

Post-Election Estate Planning and Tax Mitigation Strategies

Presented by:

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WELCOME - AGENDA

- Post-Election Results and What to (Most Likely) Expect Going Forward
 - Summary of Biden's Tax Proposals
 - Income Tax Considerations and Mitigation Strategies
 - Estate Planning Considerations and Mitigation Strategies
 - Q&A
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- Recording and slides to be made available

DISCLAIMER

- The sky is not falling! That said, no one has a crystal ball to predict the ultimate outcome of how/when Biden's tax proposals will be considered and/or enacted over the next 4 years.
- Our goal for this presentation is to synthesize and summarize the most probable outcome of the 2020 election and agenda for the Administration and Congress going forward, so as to best advise clients on how to plan for potential tax law changes based on that outcome while mitigating risks of the potential "worse case scenario"
- We do not intend to express political views or support for any political party or candidate
- For educational purposes only – not intended as legal or tax advice

ELECTION RESULTS (AS OF 11/18/2020)

Joe Biden

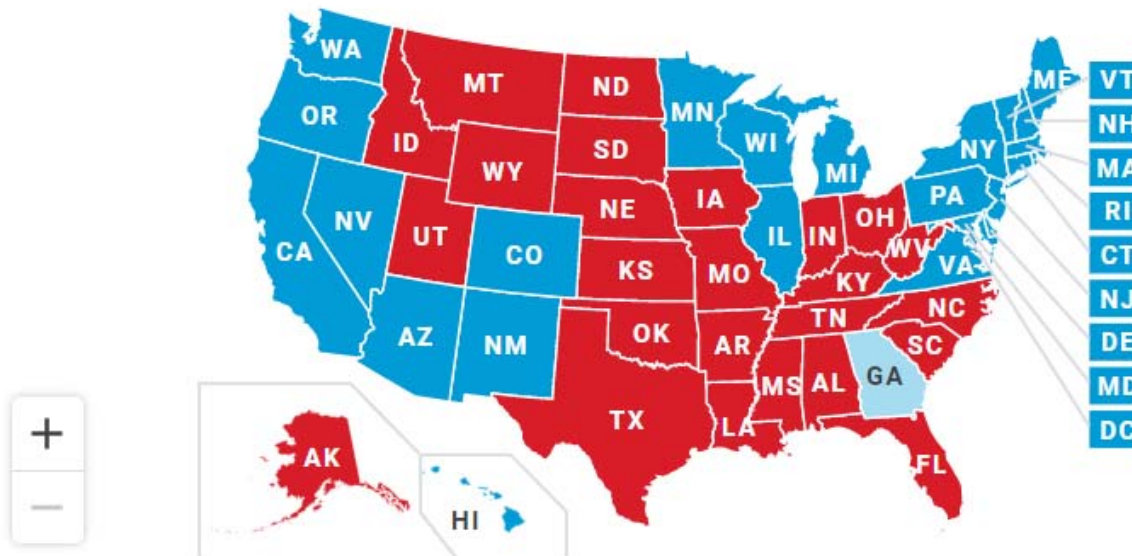


290

270 to win

Donald Trump

232



* Based on The Associated Press

■ Won ■ Leads

ELECTION RESULTS (AS OF 11/18/2020)

- President
 - Joe Biden – 290 Electoral Votes
 - Donald Trump – 232 Electoral Votes
 - Uncalled races – GA (16 Electoral Votes) – hand recount in process at the request of the Trump campaign, results to be released today (11/19/2020) affirming Biden as the winner
- Senate
 - Republican – 50 Seats
 - Democrat – 48 Seats - includes 2 Independents (Sanders in Vermont and King in Maine)
 - Open Seats – 2 Seats in GA (currently with Republican incumbents) – run-off election on 1/5/2021
 - Any recount of the run-off votes will be done by hand – control of the Senate may not be decided when Senate returns to work on 1/6/2021
- House
 - Democrat – 221 Seats (down from 232 currently in House)
 - Republican – 205 Seats
 - Open – 9 Seats in uncalled races

