commitment to America's working families to the fore as we prepare for additional legislation."[20]

One clear priority item of the Democratic leadership is another round of stimulus checks. On January 6, Leader Schumer said that $2,000 EIPs will be one of his first priorities in the Senate. "It's one of the first things we want to do once our new senators are seated, they campaigned on it."[21] Enhanced EIPs do not enjoy unanimous Democratic support, however, with Sen. Manchin signaling recently that he would not support a $2,000 payment that is not well targeted to those in greatest need.[22]

It is unclear what relief will be provided in addition to stimulus checks, however. Likely priorities for Biden and Congressional Democrats include extensions of the enhanced unemployment insurance (UI) that begins to expire on March 14, state and local funding relief, and money to help reopen schools. In fact, the March expiration date of UI is expected to drive the timing of the next package. Several other expiring or limited provisions could be included, such as PPP and other grant funding, and the enhanced employee retention credit. Additionally, there were several items that were left off of the end of the year bill that could make their way back into a future bill, liability protection (sought by Republicans), remote worker relief, or credits for reopening businesses.

The HEROES Act, which was passed in the House last May, contains items that are Democratic tax priorities that could be raised in this first bill. Most notably, an enhanced child tax credit and earned income tax credit is likely to be included in President-elect Biden's proposed COVID-relief package. Other items that could be addressed include elimination of the TCJA's state and local tax deduction cap and a refundable business interruption credit for self-employed individuals experiencing a reduction in their income.[23] The HEROES Act would also curtail certain business tax benefits included in the CARES Act, such as the NOL carryback relief and business loss limitation provisions, which Republicans opposed as a retroactive tax increase.[24] Some Congressional Republicans, however, have been supporting extending several CARES Act business provisions, such as the increased business interest expense deduction, which expired at the end of 2020.

Before passing the last bill, Leader McConnell said that the "next" bill would be the "final" bill.[25] Since passing the December relief bill, however, Leader McConnell said that if there is

[20] Id.
[21] Fox Business, Morgan Phillips, "Schumer: $2,000 stimulus checks 'one of the first things we want to do'," January 6, 2021.
[22] The Hill, Jordan Williams, "Manchin on proposed round of $2K checks: 'Absolutely not'," January 8, 2021.
[23] 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.
[24] For example, see the May 20, 2020 floor statement of Sen. Chuck Grassley (R-IA), available at: https://www.grassley.senate.gov/news/news-releases/grassley-house-democrats-quarter-trillion-dollar-tax-hike.
[25] Forbes, Sarah Hansen, "McConnell Vows the Next Stimulus Bill Will Be the Last One," May 29, 2020.

another COVID relief bill that he will "insist that liability protection for these universities and health care providers is a part of it."[26]

Although Leader McConnell hedges that another bill may be necessary, many Congressional Republicans may not be open to supporting a large relief package due to the robust fiscal spending in 2020 and historic debt levels. Senate Majority Whip John Thune (R-SD) said that limiting government spending is "getting back to our DNA. ... I think spending, entitlement reform, growth and the economy are all things that we're going to have to be focused on next year, and, yeah, I would expect you'll hear a lot more about that."[27]

Expect Republicans to take a similar posture to the position that they took last year when they generally stood united in wanting to provide smaller, targeted relief. General interest will likely be impacted by the status of the economy and pandemic.

Last fall, House Republicans, including Minority Leader Kevin McCarthy (CA) and Ways and Means Ranking Member Brady, released a COVID relief package to provide relief and enhance U.S. manufacturing of critical medical supplies. Although many of the provisions weren't part of negotiations for the last bill, they remain a priority for Members and could be part of bipartisan conversations moving forward. The "Commitment to Defeat the Virus and Keep America Healthy Act" would, according to its sponsors, 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.[28] The tax title contains about 15 provisions, including a domestic medical and drug manufacturing credit, an advanced medical manufacturing equipment credit, an enhanced research and development credit associated with the development of countermeasures and a healthy workplace tax credit (substantially similar to the proposal included in the HEALS Act).

Important Legislative Deadlines

The following are deadlines that may impact the legislative calendar and dictate what policy priorities may be part of any legislation in 2021:

January 20, 2021	Presidential Inauguration Day
January 31, 2021	Eviction moratorium expires
February 10-11, 2021	House Democratic 2021 Issues Conference
March 14, 2021	Unemployment plus-up expires
June 30, 2021	Employee retention tax credit expires
August 1, 2021	Debt Limit reinstated (subject to use of extraordinary measures)
September 30, 2021	Highway Trust Fund spending authorization expires; end of fiscal year
December 31, 2021	TCJA expiring tax provisions, additional expiring tax provisions

[26] The Hill, Jordain Carney, "McConnell says he'll 'insist' liability protections are in any 2021 coronavirus deal," December 21, 2020.
[27] The Hill, Jordain Carney, "Republicans ready to become deficit hawks again under a President Biden," November 27, 2020.
[28] H.R. 14, "Commitment to Defeat the Virus and Keep America Healthy Act." Introduced October 30, 2020.

December 31, 2022	Additional TCJA, business meals deduction and other expiring tax provisions
December 31, 2025	Additional TCJA and other expiring tax provisions

Legislative Process, Reconciliation, and Filibuster Reform

Democrats will have three possible processes that can be used to pass legislation through Congress: (1) regular order (60-vote threshold in Senate), (2) budget reconciliation (simple majority in Senate with significant restraints), or (3) overturn legislative filibuster (simple majority in Senate without the restraints contained in reconciliation).

Regular order would require Democrats to work across the aisle in both chambers to come to an agreement on policy. Coming to an agreement could be difficult given the current atmosphere and with a mid-term election in 2022 and control of the House and Senate in the balance. Agreement could be met, however, on smaller legislative priorities that already have bipartisan support, such as retirement policy. Further, if the pandemic or economic crisis worsens, Congress could work together to pass additional COVID relief and/or stimulus bill.

The Biden Administration, and its relationships with Republicans, will be key for Democrats when negotiating a bill through regular order. Note that Democrats, including then-Vice President Biden, worked on a bipartisan basis in 2009 when they passed the American Recovery and Reinvestment Act of 2009 (ARRA) by getting three Senate Republicans (but no House Republicans) to support the legislation. With only 50 Democratic Senators, at least ten Republicans would need to support legislation to pass through regular order. For reasons stated below, if politically viable, this potentially is the fastest path for legislation to pass.[29]

Should Democrats seek to pass legislation with little-to-no Republican support, the budget reconciliation process could be used to bypass the Senate filibuster. Reconciliation was established in the Congressional Budget Act of 1974 and provides Congress an alternative procedure in which only a simple majority is required in the Senate to pass spending, revenue, or debt limit laws.[30] Because Congress did not pass a budget resolution for fiscal year 2021, there will be two available resolutions in 2021 for reconciliation instructions (FY2021 and FY2022), allowing Democrats to use the process twice similar to what the Republicans did in 2017, as described below. Speaker Pelosi, as recently as November, said that she would consider using budget reconciliation to pass healthcare priorities and pandemic relief.[31]

[29] In 2009, ARRA was introduced in the Senate on January 6, 2009, introduced in the House on January 26, 2009 and signed into law on February 17, 2009.
[30] Also, floor debate on reconciliation bills is limited and voting procedures are expedited. Because of these 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 in 2010, and the TCJA in 2017.
[31] “We’ll almost certainly be passing a reconciliation bill, not only for the Affordable Care Act, but for what we may want to do further on the pandemic and some other issues that relate to the well-being of the American people,” Pelosi said. Politico, Caitlin Emma, “Pelosi eyes reconciliation to boost Obamacare, pandemic aid,” November 2, 2020.

This process comes with both political and procedural limitations. First, Democrats in both chambers would have to remain unified and reach agreement to pass a budget resolution, including reconciliation targets. This is not necessarily easy to achieve given the often-differing agendas of the two chambers and between the moderate and progressive wings of the party.

Second, any reconciliation legislation must comply with the requirements of the Byrd Rule. The Byrd Rule prohibits including policies considered extraneous to the purpose of the reconciliation bill; this includes items without a budgetary component, increasing the deficit beyond the covered budget period, violating the reconciliation budget target, items that have a budget effect merely incidental to the policy, and items affecting the Social Security trust fund.[32] Any member can raise a point of order if the Byrd Rule is violated, requiring 60 votes in the Senate to overcome.

Reconciliation was most recently used in 2017, when Republicans used it twice – (1) to pass a health care bill that was ultimately unable to meet the simple majority threshold in the Senate,[33] and (2) to pass the TCJA.[34] Because the TCJA was passed using budget reconciliation, a number of its provisions had to be sunset or phased-out (at the end of this year, next year, or 2025) to meet the reconciliation target and avoid a revenue impact outside the budget window that would allow the Byrd Rule to be invoked.

Sen. Bernie Sanders (I-VT) is expected to be Budget Committee chair. In a recent interview Sen. Sanders said he intends to be “extremely aggressive” in using the reconciliation process to advance progressive policies.[35] According to the article, he will push for an additional $1,400 EIP. He also said he wants legislation supporting “those facing eviction, can’t afford to go to the doctor, don’t have enough food, and are unemployed – in addition to measures that would repair infrastructure and combat climate change. He also said “he sees no reason to wait to raise taxes on the wealthy and on major corporations. At this point it is unclear whether a budget reconciliation instruction will be under the direction of the Budget Committee chair or leadership.

A third possible avenue, though least likely because it is a more drastic step with adverse precedential consequences, is for Democrats to waive the Senate filibuster. This would remove the 60-vote threshold, a similar outcome to budget reconciliation, but would not have the Byrd Rule limits, or the need to pass concurrent budget resolutions. There are several institutionalist Democratic Senators who could object to this approach. Sen. Manchin, for example, cooled expectations for this option in an interview on November 9, saying “I will not vote to end the

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[32] The rule against impacting Social Security seemingly would preclude consideration of President-Elect Biden’s proposal to increase Social Security taxes on taxpayers making over $400,000 in a reconciliation process. Further, section 310(g) of the Congressional Budget Act of 1974 prohibits reconciliation bills that contain recommendations for social security changes.
[33] A budget resolution with instructions for Committees to process healthcare policy was introduced in the Senate on January 3, 2017 and ultimately failed in the Senate on July 28, 2017.
[34] The TCJA budget resolution with reconciliation instructions was introduced in the House on July 21, 2017 and the TCJA was signed into law on December 22, 2017.
[35] Bloomberg Government, Jack Fitzpatrick, “Sanders to Use Budget Gavel to Seek Aggressive Economic Aid,” January 12, 2020.

filibuster."[36] Without Sen. Manchin's (or any other Democratic Senator's) support, filibuster repeal likely will not be an option. However, if Democratic priorities languish because they are unable to move through regular order or budget reconciliation, pressure could increase to pass Democratic priorities by waiving the filibuster.

