NAEPC Journal of Estate & Tax Planning
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**Steve Leimberg's Estate Planning**
**Email Newsletter Archive Message #2854**

**Date:18-Jan-21**

**Subject: Bob Keebler, Jonathan Blattmachr & Martin Shenkman - After the Georgia Runoff, What Tax Planning Should You Do NOW!**

*"With the results of the Georgia runoff election,  the Democrats control the House, the Senate and the White House. So, the potential for significant tax legislation increasing taxation of the wealthy along the lines of prior Democratic proposals might be likely to happen. What might those changes be? When might they be effective? What planning might you want to do now? Despite the uncertainty practitioners should act now to advise and guide clients. This newsletter will discuss many considerations concerning the advice practitioners might consider."*

**Robert S. Keebler, CPA**, **Jonathan G. Blattmachr, Esq.** and **Martin M. Shenkman, Esq.** provide members with timely and important commentary that examines the estate and income tax planning considerations advisors should be discussing with clients. Members who wish to learn more about this topic should consider watching Bob, Jonathan and Marty in their 2-part LISI Webinar:

- Georgia Senate Election Results – Deep Dive PART 1 of 2 - Income Tax Planning TUE, JAN 19, 2021 1:00 PM - 02:30 PM EST
- Georgia Senate Election Results – Deep Dive PART 2 of 2 - Estate Planning to do NOW! TUE, JAN 19, 2021 3:00 PM - 05:00 PM EST

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Here is their commentary:

## EXECUTIVE SUMMARY:

With the results of the Georgia runoff election,  the Democrats control the House, the Senate and the White House. So, the potential for significant tax legislation increasing taxation of the wealthy along the lines of prior

Democratic proposals might be likely to happen. What might those changes be? When might they be effective? What planning might you want to do now? Despite the uncertainty practitioners should act now to advise and guide clients. This newsletter will discuss many considerations concerning the advice practitioners might consider.

## COMMENT:

**How Do the Dems "Control" the Senate**?

The Senate has a 50/50 Dem/Republican split, so that does not sound like control. But Vice President Kamala Harris will cast the tie-breaking vote and that equates to control, except to the extent a filibuster arises which takes 60 votes to end it. Might that suffice to push through major tax legislation? Certainly, and it would not be the first time. In 2001 Vice President Dick Cheney cast the deciding vote in the Senate in the adoption of the Tax Reform Act of 2001 which ushered in significant tax changes, and we may face similar situation this year. Note that, among other Senate legislation, a filibuster cannot be engaged with respect to a budget reconciliation act, which is likely how tax changes under the Biden administration will occur, as it did under the Trump and other administrations.

**Be Wary of Retroactive Estate Tax Changes**

Retroactive changes to the tax law be viewed by some as not fair. How can Congress retroactively change the tax rules? Well, it may feel unfair, but it is legal to do and Congress might choose to do it! One of the tax changes that some commentators suspect might be retroactive is the reduction in the transfer tax exemption (the amount you can gift or bequest to an individual without incurring a gift, estate or generation-skipping transfer tax). Specific suggestions on how to guide clients to possibly protect themselves against such a retroactive reduction in exemption are provided below. While nothing can be known with certainty, there have been several cases holding that retroactive tax changes are legal.

For a retroactive change in the law to be respected, it must be rationally related to a legitimate legislative purpose. Raising revenue in the midst of a pandemic with historic bailout packages would seem easily sufficient to meet this requirement. Cf. Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U. S. 717 (1984); United States v. Carlton, 512 U.S. 26 (1994).

So, when planning what type of wealth transfers you might recommend clients complete this year in hopes of preceding the effective date of future legislation, caution clients to consider the risk of some changes being enacted retroactively. That is important as it can and, perhaps, should affect how clients structure wealth transfers in 2021. This planning will be described below.

## Be Wary of Retroactive Income Tax Changes

Retroactive tax changes could also include income tax changes. Retroactive income tax changes might be viewed as less likely than retroactive estate tax changes. That could be because of the complexity a retroactive income tax change might create (but do not read that as implying it cannot happen). Income taxes are paid in quarterly based on estimates. And some changes, like an increase in tax rates on long-term capital gain can simply be made to apply to sales after a certain date. A retroactive change could adversely affect the potential for interest and penalties on amounts clients paid in through withholding taxes and estimated taxes all based on prior law. In contrast, estate taxes are due nine months following death so that a retroactive change might be less problematic for Congress to enact.

