

November 10, 2016

To Our Clients and Other Friends:

It is no overstatement to say that the results of Tuesday's Presidential and Congressional elections are both profound and largely unpredictable at this early date in the transition. Although the new Congress will not be sworn in until January 3, 2017, and President-Elect Trump will not be sworn in as President until January 20, 2017, we are beginning to get some sense of how this change in Washington may affect our estate and tax planning clients. The purpose of this communication is to give you our very preliminary thoughts and suggestions.

First and foremost, you should know that President-Elect Trump has included on his campaign website, and has communicated in other ways throughout the campaign, a commitment to repeal the federal estate tax. This commitment is consistent with a longstanding hope, and prior legislative efforts, by Republicans in Congress to get rid of the estate tax once and for all. Putting aside the procedural and budgetary hurdles that such a repeal may need to surmount, any repeal would necessarily include related changes to, or perhaps repeal of, the federal gift tax, the federal generation-skipping tax and the so called "step-up in basis" for most assets owned at death. President-Elect Trump's website, and other pronouncements, do not contain much in the way of specific proposals regarding these associated tax regimes.

That said, based on President-Elect Trump's public platform, the history of efforts to repeal the estate tax and the Republican control of both houses of Congress, we believe that it is likely that the estate tax will be modified, and possibly repealed, in the relatively near future. Put another way, there is only a vanishingly small chance that the estate tax will be increased, or the estate and gift tax exemption decreased, under the incoming Administration.

Under today's laws, even if assets are not subject to federal estate tax, their tax cost basis is adjusted, either upward or downward, to their fair market value at death. For appreciated assets, this typically reduces the income tax on gain upon a subsequent sale. The proposal on President-Elect Trump's campaign website, consistent with many other proposals over the years to eliminate the estate tax, would eliminate this basis adjustment, with exceptions for capital gain below a certain threshold, or on small businesses and family farms. The elimination of the step-up in basis means that individuals who inherit appreciated assets would inherit the unrealized capital gain, to be realized only if and when such assets are sold.

Without knowing any details of legislation, we are not in a position to recommend any particular course of action at this time. Unlike prior changes in the federal estate, gift and generation-skipping tax regimes, there is no looming deadline and nothing that you must do now or risk losing an opportunity. Some tax-related gifting mechanisms, such as grantor retained annuity trusts (GRATs), qualified personal residence trusts (QPRTs) and irrevocable life insurance trusts (ILITs), may become less useful if the estate tax is permanently repealed, and you might consider with your HTT&S lawyer whether any such plans in process now could or should be deferred. Most planning involving charitable giving such as private foundations, charitable remainder or charitable lead trusts, should continue in order to permit income tax benefits, given that such benefits do not appear at this time to be in jeopardy under President-Elect Trump's tax platform. Finally, all planning that addresses how your assets pass, and to whom, and when, and under whose management, should continue.

Of course, as we have all seen over the last decade or so, "permanent" changes to the tax code are often not truly permanent. The political pendulum tends to swing both ways. Repeal of the federal estate tax, if coupled with repeal of the gift tax, could open the door to planning opportunities to hedge against the possible return of the tax some time in the future.

We recently wrote you about proposed IRS regulations aimed at reducing valuation discounts for family businesses and family controlled entities, which we thought might be finalized in 2017. Such regulations would be irrelevant if the estate tax were repealed, and even if the estate tax is not repealed we believe that the final promulgation of the regulations will be delayed. Therefore, if you are considering gifts or other transactions to reduce the impact of those regulations, you may want to reconsider such planning, especially if you are doing so on an accelerated timeline. Such planning may still be valuable for other non-tax reasons.

We at HTT&S are very aware of the uncertainties that come from this major political change, and we are committed to studying proposed legislation and regulations, and advising our clients about how they might be affected, including where opportunities might arise. We will continue to communicate through this email mechanism and on our website as we learn more. In the meantime, you should always feel free to contact your HTT&S lawyer, or any of us, if you have questions about these important matters.