Proposed Treasury Regulations Place Family Businesses Under Attack, Again - Part Deux

By Geoffrey N. Taylor

Readers of this space know **I recently wrote an article** about proposed United States Department of Treasury regulations attacking valuation discounts for federal estate, gift, and generation-skipping transfer tax purposes currently available for gifts of interests in family-controlled entities. Lawmakers have had an opportunity to begin digesting the meaning and effect of the proposed regulations. How has the landscape changed from a couple of months ago?

In mid-September, 2016, Representative Jim Sensenbrenner (R-Wis.) introduced legislation that would nullify the proposed regulations, noting the “IRS should not be in the business of making it difficult for family-owned businesses to keep their doors open, especially during a difficult time such as the loss of a loved one.”

Representative Warren Davidson (R-Ohio) took things a step further by introducing legislation that would block funding for IRS work on the proposed regulations, commenting that the regulations violate the separation of powers and reflect “bad policy which will remove billions of dollars invested into our economy.”

The Senate followed suit when Senator Marco Rubio (R-Fla.) introduced the Protect Family Farms and Businesses Act, a copy of the Davidson bill.

Senator Rubio also joined 40 Senate colleagues who wrote to urge Treasury Secretary Jacob Lew to withdraw the proposed regulations, claiming “they directly contradict long-standing legal precedent, create new uncertainty for taxpayers, and put family-owned businesses at a disadvantage relative to other types of businesses.”

Not surprisingly, much of the opposition to the proposed regulations comes from the Republican side of the aisle and much of the dialogue regarding legislative opposition focuses on the plight of small businesses, including family farms. Many arguments focus on the importance of small business to creating and maintaining jobs with family business being the backbone of small business.

Rob Kaplow, one of Maddin Hauser's tax attorneys, recently attended an estate planning seminar which included a presentation on the proposed regulations. The presenters reported the following:

- The IRS has received over 3,200 comments about the proposed regulations.
- The IRS will be proceeding slowly to issue the final regulations and it likely will not do so before the first quarter of 2017.
- The three year lookback rule was intended to be prospective only, meaning the rule will only apply to transactions that are within three years after the issuance of the final regulations. Thus, transactions that have already occurred will not be effected.
- The biggest revelation was the regulations are not intended to eliminate minority or marketability discounts. Instead, the intent is to prevent the appraiser from using restrictions in the entity's agreements or state law to reduce the fair market value.
- The standard for fair market value is still based on a hypothetical willing buyer/willing seller.

The pending presidential election exacerbates the uncertainty. Hillary Clinton wants to reduce the estate tax exemption to $3.5 million, reduce the gift tax exemption to $1.0 million, and increase the estate tax to 45% or more. Donald Trump wants to eliminate the federal estate tax. While the proposals are not diametrically opposed, each would present vastly differing opportunities and objectives.

Please contact one of the Maddin Hauser tax attorneys if you or someone you know may be affected by the proposed regulations.