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Taxes in the Build Back Better Act: Five Ways Congress Is Dodging Accountability and Three Ways It Could Take Responsibility

Preston Brashers

KEY TAKEAWAYS

The House of Representatives has the primary responsibility for tax policy, in part because it is closest and most accountable to the people.

The Build Back Better Act would shift more power over taxes to the IRS, the executive branch, and nongovernmental organizations.

Congress should reject this proposal and instead promote tax reform that simplifies the tax code and reverses growth of the administrative state.

"It is hard to imagine a more stupid or more dangerous way of making decisions than by putting those decisions in the hands of people who pay no price for being wrong."[1] Whether by accident or by design, many of the major tax provisions in the multitrillion-dollar Build Back Better Act (BBBA) would empower unelected and unaccountable bureaucrats to determine U.S. tax policy.

The Founding Fathers understood the tyranny that can come with the power to tax, so it is no accident that the U.S. Constitution gives the power of taxation and spending to the House of Representatives. Representatives in the House serve brief two-year terms and represent relatively small districts, which theoretically makes them more responsive and accountable to the people.[2]

But what happens when tax policy is not set by elected representatives but by a hodgepodge of bureaucrats in the executive branch, nongovernmental bodies, and international organizations that do not report to voters? This *Issue Brief* explains five ways that the BBBA would allow Congress to avoid accountability for bad tax policy and offers three solutions.

How the BBBA Lets Congress Avoid Accountability

1. The Act Would Give the IRS More Regulatory Authority. Even with 2,135 pages, the BBBA is not nearly detailed enough to fully describe the proposed law's implementation.[3] Congress expects the federal bureaucracy to fill in the many gaps. Taxpayers do not have enough information to comply with many of the bill's tax provisions until the Internal Revenue Service (IRS) issues new regulations and guidance explaining how the agency will administer and enforce them.

The BBBA gives authority to the Secretary of the Treasury (or her delegates in the IRS) to determine tax rules for the new book minimum tax, the tax on stock buybacks, interest deduction limitations, foreign tax credit limitations, base erosion taxes, wash sales, income tax surcharges, retirement contribution limits, and news journalist credits, just to name a few. Each instance gives the President, the Secretary, and the bureaucracy more control over federal tax policy and makes Congress less accountable.[4]

Voters who disapprove of new laws passed by Congress can call and send letters to the offices of their Representatives to make their voice known. When the IRS issues new regulations, it is unclear what that process would look like or to whom a voter could lodge a complaint: The Treasury Secretary? The President who appointed the Treasury Secretary? The IRS commissioner? A low-level bureaucrat? Without a direct line between one's Congressman and new tax regulations, Congress can more easily shirk responsibility. As executive agencies grow, voters have less control over their government. Bureaucrats do not face reelection, so they are not accountable for bad decisions. Their jobs and pensions are safe.

It may be easy to pass the BBBA off as just one of a great many bills that expand bureaucrats' regulatory authority. The BBBA, though, is egregious in complicating the tax code to administer corporate and social welfare. The BBBA would raise revenue by instituting at least four new taxes;[5] by altering (but not eliminating) at least nine tax credits and deductions;[6] by expanding alternative minimum tax regimes for international businesses;[7] and by altering numerous definitions, inclusion rules, exclusion rules, and distribution rules. At the same time, those revenues are offset by at least 20 new tax credits and more than 20 expanded tax credits.[8] Each instance where new taxes are targeted at select groups or tax preferences are offered to others expands the IRS's regulatory authority.[9]

2. IRS Agents Would Be Tasked with Finding 20 Percent of the Bill's New Revenues. The BBBA would expand the IRS bureaucracy, focusing especially on the agency's enforcement function. According to the White House's overly optimistic estimate, with the increased funding, the agency is expected to find up to $400 billion of new revenues to help pay for the trillions of dollars of new spending.[10] The bill would add approximately 87,000 new IRS agents, mostly dedicated to new enforcement efforts such as increased audits.[11]

Although the White House claims that the additional enforcement will be focused only on pursuing taxpayers making more than $400,000 per year,[12] the text of the BBBA is more vaguely worded. The subsection describing IRS enforcement appropriations states, "Nothing in this subsection is intended to increase taxes on any taxpayer with a taxable income of $400,000." First, it is unclear whether examining and enforcing payment of legally owed taxes would be interpreted as increasing one's taxes.[13] Second, the BBBA's text does not say that the IRS should not *increase audits* on taxpayers reporting less than $400,000 of income, which is unsurprising since part of the reason for audits is to verify that taxpayers are properly reporting their income. Even if all of new revenues from expanded enforcement comes from taxpayers earning more than $400,000, the IRS would likely increase audits on taxpayers earning less than $400,000 in order to identify underreported income.

