Biden My Time: Flexible Strategies for an Uncertain Future

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I. Introduction

Estate planning is a complicated science, even when one knows all the rules. The interplay of federal and state income and transfer tax laws, differences among state trust and property laws, clients' unique circumstances and preferences, and myriad other factors combine to create a web of complexity that is difficult to navigate under the best of circumstances.

Today's estate planning environment is even more complex than normal, as the Biden Administration and Congress wrestle with new legislation that has the potential dramatically to change the tax laws, as we have come to know them. Some of these changes may apply retroactively: If so, then as a practical matter, these new laws already exist—Congress just hasn't had the courtesy to tell us about them yet. How can we plan effectively for our clients when we don't know *current*, much less future, tax laws?

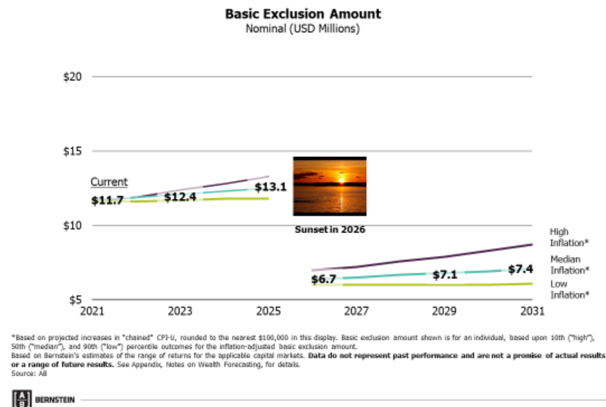
In this paper, I first establish a baseline by assessing the best planning opportunities in the current low-interest-rate and very favorable (at least for the time being) legislative environment. Next, I explore how certain legislative initiatives may reshape our advice. Finally, I focus on three flexible planning strategies—spousal lifetime access trusts (SLATs), private placement life insurance (PPLI), and charitable remainder trusts (CRTs)—that arguably have emerged or will emerge as "go-to" strategies for wealthy families.

II. Overview of Wealth Transfer Planning in the Current Environment

A. $11.7 Million Basic Exclusion: The 99.9% Solution

Within the last 10 years, modifications brought about by tax legislation—most notably the American Taxpayer Relief Act of 2012 (ATRA)[1] and the Tax Cuts and Jobs Act of 2017 (TCJA)[2]—have altered the face of estate planning considerably. For example, the top marginal federal estate tax rate has settled at 40 percent[3]—well below the 55 percent marginal threshold that once prevailed—while capital gain tax rates have risen dramatically.[4] Further, the basic exclusion amount that each person may shelter from federal gift and estate tax was scheduled to revert to a fixed $1 million effective January 1, 2013. Instead, ATRA left undisturbed a $5 million exclusion that is indexed for inflation; TCJA "doubled-down" on that increase through 2025. Today, the basic exclusion amount stands at an inflation-adjusted $11.7 million per person, $23.4 million for a married couple.[5] Bernstein's projected future growth of the basic exclusion amount is shown in Display 1.

Display 1



With the basic exclusion amount at this enhanced level, it is estimated that about one in 1,500 families currently have enough wealth to need tax-driven estate planning.[6] If estate taxes are likely to affect only those few, what should the other 1,499 families do?

B. The Importance of Income Taxes

Aside from today's high basic exclusion amount, another factor that has evolved is the relatively greater importance of income tax planning. Without a doubt, tax-driven estate planning is a double-edged sword. Assets held until death generally qualify for a "step-up" in basis for income tax purposes under current law,[7] but the date-of-death value of those assets may be subject to estate tax. On the other hand, the post-transfer appreciation of assets transferred during life should avoid estate tax, but barring some fortuitous and highly specialized additional lifetime planning, will not receive a basis step-up upon the death of the transferor.[8] For decades, high estate tax rates, coupled with relatively low capital gain tax rates, tended strongly to favor the latter strategy of transferring assets during life, thereby foregoing the income tax benefit of a basis step-up at death in order to avoid a punitive estate tax on post-transfer growth. But times have changed.

Until ATRA came along, many thought that the federal estate tax rate would revert to 55 percent. But that didn't happen; under current law, the federal transfer tax rate is just 40 percent—still quite high, but not as bad as it could have been. At the same time, the federal long-term capital gain tax rate is as high as 23.8 percent for passive investments.[9] The income tax rate is even higher than that for collectibles, and higher still for short-term capital gains and ordinary income. Moreover, some states, like California, New York, and Minnesota, among others, have very high income tax rates on top of those higher federal rates—and TCJA limits the federal deduction for state and local taxes paid to $10,000 per taxpayer per year.[10] As a result of all this, the "gap" between transfer tax and income tax rates has closed considerably for many families. In some unusual cases—like when families own, say, depreciated real estate[11]—the cost to the family of losing a step-up in basis at death may be greater than if mom had simply kept the asset on her balance sheet, paid any estate tax due, and gotten a basis step-up. Sometimes, the best gift that a parent can make to her children may be no gift at all.

C. Roll with the Changes: Portability as a Testamentary Planning Tool

ATRA also made "portability" of a deceased spouse's remaining exclusion amount[12] a permanent feature of the federal tax law. Portability is the notion that for a married couple, the remaining exclusion of the first spouse to die can be "ported" over to the survivor by making an election on the deceased spouse's federal estate tax return.[13] As a result, a couple in a common law jurisdiction may not need to split up assets and adopt an estate plan that creates a credit shelter trust upon the death of the first spouse to die. Instead, the estate plan can provide that each spouse will leave all of his or her assets to the survivor, and the executor of the first spouse to die can elect to port that spouse's remaining exclusion to the survivor. When the dust settles after the first death, in a typical case under current law, the surviving spouse has all of the couple's assets and a combined applicable exclusion amount of up to $23.4 million.

Aside from simplicity, one benefit of this method is that the entire estate will get a step-up in basis at the second death. That may be much more difficult to achieve in an estate plan that calls for a credit shelter trust to be established at the first death. And portability seems ideally suited to situations where the first spouse to die has substantial assets in a qualified retirement plan or individual retirement account. Before portability, couples faced a real dilemma: Whether to leave such benefits outright to the surviving spouse and get potentially great income tax treatment but no estate tax relief at the second death, or to leave those assets in a credit shelter trust to avoid estate taxes but with potentially lousy income tax treatment due to acceleration of required minimum distributions.[14] With portability, leaving qualified plan benefits to a surviving spouse provides the best available income tax treatment and enhances the survivor's ability to shelter those assets from estate tax at the second death.

Portability is helpful, but it's not perfect. For one, the portability election must be made on a federal estate tax return,[15] regardless of the possibility that the value of the estate of the first spouse to die may be well below the filing threshold for Form 706—and there is no such thing as "Form 706-EZ." Further, while the surviving spouse's basic exclusion is indexed for inflation, the deceased spousal unused exclusion—or DSUE—amount,[16] is not. As a result, the longer the surviving spouse sits on the DSUE, the less purchasing power that DSUE will have upon her death. And only the gift and estate tax exclusion is portable; the exemption for federal generation-skipping transfer (GST) tax purposes is not. While it's possible to do GST tax planning with portability, it's messy and inefficient.[17]

D. Estate Taxes Today: Identifying the "Happy Few"

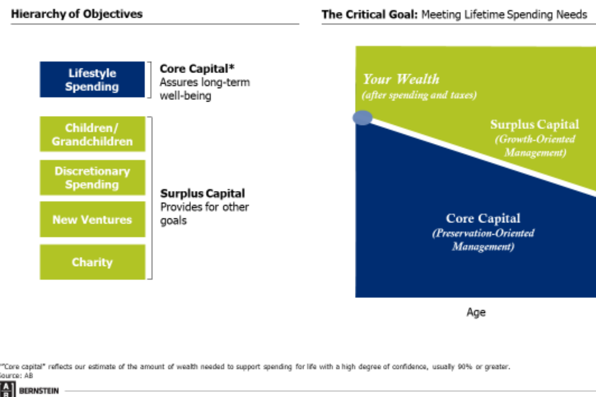
For these and other reasons, estate planning professionals need to re-think how they advise most clients.[18] Very few families now need plans that are driven exclusively by reduction or elimination of the estate tax, which should allow most plans to be based upon *income* tax saving considerations and non-tax-related goals. But it's not always clear on which side of the line a particular family will fall. For example, there are couples who currently have considerably less than the combined basic exclusion amount of $23.4 million, but who absolutely should do transfer-tax-driven planning because it's likely, due to anticipated estate growth and potential "sunset" of the current exclusion amount after 2025, that they will pay at least some estate tax at the second death if they don't plan. Conversely, couples who have more than $23.4 million today may spend themselves out of their current estate tax problem. The starting point for analysis should be how much an individual or a couple can afford to transfer during life, not how much exclusion they have available at this moment. When advising clients and their professional advisors on this issue, I seek to establish how much an individual or a couple can afford to give away by first determining how much of their current wealth they need to keep to secure their lifestyle with an adequate margin of safety.

E. The Starting Point for Analysis: Core Capital

In today's world, it's unrealistic to expect most investors to accumulate a portfolio that will allow them simply to "live off the income." A $1 million portfolio that consists of 60 percent stocks (represented by the S&P 500) and 40 percent bonds (represented by 10-year Treasuries) currently yields pre-tax income of $15,500 per year.[19] In 1982, that same portfolio would have generated over $88,000 of pre-tax income. Furthermore, dividend yields and bond interest tend to vary quite a bit over time, so living off the income just doesn't produce reliable enough cash flow for most people. Based on current yields, a retiree who expects to spend $100,000 per year may need a nest egg of $8 million or more to generate sufficient after-tax portfolio income (i.e., dividends and interest) to meet expenses, assuming a 20 percent effective income tax rate. Some of us may be fortunate enough to be able to save that much prior to retirement, but for many, that's an unrealistic goal. Most investors will need to rely on both income *and portfolio value* to get through retirement.

For that majority of investors who may need to spend both income and principal in retirement, let's call the minimum amount needed to meet one's spending goal "core capital." That amount, allocated prudently, will allow an investor to spend what they need to spend each year, adjusted for inflation, for the rest of their lives with a very high level of confidence—say 90 or 95 percent—that they will never run out of money.[20]

Core capital is represented visually by the downward-sloping white line on the right-hand side of Display 2. This downward slope indicates that the amount of inflation-adjusted capital needed to support lifetime spending will decline over time due to shorter remaining life expectancy as one ages. By way of example, using this methodology, a typical 65-year-old couple that spends an inflation-adjusted $100,000 per year, after tax, from their well-diversified portfolio would need $3.4 million today to support that spending for their joint lives with a 90 percent level of confidence. If they decided to spend 30 percent more, or $130,000, each year, their core capital requirement correspondingly would increase by 30 percent, to just over $4.4 million. An investor's actual spending goal may be more complicated than a fixed, inflation-adjusted annual amount; in those cases, a more rigorous analysis is required to define core capital.



The key element is that core capital is designed to be a "sinking fund." Each year, the investor will spend the after-tax income of the fund, and to the extent that income is insufficient, some principal. The objective is to make that fund big enough so that it won't run out of money even if the investor

lives a very long time or experiences periods of high inflation, or if the capital markets perform poorly. For the vast majority of investors, this conservative approach is very effective—it gives them peace of mind that they will be secure.

Of the three variables upon which core capital is based—asset allocation, longevity, and spending—spending may be the most important. It's a variable that an investor can control, and it has a significant and quantifiable impact on the core capital amount. On the other hand, longevity is by far the most underappreciated variable. Recent actuarial data[21] shows that for a typical 65-year-old couple in the US, there is a 50 percent chance that at least one of them will live to age 92, and a one-in-four chance that at least one of them will live to age 97. High-net-worth Americans tend to live six to eight years longer than that.[22] Thus, a retirement portfolio for a high-net-worth, 65-year-old couple conservatively may need to last 35 years or more, which implies for most asset allocations an annual spending rate of less than three percent in the first year, indexed for inflation thereafter, based upon projected market conditions—far below the often-cited four percent "safe" spending level upon which many retirees have been told they can rely. A well-designed portfolio needs to be customized to the clients' circumstances, and must be able to survive poor markets, inflation, and a potentially long time horizon.

Assume that this analytical process yields a conclusion that a client has sufficient core capital to meet her or his spending goal for life. Further assume that the client's current balance sheet includes substantially *more* than that amount; let's call that excess "discretionary capital." Should the client transfer that discretionary capital during life? Or should the client retain that discretionary capital to obtain a step-up in income tax basis at death?

III. The Enviable Dilemma: Dealing with Discretionary Capital

A. Transfer or Retain Appreciated Assets?

The benefit of a lifetime gift is that all *future* appreciation in the value of the transferred asset will avoid a 40 percent estate tax. But we also know that with a lifetime gift, the donee "inherits" the donor's income tax basis in the asset.[23] Therefore, an appreciated asset transferred by gift is saddled with a "debt" in the form of a built-in income tax liability, and the transfer tax laws give a donor no "credit" in the form of a valuation discount for that debt. Under these circumstances, is a gift of an appreciated asset from, say, mother to daughter a good idea?

Well, if mom were to die tomorrow without having made this gift, her estate would receive a step-up in basis under current law and her daughter could receive the asset through her mom's testamentary estate plan with no built-in income tax liability.[24] But if mom made a gift of that asset today and she were to die tomorrow, her daughter would pay a lot of additional income tax due to the loss of the step-up—if and when she sold the asset. In either case, the estate tax outcome would be substantially the same,[25] but the income tax result would be vastly different in these two cases.

