

Family Business Owners Challenge Estate Tax Valuation Rules At Treasury Hearings on 2704 Regulations on December 1, 2016 –

Ashlea Ebeling

Family business owners, along with estate lawyers, CPAs, and appraisers, piled into an Internal Revenue Service auditorium on December 1, 2016 to challenge proposed Treasury Department rules they say will wreak havoc on their legacy plans. The proposed rules, known as the 2704 Regulations, would curb valuation discounts, which would result in increased estate taxes on the deaths of owners of family businesses, as well as gifting to an owner's heirs.

“Everyone is asking that the proposed regulations be entirely withdrawn,” says Michelle Gallagher, a CPA and business valuation expert and committee chair who spoke on behalf of the American Institute of CPAs.

“If we’re already interpreting these in a different way than they’re intending, how are the courts going to interpret it. You need to scratch these and start over. Whether they’ll listen or not, we don’t know.” Michelle Gallagher, CPA, testified at the Dec. 1 2016 Treasury hearing.

Proponents say the rules, [Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest](#), proposed last August, would close a tax loophole used by the wealthy. **Detractors say the rules would virtually eliminate discounts for minority interest ownership and discounts for lack of marketability**, which are legitimately used in succession planning.

One of the reasons the [initial reaction to the proposed rules](#) was so intense is that they are drafted to apply to operating businesses—not just family limited partnerships holding securities, which are more ripe for abuse.

The proposed regulations “use a shot gun approach when a rifle approach is more in order,” said Dennis Belcher, an estate lawyer with McGuireWoods in Richmond, Va. who testified that the regulations should not apply to entities with an operating business.

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Just one of the 36 people who testified, Frank Clemente, of Americans for Tax Fairness, whose testimony is [here](#), spoke in favor of the proposed rules, citing abuses and urged that the rules be finalized.

Cathy Hughes, from the Treasury's Department of Tax Policy, assured the audience that the intention of the rules was not to take away valuation discounts entirely.

“Her saying that led a lot of us to believe at the very least, they'll reword the regulations,” Gallagher says.

In addition, Hughes appeased opponents by stating that final rules would clarify that there is no deemed put right (as lawyers have read into the draft rules) and that the three-year lookback provision wouldn't be retroactive.

Still there are many other issues. Gallagher explained, for example, how the rules upend longstanding definitions of fair market value, marketability and control. She handed Hughes and the three Internal Revenue Service representatives on hand Snickers bar to demonstrate that just like you can't take out the peanuts and still have a Snickers bar, you can't just replace the key elements of FMV—“a hypothetical willing buyer and seller, dealing at arm's length”.

The proposed rules have drawn 9,477 comments so far and brought the biggest crowd ever to a Treasury public hearing. There were emotional pleas from 83-year-old Clarene Law, a hotelier in Jackson Hole, Wyoming, [Kevin Kester](#), a 5th-generation California cattle rancher and vice president of the National Cattlemen's Beef Association, and Jamie Richardson, fourth-generation owner of White Castle Management (the burger joints). It was an all-day affair, with technical critiques from the army of advisors business owners employ to navigate the ever changing estate tax laws.

Gallagher says that in a way the whole exercise of the public hearings seemed strange, given president-elect Donald Trump's position of estate tax repeal. “I'd be surprised if the regulations ever get finalized with the new administration,” she says, noting that could just mean they get shelved for four years. Hughes has said given the reams of comments that it's unlikely the rules could be finalized by year-end.

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That leaves advisors and their clients in a bind. “It’s a pretty uncertain time as to how to plan,” says Paul McCawley, an estate planner with Greenberg Traurig in Fort Lauderdale, Fla. Some clients are moving forward with transactions with valuation discounts, while others have put planning on hold. Valuation discounts are just one piece of the puzzle. “The other wild card is what’s going to happen with Trump in the White House—what he’s going to do with the estate tax,” he says. Keeping transfers within the nearly [\\$11 million a couple lifetime gift tax exemption](#) now makes sense, but given the possibility of estate and gift tax repeal under a Trump presidency, doing transfers that would incur gift tax aren’t advisable. See [Will Trump Victory Yield Estate Tax Repeal?](#)

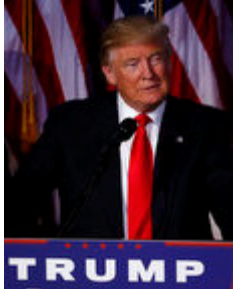
Another venue for scratching the proposed rules is Congress. Members of the Ways and Means Committee and Senate Finance Committee wrote to the Treasury last month requesting that the rules be withdrawn. Congressman Warren Davidson (R-OH) and Senator Marco Rubio (R-FL) introduced bicameral legislation, the [Protect Family Farms and Businesses Act](#), to nullify the rules in September.