Also, based on IRS data, individual filers reporting less than $50,000 of income accounted for 62 percent of the underreported taxes on audits between 2016 and 2018.[14] Much of the underreporting stems from improper payments of refundable tax credits.[15] The BBBA would expand refundable tax credits, which would likely increase the rate of errors and fraud on low- and middle-income tax returns. This would lead to more IRS scrutiny on the middle class.[16]

Section 138403 of the BBBA would repeal a requirement that IRS employees gain supervisor approval before assessing penalties.[17] In this way, the BBBA would even further reduce accountability within the IRS.

3. Congress Would Allow a Nonprofit Organization to Set Book Minimum Tax Rules. One of the most troubling tax provisions in the BBBA is the new minimum tax on financial statement income (also known as book income). The American Institute of Certified Public Accountants described the provision as representing "an insurmountable degree of complexity and cost of compliance."[18]

Currently, companies pay taxes on their *taxable income*, which may be different from their *book income* as reported on financial statements to their investors. The Financial Accounting Standards Board (FASB), a Connecticut-based private nonprofit organization, sets financial accounting rules in the United States that govern these financial statements.[19] This improves the functioning of the U.S. economy by ensuring that investors can reliably and consistently evaluate and compare companies' financial health.[20]

If the minimum book tax becomes law, some companies would pay taxes on the income reported on their financial statements. Thus, when the FASB changes financial accounting rules related to book income, it may also be effectively changing federal tax policy. Tax lobbyists and politicians would attempt to exert influence on the FASB, casting doubt on the propriety of any of its accounting changes. Even if the FASB were unaffected by lobbying efforts, some companies would inevitably change their financial statements for tax purposes.[21] This would make financial statements less valuable to investors and would give an unelected nongovernmental body the power to dictate federal tax rules.

4. Congress Would Allow the OECD to Exert More Influence on U.S. Tax Policy. Under the U.S. Constitution, the President does not have unilateral authority to enter treaties; rather, a treaty requires consent from two-thirds of the Senate to take effect.[22] So, when President Joe Biden agreed to the Organization for Economic Co-operation and Development (OECD) global tax framework, that agreement was nonbinding without implementation by Congress.[23]

"Pillar One" of the global tax accord would give other countries taxing rights to a portion of the digital profits of large multinational companies.[24] This would disproportionately harm U.S. companies who would face most of the Pillar One tax burden.[25]

The House stopped short of including Pillar One in the BBBA. However, the BBBA includes a major expansion of the global intangible low-taxed income (GILTI) tax in order to adhere to Pillar Two of the global tax agreement, which calls on countries to impose a global minimum corporate tax of 15 percent, calculated on a country-by-country basis.[26] The expansion of the GILTI provision is itself problematic, but the BBBA's alignment with the global tax framework is also concerning. It adds momentum to a global tax movement that is against America's best interest, it gives more influence over U.S. tax policy to the OECD,[27] and it may lead other countries to accelerate adoption of these damaging global tax provisions.

As the legislature of a sovereign nation, Congress should not take marching orders from policymakers in Paris. The OECD is not accountable to American voters. The United States should engage with other countries to reduce double taxation, but it should not go along with an overhaul of the global tax system that specifically targets U.S.-headquartered companies.

5. Future Generations Would Pay for This Congress's Fiscal Irresponsibility. Many of the major social welfare spending provisions in the BBBA are funded for one to six years, while the new taxes generally run for the full 10-year budget window.[28] Based on this gimmicky math, the Congressional Budget Office still estimated that the bill, as written, would add about $200 billion to the 10-year deficit.[29]

However, if temporary government programs are renewed (as so often happens), the cost of the bill would triple. The Congressional Budget Office estimates that if the programs were extended, the BBBA would add a massive $3.0 trillion to the 10-year deficit.[30]

Whenever BBBA supporters claim that the bill is "paid for," they are using phony math that does not fully account for the massive burden the bill would place on future generations. Every debt must eventually be paid. With a national debt that has risen from approximately $23.1 trillion to $28.9 trillion in just two years, it is becoming increasingly likely that a future Congress will impose painful taxes on the American middle class to avoid a debt crisis.[31]