**Example**: An individual owns commercial real estate and is considering a Code Section 1031 "like-kind" exchange. This is where a taxpayer swaps or exchanges an investment real property for another real estate investment property and there is no current gain recognition for income tax purposes. In other words, under current law, one can exchange real estate instead of selling it and avoid any current income tax. A repeal of section 1031 may be on the tax agenda. It has been talked about before. So, if someone plans a Section 1031 like-kind exchange care should be taken as Congress might enact a repeal (or restriction) and might make the change retroactive to January 1, 2021. So, clients might wish to discuss with their real estate attorneys whether it is feasible to incorporate into the contract sale/exchange documents that the transaction will be automatically void if the law changes retroactively before the transaction is consummated.

Also consider the impact of a repeal or significant restriction on Code Section 1031 on transfers to grantor trusts. Clients may have used Section 1031 to exchange real estate assets held in a grantor trust that did not benefit from a basis step up on death. That step-up in basis safety valve may be eliminated. And regardless of whether any tax changes are retroactive, this type of change could have an adverse impact on those who sold large real estate interests to grantor trusts counting on the use of Section 1031 as an exit strategy for properties that would not obtain a basis step up.

## Some of the Possible Income Tax Changes

There could be a myriad of income tax law changes that a new Biden administration may seek to enact. The discussion below summarizes a few of the likely changes a Biden Administration might seek to have enacted. Some of these changes could have a profound impact on estate, charitable and other tax planning as well. Indications are that the tax increases will generally if not exclusively be targeted at higher income and higher net worth taxpayers. Several of the changes might be targeted at those earning $400,000 plus, some at those earning $1 million plus.

## Capital Gains Tax

Capital gains taxes could be raised substantially. They have discussed essentially doubling the tax rate on capital gains by taxing capital gains as ordinary income. And those gains could also be subject to the 3.8% net investment income tax. Adding in state income tax if the particular client resides in a high tax state means the effective tax rate on capital gains over $1 million could exceed 50%. If this change is enacted, practitioners should expect a tremendous amount of sales of assets before the effective date of that change.

Some commentators have speculated that a capital gains tax rate change could also be made retroactive to January 1, 2021, but others believe that is unlikely. Some have suggested that such a change might be made effective January 1, 2022. Or there could be an effective date based on the date of enactment of the tax legislation. This will affect planning dramatically. It might prove to be advantageous to sell appreciated assets now and lock in the current capital gains tax rate if the changes aren’t retroactive. An installment sale might be appropriate to consider.

If you sell assets on the installment basis you would pay tax when the proceeds are received (plus a potential interest charge). You might instead prefer to elect out of installment sale treatment for income tax purposes so that you have a gain recognized at the current and, perhaps, lower capital gains rate.

## CRTs and Capital Gain Planning

Strategies to try to ameliorate the impact of possible law changes may include gain/loss management, installment sales, or charitable remainder trusts ("CRTs"). It should be noted that a transfer of highly appreciated stock to a CRT now might prove disadvantageous as capital gains after the effective date of a law change may then be taxed at a new higher rate. It might be more advantageous for the client to simply sell an asset at the current lower tax rates. The suggestion for the possible use of CRTs after a change in the capital gains rules is to use CRTs in that context to smooth income between taxable years to keep income overall under the $1 million level where only the 20% capital gains tax rate (rather than the 39.6% ordinary income rate) may apply.

If capital gains rates are increased on gains over $1 million (or when income for the year exceeds $1 million), then consideration may be given to the use of CRTs to smooth out or reduce income. CRTs are exempt from income tax. So, if you gift appreciated stock into the CRT and the CRT sells it, no gain is recognized at that time. If you use a NIMCRUT (a net income with make-up charitable remainder trust), you can postpone gain for up to 20 years. Perhaps, rates may be lowered again in the future.

An individual can donate appreciated stock to a CRT. The CRT can sell the stock without realizing gain since CRTs are tax exempt. As the grantor (or other beneficiaries) receive periodic payments from the CRT (e.g., a unitrust payment), the payments will flow out tax income from the CRT to the beneficiary. In other words, the cash flow distributed by the CRT as part of the periodic payments will be characterized and taxed based on the income earned by the CRT. So, if the CRT sold appreciated stock and realized a capital gain, that gain would flow out to the beneficiaries over many future years as capital gain. If the capital gains tax rate is increased in those future years, using a CRT today might effectively defer taxation of capital gains income to later years when the tax rate is higher.