ELECTION TAKE-AWAYS

- “Blue wave” did not materialize as expected
 - Democrats lost seats in the House
 - Republicans won/gained seats at the Governor and State Legislature levels, who will oversee redistricting pending 2020 Census results for the 2022 mid-term elections
 - Democratic moderates may not support all of Biden’s tax proposals pending mid-term elections in 2022
- Presidential-Elect Biden will be the first among the last 4 Presidents to take office without the same party also controlling the Senate
 - George W. Bush won the Presidency in 2001 and the Senate was 50/50 – passed the 2001 Tax Act with VP voting as tie-breaker (but that was a tax cut, not tax increase)
 - Assuming Republicans retain control of the Senate, highly unlikely any Republican will vote for any tax increase for the next 2-4 years, pending the 2022 mid-term and 2024 elections
 - Even if the Senate turns out to be 50/50 with VP as tie-breaker, **60** votes are required to defeat a filibuster in the Senate (except for votes for judicial appointments and Budget Reconciliation, which pass with a majority vote)

BIDEN TAX PROPOSALS

Tax Items	Current Law	Biden
Corporate Tax Rate	21%	28% tax rate Minimum tax of 15% on companies that earn \$100M or higher on book income
Social Security Tax	Subject to a tax rate of 12.4% on the first \$137,700 (2020) Executive Order allows SS tax deferral for employees from 9/1-12/31/20	Resume when wage and SE income exceed \$400,000
Section 199A Qualified Business Income Deduction	Deduction of 20% of qualified business income (QBI)	Phase out the Sec 199A deduction for taxpayers making more than \$400,000
Individual Tax Rate	7 tax brackets ranging from 10% to 37% (expires after 2025)	Increase the top rate to 39.6%
Capital Gain Rate	Ranging from 0% to 20% for long-term capital gains and qualified dividends. 3.8% net investment income tax (NIIT) is added for MFJ (\$250,000) and others (\$200,000)	Capital gains and dividend income would be taxed at ordinary income rate (39.6%) for taxpayers with income over \$1M. 3.8% NIIT still applies

BIDEN TAX PROPOSALS (CONT'D)

Tax Items	Current Law	Biden
Deductions	Standard deduction or itemized deductions have no cap	Cap the itemized deduction at 28% for households with income over \$400,000
	Cap for state and local tax (SALT) is \$10,000 (expire after 2025)	Repeal the SALT cap
Estate Tax	Estate, gift, and generation-skipping tax is 40% with an exemption of \$11.58M in 2020 (\$11.7M in 2021).	Estate, gift, and generation-skipping tax top rate of 45% with an exemption of \$3.5M indexed annually for inflation
	This will expire after 2025. Inherited assets receive a step-up to fair market value for the recipient	Eliminate the stepped-up basis rule that allows people to pass capital gains to heirs without tax after death
Child Tax Credit	\$2,000 per child under age 17 and \$500 credit per qualified dependent.	\$3,000 per child age 6 to 17 and \$3,600 for children under 6.
	Up to \$1,400 is refundable	Make the credit fully refundable
Earned Income Tax Credit	No credit is allowed for individuals without a qualifying child who are age 65 and above	Would made credit available to low-wage workers ages 65 and over who are without qualifying children

MOST LIKELY LEGISLATIVE AGENDA GOING FORWARD

- COVID Relief/Economic Stimulus is number one priority
 - Including extension of certain CARES Act provisions that expire on 12/31/2020
 - Democrats are backing a larger bill (\$2.2 trillion), Republicans support targeted smaller bill (\$650 billion)
 - PPP re-authorization, including allowing PPP expenses to be deductible (but when?)
 - Could include tax incentives for investment and tax extenders (similar to 2009 stimulus)
- FY 2021 Appropriations Bill to fund the Federal Government
 - Current continuing resolution expires at midnight on 12/11/2020
 - Congress and the current Administration have two options: (i) agree to another temporary continuing resolution, or (ii) pass an omnibus appropriations bill containing all 12 outstanding appropriations measures for FY 2021
 - If Congress and the current Administration fail to act by the 12/11/2020 deadline, government funding will expire and non-essential services will be suspended
- Bi-partisan measures such as infrastructure
 - Will require negotiation between Biden and Senate Majority Leader McConnell who have a long history of negotiating and working together, along with House Speaker Nancy Pelosi (nominated as Speaker official vote to take place in early January when new Congress convenes)

