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Caveats for Last-Minute Givers

By Laura Saunders – December 15 2012

Estate planners say prospective clients who want to give away millions of dollars before Jan. 1 are bombarding them with last-minute requests for tax advice.

Many people waited until after the election to decide to give, says Diana Zeydel, an estate lawyer at Greenberg Traurig in Miami. "Now they're concerned the window of opportunity is closing, and we're working till 11:30 or midnight every day, including weekends," she says.

Stacy Singer, an estate expert at Northern Trust NTRS -0.82%in Chicago, says the firm has reviewed 500 new trusts since October, more than double the typical number. "Most appraisers stopped taking new business in early November," she says. For 2012 the gift- and estate-tax exemption is $5.12 million per individual and twice that per married couple, with the excess taxed at a top rate of 35%—the most generous terms in decades. On Jan. 1, 2013, the exemption is slated to drop to $1 million and the top nominal rate to rise to 55%.

Both the rate and the exemption are part of the current "fiscal cliff" negotiations, however, so the ultimate outcome is uncertain. President Barack Obama favors a $3.5 million exemption per individual, of which only $1 million can be used for gifts made during a person's lifetime, and a 45% top rate. Many Republicans—and some Democrats—would like to abolish the tax altogether.

Meanwhile, a group of wealthy people including Warren Buffett and Bill Gates Sr., the father of the Microsoft MSFT -0.76%founder, recently called for a $2 million-perindividual exemption and a 45% top rate. Some longtime tax experts, based on gut instincts, think the current regime will remain in force.

Since this year's exemption applies both to gifts made during one's lifetime and to assets in an estate after death, people who use up their allowance this year won't get one when they die, unless the law becomes more generous. In many cases such a move makes sense, because it removes future appreciation from the estate.

What happens to this year's gifts if the exemption shrinks or the rate rises? Many experts think they won't be affected. "I don't think Congress's intention was to set up a 'gotcha,'" Ms. Zeydel says. At worst—if there is a "clawback" of some assets—she and others think it won't include any appreciation after the date of the gift.

A bigger worry is the difficulty of cramming complex decisions into little time. Givers face a wrenching emotional decision—handing over control of a large sum—and planners must work with myriad legal complexities to do quickly what usually takes at least three to six months.

Last-minute planning is especially difficult when much of a couple's wealth is possessed by one spouse—say, in a large individual retirement account.

Expert opinion is divided about one last-minute technique some planners advocate called a "donative promise gift." Givers using it make an irrevocable promise to deliver assets at a future date. While many agree this technique works in Pennsylvania, where the law is established, it is less clear that it works in other states.

Carlyn McCaffrey, an estate lawyer at McDermott, Will & Emery in New York, is reminding some last-minute givers of a simple place to start: Give cash or forgive loans to relatives or friends.

For gifts requiring an appraisal that can't be made until next year, she says it might be possible to give a fixed-dollar amount of an asset this year, with the percentage determined by the appraisal. In a few other cases a giver might be able to borrow a large sum, put it in trust and have the trust buy assets later.

But, as she warns, "Beware of cookie-cutter approaches." Howard Zaritsky, an estate attorney in Rapidan, Va., who advises on complex cases, agrees. "This rush makes me fear that in four or five years I'll be called to be an expert witness on lots of estate malpractice cases," he says.