Here's the key: When someone wants to transfer an appreciated asset to a family member (or to any person other than the transferor's spouse or any entity other than a charity), there is a built-in income tax liability that must be "burned off" before the donee can realize a financial benefit.[26] As a result, the transfer tax benefit of a lifetime gift takes time to manifest. The key drivers include the donor's life expectancy, the "tax gap" (i.e., the difference between the *donor's* estate tax rate and the *donee's* effective income tax rate), the donor's basis, and the asset's prospects for future growth. Keep in mind that the tax gap depends on multiple factors, including the respective tax domiciles of the donor and donee, the donee's expected income tax bracket at the time of sale, whether the subject matter of the gift is a capital asset or something else, and many other circumstances.

Note, too, that a proper assessment of this problem is not based upon estate tax considerations alone; both estate *and income* tax consequences of lifetime wealth transfer strategies must be taken into account. Life insurance could be used to hedge the *income*-tax risk of a lifetime gift—that is, the potential loss of a step-up in basis sooner than expected as a result of the donor's early death. Historically, most planners have viewed life insurance exclusively as an estate tax hedge, not as a way to mitigate income tax exposure. Current law provides an opportunity to change that mindset.[27]

B. "Leveraged" Transfers

Families that can afford to engage in lifetime wealth transfer strategies should act now, despite the present uncertainty about tax laws. In addition to potential legislative changes, a key driver behind this thinking is interest rates. Those rates—specifically, yields on Treasury securities—drive estate planning today because the tax laws limit how much individuals can give to their children and grandchildren free of gift and estate tax. As estate planning has evolved during an era of exceptionally low interest rates, most ultra-high-net-worth families don't give away much, if any, of their current wealth during life. Rather, they give away the future *growth* of that existing wealth.

To use a very simple example, instead of making a $1 million gift to my child today, I might lend her that amount at a very low rate of interest. If my child invests the $1 million, she gets to keep the "spread" between her investment return and the interest that she owes me during the term of the loan, which most tax advisors will tell you she should pay at least annually. At the end of the loan term, my child pays me back the $1 million. Arguably, this arrangement isn't a gift because I didn't actually give my child anything; I would argue that it's a bona fide loan. The question is: How much interest do I need to charge to ensure that this arrangement is treated as a true loan, and not as a gift, for gift tax purposes. The answer to that question is complicated, but most professionals believe that I must charge at least the "applicable federal rate" of interest, commonly referred to as the "AFR," which is published monthly by the Treasury Department. The AFR is based upon the term of the loan and current Treasury yields.[28] If my child can borrow money from me at an interest rate of about one percent per annum and invests those borrowed funds at an annual return of, say, six percent, she gets to pocket the difference—no gift tax, no estate tax. At least that's the current thinking of most practitioners.

If I make the loan, not to the child, but instead to a trust for her benefit, the assets in the trust should avoid creditors' claims—including those of her present or future spouse in the event of a divorce—and the trust can be structured so that assets still held in the trust at her death could be made available to her descendants for many generations without imposition of estate or GST tax. And if I were to retain certain nominal powers over the trust—thereby creating an irrevocable ("intentionally defective") grantor trust (IGT)—I would be deemed to own the trust assets for income tax purposes, resulting in some additional benefits:

- First, I—not the trust or its beneficiaries—would be responsible for paying income taxes on returns generated by the trust assets during my lifetime. Paying those taxes year after year on behalf of the trust and its beneficiaries is a very powerful estate planning tool, and the Internal Revenue Service (IRS) has determined that those tax payments are not treated as additional gifts for gift tax purposes.[29]

- Second, interest payments from the trust to me would not be taxable income to me. For income tax purposes, I, as deemed owner of the trust assets, would be treated as paying interest to myself.

- Third, if I am treated as owner of the trust because of my retained powers, then I should be able to sell appreciated assets to the trust on an installment basis—not just lend the trust money—without having to recognize any gain in that sale. In effect, I should be treated as selling assets to myself; there should be no income tax assessed at the time of sale or when the trust pays me interest on the installment note.[30]

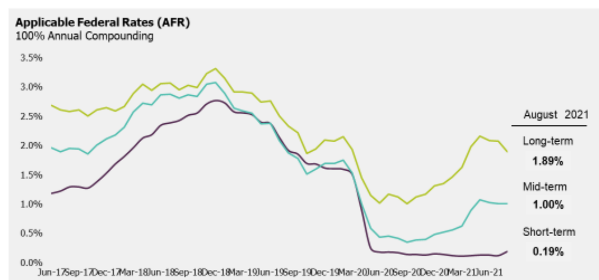
There are many variations on this theme, but here's the key: These types of leveraged strategies (i.e., loans, installment sales, and the like) offer the ability to transfer virtually unlimited amounts of future growth above a "hurdle" rate of interest free of gift and estate tax. But that hurdle rate is based on Treasury yields, and those yields—which are extraordinarily low today—eventually will rise. For many families, the time to act is now. And the action to take is to transfer future growth while the economic cost of doing so is low.[31]

A similar transaction—called a "grantor retained annuity trust" (GRAT)—is taken right out of Section 2702 of the Internal Revenue Code. So long as the family follows the "recipe" in the Treasury regulations under Section 2702, a GRAT should pose no big legal risks. There are practical problems with GRATs—for example, they are somewhat inflexible—but more conservative planners may opt for the certainty of a GRAT over the relative uncertainty of a loan or sale at AFR. Further, a series of very short-term GRATs implemented over a period of years can be highly effective regardless of rising interest rates.[32] Professional advisors should help clients assess whether the potential economic benefits of a particular strategy are worth the perceived risks.

C. To Give . . . or Not to Give?

Display 3 highlights several key features of the current interest-rate environment: (1) rates overall are low by historical standards; (2) short-term rates are nearly zero; and (3) the "spread" between rates remains quite compressed, although mid- and long-term rates have steepened just a bit off all-time lows during the 2020 pandemic.[33] The long-term AFR—1.89 percent for transactions completed in August 2021—is particularly compelling at the moment. In an appropriate case, that rate can be locked in for 15, 20, or even 30 years, whereas the mid-term AFR can be locked in for no more than nine years. Due to rate compression, a loan or installment sale at the long-term AFR may among the best opportunities in estate planning today.

Display 3



Source: www.irs.gov

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SIDEBAR: TREASURY YIELDS AND WEALTH TRANSFER PLANNING

The Treasury yield curve reflects investor expectations for future economic growth over the near-term (represented by the short end of the curve), the intermediate-term (middle of the curve) and the long-term (far end of the curve). The Federal Reserve Board (Fed) has direct control over only the very short end of the yield curve through the federal funds rate, which is 0 to 0.25 percent at the time of this article.

The biggest factor driving yields lower at the long end of the curve is investor expectations for slower global growth. In addition, US interest rates remain high relative to other parts of the world (some global bond yields actually are negative), which has led foreign investors to purchase long-term US Treasury securities—thereby further pushing down yields. Finally, many investors, worried about the possibility of a recession, have fled to the perceived safety of long-term Treasuries, further stoking the decline in yields across the curve.

How do these capital market conditions affect your practice and your clients? Take another look at the information shown on Display 3. You're seeing, month-by-month, changes in the short-, mid-, and long-term AFRs from February 2017 through August 2021. Most attorneys use these rates to determine the minimum amount of interest that must be charged when family members lend money to each other or to trusts established for the benefit of family members.

On Display 3, the bottom (purple) line represents the short-term AFR, which governs intrafamily loans having terms of three years or less; the middle (teal) line represents the mid-term AFR, which governs loans that have terms of greater than three years, but no more than nine years; and the top (green) line represents the long-term AFR, which governs loan terms of greater than nine years. The short-, mid- and long-term AFRs reflect recent yields on comparable US Treasury securities; thus, for example, the mid-term AFR reflects recent yields on securities that mature in three to nine years.

As mentioned, the Treasury Department resets each AFR monthly, but there is a bit of a time lag. For example, the August AFRs are based on daily Treasury yields measured from June 15th through July 14th. Average yields for each such mid-month to mid-month period are compiled and announced by Treasury in a Revenue Ruling that is published around the 16th of each month, effective for transactions completed in the following month.[34]

Why is this important to you and your clients? Ordinarily, the mid-term AFR provides the best combination of a relatively low interest rate combined with the ability to lock that rate in for up to nine years. Today, however, it may be the *long*-term AFR that is most compelling; depending upon a family's circumstances, it may be possible for a patriarch or matriarch to lend money (or sell assets) to an IGT for 15, 20, or even 30 years at a fixed interest rate of 1.89 percent per year for transactions completed in August 2021. If the trustee of that trust can invest for a total return that beats that rate, all that excess growth should (1) avoid the claims of any trust beneficiary's creditor, including a spouse in the event of a divorce; and (2) avoid estate tax at the deaths of the matriarch and patriarch, the children, and potentially many generations beyond.

If you find it difficult to talk clients into making an $11.7 million gift, perhaps you could instead suggest that they take the baby step of *lending* $11.7 million to an IGT for the benefit of their spouse (if appropriate), their children, and their grandchildren for up to 30 years at the long-term AFR. Later, the lender could forgive the debt and complete the gift. If the amount forgiven does not exceed the lender's available lifetime exclusion, no gift tax would be payable.

Without question, the incredibly high (for now) basic exclusion amount and low (for now) interest rates are the two key drivers of modern estate planning. But the exclusion is indexed for inflation, so at least for the moment, it is moving in a direction that is favorable to our clients. That favorable movement may continue until after 2025, when most of TCJA—including the current "double exclusion"—is scheduled to revert to its pre-2018 state.[35] But interest rates ultimately will move in a direction that is *detrimental* to your clients. When your advice depends primarily on two key variables, one of which is moving in your clients' favor and the other inevitably to their detriment, which should you "lock in" first?

Today, all other things being equal,[36] I recommend locking down current interest rates. But that doesn't necessarily mean that our clients can't capture the benefit of the currently generous exclusion as well. Modern estate plans include a tremendous amount of flexibility that allow families and the professionals who advise them to react to future change, including changes in the tax laws. Flexible planning will allow clients to have their cake—lock in the long-term AFR for up to 30 years—and eat it too—forgive the debt and complete the gift, if political developments make that step necessary. If tax laws stay essentially unchanged, planning strategies implemented today have a high probability of success because interest rates are still relatively low. On the other hand, if tax laws change dramatically, the flexible structures that clients put in place now can be adapted later to take advantage of those changes.

IV. Time to Change Course? The Current Legislative Environment

What if Congress were to change the tax laws to the detriment of our clients? Proposals abound, including a reduced gift and estate tax exclusion, and a near-doubling of the long-term capital gain tax rate applicable to high-income taxpayers. Some of these potential changes may apply retroactively.

What changes may be forthcoming? And, more importantly, how should we respond?

A. Tax Law Changes Are Coming … But How Extensive Will They Be?

1. Retroactive Reduction to the Basic Exclusion Amount?

In estate planning circles, there was much concern, especially early in 2021, about whether Congress would reduce the "basic exclusion amount"—the amount that any person may transfer without imposition of gift or estate tax—and make that reduction retroactive to January 1, 2021. Currently, the exclusion is set at an inflation-adjusted $11.7 million, but during the 2020 presidential campaign, the Biden Administration proposed a reduction of the exclusion to as little as $3.5 million at death, with only $1 million of that amount being available during a donor's lifetime. If that change were enacted by Congress and made retroactive to the beginning of 2021, individuals who make large gifts this year may face an unwelcome surprise: A huge tax bill when they file their gift tax return in April 2022, as shown in Display 4.

Display 4

Federal Gift Tax Payable
$11.7 Million Gift

Lifetime exclusion	40% rate	45% rate
$11,700,000	$0	$0
$5,850,000	$2,340,000	$2,632,500
$3,500,000	$3,280,000	$3,690,000
$1,000,000	$4,280,000	$4,815,000

Source: AB

Although most observers now believe that such a retroactive reduction to the exclusion is unlikely in 2021 given the current political and economic climate, the possibility cannot be ruled out completely. But what if Congress were to pass a new law that reduced the exclusion and said nothing about retroactivity? Would gifts prior to the date of enactment be "grandfathered"? Surprisingly, the answer to that question may be "no."

Most of the analysis around retroactivity has focused on a potential reduction to the basic exclusion amount, which is defined in the estate tax provisions of the Internal Revenue Code (Code), specifically, Section 2010(c)(3). But the mechanism through which a gift or estate tax is computed is based not upon the exclusion, per se, but rather upon a tax credit—the "applicable credit amount"—which is defined separately. For gift tax purposes, the operative provision is Code Section 2505(a)(1): "In the case of a citizen or resident of the United States, there shall be allowed as a credit against the [gift] tax imposed … for each calendar year an amount equal to … (1) the applicable credit amount in effect under section 2010(c) which would apply if the donor died as of the end of the calendar year," subject to certain adjustments not applicable to the current discussion.

Read the above-quoted language of Code Section 2505(a)(1) closely: It provides that the credit against gift tax is not the amount of credit under the law that is in effect *at the time of the gift*; rather, it is the credit that would have applied for estate tax purposes had the donor died at "the *end of the calendar year* [emphasis added]." That credit, in turn, would be based upon the basic exclusion amount that is in effect at year's end. The ramifications seem significant: If Congress were to enact a law with an effective date on or before December 31, 2021 that reduced the exclusion from $11.7 million to, say, $3.5 million, Code Section 2505(a)(1) may result in a reduced exclusion for a gift made at any time during 2021, *even if the new law were silent on retroactivity*.