OUTLOOK FOR BIDEN TAX PROPOSALS

- Any major tax proposals would like not likely occur until Q3 or Q4 of 2021 at the earliest
- Very unlikely that any tax increase would be retroactive to 1/1/2021
 - Historically, tax increases have always been prospective, except for 1993 when OI tax rates were increased after Clinton was elected as part of the Budget Reconciliation process (with Democratic control of Senate)
- Income Tax
 - Any increase in corporate tax rates could have adverse effect on stimulus
 - Any increase in highest marginal ordinary income rate for individuals would likely be deferred until 1/1/2022 and only apply to “high income” taxpayers
 - Any increase in capital gains tax rate could potentially be made effective as of date of enactment in 2021, with announcement to put taxpayers on notice
 - Limiting itemized deductions to 28% tax bracket not likely to succeed due to impact on charitable deduction
 - Relief from SALT cap unlikely as it mostly affects “wealthy” states (sunsets in 2026 anyway)
- Estate, Gift and GST Tax
 - Increase in the estate tax (so-called “death” tax) is a hard sell for moderate Democrats (sunsets in 2026 anyway)
 - Elimination of stepped-up basis at death unlikely to pass due to difficulty in recordkeeping - capital gains tax at death would be easier to administer

OTHER POTENTIAL CHANGES VIA EXECUTIVE ORDER

- Controlling COVID-19 and economic stimulus will remain top priority
- Potential to undo regulations implementing the 2017 Tax Act where there is ambiguity (e.g., reversal of provision allow US companies with foreign affiliates to opt out of the GILTI tax)
- Increase in IRS funding for enforcement
- Other Democratic Initiatives
 - Environment – undo rollback of Obama regulations; rejoin 2015 Paris Accord
 - Immigration – Reinstatement of DACA
 - Social Justice Reform (DOJ enforcement; funding for community programs)
 - Racial and wealth inequality

KEY INCOME TAX NUMBERS FOR 2020

- Standard Deduction
 - Single \$12,400
 - MFJ \$24,800
- Retirement Plan Contribution Limits
 - Maximum deferrals \$19,500 plus \$6,500 if over age 50
 - IRA contribution \$6,000 plus \$1,000 if over age 50
 - Roth IRA contributions phased out at \$206,000 for MFJ or \$139,000 for Single
- Charitable Contribution
 - Standard deduction filers - allows up to \$300 "above-the-line" deduction for qualified cash charitable contributions
 - Itemized deduction filers - individuals can elect to deduct cash donations (to public charity) up to 100% of their 2020 adjusted gross income
- State and Local Taxes
 - Deductions for state and local sales, income, and property tax remain in place and are limited to a combined total of \$10,000 or \$5,000 for MFS
 - VA does not limit state and local tax deduction to \$10,000

COVID-19 RELIEF FOR RETIREMENT PLANS

- Required Minimum Distributions (RMDs) – Not required for 2020 (Normal rules are scheduled to resume for 2021)
- 60 Day Rule – You have 60 calendar days from date of distribution to return 2020 RMD to avoid taxation
- Retirement Plan Loans – Loan repayments due 3/27/2020 to 12/31/2020 can be delayed up to 1 year
- Coronavirus-Related Distributions
 - Distribution of up to \$100,000 made before 12/31/2020
 - 10% early withdrawal penalty does not apply
 - Distribution is included in taxable income ratably over 3-year period (or all included in 2020)
 - May repay the distribution within 3 years from date of distribution

