The 45th President and 100-Year-Old Estate Tax

By Richard S. Franklin

With the presidential race well underway and the Democratic and Republican fields shrinking, we thought you might appreciate knowing the remaining candidates' positions on federal estate taxes.[1] Not surprisingly, each of the remaining Republican candidates proposes to eliminate the estate tax. Alternatively, the two remaining Democratic candidates propose to increase the estate tax rate and lower the exemption amount.

Candidate	Estate Tax Position	Statement from Candidate's Website (or as noted) relating to Estate Taxes
Hillary Clinton (D)	Increase rate to 45% (it is currently 40%) and decrease the exclusion to $3.5 million (it is currently $5.45 million)	As reported in the WSJ (Jan. 12, 2016) "In her plan, the tax would apply to estates exceeding $3.5 million per person and at a 45% top rate. Under current law, reached in a compromise between President Barack Obama and congressional Republicans, the per-person exemption is $5.45 million and the top rate is 40%. As a result, the tax would hit about 0.4% of estates each year, up from 0.2% today."
Bernie Sanders (D)	Increase rate to 65% and decrease the exclusion to $3.5 million Establish a new progressive estate tax rate structure as follows: 45 percent on the value of an estate between $3.5 million and $10 million. 50 percent for the value of an	"This plan would only impact the wealthiest 0.3 percent of Americans who inherit more than $3.5 million. 99.7 percent of Americans would not see their taxes go up by one penny under this plan." "According to Forbes Magazine, there are only about 530 billionaires in the United States out of a population of

[1] The modern federal estate tax first comes from the Revenue Act of 1916 (39 Stat. 756), which created a tax on the transfer of wealth from an estate to its beneficiaries.

Candidate	Estate Tax Position	Statement from Candidate's Website (or as noted) relating to Estate Taxes
	estate between $10 million and $50 million. 55 percent for the value of an estate in excess of $50 million. Include an additional billionaire's surtax of 10 percent. Close perceived loopholes in the estate tax (many of which echo proposals by President Obama).[2]	320 million, making them the wealthiest 0.0002 percent of America. These are the only Americans who would pay the billionaires' surtax under this plan."
Donald Trump (R)	Repeal Estate Tax	"The death tax punishes families for achieving the American dream. Therefore, the Trump plan eliminates the death tax." Additionally, the "Trump plan also phases out the tax exemption on life insurance interest for high-income earners…"
Marco Rubio (R)	Repeal Estate Tax	"Immediately eliminates the federal estate tax, a tax that penalizes family-owned farms and businesses and reduces saving and investment in our economy."

[2] "End tax breaks for dynasty trusts. Billionaires like Sheldon Adelson and the Walton family, who own the majority of Walmart, have for decades manipulated the rules for trusts to pass fortunes from one generation to the next without paying estate or gift taxes. Specifically, Senator Sanders plan would: Strengthen the "generation-skipping tax," which is designed to prevent avoidance of estate and gift taxes, by applying it with no exclusion to any trust set up to last more than 50 years. Prevent abuses of grantor retained annuity trusts (GRATs) by barring donors from taking assets back from these trusts just a couple of years after establishing them to avoid gift taxes (while earnings on the assets are left to heirs tax-free). The lawyer who invented this technique for the Walton's claims it has cost the Treasury $100 billion since 2000. Prevent wealthy families from avoiding gifts taxes by paying income taxes on earnings generated by assets in "grantor trusts." Sharply limit the annual exclusion from the gift tax (which was meant to shield the normal giving done around holidays and birthdays from tax and record-keeping requirements) for gifts made to trusts. Close other loopholes in the estate and gift tax, including valuation discounts. Senator Sanders' plan would protect family farmers by allowing them to lower the value of their farmland by up to $3 million for estate tax purposes. This plan would also increase the maximum exclusion for conservation easements to $2 million." [from Senator Sanders' website.]

