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Estate Planning
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Looking towards estate planning changes under new administration

Tax changes are expected under the new administration. We don't know how quickly President Joe Biden will move to enact his tax proposals, or whether the Democrats' thin margin in Congress will be a moderating force.

Many analysts believe that economic recovery will be the administration's first priority, meaning we might not see immediate action. But the pandemic has required high levels of government spending that could accelerate demand for tax increases.

Now is the time to be talking with an estate planning attorney to review potential tax changes and consider whether you want to implement certain strategies sooner rather than later.

The following proposals were included in Biden's campaign plans and may require planning:

Decrease in estate and gift tax exemptions: Biden has proposed decreasing the federal estate and gift tax exemptions. The estate tax exemption could drop to the pre-Tax Cuts and Jobs Act level of $5 million per individual, adjusted for inflation, or as low as 2009-levels of $3.5 million per individual, according to some analysts. Anything over the exemption amount could be subject to a 40% estate and gift tax, or an increased top tax rate of 45%.

Currently, the federal estate tax exemption is $11.7 million per individual. Without further legislative action, this exemption will sunset on December 31, 2025, reverting to $5 million, adjusted for inflation.

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Increase in long-term capital gains (LTCG) tax: Biden has expressed an intention to increase LTCG taxes for taxpayers earning more than $1 million per year. If you fall into that category, you may want to reduce your exposure to high dividend paying stocks or funds with large capital gains distributions in your taxable accounts.

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Don't shut me down: Planning for digital assets

In a world gone increasingly remote, managing your digital assets has become an even more important part of estate planning. From email accounts to digital photos and cloud-based storage, almost everyone owns some kind of digital asset.

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Terms-of-service agreements and privacy policies govern these accounts and generally expire when you die. That means surviving family members may not be able to access your email, photos, social media accounts, etc.

However, emerging laws are providing a legal path for your executors to manage these assets. These laws also provide a framework to allow tech company "custodians" (e.g. Facebook, Google, or Apple) to safely disclose your assets without violating privacy agreements.

Most states have adopted the Revised Uniform Fiduciary Access to Digital Access Act (RUFADAA) or something similar, but legislation continues to evolve.

Digital assets can include any part of your electronic record, including access to your financial accounts, bitcoin and cryptocurrency, music and photos, licensed domain names, seller accounts on eBay or Amazon, and information stored on your computer and other devices.

If your state has adopted the RUFADDA, your executors may be up against the following limitations:

An executor does not have authority over the content of your electronic communications (email, messages, or chats) unless you've explicitly granted this disclosure.

An executor may petition a court to gain access to your electronic communications, but only insofar as such access is necessary to settle the estate.

An executor may get access to other types of digital assets such as photographs, eBay, or PayPal accounts.

If an executor does not have your explicit permission to access your account, tech companies may rely on their terms of service to determine whether to grant access.

Tech companies may not provide access to joint accounts or deleted assets.

All in all, this means you need to plan for your digital assets. Do you want social media accounts deleted after you're gone? Do you want your family to have access to your digital photos? The best way to make sure your wishes are followed is to catalog your online presence and create a legal plan.

Moving? Remember to unpack that estate plan

There's a lot to think about when you move. In all the hustle and work of a relocation, certain things can get forgotten. Once you have the utilities on and the boxes unpacked, it's time to have your estate planning documents reviewed by an attorney in your new home state.

Here's a list of updates that might be needed:

Estate taxes: Currently, 12 states and the District of Columbia have state-specific inheritance or estate taxes. Your estate plans may have been drafted to address local taxes which no longer apply. You could wind up with an unexpected tax bill or miss out on the full benefits your new state provides.

Your executor: An executor's role is determined by state law, and some states require your representatives to reside in the state in which your will is probated. If your executor lives out of state, they may have to post a bond to serve or appoint a local representative. Your move may make it impractical or costly for your current executor to serve.

Communal property: In some states, property acquired during marriage is considered community property owned by both spouses. In other states, spouses only own what is under their own name.

These designations can have implications for how your will is carried out, including the step-up in basis for tax calculations. Review the titling of your assets to determine if additional planning is needed.

Health care directives: Advance medical directives, living wills and powers of attorney should always be updated when you move to ensure they are in adherence with your local laws. Every state has its own documents and forms, and differences could delay or complicate your representative's ability to act on your behalf.

Irrevocable trusts: Review your named trustee and beneficiaries for an irrevocable trust anytime you or they relocate. Some states may consider the domicile of the trust creator, beneficiary or trustee in determining state income taxes.

