

219 ECONOMISTS & LAW PROFESSORS SUPPORT THE BILLIONAIRES INCOME TAX

December 9, 2021

The Honorable Chuck Schumer
Senate Majority Leader
The Capitol
Washington, D.C. 20510

The Honorable Ron Wyden
Chairman, Senate Finance Committee
Washington, D.C. 20510

Dear Majority Leader Schumer and Chairman Wyden:

As legal and economic scholars from across the nation, we write to express our support for the proposed Billionaires Income Tax. Our broken income tax rules let billionaires treat the income tax system as a mere suggestion, not like the obligation most Americans face. Scholars estimate that over three-quarters of the investment income of ultra-wealthy taxpayers fully and permanently escapes the existing income tax.¹ President Biden campaigned on a promise to ensure the richest Americans pay their fair share of tax, and without the Billionaires Income Tax the Build Back Better Act as it is now written would disappoint the millions of voters who support that promise.

Letting billionaires skip out on the income tax is unjust to the ordinary taxpayers who must ultimately foot the bill. The 2017 Tax Cuts and Jobs Act compounded this injustice by increasing the deficit to provide tax cuts primarily to the ultra-wealthy.² Letting billionaires opt out of their tax obligations also undermines perceptions of fairness, weakens the public's faith in the overall tax system, and erodes the public's confidence in government. Beyond that, the tax planning that billionaires use to escape the income tax causes serious harm to the economy. By making the entire tax system more complex and uncertain, billionaire tax avoidance also harms small businesses and other ordinary taxpayers.³

The proposed Billionaires Income Tax would help to fix this broken tax system. No tax reform is perfect, and the proposed Billionaires Income Tax should not be held to a standard of perfection. On balance, our assessment is that the Billionaires Income Tax would substantially improve our nation's tax system by ending the biggest opportunities for billionaires to escape the income tax. Moreover, this reform would help to generate the revenue needed for vital public investments. The Joint Committee on Taxation has scored the reform as raising \$557.2 billion over the ten-year budget window from these taxpayers.⁴

¹ David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 101, at 116 (forthcoming 2021), available at <https://ssrn.com/abstract=3801164>.

² Greg Leiserson, *A Regressive, Deficit-Financed Tax Cut Is Not What The United States Needed*, AEI IDEAS, Oct. 9, 2019, available at <https://www.aei.org/economics/a-regressive-deficit-financed-tax-cut-is-not-what-the-united-states-needed>.

³ Gamage & Brooks, *supra* note 1, at 127-36.

⁴ *Wyden Statement on Billionaires Income Tax Score*, Nov. 5, 2021, available at <https://www.finance.senate.gov/chairmans-news/wyden-statement-on-billionaires-income-tax-score>.

Administration and Compliance

The proposed Billionaires Income Tax would change the timing and method of calculating capital gain income for the very richest Americans—those with over \$1 billion in wealth or who have earned more than \$100 million a year over a three-year period. For these taxpayers’ liquid assets, the reform would remove the requirement that an asset’s capital gain income is taxable only on “realization”—the point at which there is a sale or disposition of that asset. Instead, these taxpayers would have to pay tax on their true income from liquid assets—including unrealized gain—every year, regardless of whether they sell the underlying assets. For illiquid assets, the reform would retain the realization rule, but would end the various loopholes that currently allow billionaires to escape the income tax.

Billionaires will not have any trouble paying the tax. Those who own publicly traded stock can sell it easily to generate cash. But billionaires need not sell shares to pay the tax if that is their preference. In order to avoid the current realization requirement and enjoy the benefits of their immense appreciation in assets, billionaires already borrow on favorable terms to access the cash needed to fund their orbital adventures, mansions, and other spending. There is no reason why such borrowing should only be available to avoid tax rather than to pay tax. In the case of more illiquid assets, taxpayers would still generally only be required to pay taxes upon a sale or disposition, when they will have cash available to pay their taxes.

Effects on Capital Markets

The Billionaires Income Tax would improve the efficiency of capital markets by eliminating the incentive for taxpayers to indefinitely hold or “lock in” their investments to avoid paying tax.⁵ Billionaires would become more willing to sell underperforming assets and reallocate capital to more promising investments, thereby promoting economic growth.

Aside from enabling more efficient capital markets, the tax would have little impact on stock prices from any taxpayers who do sell stock to fund their taxes. The JCT estimated that billionaires would have to pay \$557 billion in total over 10 years, which works out to 3,652 days. Every day, about \$250 billion worth of stock trades on the US stock market (NASDAQ and NYSE).⁶ So the extra transactions needed to pay the billionaire tax would correspond to .0061% $((557/250)/3652)$ of existing transactions over this 10-year period, a drop in the bucket that cannot durably depress stock prices. Billionaires are more than sophisticated enough to sell smoothly to avoid any negative impact on the companies they own.

Some critics have suggested that the tax would discourage businesses from going public, but this claim misunderstands how the Billionaire Income Tax works. Although the reform treats publicly-traded and non-traded assets under separate rules, both sets of rules work to eliminate the benefit from holding assets indefinitely. Owners of non-public assets would pay an extra tax, effectively an interest charge, when they do sell, based on how long they owned the asset. It therefore won’t usually pay for business owners to stay private or to invest in privately-traded assets as a way of avoiding immediate taxation.