Infrastructure

After extending authorization for spending from the Highway Trust Fund (HTF) for one year, Congress will again have to decide how to proceed on funding the rapidly depleting fund by the end of September. Although Congress has simply extended authorization recently and taken any needed funds from the general Treasury fund, it is possible that due to a potential need for economic stimulus and a general frustration about not addressing the long-term struggles of the HTF, that infrastructure may be addressed in a comprehensive manner.

Infrastructure has generated support from both sides of the aisle, although if bipartisan negotiations fail, it is possible that Democrats could use reconciliation to pass an infrastructure package. Democrats have discussed the possibility of reinstating earmarks, with strict limits and transparency, which could aid in the passage of an infrastructure bill.

Last year, House Democrats passed the Moving Forward Act, which provided over $1.5 trillion to rebuild infrastructure, which was broadly defined to include not only roads, bridges, airports, and transit, but also investments in schools, housing, broadband, green energy, and childcare.[37] Speaker Pelosi urged Leader McConnell to take up the legislation, and the legislation can be viewed as indication of the priorities House Democrats will push during any infrastructure negotiations.[38]

The Moving Forward Act included a large number of tax provisions, including:

- Reinstating Build America Bonds,
- Reinstating advanced refunding of tax-exempt bonds,[39]
- Expansion of private activity bonds,
- Expansion of the historic rehabilitation, new markets, and low-income housing credits, and
- Provisions included in the Growing Renewable Energy and Efficiency Now Act of 2020 (GREEN Act).[40]

To fund the Highway Trust Fund, the Moving Forward Act would extend certain highway-related taxes, including taxes on diesel fuel and special motor fuels and certain alcohol fuels,

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[36] Roll Call, Niels Lesniewski, "Joe Manchin kills dreams of expanding Supreme Court, eliminating the filibuster," November 9, 2020.
[37] H.R. 2. A fact sheet of the Moving Forward Act can be found at: https://transportation.house.gov/imo/media/doc/Fact_sheet_HR_2_Moving_Forward_Act_FINAL_1.pdf.
[38] Pelosi press release following the House passage of H.R. 2, July 1, 2020. https://www.speaker.gov/newsroom/7120-0.
[39] The ability of a tax-exempt bond issuer to advance refund its bonds was repealed in the TCJA.
[40] The GREEN Act, H.R. 7330, is discussed more fully in the section below.

retail sales taxes on certain truck and semitrailer chassis and bodies, taxes on the use of certain heavy vehicles, and taxes on tires and taxable fuel.[41]

During the Presidential campaign, President-Elect Biden released a $2 trillion plan to revamp American infrastructure and energy designed to both curb climate change and spur economic growth.[42] The stated priorities of the plan include:

- Building a modern infrastructure,
- Positioning 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 free power sector by 2035,
- Make dramatic investments to upgrade energy efficiency in buildings and weatherize two million homes,
- Build 1.5 million new affordable, sustainable homes,
- Advance sustainable agriculture and conservation, and
- Secure environmental justice and equitable economic opportunity.

Efforts to make infrastructure bipartisan may be met with objections from Republicans that the package is too costly. Note that in the 2015 highway discussions, which culminated in passing a five-year extension, conservatives opposed using revenue from tax reform measures for specific priorities, such as highway spending.

The HTF is rapidly running out of money. Below represent some of the options that could be considered for addressing the funding gap:[43]

- Increasing/indexing the fuel tax. If the motor fuel taxes for gasoline and diesel had been adjusted in 2018 to keep pace with the Bureau of Labor Statistics consumer price index since 1993, the 18.3-cents-per gallon gasoline tax would now be 31.8 cents per gallon and the 24.3-cents per gallon diesel tax would be 42.2 cents per gallon. A one cent-per-gallon increase in the fuel taxes generates approximately $1.7-1.8 billion/year in additional HTF.
- Vehicle miles traveled tax (VMT). A tax based on mileage driven that may possibly replace the federal gas tax. Some VMTs have been tested at the state level, but concerns remain with privacy, administrability, implementation, collection costs, and distributional effects.
- Tax electric vehicles (EVs). Charging EV drivers for road use would provide some revenue and address the policy concern of these vehicles' current lack of contribution to the HTF.

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[41] The JCT revenue estimate of H.R. 2 can be found at: https://www.jct.gov/publications/2020/jcx-18-20/.
[42] https://joebiden.com/clean-energy/.
[43] The excise taxes on gasoline and diesel fuel will decrease to 4.3 cents per gallon after September 30, 2022. The fuel rates have not been increased since 1993.

The options for raising revenue for the HTF are compiled from resources produced by the Congressional Research Service, Congressional Budget Office, and Joint Committee on Taxation.

- Federal sales tax on motor fuel. Imposing a federal tax on some percentage of the retail price of fuel either alongside or in place of a fixed cents-per-gallon tax. Some states have adopted this approach, but it is subject to wide fluctuations in times of retail price changes.
- Expanded use of tolling. Tolls could be used to pay for highway projects but are often expensive to administer and enforce and subject to evasion.
- Private investment. Increased use of public-private partnerships and privatization of roads and bridges may reduce federal costs in some cases.
- Asset recycling. The sale or lease to the private sector of government-owned infrastructure assets and the investment of the proceeds in new infrastructure was included in a draft bill circulated by former House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) in 2018.

Energy Policy and Climate Change

Energy policy and the climate emerged as a topline political issue during the 2020 election cycle for the Democratic Party. President-elect Biden indicated that he will use his early days in office to implement green energy policies designed to combat climate change, including rejoining the Paris climate accord on "day one" and rolling back Trump executive orders on energy policy.[44] Also, Treasury Secretary nominee Janet Yellen said recently that climate change will be a "very high priority" of the Biden Administration.

Legislatively, Congressional Democrats are expected to continue pushing for incentives for building renewable energy resources and policies to combat climate change. Earlier this month, Schumer said, "We need bold climate action now," adding, "I will fight side-by-side with the Biden-Harris climate team to pass a bold climate and clean-energy agenda."[45]

On the tax front, this could include finding avenues to pass provisions included in the GREEN Act, which was introduced by Rep. Mike Thompson (D-CA) and cosponsored by the Ways and Means Committee Democrats. Some of the items in the GREEN Act include expanding developers' and utilities' ability to monetize renewable energy credits, extending credit phase outs, allowing publicly traded partnerships (or master limited partnerships, MLPs) to invest in renewable energy, and enhancing and expanding investment in electrification of the transportation sector. Some of the GREEN Act provisions were included in the 2020 year-end bill.

In addition to the GREEN Act provisions, Members will likely continue working on "technology-neutral" approaches to providing tax incentives for renewable energy technologies. Incoming Senate Finance Committee Chairman Ron Wyden (D-OR) has previously introduced with the support of 25 other Senate Democrats the Clean Energy for America Act, which consolidates the current tax provisions into three technology-neutral provisions to promote a low-carbon economy and U.S. energy independence.[46] Rep. Reed has also been working on the

[44] CNBC, Emma Newburger, "Biden will rejoin the Paris Climate Accord. Here's what happens next," November 20, 2020.
[45] Sen. Chuck Schumer tweet, January 4, 2020, 7:29 P.M.
[46] S. 1288.

Energy Sector Innovation Act, which provides tax credits for innovation in emerging energy technologies.[47]

Although prospects for becoming law this Congress are unclear, there has been a growing coalition in support of a carbon tax. Several different proposals were introduced last Congress, including the America Wins Act introduced by Ways and Means Member John Larson (D-CT)[48] and the America's Clean Future Fund Act introduced by Sen. Durbin.[49] In an October 2020 interview, Treasury Secretary nominee Yellen said, "I do see Republican support, and not only Democrat support, for an approach that would involve a carbon tax with redistribution." She added, "it is not politically impossible."[50] Several business organizations have supported Federal efforts to impose a carbon tax, including the Climate Leadership Council, which supports a carbon fee and dividend plan.[51] A carbon tax would potentially provide Congress with an additional revenue stream to pay for spending programs or to fill the budget deficit.

As discussed above, to the extent there are efforts to pass an infrastructure package, green energy provisions will be part of the conversation.

In addition to the work on tax issues, House Democrats will continue their work on the Select Committee on the Climate Crisis in the 117th Congress with Rep. Cathy Kastor (D-FL) continuing to lead that effort.[52] The Committee released a robust report last Congress outlining what they viewed as priority items to combat the climate crisis.[53] The House Rules package also allows the House Budget Chair, John Yarmuth (D-KY), to waive the Pay-Go budget limitations for energy bills addressing climate change.

During 2020, global government shutdowns of local economies disrupted supply chains, causing unforeseen delays in renewable energy construction, adding uncertainty as to whether the projects will qualify for the valuable tax credits. In response to construction and supply chain delays, Treasury, at the urging from Members from both parties, issued guidance extending the continuity safe harbor for one year for projects started in 2016 and 2017.[54] Additional guidance was released on December 31 providing a ten-year continuity safe harbor for offshore wind projects and projects on federal lands.[55] As the pandemic continues, additional regulatory relief may be needed for renewable energy projects.

