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ATTORNEYS AT LAW

CLIENT ALERT

June 2019

The 2020 Elections: A Stimulus to Use Your Transfer Tax Exemptions?

The upcoming 2020 federal elections have the potential to cause seismic changes to the estate planning landscape. Should Democrats retake control of the White House and both chambers of Congress, drastic reductions to the estate, gift and generation-skipping transfer (GST) tax exemption amounts and tax rates may be implemented, accompanied by the possible rollback of several traditional estate planning vehicles. A review of the current platforms of high profile Democratic candidates is a powerful inducement to take action now to use gift and GST tax exemptions and undertake planning opportunities while they are available.

Current Law

The Federal estate, gift and GST tax exemptions in 2019 are $11.4 million per individual. These exemptions, which are indexed annually for inflation, were doubled in 2018 under the Tax Cuts and Jobs Act from $5 million per individual to $10 million per individual, and they are scheduled to revert back to $5 million per individual, as indexed for inflation (estimated at $6.7 million), at the end of 2025 unless new legislation is enacted. The tax rate for transfers in excess of the estate, gift and GST exemptions is 40%.

Senator Bernie Sanders (D-VT)

Senator Bernie Sanders has advanced what may be the most sweeping and disruptive estate tax reform proposal. His "For the 99.8 Percent Act," introduced in January 2019, would significantly reduce current estate, gift and GST tax exemption amounts and increase tax rates. The Act would decrease the estate and GST tax exemptions to the 2009 level of $3.5 million, decrease the gift tax exemption to $1 million and increase the estate, gift and GST tax rates from 40% to a maximum of 77%.

In addition, the Sanders proposal contains other provisions which would eliminate or restrict well-established estate planning techniques, including:

- Elimination of valuation discounts for "nonbusiness assets" (assets which are not used in the active conduct of a business) held by an entity.
- Elimination of minority discounts where a transferor, transferee, and members of the family of the transferor and transferee control a business or own the majority of the ownership interests (by value) in such business.
- Limiting the total gift tax annual exclusion for transfers made in a calendar year to twice the annual exclusion amount.
- Limiting the utilization of grantor retained annuity trusts (GRATs) by requiring a minimum term of 10 years for such trusts.
- Requiring that the assets of a grantor trust less the amount of any taxable gifts made by the decedent to the trust be included in the grantor's gross estate.
- Limiting the utilization of dynasty trusts by eliminating the GST tax exemption for transfers to "non-qualifying trusts" with a duration of 50 years or more from creation.
- Eliminating the use of Crummey Demand Powers in trusts, including irrevocable life insurance trusts.

Senator Elizabeth Warren (D-MA)

In January 2019, Senator Warren unveiled her "Ultra-Millionaire Tax," a proposal for an annual tax of 2% on ultra-millionaires who own more than $50 million in assets and an annual tax of 3% on those who own more than $1 billion in assets. There would also be a 40% tax penalty for those attempting to "evade" taxation by renouncing their U.S. citizenship.

In March 2019, Senator Warren, along with Senator Kirsten Gillibrand (D-NY) and Senator Edward Markey (D-MA), introduced the "American Housing and Economic Mobility Act of 2019." The proposal would reduce the estate and gift tax exemption amount to $3.5 million. It would also raise to 55% the estate, gift and GST tax rate on transfers of $3.5 million to $13 million, 60% on estates, gifts and transfers over $13 million and not over $93 million, 65% on estates, gifts and transfers of over $93 million and not over $1 billion, and 75% on estates, gifts and transfers of more than $1 billion.

Like the Sanders proposal, this proposal would require a 10 year minimum term for GRATs, require that assets of a grantor trust be deemed included in an owner's gross estate for estate tax purposes, eliminate the GST exemption for transfers to trusts with a termination date of 50 years or more from creation, and limit the total gift tax annual exclusion for all transfers made in a calendar year to twice the annual exclusion amount.

Senator Joseph Biden (D-DE)

Senator Biden has not yet offered or introduced a specific estate tax reform proposal. However, in the past he has voted against raising the estate tax exemption from $1 million to $5 million, voted against making estate tax cuts permanent and voted against repealing the estate tax.

Senator Kamala Harris (D-CA)

Like Senator Biden, Senator Harris has not introduced a specific estate tax reform proposal, but has offered that she would use the estate tax to fund her proposal to give teachers a pay raise. She has gone on record in the Washington Post that she would increase the estate tax on "the top 1 percent of taxpayers" and crack down "on loopholes that let the very wealthiest, with estates worth multiple millions or billions of dollars, avoid paying their fair share."

The Time to Act is Now

This Alert is not intended to offer a prediction on the outcome of the 2020 elections or to opine on the merits of any particular proposal, but clearly there is a common theme in the Democratic candidates' rhetoric and platforms.

Current law provides a tremendous opportunity for families to engage in estate planning right now, while estate, gift and GST tax exemptions remain at historic highs. This is particularly true with the issuance of proposed regulations by the IRS in November 2018 providing that the use of any gift tax exemption under the Tax Cuts and Jobs Act will be grandfathered and not subject to "clawback" by the IRS. Since the current law is scheduled to sunset on December 31, 2025 (to an estimated exemption of $6.7 million), the popular belief is that there is plenty of time to take advantage of the temporary exemption amounts.

If, however, the Republicans are swept out of office in the 2020 elections, the current exemptions could be materially curtailed to $3.5 million, and longstanding estate planning strategies may be swept away well before December 31, 2025. While there is no guarantee that any technique undertaken now will not be adversely impacted under a new law, failure to act now could result in vanished planning opportunities.

Please contact us so that we can discuss the current estate planning strategies available for your particular circumstances before they potentially disappear.

For more information on Meyer Suozzi's Wills, Trusts & Estates Law practice, click here.

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