The Results Are In: Where Do We Go From Here?

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With 2020 in the rear view, a lot of hope is riding on 2021 and the years that follow. After enduring a global pandemic that triggered a public health crisis, social unrest that triggered a social justice movement unlike any since the civil rights era, and one of the most divided and hotly contested presidential elections in recent memory that sparked widespread political turmoil, this hope seems reasonable and well placed. Unfortunately, much of the stress of the unknown created in 2020 still lingers in the early days of 2021. Chiefly among those concerns for our clients is whether the administration of President Biden will be able to significantly change the nation's tax policy as many feared in the months prior to the November election.

Although this author cannot accurately predict the likelihood of the tax changes that may occur over the next year (or the next several years, for that matter), this manuscript is intended to assist advisers in conversations with clients about their estate planning in light of possible future changes in tax policy. After all, it is the adviser's role to properly counsel clients regarding their planning options and the consequences of choosing to implement or forgo particular plans, especially in times of uncertainty. This manuscript will provide a brief overview of current tax law to establish the lens through which any future changes must be viewed. Then, this manuscript will examine proposed changes to tax laws and the effects those changes, if enacted, could have on wealthy clients. With that framework in mind, this manuscript will then offer a brief discussion of common and effective estate planning strategies that clients may choose to utilize in the coming months and years.

1) ***Current Tax Law***. Much of the current individual and corporate tax law in the United States was created by the Tax Cuts and Jobs Act that was signed into law on December 22, 2017, and effective beginning January 1, 2018 (the "TCJA"). The TCJA has been widely heralded as a significate accomplishment by the Trump Administration and lauded by many in the wealthy and business classes who have largely benefited from higher transfer tax exemptions and lower income tax rates. Because the TCJA was passed using the Byrd Rule and in light of the national budget concerns attendant to major tax policy legislation, most of the individual tax reform provisions will sunset on December 31, 2025, which will bring many of the pre-TCJA rates and exemptions back into effect immediately on January 1, 2026. Many of the business tax reform provisions, however, were made permanent (or as permanent as legislation can be).

[1] The author would like to especially thank his colleagues at Womble Bond Dickinson (US) LLP, Jonathan R. Hilliard and Sarah R. Warren, for their assistance with this manuscript.

a) ***Income Tax***.

i) ***Taxation of Individuals***. The provisions of the TCJA significantly affected individual income taxation for wealthy clients. As many advisers have become acutely aware over the past decade, income tax planning has become more of a significant part of planning for clients and is considered more often when selecting and implementing estate planning strategies. Accordingly, a knowledge of income tax is important for all advisers, even for those whose roles have been traditionally limited to other areas, such as transfer taxes. A high level summary of the current provisions impacting clients is included below.

(1) ***Income Tax Rates***. The TCJA significantly modified the income tax brackets for individuals. Most significantly, the TCJA reduced the highest tax rate to 37%. The income tax brackets for single individuals and married individuals filing jointly for 2021 are as follows:[2]

Single Individuals	
Amount of Income	**Tax Rate**
Not over $9,950	10%
Over $9,950 but not over $40,525	12%
Over $40,525 but not over $86,375	22%
Over $86,375 but not over $164,925	24%
Over $164,925 but not over $209,425	32%
Over $209,425 but not over $523,600	35%
Over $523,600	37%

Married Individuals Filing Jointly	
Amount of Income	**Tax Rate**
Not over $19,900	10%
Over $19,900 but not over $81,050	12%
Over $81,050 but not over $172,750	22%
Over $172,750 but not over $329,850	24%
Over $329,850 but not over $418,850	32%
Over $418,850 but not over $628,300	35%
Over $628,300	37%

(2) ***Capital Gains Rates***. The TCJA also altered the manner in which capital gains are taxed. Prior to the adoption of the TCJA, capital gains rates were determined based on a taxpayer's income tax bracket. Under the TCJA, however, capital gains rates are based on a taxpayer's income level. The capital gains rates for single

[2] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

individuals and married individuals filing jointly for 2021 are as follows:[3]

Single Individuals	
Amount of Income	**Tax Rate**
Not over $40,400	0%
Over $40,400 but not over $445,800	15%
Over $445,800	20%

Married Individuals Filing Jointly	
Amount of Income	**Tax Rate**
Not over $80,800	0%
Over $80,800 but not over $501,600	15%
Over $501,600	20%

(3) ***Standard Deduction***. The TCJA increased the standard deduction significantly in an effort to simplify the tax filing process for a majority of taxpayers. In 2021, the standard deduction under Code Section 63(c)(2) is $12,550 for a single individual and is $25,100 for married individuals filing jointly.[4] The increased standard deduction has resulted in more taxpayers taking the standard deduction rather than itemizing.[5]

(4) ***State and Local Tax Deduction***. The deduction for state and local taxes was reduced to $10,000 per taxpayer by the TCJA.[6] This limitation created significant challenges for taxpayers in high tax states and limited the ability to fully deduct local taxes. Note that this limitation does not apply to real and personal property taxes paid in carrying on a trade or business. The introduction of this limitation led to some states concocting schemes purported to allow taxpayers to contribute a portion of the taxpayer's local tax to a charitable fund established by the state, for which the taxpayer would receive a credit for taxes paid and, purportedly, a federal income tax charitable deduction in lieu of the state and local income tax deduction.[7] A recent development regarding state and local taxes is that the IRS has indicated it intends to approve a more recent strategy introduced by a few states that enable a pass-through entity

[3] *Id*.
[4] *Id*.
[5] *See* Individual Income Tax Returns Complete Report 2018 (IRS Publication 1304 – Rev. 9-2020), 22, https://www.irs.gov/pub/irs-pdf/p1304.pdf#page=22. The 2018 tax report indicates that 87.3% of tax returns claimed a standard deduction in 2018—up from 68.9% in the prior year.
[6] 26 U.S.C.A. § 164(b)(6) (Westlaw through P.L. 116-258). This provision will sunset effective December 31, 2025.
[7] Treas. Reg. § 1.170A-1(h)(3) requires a taxpayer to reduce the value of a contribution to charity that results in a local tax credit or deduction, the value of the charitable contribution must be reduced by the amount of the credit or deduction (any such deduction or credit is a deemed quid pro quo benefit that negates the charitable deduction in the same manner as any return benefit received from a charitable entity).

to elect to pay an entity-level state tax that results in an offsetting credit against the owners' individual income taxes.[8]

ii) ***Taxation of Business Entities***. Although the TCJA included many corporate provisions, two of the most discussed changes were as follows:

(1) ***Corporate Tax***. The TCJA lowered the corporate income tax to 21%, a significant change for corporate income taxes.

(2) ***Pass-Through Deduction***. The TCJA added Code Section 199A, which allows for a 20% deduction for certain pass-through entities.[9] The combination of the pass-through deduction and the lower corporate tax caused some clients to change the form of their business entity to take advantage of the new tax regime.

iii) ***Taxation of Estates and Trusts***. Trusts and estates are subject to quite unfavorable tax rates and a rather complex taxation scheme that resembles that of a pass-through entity in some regards. Trustees and advisers must carefully monitor the tax liability of estates and trusts and, when appropriate, seek to push taxable income out to the beneficiaries so that the income will be taxed at the beneficiary's rate, which is presumably lower than the rate that would otherwise apply if the income were taxed to the estate or trust. Although fiduciary income tax is not within the scope of this manuscript, the updated tax information for estate and trusts for 2021 is included below for easy reference for advisers tasked with the administration of estates and trusts.