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[47] H.R. 5523.
[48] H.R. 4142.
[49] S. 4484.
[50] Reuters Market News, Matthew Green, "US Could Adopt Carbon Tax Plan Under a Biden President-ex-Fed Chair Yellen," October 8, 2020.
[51] Yellen is a founding member of the Climate Leadership Council. Also note that in January 2017, Obama Administration Treasury Officials released a working paper on the "Methodology for Analyzing a Carbon Tax," Working Paper 115, John Horowitz, Julie-Anne Cronin, Hannah Hawkins, Laura Konda, and Alex Yuskavage.
[52] https://climatecrisis.house.gov/news/press-releases/speaker-pelosi-announces-select-committee-climate-crisis-will-continue-work.
[53] https://climatecrisis.house.gov/sites/climatecrisis.house.gov/files/Climate%20Crisis%20Action%20Plan.pdf.
[54] Notice 2020-41.
[55] Notice 2021-05.

Retirement and Multiemployer Pension Fixes

Although no agreement was reached on multiemployer pension (MEP) fixes during the December COVID negotiations, retirement reform remains a bipartisan priority for Congressional tax-writers. Stabilizing multiemployer pension funds will remain a top issue, and any additional retirement tax policy will likely be prevented from moving through Congress without a deal on MEPs.

About 1.3 million American workers and retirees are enrolled in MEPs that will soon go insolvent, threatening those individuals' benefits and the larger pension system. This threat, combined with dissatisfaction with the current system to address these issues, has created an apparent bipartisan desire in Congress to develop a better solution for rescuing failing MEPs. The problem to date has been reaching a consensus as to what that solution should be.

Until the HEROES Act was released, there had been two principal competing proposals in Congress intended to stabilize the funding of struggling multiemployer plans: (i) the Rehabilitation for Multiemployer Pensions Act (known as the "Butch Lewis Act"), which passed the House in the summer of 2019, and (ii) the Multiemployer Pension Recapitalization and Reform Plan (MPRRP) released by Senate Finance Committee Chairman Grassley and Senate Health, Education, Labor and Pensions Committee Chairman Alexander late in 2019.

While the proposals differed in several respects, the principal difference of concern between the parties (as well as certain healthy plans) was the method for funding the stabilization of underfunded plans. The Butch Lewis Act would have stabilized funding by making low-interest government loans (funded by government bonds) to underfunded plans. Republicans argued this amounted to a government bailout. By contrast, the Senate bill would increase PBGC benefit guarantees by increasing PBGC insurance premiums for all multiemployer plans. In other words, the MPRRP would require increased funding from healthy plans to help stabilize underfunded plans, while the Butch Lewis Act would have relied solely on funding from government bonds to stabilize underfunded plans.

In the HEROES Act, the House Democrats modified their approach in an effort to narrow the gap between them and Senate Republicans. Instead of relying on Treasury loans, the HEROES Act approach would allow PBGC to partition certain underfunded portions of plans, known as orphan liabilities; this is similar to the Senate Republicans' approach. An added benefit of this approach is that Treasury will not have to create a new program to administer loans. The House Democratic approach, however, would still rely solely on taxpayer funding and would not increase PBGC premiums on healthy plans.

The two sides spent two weeks attempting to reach a compromise in the context of the negotiations on the year-end tax package, but were unable to strike a deal. In a floor statement afterwards, Chairman Grassley said that despite good faith and agreement on both sides to make significant changes, they were unable to "find a compromise that satisfied our respective principles and objectives for resolving this situation." He then reiterated that, from a Senate Republican perspective, they believe that although federal funds will be needed to solve the crisis in the short term, "reforms are essential to ensure the system can be self-sustaining in the long term. Otherwise, taxpayers will be perpetually subsidizing a private-sector system of employee-benefit promises."

Following the failed negotiations, Chairman Grassley and Chairman Alexander released a revised version of their prior bill, incorporating "a year's worth of improvements and stakeholder feedback."[56]

President-elect Biden has said "our administration will fight for workers' retirement security by working with Congress to stabilize the multiemployer pension system and work with labor to pursue structural multiemployer pension reform. Workers need retirement security, and they deserve to have the promises their employers made to them about their pensions fulfilled." Also, since the negotiations on these issues fell apart in December, both Chairman Neal and Chairman Grassley have reiterated that addressing the multiemployer plan funding issue remains a top legislative priority for each of them. Consequently, we expect this issue to continue to be the subject of much effort and discussion as we head into the new year.

If an agreement can be made on MEPs, that will help clear the way to provide additional relief on single employer pension plans and other retirement provisions.

In October, Chairman Neal and Ranking Member Brady introduced a bipartisan package of retirement provisions this week, labeled Securing a Strong Retirement Act of 2020 (or "Secure 2.0").[57] It includes an amalgam of items, intended to encourage "more workers to begin saving earlier – and saving more – for their futures."[58]

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,

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[56] The bill is named after Chris Allen, the lead Senate Finance Committee majority staff aide on these issues who tragically passed away in 2019. A section-by-section summary of the bill can be found at https://www.finance.senate.gov/imo/media/doc/CAMPRRA%20Section%20by%20Section%20(FINAL%20FOR%20INTRO).pdf.

[57] 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, 2019. It included a variety of 401(k) reforms designed to broaden access for employees of small businesses while also making it easier for plan sponsors to include annuity options within 401k plans.

A section-by-section of SECURE 2.0 can be found at: https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2.0Sectionbysection_final.pdf.

[58] https://waysandmeans.house.gov/media-center/press-releases/neal-and-brady-introduce-new-bipartisan-legislation-strengthen-americans.

- Offer individuals 60 and older more flexibility to set aside savings as they approach retirement by increasing the maximum catch-up contributions,
- Allow individuals to save for retirement longer by increasing the required minimum distribution age to 75,
- 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,
- 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.

The bill has significant similarities with a retirement bill introduced in 2019 by Sens. Portman and Cardin called the Retirement Security & Savings Act.[59] According to the press release, their bill includes more than 50 provisions "designed to strengthen Americans' retirement security by addressing four major opportunities in the existing retirement system: (1) allowing people who have saved too little to set more aside for their retirement; (2) helping small businesses offer 401(k)s and other retirement plans; (3) expanding access to retirement savings plans for low-income Americans without coverage; and (4) providing more certainty and flexibility during Americans' retirement years."[60]

The Senate Finance Subcommittee on Social Security, Pensions, and Family Policy held a hearing in December on retirement security.[61] During the hearing, Subcommittee Chairman Portman said he believes there will be progress on retirement security legislation in the 117th Congress. He said, "Regardless of who gets the majority in the Senate come January, this is an area where I think we have the potential to make some progress because I think it has been and will be bipartisan." He noted that 27 provisions of the Portman-Cardin bill were included in the Neal-Brady bill. He said, "There are some provisions in ours that they do not include, and there are some in theirs we do not include, but that, I would argue, is just an opportunity when you have so much common ground between the two proposals. So, I think it's a really good starting point and again, it gives us an opportunity to get something done."

Another issue that could arise in the context of a COVID relief package or retirement savings package is pension smoothing relief. The HEROES Act would have made several single employer pension funding changes:

- The 10 percent corridor would be reduced to 5 percent, and the phase out would be delayed until 2026, at which point the corridor would, as under current law, increase by five percentage points each year until it attains 30 percent in 2030, and

[59] S. 1431.
[60] https://www.portman.senate.gov/newsroom/press-releases/portman-cardin-introduce-sweeping-reforms-strengthen-americans-retirement-0.
[61] Senate Finance Committee hearing, "Investigating Challenges to American Retirement Security," December 9, 2020.

- A 5% floor would be put on the 25-year interest rate averages to establish stability and predictability on a longer-term basis.

This provision was estimated to raise roughly $17 billion in the budget window. The provision was part of active negotiations as part of the end-of-year COVID relief package, but was tabled along with other retirement reforms when agreement could not be reached on a MEPs relief package.

Expiring Provisions

The December COVID-relief and omnibus spending package's extenders title reset the landscape for tax extenders moving forward. By permanently extending several popular extenders and aligning other expiring provisions with the TCJA expiring provisions in 2025, the typical politics that drive an extender bills each year will go through a significant realignment.

Further, there are several CARES Act provisions that expired at the end of 2020, such as an increased business interest deduction limitation and NOL carryback, that have some Congressional support to extend for this year. Efforts to extend the CARES Act provisions could be made in any subsequent COVID relief package or as part of an extenders conversation.

At the end of 2021, there are two expiring TCJA provisions that have support from the business community – (1) the business interest deduction limitation addback for depreciation, amortization, and depletion expenses, and (2) the ability to expense, rather than amortize, research and experimental expenditures. Having passed on a partisan basis, the TCJA has complicated politics that could make extending these TCJA provisions challenging in a bipartisan Washington, especially because their expiration was designed in TCJA to raise revenue to comply with the $1.5 trillion reconciliation instruction. By extending the most popular expiring provisions beyond 2021, with the exception of the wind PTC, an agreement that extends the TCJA provisions could include new legislative items that are important to Democrats.

The December bill also created a new extender by allowing businesses to fully deduct business meal expenses through the end of 2022.[62] President Trump was the strongest advocate for that provision, so it is unclear the extent to which it will help drive an extenders package in the future.

Health care

President-elect Biden has as one of his legislative priorities "to protect and build on the Affordable Care Act (ACA) and give every American access to affordable health insurance." This campaign promise has three principal features.

First, everyone will be provided a public health insurance option like Medicare. This is intended to provide relief to small businesses and individuals struggling to afford health care.

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[62] Previously, the business meal expense deduction was limited to 50 percent of expenses.

Second, he intends to increase the availability and size of premium tax credits to reduce the cost of health insurance coverage. Individuals and families currently are eligible for the premium tax credit if they have incomes between 100 percent and 400 percent of the federal poverty level (FPL) and are not eligible for coverage through a government program, such as Medicaid or Medicare. Many stakeholders have noted the need to improve financial assistance by increasing the amount of the premium tax credit for those already eligible and "lifting that cap" to include those with incomes above 400 percent of the FPL. Legislation to make these improvements, similar to the Biden campaign proposals, was introduced by Rep. Lauren Underwood (D-IL) and passed in the House earlier this year as part of the Patient Care and Affordable Care Enhancement Act.[63]

Third, President-elect Biden would ensure that low-income families not eligible for Medicaid because their state did not expand eligibility receive health insurance through the public option.

