

Pre-Election Tax Planning

By: Susan W. O'Donnell
Tax and Estates Alert
10.15.20

Depending upon the results of the November election, potential changes could have a profound effect on the current estate and gift tax laws. Although the Biden-Harris campaign has not released any formal plans with respect to these issues, potential revenue raising changes provide good reason to review existing estate plans this year.

Two significant estate planning issues are: whether the current exemption from estate and gift tax (which is at an all-time high) will be reduced and if so, to what amount; and whether the current step-up in income tax basis at death will be eliminated.

Current Tax Provisions

Estate and Gift Tax Exemption Amount

For 2020, each taxpayer has an estate and gift tax exemption of \$11,580,000, or \$23,160,000 for gifts made by a married couple. The current increased exemption amount is a part of the Tax Cuts and Jobs Act of 2017 (TCJA) and temporarily doubled each taxpayer's exemption amount from \$5 million as adjusted for inflation to \$10 million as adjusted for inflation. Pursuant to the TCJA, this increased exemption amount is scheduled to "sunset" and revert back to pre-2018 levels (\$5 million per taxpayer, adjusted for inflation) on January 1, 2026 (or earlier, if Congress were to take action).

It is important to note that although the increased exemption will revert to pre-2018 amounts on January 1, 2026 or earlier, Reg. §20.2010-1(c) provides anti-clawback provisions, which eliminates any retroactive taxation of previously excluded transfers due to a lowering of the basic exclusion amount.

Stepped-Up Basis. Under current law, the income tax basis of an asset held at death is increased (or stepped-up) to its fair market value as of the taxpayer's date of death, subject to a special rule for an alternate valuation date. Accordingly, any unrealized gain on the asset during the taxpayer's life would be eliminated. If the asset is then sold either by the estate or by the beneficiary, any gain or loss is calculated using the new date of death stepped-up basis (or, if applicable, the alternate valuation date).

Potential Changes

Lowered Estate and Gift Tax Exemption

A major concern is the possibility that a Biden White House and Democratic Congress could enact a law at any time during 2021 that is effective retroactively to January 2021 that would significantly reduce the estate and gift exemption amount (potentially as low as \$3.5 million per taxpayer).

To avoid any uncertainty, taxpayers who are considering utilizing some or all of their current exemption amount should complete gifts prior to December 31, 2020. Those who wait until after the election to begin any 2020 gifting may find it difficult to effectively take advantage of many ideal planning techniques because of the numerous steps involved and the short time remaining in the calendar

year.

Elimination of Step-Up in Basis at Death

Former Vice President Biden has signaled that he may support eliminating basis step-up at death. It is not yet known what capital gains tax regime his administration could propose in its stead.

One option is that "carryover" basis would apply to testamentary gifts, which is the same basis currently applied to lifetime gifts. Accordingly, the estate and/or the beneficiary would receive the deceased taxpayer's income tax basis in the asset, so that any unrealized gain during the taxpayer's life would be deferred until the eventual sale of the asset.

A second option is that unrealized gain in the asset during the taxpayer's lifetime would be taxed at his or her death (in addition to any applicable estate or inheritance taxes).

The potential elimination of the basis step-up needs should be considered in determining whether to make gifts now. In addition, taxpayers must consider the amount and types of assets to be gifted. These potential changes by the Biden-Harris campaign could have a significant impact on estate plans and may require action now.

If you have questions or would like additional information, please contact Susan W. O'Donnell (odonnells@whiteandwilliams.com; 215.864.6293) or another member of the Tax and Estates Group.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