(1) ***Income Tax Rates***. Estates and trusts are subject to an incredibly condensed tax bracket that results in the taxation of income at the highest rate with very modest income (significantly lower than the income required for a single individual or married individuals filing jointly). The 2021 income tax brackets for estates and trusts for 2021 are as follows:[10]

Estates and Trusts	
Amount of Income	**Tax Rate**
Not over $2,650	10%
Over $2,650 but not over $9,550	24%
Over $9,550 but not over $13,050	35%
Over $13,050	37%

[8] *See* I.R.S. Notice 2020-75, 2020-49 I.R.B. 1453.
[9] 26 U.S.C.A. § 199A (Westlaw through P.L. 116-258).
[10] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

(2) ***Capital Gains Rates***. The capital gains tax rates for estates and trusts for 2021 are as follows:[11]

Estates and Trusts	
Amount of Income	**Tax Rate**
Not over $2,700	0%
Over $2,700 but not over $13,250	15%
Over $13,250	20%

(3) ***Effect of Suspension of Miscellaneous Deductions***. The TCJA suspended miscellaneous itemized deductions (e.g., those subject to the 2% floor) for individuals for tax years beginning January 1, 2018, through December 31, 2025.[12] It was unclear whether this suspension applied to estates and trusts and whether a beneficiary could benefit from the distribution of excess deductions in the year of termination of an estate or trust. The IRS issued final regulations effective October 19, 2020, that address these issues, as briefly discussed below.[13]

(a) ***Code Section 67(g) does not apply to Estates and Trusts***. Treasury Regulation Section 1.67-4(a) was revised to provide that an estate or trust must compute its adjusted gross income in the same manner as an individual, except that the following Code Section 67(e) deductions are allowed in the calculation: (i) costs paid or incurred in connection with the administration of the estate or trust that would not have been incurred had the property not been held in an estate or trust; (ii) deductions allowed under Code Sections 642(b) (personal exemption), 651 and 661 (distributions). Further, a provision was added to provide that Code Section 67(e) deductions are not itemized deductions and are not miscellaneous itemized deductions under 67(e) and are therefore not suspended by Code Section 67(g).

(b) ***Excess Deductions Benefit Beneficiaries***. Code Section 642 provides that in the year of termination of an estate or trust, if there are certain excess deductions that exceed the taxable income of the estate or trust, then those excess deductions will pass to the beneficiary or beneficiaries who can in turn claim those deductions on their individual tax returns for the year in which the estate or trust terminated. The suspension of miscellaneous itemized

[11] *Id*.
[12] 26 U.S.C.A. § 67(g) (Westlaw through P.L. 116-258).
[13] Final Treas. Reg. §§ 1.67-4(d), 1.642(h)-2(f) and 1.642(h)-5(c), 85 F.R. 66219 (Oct. 19, 2020).

deductions under Code Section 67(g) called into question whether beneficiaries may still receive a benefit from the excess deductions. Treasury Regulations Section 1.642(h)-2 was revised to provide as follows:[14]

(i) Excess deductions will pass to the beneficiary succeeding to the property of the estate or trust.

(ii) The character of the excess deduction retains its character in the hands of the beneficiary as it was in the hands of the estate or trust. Specifically, those deductions may be characterized as a deduction allowable in arriving at adjusted gross income, as a non-miscellaneous itemized deduction or as a miscellaneous itemized deduction (which is suspended for an individual under Code Section 67(g) until the tax year beginning January 1, 2026). Prior law treated these deductions as one single miscellaneous itemized deduction, which remains suspended until the tax year beginning January 1, 2026.

b) ***Transfer Taxes***. In addition to being concerned about income taxes, the ultra-wealthy are concerned with the transfer taxes under the Code—the estate tax, the gift tax and the generation-skipping tax. Each of these taxes is briefly discussed below.

i) ***Estate and Gift Tax***. The estate tax is levied on the estates of citizens of the United States, the estates of non-citizens who are residents of the United States and on United States assets owned by non-citizens who are residents of the United States. The estate tax is part of a unified transfer tax system that combines the estate and gift tax to tax both transfers during lifetime and at death (subject to certain deductions and credits). A full description of the unified estate and gift tax is beyond the scope of this manuscript. An update on the current basic exclusion amount that can be utilized for lifetime gifting or at death, the applicable tax rates and the gift tax annual exclusion are included below.

(1) ***Tax Rate***. The current maximum estate and gift tax rate is 40%.[15] This rate has fluctuated over the decades and was as high as 55% as recently as 2001.[16]

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[14] Treas. Reg. § 1.642(h)-2.
[15] 26 U.S.C.A. § 2001 (Westlaw through P.L. 116-258) and 26 U.S.C.A. § 2502 (Westlaw through P.L. 116-258).
[16] A Historical Look at Estate and Gift Tax Rates, 1 https://www.cch.com/press/news/historicalestategifttaxrates.pdf

(2) ***Basic Exclusion Amount***. The basic exclusion amount is used to determine the applicable estate tax credit at death. Put simply, the basic exclusion amount is the value of assets that an individual may transfer during lifetime or at death without triggering gift or estate taxes. The basic exclusion amount has increased significantly throughout the past twenty-four years and, most recently, was doubled by the TCJA. The basic exclusion amount for 2021 is $11,700,000.[17] With portability, the total basic exclusion amount available to a married couple is $23,400,000. Note that the basic exclusion amount is scheduled to be reduced back to $5,000,000, as adjusted for inflation, according to the terms of the TCJA. A chart of the historical basic exclusion amount is included below.[18]

Year(s)	**Basic Exclusion Amount**
1997	$600,000
1998	$625,000
1999	$650,000
2000 – 2001	$675,000
2002 – 2003	$1,000,000
2004 – 2005	$1,500,000
2006 – 2008	$2,000,000
2009	$3,500,000
2010	$5,000,000 or $0
2011	$5,000,000
2012	$5,120,000
2013	$5,250,000
2014	$5,340,000
2015	$5,430,000
2016	$5,450,000
2017	$5,490,000
2018	$11,180,000
2019	$11,400,000
2020	$11,580,000
2021	$11,700,000

(3) ***Gift tax annual exclusion amount***. Code Section 2503(b) provides that the first $10,000 in gifts to an individual shall be excluded from the determination of a donor's taxable gifts in a tax year (the "annual exclusion amount"). The annual exclusion amount is indexed for inflation.[19] The annual exclusion amount for 2021 is

[17] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.
[18] Rocky Mengle, Estate Tax Exemption Amount Goes Up for 2021, https://www.kiplinger.com/taxes/601639/estate-tax-exemption (last visited Jan. 12. 2021).
[19] 26 U.S.C.A. § 2503(b)(2) (Westlaw through P.L. 116-258).

$15,000 per individual.[20] The annual exclusion amount will enable a married couple to gift a total of $30,000 to each donee without triggering a taxable gift that reduces each individual's lifetime gift tax exemption or requires the payment of gift tax.[21] Utilizing the annual exclusion amount in an annual gifting strategy can be very beneficial to wealthy clients attempting to reduce their taxable estates. Developing the habit of making annual exclusion gifts to descendants or other family members can transfer significant wealth over time, particularly when utilizing the split-gift election for a married couple. In addition, annual exclusion gifts remove the value of the gift and appreciation attributable to the gifted property from the donor's estate.

ii) ***Generation-Skipping Transfer Tax***. The generation-skipping transfer tax is imposed by Code Section 2601 on generation-skipping transfers. Although an analysis of the generation-skipping transfer tax can be complex, in its basic form, a generation-skipping transfer is a transfer from a donor to an individual occupying the generation of a donor's grandchild (a different calculation exists for unrelated individuals). The generation-skipping transfer tax is imposed at a flat rate of 40%.[22] Each individual has a generation-skipping exemption amount that is equal to the basic exclusion amount utilized for estate and gift tax purposes.[23] Therefore, an individual's generation-skipping transfer tax exemption is $11,700,000 in 2021.

c) ***Miscellaneous***.

