Election results; preliminary observations regarding effect on future tax agenda

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NOTE: This report reflects developments as of 8:00 AM EST on December 15, 2020.

Introduction

Election day in the United States was November 3, 2020. KPMG on November 11, 2020, issued a report on the U.S. presidential and congressional election results available at that time. This document updates that report to reflect more recent results and developments.[1] As of 11 PM EST on December 14, 2020:

- Former vice president Joe Biden and Senator Kamala Harris have received more than the number of electoral votes needed to be the next president and vice president, respectively, of the United States.

- Democrats apparently will control the next U.S. House of Representatives, but by a considerably narrower margin than in the current Congress.

- The issue of whether the next Senate will be controlled by Republicans or Democrats at the outset of the Biden administration will be determined by run-off elections in the state of Georgia that will not be held until January 5, 2021.

As a result of the uncertainty surrounding the two Georgia seats in the U.S. Senate, it will not be clear until January 2021 whether there will continue to be divided government at the federal level or whether the Democratic party will control the White House as well as both chambers of Congress. This lack of certainty has implications for tax planning (including year-end planning). The prospects for the enactment of major tax policy changes in the next couple years can be expected to be lower under a divided government scenario than under a scenario in which one party controls the White House as well as both chambers of Congress.

This report summarizes key election results and provides some preliminary observations regarding the possible implications of the elections on tax legislation in 2021.

Contents

[1] This report also shortens the discussion of the potential agenda for the "lame duck" session following the election given that such session is already well underway.

Election results

Presidential race

Under the U.S. Constitution, the winner of the presidential election is determined by the vote of the electors to the electoral college, rather than the popular vote. On December 14, 2020, electors met in their states and voted for president and vice president. 306 electors voted for Joe Biden and Kamala Harris to be president and vice president, while 232 electors voted for Donald Trump and Mike Pence to serve second terms as president and vice president.

The president of the Senate and the archivist of the United States are supposed to receive the results of those votes within nine days—i.e., by December 23, 2020. The next Congress then is expected to meet in joint session on January 6, 2021, to count the electoral votes.

The new president is scheduled to be sworn in and to take office on January 20, 2021.

House races

Currently, the House consists of 233 Democrats, 196 Republicans, one Libertarian, and five vacant seats. All seats in the House were on the ballot on November 3.

It appears that Democrats have won 222 seats in the next House of Representatives, while Republicans have won 211 seats.[2] Official results are not yet available for two races. As a result, Democrats would continue to control the House in the next Congress (the 117th Congress), but by a smaller margin than in the current Congress (the 116th Congress). With a minimum of 218 votes needed to pass legislation in the House, House Democrats would not be able to lose many Democratic votes if they wanted to move legislation that does not have any Republican support.

Senate races

The current Senate consists of 52 Republicans and 48 Democrats.[3] Thirty-five Senate seats were on the ballot on November 3.

At the start of the Biden administration, the next Senate will include at least 50 Republicans and at least 48 Democrats. Two Senate races in Georgia are headed to run-off elections that will be held on January 5, 2021.[4] As a result, which party will control the next Senate at the start of the next administration will

[2] One House race is headed to a run-off election, while the results in several others are very close.

[3] Note that the party affiliation of one seat moved from Republican to Democratic on December 2, 2020 with the swearing in of Senator Mark Kelly (D-AZ), who won a special election to fulfill the remaining two years of the term of the late Senator John McCain (R-AZ). The number of Democrats includes two Independents who caucus with the Democrats.

[4] The two unresolved Senate races are for seats currently held by Sen. David Perdue and Sen. Kelly Loeffler, both Republicans. Senator Purdue is serving the "regular" six-year term for a Senator and, thus, his term will expire at the end of the current Congress (i.e. at noon on January 3, 2021). That seat will remain vacant from noon on January 3, 2021 until a winner of the January 5, 2021 election for that seat is determined and sworn into the Senate. By contrast and due to the fact that the election for the seat that Senator Loeffler currently holds (by reason of gubernatorial appointment) is a special election to fulfill the remaining two years of the term of retired former Senator Johnny Isakson (R-GA), the appointed Senator Loeffler will continue to occupy that seat until a winner of the January 5, 2021 special election is declared and sworn into the Senate. Thus, Georgia will only be represented by one Senator in the Senate for a relatively short period time.

not be known until the outcomes of those races are certain.