How Congress Could Take More Responsibility for Tax Policy

1. Simplify the Tax Code and Reduce Reliance on Tax Credits and Unnecessary Deductions. Few Members of Congress understand the U.S. tax code well. Delegating substantive regulatory authority to the IRS conveniently allows legislators to pass tax increases and tax reforms with limited technical knowledge and only partially developed ideas. However, this practice has put too much regulatory authority into the hands of people and institutions that are not accountable to U.S. taxpayers, and it has made the U.S. tax code overly complex.[32] Complying with the convoluted U.S. tax rules costs American taxpayers hundreds of billions of dollars per year.[33]

Legislators should simplify the tax code. A good place to start is by eliminating tax credits and tax deductions that are not economically justified. This includes a wide range of tax breaks for politically favored energy companies and their products, tax credits for college expenses, place-based tax credits, and the state and local tax deduction.[34]

2. Stop or Reverse the Growth of the IRS and the Administrative State. Congress should craft tax legislation that is clear and concise and avoids delegating too much regulatory authority to the IRS or any other bureaucracy.[35] Congress should review and scrutinize new and existing IRS regulations to ensure that they are consistent with legislative intent and do not add excessive compliance burdens on taxpayers.[36] It should replace open-ended delegation of authority to the IRS with laws specifying more narrow functions of the IRS. Finally, Congress should reject attempts to expand the size of the IRS.

3. Reject the Build Back Better Act. Tax reform should simplify the tax code, not add to its complexity. It should provide clear tax law that is not open to different interpretation by taxpayers or by the IRS. The BBBA takes exactly the opposite approach: It adds new tax deductions, tax credits, excise taxes, and even parallel tax systems—all while doubling the size of the IRS and giving the FASB and the OECD more say in U.S. tax policy. Congress should reject this misguided proposal.

A Better Way Forward

As the branch of government that makes laws, Congress has the power to make the administrative state grow or shrink. It comes down to how Congress chooses to exercise its power. Instead of sidestepping the constitutional power that they were entrusted with, Members of Congress should take full accountability for the taxes that their constituents face.

Preston Brashers is Senior Analyst for Tax Policy in the Grover M. Hermann Center for the Federal Budget, of the Institute for Economic Freedom, at The Heritage Foundation.

