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Wyden proposes mark-to-market system for high-income households

Ron Wyden of Oregon, the ranking Democrat on the Senate Finance Committee, unveiled a detailed white paper on September 12 proposing an annual mark-to-market regime for high-income households that would also tax resulting capital gains at ordinary rates.
URL: https://www.finance.senate.gov/imo/media/doc/Treat%20Wealth%20Like%20Wages%20RM%20Wyden.pdf

Wyden foreshadowed the white paper's release earlier this year in an April 2 announcement. (For prior coverage, see *Tax News & Views*, Vol. 20, No. 13, Apr. 5, 2019.)
URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190405_6.html

Mark-to-market and ordinary rates

According to the plan, taxpayers subject to the new regime would be required to pay tax annually – at ordinary rates, not the long-term capital gains rate which currently tops out at 23.8 percent (including the net investment income tax – on any net gain associated with tradable assets held at the end of the year.

Nontradable assets, such as real estate or business interests held by the taxpayer, would not be assessed annually; instead, a "lookback charge" intended to minimize the benefit of deferral would be determined upon sale or transfer.

An accompanying press release notes that Sen. Wyden is "evaluating several possible methods of calculating a lookback charge, including an interest charge on deferred tax, a yield-based tax to eliminate the benefits of deferral, or a surtax based on an asset's holding period."
URL: https://www.finance.senate.gov/ranking-members-news/wyden-unveils-proposal-to-fix-broken-tax-code-equalize-treatment-of-wages-and-wealth-protect-social-security-

Only for the wealthy or high-income: Importantly, only taxpayers with more than $1 million in annual income or more than $10 million in assets for three consecutive years would be subject to the mark-to-market regime. A covered taxpayer would remain so unless and until he or she fails to meet the income or asset thresholds for three consecutive years.

According to the release, the value of personal residences, retirement accounts, and family farms – up to $2 million, $3 million, and $5 million, respectively – would not be counted toward the asset threshold. However, any value of above those excepted amounts would be factored in when assessing whether the asset test is met.

Revenue used to shore up Social Security: Wyden's plan would direct the estimated $1.5 to $2 trillion in new revenue generated by the plan over the next 10 years to the Social Security trust fund. (The white paper states that the projected revenue score is "based on external revenue estimates of related proposals.")

According to the most recent estimates by the Social Security program's trustees, absent action by lawmakers Social Security beneficiaries will face an approximate 20 percent reduction in benefits by 2035 when the trust fund is exhausted and capable of paying benefits commensurate only with incoming payroll tax revenue.

In his press release, Wyden framed the proposed as a way to ensure that high-income individuals pay their fair share.

"There are two tax codes in the United States: one for workers who pay taxes out of every paycheck and the other for high fliers who use games and tricks to avoid their taxes," Wyden said. "They pay what they want, when they want, and sometimes nothing at all…. Simply requiring the most fortunate Americans to pay taxes on income generated by their wealth – just like cops, nurses, and factory workers – would generate enough revenue to protect Social Security for decades to come."

Near-term action unlikely, but a potential marker for 2021

Wyden's proposal appears unlikely to be taken up in the Republican-controlled Finance Committee in the near term; but it does add to the list of revenue-generating ideas being put forward by congressional Democrats and 2020 presidential contenders – many of which seem to suggest the taxation of the wealthy should be based on their assets and not on traditional notions of realized income – that could come into play if Democrats clinch the White House and make substantial electoral gains in Congress next year.

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In a similar vein, Wyden released a proposal earlier this year to close the perceived carried interest loophole that relies on a concept of "deemed compensation" – an approach he argues would not only prevent fund managers from converting wage income into lower-taxed, long-term capital gain, but also would prevent deferral of carried interest income taxation until the underlying investment producing the carry is sold. (For prior coverage, see *Tax News & Views*, Vol. 20, No. 18, May 24, 2019.)
URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190524_5.html

Trump backs off capital gains indexing

In other developments, the *Wall Street Journal* reported this week that President Trump has for the time being set aside the idea of taking regulatory action to index capital gains to inflation – something he has floated several times over the past year, most recently during the just-concluded summer congressional recess.

White House spokesman Judd Deere said in an e-mail to the *Journal* that "President Trump was thoroughly briefed on the complex economic, legal, and regulatory issues [during a September 11 meeting with his economic advisors] and concluded that at this time he does not feel enough of the benefits [of indexing] will go to the middle class."

But according to the *Journal* an "individual familiar with the meeting" has indicated that even though the president will not pursue capital gains indexing in the near term, he may be open to revisiting it in the future.

A group of 21 Senate Republicans, including several Finance Committee members, had expressed support for administrative action on capital gains indexing in a July 29 letter to Treasury Secretary Steven Mnuchin. But any attempt by the administration to bypass Congress and index capital gains through regulations would likely face a court challenge from Democratic lawmakers.
URL: https://www.cruz.senate.gov/files/documents/Letters/2019.07.29_FINAL_Gapital_Gains_Letter_to_Mnuchin.pdf

There is no clear legal answer as to whether such a policy change can be carried out administratively. Although some legal experts and Trump administration officials believe the case can be made, the Justice Department concluded in 1992 (when the George H. W. Bush administration considered such a policy) that the White House lacked the regulatory authority. Notably, the attorney general at the time, William Barr, holds that same position in the Trump administration today.

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