If Republicans win at least one of the two Georgia run-off races, they would continue to control the Senate. If, however, the Democrats win *both* of those races, the Senate would be split 50-50 between Republicans and Democrats. In this case, the party of the vice president would control the Senate; under the U.S. Constitution, the vice president serves as president of the Senate and may vote in the Senate in the case of a tie. Because Mike Pence would be the vice president until Kamala Harris is sworn in on January 20, 2021, Republicans would continue to control the Senate through the end of the Trump administration, even if Democrats win both Georgia run-off races. At the start of the Biden administration, however, Democrats would control a 50-50 Senate by virtue of the role of vice president Harris.[5]

Organizing the next Congress

The 116th Congress will end when the House and Senate adjourn later this year. The 117th Congress is scheduled to convene on January 3, 2021. Any tax bills that were introduced in the 116th Congress, but that have not yet become law, would expire and would have to be reintroduced in the 117th Congress to move forward in the legislative process—bills do not "carry over" to the next Congress.

Even though the 117th Congress does not begin until early next year, Republicans and Democrats hold orientations for incoming members during the "lame duck" session that runs from after the elections until the end of the current Congress. In addition, Republicans and Democrats who will serve in the next House and Senate elect their party leaders for the 117th Congress during the lame duck session.

Note, however, that the new House must vote to elect its speaker, so that vote will be taken when the new House convenes in January. Because designating the speaker typically requires a majority vote of the House, as a practical matter, substantially all of the members of the party that controls the House may need to vote in favor of their party leader for that person to become speaker because members of the minority party typically would be expected to vote for their leader. With Democrats retaining control of the House, Nancy Pelosi (D-CA) might be expected to continue as speaker, with Kevin McCarthy (R-CA) remaining the minority leader.

In the Senate, Sen. McConnell (R-KY) would continue as majority leader if Republicans retain control, while Sen. Schumer (D-NY) would be majority leader if Democrats gain control.[6] However, some organizational matters with respect to the new Senate, such as installing new chairs of committees, are expected to be delayed pending the outcome of the Georgia run-off races. (Listen to KPMG's ***Catching Up on Capitol Hill* podcast** for more on how the uncertainty regarding the outcome of the run-off races might affect the organization and start of the next Senate.)

Leadership of tax-writing committees

Rep. Neal (D-MA) will continue to be chair, and Rep. Brady (R-TX) will continue to be the ranking

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[5] The governor of California (a Democrat) can appoint a replacement for Senator Harris in the Senate; the replacement would serve until 2022 (when Harris's current Senate term is scheduled to expire).
[6] On November 10, 2020, Senate Republicans and Democrats elected Mitch McConnell and Chuck Schumer to be their respective leaders.

member, of the House Committee on Ways and Means.[7] It is possible that the ratio of Democratic and Republican members of the committee might be modified to better reflect the composition of the next House.

Depending upon whether Democrats or Republicans ultimately control the next Senate, it is likely that either Sen. Wyden (D-OR) or Sen. Crapo (R-ID) would be chair of the Senate Finance Committee at the outset of the Biden administration, with the other becoming the ranking member. Sen. Wyden is currently the ranking member of Senate Finance and was its chair in 2014 and 2015. Due to Republican term limits for committee chairmen and ranking members, Sen. Crapo is expected to replace current Chairman Grassley (R-IA) as the top Republican on the committee once control of the next Senate has been resolved. Sen. Crapo has been a member of the committee since 2005.

Presidential campaign tax proposals

Prior to the elections, KPMG issued reports on the policies that each of Trump and Biden might be expected to propose from a federal tax perspective if he won the election.

Biden campaigned on making a number of major changes to the current U.S. tax system. Many of his campaign tax proposals focused on furthering policy goals of, or raising revenue to fund, a variety of tax and non-tax initiatives (including, for example, initiatives relating to infrastructure, clean energy, domestic manufacturing, rebuilding U.S. supply chains, housing, racial inequities, child care, elder care, and health care). Tax proposals included:

- Raising the top statutory corporate income tax rate to 28%
- Creating a new 15% corporate minimum tax on global book income of $100 million or more
- Increasing the tax rate on certain foreign income from the 10.5% imposed by the current "global intangible low-taxed income" (GILTI) regime to 21%
- Providing new or expanded tax incentives for certain business activities and industries (including domestic manufacturing)
- Providing some form of economic stimulus
- Increasing the top individual tax rate to 39.6% for those with over $400,000 in income
- Taxing capital gains for individuals with over $1 million in income at ordinary income rates
- Taxing unrealized capital gains at death or eliminating stepped up basis at death
- Reducing the estate tax exemption amount
- Providing new or expanded tax credits for lower-income home buyers, renters, informal caregivers, parents, older workers without children, and others

Biden's campaign also indicated that, as president, he would not raise taxes on individuals with under $400,000 of income.