i) ***Inflation Adjustments***. One change in the TCJA that did not garner much attention in the mainstream media but that has a significant impact on long term tax policy is the new method for calculating inflation adjustments. Specifically, the TCJA provided that inflation adjustments must now utilize the chained-CPI approach. The chained-CPI approach requires an inflation calculation that factors in a substitution effect in pricing goods. In the traditional calculation, the hypothetical basket of goods used to calculate inflation utilizes the same goods year over year—if the price of the specific goods increases, then there is inflation. Under the chained-CPI approach, if a good in a particular category becomes too expensive, it is assumed that consumers will substitute a cheaper good in the same category rather than continuing to purchase the exact same good at the higher price. Although this is perhaps a better method to analyze the spending habits of consumers, the chained-CPI approach will result in lower inflation rates and, more specifically, lower adjustments to income tax brackets, the basic exclusion

[20] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.
[21] Note, however, that a split-gift election of this nature requires the filing of a gift tax return for the year of the gift.
[22] 26 U.S.C.A. § 2641(a)(1) (Westlaw through P.L. 116-258) (providing that the applicable rate is calculated using the maximum federal estate tax rate).
[23] 26 U.S.C.A. § 2631(c) (Westlaw through P.L. 116-258).

amount, the annual exclusion amount and other tax items that are annually adjusted for inflation.

ii) ***Applicable Federal Rate***. The applicable federal rates ("AFRs"), which is often utilized in intra-family loans to avoid adverse income tax and gift tax issues, are at historical lows. As discussed below, this presents an opportunity for clients to provide significant benefits to family members without making a lifetime gift and can be quite helpful in certain transactions with trusts. The AFRs for January 2021 are as follows: the short-term AFR is 0.14%; the mid-term AFR is 0.52%; and the long-term AFR is 1.35%.[24]

iii) ***Code Section 7520 Rate***. The Code Section 7520 rate is utilized in calculating a remainder or reversionary interest—most often in determining the value of gifts in funding certain types of trusts. Like the AFR, the Code Section 7520 Rate is at a historic low, which presents a great opportunity for clients who are seeking to enter into lifetime transactions. The Code Section 7520 Rate for January 2021 is 0.6%.

d) ***The SECURE Act***. The Setting Every Community Up for Retirement Enhancement Act[25] (the "SECURE Act") was signed into law on December 20, 2019, and became effective January 1, 2020. The SECURE Act made significant changes to the law governing retirement plans, including qualified retirement plans, 403(b) plans and IRAs (hereinafter, a "retirement account" or, collectively, "retirement accounts"). An entire manuscript can be devoted to exploring the changes made by the SECURE Act (and many have been). Accordingly, this section of this manuscript is intended to highlight the major changes in the SECURE Act rather than to provide a detailed analysis of its provisions.

i) ***Later Required Minimum Distributions***. Required minimum distributions have historically been mandatory beginning in the year that a retirement account owner attained the age of 70.5. The SECURE Act extended the start date for required minimum distributions to the year in which a retirement account owner attains the age of 72.[26]

ii) ***Later Contributions to Traditional IRAs***. The SECURE Act removed the age limit for contributions to traditional IRAs, originally the year in which an individual attained the age of 70.5. Accordingly, clients may continue to contribute to traditional IRAs much later in life.

iii) ***Distributions after Death***. The most significant change by the SECURE Act is the manner of distributions to a designated beneficiary after the death of the retirement account owner. As described below, the SECURE Act substantially limits the availability of stretch distributions

[24] Rev. Rul. 2021-45, 2021-2 I.R.B. 294.
[25] Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019).
[26] 26 U.S.C.A. § 401(a)(9)(C) (Westlaw through P.L. 116-258).

that most advisers and clients have relied upon for years to minimize the income tax effect of large retirement accounts inherited by beneficiaries.

(1) ***Prior Law***. Prior to the adoption of the SECURE Act, there were two types of beneficiaries: a designated beneficiary and a beneficiary who is not a designated beneficiary.[27] A designated beneficiary included the retirement account owner's spouse, other individuals, and certain see-through trusts.[28] A beneficiary who was not a designated beneficiary included the account owner's estate, charitable organizations and trusts that did not meet the requirements of see-through trusts. A designated beneficiary was entitled to distributions of the retirement account proceeds based on the designated beneficiary's life expectancy.[29] A beneficiary who was not a designated beneficiary had to withdraw all of the retirement account proceeds within five years of the owner's death if the owner died prior to beginning required minimum distributions, or, if the owner died after starting to receive required minimum distributions, over the deceased account owner's life expectancy (determined as if the account owner had not died).[30]

(2) ***Current Law***. The SECURE Act utilizes three classes of beneficiaries to determine how distributions will be made after an account owner's death. For most beneficiaries, the distribution period will be limited to ten years.[31] As further described below, the ability to stretch distributions over a beneficiary's life expectancy will be limited to a particular class of beneficiaries. The classes of beneficiaries and the distributions each class is entitled to is further described below.

(a) ***Beneficiary who is not a designated beneficiary***. The definition of a designated beneficiary did not change under the SECURE Act and, therefore, the definition of a beneficiary who is not a designated beneficiary did not change.[32] Further, the distribution requirements for this class of beneficiary did not change.[33]

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[27] Natalie B. Choate, Planning for Retirement Benefits, Recent Developments: CARES: The Act + IRS Notices 2020-50 and -51, Even Newer Life Expectancy Tables for 2021 and SECURE, SECURE, SECURE!, Version 2020-3, 32 (2020), https://www.ataxplan.com/wp-content/uploads/2020/11/NewDev2020-3.pdf.
[28] *Id*. at 31.
[29] *Id*.
[30] *Id.* at 33.
[31] 26 U.S.C.A. § 401(a)(9)(H)(i) (Westlaw through P.L. 116-258).
[32] Natalie B. Choate, Planning for Retirement Benefits, Recent Developments: CARES: The Act + IRS Notices 2020-50 and -51, Even Newer Life Expectancy Tables for 2021 and SECURE, SECURE, SECURE!, Version 2020-3, 34 (2020), https://www.ataxplan.com/wp-content/uploads/2020/11/NewDev2020-3.pdf.
[33] *Id.*

(b) ***Designated Beneficiary***. A designated beneficiary (same definition as under pre-SECURE Act law) must now withdraw all retirement account proceeds within ten years of the account owner's death.[34] Note that a designated beneficiary is not required to withdraw equal amounts over the ten-year period but can instead withdraw the retirement account proceeds in any manner the beneficiary chooses. Accordingly, the beneficiary may plan to make larger withdrawals in years that the beneficiary may have less income so that withdrawals will be subject to a lower rate than in other years. The beneficiary could also choose to wait to withdraw all of the account proceeds in the final year.

(c) ***Eligible Designated Beneficiary***. A limited class of eligible designated beneficiaries was added to the law by the SECURE Act. Unless otherwise noted in the list that follows, this limited class of beneficiaries is entitled to a distribution based on the beneficiary's remaining life expectancy. The SECURE Act defines eligible designated beneficiaries to include the following:[35]

(i) The retirement account owner's surviving spouse;

(ii) A minor child of the retirement account owner (a minor child receives distributions based on life-expectancy until the minor child attains the age of majority, at which time the minor child is subject to the ten-year payout requirement of designated beneficiaries[36]);

(iii) A designated beneficiary who is disabled;

(iv) A designated beneficiary who is chronically ill; and

(v) An individual who is not more than ten years younger than the retirement account owner.

Note that at the death of an eligible designated beneficiary, the beneficiaries of the deceased eligible designated beneficiary must withdraw the remaining retirement account proceeds within ten years of the death of the eligible

[34] 26 U.S.C.A. § 401(a)(9)(H)(i) (Westlaw through P.L. 116-258).
[35] 26 U.S.C.A. § 401(a)(9)(E)(ii) (Westlaw through P.L. 116-258) (defining an "eligible designated beneficiary").
[36] 26 U.S.C.A. § 401(a)(9)(E)(iii) (Westlaw through P.L. 116-258).

designated beneficiary.[37] In other words, a beneficiary of an eligible designated beneficiary may not qualify as an eligible designated beneficiary.

