

What US and international taxpayers need to know about Biden's tax policy proposal (Green Book)

The Green Book is effectively President Biden's wish list for future tax policy to provide funding for his proposed budget. It is a proposal. It is not yet legislation and it is clearly not law. It is an insight into where changes in the tax code might occur. For taxpayers, it is important to understand what types of transactions will be impacted if part or all of the Green Book becomes law. This note is intended to be an overview of the Green Book focusing on its impact on private clients. It is not an exhaustive analysis of all provisions of the Green Book.

Given the razor-thin Democratic majorities in the House of Representatives and the Senate, President Biden would need near Democratic unanimity in the House, and could not lose a single Democratic Senator if he hoped to enact the Green Book. The Green Book supports Biden's political agenda as well as serving as a proposed blueprint for the U.S. Tax Code. Most of the proposals in the Green Book have been included in President Biden's tax positions since the early Democratic primaries, but the Green Book does contain some surprises.

It is as important to understand what President Biden omitted from the Green Book as well as to consider what he included. There is no discussion of Estate Tax increases, Estate Exemption decreases or a reduction or curtailment of Qualified Business Income under §199A for owners of passthrough entities. The proposal to impose the OASDI portion of Social Security on wages or self-employment income at or above \$400,000 is not included. A broad reinstatement of state and local tax deductions is also absent. This is not a guarantee that these proposals may not ultimately be included in legislation.

I. EXECUTIVE SUMMARY

- Individual income tax rates raised to 39.6%, with significant compression of the top bracket.
- A capital gains hike to 37% (plus 3.8% NIT) retroactive to April 28, 2021 for individuals with adjusted gross incomes of \$1 million or more in 2021. Capital Gains rates are likely to rise to 39.6% for individuals with adjusted gross income of \$1 million or more in 2022.
- At death, the elimination of the step-up in basis on investment assets with cumulatively over \$1 million of built in appreciation.
- At death, the elimination of the step-up in basis on personal residences with built in appreciation over \$250,000.
- Taxation of all unrealized appreciation on death or gift subject to exclusions.

- Limited exclusions are available for transfers by gift or at death:
 - spousal
 - charitable
 - family owned and operated businesses
 - individual exclusion of \$1 million of appreciation plus \$250,000 of appreciation on personal residence
- C Corporation income tax increases to 28%
- Elimination of Carried Interest treatment for hedge fund, private equity and real estate clients
- Elimination of §1031 like kind exchanges on real estate for more than \$500,000 of appreciation per year
- Permanent imposition of the Excess Loss Limitation under §461(l)
- SECA tax imposed on all trade or business income of S corp owner/employees
- Enhanced regulation of cryptocurrency transactions
- A global minimum tax on earnings of foreign subsidiaries of at least 21%
- A change to the inversion rules that would make it more difficult for companies to move the parent company out of the United States
- Expansion of U.S. Tax Base Erosion Rules

II. INDIVIDUAL TAX CHANGES

A. Individual Income Tax

The Green Book would raise the top marginal individual income tax rate to 39.6% (the top marginal individual rate is 37% in 2021). There would also be rate compression. Beginning in 2022, the top marginal rate would apply to taxable income in excess of \$509,300 for married couples filing jointly (as opposed to \$628,300 in 2021), \$452,700 for single taxpayers (as opposed to \$523,600 in 2021), \$481,000 for head of household filers (as opposed to \$523,600 in 2021), and \$254,650 for married individuals filing separately (as opposed to \$314,000 in 2021).

This proposal would be effective for tax years beginning after December 31, 2021. In tax years beyond 2022, the rate thresholds would be indexed for inflation.

B. Capital Gains Tax

1. Rate Increase and Retroactive Effective Date

The Green Book would increase the capital gains tax rate to the top ordinary income tax rate—37% in 2021—for long-term capital gains and qualified dividends of taxpayers with adjusted gross income of more than \$1 million. For individuals subject to the higher rate, the rate differential between long-term and short-term capital gains will disappear. The \$1 million dollar threshold will be indexed for inflation after 2022.

Example: A taxpayer earns \$900,000 in labor income and \$200,000 in capital gains in 2021. \$100,000 of capital gain would be taxed at the current capital gain rate (20%) and \$100,000 would be taxed at ordinary income tax rates (37% in 2021 and 39.6% in 2022).