For more information on Biden's campaign proposals, read the KPMG report: **Joe Biden's Tax Proposals: Frequently Asked Questions** (last updated September 18, 2020).

[7] The chairs and ranking members for committees in the next Congress were announced by House Democrats and Republicans, respectively, on December 3, 2020.

Treasury

Biden has indicated Janet Yellen, former chair of the Federal Reserve, will be his nominee for Treasury Secretary.

The U.S. Constitution provides that the president may appoint "officers of the United States" with the "advice and consent" of the Senate. Under current Senate rules, only a majority vote is needed to confirm the appointment of a cabinet official.

Potential implications of election results—Senate filibuster rules

Under current Senate rules, 60 votes are generally needed to avoid a filibuster of legislation. Given that neither Republicans nor Democrats are expected to occupy close to 60 seats in 2021, bipartisan agreement would generally be needed for the Senate to pass legislation, regardless of whether Republicans or Democrats ultimately control that chamber.

Special "budget reconciliation" procedures, however, allow some types of legislation, including tax legislation, to be passed with only a majority vote in the Senate without being subject to a filibuster. The reconciliation procedures involve complex and intricate rules that can affect the design and substance of legislation. Moreover, as a general matter, the reconciliation process can be used for only one reconciliation bill with tax provisions for a fiscal year.[8] Notwithstanding these constraints, using the reconciliation process can allow legislation to pass with little or no support from the minority party.[9]

Importantly, however, as a practical matter, the reconciliation rules are significantly more likely to be used if both the House and the Senate are controlled by the same party.[10] Thus, reconciliation would not be expected to come into play if Republicans continue to control the Senate during the Biden administration.

Further, even if Democrats win both Georgia Senate races and end up controlling both chambers of the next Congress, the ability to use budget reconciliation rules for only one tax bill for a fiscal year could force Democrats to address major tax policy changes that Republicans would not support together rather than having the ability to include major tax policy changes in multiple bills throughout the course of a fiscal year.

If Democrats end up controlling the Senate at the start of the Biden administration, it is possible (although far from certain) that Democratic senators might eliminate the filibuster rule so that legislation (including tax legislation) could be passed with a simple majority vote, without having to surmount the procedural hurdles associated with the use of budget reconciliation procedures. Eliminating the filibuster

[8] This limitation relates to a fiscal year, not a calendar year. The federal government uses a fiscal year that ends September 30. Thus, it technically is possible for there to be two reconciliation bills with tax provisions in a calendar year so long as they are for different fiscal years.
[9] The legislation that is commonly called the Tax Cuts and Jobs Act of 2017 (TCJA) passed the Senate on a party-line vote using budget reconciliation procedures. The use of these procedures resulted in design complexities such as phase-outs of individual rate reductions, "ramping up" of business revenue raisers in future years, and the lack of an official title and a table of contents.
[10] To "unlock" the use of the budget reconciliation rules, both the House and the Senate first must agree to a budget resolution. It is highly unlikely that a House controlled by one party would agree to a budget resolution to allow a Senate controlled by the other party to pass legislation without bipartisan support.

rule could allow Senate Democrats to pass multiple bills with tax policy changes in 2021 without significant Republican support. Nonetheless, both eliminating the filibuster rule and passing legislation by a simple majority afterwards would require support from all Senate Democrats—which could be challenging. Indeed, on November 9, 2020, Sen. Manchin (D-WV) reportedly indicated that he would oppose eliminating the filibuster.

For more on the possibility of eliminating the filibuster, listen to this episode of the ***Catching Up on Capitol Hill podcast***.

Outlook for tax legislation in 2021

As a general matter, the House, the Senate, and the president all need to agree to the same version of legislation for that legislation to become law. As a result, major policy changes have often been possible in recent years only when one party controls the White House and both chambers of Congress. Indeed, both the 2017 tax law ((Pub. L. No. 115-97), commonly referred to as the "Tax Cuts and Jobs Act" (TCJA)) and the Affordable Care Act (ACA) were enacted under single party control, with no or very little minority-party support.

Consequently, what tax legislation ultimately might be enacted in 2021 can be expected to be affected by whether there is divided government or one party (Democratic) control at the start of the Biden administration. Control of the Senate, however, will not be known until after the Senate run-off races in Georgia that are scheduled for January 5, 2021, complicating end-of-year tax planning. Moreover, even if Democrats do end up controlling both the House and the Senate, they will do so by small margins, making achieving intra-party consensus more challenging.

Divided government scenario

If Republicans end up controlling the next Senate, legislative changes to tax policy might be expected to be relatively modest given the differences between many Republicans and Democrats on major tax policy issues. Indeed, the Senate majority leader (Sen. McConnell) could prevent major tax legislation not supported by the Senate Republican caucus from having a vote on the Senate floor. As a result, major tax policy changes, such as increases in the individual and corporate rates, do not appear likely under this scenario.