ESTATE TAX LAW CHANGES SINCE 2001

- 2001 Tax Act (Bush)
 - Estate and GST tax exemptions gradually increased from \$675K/55% rate level in 2001 for years 2002 to 2009 (from \$1MM to \$3.5MM with reduction in the rates from 55% to 45%), and were repealed and replaced with modified carryover basis regime for 2010
 - Gift tax exemption remained at \$1MM for years 2002-2010 (lower 35% rate applied in 2010)
 - Repealed state death tax credit (up to 16%) in favor of a deduction – huge blow to state revenues
 - Scheduled to sunset on 12/31/2010 and revert back to \$1MM exemption with 55% rate in 2011
- 2010 Tax Act (Obama)
 - Extended sunset date of Bush tax cuts for two years and increased/recoupled the estate/gift/GST exemption to \$5MM (indexed for inflation) with a 35% rate for 2011-2012 (estate tax also applied for 2010, but could opt out for modified carry over basis regime)
 - Allowed for “portability” of estate and gift tax exemption to surviving spouse in 2011-2012
 - Scheduled to sunset on 12/31/2012 and revert back to \$1MM exemption with 55% rate in 2013
- 2012 Tax Act (Obama)
 - Made estate/gift/GST tax exemption permanent at \$5MM (indexed annually for inflation) with 40% rate
 - Made portability election and repeal of state death tax credit permanent
- 2017 Tax Act (Trump)
 - Doubled estate/gift/GST exemption to \$10MM (indexed or inflation) – currently \$11.58MM for 2020, \$11.7MM for 2021
 - Scheduled to sunset on 12/31/2025 and revert back to \$5MM exemption (indexed annually for inflation)

OTHER ESTATE TAX LAW CHANGES PROPOSED BY DEMOCRATS

- 20% capital gains tax at death
- Wealth tax (Sanders/Warren)
- Potential de-coupling of gift tax exemption from estate and GST tax exemption (i.e., back to \$1MM)
- GST tax on trusts every 50 years
- Inclusion of grantor trust assets in the grantor's taxable estate

ESTATE PLANNING CONSIDERATIONS

- Many clients have “buyer’s remorse” from 2012 lifetime gifting done prior to sunset of the 2012 Tax Act, which turned out to be for naught
- Even though it appears unlikely we will see any estate/gift/GST tax law changes in 2021, the exemption is still scheduled to sunset in 2026 – prudent to continue with any current planning in process but no rush to complete by 12/31/2020
- Biden has proposed that the estate/gift/GST tax should be “raised back to the historical norm” (i.e., pre-2017 Tax Act)
- “Anti-claw back” regulations provide that any excess exemption used during lifetime will not be counted against the taxpayer at their death after 2025
- “Use it or lose it” time window mostly for clients who have already used pre-2017 Tax Act exemption (\$5.49MM in 2017) to utilize excess exemption via lifetime gifts
- Make gifts in trust (vs. outright gifts) to provide additional asset protection and potential access to gifted funds by the donor/grantor, if needed
- Financial planning is extremely important to determine extent of grantor’s ability to make lifetime gifts while retaining sufficient funds for their lifetime

ESTATE TAX MITIGATION STRATEGIES

- Gift of Excess Exemption to Spousal Lifetime Access Trust (SLAT/SPLAT) for married couples
 - Provides grantor with indirect access to the trust funds by naming grantor's spouse as a discretionary beneficiary
 - Use "floating spouse" clause; risk of divorce is still an issue
 - Grantor's spouse can also be the trustee subject to ascertainable standard
 - Generally, gift-splitting election is not available due to spouse being a discretionary beneficiary of the SLAT
 - Avoid reciprocal trust doctrine if each spouse is creating a SLAT
 - For married couples with assets under \$10MM, generally better for one spouse to make gift to SLAT to fully utilize excess exemption amount (vs. both spouses gifting a lesser amount to reciprocal SLATs)
 - Design as ongoing Dynasty Trust for descendants – beneficiary can be their own trustee subject to ascertainable standard
 - Allow for loans to grantor from trust without security to provide additional access to the trust funds at (now very low) AFR rate
- Gift of Excess Exemption to Dynasty Trust/SPAT
 - Grants an individual (other than the grantor or a beneficiary) a lifetime special power of appointment (SPAT), in a nonfiduciary capacity, to add the grantor as a beneficiary as part of a class of beneficiaries (i.e., descendants of grantor's grandparents)
 - See Blattmachr, et al article in Feb 2019 issue of *Estate Planning Journal*
- Gift of Excess Exemption to Domestic Asset Protection Trust (DAPT)
 - Allows grantor to be a discretionary beneficiary
 - Must have independent trustee with nexus to DAPT-friendly state
 - Be cautious of potential fraudulent transfer issues