A traditional estate planning/CRT planning technique was the use of a so-called wealth replacement trust. The CRT would be paired with an irrevocable life insurance trust ("ILIT") that would be used to approximately replace for heirs the estimated wealth to be transferred to charity at the end of the CRT term. Practitioners should bear in mind that another proposed change, capping annual exclusion gifts at $20,000/donor, could impede this type of planning as gift tax free contributions to pay the premiums may be inhibited.

**<u>Should Assets be Sold Before Capital Gains Rates Increase</u>**?

It may prove advantageous to sell some of those appreciated assets in 2021 if the law change increasing capital gains to ordinary income tax rates only takes effect in 2022 and not this year. When evaluating the guesstimated cost/benefits of selling now versus waiting, also consider possible state income tax costs and planning. It may be advantageous to shift assets into an incomplete gift non-grantor ("ING") trust in a trust friendly (i.e., no state income tax) jurisdiction so that state income tax can be avoided. A taxpayer might, for example, provide in such a non-grantor trust that distributions can only be made to a spouse with the consent of an adverse party to prevent the trust from being a grantor trust under Code Sections 676 and 677 because distributions can be made to the grantor's spouse. Grantor trust status, which of course, will attribute all trust income directly to the trust's grantor, will not apply under those sections if the distributions to the spouse may be made only with the consent of an adverse party. That mechanism may permit a spouse to benefit from trust assets, not undermine characterization as a non-grantor trust, and still permit avoiding state income tax on a large sale to avoid an increase in the capital gains tax. Note that in Rev Proc. 2021-3 the IRS stated that it will no longer rule on ING trusts so caution is in order.

A transfer to a non-grantor trust can be structured as a completed gift or incomplete gift. One may transfer assets to an incomplete gift trust without resulting in gift tax even if the transferor's entire gift tax exemption has been used and still create a structure to avoid the state income tax on the sale. If the taxpayer has gift tax exemption remaining, then the taxpayer may want to try to use exemption and structure the non-grantor trust as a completed gift to the extent of the remaining exemption. Several options may be available to review with a client, but the uncertainty of how the tax law will develop, risk of retroactive change, etc. probably should be kept in mind. Note also that New York has anti-ING legislation providing that if the transfer to the trust is incomplete, the trust will be treated as a grantor trust for New York income tax purposes even if the trust is not a grantor trust for Federal tax purposes. And similar legislation has been proposed in California.

## Charitable Giving

Charitable and other deductions might continue to be allowed, without dollar limitations like those that now apply to state and local tax deductions under a Biden tax proposal, but the benefit may be less than initially perceived because of some of the limitations discussed later. Under current law you may receive a 20-100% of adjusted gross income (specially determined) charitable deduction, but some Democrat proposals provide that all itemized deductions be limited to a 28% maximum benefit. In other words, even if the taxpayer is in a 39.6% income tax bracket, the benefit of the contribution deduction might be capped at 28%. The Pease rule, discussed below, might also be readopted.

**Social Security Base May Increase**: If someone earns compensation income, a 12.4% Social Security tax is imposed on the first $142,800 of that income under current law. But Biden proposals might leave a gap from that amount up to $400,000 on which no Social Security tax is paid. But once income exceeds $400,000, the 12.4% Social Security tax would again apply to the excess compensation income. So, under one Democrat proposal, if enacted, if a taxpayer earned $1 million there would be approximately another $74,000 of just Social Security taxes on those earnings (combined with the 39.6% income tax and state income tax). One potential approach to reduce this tax burden has been to organize as an S corporation and take some portion of earnings as salary subject to Social Security, and the remaining portion as S corporation dividends which is not subject to the tax. But the IRS has been somewhat successful in attacking many of these plans under a "reasonable compensation" approach, thereby converting S corporation income into compensation that is subject to the 12.4% tax. The taxpayer will have to take out a reasonable salary comparable to what a similar executive might earn. Congress might close this planning technique down by saying if you are a personal service provider, e.g., a doctor, lawyer, architect, etc. you may not be able to avoid the tax by using an
S corporation.