Health care reform may become an even more immediate priority if the U.S. Supreme Court finds that the ACA is unconstitutional. In 2012, the Supreme Court held that the individual mandate was constitutional as an exercise of Congress's taxing authority, because households without qualifying health insurance were required to pay a penalty.[64] The TCJA removed the penalties underlying the individual mandate. Subsequently, Texas and 19 other Republican-led states have argued that, because the mandate no longer has a tax penalty, the entire ACA was unconstitutional. California, joined by 20 other states and the House, appealed the case to the Supreme Court and argued that the mandate remains constitutional and alternatively that, if the Court finds that it is not constitutional, the mandate is severable. The Supreme Court heard the case on November 10th and is expected to issue a decision before it adjourns in June.

If the Court determines that the individual mandate is unconstitutional, or even more drastically that the ACA is unconstitutional because the mandate is not severable, Democrats will scramble to restore the constitutionality by either reinstating the individual mandate or through some other means. This likely will require them to use budget reconciliation procedures (described above), which could limit the types of reforms adopted because of the Byrd Rule (e.g., a desired policy change does not have a revenue effect) and political constraints.

Revenue Raisers, Fiscal Responsibility, and the Debt Limit

The COVID pandemic has ushered in an unprecedented level of government spending in the U.S. and across the globe. Although largely recognized as necessary to stop the spread of the disease and to ensure businesses and people have the resources necessary to survive the duration of government-imposed shutdowns, the large Federal deficit will likely become a topline political issue as the U.S. vaccinates its population and the economy rebounds from the pandemic.

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[63] H.R. 1425, Passed the House on June 29, 2020 by a vote of 234-179. Underwood's legislation, the Health Care Affordability Act, H.R. 1868, was introduced in March 2019.
[64] NFIB v. Sebelius, 567 U.S. 519 (2012).

With an impending debt limit showdown this summer or fall, Congress must focus on how to pass a debt ceiling increase, which will bring up debates on the deficit and spending and revenue collection.[65]

Members from both sides of the aisle are concerned about the long-term implications of the deficit and rising debt limit. House Budget Committee Chairman Yarmuth said early last year "we need to think seriously about severe and persistent deficits in the real economy, not just deficits in the budget. That doesn't mean that we can spend tax dollars without thought or discretion, but it does require that we use our Nation's resources, including our deficits, more wisely than this administration has."[66] Sen. Lindsey Graham (R-SC), who is expected to be ranking member on the Budget Committee, has said he would like to create a commission to propose ways to address debt and the deficit.[67]

Given these dynamics, it is possible that any debt limit deal will require some form of an agreement between the parties addressing spending decreases and revenue increases. Note, however, that a debt limit increase may be part of a reconciliation bill and if it is, then offsets are unlikely.

Although potential revenue raisers will be discussed as Democrats control Washington, it is unlikely that an initial COVID-relief bill will include offsets to pay for the package because the general policy consensus is that tax increases are not appropriate when faced with an economic crisis. Chairman Neal has acknowledged this problem saying, "timing on these sorts of considerations in an economic downturn, seeking new revenue, that would be a bit of a challenge."

If Congressional Democrats move non-COVID relief legislation through reconciliation, the discussion about possible revenue raisers becomes more relevant, because Democrats may be inclined to include raisers in a reconciliation bill, which mandates deficits may not be increased outside the budget window. Moreover, to address his view that there is both rising income inequality and a tax code that benefits the wealthy, President-elect Biden's campaign proposed significant tax increases on high-income individuals and corporations.

On the campaign trail, President-elect Biden was 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."[68]

For businesses, the Biden plan would increase the corporate rate to 28 percent and increase the effective tax rate on GILTI to 21 percent, apply it on a country-by-country basis, and eliminate

[65] The debt limit cap is reinstated on August 1, 2021, however, the Treasury Secretary may implement "extraordinary measures" to delay the debt limit for a short period of time, likely into the Fall.
[66] Rep. Yarmuth speech on the House floor, January 28, 2020. https://www.congress.gov/congressional-record/2020/1/28/house-section/article/h609-2?q=%257B%2522search%2522%253A%255B%2522yarmuth+deficit%2522%255D%257D&s=5&r=3.
[67] The Hill, Jordain Carney, "Republicans ready to become deficit hawks again under a President Biden," November 27, 2020.
[68] Biden tweet, November 1, 2020, 8:10 PM.

the exemption for qualified business asset investment. His campaign materials also proposed implementing a 15-percent minimum tax on global book income and a bank tax on large financial institutions.

For individuals, President-elect Biden proposed restoring the top individual rate to pre-TCJA levels for taxpayers earning more than $400,000, phasing out the passthrough business deduction for taxpayers earning more than $400,000, capping itemized deductions at 28 percent, and taxing capital gains as ordinary income for taxpayers with more than $1 million in income. He also proposed taxing built-in gains at death and modifying retirement benefits to equalize the benefits across income brackets.

Increasing taxes that were cut in the TCJA will likely be a redline for many Republican members. Conversely, without changes to the TCJA, extensions of TCJA expiring tax cuts may prove difficult for some Democrats.

Regarding potential effective dates, most tax increases included in major tax bills over the past three decades have been prospective. Based on that general precedent, if a tax bill were enacted during 2021, the effective date would likely be prospective, meaning for tax years beginning after 2021.[69] There is one significant exception – in 1993, the deficit reduction bill included several tax increases on a retroactive basis, including individual rate increases and raising the corporate rate from 34 to 35 percent. While retroactive tax increases are possible, the state of the economy and tight vote margins will present political challenges for Democrats to enact significant tax increases, especially retroactive ones.

While President-elect Biden has proposed to raise revenue in part by reversing Republican tax cuts for the wealthy and corporations, he and his advisers have also emphasized "tax fairness" or reforming tax compliance to combat high-end tax avoidance. According to a September 28, 2020 report by the Treasury Inspector General for Tax Administration (TIGTA), for tax years 2011 through 2013, the IRS estimated the annual gross tax gap, the difference between taxes owed and taxes voluntarily collected, to be $441 billion.

The tax gap has been made worse over the years through reductions to the IRS's annual budget. In 2010, the budget for the IRS peaked at $14 billion. Budget cuts in subsequent years resulted in the agency having fewer auditors in 2017 than in 1953 when the economy was a seventh of its current size. Former Treasury Secretary Larry Summers in a June 2020 Washington Post Op-Ed expressed "outrage" that the IRS is leaving billions of dollars in tax revenue on the table by failing to pursue high-income individuals, especially those who don't bother to file tax returns. Summers and other Biden advisers are advocating for investing more in the tax collector to attack the tax gap.[70] They argue that a modest increase in the compliance rate could produce at least a hundred billion dollars over the decade.

[69] A blended rate for the year of enactment is possible.
[70] The Washington Post, Lawrence H. Summers and Natasha Sarin, "The IRS is leaving billions on the table. Here's how it can collect that money.," June 22, 2020. See also Tax Notes Federal, Charles O. Rossotti, Natasha Sarin, and Lawrence H. Summers, "Shrinking the Tax Gap: A Comprehensive Approach," November 30, 2020.

In addition to sufficiently funding the IRS, the incoming Biden Administration likely will pursue a strategy of closing tax loopholes, eliminating abuse, and developing new tax policies that reflect changes in the economy and workforce. Rules relating to digital currencies, freelance work relationships, and information reporting could be targets to close the tax gap.

Technical Corrections

Over 70 potential technical fixes to the TCJA were identified in the Bluebook released by the Joint Committee on Taxation.[71] A discussion draft bill to address many of these identified technical issues was released by outgoing Chairman Brady at the start of 2019.[72]

While tax technical corrections historically have been noncontroversial measures offered jointly by the Chairmen and Ranking Members of the two tax-writing committees, Democrats have been resistant to fixing problems with a bill passed on a party-line basis. This is a similar political position to the objections raised by Republicans to making corrections to the ACA. It remains unclear whether and when Democrats will agree to address these technical corrections and whether it will come at a price Republicans are willing to pay.

A few of the highest profile technical corrections to the 2017 law moved separately from a broader package in the CARES bill, including clarifying the recovery period for qualified improvement property and clarifying the carryback period for net operating losses of certain corporations. Other significant ones remain, however, including allowing taxpayers that elect to pay the section 965 transition tax in installments to receive refunds or credits of tax overpayments and clarifying the application of the downward attribution rules as a result of the repeal of section 958(b)(4).

[71] JCS-1-18, "General Explanation of Public Law 115-97," December 20, 2018.
[72] The Tax Technical and Clerical Corrections Act was released as a discussion draft on January 2, 2019. For a Capitol Tax Partners comparison of the TCJA technical corrections identified by the JCT and in the Tax Technical and Clerical Corrections Act, see https://www.capitoltax.com/blog-collection/tcja-technical-corrections-comparison-chart.

New Administration

President-Elect Joe Biden

President-elect Biden has announced an ambitious agenda for his first 100 days in office, including a concerted effort to expedite vaccinations, the introduction of an additional COVID relief package, introduction of an immigration reform bill, a return to the Paris Climate Agreement, and roll-back of certain Trump Administration executive orders that he considers to be harmful to the environment and health.

President-elect Biden announced that he plans to unveil an outline of his COVID-relief economic growth package on Thursday, January 14. During a January 8 news conference, he broadly outlined the plan and said the economic relief package would cost trillions of dollars and would provide immediate funding for:

- Vaccine distribution,
- Safe reopening of schools,
- State, local and tribal government assistance,
- Unemployment benefits,
- Assistance for small businesses, and
- Assistance to individuals and families, including through an increase in economic impact payments to $2,000, and an extension of the moratorium on evictions.

Regarding business relief, President-elect Biden said that the Administration would put an emphasis on small businesses that have been hardest hit by the pandemic. "Our focus will be on the small businesses on Main Street that aren't wealthy and well-connected and that are facing real economic hardships through no fault of their own," he said.[73] He added that there will be a priority on helping minority and women-owned businesses, and that he will make a "concerted effort to help small businesses in low-income communities…that have faced systemic barriers to relief." The incoming Administration has also emphasized the need to reopen schools to allow parents to get back to work.