Endnotes

1. Thomas Sowell, "Thomas Sowell: Forcing Parents to Drug Their Children," *The Kitsap Sun*, August 26, 2000, https://products.kitsapsun.com/archive/2000/08-26/0001_thomas_sowell__forcing_parents_to.html/ August 26, 2000 (accessed December 10, 2021).
2. James Madison, *Federalist* No. 58, https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493434/ (accessed December 10, 2021).
3. Committee print, *H.R. 5376—Build Back Better Act*, Committee on Rules, U.S. House of Representatives, November 3, 2021, https://www.congress.gov/bill/117th-congress/house-bill/5376/text/ (accessed December 10, 2021).
4. Ibid.
5. The new taxes in BBBA include a corporate alternative minimum tax; an excise tax on repurchases of corporate stock; a surcharge on high-income individuals, estates, and trusts; and a tax on nicotine.
6. Alterations to existing tax credits and deductions in BBBA include limitations on deduction of interest expense, modifications to deductions for foreign-derived intangible income and global intangible low-taxed income, modifications of foreign tax credit rules, modifications to foreign tax credit limitations (on a country-by-country basis), modifications to determination of deemed paid credit, limitations on the deduction for foreign source portion of dividends, limitations on the credit for clinical testing of orphan drugs, limitations on business loss deductions, and limitations on deductions of excessive employee remuneration.
7. BBBA expands the base erosion and anti-abuse tax—an alternative minimum tax that large multinational companies must calculate in addition to their regular corporate income tax amount. This expansion would make more companies subject to a complex parallel tax regime intended to disincentivize the use of aggressive tax structures. BBBA would also expand taxation on global intangible low-taxed income and foreign-derived intangible income and force companies to compute applicable taxes on a country-by-country basis instead of a worldwide basis.
8. The BBBA's new tax credits include a payroll credit for compensation of local news journalists, a neighborhood homes credit, a new markets tax credit for Tribal Statistical Areas, a possessions economic activity credit, a zero-emission nuclear power production credit, a sustainable aviation fuel credit, a clean hydrogen tax credit, the qualified wildfire mitigation expenditures credit, a new qualified plug-in electric drive motor vehicle refundable credit, a previously owned qualified plug-in electric drive motor vehicles refundable credit, a qualified commercial electric vehicles tax credit, the credit for certain new electric bicycles, a credit for the costs of installing mechanical insulation on property, an advanced manufacturing investment credit, an advanced manufacturing production credit, a qualified environmental justice program credit, clean energy production and investment credits, a clean fuel production tax credit, a Pathway to Practice Training medical scholarship voucher refundable credit, and a general business credit for public university research infrastructure. The BBBA also includes new, economically unjustifiable tax deductions, such as a deduction for labor union dues. Expanded and extended tax credits include the low-income housing tax credit, the production tax credit, the investment tax credit, the carbon-dioxide sequestration tax credit, the biodiesel income and excise tax credit, the agri-biodiesel producer credit, the alternative fuels excise tax credit, the second-generation biofuel income tax credit, the nonbusiness energy property credit, the residential energy-efficient property credit, the new energy-efficient home credit, the qualified fuel cell motor vehicles credit, the alternative fuel refueling property credit, the advanced energy project credit, the child tax credit, the earned income tax credit, 36B premium tax credits, the health coverage tax credit, the American opportunity tax credit, the lifetime learning credit, the small business payroll tax credit, and the employer-provided childcare credit. The BBBA also expands economically unjustifiable tax deductions, such as the state and local tax deduction.
9. The BBBA would not substantially expand the IRS's regulatory authority if it raised revenues by simply increasing existing tax rates or by removing deductions and credits.
10. The White House, "President Biden Announces the Build Back Better Framework," October 28, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/ (accessed December 10, 2021). Contrary to the White House's estimate, the Congressional Budget Office estimated that the IRS enforcement provisions would raise $207 billion of revenue over the 10-year period from 2022 to 2031. Congressional Budget Office, "Summary of Cost Estimate for H.R. 5376, the Build Back Better Act," November 18, 2021, https://www.cbo.gov/publication/57627/ (accessed December 10, 2021).
11. U.S. Department of the Treasury, "The American Families Plan Tax Compliance Agenda," May 2021, https://home.treasury.gov/system/files/136/The-American-Families-Plan-Tax-Compliance-Agenda.pdf/ (accessed December 10, 2021). The American Families Plan, as described in the report cited above, included a proposed $72.5 billion of new mandatory funding over a decade and a $6.7 billion program integrity allocation. This combined $79.2 billion of new IRS funding corresponds almost exactly to the new IRS funding in the BBBA. Therefore, the Treasury report's estimate of an additional 86,852 full-time-equivalent IRS employees by 2031 serves as a reasonable estimate of the number of additional IRS employees that would be hired under the BBBA.
12. The White House, "President Biden Announces the Build Back Better Framework."
13. It is also unclear how the IRS would determine taxpayers' baseline taxes under a counterfactual in which the IRS did not receive the additional enforcement funding. This ambiguity leaves the IRS with significant discretion in the use of the additional funding.
14. IRS, *2020 Data Book*, Table 17. Examination Coverage and Recommended Additional Tax After Examination, by Type and Size of Return, Tax Years 2010–2018, June 2021, https://www.irs.gov/pub/irs-pdf/p55b.pdf/ (accessed December 13, 2021).
15. Treasury Inspector General for Tax Administration, "Improper Payment Rates for Refundable Tax Credits Remain High," May 10, 2021, https://www.treasury.gov/tigta/auditreports/2021reports/202140036fr.pdf/ (accessed December 13, 2021).