Nonetheless, even with divided government, the White House, House, and Senate might be able to reach consensus on some tax law changes on which significant numbers of lawmakers in both parties might agree. These might include, for example:

- Enhancing retirement savings (perhaps based on a bipartisan bill recently introduced by Ways and Means Chair Neal (D-MA) and ranking member Brady (R-TX))

- Addressing some Internal Revenue Code provisions that recently have expired (assuming those provisions are not extended in what remains of the current lame duck session), or that are scheduled to expire soon

- Promoting research and development (perhaps including postponing or eliminating the change to the treatment of research and experimentation expenditures that is scheduled to go into effect in 2022 under the TCJA)

- Providing tax incentives for investment in the United States

Depending on the state of COVID-19 and the economy next year, as well as on what legislation might be enacted in the lame duck session, it might be possible to achieve bipartisan consensus on using the Internal Revenue Code to respond to some of the health and economic repercussions of COVID-19, including providing relief to certain sectors/industries/taxpayers or general economic stimulus. Further, Biden has indicated as a general matter that, as president, he would work with Republicans to achieve consensus. Nonetheless, it is not clear whether reaching such consensus would be achievable in a divided government scenario or, if it is possible, what the size and details of such legislation ultimately would be.

It's also worth considering whether the ongoing BEPS 2.0 project work at the OECD could be the impetus for significant future tax legislation, even in a divided government. For example, if the OECD work produces an agreement on new sourcing rules and global taxing rights, the United States might propose new tax legislation in response to that consensus. If, on the other hand, the OECD fails to produce a consensus, the result could be a series of unilateral digital services taxes that fall especially hard on US companies. This too could lead to a U.S. tax response. In either of these scenarios, a bipartisan response would be necessary with a divided government.

Democratic control scenario

If Democrats control both chambers of Congress during the Biden administration, they can be expected to try to address the items described in the "divided government scenario" above, including COVID-19 related legislation. Such legislation might be expected to include tax provisions—although many of those provisions might be temporary in nature. The legislation, however, might be expected to be larger and broader in scope than might be the case under a divided government scenario.

In addition, Democrats can be expected to try to make some tax policy changes for which there is not significant bipartisan consensus. For example, there is more of a chance than under a divided government scenario that some tax policy changes based on Biden's campaign proposals might become law at some time in the next couple years—with Biden likely continuing to be committed to not increasing taxes on individuals with over $400,000 of income (however that threshold ends up being technically defined).[11] Nonetheless, it is important to note the following:

- Leadership in the House and Senate would need to take into account political considerations, such as potentially differing views of progressive and moderate members of their caucuses, in assessing both the substance of proposed legislation and in counting Democratic votes in support of legislation. If Democrats seek to move legislation that would not have any Republican support, they could not lose *any* Democratic votes in the Senate and could not lose many Democratic votes in the House.

- For example, if Democrats only hold the majority in a 50-50 Senate by virtue of the potential role of a vice president Harris, they either (1) would need *every* Democratic senator to support legislation or (2) would need to at least get *some* Republicans on board.[12] The potential need to secure the support of every Democrat would give each Democratic senator tremendous power over the content of the bill, likely resulting in compromises affecting the substance and design of legislation. Likewise, in the House, Speaker Pelosi would face the challenge of putting together legislation that almost all House Democrats could support, notwithstanding potentially different perspectives of different

[11] As noted in the KPMG FAQ's on Biden's campaign tax proposals, those proposals are not technically detailed. Thus, for example, they do not explain the details of the "$400,000 of income" threshold.
[12] This would be the case regardless of whether Democrats use budget reconciliation procedures to pass a tax bill or eliminate the filibuster rule.

members of the Democratic caucus. Thus, tax bills likely would need to be carefully crafted to garner the necessary support (e.g., with tax increases being paired with significant tax cuts for lower income individuals, stimulus/relief/incentives for certain businesses, or achieving significant non-tax policy objectives).

- Unless Senate Democrats vote to eliminate the filibuster, Senate Democrats would need to use budget reconciliation to pass any tax bill that lacks any Republican support. That would require the substance of the bill to comply with budget reconciliation requirements. Moreover, it could require Democrats to package major tax policy changes together rather than to include tax provisions in various bills as components of different policy initiatives (as contemplated in Biden's campaign proposals). Packaging numerous major revenue-raising policy changes together could up the ante on structuring the legislation to be politically palatable to every Senate Democrat.