"Congress needs to act as quickly as possible on all of the issues I just laid out," President-elect Biden said, expressing a sense of urgency in the "midst of the most unequal economic and jobs crisis in modern history."[74]

The legislation would address infrastructure, health care and "a whole range of things that are going to generate good paying jobs that will enable us to grow the economy."[75] He said he also would seek to increase the federal minimum wage to $15 per hour but did not specify whether that would be part of his near-term proposal, or as part of later legislation.

President-elect Biden indicated his support for deficit financing of his COVID and economic-relief package. He said that given the low interest rates and limits on the power of the Federal

[73] Excerpt from a January 8, 2021 news conference in which he announced labor and economics nominees.
[74] Id.
[75] Id.

Reserve, "every major economist thinks that we should be investing in deficit spending to generate economic growth."

Nominations Process

Although President-elect Biden has expressed a desire to hit the ground running, and has set an ambitious 100-day agenda, he faces the challenge of getting his nominees through the Senate confirmation process. This process was made easier by the Georgia election results, as Democrats will control the committee hearing process and timing of the Senate floor consideration of nominations. While some nominees, such as Treasury Secretary-designate Janet Yellen may have a relatively easy time securing Senate approval, other nominees with a more partisan public record, such as the Office of Management and Budget Director-designate Neera Tanden, are expected to have a more difficult time.

Leader Schumer in a January 6 news conference said the Georgia runoff election results would ease that process. He said, "Obviously, with Democratic control, the ability of Joe Biden to move nominees forward will be easier."

President-elect Biden said on January 7, "I intend to work with the next Majority and the Minority Leader to move forward with key Cabinet nominations even while the Georgia results are confirmed. My nominees for critical national security positions at State, Defense, Treasury, and Homeland Security have bipartisan support and have been confirmed by the Senate before. They need to be in their jobs as soon as possible after January 20th."

While there were some initial delays in the nominations process while the Senate awaited the results of the Georgia runoff elections, Senate committees have started to schedule nomination hearings. The Finance Committee scheduled a hearing on the Yellen nomination for January 19, 2021. The Senate Armed Services Committees has scheduled a January 19 hearing on the nomination of Lloyd Austin to be Defense Secretary and the Veterans' Affairs Committee has scheduled a January 27 hearing on the nomination of Denis McDonough to be Veterans Affairs Secretary.

Chairman Grassley, along with Sen. John Barrasso (R-WY), have criticized Senate Democrats for what they perceived to be their delays in consideration of President Trump's nominees in the beginning of his Administration. Sen. Barrasso noted in a December 6, 2020 opinion piece in The Wall Street Journal that President Clinton had 13 of his 14 Cabinet nominees approved by the end of January, President Obama had 11 out of 15, and President Trump had only three.[76] Most of Trump's nominees were appointed and in place by mid-February (except for Wilbur Ross, Ben Carson, and Ryan Zinke).[77]

Sen. Durbin disagreed with their criticisms, saying in a December 17, 2020 floor statement, "There were some that were delayed because of very basic things. They had not filed their financial disclosure forms and the ethics reports, which were expected of all Cabinet nominees."

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[76] Sen. John Barrasso, Wall Street Journal, "Schumer's Wages of 'Resistance,'" December 6, 2020.
[77] https://www.senate.gov/reference/Trump_cabinet.htm.

White House Economic Nominees and Appointments

Although President-elect Biden has not yet announced a nominee for Assistant Secretary for Tax Policy, the incoming Administration has announced several nominees and appointments that will be relevant on economic policy matters. The team, which includes several Clinton and Obama veterans, include:

- Janet Yellen as Treasury Secretary. She served as Chair of the Federal Reserve Board from 2014-2018, as Vice Chairman of the Federal Reserve Board from 2010-2014, and as President and Chief Executive Officer of the Federal Reserve Bank of San Francisco from 2004 to 2010. She left the Federal Reserve Board of Governors at the end of her term as Chair. She was Chair of the White House Council of Economic Advisors during the Clinton Administration from 1997 to 1999. She co-chaired the OECD Economic Policy Committee during the Clinton Administration.
- Wally Adeyemo as Deputy Treasury Secretary. He served as Deputy Director of the National Economic Council and Deputy National Security Advisor in the Obama Administration. He was the first Chief of Staff of the Consumer Financial Protection Bureau and is the current president of the Obama Foundation.
- Brian Deese as Director of the National Economic Council (NEC). During the Obama-Biden Administration, he served as Special Assistant to the President for Economic Policy after the 2008 financial crisis, as Deputy Director of the NEC, and as Deputy Director and Acting Director of the OMB. He currently serves as Global Head of Sustainable Investing at BlackRock.
- Neera Tanden as Director of the White House Office of Management and Budget. She currently serves as President and CEO of the Center for American Progress, and is a veteran of several presidential administrations.
- Cecilia Rouse as Chair of the Council of Economic Advisers (CEA). She was a member of the CEA in the Obama Administration, and is dean of the Princeton School of Public and International Affairs.
- Jared Bernstein as a member of the CEA. He served as Vice President Biden's Chief Economist in the first years of the Obama Administration.
- Heather Boushey as a member of the CEA. She is a long-time economic counselor to President-elect Biden, and currently serves as President and CEO of the Washington Center for Equitable Growth.
- Nadiya Beckwith-Stanley as Special Assistant to the President for Budget and Tax Policy. She has served as Policy Advisor to the Biden-Harris Transition Team. Previously she was an Associate with Skadden, Arps, Slate, Meagher & Flom LLP and a clerk for Tax Court Judge Ronald Buch.
- Sameera Fazili as Deputy Director of the National Economic Council. She has served as Economic Agency lead on the Biden-Harris Transition Team. Previously she was at the Federal Reserve Bank of Atlanta where she served as the Director of Engagement for Community and Economic Development and a policy advisor at the NEC during the Obama Administration.

Other noteworthy nominees and appointees include:

- John Kerry as Special Presidential Envoy for Climate. He is a former U.S. Senator and served as Secretary of State in the Obama Administration. He launched a bipartisan organization with the goal of net-zero carbon in the United States by 2050.
- David Kamin as Deputy Director of the NEC. He previously served in the Obama Administration as a Special Assistant to the President for Economic Policy and as special assistant and later as an adviser to the Director of OMB. He is currently a law professor at the New York University School of Law.

- Cedric Richmond as Senior Advisor to the President and Director of the White House Office of Public Engagement. Richmond was a House Member from Louisiana who served as a Ways and Means Committee Member in the 116th Congress and will leave Congress in January to join the Administration.

The nominations and confirmation of Assistant Secretary for Tax Policy, however, generally takes several months for the Administration to name and the Senate to process. For example, President Trump's nominee David Kautter's nomination was received on May 11, 2017, and he was confirmed on August 3, 2017. President Obama's eventual nominee Michael Mundaca was announced in September 2009, and approved by the Senate Finance Committee on December 23, 2009, but eventually was a recess appointment in March 2010.[78] President Bush's nominee Mark Weinberger, however, was an exception by being confirmed on March 1, 2001, only one month after his nomination was received by the Senate. Weinberger's nomination moved quickly because passing the 2001 tax cuts bill was a priority of President Bush. The Ways and Means Committee markup of the Bush tax cuts began that same day.

At this point it is unclear whether IRS Commissioner Charles Rettig will continue in that role when Biden takes office; his five-year term expires in November 2022. Commissioner Rettig said at a House Ways and Means Oversight Subcommittee hearing on November 20, 2020 that he did not intend to submit his resignation when the new Administration takes office.[79] He did, however, acknowledge that he serves at the pleasure of the President, and that it was possible that President-elect Biden could request his resignation. At the hearing, Oversight Subcommittee Chairman Bill Pascrell (D-NJ) recommended that Commissioner Rettig submit his resignation, citing his handling of Ways and Means request for information about President Trump's tax returns.

The fate of IRS Chief Counsel Michael Desmond is similarly uncertain. Unlike the Commissioner, the Chief Counsel does not serve for a specific term.

[78] President Obama's initial nominee, Elizabeth Garrett, was announced on March 28, 2009 but eventually withdrawn citing personal family reasons.
[79] "Oversight Subcommittee Hearing with the Commissioner of the Internal Revenue Service," November 20, 2020. A video of the hearing can be found at https://waysandmeans.house.gov/legislation/hearings/oversight-subcommittee-hearing-commissioner-internal-revenue-service.

Tax-Writing Committees

Senate Finance Committee Chairman and Ranking Member

Sen. Wyden is expected to become Senate Finance Committee Chairman when the new Senate convenes. He has previously indicated an interest in addressing several tax issues when he becomes Finance Chairman, including:

- An additional round of coronavirus relief that includes an infrastructure and/or stimulus component,
- Healthcare reform,
- Infrastructure legislation that might include technology-neutral green energy credits and reforms to the low-income housing tax credit and the New Markets Tax Credit,
- Retirement savings incentives,
- International tax issues, including possible review of TCJA provisions and regulations that he views to be incentives for businesses to leave the United States, and
- Improvements to the Opportunity Zone program.

On January 13, Sen. Wyden said he will continue working on his mark-to-market of capital assets plan and carried interest proposal.[80] He also said he wants to increase the corporate tax rate, make the child tax credit fully refundable and expand the EITC, and tie certain unemployment benefits to economic indicators.

Sen. Wyden introduced several tax bills in the 116th Congress that address a number of these priorities. Expect to see updated versions of these bills introduced in the 117th Congress:

- Encouraging Americans to Save Act (S. 5035), which is intended to help low- and middle-income families save for retirement. The bill would restructure the existing, nonrefundable saver's credit into a refundable, government matching contribution of up to $500 a year for low- and middle-income workers who save through 401(k) type plans or IRAs. The legislation would also seek to enhance the saver's credit by making the full 50 percent credit rate available to taxpayers making up to $32,500 a year and requiring that the credit be directly contributed into the saver's retirement plan or IRA.
- Clean Energy for America Act (S. 1288), which would provide tax incentives for increased investment in clean energy and repeal fossil fuel incentives.
- 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.
- Save America's Main Street Act (S. 3549), which would provide advance tax refunds to small businesses.

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[80] Bloomberg Law News, Colin Wilhelm, "Incoming Finance Chair Wyden to Move on Capital Gains Changes," January 13, 2021. See also Politico, Aaron Lorenzo, "Wyden puts corporate and wealthy America on notice for tax hikes," January 13, 2021.

