



PHILLIPS LYTLE LLP CLIENT ALERT

FAMILY WEALTH PLANNING



JUNE 2021

Proposed Legislation Affecting Estate, Gift and Generation-Skipping Transfer Taxes and the “New” New York Power of Attorney

PART I: PROPOSED LEGISLATION AFFECTING ESTATE, GIFT AND GENERATION-SKIPPING TRANSFER TAXES

On March 25, 2021, Senators Bernie Sanders and Sheldon Whitehouse introduced the “For the 99.5 Percent Act” (“Act”), which proposes significant changes to the estate, gift and generation-skipping transfer tax system. The Act would alter the existing federal transfer tax regime to increase taxes on, and eliminate a number of tax reduction strategies available to, the wealthiest .5% of Americans.

This alert addresses only the Act, and does not discuss various proposals to modify the federal income tax regime currently being debated in Congress or the recently issued U.S. Department of the Treasury’s “General Explanations of the Administration’s Fiscal Year 2022 Revenue Proposals” that includes proposals for amendment of the tax regime and changes to the capital gains tax rules. Phillips Lytle would be happy to discuss these proposals with you in connection with your planning.

Modification of Exemption Amounts and Tax Rates on Taxable Estates

In December 2017, the federal unified exemption (applicable toward federal estate and gift taxes) was increased to \$11,580,000 per person with annual adjustments for inflation. However, the current tax law is scheduled to expire after December 31, 2025, and the federal unified exemption is scheduled to reduce to \$5,000,000, indexed for inflation. Currently, the federal unified exemption is \$11,700,000.

The Act would reduce the federal unified exemption from \$11,700,000 (for an individual dying in 2021) to \$3,500,000 and decrease the gift tax exclusion amount to \$1,000,000. The gift tax exclusion amount would not be annually indexed for inflation under the Act.

Taxable estates will also face a tax rate increase. While the current maximum estate, gift and generation-skipping transfer tax rate is 40%, the Act changes the rate structure as follows:

Taxable Amount	Tax Rate
\$750,000 to \$3,500,000	\$248,300 plus 39% of Excess
\$3,500,000 to \$10,000,000	\$1,320,800 plus 45% of Excess
\$10,000,000 to \$50,000,000	\$4,245,800 plus 50% of Excess
\$50,000,000 to \$1,000,000,000	\$24,245,800 plus 55% of Excess
Over \$1,000,000,000	\$546,745,800 plus 65% of Excess



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To the extent you are financially able to do so, you should consider using your available federal unified exemption by making lifetime gifts before enactment of the Act in order to minimize potential estate tax.

Modification of Annual Gift Tax Exclusion

Under current law, an individual donor may gift a donee up to \$15,000 annually without using the donor's lifetime gift tax exclusion amount.

The Act reduces the annual gift tax exclusion amount to \$10,000 per donee and to \$20,000 per donor. Under the Act, a donor's annual exclusion gifts will be limited to \$20,000 spread among all of his or her donees, with a maximum gift to each individual donee of \$10,000. Gifts in excess of the \$10,000 per donee limitation, or \$20,000 per donor, must be reported on a federal gift tax return.

If gifting is a part of your current estate plan, or you have considered gifting to reduce the value of your estate, consideration should be given to making annual exclusion gifts prior to the Act's enactment.

Limitation on Valuation Discounts

The Act includes changes to valuation rules that affect the use of discounts in estate and business succession planning.

The Act would disallow lack of marketability and control discounts when valuing transferred assets if the transferor, transferee and members of their families have control of the entity (by vote) or own a majority of the entity (by value). In addition, non-business assets of a transferred entity, regardless of the composition of the entity's ownership, will be valued as if transferred directly to the transferee without the application of valuation discounts and will not be considered in determining the value of the entity subject to the transfer.

If you own a business and are considering a transfer or succession planning, you should consider executing such transactions while the above-mentioned discounts are available.

Changes in Treatment of Grantor Trusts

Under current law, the assets of a grantor trust may or may not be includable in the estate of the grantor depending upon the provisions of the trust. For example, an Irrevocable Life Insurance Trust (ILIT) and an Intentionally Defective Grantor Trust (IDGT) generally are not includable in a grantor's estate for estate tax purposes.

Under the Act, a grantor's estate will include assets held in grantor trusts created on or after the date of enactment of the Act. These new rules also apply to grantor trusts to which contributions are made on or after the date of enactment of the Act, even if created prior to enactment. For irrevocable grantor trusts (such as ILITs) receiving contributions after the date of enactment of the Act, this means that some or all of the trust assets (including insurance proceeds) will be includable in the grantor's estate.

If you are the grantor of an irrevocable trust, such as an ILIT, to which you are making contributions, you should consider fully funding the trust prior to the enactment of the Act to avoid estate inclusion.

Changes to GST Trusts

The Act creates limitations on the use of long-term, "dynasty" trusts by imposing the generation-skipping transfer tax on transfers from a "non-qualifying trust." The Act defines a "qualifying trust" as a trust that has a date of termination not greater than 50 years after the date of creation. In the case of a trust already in existence,



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such trust shall be deemed a qualifying trust for 50 years after the date of enactment of the Act.

Trusts in existence at the time of the passage of the Act will be affected if they do not terminate within the requisite time limitation, and such trusts may require amendment.

PART II: NEW POWER OF ATTORNEY

On December 15, 2020, Governor Andrew Cuomo signed Assembly Bill 5630-A, which amends several provisions of the General Obligations Law affecting New York powers of attorney. The amendments update the Power of Attorney (POA) form, eliminate the Statutory Gifts Rider (SGR) by incorporating gifting powers into the new form, and provide sanctions for persons or entities who refuse to accept a valid POA.

To protect vulnerable populations from fraud and abuse, the amendments also modify the POA execution process by requiring two disinterested witnesses to sign with the person creating the POA.

The new bill will not affect POAs or SGRs that were properly executed prior to its effective date of June 13, 2021.

Additional Assistance

Before you make any transfers/gifts discussed in this article, you should seek professional advice. If your current estate plan is affected by any of the foregoing, or if you would like us to review and assist you in updating your plan, please contact a member of our [Family Wealth Planning Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■



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