⁵ Ari Glogower, *Taxing Capital Appreciation*, 70 TAX L. REV. 111, 121-123 (2016).

⁶ https://www.cboe.com/us/equities/market_share/

Constitutionality

The proposed Billionaires Income Tax is constitutional. The Sixteenth Amendment explicitly authorizes taxes on income “from whatever source derived”; the Billionaires Income Tax is just a tax on income, and Congress has broad power to decide when and how to measure a taxpayer’s income. Moreover, even if the part of the Billionaires Income Tax that taxes unrealized gains were held to be outside the Sixteenth Amendment, this component would still be constitutionally valid as an excise tax on the use of public trading markets. We expand on these issues below.

Unrealized capital gain is income. “Income” is famously undefined in the tax code and the Constitution. In the early years of the income tax, courts struggled sometimes to define the term. Today, the generally accepted definition of income encompasses anything that increases the net worth of an individual, including appreciation in asset values. It is true that the early case of *Eisner v. Macomber* said that “realization”—a sale or disposition of the asset—is required for gain to become “income” under the Constitution. Yet that holding of *Macomber* has been fundamentally rejected by subsequent cases,⁷ which found that realization is merely a rule of “administrative convenience” rather than a constitutional requirement.⁸

Congress, the Treasury, and taxpayers have for decades relied on this settled and analytically rigorous understanding of realization as a policy choice. The Tax Code now contains many rules that tax accrued but unrealized gains, including for many derivatives, financial contracts, partnerships, forms of offshore income, and other assets.⁹ U.S. Courts of Appeals have uniformly and repeatedly upheld these provisions against constitutional challenges, starting as early as 1943.¹⁰ As the tax scholars Lily Batchelder and David Kamin (now Assistant Treasury Secretary for Tax Policy and Deputy Director of the National Economic Council, respectively) conclude: “[*Macomber*] has been dramatically scaled back and essentially limited it to its facts. Virtually all commentators now agree the realization requirement is a mere administrative convenience and not constitutionally required.”¹¹

Even if unrealized gains were held to not be “income,” the Billionaires Income Tax would still be valid as an excise tax. Congress is not limited under the Constitution to imposing taxes on “income.” Congress may also impose “duties, imposts, and excises.” Flat per-person taxes, and possibly other so-called “direct” taxes, would be subject to certain additional requirements, but the Supreme Court has consistently held that excise taxes are not “direct.” The Billionaires Income Tax is in part an excise tax. The BIT has two key parts—a tax on the annual unrealized gain for

⁷ E.g., *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931); *Helvering v. Bruun*, 309 U.S. 461 (1940); see also *Comm’r v. Glenshaw Glass*, 348 U.S. 126 (1955).

⁸ *Cottage Savings Association v. Comm’r*, 499 U.S. 554 (1991).

⁹ John R. Brooks & David Gamage, *The Indirect Tax Canon, Apportionment, and Drafting a Constitutional Wealth Tax or Accrual-Income Tax Reform*, INDIANA LEGAL STUDIES RESEARCH PAPER NO. 459, at 47-48 and 53-55, Aug. 27, 2021, available at <https://ssrn.com/abstract=3910717>.

¹⁰ *Prescott v. Comm’r*, 561 F.2d 1287, 1293 (8th Cir. 1974); *Eder v. Comm’r*, 138 F.2d 27, 28-29 (2d Cir. 1943).

¹¹ Lily L. Batchelder & David Kamin, *Taxing the Rich: Issues and Options*, at 26, Sept. 11, 2019, available at <https://ssrn.com/abstract=3452274>.

publicly traded assets, and a retrospective charge on non-traded and illiquid assets that would be imposed at realization to account for not taxing the gain in earlier years. This second part is, clearly, a tax on *realized* gain (that is, it is imposed at the time of sale) and so faces no constitutional issues even if the strained analysis of *Macomber* were somehow to be revived into current law. The first part is a tax on the privilege of using public trading markets—which is exactly the sort of privilege the Supreme Court has previously held to be a valid excise tax (rather than a direct tax). For instance, in *Nichol v. Ames*, the Court held that a tax on trades at the Chicago Board of Trade commodities exchange was a tax on the “privilege, opportunity or facility” offered by the exchange, and not on the underlying property being traded.¹²

That the Billionaires Income Tax would only be imposed on individuals with at least one billion dollars in assets does not change this analysis. This limitation is just an exemption threshold. Exemption thresholds based on the value of owned assets are found in existing law and not a cause for constitutional concern.¹³ It would also not be difficult to restructure the exemption threshold as based on a specified amount of unrealized gains (that is, the total value of owned assets minus both indebtedness and the taxpayer’s basis in owned assets).

In summary, the Billionaires Income Tax is a needed and desirable reform to the broken state of the existing income tax. The Billionaires Income Tax is constitutional and would not impose excess administrative or compliance burdens or harm capital markets. Although no tax reform is perfect, our assessment is that the Billionaires Income Tax would substantially improve our nation’s tax system by ending the major opportunities for billionaires to currently escape the income tax. We strongly support this proposed reform.

Sincerely,

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¹² *Nichol v. Ames*, 173 U.S. 509 (1899).

¹³ Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 772-75 (2020).

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