Harris myCFO® | Legislative Update, August 2011 | Budget Control Act of 2011

The New Legislation

It is August 2011, and we are in the "lazy days of summer." The weather is hot, the markets are not and we have just endured a partisan brawl in Congress due to a need to increase the nation's debt ceiling at the last moment before our credit rating could be affected (which was to no avail because Standard and Poor's still downgraded our sovereign debt rating) and we would have defaulted on our debt obligations. After the acrimonious debate which enthralled and dismayed much of the nation, the Budget Control Act of 2011 (Senate Bill 365, as amended), was passed and with such legislation a new Congressional bipartisan joint committee (the "Super Committee") has been formed and charged with coming up with proposals to reduce our deficit by $1.2 to $1.5 trillion over 10 years.

Potential Impact on Wealth

Where will the changes come from? At this point it is too early to tell. However, given the rhetoric over the past several years, it is not too far fetched to think that some of the revenue changes will come out of closing perceived "tax loopholes" which some in Congress believe are designed to benefit the "rich."

Because so few estates are subject to the federal estate tax due to the legislative "gift" from Congress in late 2010 where the estate tax applicable exclusion ("tax free amount") was increased to $5 million for tax years 2011 and 2012, this may be a place where revenues can be raised with little outcry from the general public. Additionally, the 2010 "holiday surprise" also unified the estate and gift tax for the same years. Prior to 2011, an individual could only make taxable gifts up to $1 million during his or her lifetime without the imposition of gift taxes and could only use the remaining amount of their lifetime tax-free amount (which was $3.5 million in 2009) at death. During tax years 2011 and 2012, individuals can give away their tax-free amount during life and/or at death up to the full tax-free amount of $5 million. The most surprising gift of all in December 2010 was that Congress gave husbands and wives the ability to tack on a deceased spouse's unused tax-free amount during the surviving spouse's lifetime or at death if not fully utilized by a predeceased spouse.

Tax Strategies to Consider

While most of us thought we would have this increased tax-free amount around until 2013, it is now not a sure thing. Many practitioners have been gearing up to advise clients to take advantage of this increased tax-free amount by making significant taxable gifts ($5 million per person or up to $10 million for married couples) prior to the scheduled termination of such legislation at the end of 2012. However, given the need for revenue enhancing ideas, looking at the end of 2012 as the cut-off date for making such gifts may no longer be prudent.

Other strategies that could easily be on the chopping block with this new joint committee looking for ways to raise revenues are possible changes to Grantor Retained Annuity Trusts (GRATs) (requiring them to last a minimum of ten years), the possible elimination of minority discounts for transfers of certain assets between family members, changes in the length of trust terms (affecting "dynasty" trusts), to name a few.

Why Act Now

Because of the uncertainty as to what this new Super Committee will do and because any changes agreed upon could be retroactive to the date the Super Committee proposes the changes (in November, 2011) and not when legislation is passed, it is important that individuals who want to take advantage of these estate planning techniques talk with their advisors now to see if such planning is appropriate based on their individual circumstances.

The adage, "death and taxes are the only things that are certain in life," is true. However, uncertainty as to what the estate tax regime will look like from year to year creates an environment which makes planning very challenging. During the "lazy days of summer" take the time to talk to your advisors and eliminate some of the uncertainty of your planning.

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