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the costs associated with the pandemic and other government programs.

Nov. 10, 2020



In the wake of the 2020 election, many expect that the Biden administration will seek to engage Congress to enact new tax legislation in order to raise revenue to pay the costs associated with the pandemic and other government programs.

The administration's ability to set policy will be impacted by the final results of several Congressional elections, and while we can only speculate on any proposed changes, based on prior policy statements by President-elect Biden's campaign and the Democratic Party, the following changes are likely under consideration.

Reduction in Exemption Amounts

The estate, gift tax and generation-skipping transfer (“GST”) tax exemptions are

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Increase in Transfer Tax Rates

The estate, gift and GST tax rates are presently 40%. Proposals have been made to increase rates to as high as 55%. Individuals considering making gifts that will cause them to incur gift tax should consider doing so now in order to lock in lower rates.

Increase in Income and Capital Gains Tax Rates

One of the most likely changes in the tax law will be an increase in tax rates. For example, the Biden campaign has proposed taxing long-term capital gains at ordinary income rates for taxpayers with income over \$1 million. Taxpayers may wish to employ certain techniques, such as selling appreciated assets and deferring deductible expenses, to minimize the impact of an increase in tax rates. The potential advantages of such strategies must be carefully weighed against: (i) the certain cost of incurring additional taxes now; and (ii) the potential loss of a “step-up” in basis on assets owned at death (although there also is a proposal to eliminate the basis step-up).

Kleinberg Kaplan’s Tax Department will feature a more detailed discussion of income tax planning opportunities to consider before year-end in its annual analysis to be published this week.

Limitations on GRATs

A grantor retained annuity trust (“GRAT”) is a trust to which the donor contributes property and retains the right to receive an annuity payment from the trust for a fixed term. The principal benefit of a GRAT is the ability to transfer appreciation in excess of a specified rate of return (currently 0.4%) to individuals or to trusts that are not includible in the grantor’s taxable estate. Two potential changes to the law governing GRATs are:

- **Minimum Terms:** With rare exceptions, GRATs are only effective if the grantor

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before the end of 2020.

Time-Limit on GST Exemption

At one time, almost all states limited the maximum duration of a trust to about 90 years by having a “rule against perpetuities.” Many states have lengthened this period, or repealed the limitation entirely. By allocating GST exemption to a trust that is not limited by a rule against perpetuities, the trust assets may be held in trust indefinitely without being subject to future transfer taxes. Congress may seek to limit the duration of an allocation of GST exemption to 90 years. Individuals who are considering making gifts to trusts and allocating GST exemption may wish to do so now to take advantage of current law.

Next Steps

Separate from the election, we continue to encourage individuals to consider taking advantage of the current low-interest rate environment before rates rise at some point in the future. A number of estate planning techniques are especially effective when interest rates are low, such as loans, installment sales and charitable lead annuity trusts (“CLATs”).

It is important to note that if the Democrats hold a majority in the House and the Republicans hold a majority in the Senate, any new tax legislation is likely to require significant compromise by both parties. Even so, current conditions provide a potentially small window of opportunity to take full advantage of a number of extremely effective estate planning techniques. In many cases, these techniques will prove effective regardless of whether there are any changes in the tax law.

Kleinberg Kaplan's [Trusts & Estates Department](#) is available to discuss these and other techniques for individual planning goals

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