The Capital Gains rate increases for individuals with adjusted gross income above \$1 million would be retroactive and appear to apply to gains recognized on or after April 28, 2021, the date President Biden announced the American Families Plan. Accordingly, for taxpayers with adjusted gross income over \$1 million in 2021, the long term capital gains tax rate for gains arising on or after April 28 would be 40.8%, after the 3.8% Net Investment Income Tax ("NIIT") is included. It is expected that the long term capital gains tax rate will track the top marginal ordinary income tax rate; which is proposed to rise to 39.6% in 2022 (43.4% after the NIIT). Please remember that both the rate and the effective date are only proposals. The U.S., has never had a retroactive Capital Gains rate hike.

2. Mark-to-Market Capital Gains Tax on Gifts and Transfers at Death: The Curtailment of Step Up in Basis

The Green Book would treat transfers of appreciated property by gift or at death as triggering a capital gains realization event. Accordingly, the donor or deceased owner of appreciated property would realize a capital gain at the time of transfer or death. Subject to exclusions presented later in this note, for a gift during life, the donor would realize gain equal to the excess of the property's fair market value on the date of transfer over the donor's basis in the property. For property transferred on death, the decedent's estate would recognize gain equal to the excess of the property's fair market value on the decedent's date of death over the decedent's basis in that asset. "Step-up" of basis at death is largely eliminated for wealthy taxpayers and would be limited to the exclusions discussed below. With respect to transfers at death, the decedent's capital losses and carry-forwards could be used to offset capital gains income and up to \$3,000 of ordinary income on the decedent's final income tax return. Additionally, the decedent's estate would be allowed a

corresponding deduction for any tax levied on gains deemed realized at death on the decedent's estate tax return (to the extent the decedent has a taxable estate).

Example: Taxpayer has an asset with basis of \$0 and its fair market value is \$100 at date of death in 2022. Assume taxpayer has used up his \$1 Million of exclusion during life.

\$100 (gain)
x 43.4% (tax rate)
\$43.40 Capital Gain tax

The \$43.40 of tax apparently would be subtracted from \$100 fair market value of the asset to calculate the Estate Tax.

\$100 (fair market value)
-\$43.40 (Capital gain)
\$56.60 (value subject to estate tax)

\$56.60
x 40% (current estate tax rate)
\$22.64 Estate tax

\$43.40 (Capital gain tax)
+\$22.64 (Estate tax)

\$66.04 Total Tax

\$33.96 Value left for heirs

This example does not include state capital gains or excise taxes. The proposal would be effective for gains on property transferred by gift or at death after December 31, 2021

3. New Valuation Rules Applicable to Transfers

The Green Book defines a transfer under the existing gift and estate tax provisions of the Internal Revenue Code. Nonetheless, with respect to the imposition of the proposed tax on appreciated property, new principles would apply. Discounting would be eliminated. A transferred partial interest would be valued at its proportional share of the fair market value of the entire asset. The IRS would be given broad power to draft regulations in this area.

4. Transfers to Trusts, Partnerships and Other Non-Corporate Entities Trigger Capital Gain on Appreciation

Transfers of property into, and distributions in kind from, a trust, partnership, or other non-corporate entity (except a grantor trust deemed wholly owned and revocable by the grantor)—would trigger recognition of

capital gain. This would represent a major change in partnership tax law and is, perhaps, intended to only be aimed at "Family Partnerships." On its face, this Green Book proposal would be a major change to taxation of partnerships under §721 of the Internal Revenue Code.

For revocable grantor trusts, the deemed owner would recognize gain on the unrealized appreciation of any property distributed from the trust to any beneficiary other than the deemed owner or a U.S. spouse.

The proposal would be effective for gains on property transferred to trusts, partnerships, and other non-corporate entities on or after January 1, 2022.