- Ending the Carried Interest Loophole Act (S. 1639), which would treat carried interest as ordinary income.
- 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.
- 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.
- E-Cigarette Tax Parity Act (S. 2463), which would provide for the regulation and taxation of electronic cigarettes and alternative nicotine products.

He also introduced a number of bills that would provide continued unemployment assistance, including the American Worker Holiday Relief Act of 2020[81] and the Continued Assistance to Unemployed Workers Act of 2020.[82]

Sen. Wyden also is expected to release legislative text of his mark-to-market proposal for individuals early in 2021.

Sen. Mike Crapo (R-ID) is expected to become ranking Republican on Finance Committee. He would move over from his role in the 116th Congress as Chairman of the Senate Banking Committee, where he played a key role in the development and oversight of the CARES Act.

Sen. Crapo has been a strong advocate for the TCJA enacted in December 2017. At the time, he said, "The tax reform legislation passed by Congress will produce growth not seen in generations, giving Americans access to higher wages, greater job opportunities and a more vibrant economy… This proposal will strengthen our economic competitiveness by creating a more competitive tax code that enables capital formation resulting in new companies being formed, staying here and expanding job opportunities."[83] In a June 3, 2019 column reflecting on the benefits of TCJA reforms to small businesses, he said, "We must continue to build on this progress to fully reinforce America as a place where a sound idea and hard work can be built into a successful business and lasting jobs."[84]

Sen. Crapo has a long history of advocating for tax reform. In 2010, he was a member of President 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, he was part of a bipartisan group of senators, referred to as the "Gang of Six," that sought to reach an agreement on tax reform and

[81] S. 4935.
[82] S. 4771.
[83] Crapo press release, December 19, 2017. https://www.crapo.senate.gov/media/newsreleases/crapo-votes-to-pass-tax-cuts-and-jobs-act.
[84] Crapo weekly column, June 3, 2019. https://www.crapo.senate.gov/media/editorials/weekly-column-small-businesses-drive-our-economy.

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 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.

During the 116th Congress, Crapo introduced eight bills that were referred to the Finance Committee. While the majority of them dealt with health-related issues, three addressed tax issues:

- 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 railroad maintenance tax credit was permanently extended in the year-end package,
- 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.

Senate Finance Committee Membership

During the 2022 Senate elections, Republicans will be defending 20 seats, compared with Democrats defending only 14. 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 President Trump.

Finance Committee ratios have not yet been decided. The last time the Senate was split 50-50, the Finance Committee had an even number of Republicans and Democrats, and the chair and ranking member had equal budgets. It is unclear whether the Senate will follow a similar path this Congress.

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

House Ways and Means Committee Chairman and Ranking Member

Rep. Neal will continue as Chairman of the Ways and Means Committee and is expected to continue focusing the Committee's tax work on additional coronavirus relief and easing burdens of the tax code on lower-income and middle-class Americans through items such as: expanding the child tax credit and the earned income tax credit; 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 repealing or reforming the TCJA. It also is likely that Chairman Neal could tackle health care and trade issues.

Neal discussed the Ways and Means agenda for the 117th Congress in a December 31, 2020 report on the committee's accomplishments in the 116th Congress.[85] He said, "In large part to the Trump Administration's mishandling of the pandemic response, the COVID-19 crisis will likely continue well into the 117th Congress. Ways and Means Democrats stand ready to continue leading Congressional efforts to protect Americans' health, create jobs, and dig our economy out of the COVID recession. In close coordination with the Biden Administration's new leadership, the Committee will undoubtedly play a key role in helping workers and families recover from this perilous time in the nation's history."

He said in a December 21, 2020 statement, "Congress will need to pass additional, substantial relief and stimulus legislation in 2021. Big investments must be made to create jobs, support families, and ensure states and localities have the resources necessary to continue providing essential services and distribute COVID vaccines quickly and fairly."[86]

House Ways and Means Committee Democrats laid out a number of their legislative priorities for the 117th Congress in a framework entitled, "Policy Pillars and Priorities: A Bold Vision for a Pathway Toward Health and Economic Equity."[87] They also released an accompanying report, entitled, "Something Must Change: Inequities in U.S. Policy and Society," that provides background on the issues they are attempting to address.

Chairman Neal said in a foreword accompanying the legislative framework, "The framework we present here is Ways and Means Committee Democrats' plan to make our nation a more just and equitable place. Some actions we can pursue almost immediately. Other advancements may take longer to become law. But inaction is not an option. Complacency cannot be tolerated. As the accompanying report to the framework clearly details, our nation's challenges are numerous and dire."

The portion of the framework that addresses economic equity issues contains several tax policy recommendations, including:

- Ensuring that the Employee Retention Tax Credit helps companies that the pandemic has harmed keep workers on the payroll,
- Extending the Work Opportunity Tax Credit,
- Increasing the Earned Income Tax Credit for childless workers and reduce the minimum age of eligibility from 25 to 19,
- Extending the Earned Income Tax Credit to U.S. possessions,
- Expanding and making fully refundable the Child and Dependent Care Tax Credit,
- Making the Child Tax Credit fully refundable,

[85] https://waysandmeans.house.gov/media-center/press-releases/ways-and-means-democrats-release-report-committee-s-work-american-people.
[86] https://waysandmeans.house.gov/media-center/press-releases/chairman-neal-statement-new-covid-19-relief-and-omnibus-agreement.
[87] https://waysandmeans.house.gov/media-center/press-releases/ways-and-means-democrats-release-framework-achieve-health-and-economic.

- Improving access to the Child Tax Credit for residents of U.S. possessions,
- Enhancing the refundable portion of the American Opportunity Tax Credit and maximizing access for Pell Grant recipients,
- Increasing the amount of employer-sponsored dependent care individuals can receive without incurring tax liability,
- Implementing automatic IRAs and 401(k)s and requiring automatic enrollment in 401(k)-like plans,
- Making the Saver's Credit refundable,
- Adjusting the new part-time workers in 401(k) plans provisions to require only two years of service,
- Ensuring that small businesses can take full advantage of the start-up credit when participating in a multiple employer plan,
- Increasing the supply of affordable housing through the Low-Income Housing Tax Credit, and providing deeper targeting of the credit to those with extremely low incomes, and
- Increasing investments in community facilities, housing, and other development in low-income communities through the New Markets Tax Credit program.

As described above, Chairman Neal and Ranking Member Brady introduced bipartisan retirement savings legislation in October 2020, known as the Securing a Strong Retirement Act of 2020. The legislation is expected to serve as the foundation for efforts to pass bipartisan legislation in the 117th Congress.

Chairman Neal introduced several tax bills in the 116th Congress, which were passed by the House:

- The Caring for Americans with Supplemental Health (CASH) Act (H.R. 5091), which would increase the economic impact payments under the year-end omnibus funding and COVID relief legislation from $600 to $2,000,
- 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. Brady is serving his last term as the top Republican on the Ways and Means Committee. His priorities are expected to include defending the TCJA and extending its key provisions, further promoting economic growth, making medical supply chains independent from China, and fostering innovation.

In October 2020, Rep. Brady joined House Republican Leader McCarthy in introducing the Commitment to American GROWTH Act (H.R. 11) which would carry out several 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.

Rep. 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.

House Ways and Means Committee Membership

The Ways and Means Committee ratio is expected to be 25 Democratic Members and 19 Republican Members.

On December 17, Rep. Stacey Plaskett (D-VI) was announced as Richmond's replacement, and will be the first Member from a U.S. territory to serve on the Ways and Means Committee. Previously, she was a member of the Transportation and Infrastructure Committee, the Oversight and Government Reform Committee, and the Agriculture Committee. She is also a member of the Congressional Black Caucus and New Democrats Coalition. Upon her nomination to the Ways and Means Committee, Rep. Plaskett said she is interested in working on strengthening retirement security, the social safety net, and infrastructure. Rep. Plaskett introduced seven tax bills in the 116th Congress, most of which addressed territorial issues.

There will be three new Republican Members of the Ways and Means Committee:

- Rep. Lloyd Smucker (PA) – Rep. Smucker has served in the House since 2017 and was previously a member of the House Transportation and Infrastructure Committee and Education and Labor Committee.
- Rep. Carol Miller (WV) – Rep. Miller has served in the House since 2019 and was previously a member of the House Transportation and Infrastructure Committee, the Oversight and Government Reform Committee, and the House Select Subcommittee on the Climate Crisis.
- Rep. Kevin Hern (OK) – Rep. Hern has served in the House since 2019 and was previously a member of the House Committee on Small Business, Natural Resources Committee, and the Budget Committee.

Joint Committee on Taxation Changes

The membership of the Joint Committee on Taxation is set to change in the 117th Congress. There are two vacancies on the committee due to the retirement of Sen. Mike Enzi (R-WY) and the death of Rep. John Lewis (D-GA). The JCT is made up of the two tax committee chairmen and the next two most senior Democrats and Republicans on the House Ways and Means Committee and the Senate Finance Committee. Given this composition, the members next in line to join JCT would be Rep. Mike Thompson (D-CA) and Sen. Maria Cantwell (D-WA).

The JCT chairmanship alternates between the Finance Chairman and the Ways and Means Chairman each Congress. Under these rules, the Finance Chairman will become JCT Chairman this year.

The Global Tax Environment

DSTs and the OECD

An ever-growing litany of foreign countries have seized upon the perceived pandemic-related “success” of digital services companies as a post-hoc rationale to impose digital services taxes (DSTs) or similar taxes to squeeze more tax revenue from (almost exclusively) US-based companies to help close the widening buckets of domestic deficits, while simultaneously scoring political points with certain segments of their electorate.

US political leaders have consistently strongly opposed these taxes as inappropriate and discriminatory for targeting US companies, and the Trump Administration had threatened retaliation. In order to resist the expansion of DSTs, the U.S. Treasury agreed in 2018 to work with the OECD to find a broader-based solution that did not ring-fence digital companies, which work has been ongoing ever since. The OECD negotiations and the ongoing tax challenges related to the digital economy - on both the trade and tax fronts – will be front and center early for the incoming Biden Administration. Hopefully in coordination with Congress, the Biden Administration will be faced with a number of difficult decisions early on, such as whether to continue negotiations at the OECD, or to concentrate efforts through trade policy, and, if the former, whether the current approaches under Pillars One and Two are appropriate as a policy matter and achievable as a political matter.