- If Democrats end up controlling both chambers of Congress, there will be a long list of Democratic policy priorities competing for legislative action—many outside of the tax realm. The White House and Congress would need to determine which policy areas to address first—and the priorities at any given time might be affected by current events. For example, election reform can be expected to be a high priority and might be one of the first items addressed in a Democratic Congress (along with COVID-19 relief legislation). As another example, health care could move to the front burner if the U.S. Supreme Court were to find the ACA to be unconstitutional. Thus, while it is possible that Democrats may try to include tax provisions in some "front burner" policy initiatives, putting together a major tax bill might be a lower priority and addressing some tax policy proposals might be deferred until later in 2021 (or beyond).

- The state of the economy and of particular sectors next year could affect which tax policy proposals Biden and congressional Democrats might push for and ultimately be able to reach consensus on—as well as the technical details of those proposals (e.g., amounts of possible rate increases, effective dates, phase-ins, dollar thresholds, exceptions, transition rules, etc.).

- The administration would need to flesh out details of campaign tax proposals and might modify, or add to, its priorities with respect to tax. Further, the interests of key congressional players (including those of the House and Senate leadership and the chairs and Democratic members of the tax-writing committees) can be expected to have an impact on the details of tax legislation.

From a timing perspective, Biden and congressional Democrats might push to address some major policy changes, including in the tax arena, in 2021 and early 2022 prior to the November 2022 congressional mid-term elections. This could maximize the possibility that Democratic high priority items would be addressed in the 117th Congress given the possibility that Republicans could gain control of one or both chambers of Congress in 2023.[13]

Finally, note that, if Democrats control both chambers of Congress and enact legislation during 2021 that includes increases in tax rates, it is possible, although far from certain, that some of the increases could be effective retroactive to the beginning of 2021. While rare, there are historical precedents for tax rate increases being applied retroactively. Further, the Supreme Court has upheld some retroactive changes to existing tax laws against challenge under the due process clause of the U.S. Constitution.

Nonetheless, ultimately what changes lawmakers decide to make, as well as when those changes are

[13] Note also that, in a 50-50 Senate, control of the Senate could flip (or increase) before the next elections in the event a Senate seat were vacated in a state in which a governor of another party could appoint someone in that other party to fill the vacancy pending a special election or the next regularly scheduled general election. There are several Democratic and Republican Senators whose seats, if vacated, might be expected to lead to the temporary appointment of a member of the other party.

enacted and are effective, can be expected to be affected by political and other factors (including the state of the economy)—and some of those factors might weigh against significant retroactive changes. As a result, even though it might be possible for legislation to be enacted increasing tax rates retroactively (e.g., to the beginning of the year of enactment), it is by no means certain that a Congress controlled by Democrats ultimately would do so—particularly given the likely inability to lose *any* Democratic votes in the Senate or to lose more than a small number of Democratic votes in the House.

Read the **KPMG report of Biden's tax proposals** [PDF 1.9 MB] for a more detailed discussion of his campaign proposals and what factors might affect the tax legislative agenda if the White House and both chambers of Congress are controlled by Democrats in 2021.

The "lame duck" session

The 116th Congress was in recess for the elections; however, it has returned for a short "lame duck" session that will end before the 117th Congress convenes on January 3, 2021. The politics of any lame duck session are often complicated given that some members have lost their races or are retiring and the parties' respective strategies can be affected by what power they expect to have, or not, in the coming year. The dynamic is even more complicated in the current lame duck session given the uncertainty surrounding the future control of the Senate.

Government funding is one of the issues the 116th Congress still needs to address in its lame duck session. The current continuing resolution expires December 18—after having been already extended once (from December 11) during the lame duck session. Unless an omnibus funding bill or additional continuing resolution is enacted by December 18, there could be a full or partial government shutdown. Nonetheless, resolving government funding issues is not easy.

Many tax professionals are interested in whether the lame duck session will advance additional COVID-19 relief or economic stimulus legislation or will extend any of the tax incentives that are scheduled to expire at the end of 2020, perhaps as part of government funding legislation. Although discussions are actively ongoing with regard to both these issues, those discussions are very dynamic and the ultimate outcome is not certain. Stay tuned to **TaxNewsFlash-Legislative Updates** for relevant developments in this regard.

Additional resources

KPMG's ***Catching up on Capitol Hill* podcast series** includes insights from KPMG professionals about current developments in Washington and what might happen next. So far, over 20 podcasts have been released that cover topics relating to the organization of the next Congress, the possible post-election agenda, Biden's campaign tax proposals, expiring provisions, COVID-19, regulations under the TCJA, and more. Additional podcasts will be released soon.

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