Fortunately, several viable strategies may be available to those clients who want to avoid retroactive application—by whatever mechanism—of a potential reduction to the basic exclusion amount in 2021.

a. Disclaimer Trust

A "disclaimer trust" gives the trustee or other recipient of property nine months to decide whether to disclaim a gift if Congress were to reduce the exclusion retroactively. In the event of adverse legislation, the disclaimed gift presumably would revert to the grantor. But there's a potential conflict

of interest: How could a trustee, who owes a duty of absolute loyalty to the trust beneficiaries, refuse a large gift in trust to the benefit of the grantor, to whom the trustee owes no duties whatsoever? This model seems unlikely to pass muster under basic fiduciary principles. If someone other than a trustee (say, a beneficiary) were to disclaim, would that disclaimer be binding on the other beneficiaries of the trust? And if so, would those other beneficiaries have a cause of action against the disclaimant? Each state has its own disclaimer statute, so there is no consistent answer to these questions.

It may be possible to avoid a conflict by drafting the trust to provide instead for, say, an outright distribution to the grantor's spouse, which if disclaimed by that spouse, would pass or continue in trust for the benefit of that spouse (under an exception to the general rule that the disclaimant cannot be a beneficiary of the recipient trust) and the grantor's descendants. There should be no conflict of interest in this case, as the spouse is disclaiming on her or his own volition, with no underlying fiduciary duties to the beneficiaries of the recipient or continuing trust. In this model, the gift presumably would be disclaimed if Congress did *not* enact adverse legislation. Note that the gift under this model would *not* revert to the grantor.

A qualified disclaimer for federal gift tax purposes must comply with the requirements of Code Section 2518, which include in most cases a written refusal by the disclaimant to accept the property within nine months after the original transfer. Due to this nine-month limit, most estate planning practitioners postponed implementing disclaimer trusts until April 1, 2021 or later, just in case Congress were to enact new tax legislation very late in the year. In addition, the disclaimant cannot have accepted any benefits (e.g., dividends or interest) from the disclaimed property. Finally, the disclaimer must be valid under applicable state law; practitioners must ensure that the disclaimer trust is compliant with local standards.

One final word of caution about disclaimer trusts: Sometimes, disclaimants may surprise you! A donee who swore to abide by the grantor's wishes on April 1st might experience a change of heart nine months later, on New Year's Eve. And the grantor would have no legal recourse. (April Fools!)

b. "QTIP-able" Trust

What if a donor is concerned about whether the designated disclaimant will "do the right thing" when the time comes? One option may be to establish an irrevocable trust that, among other requirements, provides the grantor's spouse with a mandatory income interest for life. By April 202*2*, when the grantor's gift tax return for 2021 is due, the grantor will know whether Congress did or did not retroactively reduce the exclusion. If Congress were to make such a change retroactively, the grantor can opt to make a qualified terminable interest property (QTIP) election, in whole or in part, that is effective as of the date of the gift. In that case, the elected portion should qualify for the unlimited gift tax marital deduction and avoid the imposition of any gift tax. If Congress were to fail to reduce the exclusion in 2021, the grantor could opt *not* to make the QTIP election. In that case, the gift would use up some or all of the grantor's $11.7 million exclusion, but again, no gift tax would be imposed.

Importantly, the grantor in this model retains control over whether to make or not make the QTIP election. In other words, control over whether a gift is taxable is not ceded to a third party, as in the case of a disclaimer trust. Provided that the election does not give the grantor, in effect, a retained power to direct trust property, there should be little risk of a taxable gift or inclusion in the grantor's estate at death. One way to mitigate that risk would be to administer the trust under identical dispositive provisions, whether the election is or is not made.

The caveat? In the case of a QTIP-able trust, the trustee must pay all trust accounting income annually to the beneficiary spouse, which has the potential to send a steady stream of assets back into

the taxable estate during that spouse's lifetime. Those income payments must continue for the beneficiary spouse's life, even if the grantor and the beneficiary spouse were to divorce, and even if the beneficiary spouse were to remarry after the death of the grantor or after a divorce. It may be possible under the applicable state principal and income act to "control the spigot" of income being paid out to the beneficiary spouse each year by wrapping the trust's assets in a limited liability company (LLC) or similar entity, and limiting distributions from that entity, but a QTIP-able trust also must give the beneficiary spouse the power to cause the trustee to make trust property productive of a reasonable amount of income. (Good luck with that under current capital market conditions!) Alternatively, an independent party (for example, a "trust protector") may be granted broad powers to amend the trust, presumably including elimination of mandatory income distributions if not necessary to qualify the trust for the unlimited marital deduction.

c. Defined-Value Clause

A third option may be a gift that is subject to a "defined-value clause." This clause would allow any portion of the gift in excess of the donor's exclusion, "as finally determined for federal gift tax purposes," to pass to charity, the grantor's spouse, a marital deduction trust, or some other recipient without being subject to gift tax.

Such clauses are very common in testamentary estate planning, and frequently are used in connection with sales to IGTs, a popular lifetime wealth transfer strategy. Based upon a line of Tax Court cases that includes *Wandry v. Commissioner*, a carefully drafted defined-value clause should be given effect, provided that no portion of the gift may revert to the donor.[37] But *Wandry* and its progeny are based upon uncertainty regarding the *value* of a transferred asset, not uncertainty about the amount of *credit* that may be available at the time of transfer for federal gift tax purposes. We know that such a formula, based upon the available credit on the date of death, works for federal estate tax purposes. Does it not follow that such a formula, adapted to a lifetime transfer, should be equally effective for federal gift tax purposes?

d. Installment Sale or Loan in Defined-Value Clause

The safest option may be to sell, rather than give, assets to an irrevocable grantor trust in exchange for a promissory note at the short-, mid-, or long-term AFR. The benefit? If the exclusion were to be reduced retroactively, assets sold should not be subject to gift tax. On the other hand, if Congress ultimately fails to reduce the exclusion in 2021, the grantor can forgive the debt and complete the gift. If the debt is forgiven, in whole or in part, this strategy will use some, or all, of the grantor's remaining exclusion, and should mitigate the risk of incurring a gift tax.

This option is particularly appealing in the current environment, when interest rates are near all-time lows. For example, as of this writing in August 2021, the short-term AFR, which applies to debt instruments having a fixed term of three years or less, is just 0.19%. If the principal amount of the debt instrument for a sale or loan in August 2021 were $11.7 million (ignoring, for the moment, whether a modest "seed gift" of a portion of that amount might be used to establish the creditworthiness of the trust), 100 days of interest payable from the trust to the grantor at year-end would be just $6,090. That seems a very small price to pay to avoid a potential gift tax of $4.8 million, as shown in Display 4, if the lifetime exclusion amount were retroactively reduced to $1 million and the gift tax rate were retroactively increased to 45%.

2. Irreconcilable Differences?

On April 5, 2021, the Senate Parliamentarian, Elizabeth MacDonough, stunned many political observers when she opined that a second reconciliation bill could be passed by that chamber in the current fiscal year, which ends September 30th. Reconciliation, which is limited to budget and revenue matters, requires only 50 votes in the Senate, with the concurrence of the Vice President. Without reconciliation, current Senate rules would require 60 affirmative votes—unlikely, given 50 Republican Senators and the current sharp, partisan divide.[38]

Prior to the Parliamentarian's determination, many had believed that the $1.9 trillion American Rescue Plan Act of 2021, signed by President Biden on March 11, 2021, was the Democrats' one and only shot to use the streamlined reconciliation process this fiscal year. Those observers believed that the next chance for significant tax law changes—absent a repeal of the so-called "Byrd Rule"[39]—would be in Fiscal Year 2022, that is, on or after October 1, 2021. The Parliamentarian's surprising announcement seemed to portend that a legislative package including major tax increases could be introduced in the summer, more than three months earlier than expected.

a. Double Trouble?

Earlier in 2021, the Biden Administration announced its near-term legislative agenda, which consisted of two primary components. First, a $2.3 trillion "Build Back Better" infrastructure package would be introduced as soon as practicable, to be paid for primarily by an increase in the corporate income tax rate, from 21% to 28%. Other economic and social initiatives would follow in a second bill, to be paid for in part by a near-doubling of the long-term capital gain tax rate on individuals having adjusted gross income of $1 million or more.[40]

But there was a problem: Any tax increases would be highly unlikely to draw any Republican support; thus, reconciliation would almost certainly require the concurrence of all 50 Democratic and Independent Senators. Several moderates, most notably Senator Joe Manchin (D-WV), do not support a 28% corporate income tax rate; Senator Manchin and others favor a maximum 25% rate.

The impact on anticipated revenue would be significant. According to the Tax Policy Center, an increase in the corporate income tax rate from 21% to 28% would generate an additional $740 billion of revenue over the next 10 years.[41] If the corporate rate were set instead at 25%, the revenue shortfall would exceed $300 billion. Would that shortfall be made up through estate and gift tax reform? Not likely. Senator Bernie Sanders' proposed "For the 99.5 Percent Act"—which would reduce the basic exclusion amount to $3.5 million, effectively eliminate grantor retained annuity trusts (GRATs) as a viable strategy, and (most importantly) gut planning with grantor trusts—won't raise meaningful revenue.[42] No, if the corporate income tax rate increase were insufficient, the Democrats would look to raise revenue largely from *income* taxes, not transfer taxes.

Which income tax proposals are substantial enough to raise $300 billion of lost revenue? We don't have to look very far: After the corporate income tax rate increase, a near-doubling of the long-term capital gain tax rate on the wealthiest Americans appears next on the Biden Administration's agenda. According to the Tax Policy Center, such a rate increase would raise $370 billion of revenue over the next 10 years[43]—more than enough to cover the shortfall of a 25%, rather than 28%, corporate income tax.

When would the capital gain tax rate increase become effective? If legislation including that increase had been passed and signed in the third quarter, it's unlikely that it would have been effective as of a future date, like January 1, 2022. A prospective effective date could create a market sell-off across

multiple asset classes that might send an already fragile economy into a tailspin.[44] Instead, the effective date of any capital gain tax rate increase may be the date on which the legislation is enacted, or perhaps the date on which the bill is introduced. Alternatively, any rate increase could be made retroactive to January 1, 2021—which seems unfair, but would not be unprecedented. For example, tax rate increases in the Omnibus Budget Reconciliation Act (OBRA) of 1993, signed by President Clinton on August 10th of that year, were effective retroactively for all of 1993. In the Biden Administration's "Green Book," the President suggested that the proposed capital gain tax rate increase be effective as of April 28, 2021, the date on which he announced his legislative agenda to a joint session of Congress.

b. The Parliamentarian Giveth … And Taketh Away

Just as legal and financial advisors were beginning to wrap their heads around the implications of the Senate Parliamentarian's April 5th announcement, she dropped another bombshell: In written advice issued on May 28, 2021, the Parliamentarian clarified that while the Democrats could use the reconciliation process again in Fiscal Year 2021, Republican cooperation would be required. Specifically, as a practical matter, any further reconciliation bills going to the floor of the Senate in Fiscal Year 2021 must first be approved by the Senate Budget Committee, which consists of 11 Democrats and 11 Republicans. Ordinarily, an 11-11 split would be enough to get a bill to the Senate floor. But the Republicans could block that result by unanimously boycotting any vote on the bill. Such a boycott would deny a quorum in the Budget Committee and stall the bill indefinitely. No one, it seems, saw this coming.

In light of the Parliamentarian's findings, what are the Democrats' options? As of this writing, the Democrats appear content to postpone any legislation that includes significant tax increases until the fourth quarter of 2021.[45] Although there currently is bipartisan support for a scaled-down version of President Biden's "American Jobs Plan" infrastructure and transportation package, it appears that his more ambitious "American Families Plan" will have to proceed without a single Republican vote. The latter bill may include tax increases and certain expenditures that some moderate Democrats are likely to oppose, whereas a scaled-back version of that bill may face opposition from progressives within the Party. With razor-thin margins in both the House and Senate, the Democrats may struggle to craft a package that is acceptable to majorities in both houses of Congress. The overall price tag, currently estimated at $3.5 trillion, is viewed by some as a political liability.

c. Potential Tax Law Changes and Retroactivity: Where Do We Stand?

i. Transfer Taxes

As of this writing, there is no serious proposal that would change current gift or estate tax laws, including today's $11.7 million basic exclusion amount, in any material way prior to January 1, 2022. The Administration and moderate Democrats may be content to allow the currently doubled basic exclusion amount to "sunset" in 2026, without further transfer tax reforms. The base case seems to be that there will be no changes to the transfer tax laws included in the pending American Families Plan legislation. Bernstein estimates that under current laws, the inflation-indexed basic exclusion amount should increase to approximately $13.1 million by 2025, then "sunset" back to about $6.7 million in 2026.

ii. Long-Term Capital Gain Tax Rate

President Biden has proposed a near-doubling (from 20 percent to 39.6 percent) of the long-term capital gain tax rate, effective retroactively to April 28, 2021, for taxpayers with adjusted gross

income greater than $1 million.[46] Making such a tax increase effective in the middle of a year, so that there would be two rates—one before the effective date, and another on and after that date—may be difficult to administer. A rate increase that is retroactive back to January 1, 2021 or a "blended" rate that is effective for the entire year may make more sense. At least one moderate Democrat, Senator Joe Manchin (D-WV), has expressed reservations about the proposed 39.6 percent rate; he suggests a compromise at 28 percent. It's unclear whether the moderates will support retroactive application of any rate increase. But one thing is clear: The Parliamentarian's guidance, which may postpone enactment of any tax increases until October or later, makes retroactive application of a rate increase less likely to gain support from moderates who are concerned about fairness—or at least the perception of fairness. The base case seems to be a maximum 28 percent long-term capital gain tax rate, effective as of the date of introduction, or perhaps date of enactment, of the American Families Plan legislation.

iii. Basis Step-Up and Deemed Recognition of Gain

Proposed legislation in the House and a draft Senate bill would (1) effectively eliminate the so-called "step-up" in the income tax basis of most assets at death and (2) impose a deemed recognition of taxable gain upon the occurrence of certain events, including death.[47] At present, it is unclear whether such a tax on gain would be in addition to any estate tax that otherwise may be payable.[48] While technically income tax provisions, these changes, if enacted, would materially change wealth transfer planning. For example, tax-sensitive investors may choose to invest through institutionally priced private placement life insurance products, which pay a "stepped-up" cash death benefit upon the death of the insured.

