Federal estate tax law changes are possible in Biden administration

By TODD ETSHMAN

Have your children been naughty or nice in 2020? If they've been nice and you have a lot of money to spare, maybe you should give them a $23 million gift this year before President-elect Joe Biden takes office in January. It would make a nice Christmas gift just about anyone could appreciate.

That's because there is a possibility the Biden administration may change the federal estate and gift tax exemption that was enacted in 2017 with the Tax Cuts and Jobs Act, which raised the exemption to an all-time high of over $11 million per person and over $23 million for a married couple.

That legislation is scheduled to sunset in 2025, at which time the exemption would return to pre-2017 levels of just $5.5 million adjusted for inflation. Biden has hinted at changing it before that happens, however, and could do so as soon as he takes office.

There is concern that the sunset provision could be accelerated and applied retroactively, meaning to escape it one would have to make the gift by the end of the year, explains CPA Tammy Reyes of Mengel Metzger Barr & Co.

Not surprisingly, the wealthy clients of estates and trusts attorneys and accountants are looking for advice on what they should do.

"Some clients in that category say they


Reyes

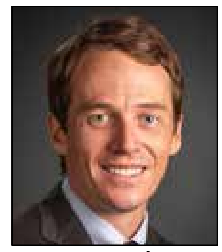
don't want to pay one more dollar than they have to," says Reyes.

Then there are some who say that's their kids' problem down the road.

"It comes down to your comfort level," she says. "Eleven million dollars is a lot of money to not have access to anymore if gifted."

Democratic runners-up Bernie Sanders and Elizabeth Warren proposed reducing the gift tax exemption to a mere $3.5 million during the Democratic primary. They may have lost the primary, but their voices will still be heard.

Another Biden tax change proposal


Leonard

that would affect far more Americans is eliminating the step-up in basis, which, as Hodgson Russ LLP estates and trusts lawyer Graham Leonard, explains is known colloquially as "the angel of death." It allows beneficiaries to escape taxes on the increase in the value of an asset when it is passed on to a beneficiary upon the death of the giver.

In Biden's administration it's possible a beneficiary would no longer get the step-up in basis and would be subject to income tax on an asset's increased value.

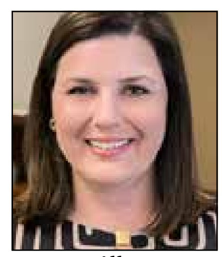
"That would be huge, a big potential tax cost," Leonard says.

How that would work exactly isn't clear at this point, but as Leonard says, it would be a fundamental change in the way estate taxes have worked in the U.S. since World War I.

"It's a great benefit, you just have to die to get it," Leonard says.

The "best" year to die in recent times for estates and trusts tax purposes was 2010 when there was no estate tax.

"This is a tough place in time for cli-


Seiffert

ents right now because there is just so much uncertainty about what could happen," says Nixon Peabody LLP attorney Stephanie Seiffert.

Conversely, Seiffert says the federal economic benefit of such changes is probably less than people imagine.

"Raising estate taxes makes a sexy headline," she notes.

But, in reality, it's not going to cover the cost of the pandemic or the federal debt.

In life, by far the biggest potential tax consequence for most Americans would be the possibility of raising the capital gains tax, which depends on how long an asset is held and is taxed according to income status. The highest capital gains tax on assets sold is currently 20 percent. Biden has proposed raising it to nearly two times that amount for those with over a million dollars in income.

Congressional approval of tax reforms

Biden would need Congress to go along with a pre-sunset estate tax exemption change, and as of writing this, the Senate is still up for grabs thanks to two runoff senate races in Georgia.

Democrats would have to win both of them in a historically Republican state to control the Senate. Biden won the state by the slimmest of margins in November.

"Normally in this period of an election, we know where things stand, but this situation in Georgia is unique," says Reyes. "We won't know until after estate planning is usually done for the year. It's very frustrating to some to not know."

Continued on page 14

BIDEN ADMINISTRATION

Continued from page 12

No one knows for sure, but many estates and tax practioners believe nothing is going to happen until 2022. The prospect of sweeping tax changes is limited if Biden doesn't have control of both halves of Congress, Leonard says.

In addition, when Biden takes office in January, tax reform isn't going to be the biggest problem with COVID-19 on the table.

"There is so much to do with the public health crisis that estate tax is a lower priority," Seiffert says.

Advising without speculation

"It pains me to tell anybody to pay a current tax, capital gains or otherwise because of an uncertain future. I don't want to see people jumping to conclusions." Seiffert says.

Instead, there are things clients can and should do regardless of political speculation. Gifting up to $15,000 is one of them and doesn't use up any exemptions. Making charitable donations and funding 529 accounts are always a good idea.

Seiffert advises people to make sure the beneficiary designations on retirement accounts are up to date especially if it's been 10, 20 or 30 years since a beneficiary was listed. Make sure your will and revocable trusts for children are updated.

Old powers of attorney, funeral arrangements and health care proxies should be updated to make sure they are in line with current intentions.

New York is among a minority of states that have an estate tax. It functions differently than federal estate taxes, although with an exemption of over $5 million, it too applies mostly to the wealthy.

"As a CPA in New York state, I'm always concerned with the New York estate tax. It's always an issue," Reyes says.

State tax laws weren't affected by the election or subject to speculation, so people in the over $5 million category should plan accordingly with their advisors.

Todd Etshman is a Rochester-area freelance writer.