Work with your estate planning attorney to determine if any changes are necessary to maximize your tax savings and ensure your wishes can be carried out efficiently and effectively.

Possible estate planning changes under new administration

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If you have large investments you were expecting to sell off in the next few years, you may want to accelerate those plans and sell now in order to take advantage of the lower rate. Likewise, business owners who are considering an exit may also want to speed up their transition plans. At this point, you need to weigh maximizing business value against maximizing net after-tax proceeds.

Flat tax credit on retirement contributions: Biden has proposed eliminating the deductibility of retirement plan contributions, and instead providing a flat retirement plan contribution credit of 26%. That would make retirement contributions less attractive for taxpayers in higher tax brackets and could make after-tax retirement vehicles more popular for those savers.

Removal of stepped-up basis: Currently, when you leave property to an heir, the basis of that property is "stepped up" to the market value at the time of your death. That means your heirs can receive the increased value of that asset without having to pay capital gains taxes.

Under Biden's campaign tax proposal, this stepped-up basis would go away. Your heirs would have to use the value the asset had when you purchased it when calculating taxes. Essentially, if you purchased an asset for $1 million, but it was valued at $5 million when it was inherited, your heirs would have a tax burden on the $4 million gain.

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Cap on itemized deductions: Biden's plan could cap itemized deductions at 28% and restore the "Pease limitation," which would phase out itemized deductions for taxpayers with income above $400,000. For taxpayers accustomed to making large, tax-saving charitable gifts, this could significantly reduce their tax benefits.

Generally, tax legislation is applied on a go-forward basis, meaning we might not see changes until January 1, 2022, or later. However, mid-year changes as well as retroactive effective dates are possible.

Tax changes are often unpopular and some of the moves outlined above (particularly changes to the step-up in basis) will be met with resistance. Work with your estate-planning advisor to create flexible estate and gift plans that can pivot with fluctuating tax laws whenever possible.

SEC expands accredited investor definition

In order to participate directly in private equity markets, individuals must meet the Security Exchange Commission's definition of an "accredited investor." Now, new rules have expanded that definition, opening a few more opportunities for investment in private equity and hedge funds.

Previously, requirements were based largely on financial status. An individual needed an annual income of at least $200,000 (or $300,000 combined with a spouse) and a net worth of at least $1 million, not including one's primary residence, to qualify.

Effective late last year, the SEC ruled that investors who can demonstrate a certain level of professional knowledge or certification will also be able to participate in private market alternative assets.

A statement from the SEC indicated that wealth would no longer be the sole means of establishing accredited investor qualifications.

Now, individuals who do not meet those wealth standards qualify if they hold certain certifications, including Series 7, Series 65 and Series 82 licenses. The rule also broadened the definition of accredited investor to include limited liability companies, family offices, Native American tribes, and governing bodies with at least $5 million in assets or assets under management.

Some critics suggest the requirements are still too restrictive and limit capital available to smaller companies. Conversely, others argue the standards are too loose because they have not changed with inflation, thus allowing more investors to participate in risky private investments.

Investors who do not meet the accredited investor definition can still participate in alternative assets through private equity exchange-traded funds. Talk to your advisor about diversification strategies and whether they make sense for you.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

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Demands for wills surged during pandemic

The COVID-19 pandemic triggered a rise in estate planning, and yet too many Americans still aren't planning ahead.

Last spring, news reports were rife with stories of advisors experiencing a surge in demand for wills and estate planning. Power of attorney and health care directives were also a focus, as people made decisions about who could access their medical and financial records and who could make decisions on their behalf.

The Q4 Wells Fargo/Gallup Investor and Retirement Optimism Index showed that close to half of investors have neither a will nor an estate plan. About a third say they have a written will (34%), 4% have a written estate plan, and 17% have both.

According to the report, higher-income investors are no more prepared than others. One good sign, though, is that the likelihood an investor has a will or estate plan does increase with age. Most (83%) investors 65 and older have some preparations in place. But that number drops to 30% for investors under age 50.

The pandemic heightened awareness of the need for clear end-of-life plans. Fortunately, mortality rates have dropped since the virus's onset, and vaccines are increasingly available. But don't let that good news stop you from preparing.

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With plans and proper documentation in place, you can get out ahead of future health crises. Estate planning allows you to retain some control over your affairs in the event of disability or incapacitation while you are alive, and it means you, and not a probate court, decide where your assets go when you die.