

Biden Presidency May See Higher Individual Tax Rates, 1031 Repeal

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While an increase in individual tax rates could be on the horizon in a Biden administration, the wealth of challenges he'll have to tackle upon taking office could put this on the back burner.

That was one of the views expressed during the recent Commercial Observer panel Tax Talk: What the 2020 Election Means for the Future of CRE Taxes, presented by Anchin and Fried Frank on Wednesday, October 28.

Moderated by Commercial Observer Editor-in-Chief Max Gross, the panel featured insights from Jeffrey Bowden, Tax Principal, Real Estate Group at Anchin; Chris Coffey, Head of NY Practice at Tusk Strategies; Mark Schneider, Head Tax Partner, Real Estate Group at Anchin; and Libin Zhang, Tax Partner at Fried Frank.

Coffey talked of how raising tax rates won't be the first priority for President Biden, and how the composition of the Senate will help determine the outcome.

"Generally speaking, the first hundred days are when you get the most done. Some of that's going to depend on stimulus, and he'll have pressure to appoint a commission to take up [expanding the Supreme Court]," he said. "If the Democrats don't get a majority in the Senate, which is possible, then I still think you would get a new tax plan. It would just be a much more slimmed down tax plan - maybe not quite where he wants to get at 39 percent (top rate). But I do think you're going to see a tax plan move in the first year."

Schneider, though, believed that the wait could be even longer.

"The Urban-Brookings Tax Policy Center said that based on the economy and the pandemic, we might not see anything go into effect until January of 2022," he said. "The thought process is, if you've got large capital gains, do you consider your options and recognize capital gains now, given a potential increase in tax rates to an ordinary income tax rate of 39.6 percent on capital gains if your income is over a

million.”

There was also discussion of 1031 exchanges, which Schneider and Bowden thought Biden might seek to eliminate.

“I think they want to use it as a revenue raiser, to do away with the like-kind exchange,” said Bowden. “Instead of deferring gains indefinitely if you’re a real estate business, they want to raise taxes by triggering that.”

Bowden advised those looking to prepare to consider entering into an exchange before the law is passed.

“They will not be retroactive, and if you’re in an exchange, then you’ll be grandfathered,” he said. “Some of the states have already done away with like-kind exchange rules.”

“This isn’t the first time they’ve tried to repeal 1031 exchanges, and they’ve survived until now,” Bowden said. “If you look at the impact of that and understand what they’re trying to do, with the elimination of a step-up in basis at death – because the 1031 exchange is not only a deferral of tax, but you get a step-up in the basis at death – it really is a significant impact.”

Also to potentially change under President Biden: opportunity zones, which could have tighter regulations.

“A Biden administration could target a few things about opportunity zones,” said Zhang. “He might require more local community benefits, and maybe restrict the types of luxury housing and sports stadiums that you can build in opportunity zones. But I think the bigger question is how the increase in capital gains tax rates would affect opportunities on investments, because one of the requirements of the opportunity zone program is that you defer your capital gains, and generally recognize the gains in 2026. So if you think that capital gains rates are lower in 2020, but they’re going to be 40 percent in 2026, that may not be the best thing to do, which is to defer your gains, but cause them to be taxed at a higher rate. Maybe you want to wait until 2022 to defer the gain. At that time, they would presumably be taxed as ordinary income anyway. So deferring that from 2022 to 2026 is not

such a big deal.”

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