

TAX TAKE: Will the Proposed Retroactive Capital Gains Tax Increase Stick?

Tax Alert
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Perhaps the most newsworthy item in the [Treasury Department Greenbook](#) was the Biden Administration's proposal to increase taxes on capital gains on a retroactive basis. Specifically, the Greenbook proposes to tax long-term capital gains and qualified dividends of taxpayers with adjusted gross income of more than \$1 million at ordinary income rates, with 37 percent being the highest rate (40.8 percent including the net investment income tax). The proposal would be effective for gains recognized after the undefined "date of announcement," which could be interpreted as the April 28, 2021 date of the release of the [American Families Plan](#) or the [May 28, 2021 date](#) of the release of the Greenbook itself. By contrast, the other proposals in the Greenbook generally state that they will be effective prospectively for taxable years beginning after December 31, 2021. The policy rationale to propose a retroactive – in this case a pre-enactment – effective date is to prevent market manipulation (*i.e.*, investors selling stocks or other capital assets in advance of a known future prospective change to the capital gains rate). It should be noted that there is precedent by which Congress – through a variety of mechanisms (including press releases and bill introductions) – has announced such a retroactive effective date in the past. Given the retroactive "date of announcement" contained in the Greenbook, the question now being asked is whether that date will "stick" and be included in any legislation enacted by Congress. We expect stakeholders to argue to Congress that a retroactive effective date is patently unfair because it removes certainty in the marketplace and does not allow taxpayers to rely on current law – creating a state of limbo for legitimate transactions.

Although Congress could consider a different effective date – perhaps exerting its jurisdiction over the Administration to dictate the terms of legislation – it may have revenue concerns over doing so since it could decrease the "revenue score" of the proposal (*i.e.*, raise less taxes). And while Congress could advance the effective date – such as a later date when a bill is introduced – it is difficult for taxpayers to rely on the potential for such a future date for planning purposes. Indeed, since taxpayers are already "on notice" of the potential for a retroactive effective date, Congress will likely not be particularly sympathetic to those who engage in transactions despite this significant risk. While Congress may entertain whether to consider the Administration's capital gain tax increase at all, or perhaps reduce the proposed amount of such increase or the scope of taxpayers that the increase applies to, it seems that Congress may show less flexibility in considering changes to the proposed effective date. The Greenbook has placed a line in the sand ... and Congress may be reluctant to cross the "date of announcement" line. **#TaxTake**

Upcoming Speaking Engagements and Events

On June 30, Loren will participate in a virtual discussion on global tax policy titled, "[A Fireside Chat with Catherine Schultz and Loren Ponds on the OECD Tax Negotiations](#)," with members of the Trade Policy Forum.

In the News

In *InvestmentNews*, Jorge [commented](#) on ProPublica's recent report asserting several billionaires paid little to no federal income tax. Jorge said "[n]ow that the article has shed light on the issue, it could change the political calculus" for moderate Democrats who may be resistant to increases taxes. **"That could add momentum to those Congressional Democrats who want to raise taxes on the wealthy."**

Loren [discussed](#) the difficulty of enacting President Biden's SHIELD proposal in *Bloomberg Tax*. The proposal aims to crack down on offshore corporate profit-shifting but is closely tied to factors that are not in its control or that remain unknown, like the fate of discussions at the OECD. **"Trying to enact rules into domestic legislation at the same time they're being enacted on the**

international stage, that's a much heavier lift," Loren said.

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