Further, for an eligible designated beneficiary to receive the life expectancy payout when a trust is used in the retirement account owner's planning, the eligible designated beneficiary must be the beneficiary of a conduit trust.[38] If an eligible designated beneficiary is named as the beneficiary of an accumulation trust,[39] then the ten-year rule will apply.

e) ***The CARES Act***. After an unprecedented year battling a global pandemic, this manuscript would be incomplete without at least mentioning the passing of The Coronavirus Aid, Relief, and Economic Security Act[40] (the "CARES Act") signed into law on March 27, 2020. The CARES Act was passed to provide much needed assistance to the country, particularly individuals, businesses and industries, that were severely impacted by the onset of the pandemic and the lockdowns that occurred throughout the nation in an attempt to slow the spread of the coronavirus. The CARES Act included substantial provisions providing relief to businesses as well as to individuals. The provisions summarized below are limited to those that directly impacted individuals.

i) ***Stimulus Payments***. One of the major impacts of the CARES Act was the issuance of stimulus checks in the form of one-time refundable rebates based on taxpayers' income as reported on 2019 tax returns. The CARES Act provided for the payment of $1,200 to individual taxpayers ($2,400 for married taxpayers who filed jointly) and an additional $500 credit for each qualifying child.[41] The credit was phased out for individual taxpayers with income exceeding $75,000 ($150,000 for married taxpayers who filed jointly).[42]

ii) ***Required Minimum Distributions Suspended***. The CARES Act suspended required minimum distributions for 2020, including any amount required to be withdrawn for 2019 that had not been withdrawn by January 1, 2019.[43]

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[37] 26 U.S.C.A. § 401(a)(9)(H)(iii) (Westlaw through P.L. 116-258).
[38] Natalie B. Choate, Planning for Retirement Benefits, Recent Developments: CARES: The Act + IRS Notices 2020-50 and -51, Even Newer Life Expectancy Tables for 2021 and SECURE, SECURE, SECURE!, Version 2020-3, 35 (2020), https://www.ataxplan.com/wp-content/uploads/2020/11/NewDev2020-3.pdf.
[39] *Id.* at 36.
[40] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).
[41] *Id*. at § 2201.
[42] *Id*.
[43] *Id.* at § 2203. *See also* 26 U.S.C.A. § 401(a)(9)(I) (Westlaw through P.L. 116-258).

iii) ***Charitable Deduction***. The CARES Act made two changes to charitable deductions for 2020:

(1) ***Additional Deduction***. An additional above-the-line charitable deduction of up to $300 for taxpayers who do not itemize their deductions was added by the CARES Act.[44] Code Section 62(f)(2) limits the new charitable deduction to charitable contributions made in cash to public charities and not to supporting organizations or donor advised funds.

(2) ***Contribution Limitations Lifted***. Previously, the itemized charitable deduction was capped at 60% of a taxpayer's contribution base. The CARES Act removed this limitation for cash contributions in 2020.[45]

iv) ***Coronavirus-Related Distributions from Retirement Plans***. Section 2202 of the CARES Act included legislation that provided that certain qualified individuals[46] would receive favorable tax treatment with respect to certain coronavirus-related distributions[47] from retirement accounts. Specifically, a qualified individual could receive up to $100,000 between January 1, 2020, and December 31, 2020, and receive the following favorable tax consequences: (i) avoid the additional 10% penalty on early distributions; (ii) spread the income recognition of the distribution ratably over three years; (iii) if the distribution is rolled over to a retirement plan within three years of the original distribution, then avoid income inclusion altogether.[48]

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[44] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2204, 134 Stat. 281 (2020). *See also* 26 U.S.C.A. § 62(a)(22) (Westlaw through P.L. 116-258).

[45] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2205, 134 Stat. 281 (2020).

[46] A qualified individual was initially defined as an individual: (i) diagnosed with COVID-19; (ii) whose spouse or dependent is diagnosed with COVID-19; (iii) who experiences adverse financial consequences as a result of (a) being quarantined, furloughed or laid off, or having work hours reduced due to COVID-19, (b) being unable to work due to lack of childcare due to COVID-19, or (c) closing or reducing hours of a business owned or operated by the individual due to COVID-19. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281 (2020). I.R.S. Notice 2020-50, 2020-28 I.R.B. 35, expanded the definition of a qualified individual to include an individual who experiences adverse financial consequences as a result of any of the following: (i) a reduction in pay (or self-employment income), or having a job offer rescinded or start date delayed due to COVID-19; (ii) "the individual's spouse or a member of the individual's household . . . . being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19"; or (iii) "closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19."

[47] A coronavirus-related distribution includes any distribution to a qualified individual as long as the distribution occurs between January 1, 2020, and December 31, 2020, and does not exceed $100,000, which enables an individual to characterize distributions received during the year that would otherwise be a required minimum distribution as a coronavirus-related distribution. *See* P.L. No. 116-136, §2202 (3/27/2020).

[48] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281 (2020).

f) ***Additional COVID Relief***. Congress approved the Consolidated Appropriations Act on December 21, 2020. The COVID relief contained in the new legislation is largely comprised of measures intended to further assist industries and business that have continued to suffer in the midst of the pandemic. The legislation also included additional stimulus payments for taxpayers that were modeled after the stimulus payments made under the CARES Act. Specifically, the new legislation provides for the payment of $600 to individual taxpayers ($1,200 for married taxpayers who filed jointly) and an additional $600 credit for each qualifying child. The credit will be phased out for individual taxpayers with income exceeding $75,000 ($150,000 for married taxpayers who filed jointly).[49]

2) ***Potential Changes with a New Administration***.

a) ***A Blue Wave***. Prior to the November elections, many projected that the election would result in a "blue wave" that would cause control of the White House and the Senate to shift overwhelmingly to the Democratic party. Given that much of President Biden's campaign focused on increased taxes for the wealthy, many feared that a blue wave would result in drastic tax law changes in 2021 that would, at a minimum, roll back the advantageous provisions introduced by the TCJA in 2017. As President Biden's election victory became clearer in the days following the election, it also became apparent that the control of the Senate would be unknown for the remainder of 2020 in light of required runoffs for two Georgia Senate seats. Georgia held its runoff election on January 5, 2021, and by the end of January 6, 2021, announced that both elections had been won by the Democratic candidates. These two victories resulted in a fifty-fifty split in the Senate.[50] Vice President Harris will have the authority to cast the deciding tie-breaker vote, which gives control of the Senate to the Democrats. So although the margins are razor-thin and the results of the election were not as overwhelmingly "blue" as anticipated, the Democrats now control the House, the Senate and the White House, which increases the likelihood of policy changes over the next few years.

b) ***President Biden's Tax Policy***. President Biden campaigned on the promise of widespread tax policy changes that would "require corporations and the wealthiest Americans to finally pay their fair share."[51] President Biden campaigned on the promise that taxpayers with income less than $400,000 per year would not pay additional tax and that most middle-class Americans would actually experience additional tax cuts and credits under his tax plan.[52] Despite this purported benefit to the middle-class, it is clear that President Biden's plan intends to increase taxes

[49] Jared B. Rifis, Kate M. Merril, Kenneth A. Johnson and Zane S. Hatahet, Federal COVID Relief Bill Passed by Congress – December 2020, https://www.natlawreview.com/article/federal-covid-relief-bill-passed-congress-december-2020 (last visited Jan. 12, 2021).
[50] Forty-eight Democrats, two Independents and fifty Republicans.
[51] A Tale of Two Tax Policies: Trump Rewards Wealth, Biden Rewards Work, https://joebiden.com/two-tax-policies/ (last visited Jan. 11, 2021).
[52] *Id*.

in a variety of ways for wealthy individuals. Highlights of President Biden's tax plan are included below.[53]

i) ***Individual Income Tax Proposals***. President Biden's tax policy proposes the following changes to individual income taxes:

(1) Increase the top individual income tax rate from 37% to 39.6%;

(2) Repeal the tax cuts from the TCJA for taxpayers with annual income exceeding $400,000;

(3) Tax capital gains of individuals with annual income exceeding $1,000,000 at the ordinary income rate rather than the preferential capital gains rate;

(4) Tax unrealized capital gains on assets held by individuals at death;

(5) Expand the child and dependent care credit by increasing the amount of covered expenses, increasing the phase-out threshold to $125,000 and making the credit refundable;

(6) Expand (temporarily) the child tax credit to $3,600 for a child under age six and $3,000 for other children under age 17 and make the credit refundable;

(7) Limit itemized deductions for taxpayers with annual income exceeding $400,000 to 28%;

(8) Create a refundable tax credit of $15,000 for down payments for first time homebuyers;

(9) Require the payment of Social Security earnings that exceed $400,000;

(10) Eliminate step-up in basis; and

(11) Phase out qualified business income deduction for taxpayers with annual income exceeding $400,000.