5. Exclusions from Capital Gain Recognition under the Green Book

a) Marital Exclusion

The Green Book provides that a transfer by gift or by death to the U.S. spouse of the decedent would carryover the decedent's basis in the property transferred and no tax would be triggered. A surviving U.S. spouse would not recognize capital gain until he or she disposed of the asset or died.

b) Charitable Exclusion

The Green Book provides that a transfer by gift or by death to a charity would carryover the decedent's basis in the property transferred and no tax would be triggered. Capital gains tax would not be imposed on appreciated property transferred to charity. However, the transfer of appreciated property to a split-interest trust—such as a charitable remainder trust—would trigger a taxable capital gain. The charity's share of the gain, based on the charity's proportional share of the value transferred, would receive an exclusion. The exact meaning of "charity" requires further guidance.

c) \$1,000,000 Lifetime Exclusion

The Green Book would include a \$1 million per-person exclusion from recognition of unrealized capital gains on property transferred by gift or at death. The individual exclusion would be indexed for inflation after 2022 and would be portable to the surviving spouse—for a combined \$2 million exclusion per married couple. The use of this proposed exclusion could produce divergent tax consequences based on the timing of the exclusion's use. These consequences, which impact the imposition of tax on the donor/decedent or the recipient, and the recipient's basis can be effectively reduced to three scenarios:

- Use of Exclusion on Transfer of Property at Death: The decedent's estate would not be taxed on appreciation of up to \$1 million and the recipient's basis in property received by transfer at death of the decedent would be the property's fair market value at time of death. Result – no tax, basis equal to fair market value.

- Use of Exclusion on Gifted Property: The donor would not pay any tax on the \$1 million of appreciation, and the donee's basis in property received by gift during the donor's life would be the donor's basis at the time of transfer if the property is shielded by the donor's exclusion amount. The recipient would pay capital gains tax on the carried over basis upon eventual disposition of the property. Result – carry over basis, no tax
- Property Not Sheltered by the Donor's Exclusion Amount: The donor or decedent's estate would pay capital gains tax on any unrealized appreciation and the recipient's basis in property received by gift or by death would be the property's fair market value at the time of transfer,. Result – tax, basis equal to fair market value.

d) Exclusion for Tangible Property and \$250,000 Exclusion on Personal Residences

The Green Book would also exclude from recognition any gain on tangible personal property (i.e. household furniture and personal items other than collectibles). Moreover, the current \$250,000 per-person exclusion for capital gain on a principal residence would be expanded to cover all residences and would be portable to a surviving spouse—effectively creating a \$500,000 exclusion for appreciation attributable to residences per married couple.

e) Exclusion of Family Owned Businesses

The Green Book includes an additional exclusion, under which payment of tax on the unrealized appreciation of certain family-owned and operated businesses on death would not be due until the business is sold or ceases to be family-owned and operated. Security and reporting to protect the IRS would be necessary

6. Installment Payment on Illiquid Assets on Death

Recipients of illiquid appreciated property transferred at death would be allowed a 15-year fixed-rate payment plan for the imposed tax, likely similar to the rules of §6166 of the Internal Revenue Code. However, transferred liquid assets such as publicly traded securities, would not qualify for the 15-year payment plan. The proposal would also authorize the IRS to require and obtain security at any time where security is reasonably necessitated by the deferral of payment.

7. Mark-to-Market Capital Gains Tax on assets held 90 years in Trusts and Non-Corporate Entities

Under the Green Book, gain on property held by a trust, partnership, or other non-corporate entity, with unrealized appreciation would be recognized if that property has not been the subject of a recognition event within the preceding 90 years. The assessment period would be set back to January 1, 1940, which means the first possible recognition event for any taxpayer would be December 31, 2030. Family-owned

businesses, art, farms, ranches or vacation homes that have been held by the same entity for multiple generations, would face imposition of capital gains tax on 90 years of unrealized appreciation as soon as 2030 if this Green Book proposal is enacted into law.

8. Section 1202 Stock Still Available

The current exclusion for capital gain on specified small business stock would remain under the Green Book.

9. Summary

It is important to remember that these proposals are not yet law, and may evolve substantially or disappear before any bill is passed. To recap, as proposed, the federal capital gains tax rate for individuals with an adjusted gross income of \$1 million would nearly double and be applied retroactively to April 28, 2021. Transfers of property by gift or at death would trigger a capital gain realization event subject to the exclusion discussed above. Without basis step-up, maintaining accurate and detailed records as to the cost of assets will be increasingly important. It is the taxpayer's duty to prove basis.

III. CORPORATE AND BUSINESS TAXES

A. Changes to Corporate Income Tax Rate

The Green Book proposes to increase the income tax rate applicable to C Corporations from 21% to 28%.

