

Trusts, Estates & Legacy Planning Updates



Fall 2020

Newsletter from the Trusts, Estates & Legacy Planning Practice Group at Lathrop GPM

The Lathrop GPM Trusts, Estates & Legacy Planning Practice Group hopes this newsletter finds you and your loved ones safe and healthy. Although we continue in a remote-work environment due to the COVID-19 pandemic, we remain available and able to assist you with all of your estate planning needs.

Impact of the Election on Current Transfer Tax Laws

The results of the upcoming presidential and congressional elections may impact current transfer tax laws. From a policy and political standpoint, historically the income tax receives considerably more attention than the three transfer taxes (i.e., the estate tax, the gift tax, and the generation-skipping transfer (“GST”) tax), as the income tax affects more people and generates more revenue. However, due to COVID-19 and current budget deficits, it is more likely than ever that all types of federal taxes, including transfer taxes, will be evaluated and potentially legislatively changed in 2021.

There are significant differences in the positions of President Trump and Vice President Biden regarding proposed changes to current transfer tax laws. Below is a summary of each candidate’s position on some of the key issues (as of the publication of this newsletter).

Key Issues	Current Law	Biden’s Position	Trump’s Position
Estate/Gift Tax Exclusion and GST Exemption Amounts	\$10 million indexed for inflation (\$11.58 million in 2020), which is scheduled to decrease to \$5 million indexed for inflation beginning in 2026	Although Biden has not taken an official position on this issue, he has indicated that he would favor a return to 2009 transfer tax laws, which would mean a \$3.5 million estate tax exclusion and GST exemption and a \$1.0 million gift tax exclusion	Permanently establish estate/gift tax exclusions and GST exemption at \$10 million indexed for inflation
Estate, Gift, and GST Tax Rates	Maximum rate of 40%	Although Biden has not taken an official position on this issue, he has indicated that he would favor a return to 2009 transfer tax laws, which would mean a maximum rate of 45%	No change to current law
Income Tax Basis Step-up	Assets that are included in a decedent’s taxable estate at death generally receive a “step-up” in basis for income tax purposes from adjusted cost basis to fair market value	Repeal step-up in basis at death. It is not clear whether, under Biden’s position, the beneficiary would take a carry-over basis from the decedent or if the unrealized capital gain would be recognized and taxed upon the decedent’s death	No change to current law
Irrevocable Grantor Trust	An irrevocable trust can be structured so that the trust assets are excluded from the grantor’s taxable estate at death and income tax generated by trust assets during the grantor’s lifetime is attributed to and paid by the grantor	The Obama Administration had previously proposed estate tax inclusion for assets sold or exchanged by the grantor with a grantor trust and to treat the termination of a grantor trust and certain distributions from a grantor trust as subject to transfer tax. It is not clear if Biden will take a similar position	No change to current law
Annual Exclusion Gifts	Amount of assets (indexed for inflation) that can be gifted to an unlimited number of donees each year without being subject to gift tax or using any exclusion (\$15,000 in 2020)	The Obama Administration had previously proposed capping the total amount of annual exclusion gifts in any one year at \$50,000. It is not clear if Biden will take a similar position	No change to current law



Planning Opportunities

Considering the differences in the positions of the two candidates on the above key items and the uncertainty regarding the outcome of the election, now may be a good time to revisit your estate plan. While it is impossible to predict if and when future transfer tax legislation will be passed and the effective date of that legislation, based on current law and precedent it is unlikely that its application would be retroactive into 2020. Therefore, if you currently would be subject to federal estate tax upon your death (i.e., if your assets are greater than the current federal exclusion amount of \$11.58 million for an individual or \$23.16 million for a married couple), you should consider using a portion or all of your remaining exclusion in 2020 in order to potentially avoid losing that excess exclusion in the event the exclusion amount decreases in 2021. Failure to do so could result in millions of dollars of avoidable estate tax upon death.