The proposals to eliminate the basis step-up and impose a deemed recognition of gain at death do not appear to have wide political support: At least one moderate Democrat, Senator Kyrsten Sinema (D-AZ), voted against a proposed budget amendment that incorporated these proposals. A previous attempt to eliminate the basis step-up in 1976 was repealed before it ever became effective; however, the digitization of records over the last 45 years could make administration of these new proposals possible in a way that was unimaginable in 1976. For example, the IRS has mandated cost basis reporting on financial accounts for the last decade. Practical considerations aside, these proposals would raise significant revenue, and in the current environment, potential revenue raisers cannot be completely dismissed. For the moment, the base case seems to be that these provisions lack the political support necessary to be enacted as part of the American Families Plan legislation.

iv. Wealth Tax

At least three Democrats, Senators Kyrsten Sinema (D-AZ), Maggie Hassan (D-NH), and Jeanne Shaheen (D-NH), voted against a proposed budget amendment that would have imposed a "wealth tax" on the assets of the richest 0.1% of Americans. This political opposition, coupled with potential constitutional challenges, make it highly unlikely that a wealth tax will be enacted as part of the American Families Plan legislation.

B. Given All This Uncertainty, How Should We Advise Our Clients?

Although the legislative landscape is unclear, it's unlikely that future income and transfer tax laws will be much more favorable than they are right now; therefore, taxpayers should continue to evaluate and, when appropriate, implement tax-saving strategies.

- With changes to the gift and estate tax laws seeming less and less likely to become effective in 2021, but possible as early as 2022, individuals who seek to transfer wealth to future

generations should consider taking advantage of the current $11.7 million basic exclusion amount, as well as leveraged transfers, like GRATs and installment sales to IGTs, that harness near-record-low interest rates.

- A substantial, potentially retroactive increase to the long-term capital gain tax rate, as President Biden has proposed, would materially impact taxpayers who are considering sales of businesses, real estate, appreciated stocks, and other capital assets. Strategies that are more effective when capital gain tax rates are high include: Qualified small business stock (QSBS), qualified opportunity funds (QOFs), pretransaction charitable remainder trusts (CRTs), and posttransaction charitable lead annuity trusts (CLATs), among others. Showing sellers how to hedge out some of the risk of a retroactive rate increase may provide the confidence they need to proceed with the sale, despite the current legislative uncertainty. Even if the rate increase were not made retroactive, time may be of the essence: A higher long-term capital gain tax rate may become effective as of the date of introduction, or perhaps date of enactment, of the American Families Plan legislation.

- Going forward, systematic portfolio loss-harvesting and investments “wrapped” in low-cost private placement life insurance may substantially increase investors’ after-tax returns, especially in a potentially higher rate environment.

- Installment sales to unfunded IGTs may need to be reconsidered. Most practitioners believe that an IGT must be “seeded” with a gift well in advance of any sale of assets to the trust. If the target asset being given or sold to the IGT is a closely held business interest or real estate, an increase in the capital gain tax rate may substantially increase the income tax exposure of the grantor, meaning that the amount transferred to the IGT will need to be scaled back to ensure that the grantor can meet her or his income tax liabilities. Timing of a gift-and-sale transaction to an IGT has become a much more important factor due to recent legislative developments. It may be advisable to include a discretionary tax reimbursement clause, sanctioned in Revenue Ruling 2004-64, in the IGT.

- Diversification of concentrated positions in a single stock is often a prudent investment strategy, but many investors hesitate because of the tax cost of diversification. With the long-term capital gain tax rate on the brink of increasing substantially for many, procrastinators should reconsider tax-efficient diversification options, including an exchange fund. After the effective date of any rate increase, a charitable remainder trust may be an attractive diversification strategy.

V. Flexible Strategies for an Uncertain World

A. Spousal Lifetime Access Trust (SLAT)

Consider the following scenario: Entrepreneurial couple, very successful, each age 50, with young children. Assume that their marriage is secure and that they function as a team—not true of every marriage, but assume that it’s true in this case. They’ve done some basic estate planning—a will and revocable trust that for the most part take effect at death—but that’s it. The couple (let’s call them Steve and Eydie) is concerned about estate tax, but they’re more concerned about spoiling their children by giving them a bunch of money at an early age—or perhaps that money they give their children today will be taken from them some day by the person they eventually marry.

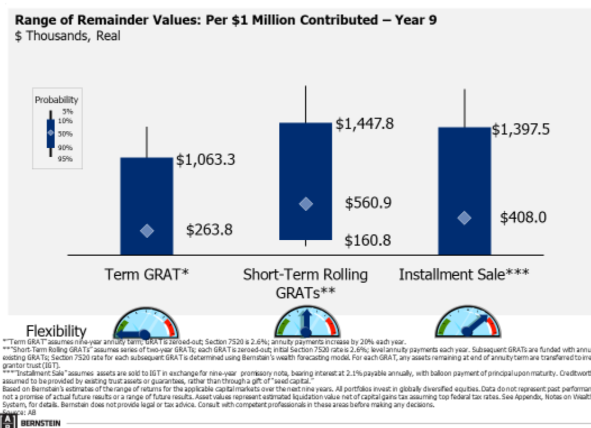
After analyzing the couple's finances, we determine that they can afford to give away some future growth and we encourage them to do so, but they are hesitant because they don't want their kids to get too much too soon. I typically respond to that concern as follows:

> "What if you could put money in a place that would never be subject to estate tax, and never be subject to the claims of a creditor or a spouse in the event of a divorce? And what if you didn't have to give the money to your children to make that happen? Would you be interested?"
>
> "Sure," they invariably respond.
>
> "Great, here is what I have in mind: Steve, what if you were to create a trust, and sell investment assets to it in exchange for a promissory note that imposes a very low rate of interest—about one or two percent per year, depending on the note term, if you did this today? Your wife, Eydie, may be the trustee or a co-trustee of that trust. Eydie, not your children, will be the primary beneficiary of that trust. Eydie will be given what's called a power of appointment over the trust: If and when the children are ready to become the primary beneficiaries, Eydie can exercise her power of appointment and make that happen. Until then, she is the main beneficiary. If the two of you ever were to need money from the trust during Eydie's lifetime, the trustee could make a discretionary distribution to Eydie. Steve, if you were to decide—even the day after you set up this trust—that all this was a big mistake and you want your money back, the trustee in its discretion could prepay the debt to you without penalty. If Congress were to threaten a reduction of the $11.7 million basic exclusion amount, Steve could forgive the debt and complete the gift to the trust with no bad tax consequence. And if the tax laws don't change, you can keep the debt in place for many years, locking in today's low interest rate. While the trust is in place, Steve will be responsible for paying the income taxes generated by the trust investments—which the two of you would have had to pay anyway if you didn't do this. The trust will be irrevocable, so no future creditors can reach assets that are held in the trust. And if you wire this correctly, all the future growth of the trust assets above the required rate of interest will avoid gift and estate tax. If you like, you can set this up so that future generations can benefit from this arrangement. How does all that sound?"
>
> "Great," they say. "What's this trust called?"
>
> I respond, "Well, like everything else in estate planning, there is an acronym. It's called a 'SLAT,' which stands for 'spousal lifetime access trust.' And there's nothing magical about this idea. All you would be doing is accelerating the creation and funding of a trust that would have been created anyway under your existing estate plan upon the death of the first of you to die. By doing this now, a bunch of future growth that otherwise would have accumulated on your personal balance sheet and been subject to estate tax at death will instead be shuttled over to an alternate balance sheet—the SLAT—that will not be subject to estate tax."
>
> Steve might then ask, "Can Eydie also set up a SLAT for me?"
>
> The answer is, "Yes, so long as the two trusts are not 'substantially identical'—an estate planning attorney might use the term 'reciprocal.' The technical literature is full of guidance on how to create two SLATs that are not reciprocal."[49]
>
> Eydie asks, "How could this plan fail?"

I respond, "There are two primary concerns. First, the two of you could get divorced. If that were to happen, it's likely that Steve's indirect access to trust property would be cut off and your kids probably would become the primary beneficiaries of that trust. You can discuss other possibilities with your own attorney, but divorce would be a concern. Second, the beneficiary spouse—Eydie, with respect to the SLAT that Steve creates—could die, at which point Steve's indirect access to the assets of that trust would be cut off. But that problem can be mitigated by using term insurance on Eydie's life to protect Steve's interests. Again, your attorney can go through all the possibilities with you."

In my experience, clients are very receptive to this approach in appropriate cases. I like this strategy because it takes advantage of currently low interest rates; if the estate tax were permanently repealed, assets could be brought back onto the marital balance sheet; if the estate tax were to continue, future growth inside the trust should avoid that tax; if Congress were to threaten a reduction of the basic exclusion amount, or if TCJA were to sunset after 2025, the debt could be forgiven in whole or in part beforehand, thereby completing the gift as to the forgiven portion; and this structure provides creditor protection benefits that are difficult to achieve using other methods. To me, it's a win-win-win-win, with very few downsides, and a great example of how to take advantage of legislative uncertainty in an economy where interest rates are unusually low.

For economic context, Display 5 illustrates three methods that may be used to fund a SLAT like the one just described—using only future growth, not current wealth. The illustrated alternative funding methods are: (1) a nine-year term GRAT, in the left-hand column; (2) a series of two-year rolling GRATs implemented over a period of nine years, in the middle column; and (3) an installment sale to an IGT in exchange for a nine-year installment note at the mid-term AFR, in the right-hand column. Display 5 shows how much wealth Bernstein projects would be transferred to the SLAT, in inflation-adjusted dollars, after nine years for each $1 million of marketable stocks allocated to the strategy in question. As you can see, the short-term rolling GRAT strategy tends to produce the best economic result.



But in a period of heightened uncertainty about future tax laws, is a GRAT—or series of GRATs—the best strategy? My concern about GRATs is their relative inflexibility as compared to an

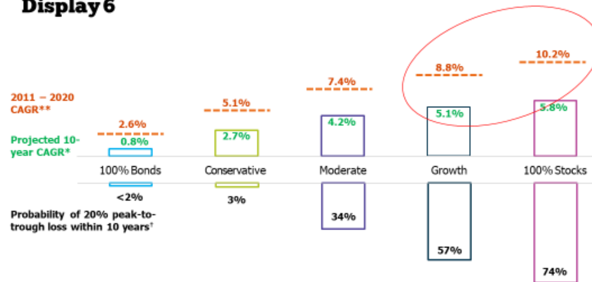
installment sale. Once a GRAT is set in motion, can you just terminate it if circumstances change? The Treasury regulations forbid any prepayment—in tax speak, "commutation"—of the annuity interest.[50] I interpret that to mean, "Once a GRAT is set in motion, it must stay in motion until the end of the annuity term or it runs out of money in due course." If that interpretation is correct, is the additional economic efficiency of a rolling GRAT strategy worth the loss of flexibility? In an uncertain world, I tend to prefer the flexibility of an installment sale over the certainty of GRATs, all other things being equal.[51] I like to call an installment sale a "triple-threat" strategy: The parties can undo it, or convert the debt into a gift, or "let it ride"—each as circumstances warrant. There are drawbacks, but in the current environment, I lean toward the flexibility of an installment sale—sometimes "overfunding" the strategy to get the family to the same place economically as a more efficient, but less flexible, strategy like rolling GRATs.[52]

Larger gifts that soak up some or all of a donor's exclusion, but do not result in the payment of gift tax, are somewhat controversial. I am firmly in the camp of those who espouse the wisdom of preserving, rather than using, one's applicable exclusion amount during life.[53] Preserving the exclusion allows a decedent's estate to capture a substantial step-up in income tax basis at death without paying estate tax—a concept that some (hilariously) describe as "free-basing." I completely agree, but am surprised and occasionally frustrated by how many estate planning professionals resist this concept, often arguing that it's "too complicated" for their clients to understand. All other things being equal, I would rather see clients use a GRAT, installment sale, or other leveraged strategy than make a gift that uses up a substantial portion or all of their exclusion. For example, an aggressively funded GRAT can get the family to the same economic result as a simple gift in many cases—without using a penny of the transferor's exclusion.[54] Better, perhaps, to hold onto one's exclusion, unless and until it becomes apparent that a reduction to the exclusion is imminent.