The Biden Administration will not be working from a blank slate. The Office of the United States Trade Representative (USTR) first launched a Section 301 investigation into the French DST in December 2019. Subsequently, in June 2020, it initiated a similar investigation of DSTs adopted or proposed by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom (for the June 2020 set of DSTs, USTR must conclude investigations and make determinations by June 2021). With respect to the French DST, USTR announced tariffs on French imports in July 2020 following its investigation, but—as France had suspended DST collection until December 2020—the tariffs were similarly suspended for 180 days until January 6, 2021, to give more time for a bilateral or OECD truce to be negotiated by the end of 2020.

But such a deal wasn’t brokered. Thus, in December 2020, despite the potential for an escalating trade war, the French finance ministry mailed notices to DST-affected (and primarily US-based) companies that their deferred DST payments were due. In refusing to further suspend collection, French Finance Minister Bruno Le Maire continued to tap into populist rhetoric, stating that “we will not bow to threats or the possibility of sanctions [because] we believe that the taxation of digital giants is fair and necessary.” And that if the US placed tariffs on French products, he would ask the EU to respond in kind. Apparently irked by the perceived lack of constructive engagement by the US, Le Maire noted that “we have fixed all the technical challenges, this is just a matter of political courage.”

Indeed, France's decision to proceed with collection was likely linked to the lack of progress in 2020 at the OECD on a multilateral solution. The lack of meaningful headway was acknowledged by the Trump Administration. Last month, Secretary Mnuchin said that he "unfortunately" agreed with the assessment that no OECD resolution is imminent. He also acknowledged that "the problem is international taxation [issues] are some of the most difficult issues, [and] even if I were to reach an agreement with Europeans on this, it would still need to be passed by Congress." And noting Hill engagement on this issue, he remarked that "Congress feels very strongly on pushing back on attacks that [are] largely targeting our internet companies."

Given the lack of OECD progress and the French moving forward with DST collection, USTR in December 2020 had given signals that it would accelerate the date on the French tariffs, along with certain other 301 investigations. However, in January 2021, USTR took two different paths with respect to its posture on DSTs. On January 6th, USTR issued three notices of determination regarding its investigations into DSTs in Italy, Turkey, and India, concluding that each of them discriminates against U.S. companies, is unreasonable, and burdens or restricts U.S. commerce. But the following day, USTR announced that it had indefinitely suspended the French tariff action. The rationale for these arguably mixed postures, according to USTR, was that the June 2020 set of DST "investigations have significantly progressed, but have not yet reached a determination on possible trade actions" and thus the suspension of the French tariff action "will promote a coordinated response in all of the ongoing DST investigations."

The proliferation of DSTs and potential trade counteractions has continued to drive the OECD to hammer out a multilateral solution. Indeed, OECD staff and member country delegates churned out volumes of work product to develop the technical elements of a potential proposal—while acknowledging that outstanding key issues remain for political decisionmakers. On October 12, 2020, the OECD released Pillar 1 and Pillar 2 Blueprints to further its examination of its two-pillar proposal, which could form the building blocks for a consensus solution to the perceived tax challenges arising from digitalization. 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. In advance of a virtual public consultation meeting to be held on January 14th and 15th of this year, a wide swath of businesses, trade associations, and non-governmental organizations filed over 3,000 pages of public comments by the December 14th deadline.

Those diverse comments reflect the many political and technical challenges which still need resolution. While the US position (through the Trump Administration) in the negotiations has centered around (1) not ring-fencing the digital economy, (2) adopting the Pillar 1 Amount A nexus and profit reallocation proposal on a "safe harbor" basis, and (3) treating GILTI as a deemed compliant income inclusion rule under the Pillar 2 Global Anti-Base Erosion (GloBE) proposal, many other controversial issues still require some level of input from political decisionmakers.

On Pillar 1 Amount A, key outstanding questions include (but are not limited to): (1) the scope of Amount A activities, and definitions thereof (e.g., limited to DST-related activities vs. broader digital/automated digital services vs. digital + consumer-facing businesses vs. all businesses earning a certain profit margin with activities meeting certain quantitative factors); (2) quantum (i.e., amount/percentage of residual profit to be reallocated among jurisdictions); (3) segmentation (e.g., financial reporting-based or limited exceptions therefrom); (4) revenue sourcing rules (and related privacy-related implications of relying on user location data); (5) treatment of losses (e.g., appropriate measurement, pre-regime losses, length of carryforwards, profit shortfalls); (6) double taxation concerns (e.g., whether to reduce reallocation for income already subject to local country withholding taxes); (7) identification of paying (or surrender) entities; and (8) an effective dispute prevention/resolution process. On Pillar 1 Amount B, key issues also include scope and related definitions (e.g., baseline marketing and distribution functions, or something broader (or narrower)), as well as ensuring any such amount is consistent with existing arm's length principles. And on Pillar 2, in addition to whether GILTI is a complaint regime, key concerns include ensuring that no other GloBE rule (e.g., undertaxed payments or subject-to-tax rules) takes priority over the income inclusion rule, the effective tax rate calculation, as well as the size and scope of any carveout.

Despite the many difficult questions to resolve and significant hurdles to overcome, many European finance leaders apparently expect prompt cooperation from the Biden Administration and have begun exerting pressure on them to act quickly in alignment with the EU tax agenda. For instance, German Finance Minister Olaf Scholz stated that President-elect Biden's historically multilateral approach "will help us overcome differences" more than President Trump had and that Biden will "more clearly be in favor of combating tax evasion, and also represents the viewpoint that a great many large undertakings pay too little by way of taxes." And the French finance ministry has indicated they will give the Biden team about two months from inauguration to establish their position on OECD-related issues; specifically, the French anticipate receiving this clarification ahead of a key March 25-26 European Council meeting. During that March meeting, EU leaders are expected to develop digital tax guidelines; indeed, in November 2020, those leaders agreed on a budget that included a new EU digital tax levy, with a legislative proposal expected by June 2021.

Despite the hurry-up-and-cooperate narrative from European leaders, the Biden Administration has subtly indicated that it will not be pressured into acting quickly on sticky foreign policy-related issues, and that domestic priorities will come first. Indeed, in November, President-elect Biden said, "I want to make sure we're going to fight like hell by investing in America first," and "I'm not going to enter any new trade agreement with anybody until we have made major investments here at home and in our workers." Specifically, he referenced his hesitancy to immediately reverse the Trump-imposed 25-percent tariffs on certain Chinese exports to the US, stating that "I'm not going to make any immediate moves" nor "prejudice my options" before a full review of the existing agreement.

In a similar vein, it is anticipated that, once all relevant Treasury and USTR personnel are in place (which could take the first couple of months in 2021), the Biden Administration will undertake a full review of OECD/DST-related issues to try to formulate a coherent strategy. This will include the need to determine (i) whether, and to what extent, to continue with USTR's section 301 DST-related tariffs and investigations; and (ii) whether to continue engaging in the OECD process and, assuming they do, whether and how to alter US negotiating positions on both pillars to maximize their tax, trade, and fiscal agenda. A key issue to monitor is whether certain Biden campaign tax proposals (e.g., GILTI modifications) influence the US negotiating posture at the OECD. Either way, 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, as well as revenue impacts. Given any potential agreement will likely require Congressional implementation, it remains to be seen whether, and how much, the Biden Administration will involve Congress to develop and embrace a new strategic position.

Finally, decisions on these tax and trade issues likely won't occur in a vacuum. They may well become intertwined and/or swept up with other non-tax priorities of, and issues facing, the Biden Administration and Congress (e.g., energy/climate policy, government-backed R&D investments, antitrust actions, free speech). Without key personnel in place to respond to growing foreign pressure to immediately address these tax and trade challenges, the current state of play is relatively cloudy. However, by the end of the first quarter 2021, a clearer picture should develop on whether European leaders eager for a populist victory that helps close their deficits (and OECD personnel eager for an accomplishment) will allow the Biden Administration sufficient time to develop its position on a very complex and potent set of issues.

Treaties

In 2019 the Senate approved protocols to U.S. tax treaties with Japan, Luxembourg, Spain, and Switzerland. Those approvals were notable, as it had been nearly a decade since the Senate had ratified any treaties or protocols, in large part related to Sen. Rand Paul's (R-KY) privacy-related objections. While those four protocols sailed through the Senate once receiving floor time, three pending tax treaties—with Chile, Hungary, and Poland—have stalled over concerns regarding whether the BEAT violates articles 23 (double taxation relief) and 24 (nondiscrimination) of the U.S. model income tax treaty. Specifically, these treaties have been hung up over whether a treaty reservation would be necessary to clarify that treaty approval would not affect application of the BEAT. Those treaties, and the BEAT issue, may now be implicated by the OECD Pillar Two negotiations, which suggest other countries are seeking potential treaty modifications to address BEAT-related issues, as described above. Assistant Secretary Kautter has said that Treasury is involved in new treaty negotiations with other countries, including Croatia.

Regulatory Outlook

Moratorium on "Midnight" Rulemaking

During the final months of some recent presidential administrations, including the Trump Administration, 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," and is in part an attempt to create a legacy and finalize rules before an incoming administration issues a memorandum halting regulations that have not yet become effective.[88]

The Biden transition team has announced that President-elect Biden will issue a memorandum effective on Inauguration Day to block all regulations that have not become effective. This memorandum may be similar to those issued by each President since Reagan. For example, under the Trump Administration memorandum, issued January 20, 2017, no regulation could be sent to the Office of the Federal Register (OFR) until it was reviewed and approved by a department or agency head appointed or designated by the President. If a regulation had already been sent to the OFR, but not yet published in the Federal Register, it was to be withdrawn from the OFR until reviewed and approved. Finally, if a regulation had been published in the Federal Register, but had not yet become effective, its effective date was delayed for 60 days, and subject to further review and potentially notice-and-comment. In this regard, it is noteworthy that Treasury has used the "good-cause" exception for recently issued final regulations, including final regulations under sections 45Q, 163(j), 451(b), 1031, and 1061, to make them effective for CRA purposes when they are published, or filed for public inspection, in the Federal Register.