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[53] The information regarding President Biden's tax plan was obtained from his campaign website (A Tale of Two Tax Policies: Trump Rewards Wealth, Biden Rewards Work, https://joebiden.com/two-tax-policies/ (last visited Jan. 11, 2021)), the Tax Policy Center (Where the 2020 Presidential Candidates Stand on Tax Policy, https://2020-presidential-candidates-tax-policy.urban.org/ (deselect Donald Trump to highlight only those policies for President Biden)) and the Tax Foundation (Details and Analysis of President-elect Joe Biden's Tax Plan, https://taxfoundation.org/joe-biden-tax-plan-2020/ (last visited Jan. 11, 2021)).

ii) ***Business Income Tax Proposals***. President Biden's tax policy proposes the following changes to business income taxes:

(1) Increase the top corporate income tax rate to 28% (from 21%);

(2) Require a minimum 15% tax on book income for corporations with book profits exceeding $100,000,000;

(3) Introduce a 10% surtax on sales of goods produced abroad and sold domestically;

(4) Require a country-by-country minimum 21% tax on earnings of foreign subsidiaries (this results in a doubling of the Global Intangible Low Tax Income currently in effect);

(5) Create new incentives to encourage domestic production of certain "critical" products;

(6) Expand tax deductions for energy efficient upgrades in commercial buildings;

(7) Introduce a tax credit to cover 50% of a business's cost to construct a child care center for employees (up to $1,000,000); and

(8) Create a tax penalty for pharmaceutical companies when they increase the costs of drugs by more than the inflation rate.

iii) ***Transfer Tax Proposals***. It is assumed that President Biden's tax policy proposes to restore the estate and gift tax rate and exemptions to 2009 levels. This would result in a top estate tax rate of 45% and an exemption of $3,500,000. Note that President Biden's campaign website did not address the estate tax and that President Biden did not officially indicate his exact plans for the estate tax. Many have assumed his plans would mirror those of President Obama. Accordingly, any actual proposal by President Biden may differ from those assumed here. No mention has been made of the generation-skipping tax, but one can logically assume that unless it is fully decoupled from the estate and gift tax, it will continue to mirror the provisions of the estate and gift tax.

c) ***Other Proposals and Potential Changes***. In addition to the changes proposed by President Biden, other congressional leaders and political candidates have espoused other changes in the tax code. The changes discussed below are quite progressive but indicate what some individuals in Congress are willing to enact. A few of these are briefly described below.

i) ***For the 99.8 Percent Act***. Senator Sanders introduced the For the 99.8 Percent Act to modify provisions regarding the estate, gift and generation-skipping taxes.[54] Although Senator Sanders was unsuccessful with his presidential bid, his policy proposals have become more popular over the past few years and more congressional leaders support similar policy changes. As an illustration, the proposed legislation would make the following changes:

(1) Increase the estate tax rate to 77% for estates that exceed $1 billion;[55]

(2) Reduce the basic exclusion amount to $3,500,000;[56]

(3) Require consistent basis reporting for gifts and transfers to trusts;[57]

(4) Limit availability of discounts for business interests;[58] and

(5) Require Grantor Retained Annuity Trusts ("GRATs") to have a minimum term of ten years and a minimum remainder interest value equal to the greater of 25% of the fair market value of the trust property or $500,000.[59]

ii) ***Wealth Taxes***. Senator Sanders and Senator Warren proposed wealth taxes as part of their campaigns. These proposals are briefly summarized below.

(1) ***Senator Sanders's Wealth Tax***. A brief summary of Senator Sanders's wealth tax is as follows:[60]

(a) The wealth tax would impose a 1% tax on net worth above $32 million for a couple. The tax rate would gradually increase to 8% on wealth over $10 billion.

(b) The wealth tax would target the wealthiest 180,000 households in America that make up the top 0.1%.

(c) The wealth of billionaires would be cut in half over fifteen years.

(d) The wealth tax would allow periodic rather than annual appraisals for the purpose of the tax. Those who elect

[54] S.309, 116th Cong. (1997).
[55] *Id.* at § 2.
[56] *Id.*
[57] *Id.* at § 5.
[58] *Id.* at § 6.
[59] *Id.* at § 7.
[60] Tax on Extreme Wealth, https://berniesanders.com/issues/tax-extreme-wealth/ (last visited Jan. 11, 2021).

periodic appraisals would be subject to an average rate of inflation in the intervening years.

(e) Assets placed in a trust would be treated as owned by the grantor until the grantor's death.

(2) ***Senator Warren's Wealth Tax***. Senator Warren's wealth tax proposed the following:[61]

(a) A 2% annual tax on net worth between $50 million and $1 billion.

(b) A 4% annual surtax on net worth above $1 billion.

(c) A deferral of payment for up to five years with interest.

(d) A 40% exit tax on net worth over $50 million of any U.S. citizen who renounces citizenship.

Note that this proposal would result in an heir with a net worth of $20 billion having a total annual liability of $1.16 billion.

d) ***Regulatory Changes***. In the event it becomes difficult to obtain Congressional approval of proposed tax law changes, the Biden Administration could choose to effect change through the adoption of new regulations. The Obama Administration proposed new regulations for Code Section 2704 that would drastically limit the availability of lack of control and marketability discounts of closely-held business entities.[62] President Biden could opt to reintroduce regulations of this nature or use this avenue as a method to effect tax policy changes.

e) ***Likelihood of Change***. It is impossible to predict if and when the new administration and the new Congress will address new tax legislation and what any such legislation will include. In addition to tax policy changes, President Biden made climate change, pandemic relief and economic recovery pillars of his campaign. It is possible that President Biden will focus on these other areas prior to undertaking any new tax legislation, which will likely be highly contested by Republicans in Congress. Further, although the Democrats have control of the Senate, that control is only by razor-thin margins. All of the Democrats, including moderate Democrats representing moderate electorates, would need to agree. If tax legislation is enacted, it could be more moderate than the proposals made by

[61] Ultra-Millionaire Tax, https://elizabethwarren.com/plans/ultra-millionaire-tax (last visited Jan. 11, 2021).
[62] *See* Prop. Treas. Reg. §§ 25.2704-1, 25.2704-2 and 25.2704-3, 81 Fed. Reg. 51413 (Aug. 4, 2016). The Trump Administration subsequently withdrew these proposed regulations.

President Biden during his campaign. Some commenters have opined that tax legislation is more likely to become effective in 2022 as opposed to 2021.[63]

f) ***Retroactivity of New Legislation***. Many practitioners and advisers are concerned about the prospect of retroactive tax legislation—particularly the retroactive application of a lower lifetime estate and gift tax exemption to any transfers occurring after January 1, 2021. Precedent exists for retroactive tax legislation,[64] but many practitioners believe that retroactive tax legislation is unlikely to occur. Those practitioners cite the inherent unfairness of such legislation, the public policy against such legislation, and the inability for individuals to adequately complete tax planning when faced with retroactive laws as the basis for the skepticism. It is impossible to say now, however, whether any new legislation will be made retroactive. It is certainly a possibility and an adviser's job is to counsel a client against the risks of making a gift today in light this unknown. The safest course is likely to prepare for year-end gifts and wait to see if any legislation is discussed or enacted this year prior to implementing the prepared plans. Some clients, however, may feel that they need to make gifts earlier this year in light of business transactions anticipated in mid- or late-2021. For those clients, there are likely a few strategic options the clients may use to minimize the risk of retroactive tax legislation. Those strategies are discussed in further detail below.