B. Private Placement Life Insurance (PPLI): The *Opposite* of Life Insurance?

Perhaps the most daunting challenge facing investors today is that both stocks and bonds are unlikely to enjoy the kinds of returns in the future that we have seen over the past 30 years. As can be seen in Display 6, the compound annual growth rate for diversified municipal bonds over the next ten years is likely to be well below one percent, with global stocks expected to struggle to compound at six percent. In each case, these expected returns are well short of historical norms. It's possible to achieve 10 percent or greater returns in certain segments of the fixed income and stock markets, but often, these "alternative" strategies produce nothing but current income that is taxable at the highest marginal rates. Lower expected returns, the possible reemergence of inflation, and stiff income tax consequences on some of the most potentially productive investments—this perfect storm of circumstances creates challenges that investors haven't seen in quite a while.

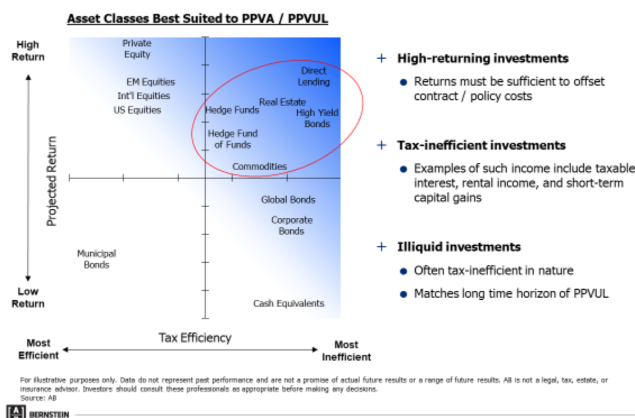
Display 6



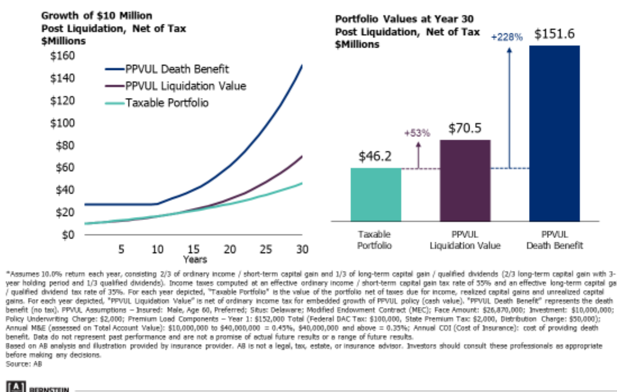
Past performance is not necessarily indicative of future results. There is no guarantee that any estimates or forecasts will be realized.
*Based on Bernstein's estimates of the range of returns for the applicable capital markets over the next 10 years as of June 30, 2020
Projected pretax 10-year compound annual growth rate. Conservative is 30% stocks/70% bonds; moderate is 60% stocks/40% bonds; growth is 80% stocks/20% bonds. Stocks are represented by the following allocation for a 100% stock allocation: 16.2% US value, 16.2% US growth, 12.0% US diversified, 6.0% US small-/mid-cap, 21.2% developed foreign markets, 8.1% emerging markets, 9.6% US Low Vol Equity, 10.7% high-risk international. Equity geography weights may shift in proportion to total return-seeking allocation. Bonds are represented by diversified intermediate-term municipal bonds in the proportions noted. Additional details regarding allocation available upon request.
**Reflects compound growth rates from January 1, 2011, through December 31, 2020. Stocks represented by 60% Russell 3000 Index and 40% MSCI ACWI ex US. Bonds represented by Lipper Short/Int Blended Muni Fund Avg.
†Probability of a 20% peak-to-trough decline in pretax, pre-cash-flow cumulative returns within the next 10 years. Because the Wealth Forecasting System uses annual capital-market returns, the probability of peak-to-trough losses measured on a more frequent basis (such as daily or monthly) may be understated. The probabilities depicted above include an upward adjustment intended to account for the incidence of peak-to-trough losses that do not last an exact number of years.
See Assumptions and Notes on Bernstein Wealth Forecasting System in Appendix for further details.
Sources: Lipper, MSCI, Russell, S&P, and AB

One potential solution to this dilemma is to concentrate high-returning, tax-inefficient investments in one's tax-deferred qualified retirement plan or individual retirement account (IRA). But many investors don't have adequate funds set aside in those kinds of accounts to take full advantage of their tax-deferred nature. For those investors, we have found it useful to package high-returning, tax-inefficient investments in a portfolio that can be accessed through a low-cost, "private placement" life insurance (PPLI) policy. When properly structured, growth of assets held in a PPLI policy will not be subject to current income taxation. If held until the insured's death, the policy's death benefit is almost always income-tax-free to the beneficiary.[55] And if policy premiums are paid gradually (generally, in at least three roughly equal installments) rather than immediately, cash value may be accessed during the insured's lifetime without incurring income tax.

For example, assume that an investor is interested in acquiring certain alternative investments that have the potential to produce a 10 percent pre-tax annual return, but all of that return is taxable currently as a combination of short-term capital gain and ordinary interest income. Display 7 provides examples of the types of high-returning, tax-inefficient alternative investment strategies that are likely to benefit most from PPLI. Short-term capital gain and ordinary income is taxed by the federal government at rates currently as high as 37 percent; if categorized as "net investment income," there may be an additional 3.8 percent federal surtax[56]; and the investor's tax domicile may impose an additional income tax at the state and local levels. In certain jurisdictions, the combined tax rate on this type of income can exceed 50 percent. If the investor doesn't have sufficient capacity in her qualified plan or IRA, a 10 percent pre-tax annual return in these alternative investment strategies may produce an after-tax return of less than five percent—arguably not worth the trouble.



But what if instead we could invest in those same alternative strategies through PPLI? In that case, if the policy is properly structured, no current income tax would be paid, but the investment portfolio would bear annual insurance expenses. In most cases, those expenses should be less than one percent per year—0.70 percent annual expenses[57] over the long-term are typical for a well-designed policy on a reasonably healthy insured. If that expense estimate is accurate, then in this example, the investor's five percent after-tax annual return outside of PPLI becomes a 9.3 percent after-expense return in the PPLI policy. As shown in Display 8, over the course of a single generation, PPLI can produce after-tax portfolio values and death benefits that are two to four times higher than had comparable investments been made through a taxable account.



Why not just use "normal" life insurance to accomplish the same thing? Retail variable life insurance products generally provide access only to registered funds—the kinds of traditional stock and bond portfolios that are expected to struggle over the next 10 years. In contrast, PPLI can offer unregistered funds, potentially including alternative investment strategies that may be capable of double-digit pre-tax annual returns. Moreover, expenses associated with traditional life insurance products generally are much higher than those associated with PPLI. This combination of higher expected returns and lower expenses makes PPLI particularly appealing, especially in the current challenging investment environment. Because PPLI is treated as an unregistered "private placement" investment for securities

law purposes, only those who are qualified purchasers and accredited investors within the meaning of those laws may purchase a PPLI policy.

Importantly, PPLI is real life insurance; income tax deferral benefits are forfeited if the policy does not comply with various insurance regulations and tax requirements. But PPLI serves a very different purpose than traditional life insurance. In the traditional model, the objective is to pay the lowest possible premiums in exchange for the greatest possible death benefit, because a traditional policy is a hedge against early death. *PPLI is the opposite*: The twin objectives in PPLI are to (1) invest the *most* premium dollars as quickly as possible and (2) acquire the *least* additional incremental death benefit that the tax laws will allow. Any at point in time, the spread between the cash value of the investment portfolio and the policy's death benefit is referred to as the "net amount at risk" (NAR), which is the portion of the death benefit for which the insurance company is responsible upon the death of the insured. The greater the NAR, the more the insurance carrier will charge against the cash value of the policy to compensate itself for the risk that the insured may die during the next year. As the insured ages, the cost of insurance per unit of risk increases substantially. By reducing NAR to the lowest possible level, PPLI policy expenses are kept at an absolute minimum. Low expenses reduce the drag on performance of the PPLI's investment portfolio, thereby giving that portfolio the greatest opportunity to grow in value free of income taxes. Unlike traditional life insurance, PPLI is a bet on *longevity*, not a hedge against mortality. A truly diversified insurance plan for wealthy clients should include both traditional and PPLI elements.

Most investment managers who operate in the PPLI space have taken one of two approaches to portfolio construction. Those who have developed diversified portfolios rely largely or entirely on traditional stock and bond funds. Those strategies are expected to produce relatively low returns and usually are quite tax-efficient (at least under current law), and therefore are not best suited for PPLI. Other managers have created "stand-alone" alternative portfolios, consisting of securities and other financial instruments designed to support a single investment thesis. Although those portfolios tend to be both high-returning and tax-inefficient, it's risky to base a life insurance policy—presumably a long-term strategy—on a single investment theme. To avoid this concentration risk, PPLI policyholders can cobble together a portfolio of multiple stand-alone alternative strategies, but few have the expertise or wherewithal to do so in a way that is likely to maximize return and minimize risk over the long haul. We propose a third approach: A diversified portfolio of largely (ideally, about 80 percent) alternative investment services that are uncorrelated to one another and to the broader markets, are likely to produce high returns, and are mostly tax-inefficient. The balance of the portfolio (about 20 percent) consists of traditional stocks and bonds, to provide liquidity and promote portfolio diversity. This portfolio should be actively managed, so that policyholders will not need to cobble together a collection of stand-alone funds and rebalance that collection on their own as market conditions change in the future. Based upon our study, such a portfolio, if carefully constructed and managed, should outperform global stocks by two percent or more per year.

Who should be the insured under a PPLI policy? Short answer: The insured should be that individual or those individuals who allow the purchaser to get best pricing on PPLI. When working with a family, every family member is "in play" in determining who will be the insured. Numerous factors must be considered, including the insurance carrier's financial underwriting process, which places limits on how much NAR may be placed on a particular individual. Age and health of the prospective insureds are also key variables. The result of this complex underwriting process is often counterintuitive. Consider, for example, a family that would like to invest $10 million in PPLI. We considered two potential insureds: A 65-year-old father and his 35-year-old daughter, both healthy and quite wealthy by life insurance industry standards. Because the daughter is so young, $10 million of premium would result in a death benefit of about $70 million if she were the insured; the NAR (that is, the spread between the death benefit and the initial account value) at inception is $60 million.

In contrast, $10 million of premium would result in a death benefit of about $32 million if the father were the insured; the NAR at inception is $22 million. Although the cost per unit of risk is likely to be substantially lower on daughter's life, (1) the daughter may not have enough assets of her own to support $60 million of risk to the insurance carrier; and (2) costs of insurance expressed in absolute dollars (rather than per unit of risk) may actually be lower on father than on daughter because his initial NAR ($22 million) is so much lower than hers ($60 million).

Arguably, the best prospective PPLI purchaser is a multi-generational trust. This tentative conclusion is driven largely by the current challenging investment environment. In the past, the trustee of a multigenerational trust typically has been advised to invest trust assets in a traditional, stock-tilted portfolio; 80 percent stocks and 20 percent bonds was a common recommendation. But based upon our 10-year return projections, such an 80/20 portfolio is likely to compound at a rate of just about five percent per year, pre-tax, over that period, compared to an historical annual return of more than nine percent for that asset mix. Going forward, inflation is likely to consume about 2.5 percent of annual return, and income taxes another one percent or so, leaving perhaps 1.5 percent, on average, available for distribution. If distributions to current beneficiaries are expected to be greater than three percent of portfolio value, the result is likely to be a *negative* real, after-tax return for assets retained in trust for later distribution to remainder beneficiaries. That result could be a disaster, especially if the trustee is subject to the duty of impartiality, which requires a trustee to treat all beneficiaries—current and remainder—fairly and equitably. Modifying the traditional asset allocation advice to (1) include alternatives and (2) "wrap" the tax-inefficient portion of those alternatives in PPLI has the potential to reverse the outcome described in the foregoing example.

If a multi-generational trust is the purchaser, should the PPLI policy be structured as a modified endowment contract (MEC) or a non-MEC? It depends, but if the policy is being acquired primarily to preserve real, after-tax growth for the remainder beneficiaries, then arguably, PPLI purchased by a multi-generational trust should be structured as a MEC. A MEC has two big advantages—and one potential disadvantage—relative to a non-MEC. A MEC may be thought of as a life insurance policy that is funded with a single, immediate premium—or nearly so. By stuffing premium into the policy, more dollars may be invested in tax-inefficient alternatives more quickly than if premiums were paid gradually. In addition, policy expenses associated with a MEC often are lower than those associated with a non-MEC. But there is a significant downside to a MEC: If the policyholder (the trustee, in this example) wants to access policy cash value during the lifetime of the insured, withdrawals or loans from a MEC are treated first as coming from growth, taxable at the highest marginal (that is, ordinary) income tax rates. Only after all the growth has been distributed are subsequent withdrawals from a MEC treated as a tax-free return of premiums. If withdrawals during the life of the insured are contemplated, then a non-MEC—where premiums usually are paid in at least three roughly equal annual installments—may be advisable. In a non-MEC, withdrawals are treated first as a tax-free return of premium. Only after all premiums have been withdrawn are additional withdrawals treated as ordinary income, but even that tax result can be defeated by borrowing, rather than withdrawing, additional sums from the policy. And the annual cost to the policyholder of borrowing against PPLI cash value is incredibly cheap; the interest-rate spread[58] on a policy loan is currently about one-third of one percent, and is guaranteed never to exceed 0.50 to 0.70 percent per year by most insurance carriers. But a non-MEC cuts into investment return, due to both opportunity cost (because dollars are invested in alternatives more gradually) and higher policy expenses. If investment in PPLI is intended primarily for the remainder beneficiaries, why is the trustee concerned about policy withdrawals during the life of the insured? A robust discussion around this question among the trustee and his team of advisors is essential.

