Lighting Strikes Thrice: Impact to Estate Planning After Democrats Pull Upset

On Tuesday, January 5th incumbent Senators Loeffler (R-GA) and Perdue (R-GA) lost their Senate seats to Democrat candidates Raphael Warnock and Jon Ossoff, respectively. Democrats will have a 50-50 split in the United States Senate, and importantly control over the legislative calendar, with Vice President Kamala Harris being the tiebreaking vote.

The outcome has far reaching consequences for the country for the next two years. In the tax arena, President-Elect Biden ran on a plan that called for nearly **4 trillion dollars** of new revenue largely at the expense of corporations and wealthy Americans. Policies such as raising the corporate tax rate, altering the capital gains tax, and repealing some of the changes made by the 2017 Tax Cuts and Jobs Act are all under consideration.

Expect the Biden Administration to be aggressive early in 2021 to provide more stimulus to a flagging economy. Should bi-partisan agreement on further spending prove elusive, Democrats will turn to the reconciliation process which allows for limited changes with just 51 votes. Changes to Estate Tax policy could be included in such a package or be included in legislation later in the year.

Possible changes include:

- Raising rates and lowering exemptions for taxation of wealthy estates; possibly returning to pre-TCJA rates of 5.5 million per individual and 11 million per couple indexed for inflation or going all the way back to 3.5 million per individual and 7 million per couple
- Creation of a "billionaires' bracket" that would tax families leaving a billion dollars of assets or more to the next generation at rates above 70%
- Revisiting a 2017 Senate Finance Committee report which highlighted many planning techniques utilized by individuals and families including Crummey Powers, Dynasty Trusts, and Grantor Trusts that could lead to changes or increased oversight
- Increasing the rate and timing at which capital gains are taxed to harmonize with highest tax rate for individuals and taxing unrealized gains at death coupled with repealing step up in basis
- Increased auditing and enforcement from IRS on wealthy families

Timing

The Biden administration will likely move in the first 3-5 months on more COVID related stimulus to avert a potential March cliff of expiring benefits. This first package could expand beyond just COVID relief to include health care, climate change, or infrastructure which may bring in the need for pay-fors to offset the costs. A second reconciliation package could occur later in the year, possibly before the August recess which could entail major tax reform and estate tax changes.

Important to note – Estate Tax changes passed this year could be back dated to January 1st, 2021. Please consult your advisor for advice on how this could affect your estate planning.