It is important to note, however, that any gift tax exclusion used during life will reduce the amount of estate tax exclusion available at death, and the amount of estate tax exclusion available at death will be determined based on the laws in effect at the time of death.

For example, assume the federal estate and gift tax exclusion amount is \$11.58 million in 2020, and you make a \$5 million gift in 2020. If you have not made any prior taxable gifts, you would have \$6.58 million of remaining federal estate and gift tax exclusion at the end of 2020 (\$11.58 million minus \$5 million equals \$6.58 million). If you die in 2021 when the federal estate tax exclusion amount has decreased to \$5 million, you would have \$0 of remaining federal estate tax exclusion because of the taxable gift made in 2020, but you would have transferred \$5 million free of federal estate and gift tax. If, instead, you make a \$10 million gift in 2020 using \$10 million of gift tax exclusion, and you die in 2021 when the federal estate tax exclusion amount has decreased to \$5 million, you would have \$0 of remaining federal estate tax exclusion and would have transferred \$10 million free of federal estate and gift tax. Therefore, in this example, in order to use a portion of the “excess” 2020 exclusion (i.e., the amount by which the 2020 exclusion exceeds the 2021 exclusion), the gift in 2020 must be greater than the estate tax exclusion amount at the time of death in 2021 (i.e., \$5 million). Note that some states, such as Minnesota, have a state level estate tax system that taxes the value of certain gifts made within three years of death.

Below are several planning options to use a portion or all of your remaining exclusion in 2020.

- Giftting all of one spouse’s exclusion. Perhaps the best option for locking in the current estate and gift tax exclusion amount is to “use it before you lose it” by gifting assets equal to your remaining exclusion amount (i.e., \$11.58 million for an individual or \$23.16 million for a married couple, reduced by any prior taxable gifts), whether outright or in trust. However, because not every couple is in a position to simply say goodbye to \$23.16 million of assets, an effective alternative is to use all of one spouse’s exclusion in 2020 and leave the other spouse’s exclusion untouched. Please note that, if you implement this alternative strategy, you and your spouse should not elect to “split” each other’s gifts as reported on your 2020 gift tax returns.
- Hedging with a part-gift, part-sale transaction. If you would rather wait until the end of the year (e.g., December) to decide whether to use a significant portion or all of your remaining exclusion, an option to consider is a part-gift, part-sale transaction. Under this approach, a portion of the transfer would be structured as a gift (which would use exclusion) and the other portion of the transfer would be structured as a sale (which would not use exclusion)

evidenced by a promissory note. If at the end of the year it becomes apparent that the exclusion amount likely will go down in 2021, you could then at that time forgive a portion or all of the promissory note to convert that portion of the sale into a gift.

- Forgiving an existing loan. If you have previously made loans to family members or to trusts for their benefit (e.g., as part of a previously executed estate planning strategy) consider forgiving a portion or all of those loans in 2020. The forgiveness of the loans will be a taxable gift that will use exclusion. However, the income tax consequences of the forgiveness of the loans will need to first be analyzed.
- Equalize gifts to family members. If you have previously made unequal gifts to your children, grandchildren, siblings, or other family members, consider making gifts in 2020 using your exclusion amount to equalize those gifts. If the exclusion amount is reduced in the future, you may not have the opportunity to equalize prior gifts without incurring tax.
- Fund future life insurance premium payments. If you created an irrevocable trust that holds a life insurance policy requiring large annual premium payments, consider making a gift to that irrevocable trust to fund future premium payments. If the federal gift tax exclusion amount is reduced in the future and a donor's total gift tax annual exclusions in a year are limited to \$50,000, future premium payments contributed to the irrevocable trust could exceed available exclusions and incur gift tax.
- Nonqualified disclaimer. If you are the beneficiary of an irrevocable trust that will be included in your taxable estate for estate tax purposes on your death, consider making a nonqualified (i.e., taxable) disclaimer of your interest in the trust in 2020. Depending on the terms of the trust, your disclaimer could leverage your current gift tax exclusion amount to transfer trust property to the next generation, outright or in trust, before tax laws change.
- Creating a Spousal Lifetime Access Trust ("SLAT"). If you are married and are interested in using all or a portion of one spouse's exclusion but want to retain some access to the transferred assets, consider transferring those assets to a SLAT. A SLAT is an irrevocable trust created by one spouse (the "donor spouse") for the benefit of the other spouse (the "beneficiary spouse") and your descendants. During the beneficiary spouse's lifetime, distributions of SLAT assets can be made to the beneficiary spouse. The donor spouse generally should not be a beneficiary of the SLAT, but distributions made to the beneficiary spouse likely will provide an indirect benefit to the donor spouse. Upon the beneficiary spouse's death, the SLAT generally should be structured so that the remaining trust assets pass to or for the benefit of your descendants (even if the donor spouse is then living). Therefore, if the donor spouse survives the beneficiary spouse, the donor spouse's indirect access to the SLAT assets will end upon the beneficiary spouse's death.