ESTATE TAX MITIGATION STRATEGIES

- “Wait and see” gifting strategies pending certainty of election outcome and anticipated tax law changes
 - Lifetime gift of excess exemption to irrevocable trust for spouse and/or descendants (SLAT/Dynasty Trust), with ability for trustee or beneficiary to make **qualified disclaimer** under IRC §2518 (and applicable state law)
 - Qualified disclaimer must generally be made within 9 months of the transfer – gives donor additional time whether they want to make a completed gift/transfer
 - Trust terms would provide that property reverts back to donor upon disclaimer
 - Lifetime gift of excess exemption to irrevocable **Lifetime QTIP Trust**
 - Gives donor time to decide whether or not to make QTIP election on gift tax return
 - “Clayton” QTIP election is likely not available for lifetime QTIP Trusts; spouse would be entitled all of the trust income and must be the sole beneficiary during his or her lifetime
 - Similar risk of divorce as with SLAT
 - Consider including provision directing assets to trust for descendants upon disclaimer by spouse
 - Installment Sale to Grantor Trust – grantor can choose to forgive note and make a completed gift
 - Use formula adjustment clause if selling hard to value assets

OTHER ESTATE PLANNING TIPS

- Consider gifting closely-held business interests, real estate and other assets with depressed valuations to leverage gift tax exemption and shift future appreciation out of grantor's estate
 - Be mindful that donee will generally take carryover basis in gifted property
 - Special provisions can be included in trust agreement authorizing independent trustee to grant a testamentary general power of appointment to beneficiary (limited to beneficiary's bona fide creditors) to make trust assets includible in beneficiary's estate and eligible for stepped-up basis
 - Grantor can also exercise "swap" power to substitute assets of higher basis for low basis assets
- Historically low interest (AFR) rate applicable to intra-family loans and installment sales can also shift appreciation in excess of AFR rate out of grantor's taxable estate
- Review current estate planning documents in the event of tax law changes
 - Many clients no longer have an estate tax planning need for automatic funding of credit shelter trust at first spouse's death, which results in loss of stepped-up basis in the CST assets at the surviving spouse's death – "one-lung" QTIP Trust is generally a better option
- Don't let the tax tail wag the dog! Working with a TEAM of advisors is essential to analyze current situation, make financial projections, and decide on what planning approach fits best with the client's risk tolerance and ability to sleep at night.

QUESTIONS?

MELINDA MERK, JD, LLM, CFP®, AEP®

Melinda focuses on providing holistic multi-generational income and wealth transfer tax planning advice and estate and trust services to high net worth individuals, families, and business owners. She has over two decades of experience in the estates and trusts area, and brings a unique and diverse perspective from her work in private law practice, Big Four accounting firms, and private banking/trust services.

Melinda is listed among the *Washingtonian's* Top Trusts and Estates Lawyers, and is a frequent speaker and writer on estate and trust planning. She is active in the estate planning community on a local and national level, including the Northern Virginia Estate Planning Council and Washington DC Estate Planning Council. Melinda is also a member of the Wills, Trusts & Estates Legislative Committee for the Virginia Bar Association.

She recently attained the Accredited Estate Planner® (AEP®) designation by the National Association of Estate Planners & Councils, which distinguishes designees for their dedication to being a collaborative advisor.

On a personal level, Melinda is a strong supporter of local philanthropy and the arts in Northern Virginia, and is a current Board member of the Community Foundation for Northern Virginia.



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Marnette Myers is a Partner at Prager Metis CPAs, a member of Prager Metis International Group. Ms. Myers is a Certified Public Accountant and an attorney licensed to practice in the Commonwealth of Virginia.

Marnette has over 20 years of experience in the accounting profession with an expertise in overseeing and supervising the preparation of not-for-profit, corporate, partnership, fiduciary and individual tax returns. Marnette works with closely-held businesses to develop strategies to reduce taxes for the business as well as the owners. She also gives regular presentations to local groups and organizations regarding tax planning and changes in tax laws and regulations.

Marnette has been recognized by the Northern Virginia Magazine and the Washingtonian Magazine as a top tax advisor in the Metropolitan D.C. area for several years.

Prior to joining Prager Metis in 2019, she was the Director of Tax at Frank & Company, and also worked as an attorney in the Office of the Associate Chief Counsel (Income Tax & Accounting) for the Internal Revenue Service in Washington, D.C.



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