When the Tax Cuts & Jobs Act (the "TCJA")¹ lowered the corporate tax rate to 21%, it increased the parity between the overall effective tax rate that applied to ordinary income earned by a pass-through entity and ordinary income earned by corporations (when considering both the 21% corporate income tax rate and the tax on dividend distributions to shareholders). Now, the proposed increase to the corporate rate coincides with a Green Book proposal to raise the tax on qualified dividends to 40.8% in 2021 (along with capital gains) to the extent a taxpayer's adjusted gross income exceeds \$1 million (which could result in a federal effective income tax rate of 58.2% on income earned by a C Corporation and paid out as qualified dividends). If the proposal is enacted, pass-through entities may again offer a significantly lower overall effective tax rate as compared to C Corporations.

This proposal would be effective for taxable years beginning after December 31, 2021. For corporations with tax years that begin after January 1, 2021, the increase in the corporate tax rate would be phased-in by applying the increased rate to the portion of the tax year that occurs in 2022.

¹ The TCJA was enacted on December 22, 2017. The change in corporate tax rate to 21% was generally effective for tax years beginning on or after December 1, 2018.

B. Carried Interests

Hedge Fund, Private Equity, and Real Estate principals typically receive "carried interests" in the funds they manage as an equity component of their compensation. Under current law, the manager's share of profits attributable to a carried interest can, and typically does, include long term capital gains and qualified dividends which are taxed at preferential rates as compared to compensation income taxed at ordinary income rates (generally 20% vs. 37%). Sales of carried interests also generate capital gains and not compensation income. In addition, allocated capital gains and qualified dividends are not subject to self-employment taxes, but are subject to the 3.8% net investment income tax. The fairness of taxing carried interests at preferred rates rather than as ordinary income has been the subject of continuing debate among policymakers. The Tax Cuts and Jobs Act modified the rules concerning carried interest by offering long-term capital gains treatment only for fund assets held for more than three years rather than one year.²

Under the Green Book proposal, a manager's share of fund income attributed to a carried interest (an "investment services partnership interest" or "ISPI") would be taxed as ordinary income regardless of character, if the manager's income from all sources exceeds \$400,000. In addition, all income from an ISPI allocated to a manager would be subject to self-employment taxes, and gain from the sale of an ISPI by a manager would be taxed as ordinary income. Income and gain from interests held by managers attributed to contributed capital are treated similarly to interests of other partners who invested capital in the fund and would not be subject to reclassification.

The proposal includes anti-abuse language intended to prevent circumvention of the new rules through compensation arrangements other than carried interests (such as convertible debt, options or derivatives). The changes, if adopted, would be effective for tax years beginning after December 31, 2021. It should be noted that even if the proposal is not enacted, if the proposed change in the capital gains rate to 37% for taxpayers with AGI of over \$1,000,000 occurs, it would largely capture the intent of the proposal, except as to taxpayers earning between \$400,000 and \$1,000,000.

C. Tax Free Exchanges under §1031

Gain on the sale or exchange of property used in a trade or business, or held for investment, can be deferred if exchanged for property of a "like kind" in a transaction meeting the requirements of IRS §1031. Generally, deferral is accomplished by assigning the tax basis of the property relinquished to the replacement property received. Effective for sales or exchanges after December 31, 2017, the Tax Cuts and Jobs Act limited application of IRC §1031 to real estate used in a trade or business or held for investment, and not held primarily for sale.

² See IRC §1061.

Application of IRS §1031 would be further limited under the Green Book proposal to \$500,000 of annual gain deferral per taxpayer for eligible like kind real estate exchanges and sales. Currently, most §1031 transactions exceed the \$500,000 limit. The proposal would be effective for exchanges completed in taxable years beginning after December 31, 2021.

D. Make the Excess Business Loss Limitation of Non-Corporate Taxpayers Permanent

Excess business loss limitations were added to the Internal Revenue Code by TCJA effective 2018 with a "sunset" in 2026. Effectively, under §461(l) a married taxpayer filing jointly could use no more than \$500,000 of losses to offset income from other businesses in a given year. Individual filers would have a \$250,000 limit. The CARES Act, passed in March of 2020, lifted the limitation for the 2018, 2019 and 2020 tax years in response to the pandemic to allow taxpayers to monetize the losses now by either reducing tax bills or allowing taxpayers to increase NOLs, which were also liberalized under the CARES Act and could be carried back and monetized. The American Rescue Plan extended the sunset by one year to 2027. The Green Book would make the excess loss limitation permanent.

