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What the November Election Could Mean for the Estate Tax

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Posted By: Terri S. Boxer

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The November election will determine whether Donald Trump or Joseph Biden will be our President beginning in 2021 and whether the Democrats or Republicans will control the Senate. Some are predicting changes in the estate tax law under a Biden presidency and a Senate controlled by the Democrats.

Biden is proposing to return the estate tax to "historic norms." In 2017, the Tax Cuts and Jobs Act (TCJA) was signed into law. That Act increased the estate tax exemption – the value of assets that can pass without federal estate tax. Distributions to spouses and charities are deductible distributions and do not count towards the use of exemption. Prior to the enactment of the TCJA, each person could pass $5,490,000 to children or any other beneficiaries free of estate tax. A married couple could pass $11,980,000 to children or any other beneficiaries without any federal estate tax. The TCJA temporarily increased the exemption from $5,490,000 to the current level of $11,580,000 per person so that each person can pass $11,580,000 and a married couple, $23,160,000 without tax. Both the old and new exemption levels are adjusted for inflation each year.

Under the TCJA, the estate tax exemption is scheduled to revert to old levels on January 1, 2026. Without more guidance to interpret the "return to historic norms", some believe that the increased exemption may revert earlier than January 1, 2026, even as early as January 1, 2021. If we assume that the pre-2018 exemption would be adjusted for inflation, then the difference between the current level and the exemption that may be in place in 2021 would be approximately $6,000,000 per person or $12,000,000 for a married couple. At an estate tax rate of 40%, every $100,000 dollars of exemption lost is equal to $40,000 of increased tax.

Who Will This Impact? The reduction in the federal estate tax exemption will impact those individuals who expect to have an estate at death in excess of $5,600,000 and married couples who expect to have a combined estate in excess of $11,200,000. For these people, the loss of the increased exemption under the TCJA will result in an increase in federal estate tax at death.

What Can You Do? There are techniques to use the current increased exemption before it is lost. Generally, to use exemption, you must make a gift of property. The techniques range from straight-forward gifts to children to sales or gifts to various types of trusts. Each type of trust has a different purpose and different characteristics. They have names like ILIT, GRAT, CLAT, QPRT, IDGT, SLAT and others. Whatever technique is used, the only way to take advantage of the part of the current exemption that could be lost is to gift property in excess of $5,600,000. Gifts below that threshold will not preserve the increased exemption.

We highly encourage our clients who believe that they may have an estate above or near the possible reduced exemptions of $5,600,000 for an individual or $11,200,000 for a married couple, to get in touch with their Estate Planning Attorney. Your Estate Planning Attorney can explain the different techniques in detail to see if there is a form of exemption planning that is right for you.