What if, instead of a multigenerational trust, our client or prospective client is a 50-year-old entrepreneur who has just sold her business? Assume that she has never been able to set aside much

in a qualified plan or IRA, but she is very interested in having future returns on her portfolio avoid unnecessary drag due to income taxes. Further assume that she would like to start taking withdrawals to help finance her retirement starting at age 65. PPLI structured as a non-MEC may be a perfect solution for this entrepreneur. If she were to fund a PPLI policy in three annual premium installments of $1 million each and the policy's diversified alternative investment portfolio were able to achieve compound annual growth of 10 percent before policy expenses, a healthy entrepreneur may have cash value of more than $10.5 million available for retirement income starting at age 65. If the policy were a properly structured non-MEC, the entrepreneur's first $3 million of withdrawals would be treated as tax-free return of premium, and she could borrow the remaining $7.5 million at an interest-rate spread guaranteed never to exceed 0.50 to 0.70%, depending upon the insurance carrier she selects.

PPLI would be especially powerful if investors could simply pick and choose policy investments at will from the universe of options that are available in the capital markets. Unfortunately, such customization has the potential to destroy tax deferral—the most important benefit of PPLI. Court cases and IRS rulings have resulted in the development of a series of tax rules that are loosely described as "investor control" restrictions. In a nutshell, these rules require that the insurance carrier, not the policyholder, make all decisions related to the availability and composition of investment portfolios in PPLI. The net effect of these restrictions is that the policyholder generally must choose from a "menu" of portfolio options that various investment managers make available on insurance carriers' platforms. If a PPLI policyholder can influence the composition of the portfolios in which he can invest, that policyholder runs the risk of losing deferral of current taxation of portfolio income.[59] Bottom line: Customization is possible, but potentially dangerous. The safer strategy is to choose from among the portfolios that insurance carriers make available for investment through PPLI. We expect those offerings to expand in the future, and policyholders will be free to reallocate among those future offerings without incurring current income tax or policy fees.

In addition to these investor control restrictions, the underlying investments in every variable life insurance policy must be adequately diversified within the meaning of Code Section 817(h).[60] Most policyholders invest in PPLI through one or more so-called "insurance-dedicated funds" (IDFs), but it's also possible for an investment manager to assemble a diversified collection of non-IDFs as a separately managed account (SMA). There are three primary reasons why an investor might prefer an SMA to an IDF: (1) better pricing (no third-party administration fee); (2) separate account investments are not disrupted by the liquidity needs of other policyholders; and (3) reporting—although limited to "read-only" access due to investor control restrictions—more closely reflects what most investors are used to seeing for their personal accounts. Disadvantages of SMAs include (1) often higher minimum required premiums; (2) very few insurance carriers currently allow SMAs; and (3) some legal advisors believe—we think erroneously—that IDFs are "safer" than SMAs.[61]

When you look at your first PPLI illustration, one thing probably will jump out at you: The policy's death benefit is illustrated to drop precipitously after the first few years. The reason for that is simple: Dropping the death benefit as quickly as allowed under the tax laws reduces the policy's NAR, which reduces the costs of insurance that the carrier charges to compensate itself for the risk that the insured may die during the next year, which reduces the expense drag on the portfolio. The primary objective of PPLI is not to hedge against an early death; traditional life insurance products generally should be used if that is the primary concern. In PPLI, the goal is to take advantage of the longest possible run of tax-free cash value growth with the lowest expense drag possible on portfolio returns. If a PPLI illustration does *not* show a substantial decrease in the death benefit during the early years of the policy, that is a mistake—which may be attributable to an insurance advisor who does not understand the true power and purpose of PPLI.[62]

Another counterintuitive aspect of PPLI is that the insurance carrier's credit rating may not matter

much. In PPLI and other "variable" life insurance products, the death benefit consists of two components: the policy's cash value and the NAR. Cash value is segregated in a separate account for the exclusive benefit of policyholders; those assets are not subject to the claims of the insurance carrier's general creditors, so the carrier's credit rating has no impact on the cash value component of the death benefit. The insurance carrier is responsible only for the NAR, which in PPLI is intentionally kept extremely low. Further, the carrier may choose to retain only a small portion of that risk; the balance usually is ceded to the global reinsurance market, which consists of multiple, highly capitalized global insurance superpowers. At least one major PPLI carrier retains only $175,000 of risk per policy; most PPLI carriers retain $10 million of risk. If the insurance carrier were to become insolvent, the potential loss to the policyholder generally would be limited to "retention"—that is, the amount of risk that the insurance carrier retains on any policy. The lower the carrier's retention, the less credit rating matters.

C. The Reemergence of the Charitable Remainder Trust (CRT)?

A colleague called me after a recent Zoom meeting and asked, "Did I hear you say that a charitable remainder trust is not really a charitable device?" I replied, "No, you heard me say that a charitable remainder trust is a really crappy charitable device."

Why? Because the Treasury Department's actuarial tables tend to grossly underestimate the life expectancies of healthy, wealthy people—the very people who are most likely to establish a charitable remainder trust (CRT). That's because the government's actuarial tables are based upon outdated, gender-neutral data for the general population of the United States, not just the wealthiest Americans. As a result, the regulatory computation of the parties' relative interests in the trust tends to understate the value of the grantor's retained interest, and thus to overstate value of charity's remainder interest.[63] So while it's true that, under the government's actuarial tables, the hypothetical present value of charity's remainder interest at inception of a CRT must be at least 10 percent of the total value contributed to the trust, in reality, the present value of charity's interest is more likely to be one-third to one-half of that amount for a trust in which the grantor retains a lifetime interest, simply because the grantor is very likely to outlive the government's actuarial assumption.

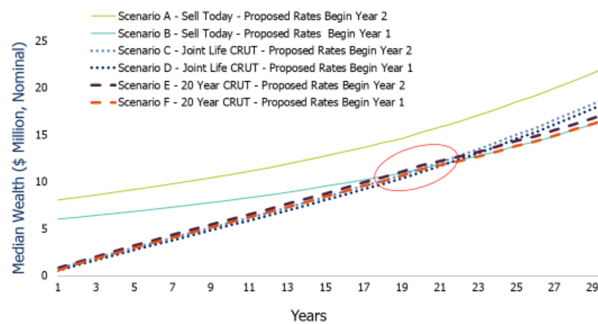
How can we harness this tidbit of information to help our clients, especially those who want to reduce income taxes, but have only modest philanthropic intent? Think of a CRT as a way for such a client to avoid immediate recognition of gain upon sale of a low-basis asset and instead spread that gain recognition over one's lifetime—or over the joint lifetimes of the grantor and the grantor's spouse. The longer the grantor's *actual* (as opposed to *actuarial*) life expectancy, the more likely that paying tax on the deferred gain in dribs and drabs over one's lifetime will produce greater personal wealth than paying tax on the entire gain upfront and investing the after-tax proceeds in a taxable portfolio.[64]

Consider the following example: Erin plans to sell closely held stock in her business, a C corporation, to a third-party purchaser later this year in an all-cash transaction. Her shares meet the requirements for "qualified small business stock" (QSBS) under Code Section 1202; thus, the first $10 million of gain that Erin realizes in the transaction will be excluded from her gross income. In addition, Erin could transfer some of her excess shares, which may not quality for the $10 million QSBS exclusion, to a lifetime charitable remainder unitrust (CRUT).[65] If the remainder beneficiary of the CRUT is a publicly supported charity, and not a private foundation, Erin should get an income tax charitable deduction of a fraction (based upon the present value of charity's remainder interest) of the stock's fair market value at the time of its contribution.[66] Further, any capital gain incurred upon sale of those shares would be recognized over Erin's lifetime, rather than in the current year. For this deferral strategy to work, Erin must transfer shares in her company to the CRUT well in advance of the transaction.[67] The CRUT would hold those shares until the company is sold. At that time, the trustee

of the CRUT would invest the cash proceeds and “book” the capital gain; as a charitable entity, a CRT pays no income tax. After the sale and during Erin’s lifetime, the CRUT would pay Erin a specified percentage of the trust assets each year. Each such payment typically would “carry out” some of the previously deferred capital gain tax liability to Erin on a Schedule K-1. In many cases, the cumulative economic benefit of deferring capital gain tax over one’s lifetime greatly exceeds the incidental benefit payable to charity upon the grantor’s death. Thus, a CRUT often works better as a personal wealth strategy than as a charitable strategy.

How might the currently proposed tax law changes affect our enthusiasm for CRTs? Short answer: Considerably. First and foremost, it’s not generally advisable to defer a tax that’s payable now, at a low rate, into a future where gains may be taxed at higher rates. But that begs the question: Is the long-term capital gain tax rate actually low right now? We don’t really know. If Congress were to increase the long-term capital gain tax rate retroactively—in other words, if Congress already has raised that rate, but just hasn’t had the courtesy to tell us about it yet— a CRT could be a *spectacular* strategy today. Display 9 shows that if the current long-term capital gain tax rate is 20 percent and the future rate is 37 percent---with, in each case, the 3.8 percent surtax on passive “net investment income” added in for good measure—a CRT has almost no chance of maximizing the grantor’s personal wealth. But if the current rate is already 37 percent, a CRT’s after-tax distributions may produce more personal wealth than an outright sale within about 20 years. Timing of any rate increase may not be everything, but in this case, it may be critically important.

Display 9



Source: AB

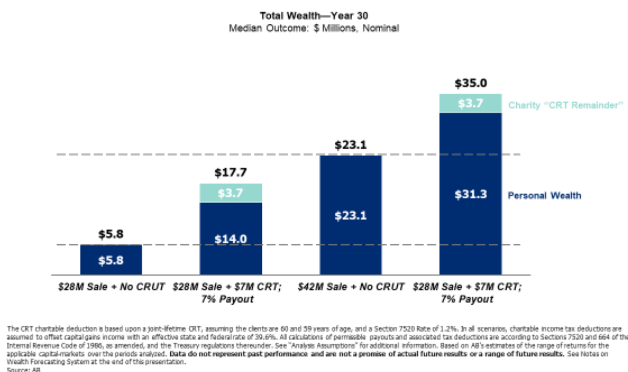
And if the long-term capital gain tax rate were increased, what will the new rate be? President Biden has proposed 37 in 2021, and 39.6 percent thereafter; Senator Joe Manchin (D-WV) suggests 28 percent—and in either case, the 3.8 surtax on net investment income also may apply. If Congress were to decide not to make the rate change retroactive, deferring gain recognition from a 20 percent current rate into a 28 percent future rate would be much less dangerous than deferring into a 37 or 39.6 percent future rate. So in addition to the timing of any increase, the rate that Congress ultimately settles upon matters. Other factors that must be considered include (1) the grantor’s age and health, (2) any potential future relocation by the grantor to a lower- or higher-tax-rate state, and (3) whether gain deferral, combined with the grantor’s other sources of taxable income, will push the grantor above the $1 million (indexed) adjusted gross income threshold for the new, higher rate in future years.

In addition, President Biden has proposed a “deemed recognition of gain rule,” under which a contribution of appreciated assets to virtually any trust, including a CRT, would be treated for federal

income tax purposes as a taxable sale or exchange. In the case of a CRT, that deemed recognition of gain would not apply to the portion of the contribution that is allocable to charity's remainder interest. This proposal, if enacted, would deliver a devastating blow to CRTs as a deferral strategy. As of this writing, the proposal, if enacted, would become effective on January 1, 2022, but it may face considerable opposition from moderate Democrats in Congress.

Assuming that the long-term capital gain tax rate increases—or already has increased—to 37 or 39.6 percent, what effect might a pretransaction CRUT have on the future personal wealth of the seller? Consider the following (admittedly extreme) example: Hi and Lois are married residents of California; each is 60 years old. They own 14 percent of the outstanding shares of a closely held C corporation; their adjusted basis in the stock is zero. They expect to receive between $28 million and $42 million in cash in a stock purchase transaction later this year. Beginning in 2022, their adjusted gross income will be below the $1 million (indexed) threshold for the higher long-term capital gain tax rate, if enacted. In addition, in 2023, they plan to relocate to Montana, where the state income tax rate is about one-half that of California. They have been advised to transfer one-quarter (1/4) of their shares to a CRUT well in advance of the anticipated transaction.[68] Thus, if the transaction closes at a cumulative $28 million sale price for their 14 percent interest, one-quarter of the cash proceeds, $7 million, will be payable to the CRUT; at a $42 million sale price, $10.5 million will go to the CRUT. After considering several alternatives, Hi and Lois settled on a seven percent annual payout from the CRUT for their joint lifetimes.