3) ***Planning Techniques***. This section discusses planning techniques available to clients who are interested in transitioning wealth to the next generation and taking advantage of higher exemption rates while they are available. This section will also examine strategies that may be used by clients who wish to mitigate the risk of retroactive legislation.

a) ***Basic Planning***. Although this likely goes without saying, advisers should ensure that clients have engaged in basic estate planning, including the execution of proper testamentary documents and powers of attorney. It is not uncommon for a client to approach an initial meeting ready to dive into complex estate planning strategies even though the client has not initially taken steps to complete basic planning. Just as important as ensuring basic planning has been completed is the need to ensure that the testamentary plan is updated after any lifetime strategies are implemented. If a client opts to create a generation-skipping trust during lifetime and allocate generation-skipping tax exemption to that trust, then the testamentary plan should likely be updated to take this into account (and can often be simplified to incorporate these trusts created during lifetime into the testamentary documents rather than using newly created trusts under those documents).

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[63] Christine Fletcher, What Does A Biden White House Mean For Estate Taxes? (Jan. 11, 2021) https://www.forbes.com/sites/christinefletcher/2020/11/30/what-does-a-biden-white-house-mean-for-estate-taxes/?sh=64ec3a1f721c

[64] *See U.S. V. Carlton*, 512 U.S. 26 (1994).

b) ***Basic Elements of Lifetime Strategies***. Advisers should keep in mind the following underpinnings of lifetime strategies to ensure that they are as effective as possible:

i) ***Utilize Discounts***. Where possible, transfer interests in property or business interests that will be eligible for minority, lack of control and/or lack of marketability discounts. Together, these discounts can, in certain circumstances, exceed 20% or more of the appraised value of transferred property. For example, if a business is worth $25 million and the client wishes to fund a lifetime trust with business interests, the client could transfer 49% of the ownership of the company to the trust and, with appropriate discounts, report a gift of under $10 million even though it effectively removes $12.25 million from the client's estate.

ii) ***Transfer Appreciating Property***. Where possible, clients should transfer appreciating property when making lifetime gifts. Transferring appreciating assets not only removes the current value of the assets from the client's estate, it also removes the future appreciation attributable to the gifted asset(s) from the client's estate. For instance, if a client owns an asset that is projected to appreciate 50% over the client's remaining lifetime and it is currently worth $20,000,000, then a gift of that asset today will remove not just $20,000,000 from the client's estate, but an additional $10,000,000 that could not have been gifted without incurring gift tax. Combine this with discounts, and the client is able to transfer even more value at a lower cost.

iii) ***Utilize Grantor Trusts***. Code Sections 671 through 679 treat grantors of trusts as the owners of the trusts under certain circumstances. The tax result is that the grantor includes all tax items associated with the trust on the grantor's tax return. Grantor trust status can be incredibly beneficial for the following primary reasons: (i) the payment of income tax on a trust's income is a gift tax free gift that enables the trust to continue growing without the burden of income tax; (ii) the tax payments will further reduce the grantor's estate; and (iii) grantor trust status enables future planning techniques, such as sales to the grantor trust, without adverse tax consequences because for tax purposes the grantor and the trust are the same taxpayer. Common methods of achieving grantor trust status include, among others, the retention of the non-fiduciary right to reacquire assets of equivalent value, the right of the Trustee to pay premiums on life insurance using the income of the trust and the power to lend trust assets to the grantor without adequate security.

iv) ***Formula Clauses***. Where clients are attempting to transfer a specific dollar amount like the client's remaining lifetime exemption of a hard to value asset (e.g., an interest in a closely-held business entity), advisers and clients should consider the use of a formula clause when making the gift. As advisers are well aware, gifts of this nature are subject to audit by the IRS and an audit can result in a drastically different valuation than the valuation obtained by the client in an appraisal. If an audit results in an increased valuation and the client transferred a specific number of shares or a specific percentage interest in the closely-held entity, then the finally determined value of that interest will result in a larger gift which could result in the imposition of gift tax. A formula clause, such as a *Wandry*[65] clause, phrases a transfer in the terms of value. For instance, a *Wandry* clause transfers that percentage of the donor's membership interest that has a value equal to $11,700,000 on the effective date of the transfer. When a clause of this nature exists, an increased valuation of the underlying company does not change the value of the gift because the total value of the gift is capped. Instead, the percentage interest transferred is decreased and that change is noted on the books of the company. These clauses provide great upside protection for assets that are subject to significantly different valuations. For clients who are charitably inclined, approved formula clauses exist that would transfer any excess over a certain defined amount to a charitable entity.[66]

c) ***Traditional Strategies***. For clients who are not concerned with the potential risk of new legislation being made retroactive to January 1, 2021, or who are willing to accept that risk, many of the traditional gifting strategies will continue to work well in utilizing remaining lifetime exemption. A brief summary of a few strategies are included below for consideration.

i) ***Outright Gifts***. If a client is not concerned with generation-skipping planning or retaining some level of control or direction over an asset or is simply one of those clients who abhor complicated estate planning strategies, then the client may elect to simply make outright gifts of property to family members. Large outright gifts may be appropriate in some instances and discounts can still be used for these types of gifts. Many clients, however, will opt to utilize trusts for planning to be able to control how those assets benefit family members in the future and to protect the assets from creditors of beneficiaries (including spouses of beneficiaries) and to provide a legacy that will last for multiple generations (rather than being squandered by a descendant during his or her lifetime).

ii) ***Spousal Lifetime Access Trusts***. Spousal Lifetime Access Trusts ("SLATs") have become incredibly popular over the past decade. They were often utilized in 2012 when individuals intended to utilize their remaining lifetime exemption amount with the scheduled decrease of the estate tax exemption the following year. SLATs are described below.

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[65] *See Estate of Wandry v. Comm'r*, T.C. Memo 2018-88 (March 26, 2012).
[66] *See Christiansen v. Comm'r*, 586 F.3d 1061 (8th Cir. 2009), and *Estate of Petter v. Comm'r*, 598 F.3d 1191 (9th Cir. 2011).

(1) ***Description***. A SLAT is an irrevocable trust created by one spouse (the "donor-spouse") for the benefit of the other spouse (the "beneficiary-spouse") and other beneficiaries the donor-spouse identifies, if any. Although a SLAT's structure can vary depending on client preference, a SLAT generally grants the Trustee discretion to distribute income and principal for the benefit of the beneficiary-spouse and any other named beneficiaries. The SLAT can also be restricted to only benefit the beneficiary-spouse during his or her lifetime or to emphasize that the beneficiary-spouse is to be considered the primary beneficiary of the SLAT.

(2) ***Benefits***. SLATs offer the following benefits:

(a) A SLAT may be used to take advantage of high gift tax exemptions before they expire under current law, while allowing the beneficiary-spouse to continue to use and enjoy the assets irrevocably gifted by the donor-spouse.

(b) A SLAT removes appreciation on the contributed assets from the donor-spouse's estate.

(c) A SLAT offers protection from the beneficiary-spouse's creditors.

(d) A SLAT is a "Grantor Trust" for income tax purposes, which results in all income being taxed to the donor-spouse, provides the benefits described above and will enable the donor-spouse to engage in transactions with the SLAT at a later time, if desired.

(3) ***Risks***. Risks with SLATs are as follows:

(a) ***Reciprocal Trust Doctrine***. If each spouse creates a SLAT for the other and the SLATs are too similar, the IRS could utilize the reciprocal trust doctrine to unwind the transaction such that it is treated as if each spouse created a trust for his or her own benefit, which would cause estate tax inclusion of the trust assets. Some methods of differentiating SLATs are as follows:

(i) Create and fund the trusts at separate times;

(ii) Utilize different trustee appointments (e.g., name an independent third party as the trustee of one trust or utilize Co-Trustees for one trust);

(iii) Incorporate a power of appointment in one trust but not the other; or

(iv) Utilize different beneficiaries for each trust (e.g., name the spouse and issue as beneficiaries of one trust and just the spouse as the beneficiary of the other trust).

