PERSPECTIVE

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If Harris Wins, Will Unrealized Capital Gain Be Taxed?

By Robert W. Wood

Even without paying attention to the news, most people know that a Kamala Harris victory in the presidential election may mean higher or additional taxes, compared with a Trump victory. Of course, presidents cannot enact higher or additional taxes without the House and the Senate. In that sense, whatever the candidates may say, much of our fate about taxes is likely to depend on what happens with House and Senate seats.

Still, the president sets the tone, can veto bills passed by Congress, and be instrumental in proposing and rallying support for higher, lower, or new taxes, as we've seen for generations. In that sense, talking about taxes around election time is nothing new. Both candidates are talking taxes, with some promises, some more vague comments, and some specifics.

Vice President Harris has piggybacked on many of President Biden's tax proposals, including his pledge not to raise taxes on anyone making under $400,000 a year. But she has plenty of other big plans for your taxes, reprising Biden's tax goals, with some of her own ideas thrown in. They include raising top marginal rates on the top earners from 37% to 39.6%. In 2019, she floated a 4% "income-based premium" on households making more than $100,000 to pay for Medicare for All, but this has not yet resurfaced in 2024.

Among the more controversial of the Biden proposals—which Harris has repeated—is a tax on unrealized capital gains for taxpayers with wealth greater than $100 million. Some have labeled it a "billionaire tax," though $100 million is a tenth of a billion. Even so, few may want to defend billionaires (or someone with a mere $100 million for that matter) in the current climate. Some people argue that this fairly targets extremely wealthy Americans who have taken advantage of tax rules to pay lower rates than their secretaries.

For example, wealthy people can tap their resources by borrowing money rather than selling something that would trigger tax. Some commentators have suggested that it would be better to target that in a tax on loans under some circumstances—even though the normal tax rule is that loans are not taxed. The idea is that wealthy people often avoid selling stock or other assets that would trigger a big tax. Instead, they have ready access to borrowing, so they just get a loan, pledging their stock if necessary.

The loan money is cash but not taxable. What's more, they can write off the interest they pay, win-win, right? Some ordinary people can do this too, but not to the extent or with the ease that wealthy people can. So why not target that behavior, instead of trying to tax unrealized capital appreciation? The answer is not clear, and in any event, the wealth tax that Kamala Harris supports would be groundbreaking.

Unlike an income tax, Harris' new wealth tax would work like this. Households worth more than $100 million would pay an annual minimum tax worth 25% of their combined income and unrealized capital gains. Say you purchase stock for $10 a share. It doubles to $20 in the first year, but you still hold it. Even though you haven't sold it, that $10 gain would be subject to the new tax.

Real estate would work the same way. You buy a house, building, or land. The increase in value over time would be taxed every year, even though you still hold it. We have never had a tax on gains that are not "realized," meaning sold. In that sense, this new tax would be groundbreaking.

Apart from policy, there are administrative issues galore about how taxpayers and the IRS would deal with this. How do you go about valuing everything every year to be taxed? Public company stock would be straightforward. But most assets could be a nightmare, and who in the end gets to carry the day on value? Disputes about value in tax cases are legendary and voluminous.

In fact, nearly every estate tax case with the IRS includes valuation disputes, often with competing experts. In income tax cases, charitable contributions of noncash assets such as real estate or crypto often end up in major valuation fights. Just imagine what annual value statements with tax returns might look like in a world where the increase in value since last year turns into taxes. Capital gains have always been singled out for *lower* taxes, not higher.

Except in the case of estate tax measured on death, it has been nearly sacred not to tax "earnings" that you didn't receive. Moreover, what if the value of your stock or other asset spikes one year, you pay tax, and then it plummets the next year? You still have the now worthless asset and can't sell it for much. In any event, why the unheard-of shift to tax something before its time?

What is arguably the scariest part of this idea? What if this opens the door to a more generalized effort by the government to tax you on something that you still own? Right now, the proposal is only to use this wealth tax for the truly wealthy. Not just billionaires, but also anyone with at least $100 million. Once we start down this path, could we some years from now face a tax like this for someone with $20 million, $10 million, even $1 million?

You get the idea. Even if he "billionaire's tax" to hit anyone at $100 million passes, there could be court challenges based on what the U.S. Constitution says about the government's taxing power. The Supreme Court has not fully ruled on a question like this, although one recent guidepost came in a 2024 tax case, Moore vs. USA, in which the Supreme Court upheld a tax on undistributed foreign assets.

The chances of this wealth tax passing may not be high. Harris would need to win, and both the Senate and House would need to be controlled by Democrats. In any event, this proposal could signal the dawn of new taxes and more coming.

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