16. Chris Edwards, "Democratic Tax Plan Would Corrupt Financial Statements," Cato Institute, November 3, 2021, https://www.cato.org/blog/democratic-tax-plan-would-corrupt-financial-statements/ (accessed December 10, 2021).
17. H.R. 5376—Build Back Better Act.
18. American Institute of Certified Public Accountants, "AICPA Highlights Issues with Corp Profits Minimum Tax," November 1, 2021, https://www.aicpa.org/news/article/aicpa-highlights-issues-with-corp-profit-minimum-tax/ (accessed December 10, 2021). This webpage includes a link to a letter highlighting the group's concerns with the book minimum tax.
19. Financial Accounting Standards Board, "About the FASB," https://www.fasb.org/jsp/FASB/Page/LandingPage&cid=1175805317407/ (accessed December 10, 2021).
20. Corporate Finance Institute, "Financial Accounting Standards Board," https://corporatefinanceinstitute.com/resources/knowledge/accounting/financial-accounting-standards-board-fasb/ (accessed December 10, 2021).
21. Edwards, "Democratic Tax Plan Would Corrupt Financial Statements."
22. U.S. Constitution, Art. II, § 2.
23. The OECD tax framework was agreed to by 136 out of 140 countries at the October 8 meetings. PwC, "136 Countries Reach Political Agreement on a New International Corporate Tax Framework," October 8, 2021, https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-136-countries-reach-agreement-on-a-new-intl-corp-tax-framework.pdf (accessed date January 13, 2022). See also Peter St. Onge, "The Biden Administration Signs America on to a Global Tax Cartel," The Heritage Foundation, June 16, 2021, https://www.heritage.org/taxes/report/the-biden-administration-signs-america-global-tax-cartel/.
24. Adam N. Michel, "The Treasury Should Disengage from the OECD Global Tax Process," Heritage Foundation *Backgrounder* No. 3445, October 29, 2019, https://www.heritage.org/taxes/report/the-treasury-should-disengage-the-oecd-digital-tax-process/.
25. European Network for Economic and Fiscal Policy Research, "EconPol: OECD Tax Reform Affects Only 78 of the World's Largest 500 Companies," July 5, 2021, https://www.econpol.eu/press_releases/2021-07-05 (accessed December 10, 2021). See also Daniel Bunn, "Treasury's Latest Pillar 1 Proposal: A Strategy to Split the Riches or Give Away the Store," Tax Foundation, April 14, 2021, https://taxfoundation.org/treasury-pillar-1-proposal/ (accessed December 10, 2021).
26. For more information on GILTI, see Daniel Bunn, "Piling on the GILTI Verdicts," Tax Foundation, July 15, 2021, https://taxfoundation.org/biden-gilti-proposal/ (accessed December 10, 2021).
27. Adam N. Michel, "The Treasury Should Disengage from the OECD Global Tax Process," Heritage Foundation *Backgrounder* No. 3445, October 29, 2019, https://www.heritage.org/taxes/report/the-treasury-should-disengage-the-oecd-digital-tax-process/. Also see James Roberts et al., "Organization for Economic Co-operation and Development (OECD): What America Should Do," Heritage Foundation *Backgrounder* No. 3593, March 16, 2021, https://www.heritage.org/markets-and-finance/report/organization-economic-co-operation-and-development-oecd-what-america/.
28. Committee for a Responsible Federal Budget, "A Permanent Build Back Better Act Could Cost $4.8 Trillion," November 30, 2021, https://www.crfb.org/blogs/permanent-build-back-better-act-could-cost-4-8-trillion/ (accessed December 10, 2021).
29. Congressional Budget Office, "Summary of Cost Estimate for H.R. 5376, the Build Back Better Act," November 18, 2021, https://www.cbo.gov/publication/57627/ (accessed December 10, 2021).
30. Congressional Budget Office, letter to Senator Lindsey Graham and Congressman Jason Smith on the Budgetary Effects of Making Specified Policies in the Build Back Better Act Permanent, December 10, 2021, https://www.cbo.gov/system/files/2021-12/57673-BBBA-GrahamSmith-Letter.pdf/ (accessed December 10, 2021).
31. U.S. Department of Treasury, "Debt to the Penny," https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny/ (accessed December 10, 2021).
32. The Internal Revenue Code contains 6,859 pages, and by the author's tabulation there are also 13,968 pages of IRS regulations under Title 26 of the *Code of Federal Regulations*. A downloadable version of the Internal Revenue Code is available at the Office of the Law Revision Counsel's website at https://uscode.house.gov/download/download.shtml/ (accessed December 13, 2021). IRS regulations under Title 26 can be downloaded from https://www.govinfo.gov/app/collection/cfr/2021/title26/chapterI/subchapterH/ (accessed December 13, 2021).
33. Scott Hodge, "The Compliance Costs of IRS Regulations," Tax Foundation, June 15, 2016, https://taxfoundation.org/press-release/americans-will-spend-89-billion-hours-409-billion-complying-us-tax-code-2016/ (accessed December 13, 2021).
34. The Heritage Foundation, "Solutions: Taxes," https://www.heritage.org/solutions/#Taxes/ (accessed December 13, 2021).
35. Robert E. Moffit, "How to Roll Back the Administrative State," Heritage Foundation *Center for Policy Innovation Discussion Paper* No. 1, February 17, 2011, https://www.heritage.org/government-regulation/report/how-roll-back-the-administrative-state.
36. Ibid.