**Marginal Tax Rates May Increase**: How might future rates look? Today's maximum income tax rate is 37%. President elect Biden's proposal might increase this to a 39.6% marginal rate. But also consider that certain investment income might still be subject to the net investment income tax ("NIIT") of 3.8% making the effective rate higher still. Income tax rates have not generally been made effective retroactively as it makes tremendous complications with withholding and estimated taxes. So, toward the end of 2021 a taxpayer may well do Roth conversions, accelerating gains, etc. to avoid the tax increase to 39.6% if that rate is to become effective next year.

**Pension and Retirement Plans**: Consider what might happen with pensions. They might restrict the benefit of an income tax deduction for contributions to a qualified plan or traditional (non-Roth) IRA to 28% even if the taxpayer is in a higher income tax bracket. If a taxpayer contributes money into a pension plan or IRA and can only get 28% benefit but when he or she retires and withdraws from the plan or IRA, those funds are taxed at 39.6%, it may not make any sense to make the contribution. Of course, while in the plan or IRA, income will grow tax deferred. One problem is that it is difficult to project what marginal tax rates will exist in the future, and it is even more difficult to predict what marginal rates will apply to a particular client in the future. Also note that qualified plan assets and IRAs (depending on state law) may provide asset protection from most creditor claims. Thus, some taxpayers who are particularly concerned about liability issues might opt to maximize pension contributions even if not optimal from an income tax perspective.

**Pease Limitation**: May further restrict itemized deductions. This provision, contained in Code Section 68, limits deductions by reducing most itemized deduction by 3% of adjusted gross income (but by not more than 80% of them) once income (which is inflated adjusted) exceeds a certain threshold. The combination of this limitation and the 28% proposed benefit cap for itemized deductions will make itemized deductions much less valuable for high income taxpayers.

**Section 199A**: This Code section that permits a deduction to reduce the taxation of many businesses might be restricted. One possibility is that when a client reaches $400,000 of income, the deduction may be reduced.

**Corporate Tax Rates**: These rates may increase from 21% to 28%. That might change the calculus of when to create a C corporation versus using a pass-through entity, what format to hold assets in, etc.

**Roth Conversions**: If income tax rates increase, it may be advantageous to convert a regular IRA to a Roth IRA and pay the tax now at lower rates. Consider charitable contributions, loss carryforwards and other ways to offset some of the gain if a conversion from an IRA to a Roth IRA is considered. Many people do their own tax returns and get their advice on planning from IRA custodians that provide packaged investments. These taxpayers may not be able to receive the sophisticated tax advice that is customized to their unique situation. Also, consider the impact of state income tax on a Roth conversion when advising these clients. There is no NIIT (net investment income tax) under Code Sec. 1411 on a conversion. It generally will be preferable to pay the income tax on the conversion from funds outside the IRA. Roth IRAs provide true tax free (as opposed to only tax deferred) compounding which can be very valuable. Regardless of whether a conversation to a Roth IRA conversion occurs, it is appropriate to review beneficiary designations in light of the Secure Act that became effective in 2020 which limits the time, in many situations, during which distributions from a plan or IRA may be taken without penalty. Most beneficiaries will no longer qualify for the so-called "stretch" payout (that is, taking distributions from the plan or IRA over their life expectancies) so an evaluation of post-death payout options should be made which, in turn, may necessitate an update of trusts and beneficiary designations that will receive distributions.

**Other Possible Income Tax Changes**

There are many other changes that have been noted in various Democrat proposals, and no doubt the process that tax legislation often entails may well result in a unique mix of many impacted income tax rules.

**Step-Up In Income Tax Basis on Death**

Most assets included in a client's gross estate will, under Code Section 1014, have their income tax bases adjusted to equal their fair market value at the date of death (or, if elected, on the alternate valuation date, normally, 9 months later). So, if stock was purchased for $1,000 that is worth $100,000 at death, the step up would eliminate the entire capital gain on the $99,000 inherent profit.

President Elect Biden has indicated he would like to see an elimination of the step up in income tax basis on death. That might convert the tax system to what is referred to as a "carry over basis" system. So, the $1,000 paid for the $100,000 of stock would carry over as the basis to the owner's estate and heirs. Potentially more impactful would be the enactment of a system analogous to the Canadian estate taxation regime where there is a capital gain tax assessed on death. There might also be a combination of approaches, perhaps giving taxpayers an option to choose to remain subject to an estate tax and thereby also obtaining a step up in income tax basis, or to instead face the loss of step up and avoid a capital gains tax on death as was available for those who died in 2010. A recognition of gain at death would a be a very far-reaching change that could have a significant impact on planning.