The more differences that are created between the trusts, the more likely it would be to withstand IRS scrutiny. Unfortunately, there is not significant case law in this area, so no strategy can be guaranteed protection from IRS scrutiny.

(b) ***Divorce***. One question clients usually ask is, "What happens if we get divorced?" That is certainly a risk. If a SLAT is created for a spouse and then the couple subsequently divorces, unless appropriate provisions are included in the trust agreement, the ex-spouse will continue to benefit from the SLAT. One option is to provide that the SLAT will terminate as to the beneficiary-spouse and be divided among issue upon the earlier of the beneficiary-spouse's death or a divorce or separation.

(4) ***Example***. Donor-spouse transfers $11,700,000 in marketable securities to a new SLAT for the benefit of beneficiary-spouse. Assuming the SLAT has a 7% growth rate, after 15 years the value of the SLAT (not taking into account distributions) will have grown to $32,280,669, which represents $20,580,669 in appreciation and an estate tax savings of $8,232,267.60 (at the current 40% tax rate).[67]

iii) ***Generation-Skipping Trusts***. If a client has sufficient wealth and the client is not concerned with maintaining access to a gift (as with a SLAT), then the client may be more interested in implementing a trust plan that provides for descendants via a generation-skipping transfer tax exempt dynasty trust. This strategy is briefly described below.

(1) ***Description***. A trust of this nature may initially provide for a "pot trust" that benefits the client's children until all of the children attain a certain age or some other predefined event (e.g., the decision of an individual to terminate the "pot trust" or the death of the client). Upon termination of the "pot trust," the assets are usually divided into separate generation-skipping trusts for the children and their issue. Each child's trust will terminate upon the child's death and be divided into separate generation-skipping trusts for each of the child's children. This division will continue in perpetuity (for a

[67] Note that this calculation ignores distributions made from the trust and any taxes paid by the trust during the fifteen-year period.

jurisdiction that has abolished the rule against perpetuities) or until the assets are diminished or the Trustee opts to distribute all of the assets outright.

(2) ***Benefits***. Generation-skipping trusts offer the following benefits:

(a) The client utilizes the client's remaining estate, gift and generation-skipping transfer tax exemptions.

(b) If the trust is structured as a grantor trust, it will continue to grow income-tax free and can be utilized for more advanced planning techniques in the future.

(c) Because the assets will remain in trust for each successive generation, the assets will be sheltered from transfer taxes at the transition of each generation. This will enable the trust assets to avoid tax rates as high as 40% or more that would likely be incurred if the assets were owned by beneficiaries outright.

(d) The trust assets may be sheltered from the claims of the beneficiaries' creditors.

(3) ***Risks***. Assuming that the trust is properly drafted to avoid retained powers by the client that could result in estate tax inclusion, this strategy is fairly benign. Aside from the risk of a retroactive tax law, the major risk would be the risk of a valuation adjustment if the gift tax return is audited. That risk, however, can be mitigated with an appropriate formula clause.

d) ***Retroactive Risk Mitigation Strategies***. For clients who are concerned with the risk of retroactive legislation but who still wish to engage in planning prior to the end of the year, the strategies discussed above may not be ideal. There are strategies, however, that the clients may use to transfer wealth but that do not pose the same risk with respect to retroactive legislation because many of these strategies are not intended to utilize a client's remaining lifetime exemption. Accordingly, a client who has previously utilized all of his or her lifetime exemption may also utilize these strategies. Brief descriptions of a few of these strategies are included below.

i) ***GRATs***. GRATs offer a great opportunity for clients to transfer appreciation on assets outside of the client's estate.

(1) ***Description***. A GRAT is an estate freeze technique that allows a client to "freeze" the value of assets in the client's estate while transferring assets to the next generation at a reduced transfer tax cost. With a GRAT, the client retains an annuity interest in the

property transferred to the trust during the term of the GRAT (often a short term period of two years). The annuity amount, which is customarily defined as a percentage of the initial funding value of the GRAT plus a minimum rate of return based on the Code Section 7520 Rate, is paid to the client each year. Any assets remaining at the end of the GRAT's term will be distributed to the remainder beneficiaries. GRATs can be used in conjunction with other trusts such that the remainder is distributed to another trust. Alternatively, continuing trusts can be created under the GRAT. GRATs are most effective when the Code Section 7520 Rate is low, as it currently is, because the annuity amount that must be paid to the client is based on the Code Section 7520 Rate. The lower the required annuity is, the greater the remainder interest will be and the more successful the GRAT will be.

(2) ***Benefits.*** GRATs offer the following benefits:

(a) A GRAT can be structured to reduce a gift to zero (or close to zero) which does not reduce the client's lifetime exemption.

(b) A GRAT freezes the value of assets in the client's estate by removing appreciation attributable to the contributed assets.

(c) Appreciation passes gift-tax free to remainder beneficiaries.

(d) GRATs are "Grantor Trusts" for income tax purposes, which results in all income being taxed to the client, which provides the benefits described above.

(3) ***Risk***. If the GRAT underperforms (does not beat the Code Section 7520 Rate) or if the client dies during the term, all of the assets contributed to the GRAT will be included in the client's estate—the same result as if the GRAT had not been created.

(4) ***Additional GRAT Strategies***. The traditional GRAT strategy can be amplified with the following strategies:

(a) ***Rolling GRATs***. The client may choose to roll each annuity received into a new GRAT each year, which is often identical to the original GRAT. Additional assets can be added to the annuity payment to reach a desired funding amount. This will ensure all appreciation associated with the assets continue to be transferred out of the client's estate.

(b) ***GRATs by Asset Class or Type***. Whether a GRAT is successful entirely depends on the return generated by the assets within the GRAT. Many clients seek to optimize the performance of GRATs by creating multiple GRATs with each GRAT holding a specific asset class or type. The rationale is that if one asset type underperforms, it will not negatively affect a GRAT that would otherwise perform well based on the other assets. If a GRAT underperforms, there simply will not be any assets remaining for the distribution to the remainder beneficiaries after payment of the required annuity.

(5) ***Example***. Client transfers $3,000,000 in marketable securities to a new GRAT in January 2021 when the 7520 Rate is 0.6%. The GRAT has a two-year term and an assumed 7% growth rate. The GRAT results in a taxable gift of $0.08, an annual annuity payment to the donor of $1,513,546.20, and a tax-free distribution of $301,659.37 to the remainder beneficiaries.

ii) ***Sale to an Intentionally Defective Grantor Trust***. A sale to an intentionally defective grantor trust (an "IDGT") is another strategy that is not intended to utilize remaining lifetime exemption and, therefore, is a strategy that may be considered by a client who is concerned about the risk of retroactive tax legislation. A description of this strategy is included below.

(1) ***Description***. A sale to an IDGT is an estate freeze technique that allows a client to transfer an asset's future appreciation to the next generation with no transfer tax cost. This strategy requires the creation of the IDGT by the client, a "seed" gift68 by the client to fund the IDGT, and a subsequent sale of an asset to the IDGT by the client. The IDGT is typically structured to benefit the client's spouse and/or the client's descendants. Because the IDGT is a "Grantor trust," the client may engage in transactions with the IDGT without income tax consequences. After creation and funding of the IDGT, the client sells an asset to the IDGT for fair market value in exchange for a promissory note with interest payable to the client at the AFR. Typically, the asset sold to the IDGT (often an interest in an LLC or partnership) receives discounts for lack of marketability and lack of control. In addition, it is customary for the promissory note to require interest-only payments with a balloon payment of principal at the end of the term. If the asset is sold at a discount, and the asset generates a rate of return while owned by the IDGT that is greater than the interest rate charged on the promissory note, the client is able to transfer wealth to the IDGT free of gift tax. The

[68] The "seed" gift is, generally, 10% of the value of the asset to be sold to the IDGT.