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Time to Plan for the Death of the Death Tax?

November 30, 2016

(Bloomberg) Some of the wealthiest families in the U.S. are hoping for a \$21 billion benefit from President-elect Donald Trump next year.



Donald Trump
(Bloomberg Photos)

Trump is gearing up to embark on the biggest U.S. tax overhaul in three decades. His proposals include cutting income and corporate taxes and eliminating the so-called death tax, which is paid primarily by the richest 10 percent of earners, according to the Tax Policy Center. Advisors to wealthy families and their offices also anticipate that the new administration's approach to estate and gift taxes could negate rules they were bracing for, which sought to limit tax breaks on transferring wealth.

Trump's tax changes already appear to be on the fast track. A week after the election, Vice President-elect Mike Pence told House Republicans to be ready to move on sweeping legislation next year and mentioned taxes among the items. On Nov. 15, Kevin Brady, the Texas Republican who chairs the House tax-writing panel said discussions were already in the works.

Partner Insights

Given the prospect for sweeping tax reform, wealth advisers are telling clients to hold off on making large wealth transfers until there's more clarity about the rules. They're also advising them to take steps before year-end to defray taxes by, for example, booking investment losses now.

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They and their businesses are re-evaluating, or putting on hold, strategies for transferring money to heirs as the new administration could work with a cooperative Congress to reform or repeal federal estate and gift taxes among its early moves. That would be an about-face from President Barack Obama, who sought to place tighter restrictions on the way wealth could be passed from generation-to-generation.

“Eliminating the death tax will equate to an enormous gift,” said Peter Rup, who manages about \$900 million for rich families at Artemis Wealth Advisors in New York. The IRS collected \$21 billion from taxes on estates and gifts in its fiscal year 2016, according to data from the U.S. Treasury Department.

Discount Strategy

Wealthy families sometimes use a discount strategy to pass on shares in their privately owned businesses and family offices -- that is, firms that handle the financial affairs of a single family and are often structured as partnerships or limited liability companies. Families often took a discount of 20 percent to 45 percent on the value of the stakes to save on taxes, according to a report by law firm White & Case LLP. The Obama administration tried for years to curtail the benefit through legislation without success, and instead in August proposed rules through the Internal Revenue Service set to do just that.

The proposed change was met by objections not only from some of the country’s wealthiest individuals but also from trade organizations like the National Cattlemen’s Beef Association and the National Beer Wholesalers Association. Both organizations have many members who own family businesses.

Family enterprises of all kinds are now optimistic that the new administration will halt the IRS effort. Under the new president, any such rules “could be pulled,” said John Olivieri, a White & Case lawyer who works with wealthy families.

Under current law, an individual can leave up to \$5.45 million to heirs without paying federal gift or estate tax. Above that threshold, the tax is assessed at a 40 percent rate. Married couples can shield estates worth as much as \$10.9 million from the tax this year.

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Tax Plans

“More than ever, any income, including investment income, that can be deferred to 2017 should be,” Nicholas Bertha, director of wealth and trust planning at Fieldpoint Private, wrote in a client advisory after the election. "Discretionary deductions, on the other hand, should be accelerated to this year."

Trump’s plan would replace the estate tax with a capital gains tax on the appreciation of inherited assets of more than \$10 million, subject to some exemptions for small businesses and family farms.

He may face a difficult time ushering in a permanent end to the estate and gift taxes, even with Congress on his side. Under current rules, a permanent repeal would require 60 senators to agree. In 2017, Republicans will hold a thin majority of only 51 or 52 seats, depending on the outcome of Louisiana’s runoff election on Dec. 10.

In the meantime, advisors to high-net-worth families on their trust and estate plans are re-evaluating. "Estate planning and gifting strategies will still be extremely important," said Ida Liu, managing director and global market manager to the metro New York region for Citi Private Bank. "But certain types of trusts may be more or less favorable going forward if the estate tax is repealed or restructured."

My own personal opinion is that:

“If you trust the Internal Revenue Service to do the right thing by the American Tax Paying Public, and the related political risks associated with a new administration, wait until 2017 to act.

However, if you believe otherwise, gift now (during 2016) and take advantage of the valuation discounts including minority interest discount (lack of control) and discount for lack of marketability (private - non-publicly traded entities), which could result in overall discounts from 25.0%-40.0%!

I repeat, this is my own personal opinion!

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