Consider that under current law many who are elderly or have a terminal condition are advised to intentionally hold highly appreciated assets until death to obtain a basis step up. In some instances, taxpayers create lines of credit to borrow against appreciated securities to avoid selling them. If a capital gains cost will be triggered on death that may eliminate the incentive to hold assets changing many estate planning, investment and other decisions.

## Reduction in Gift, Estate and GST Exemption Amount

The exemption is an amount that one may transfer without incurring a gift, estate or generation-skipping transfer ("GST") tax cost. The current exemption for all three of these tax systems is the same at $11.7 million in 2021. There are Democrat proposals to reduce the estate and GST tax exemption from $11.7 million to $3.5 million or $5 million (perhaps, inflation adjusted, perhaps not) and the gift tax exemption to only $1 million. It is not clear what might occur, but a reduction seems likely according to some commentators. It might even be reduced lower. Will this be made retroactive? No one knows. While it certainly seems inherently unfair to make such a change retroactive (a client made a gift thinking it was tax free then a retroactive change made it taxable), it just might occur. Of all changes to the estate tax rules that might be retroactive, a reduction in the exemption is suggested by some commentators to be one of the more likely. Such a change would profoundly change estate planning and subject millions of taxpayers, now unaffected by estate tax, to the tax. The critical and urgent planning message of this possibility is that those taxpayers who did not consummate estate tax transfer planning before the end of 2020, or who did not do as much as perhaps they should have, should consider acting soon. There is no assurance that planning will succeed given the uncertainty about the effective date of any such changes. It would also seem that the longer one waits in 2021 to plan, the greater the risk that a change in the law may become effective before the taxpayer completes planning.

## How a Client May Use Exemption Now While You Can (Maybe!)

What is the efficient way to use exemption now? Practitioners are well aware that gifts to irrevocable trusts are the preferred way to transfer assets for several reasons. Clients are often less aware of the benefits of trusts and may need to be educated that a robust trust can provide considerable flexibility. For example, the trust may include a disclaimer provision that could be used to unravel the gift if it is determined to be undesirable or there is a retroactive change in the law rendering a non-taxable gift taxable. See Code Sec. 2518. The trust might also provide flexibility to shift income among a class of beneficiaries which could be useful depending on the other income tax changes that are enacted. Practitioners may guide clients to consider how much access the client may directly or indirectly have to assets transferred to a trust. On one hand, many taxpayers will want sufficient access so that they do not face financial hardship. But any means of access, on the other hand, needs to be balanced against the increased risk of an IRS challenge to the arrangement, or a creditor being able to reach the transferred assets. Means to access assets in an irrevocable trust might include making a spouse a beneficiary, creating a self-settled domestic asset protection trust ("DAPT") that the property owner is a beneficiary of, creating a so-called "hybrid-DAPT" which is a trust for heirs (e.g., for spouse and descendants). With a hybrid DAPT, the property owner is are not a current beneficiary but someone acting in a non-fiduciary capacity can add him or her as a beneficiary).

What do taxpayers do who cannot easily transfer "assets" to use the exemption now? It may be possible to borrow against the assets and gift the cash borrowed to a trust. That may shift value out of the property owner's estate using exemption and the asset that could not be transferred (e.g., because of legal restrictions) remains in his or her estate but is reduced by the amount of the borrowing, thus lowering the transferor's taxable estate. This may also allow the retention of low basis assets to remain in the estate and receive a step-up in basis at death but allow his or her current net worth to be used to take advantage of current gift and GST exemptions.

**<u>Grantor Trusts</u>**

Grantor trusts are the foundation for many estate planning techniques. Grantor trusts are trusts for which the income is attributable under Code Sec. 671 to the settlor so that the settlor, and not the trust, pays income tax on trust income without being deemed to have made a gift by doing so. See Revenue Rulings 85-13 and 2004-64. Moreover, the grantor can sell assets to a trust that is a grantor trust and not recognize gain for income tax purposes on that sale. There are proposals to include assets held in grantor trusts in the settlor's estate on death, or to subject assets in such a trust to immediate gift tax if grantor trust status is terminated during the grantor's lifetime.

