Proskauer

Personal Planning Strategies

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Last Call for SLATs, GRATs, and the Use of the Enhanced Gift Tax Exemption?

You have probably heard that the House Ways and Means Committee released proposals for increasing gift and estate taxes in order support legislation being advanced by the Democratic majority in Congress. If you have not already been inundated with invitations to webinars, articles and newsletters regarding the estate planning you should consider doing before new legislation passes, you undoubtedly will receive these over the next few months. The purpose of this newsletter is to provide our top thoughts for planning now while the current law is still in effect. We are purposefully keeping it short, sweet and non-technical. For those of you that are interested in the technical details, please see our link to a professionally based estate planning newsletter that delves into the tax details. If you have any questions or want to discuss further, we are always available and ready to recommend and implement these strategies immediately. Here are our top five recommendations so that you may take action now:

1. **Exemptions may go back down.** The estate, gift and generation-skipping transfer tax exemptions are $11.7 million per person and are scheduled to increase each year by an inflationary indexed amount through 2025; in 2026, it will revert to $5 million, indexed for inflation from 2011. Under the proposed legislation, the exemption will revert to $6,020,000 and will continue to be indexed for inflation thereafter. Thus, it is a "use it or lose it" scenario, and clients should use the exemption prior to the end of the year. Additionally, if you used up your gift tax exemption in 2020 but did not make additional gifts in 2021, you have an additional $120,000 that you can use this year due to the inflation increase in the exemption in 2021. This newsletter and this podcast address these rules in more detail.
2. **Married couples can have their cake and eat it too!** For the married couple who is uncomfortable gifting significant amounts to their descendants (or, better yet, trusts for descendants), each spouse can create and gift the exemption amount to a trust for the other spouse (commonly referred to as a spousal lifetime access trust, or SLAT) so that access is not lost. It is critical that the trusts are not

exactly identical in order to avoid application of the "reciprocal trust" doctrine, but we know enough about the doctrine so it can be easily avoided. Under the new proposed legislation, SLATs will no longer work since they will be includable in your estate at death but SLATs funded before the legislation is enacted will be grandfathered from the new rules. For more detail on SLATs, please see this article from a previous edition of this newsletter, and listen to our podcast on SLATs.

3. **GRATS and other Grantor Trusts will no longer be useful.** Since under the proposed legislation grantor trusts will be includable in your estate at your death, GRATs and other grantor trusts will no longer be useful. Existing GRATs and other existing grantor trusts will be grandfathered from the new rules. Clients should consider taking advantage of GRATs before the new legislation is enacted. This article and our podcast address GRATs in greater detail.

4. **Changes to IRA rules**. If your retirement plan balances exceed $10 million, and your income exceeds $450,000 (married filing jointly) you will be restricted under the proposed legislation on making contributions to regular IRAs, Roth IRAs and defined contribution plans. Also, if you have such large retirement account balances you will be required to withdraw from your retirement plans, regardless of age, a minimum distribution in an amount equal to 50% of the amount by which the combined IRA value exceeds the $10 million threshold. In addition, if these new rules apply to you and you have retirement plan balances over $20 million, you will have to withdraw the lesser of your Roth balances or the amount of your Roth balances necessary to bring your total balances down to $20 million. Accordingly, if these new rules would apply to you, then you may not want to direct further additions to retirement accounts this year.

5. **A single individual can also have his or her cake and eat it too!** For the single individual who is uncomfortable making a large gift and losing access, he or she can create and gift the exemption amount to a trust in a jurisdiction with "domestic asset protection trust" legislation and still be a beneficiary of such trust. This must be funded before the date of enactment of the new legislation, as going forward such a trust would be includable in your estate at death.

Time to Act

Our clients have established many "grantor trusts" over the years. Indeed, practically every irrevocable trust we have drafted is such a trust because such trusts contain a provision that allows a grantor to "substitute" or "swap assets" of equivalent value with the trust. This means that a grantor can transfer assets to the trust in exchange for the trust transferring assets to the grantor, provided that the assets exchanged are of equivalent value. Alternatively, a grantor could "sell" assets to the trust for an interest only note. Because of the grantor trust status, these transactions are ignored for income tax purposes; in essence, the tax law considers the transaction as being made between an individual and himself or herself, meaning that there should not be any income tax consequences.

The benefit of doing an exchange or sale is to remove "appreciating" assets from the taxable estate. Thus, if an individual owns an asset that has more appreciation potential than an asset owned by the trust, or more than the nominal interest rate that would be charged on a note in a sale of assets for a note (less than 1% at this moment in time), then the time to act is NOW. The reason the transaction must be implemented now is that under the proposed legislation, if the transaction occurs after the date of enactment, all or a portion of the assets in the irrevocable trust would be included in the grantor's taxable estate upon his or her death. This result would obviously defeat the purpose of the transaction and be punishing from an estate tax perspective.

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