E. Self-Employment Taxes and S Corporation Shareholders

The Green Book attempts to rationalize self-employment taxes for partners, proprietors and S Corp shareholders. SECA is a corollary of FICA, which is the OASDI and Hospital Tax payable by employees and employers on W-2 wages. Under current law, general partners and sole proprietors pay SECA on full amount of their net trade or business income subject to certain exceptions. S corporation shareholders are not subject to SECA tax, but S corporation shareholders must receive "reasonable compensation" on which they pay FICA. Non-wage distributions to S corporation shareholders are not subject to FICA or SECA taxes. Currently, S corporation shareholders effectively avoid taxes by utilizing non-wage distributions.

The Green Book applies SECA tax to all ordinary business income of active shareholders of S corporations who have adjusted gross income from all sources of \$400,000 or more per year. The Green Book would effectively treat S corporation shareholders like active partners and eliminate a primary advantage of S corporation status for high earners.

F. Cryptocurrency Reporting

For U.S. tax purposes, cryptocurrency is currently treated as "property", and the use of cryptocurrency and other virtual currencies to pay for goods or services, on conversation to legal tender, or in exchange for other virtual currencies or investments, can result in a taxable transaction and required income tax reporting.³

³ See generally, IRS Notice 2014-21 and Revenue Ruling 2019-24.

The U.S. Treasury views the use of cryptocurrency as posing a significant risk of tax evasion because of its digital nature and the ease of using offshore crypto exchanges not subject to IRS reporting. To combat the potential for tax evasion, the Green Book has proposed to expand the scope of reporting by cryptocurrency brokers both within the U.S. and in foreign jurisdictions with information sharing/exchange agreements with the U.S. The proposal would require brokers to report gross proceeds from cryptocurrency transactions in addition to other information the Secretary of the Treasury may require. Further, brokers would be required to report beneficial ownership of entities holding cryptocurrency accounts. These proposals supplement those made in The American Families Plan Tax Compliance Agenda issued May 20, 2021, which calls for businesses to report the receipt of crypto assets with a value of more than \$10,000.

The expanded reporting requirements would be effective for tax returns required to be filed after December 31, 2022.

IV. INTERNATIONAL BUSINESS TAXES

A. Global Minimum Tax Regime With Respect To Controlled Foreign Corporation Earnings

The Green Book proposes several changes to the current international framework for taxing US Shareholders on income earned by a Controlled Foreign Corporation (a "CFC") in which they hold an interest.⁴ These changes are being proposed as the US is working towards an international agreement with the countries in the Organisation for Economic Cooperation and Development (OECD)/G20 Inclusive Framework to implement a global minimum tax to combat what it refers to a "race to the bottom on corporate tax rates". In that regard, the Green Book proposal seeks to limit the tax benefits of forming or operating a foreign corporation in countries with preferential income tax rates.

B. Repeal of Qualified Business Income Asset Exception

Under current law, a US Shareholder is subject to US income tax on their pro rata share of a CFC's "net CFC tested income" to the extent the income exceeds a 10% return on certain qualified business assets owned by the CFC (in general, qualified business assets means foreign tangible depreciable property). For US corporations (or individuals that have made a §962 election) that are shareholders of a CFC, certain deductions and foreign tax credits reduce the tax payable on the net CFC tested income inclusion. A US corporate shareholder is eligible to deduct 50% of its net tested CFC income inclusion⁵ (resulting in an effective tax rate on such income of 10.5%). In addition, a US corporation may claim a foreign tax credit of up to 80% of the foreign taxes allocated to the CFC's net tested CFC income. Upon repatriation of earnings,

⁴ A US Shareholder is a US person or entity that owns more than a 10% interest (measured by vote or value) in a CFC (for this purpose, certain direct and indirect interests are counted as well as interests determined under certain complex attribution rules). A CFC is a foreign corporation or which more than 50% of the interests are owned by US Shareholders.