**<u>Planning to Address Possible Retroactive Change in Exemption</u>**: What if a taxpayer makes a gift and Congress retroactively changes the exemption? The exemption today is $11.7 million. Assume a client gifts that amount, to safeguard and preserve  their entire exemption, to a trust and. in June, Congress passes new tax legislation and makes the gift exemption a mere $1 million retroactive to January 1, 2021. Did the taxpayer just make a $10.7 million taxable gift? While unfair, it appears that could be a result. What can practitioners suggest clients do   to avoid or mitigate this possible risk of an unintended gift tax consequence? There are a number of options that practitioners might consider for any 2021 gifts given this uncertainty. The client could make a gift to a marital-type trust (QTIP-like trust) if the client is married to a US citizen. The client could then evaluate making a QTIP election on their gift tax return reporting that gift. Making the QTIP election could avoid a taxable gift. A taxpayer could, for example, make a marital QTIP election for $10.7 million of the gift leaving the $1 million taxable gift to be offset by the new reduced exemption. If the estate is large enough for each spouse to  do this type of $11.7 million transfer, there will be another issue to consider. If both spouses do this plan it could be problematic under the reciprocal trust doctrine. That doctrine could “uncross” the trusts if they are too similar and unravel the plan. So, this approach might be safer if used by only one spouse to transfer $11.7 million.

**Make a Formula Gift**: Another approach to consider is to make a gift to a trust using a formula which will limit the taxable gift to the amount of the exemption that ultimately applies to it. The transfer documentation transferring assts to the trust could gift that fractional share of the asset the numerator of which is the available gift tax exemption, and the denominator of which is the full value of the gift as finally determined for gift tax purposes. The taxpayer, for example, could contribute assets into a limited liability company (“LLC”) and make a transfer of a fractional interest in the LLC to the trust. The numerator should consider the possibility of retroactive changes in exemption amount. So, it might be worded to be the gift tax exemption, reflecting a retroactive tax law change, if any.  This concept is based, in part, on standard dispositions by married decedents who bequeath their estates, based upon formulas using the amount of available estate tax exemptions, into two parts, one equal to the amount of the exemption and the other qualifying for the estate tax marital deduction. The concept also seems supported by the Wandry case which respected a formula gift. Wandry v. Commissioner, T.C. Memo 2012-88. Also, it seems very important  to use appropriate language in the formula stating that the value transferred is the value “as finally determined for federal estate and gift tax purposes.”  In the Nelson case the taxpayer did not use the appropriate terminology and lost. Nelson v. Commissioner, T.C. Memo 2020-81. Also, consideration likely should be given to how to tailor this type of formula clause. What if the GST tax exemption is different than the gift tax exemption? Do you need to have different formula clauses for each tax? If the taxpayer is gifting a group of assets, one might also consider ordering. That is, in what order should exemption be allocated to assets? A prioritization of allocations might be advisable to include in such instances.

**Disclaimer Strategy**: There is yet another approach that might be considered in planning 2021 gifts to address the risk of a retroactive tax change. The taxpayer makes transfers of assets by gift so a so-called “family trust” and provide in that trust instrument that the client’s spouse (for example) shall be treated as the principal beneficiary of the trust. And the trust would further provide that, that  to the extent the spouse disclaims (renounces) all his or her interest in the trust, the disclaimed interest does not “move down” to other beneficiaries as if the spouse died (the typical result of a disclaimer), but rather the asset reverts back to  the donor. This might avoid an inadvertent gift tax if there is a retroactive change in exemption amounts. The spouse might disclaim pursuant to Code Sec. 2518 to the extent the transfer exceeds the exemption amount if the exemption amount is changed. That disclaimer must be completed within nine months of the gift. In order to have the disclaimer be qualified under Code Sec. 2518, he or she cannot accept any benefit from the trust before exercising the disclaimer.

**GRAT Strategy**: It may be possible to consider utilizing GRATs to address this issue. Suppose that a client sets up multiple GRATs aggregating $11.7 million of gifts. If it is later learned that the gift tax exemption has been reduced, the client could selectively determine to intentionally fail meeting the regulatory requirements for GRAT treatment on those GRATs necessary to use the adjusted exemption amount. For GRATs above that amount GRAT rules could be adhered to thereby reducing the value of any current gift to the modest or zero amount under the initial GRAT calculation.  It is not clear that this approach would be successful. The problem could be analogous the lines of the arguments with respect to intentionally violating QPRT requirements to cause estate inclusion for a basis step up. Caution is in order.