Final regulations that Treasury and IRS have released, but which have not been published in the Federal Register as of the date of this document include regulations related to (i) section 45Q (carbon oxide sequestration credit, to be published January 15, 2021), (ii) section 162(f) (settlements in lieu of fines and penalties), (iii) section 163(j) (interest expense limitation, to be published January 19, 2021), (iv) section 1061 (carried interest, to be published January 19, 2021), and (v) section 1297 (PFIC insurance exception), (vi) section 4960 (excise tax on compensation paid by tax-exempt organizations), and (vii) section 199A(g) (farmer cooperatives, to be published January 19, 2021).

Potential Efforts to Unwind TCJA Regulations

Regulations that have become effective can be withdrawn or modified, but must be done pursuant to the Administrative Procedure Act, which requires notice and comment. While it is too early to tell which regulations the Biden Treasury Department may consider withdrawing or modifying, signals from Congressional Democrats suggest there may be interest in revisiting some TCJA regulations. For example, Sens. Wyden and Brown introduced a bill that would override the now finalized GILTI high-tax exclusion regulations. In her testimony before the Ways and Means Committee, Fordham University law professor Rebecca Kysar criticized those and other TCJA regulations, which included (i) the calculation of the GILTI exempt return, (ii)

[88] In general, the Congressional Review Act (CRA) requires a 60-day waiting period before any major regulatory change becomes law. Non-major rules have a 30-day waiting period under the Administrative Procedure Act. Both are subject to a "good cause" exception.

the BEAT exception for certain interest payments made by financial institutions, (iii) the treatment of high-income service providers under section 199A, and (iv) relaxation of requirements to substantially improve property in Opportunity Zones.[89]

In addition to TCJA regulations, Sens. Wyden and Jon Tester (D-MT) have been critical of regulations that no longer require donor disclosures for section 501(c)(4), (5), and (6) tax-exempt organizations and have introduced legislation to override those regulations. Sen. Wyden also said he discussed these regulations with incoming Treasury Secretary Janet Yellen.

The Biden Treasury Department may also reconsider positions taken in proposed regulations that have yet to be finalized, such as proposed regulations related to (i) the GILTI/subpart F high-tax exception; (ii) foreign tax credits, or (iii) downward attribution, or proposed regulations that have yet to be issued, such as (iii) proposed regulations related to sections 959 and 961 (PTEP and CFC stock basis), or (iv) section 245A (dividends received deduction).

Additionally, Congress has a legislative tool to overturn recently published regulations. The CRA, enacted in 1996, was intended to reassert control over agency rulemaking by establishing a special set of expedited legislative procedures for this purpose. 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 "look-back" provision in the CRA, 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. Based on the date the 116th Congress adjourned sine die (January 3, 2021), the 60-day look-back period extends to August 21, 2020. There are 22 significant final regulations submitted to Congress after August 21, 2020.[90]

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.

Unfinished TCJA Guidance and Priority Guidance Plan

In the last several weeks of the Trump administration, the Treasury Department and IRS have continued to focus on issuing regulations to implement the TCJA. The attached chart provides a status summary of key TCJA and other guidance projects. As discussed above, some of these regulations may be reconsidered by the Biden Treasury Department.

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[89] Testimony of Rebecca Kysar at Ways and Means Committee Hearing on "The Disappearing Income Tax," February 11, 2020, available at: https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Kysar%20Testimony.pdf.

[90] Tax Notes Federal, Martin Sullivan, "Congressional Review Act Threatens Some Trump Tax Regs But . . .," January 11, 2021.

The Treasury Department and IRS released an update to the 2020-2021 Priority Guidance Plan ("PGP") on November 17, 2020, which contains projects that will be the focus of efforts through June 30, 2021. The PGP contains 191 guidance projects (some of which have already been released) categorized as TCJA implementation (see attached chart), identifying and reducing regulatory burden pursuant to E.O. 13789, burden reduction, Taxpayer First Act guidance, Bipartisan Budget Act of 2015 – partnership audit regulations, and general guidance. Notable projects include:

- Section 385. An advance notice of proposed rulemaking ("ANPRM") under section 385 was published on November 4, 2019, announcing an intent to issue proposed section 1.385-3 distribution regulations that would be more targeted and streamlined. The same day, Treasury and IRS removed the section 1.385-2 documentation regulations and said they may propose a simplified and streamlined version in the future. Final distribution regulations providing rules for the treatment of certain qualified short-term debt instruments, transactions involving controlled partnerships, and transactions involving consolidated groups were published May 14, 2020. The preamble to those final regulations referenced the ANPRM and stated the intent to issue proposed regulations modifying the distribution regulations "to make them more streamlined and targeted, including by withdrawing the per se rule."
- Section 987. Notice 2020-73 was released September 17, 2020, announcing an intent to defer the applicability date of the final regulations under section 987 by one additional year, to taxable years beginning after December 7, 2021.
- Section 864(f). The PGP includes regulations under section 864(f), regarding the election to allocate interest on a worldwide basis. After several delays of the statutory effective date, section 864(f) is scheduled to take effect for taxable years beginning after December 31, 2020.
- Section 871(m). The PGP includes regulations under section 871(m), including with respect to non-delta-one transactions. Final regulations were published December 17, 2019. Notice 2020-2 extends transition relief to January 1, 2023.
- Section 1001. The PGP includes two projects under section 1001: (i) regulations on the modification of debt instruments including issues relating to disregarded entities, and (ii) guidance on the elimination of interbank offered rates (proposed regulations were published October 9, 2019, and Rev. Proc. 2020-44 was issued October 12, 2020).
- SECURE Act. Three notices and a revenue procedure were published in 2020.
- FFCRA and CARES Act. The PGP includes several guidance projects related to COVID-19 relief, including projects related to employee benefits and payroll taxes, exempt organizations, and other general tax issues (including guidance under section 165(i) on COVID-19 pandemic losses).
- Virtual currency. The PGP includes guidance concerning virtual currency and information reporting.

State and Federal

As states continue to face fiscal challenges from the COVID crisis, governors and state legislatures must consider how to address their fiscal situations and may have to raise taxes to comply with their balanced budget requirements.[91] The targets of state-level tax increases will likely be large interstate businesses and high-income individuals. Further, among the potential tax increases that are being discussed by states are digital services or advertising taxes and conforming to or decoupling from changes made by Federal law to the TCJA and CARES Act. As states compete for tax revenues, multistate businesses and individuals face risks of double taxation and unconstitutional tax positions being taken by state tax authorities.

The battle for tax revenues resulting from the taxation of compensation earned by employees working remotely has intensified during the pandemic and has led to conflicts among the states over which state has the right to impose the taxes.

For example, New Hampshire petitioned the Supreme Court to decide whether Massachusetts is unconstitutionally taxing New Hampshire residents who are working from their homes in New Hampshire due to the pandemic.[92] Republican and Democratic Attorneys General from 14 states have submitted amicus briefs requesting the Court to hear the case.[93] To address uncertainty regarding employee remote work, several bills were introduced during the 116th Congress, including the Remote and Mobile Worker Relief Act of 2020[94] and Remote Worker Relief Act of 2020.[95] These bills would have provided states, employers, and employees with tax certainty by maintaining the status quo of tax rights during the pandemic. Although temporary relief for remote work had broad Congressional support, it was not included in the final package reportedly due to objections from New York constituencies.

The above issue, and the related issue of whether employees working remotely create business nexus, will remain a concern for employers and their employees in 2021.[96] One state official called remote work taxation "the hottest issue right now in state tax administration."[97]

In addition to the issues raised by employees working remotely during the pandemic, businesses are continuing to face tax issues related to the taxation of interstate commerce following the 2018 *Wayfair* decision.[98] The issue has attracted Congressional interest in the form of several

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91 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.
92 Motion filed by 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.
93 Brief for States of Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, and Utah as Amicus Curiae, State of New Hampshire v. Commonwealth of Massachusetts, October 19, 2020, U.S. Supreme Court. Brief for States of New Jersey, Connecticut, Hawaii, and Iowa in support of Plaintiff as Amicus Curiae, State of New Hampshire v. Commonwealth of Massachusetts, October 19, 2020, U.S. Supreme Court.
94 S. 3995, Sen. John Thune (R-SD) and Sen. Sherrod Brown (D-OH).
95 H.R. 8056, Rep. Mary Gay Scanlon (D-PA).
96 Wall Street Journal, Scott Calvert, "Workers' Commutes Expected to Improve," January 4, 2020.
97 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.
98 *South Dakota v. Wayfair, Inc.* No. 17-494. 138 S. Ct. 2080 (2018).

bills, a letter from Members of Congress to the Government Accountability Office, and a hearing on the issue in 2020.[99] Congress is expected to continue highlighting concerns related to this issue and offer solutions that could become law this year.

Other Federal legislation introduced last Congress restricting states' ability to target specific industries with new taxes may be introduced again in this Congress, including the Digital Goods and Services Tax Fairness Act of 2019,[100] End Discriminatory State Taxes for Automobile Renters Act of 2019,[101] and Protecting Retirement Savers and Everyday Investors Act.[102]

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[99] Letter to Comptroller General of the United States Government Accountability Office from Sen. Ron Wyden (D-OR) and five Members of Congress requesting updated study of impact of *Wayfair* decision on businesses, November 24, 2020; Hearing of the Committee on Small Business Subcommittee on Economic Growth, Tax, and Capital Access, "*South Dakota v. Wayfair, Inc.*: Online Sales Taxes and their Impact on Main Street," March 3, 2020.

[100] S. 765, Thune; H.R. 1725, Rep. Steve Cohen (D-TN). The bill would prevent states from enacting DSTs.

[101] H.R. 4311, Cohen. The bill would prohibit state or local governments from imposing discriminatory taxes against the motor vehicle rentals.

[102] H.R. 8695, Rep. Patrick McHenry (R-NC). The bill would prevent states from imposing financial transaction taxes on certain industry participants.