The above-described strategies are just a few of the many planning options that exist. We recommend that you contact an attorney in Lathrop GPM's Trusts, Estates & Legacy Planning Practice Group if you are interested in learning more about any of the above strategies or if you would like to discuss whether using a portion or all of your remaining exclusion is prudent considering your specific circumstances and estate planning goals.

Lathrop GPM Offices:

Boston, MA
 Boulder, CO
 Chicago, IL
 Clayton, MO
 Dallas, TX
 Denver, CO

Jefferson City, MO
 Kansas City, MO
 Los Angeles, CA
 Minneapolis, MN
 Overland Park, KS
 Saint Cloud, MN

Washington, DC

BY APPOINTMENT ONLY

Columbia, MO
 Fargo, ND



Lathrop GPM Trusts, Estates & Legacy Planning Attorneys:

Jim B. Betterman	913.451.5102	Bennett S. Keller	314.613.2806	Lyle D. Pishny	913.451.5101
Benjamin O. Bonestroo	612.632.3244	Kerstine B. Kerner	314.613.2816	Marya P. Robben	612.632.3010
Ruth J. Brackney	913.451.5104	Abbi H. Kirchner	314.613.2516	Erik M. Rome	913.451.5117
Peter W. Brown	913.451.5165	Amanda J. Kruse	612.632.3479	Nancy S. Roush	816.460.5820
Ann B. Burns	612.632.3402	James D. Lamm	612.632.3404	Mary S. Shafer	816.460.5415
Courtney M. Conrad	913.451.5171	Scott H. Malin	314.613.2807	Matthew J. Shea	612.632.3428
Julie A. Frommelt	612.632.3068	Karen E. McMahon	612.632.3254	James R. Thomson	612.632.3251
Gretchen M. Gold	816.460.5410	Richard A. Moore Jr.	612.632.3265	Edward H. Tully	612.632.3445
Sally S. Grossman	612.632.3007	Beth T. Morrison	612.632.3322	Joel B. Voran	816.460.5625
Joseph D. Growney	913.451.5105	Sheryl G. Morrison	612.632.3376	Justin W. Whitney	913.451.5183
Lee W. Hanson	320.202.5313	Maurice O'Sullivan	816.460.5626	Alison E. Zinn	720.931.3255
Phillip K. Johnson	816.460.5854				

For more information on our Trusts, Estates & Legacy Planning Practice Group, visit our website at <https://www.lathropgpm.com/services-practices-trusts-estates-legacy-planning.html>.

On January 1, 2020, Gray Plant Mooty and Lathrop Gage combined to become Lathrop GPM LLP. This newsletter is a periodic publication of Lathrop GPM LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. The choice of a lawyer is an important decision and should not be made solely based upon advertisements. Lathrop GPM LLP, 2345 Grand Blvd., Suite 2200, Kansas City, MO 64108. For more information, contact Managing Partner Cameron Garrison at 816.460.5566.