Display 10 summarizes, based upon Bernstein's wealth forecast, the anticipated personal wealth enhancement (net of lifestyle spending) of transferring one-quarter of the couple's shares to the CRUT prior to the transaction. At a $28 million cumulative price for their shares, the couple's personal wealth in 30 years should be enhanced by a whopping 141 percent ($14.0 million vs. $5.8 million), primarily because the CRUT will allow them to defer one-quarter of the taxable gain over a 30-year period at a substantially lower blended federal and state long-term capital gain tax rate. At a transaction price of $42 million, Bernstein projects a 30-year benefit of a more modest 35 percent ($31.2 million vs. $23.1 million). Further, in either case, charity should receive $3.7 million—roughly $1.7 million in today's dollars, after accounting for expected inflation—assuming that the second death occurs in 30 years.



The facts and assumptions in the foregoing case are extraordinarily favorable; each case must be evaluated on its merits—especially given the uncertain status of *present* and future tax laws. Funding

a CRT with illiquid assets, like closely held business interests, commercial real estate, or works of art poses unique, but not insurmountable, challenges.[69] With the right set of facts, a CRT can be an important estate planning strategy for clients who are selling appreciated assets and seeking to defer substantial gains.

VI. Conclusion

Recent changes in transfer tax laws under ATRA and TCJA have transformed estate planning. For many clients, income tax and nontax issues will drive estate planning strategies; estate taxes will play little or no role.

But in the current era of legislative uncertainty, how do we decide which families need to engage in lifetime wealth transfer planning and which do not? In a doubtful case, I first analyze whether the family can afford to transfer wealth without adversely impacting lifestyle. Those who can afford it should do so—if only as a hedge against future legislative changes.

As to method, I prefer leveraged strategies like loans, installment sales, or GRATs over current use of the client's exclusion in most cases. Ideally, I recommend a loan or installment sale at the AFR, reserving an "option" to forgive the debt and complete the gift it appears that Congress, through action or inaction, may reduce the basic exclusion amount in the future.

In today's world, a flexible approach is essential. We never know precisely how tax laws will change in the future, and due to the potential for retroactivity, we don't know for certain what the tax laws are today. Estate and financial planners should use flexible strategies that can adapt to changed circumstances—and exited, if necessary, in the event of adverse legislative changes.

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[1] Pub. L. 112-240, 126 Stat. 2313 (2013), effective after Dec. 31, 2013.

[2] Pub. L. 115-87 (2017), https://www.congress.gov/115/bills/hr1/BILLS-115hr1enr.pdf. The Senate Parliamentarian determined that the short title "Tax Cuts and Jobs Act" violates the so-called Byrd rule, so that title was dropped from the final version of the legislation. The author is not subject to the Byrd rule, so at least for now, I choose to identify Public Law 115-87 as "TCJA."

[3] *See* Section 2001(c) of the Internal Revenue Code of 1986, as amended [hereinafter, "Code" or "I.R.C."]. Although lower marginal rates still exist, the extremely high basic exclusion amount effectively results in the imposition of federal estate tax at a "flat" 40% rate.

[4] For individuals, trusts, and estates, the highest marginal federal brackets are 37 percent for ordinary income and 20 percent for long-term capital gain income. *See* I.R.C. § 1(a)-(e), (h). For passive "net investment income" in excess of specified thresholds, an additional 3.8% federal surtax applies. *See* I.R.C. § 1411(a)(1).

[5] *See* https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2019, I.R.S. News Release 2018-222 (Nov. 15, 2018).

[6] *See, e.g.,* Steve R. Akers, "Heckerling Musings 2018 and Current Developments," at 28 (Apr. 2018), available at www.bessemer.com/advisor.

[7] *See generally* I.R.C. § 1014(b). Although this article consistently refers to the basis adjustment accorded to property that is "acquired from or [having] passed from the decedent" as a "step-up" in basis, such basis is stepped up *or down* to its fair market value on the date of the decedent's death, or in the case of a proper election under Code Section 2032, on the date which is six months after the date of the decedent's death. *See* I.R.C. §§ 1014(a)(1)-(2), 2032(a)(2). Alternate valuation, if elected, must reduce both the value of the decedent's gross estate and the amount of estate tax imposed; otherwise, basis generally equals date-of-death value. *See* I.R.C. § 2032(c).

[8] As a general matter, property that is (1) acquired from a decedent prior to the decedent's death and (2) not includable in the decedent's gross estate for federal estate tax purposes does not qualify for a basis step-up under Code Section 1014(b). For a contrarian view, see Jonathan G. Blattmachr, Mitchell M. Gans & Hugh H. Jacobson, "Income Tax Effects of Termination of Grantor Status by Reason of the Grantor's Death," 97 J. Tax'n 149 (Sep. 2002).

[9] *See* supra note 4.
[10] I.R.C. § 164(b)(5).
[11] With respect to certain real estate placed in service prior to 1986 for which accelerated depreciation was allowable, those deductions are recaptured at *ordinary* rates under Code Section 1245. Thereafter, straight-line depreciation generally is required; those deductions are recaptured at the 25 percent (rather than 20 precent) rate on "unrecaptured section 1250 gain." *See* I.R.C. § 11(h)(1)(E). For an excellent discussion of lifetime wealth transfer applications for unique asset classes, see Paul S. Lee, "Venn Diagrams: The Intersection of Estate & Income Tax (Planning in the ATRA-Math)," 48th Annual Heckerling Institute on Estate Planning (Jan. 2014), at 24-39.
[12] The amount for which portability may be elected is called the "deceased spousal unused exclusion" (DSUE) amount, and equals the lesser of (a) the *basic* exclusion amount; and (b) the deceased spouse's *applicable* exclusion amount, reduced by the sum of that spouse's taxable estate and any adjusted taxable gifts. *See* I.R.C. § 2010(c)(4). In turn, the surviving spouse's applicable exclusion amount equals the sum of the basic exclusion amount and any DSUE amount that spouse may have acquired. *See* I.R.C. § 2010(c)(2). Talk about an algebraic labyrinth! In a somewhat feeble attempt at simplification, for purposes of this article, I choose to refer to the DSUE amount as the deceased spouse's "remaining exclusion."
[13] *See* I.R.C. § 2010(c)(4)-(6).
[14] For a concise summary of the rules contrasting required minimum distributions to spouses as compared to others, see https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-required-minimum-distributions-rmds.
[15] I.R.C. § 2010(c)(5)(A).
[16] *See* supra note 12.
[17] In addition, states generally do not recognize portability for state death tax purposes, with two current exceptions: Maryland (retroactive to 2011) and Hawaii. *See* Md. Code, Tax-Gen. § 7-309(b)(9); Haw. Rev. Stat. tit. 14, § 236E-3.
[18] Other recent developments have dramatically changed certain aspects of estate planning, most notably, the Supreme Court's decision in United States v. Windsor, 570 U.S. 744 (2013), which establishes the validity of same-sex marriages for all federal tax purposes. ATRA and TCJA are noteworthy in that their far-reaching provisions affect virtually *everyone* who engages in estate planning.
[19] *See* http://www.indexarb.com/dividendYieldSortedsp.html (for current S&P 500 dividend yield); https://finance.yahoo.com/quote/%5ETNX?ltr=1 (for current 10-year U.S. Treasury bond yield). As of August 12, 2021, the dividend yield for S&P 500 stocks was 1.67% and the 10-year Treasury yield was 1.37%. Thus, a $1 million portfolio consisting of 60% S&P 500 stocks and 40% 10-year Treasuries currently yields $15,500 (= $1,000,000 x {[60% x 1.67%] + [40% x 1.37%]}.
[20] Many investment firms and certified financial planners (CFPs) use wealth forecasting software to assess potential future outcomes of the capital markets. In this article, all mathematical planning scenarios were tested using Bernstein's proprietary Wealth Forecasting System™ (WFS). This software simulates 10,000 plausible future paths of returns for each asset class and produces a probability distribution of outcomes. Market forecasts are based on the building blocks of returns, such as inflation, yields, yield spreads, stock earnings, and price multiples. The WFS incorporates the linkages that exist among the returns of various asset classes and takes into account prevailing market conditions at the time of the analysis. In addition, a reasonable degree of randomness and unpredictability is factored in. The WFS generates 10,000 new market paths for each analysis; market paths are not "recycled." Importantly, the WFS does not draw randomly from a set of historical returns. History informs, but does not control, the results reflected in the model. An assessment of a client's core capital requirement is based primarily upon three variables: (1) how much risk the investor is willing to take; (2) how old they are; and (3) how much they want to spend each year, which we typically index for inflation. Armed with this information, the WFS can arrive at a core capital amount that will support the investor for the rest of her life in 9,000 or 9,500 of 10,000 capital market trials. Is a 90 or 95 percent confidence level good enough? The short answer is that it tends to be sufficient when there is an opportunity to re-analyze the client's situation periodically, which provides an ability to recommend adjustments to asset allocation and spending when necessary. One problem with solving for a higher level of confidence—say 98 percent—is that the recommended core capital amount at that level is probably going to be much larger than it ultimately needs to be. One wants to be conservative, but also realistic in terms of how much more the investor needs to save in order to ensure a secure financial future. Striking the proper balance between conservatism and realism is indeed a big challenge.

[21] Society of Actuaries RP-2000 Mortality Tables, https://www.soa.org/experience-studies/2000-2004/research-rp-2000-mortality-tables/.

[22] According to research published by the M Financial Group of insurance advisors, a healthy, wealthy 65-year-old man has a one-in-four chance of living to age 98; a woman of the same age, health, and wealth has a one-in-four chance of living to age 101. Across a wide swath of ages and both genders, wealthy individuals tend to outlive their less "fortune"-ate counterparts by six to eight years. The correlation between wealth and longevity in the United States is astounding, but in our experience, it is generally—and unfortunately—ignored by most financial and estate planning professionals. As a result, many wealthy people either forego life insurance altogether—assuming, erroneously in our opinion, that it's a bad investment—or purchase products that are designed for the "retail" market and are not priced to reflect the longevity advantage of the wealthy. When assessing life insurance proposals for the wealthy, professional advisors should ask whether the products being considered are priced for the high net worth market, and if so, how that pricing is reflected in the policy expenses or other features. *See generally* Harold D. Skipper & Wayne Tonning, The Advisor's Guide to Life Insurance (M Financial Group 2013).

[23] *See* I.R.C. § 1015(a). There is an exception for gifts of depreciated property; in such a case, the basis for purposes of determining a *loss* is its fair market value on the date of the gift. *Id.*

[24] *See* supra note 7.

[25] If mom were to retain the asset and die tomorrow, her estate would be subject to estate tax based upon the asset's date-of-death fair market value (assuming no alternate valuation under Code Section 2032), but her estate could apply exclusion to offset the amount of estate tax owed. If she instead transferred the asset to her daughter today and died tomorrow, she would use exclusion equal to today's date-of-gift value, but her gross estate would be reduced by the fair market value of the asset tomorrow. The only difference in the estate tax consequence would be based upon the appreciation or depreciation in the value of the asset during the 24-hour period between her gift today and her death tomorrow. In almost every case, the economic detriment to the donee of a loss of the step-up in basis that would result from a lifetime transfer would greatly exceed any estate tax savings realized from the potential growth in the asset over a one-day period. For a highly appreciated asset, it may take *years*, not days, to overcome that hurdle. Note, however, that if mom lived in a jurisdiction that imposed a state death tax, but not a state gift tax, a lifetime wealth transfer may reduce the overall transfer tax profoundly; careful analysis is required in such a case.

[26] A step-up in basis may be irrelevant if (1) the donee intends to hold the donated asset until death; and (2) the asset is not expected to generate depletion, depreciation, or amortization deductions during the donee's lifetime. But a client's "I-will-never-sell" assertions should be taken with several large doses of salt.

[27] For a detailed discussion of life insurance planning in a post-ATRA, post-TCJA world, see Thomas J. Pauloski & Andrew T. Bishop, "Triangulation: Integrating Life Insurance into the Estate and Investment Plans" (2019 revision) (copy available from the author upon request).

[28] For transactions completed in September 2021, the "short-term" AFR for a fixed-term loan up to three years in length is 0.17% per annum; the "mid-term" AFR for a loan up to nine years in length is 0.86%; and the "long-term" AFR for a loan of more than nine years in length is 1.73%, an all-time low. *See* Rev. Rul. 2021-16, https://www.irs.gov/pub/irs-drop/rr-21-16.pdf.

[29] *See* Rev. Rul. 2004-64, https://www.irs.gov/irb/2004-27_IRB%20-%20RR-2004-64.

[30] *See* Rev. Rul. 85-13, 1985-1 C.B. 184, 1985-7 I.R.B. 28 (Feb. 19, 1985).

[31] A sale or loan to my child or to a trust for her benefit at the AFR should not be particularly controversial, so long as my child and I treat the arrangement as an arms' length business transaction, the transaction is properly documented, and all interest and principal gets paid in accordance with the business terms. But the IRS is not happy about certain aspects of these kinds of transactions. For example, if I were to wrap $1 million of assets that I want to sell to my child in an entity, like a limited partnership or limited liability company, and attempt to sell the ownership interest in that entity to my child for say $700,000, rather than $1 million, because of restrictions on my child's ability to withdraw the $1 million from the entity, the IRS would likely have a problem with that. Or if I were to die owning a promissory note under which I am owed $1 million, but my executor took the position on my estate tax return that the note is worth only $500,000 because my child is not creditworthy, the IRS would probably make a fuss. The Treasury Department withdrew proposed regulations under Section 2704 of the Internal Revenue that would have curbed certain valuation discount practices. *See* REG-163113-02, 81 Fed. Reg. 51413 (Aug. 4, 2016), *withdrawn*, 82 Fed. Reg. 48779 (Oct. 20, 2017). A future administration may consider reopening regulatory projects regarding valuation discounts.