IDGT is designed to avoid estate inclusion for the client. With the AFR rate at a historic low, having a return that is greater than the interest rate is simpler than it has been in the past.

(2) ***Benefits***. The benefits for a sale to an IDGT are as follows:

(a) A sale to an IDGT freezes the value of assets in the client's estate by transferring the assets to the IDGT in exchange for a promissory note of equivalent face value. Appreciation on the sold asset passes gift-tax free to the trust beneficiaries.

(b) IDGTs are "Grantor trusts" for income tax purposes, which provides the benefits described above.

(c) A client's generation-skipping transfer tax exemption may be allocated to the IDGT upon funding to maximize future transfer tax benefits of the IDGT.

(d) The interest payments made by the IDGT to the client are not taxable income to the client because the payments are technically being made from the client, as the IDGT for tax purposes, and to the client, individually.

(3) ***Risk***. If the client dies during the term of the note, the outstanding value of the promissory note will be included in the grantor's estate.

(4) ***Example***. Client sells a membership interest in an LLC valued at $1,000,000 to an IDGT in exchange for a promissory note requiring interest-only annual payments using the mid-term AFR of 0.58%. The promissory note has a nine-year term and the membership interest sold to the IDGT has an assumed 5.0% rate of return each year. At the end of the term, the membership interest has grown to a value of $1,487,374.14 as compared to the $1,000,000 debt the IDGT must repay to the client. This appreciation avoids approximately $194,949.66 in gift tax (assuming the current 40% tax rate), and removes the membership interest's future income and appreciation from the client's estate.

iii) ***Intra-Family Loans***. In this low-rate environment, intra-family loans are a great tool to give family members the benefit of a client's wealth at little-to-no cost. Note that this strategy is not intended to utilize lifetime exemption. A brief description is included below.

(1) ***Description***. An intra-family loan may be considered an estate freeze technique that allows a client (the lender) to "freeze" the value of assets in the lender's estate while transferring assets to the next generation at no transfer tax cost. The IRS-approved

interest rate used for intra-family loans is the AFR. The IRS assigns AFRs based on the term of the loan: short-term (less than three years), mid-term (between three and nine years) and long-term (longer than nine years). Intra-family loans can be used by the borrower for any purpose, including to purchase a home, start a business, or otherwise invest. When the borrower earns a rate of return in excess of the AFR, the loan has a similar effect as a transfer of wealth from the lender to the borrower but without gift tax consequences. Note that an alternative strategy of refinancing existing intra-family loans using today's low AFRs can reduce the cost of capital for a related borrower and minimize income taxable to the lender.

An intra-family loan is documented using a promissory note that can be structured to require interest-only payments with a balloon principal payment at the end of the term, or amortized with traditional installment payments of principal and interest. Collateral is not required but may be recommended depending on the circumstances.

(2) ***Benefits***. Benefits of intra-family loans are as follows:

(a) The borrower obtains a low-interest loan and pays interest to a family member, as opposed to a commercial lender.

(b) If the borrower obtains a rate of return higher than the interest rate charged, wealth transfer benefits occur without transfer taxes.

(c) The lender may be able to forgive a portion of the loan each year using the lender's gift tax annual exclusion ($15,000) or lifetime exemption ($11,700,000 million).

(3) ***Risk***. The loan must be documented properly and administered according to its terms. Otherwise, the loan may be deemed a gift and taxed accordingly.

(4) ***Example***. Parent makes a $1,000,000 interest-only loan to a child for a term of eight years using the 0.52% AFR. The child invests the loan proceeds in securities and obtains a 5% rate of return each year during the loan term. At the end of eight years, the parent has received interest income of $41,400, the child has earned $436,055 in net appreciation, and the parent has avoided gift tax on the net appreciation of approximately $174,422.

iv) ***Lifetime QTIP Trust***. If the client would still like to use exemption but is concerned about retroactive legislation, one option is to utilize a lifetime QTIP trust created for the benefit of the client's spouse. A brief description is included below.

(1) ***Description***. A lifetime QTIP trust has the same requirements as a QTIP trust created at the death of a taxpayer.[69] A transfer to a lifetime QTIP trust will not be a taxable gift because it qualifies for the marital deduction and will be included in the beneficiary-spouse's estate at death. The flexibility provided by this strategy is that the QTIP election does not need to be made until the gift tax return for the transfer is filed the following year in April or October (if the return is extended). So a client may make a gift early in 2021 and wait until the end of the year to determine what will occur with legislation and whether a QTIP election should be made to protect the gift (i.e., if more was gifted than allowed under retroactive legislation).

(2) ***Benefits***. The main benefit to this strategy is that the client is given time to watch legislative developments throughout the rest of the year to determine whether the transfer should utilize exemption or the marital deduction.

(3) ***Risk***. A few risks and disadvantages are discussed below.

(a) Unless this strategy is combined with a properly exercised qualified disclaimer, then the funding transfer will still be a transfer that leaves the client without control over the transferred assets. Further, if the assets land in a lifetime QTIP trust, the value of the assets will still be included in the beneficiary-spouse's estate. Although this does not result in tax consequences that are different than the client not making the transfer (from the perspective of the marital unit), it would reduce future options in planning with the transferred assets should estate tax laws change again.

(b) If the client and the beneficiary-spouse divorce, then the beneficiary-spouse will not lose the interest in the trust over the beneficiary-spouse's remaining lifetime.

(4) ***Example***. Client funds a lifetime QTIP trust for client's spouse in April 2021. Client may wait until April 2022 (or October 2022 if client's return is extended) to make the QTIP election. If

[69] *See* 26 U.S.C.A. § 2056(b)(7) (Westlaw through P.L. 116-258) (requiring that the interest pass from the beneficiary's spouse, that the beneficiary-spouse receive all income for the beneficiary's remaining lifetime, that no person have a power to appoint any part of the property to any person other than the surviving spouse, and that a QTIP election be made on the appropriate gift tax return).

retroactive legislation is enacted in 2021, then client can make the appropriate QTIP election. If retroactive legislation is not enacted, client can elect not to make the QTIP election and utilize exemption for the transfer.

v) ***Disclaimer***. Another option to mitigate the risk of retroactive legislation that has received attention since the election is the use of qualified disclaimers. A brief description is included below.

(1) ***Description***. A client can create a trust to receive a gift that includes a provision that specifically allows the beneficiary to disclaim the beneficial interest in the trust and if there is such a disclaimer, then the assets will revert back to the grantor.[70] If the beneficiary has not received a benefit from the trust and otherwise satisfies the requirements of a qualified disclaimer, then this strategy buys an additional nine months from the date of the initial gift to determine whether tax legislation will be passed.

(2) ***Benefits***. The benefits of this strategy are as follows:

(a) The client may make a gift now, if time necessitates such a gift.

(b) The risk of retroactive legislation is partially mitigated.

(3) ***Risks***. The risks with the disclaimer strategy are as follows:

(a) The client must rely on the beneficiary to disclaim an interest in a trust if tax legislation dictates the use of a disclaimer.

(b) The trust must be administered to not benefit a beneficiary during the nine months following the initial funding to allow for a qualified disclaimer.

(c) A qualified disclaimer must be made within nine months of the transfer, so if a gift is made early in the year, it will not protect against legislation that may come at the end of the year.

4) ***Conclusion***. The next few years will likely prove to be quite interesting for advisers and their clients as President Biden moves to fulfill campaign promises with a Congress with such a razor-thin Democratic majority. Advisers' roles with clients will likely become

[70] Jonathan Blattmachr and Carlyn McCaffrey, The Estate Planning Tsunami, Estate Planning Journal, 2020, Volume 47, Number 11 (November 2000).

more challenging in the face of the unknown, and advisers will be required to navigate the complexity of the unknown with clients.