**Rates**: Consider that under the Bernie Sanders tax proposal estate tax rates were to become graduated up to 77% (for transfers above $1B). So, higher estate, gift and GST rates may be a possibility.

**Discounts**: When an asset is valued for gift and estate tax purposes, the value may be reduced, among other cases, if the transfer is of a non-controlling interest in an entity. For example, if a taxpayer owns 25% of a family business worth $10 million, his or her 25% interest might be valued at less than the pro-rata $2.5 million because the taxpayer has no ability to control the enterprise, distributions, liquidation, etc. These so-called valuation discounts may be eliminated in Democratic tax legislation or possibly by regulatory changes. So, it may be advisable to engage in transactions now to lock in discounts.

**Example**: If a taxpayer's spouse died and left the survivor valuable assets in a marital deduction trust (or outright) those assets may be taxed on the survivor's death. It might be advantageous to consummate transfers now, while discounts, larger exemptions and lower rates remain possible. One might consummate an installment sale from a marital trust (a "QTIP" trust described in Code Sec. 2523(f)) to lock in the low AFR interest rate and discounts which may be eliminated.

What should be considered on a sale from a QTIP trust to a non-grantor trust? What about Code Section 2519? This Code Section says if the surviving spouse relinquishes any of his or her income interests in a QTIP trust, he or she will be deemed to have made a gift of the entire value of his or her income interest in the trust. And, on account of Section 2703, it likely will cause the spouse to have made a gift of the entire value of the trust. Estate of Kite v. Comm'r, 2013 T.C. Memo. 43, 105 T.C.M. 1277, 2013 Tax Ct. Memo LEXIS 43. Instead, perhaps, the trustee should invade the trust, transfer the assets to the surviving spouse and have him or her make the sale. That might be safer. But be certain that if you make a principal distribution the trust permits that. Consider bifurcating the QTIP trust. If the QTIP trust is divided into two QTIP trusts and only the portion holding the stock to be sold consummates the sale, perhaps the second QTIP will be insulated from a Section 2519 attack. Note, however, that the Kite case involved such an invasion followed immediately by an exchange by the spouse but it involved rather extreme facts.

**GRATs**: Grantor retained annuity trusts ("GRATs") described in Reg. 25.2702-3 are a technique in which assets are gifted to a trust in exchange for an annuity. If the total return on the trust assets exceeds the Code Section 7520 rate used to determine the value of the annuity stream and the remainder following it, the GRAT will produce a tax-free transfer to beneficiaries. The greater the excess return, the larger the tax-free transfer will be. This technique may become extinct because new legislation may require that 25% of the value of the assets transferred to the GRAT be a taxable gift rendering the technique impractical to use in almost all cases

**Generation Skipping Transfer ("GST") Tax**: The Democrats have discussed assessing a GST tax on long term trusts every 50 or 90 years. This proposal is not a revenue raiser for the government, but it is primarily a social objective of minimizing the concentration of wealth.

**Annual Exclusions**: There is a proposal to cap these at $20,000/donor. Presently, it is $15,000 per donee.

**Conclusion**.

Practitioners faced an incredible amount of work in 2020 as clients endeavored to complete wealth transfers before 2021 in case the Democrats gained control over Congress and passed retroactive tax changes. That control has now occurred. So, now, in 2021, until legislation is proposed, and effective dates are known, clients who did not complete all appropriate planning in 2020 probably should continue to plan in advance of any changes. Practitioners should explore continuing to use many of the same planning techniques used in 2020 (irrevocable trusts that preserve access to assets, GRATs modified to reflect the possibility of rolling or cascading being eliminated by legislation, etc.). One unique aspect of 2021 planning that was not broadly under consideration in 2020 is incorporating into 2021 transfer mechanisms to reduce the taxable transfers if the exemption is reduced retroactively. While many practitioners may view the likelihood of a retroactive tax change as low, this article has provided an array of options that might be offered to clients so that they can make a decisions whether or not to take those precautions. Practitioners may also wish to consider advising clients of the uncertainty as to effective date and law changes and that the impact on planning cannot be known. Those issues aside, it does seem prudent for those who failed to plan in 2020 to consider planning now. Finally, this article has provided an overview of a several income tax proposals that may be incorporated into a tax bill and the impact those may have on estate and overall planning.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

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