[32] *See* "The Path from GRAT to Great: Efficient Wealth Transfer with Grantor Retained Annuity Trusts," https://www.bernstein.com/Bernstein/EN_US/Research/Publications/Instrumentation/PathFromGRATtoGreat.pdf.
[33] Investment professionals refer to this compression as a "flattening" of the Treasury yield curve.
[34] As a service to professional advisors, Bernstein publishes an early estimate of next month's AFRs (as well as the "Section 7520 rate") a week or two in advance of the monthly Revenue Ruling; if you don't currently subscribe, please contact the author, who would be happy to add your name to our distribution list so you have an early indication of what next month's AFRs are likely to be. Due to the combination of Treasury's time lag in implementing yield changes and Bernstein's early-bird projections, you can plan ahead and decide whether to rush a transaction through to completion this month or hold off until more favorable rates kick in next month.
[35] In fact, due to TCJA's adoption of "chained CPI," the basic exclusion amount in 2026 (after "sunset") is likely to be *lower* than it would have been had TCJA never been enacted.
[36] There are exceptions to every rule. Lifetime use of the exclusion might be useful to (1) forgive existing debt that might raise questions on a decedent's balance sheet, (2) reduce a trust's debt-to-equity ratio, (3) equalize prior gifts among children and grandchildren, (4) avoid state estate tax, (5) roll out of a pre-September 18, 2003 "split-dollar" life insurance plan, (6) facilitate the creation of multiple trusts to expand a family's ability to maximize state and local tax (SALT) deductions, or (7) cover the imputed gift associated with a private annuity under "minimum funding" regulations. *See* I.R.C. § 164(b)(5) (SALT deduction limitation); Treas. Reg. §§ 1.7872-15(n)(2) ("material modification" to split-dollar plan treated as taxable gift), 25.7520-3(b)(2)(v) (failure of regulatory exhaustion test may result in imputed gift of portion of assets initially transferred in exchange for private annuity).
[37] *See* Wandry v. Commissioner, T.C. Memo 2012-88; Treas. Reg. § 25.2511-1(e) ("if the donor's retained interest is not susceptible of measurement on the basis of generally accepted valuation principles, the gift tax is applicable to the entire value of the property subject to the gift").
[38] *See* "U.S. Senate Parliamentarian Says Democrats Can Use Reconciliation to Pass More Bills," https://www.reuters.com/article/us-usa-budget-schumer/u-s-senate-parliamentarian-says-democrats-can-use-reconciliation-to-pass-more-bills-idUSKBN2BS23F (Apr. 5, 2021).
[39] *See* U.S. House Comm. on Rules Majority Office, "Summary of the Byrd Rule," https://archives-democrats-rules.house.gov/archives/byrd_rule.htm (undated).
[40] *See* Jeff Stein and Tony Romm, "White House Eyes Tax Increases on Companies and the Wealthy to Fund Infrastructure, Setting Up Clash with GOP," https://www.washingtonpost.com/us-policy/2021/03/23/biden-taxes-rich-companies/ (Mar. 23, 2021). "The part of the legislation focused on other domestic priorities, by contrast, is expected to be funded by taxes on rich people and investors. Those measures, according to officials, include increasing the highest income tax rate from 37[%]to 39.6[%]; significantly increasing taxes on wealthy investors; and limiting deductions that rich taxpayers can claim annually, among other measures."
[41] *See* Thornton Matheson, "Biden's Corporate Rate Increase Would Raise Revenue Efficiently and Progressively," https://www.taxpolicycenter.org/taxvox/bidens-corporate-rate-increase-would-raise-revenue-efficiently-and-progressively (Dec. 15, 2020). A doubling, from 10.5% to 21%, of the rate of tax that U.S. multinationals pay on foreign earnings also is on the table.
[42] *See* "For the 99.5% Act: Summary of Sen. Bernie Sanders' Legislation to Tax the Fortunes of the Top 0.5%," https://www.sanders.senate.gov/wp-content/uploads/For-the-99.5-Summary.pdf (undated). Senator Sanders' "table of billionaires" includes Jeff Bezos, Warren Buffett, Steven Spielberg, Oprah Winfrey, Michael Jordan, and Jay-Z, among others. His analysis assumes that the entire wealth of all these billionaires will be subject to estate tax at death, making no allowance for, e.g., charitable contributions or other estate planning.
[43] *See* Gordon B. Mermin, et al, "An Updated Analysis of Former Vice President Biden's Tax Proposals," https://www.taxpolicycenter.org/sites/default/files/publication/160472/an_updated_analysis_of_former_vice_president_bidens_tax_proposals_1.pdf (Oct. 15, 2020).
[44] *See* Gene Steuerle, "Some Notes on 'Retroactive' Income Tax Increases," http://www.taxhistory.org/www/econpers.nsf/Web/128D83352B83E89E852566DB0063DAB0?OpenDocument (Sep. 6, 1993).
[45] The Senate Parliamentarian's opinions are merely advisory; as President of the Senate, Kamala Harris could ignore that advice. The Parliamentarian serves at the pleasure of the Senate majority leader; Chuck Schumer could fire her. Neither of these actions is without precedent in recent times. But President Biden and Senate moderates expressed significant reservations about such drastic actions in the wake of the Parliamentarian's opinion that a $15 per hour federal minimum wage was unrelated to the budget, and therefore could not be part of the American Rescue Plan Act. Ms. MacDonough is nonpartisan; she has been Senate Parliamentarian since

2012; she was appointed by Harry Reid, a Senate Democrat. Given the totality of circumstances, it seems unlikely that her May 28th opinion will be ignored or that she will be fired. Under current Senate rules, the votes of 60 Senators can end debate on any pending measure, a process called "cloture." The Democrats could modify the current cloture requirements, in whole or in part, using one of several different procedural mechanisms, but it's unclear whether they have the political will to do so. There may be political advantage to leaving the current rules in place: If a bill fails because it didn't receive 60 votes, it's easy to blame the Republicans; but if it fails because it's so controversial that it didn't gather even 50 Democratic votes, the blame lies squarely with the Democrats. Changing the Senate filibuster rules requires you to know the outcome before the game is played, and that's tough to do when you can't afford to lose even a single vote.

[46] Under President Biden's proposal, long-term capital gains and qualified dividends of taxpayers with adjusted gross income of more than $1 million would be taxed at ordinary income tax rates, with 37 percent generally being the highest rate (40.8% including the net investment income tax). A separate proposal would increase the top ordinary individual income tax rate to 39.6% (43.4% including the net investment income tax) beginning January 1, 2022. *See* Treasury Dept., "General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals," (May 2021), https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals [hereinafter Green Book].

[47] *See, e.g.*, H.R. 2286, 117th Cong. (2021) (most property transferred by gift during life or at death is treated as if sold for fair market value, with up to $1 million, indexed for inflation, of net capital gain excluded from gross income for transfers at death) [hereinafter H.R. 2286].

[48] President Biden's plan, outlined in the Green Book, supra note 46, provides that any tax imposed on gains realized at death would be deductible on the decedent's federal estate tax return, Form 706. H.R. 2286, supra note 47, does not so provide.

[49] *See* United States v. Estate of Grace 395 U.S. 316 (1969); *see also* Mark Merric, "Can Husband Create Irrevocable Trust for Benefit of His Wife and Vice Versa?" http://www.naepc.org/journal/issue07r.pdf.

[50] *See* Treas. Reg. § 25.2702-3(d)(5).

[51] A rolling GRAT strategy tends to produce a superior economic result when the assets being transferred are volatile, publicly traded securities that have a readily ascertainable value. For less volatile or hard-to-value assets, an installment sale may be economically superior *and* offer greater flexibility.

[52] Those who can afford to do so should take maximum advantage of the few "crumbs" that the transfer tax laws allow. For example, a donor can give up to $15,000 per donee, per year, without using any applicable exclusion or paying any gift tax; these transfers are commonly referred to as "annual exclusion gifts." *See* I.R.C. § 2503(b). In addition, a donor may pay unlimited medical and tuition expenses directly to the health care provider on behalf of any one or more individuals, also without using any applicable exclusion or paying any gift tax. *See* I.R.C. § 2503(e). These relatively small gifts, implemented relentlessly over a long period, can produce meaningful estate tax savings.

[53] *See, e.g.*, Paul S. Lee, Cassady V. Brewer, & Ellen Harrison, "Venn Diagrams I: Meet Me at the Intersection of Estate and Income Tax," 48A Univ. of Miami Heckerling Inst. on Est. Plan. (Jan. 2014), at 2-1 to 2-13.

[54] TCJA temporarily doubled the basic exclusion amount, to $11.18 million, effective January 1, 2018. Increased for inflation, the basic exclusion amount now stands at $11.7 million. See text accompanying supra note 1. Using one's exclusion during life could be an effective strategy for transferors who believe that the recent increase in the exclusion amount will either sunset after 2025 or be reduced in future legislation. Each family's case would have to be evaluated on its own merits under this "use-it-or-lose-it" construct. We saw a similar phenomenon at the end of 2012, when most believed that the applicable exclusion amount would revert from $5.12 million back to $1 million in 2013. That didn't happen, but mountains of wealth were transferred by gift based upon the belief that it would.

[55] *See generally* I.R.C. § 101. Certain "transfers for value" during the lifetime of the insured may cause the imposition of income tax on the excess of the policy's death benefit over the sum of consideration and subsequent premiums paid by the transferee. *See* I.R.C. § 101(a)(2).

[56] *See* supra note 4.

[57] PPLI annual expenses usually include a mortality and expense (M&E) charge of 0.35 to 0.55% per year, plus costs of insurance (COIs) that usually amount to 0.15 to 0.40% (expressed as a percentage of policy cash value) per year for a healthy insured, and a nominal policy administration fee. In addition, a third-party administration charge may apply to an investment that is structured as an insurance-dedicated fund (IDF). *See* infra notes 60 and 61.

[58] This "interest-rate spread" is the difference between (1) the interest rate charged by the carrier on the policy loan and (2) the rate credited to the policyholder on the collateral component of the policy's cash value.

[59] For an egregious example of this type of policyholder behavior, see Webber v. Commissioner, 144 T.C. 324 (2015).
[60] *See* Treas. Reg. § 1.817-5. Specifically, an insurance carrier's segregated asset account cannot invest more than 55% of the total account value in any one investment, more than 70% in any two investments, more than 80% in any three investments, or more than 90% in any four investments. *See* Treas. Reg. § 1.817-5(b)(1)(i). Generally, a carrier's segregated asset accounts are tested for compliance with these diversification requirements on the last day of each calendar quarter. *See* Treas. Reg. § 1.817-5(c)(1). For purposes of the percentage limitations, an "investment" generally means any interest in a partnership, trust, or other entity, provided that in the case of a so-called "insurance-dedicated fund" or IDF (i.e., a fund that is available for investment exclusively through the purchase of a variable life insurance policy or annuity contract), diversification is tested by "looking through" the entity to the underlying investments of the fund. *See* Treas. Reg. § 1.817-5(f).
[61] SMAs are not expressly mentioned in Section 1.817-5 of the Treasury Regulations; requirements for IDFs are expressly provided in Section 1.817-5(f). But those requirements are not exclusive, as evidenced by the fact that the first word in subsection (f) is "If"—as in: "If" the following requirements are met, then the fund is an IDF and qualifies for "look-through" treatment. By implication, then, an SMA does not qualify for look-through treatment, but it doesn't follow that SMAs are disallowed. The negative inference that some insurance carriers and professional advisors draw from this regulatory provision is puzzling.
[62] Many insurance advisors do not want to place PPLI cases, as their compensation in those products tends to be much lower than in traditional life insurance products. In addition, properly structured PPLI has many counterintuitive features; an insurance advisor who has little or no PPLI experience may not understand how correctly to illustrate the policy, which may create delays—or worse.
[63] These seemingly favorable circumstances can backfire in the rare case when there is an intervening noncharitable interest for someone other than the grantor's surviving spouse (e.g., to grantor for life, *then to child for life*, then to charity). In such a case, the government's tables tend to overvalue the *intervening* interest because it will begin sooner under the government's tables than is likely in reality, resulting in a higher gift tax value than the interest actually is worth. I generally try to talk clients and practitioners out of creating intervening noncharitable interests for anyone other than the grantor's surviving spouse, if any. Other strategies more efficiently transfer wealth to younger generations.
[64] Although the government's actuarial assumptions also produce the collateral benefit of a larger income tax charitable deduction, that deduction is not a primary driver of a CRT's success. Of the three factors that maximize personal wealth derived from a CRT—upfront income tax deduction, longevity of the grantor, and tax deferral—the deduction is, by far, the least important.
[65] It's not entirely clear to me that a CRT cannot qualify for a separate QSBS election, but for purposes of the current discussion, let's assume that it does not.
[66] If the remainder beneficiary were, or could be, a private foundation, her deduction would be limited to a fraction of her adjusted basis in, rather than the fair market value of, her company stock.
[67] To qualify for the income tax charitable deduction, the transferors' interest in their closely held stock cannot have "ripened from an interest in a viable corporation into a fixed right to receive cash." *See* Ferguson v. Comm'r, 174 F.3d 997 (9th Cir. 1999).
[68] *Id.*
[69] *See* Paul S. Lee & Stephen S. Schilling, "CRTs Are Back (in Four Delicious Flavors), Tr. & Est. (Oct. 2014), at 31.