Candidate	Estate Tax Position	Statement from Candidate's Website (or as noted) relating to Estate Taxes
Ted Cruz (R)	Repeal Estate Tax	"The Death Tax will be eliminated." *** "This unjust tax will be totally eliminated. Time and money wasted on an industry of lawyers and accountants to minimize taxes will be diverted to productive uses. Small family businesses and farms that would have been sold in order to pay the Death Tax will be spared and family businesses will stay in the family."
John Kasich (R)	Repeal Estate Tax	"Eliminate the death tax."
Ben Carson (R)	Repeal Estate Tax	"The death tax is abolished in its entirety."

Repealing the estate tax is more complicated than it sounds at first blush. None of the websites for the Republican candidates address such matters as the future of the gift tax or generation-skipping transfer tax. During 2010 when we had a one-year repeal of the estate tax, the gift tax remained in place. The rationale for this is that the gift tax is needed to back-up the income tax system. The concern is that wealthy families would give their income producing property to the younger family members in lower income tax brackets. Therefore, some argue, the gift tax is needed to prevent this sort of gaming of the income tax.

Carryover basis is another concern with repealing the estate tax. In the absence of the estate tax, will heirs be able to sell the inherited assets free of capital gains taxes on appreciation? Again looking back at 2010, when the estate tax was not applicable, Congress provided that assets inherited upon death would have an unadjusted income tax basis (i.e., carryover basis – meaning the post-death sale of an appreciated inherited asset would trigger capital gains tax), whereas under the estate tax as it presently exists the income tax basis of an inherited asset is adjusted to equal its fair market value upon the decedent's death (the so-called step up in basis – meaning the post-death sale of an inherited asset would only trigger capital gains tax relating to post-death appreciation). In 2010, the income tax basis of inherited assets could be increased by up to $1.3 million, and an additional $3 million for assets passing to a surviving spouse. Because of this ability to increase the basis of inherited assets by the limited amounts, a special basis increase return had to be filed after the decedent's death (in effect taking the place of the estate tax return currently required).

Should you count on repeal of the federal estate tax? Not in our opinion. State death taxes will likely still exist in the District of Columbia and Maryland, and 17 other states. The estate tax rates in D.C. are graduated, starting at 6.4% for estates over $1 million and reaching the top rate of 16% for estates exceeding $10 million. Maryland is approximately the same.

More critically, however, if the federal estate tax were repealed, wealthy families would likely fear it returning if the political tides shifted again. For example, it is apparent that Senator Sanders has hit a nerve. Moreover, the estate tax has been around since 1916 – 100 years! If repeal of the estate tax is enacted, our advice would be to immediately move assets to irrevocable trusts to protect against the possibility of it returning.[3] Imagine counting on the repeal to hold, not implementing estate tax planning strategies in reliance on the repeal holding, and then when it's too late for estate tax planning to mitigate the estate tax result, Congress re-enacts the estate tax shortly before death. Repeal is alluring, but too ephemeral to warrant serious reliance.

Given this landscape, and at the risk of sounding self-serving, our suggestion is that thoughtfully planning to mitigate the effect of estate taxes is the most assured and responsible way to accomplish this goal. By starting early enough to have time on your side, we believe that the existing estate tax system can essentially be sidestepped, but only for clients sufficiently motivated to engage in planning. We have lots of ideas about how to mitigate estate taxes – we are leaders at developing creative and innovative ideas to lessen the tax burden.[4]

If you have any questions about these laws, please contact one of our lawyers.

RICHARD S. FRANKLIN bio
rfranklin@mcarthurlaw.com

DISCLAIMER: This material is not intended to constitute a complete analysis of all tax or legal considerations. This material is not intended to provide financial, tax, legal, accounting, or other professional advice. Consult with your professional adviser to obtain counsel based on your individual circumstances.

[3] Precisely how we would recommend such gifts to occur would depend on the structure of the gift tax, if it remains applicable post-estate tax repeal.
[4] For a list of Richard Franklin's prior presentations to professional groups where he has discussed such ideas click here and for a list of future presentations click here.