⁵ Under current law, the deduction will be reduced to 37.5% in 2026.

a US corporation that owns 10% or more of a foreign corporation may deduct the foreign source portion of dividends received.

The Green Book proposes to repeal the qualified business asset income exception such that US Shareholders would be subject to US income tax on the entire gross tested CFC income earned by a CFC in which they hold an interest. This income is taxed to the US Shareholder regardless of whether the CFC makes a distribution of earnings and profits.

The Green Book also proposes to reduce the deduction of net tested CFC income to 25%. Combined with an increase in the corporate tax rate to 28%, this would raise the effective tax rate on net tested CFC income to 21%. The foreign tax credit would be determined on a jurisdiction-by-jurisdiction basis, so as to address a concern that US corporations are using taxes paid in high-tax foreign jurisdictions to offset income earned by foreign corporations in low-tax jurisdictions. In addition, the Green Book proposes to limit deductions allocable to income taxed at preferential rates (such as deductions with respect to net tested CFC income or the foreign source portion of certain dividends).

The Green Book also seeks to repeal the high-tax kick out (which exempts income earned in high-tax foreign jurisdictions from current inclusion in a US Shareholder's gross income).

The proposals described above would be effective for taxable years beginning after December 31, 2021.

C. Repeal of the Foreign Derived Intangible Income Deduction

Under current law, a US corporation may deduct 37.5% of its "foreign derived intangible income" (or "FDII"). In general, a domestic corporation's FDII is equal to its intangible or service income derived from non-US sources (and in excess of a 10% return on the domestic corporation's tangible depreciable property). The FDII deduction was enacted as part of the TCJA in an effort to encourage multi-national corporations to hold intellectual property in the US. However, the Biden administration views the deduction as a tax-break for large corporations and as ineffective for incentivizing new domestic research and development.

The Green Book proposes to repeal the deduction for FDII.

The proposal would be effective for taxable years beginning after December 31, 2021.

D. Limit ability of US corporations to perform inversions

Under current law, certain transactions are treated as "inversion transactions" if: (i) substantially all of the assets of a US corporation are acquired by a foreign corporation, whether directly or indirectly (known as an "inversion transaction"), (ii) the former shareholders of the domestic corporation hold at least a 60 percent ownership interest in the foreign acquiring corporation by reason of the acquisition, and (iii) the foreign acquiring corporation does not conduct substantial business activities in the country in which the foreign acquiring corporation is created or organized.

If continuing ownership by the former shareholders is at least 80%, the foreign corporation is treated as a domestic corporation for all US tax purposes (effectively invalidating the attempted inversion) (referred to as the "80% test"). If continuing former ownership is at least 60 percent but less than 80% (the "60% test"), the foreign acquiring corporation will be respected as a foreign corporation but US tax must be paid on certain "inversion gain" and certain other gains within the 10 year period ending after the inversion.

The Green Book proposals expand the number of transactions that would be treated as inversions by: (i) eliminating the 60% test, and (ii) lowering the threshold on the 80% test to a greater than 50% test. In addition, in a proposal aimed at inversions which it views as lacking economic substance, the Green Book proposes that certain transactions would be treated as inversions regardless of the level of shareholder continuity if the fair market value of the domestic corporation is greater than that of the foreign corporation, the affiliated group is primarily managed from the US after the inversion, and the foreign entity does not conduct substantial operations in the country where it is organized.

The proposal would be effective for all transactions completed after the date of enactment.

E. Replace the Base Erosion Anti-Abuse Tax With SHIELD

Certain corporate taxpayers with a 3-year average of gross receipts in excess of \$500 million may be subject to a Base Erosion Tax Liability in addition to their regular tax liability. In general, a taxpayer's BEAT liability is determined by re-computing its taxable income without certain base erosion tax payments (e.g., deductible payments made to foreign related parties).

The Green Book proposes to repeal BEAT and replace it with a new expanded base erosion rule that would disallow deductions to domestic corporations or branches with respect to certain payments made to foreign entities within the same affiliated group if such foreign entity was subject to an effective tax rate below a certain threshold.

The proposal would be effective for tax years beginning after December 31, 2022.

The full text of the Green Book is available [here](#).

If you would like to discuss how these proposals might affect you and your planning opportunities, please contact your usual Withers attorney or any of the authors of this article.

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