



THE MONITOR

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2021 ESTATE TAX ADVISORY

Although President Biden has not yet attempted to overhaul the nation's tax system, it is expected that his administration will soon attempt to make good on some of the tax policy reforms he proposed during the run up to the 2020 elections. This advisory raises important considerations regarding how Biden's tax reforms might negatively affect you and your current estate planning so that you can be prepared to take steps to minimize your tax obligations before any substantive or retroactive changes are passed.

Senator Bernie Sanders, chair of the senate budget committee, is not waiting for Biden's lead. He recently introduced an estate tax bill, aimed at taxing the rich, that significantly lowers the federal exemption and

imposes a progressive estate tax topping out at 65%.

While the Sander's bill will face strong opposition and is unlikely to pass, there is little doubt that, over the next two years, we can expect ongoing attempts to increase tax revenue at the expense of corporations, highly compensated earners and high net worth individuals. As such, Johnson Fistel is issuing this tax advisory as a service to our valued clientele. Please be aware that this advisory is purely speculative and there is no way to accurately predict whether any of proposed tax reforms will be enacted. In addition, while we anticipate that the current administration will propose sweeping tax reform across the board (including income, property, corporate

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and capital gains taxes), this advisory mainly focuses on reviewing potential changes to the current estate and gift tax infrastructure.

Federal Estate/Gift Tax Exemption

In 2021, the lifetime federal estate/gift tax exemption was raised to \$11.7M per person (or \$23.4M per couple), meaning you can individually gift or bequeath almost \$11.7M in assets before your estate or heirs would have to pay federal tax on the overage.

The Sanders bill would lower the federal exemption to \$3.5M per person (or \$7M per couple). Under this scenario, without adequate planning, any individual estate with over \$3.5M in assets would be subject to considerable tax exposure under the second phase of the Sander's bill – the progressive estate tax.

Progressive Estate Tax

The Sanders bill includes the adoption of a progressive estate tax that would start at 45% for individual estates between \$3.5M and \$10M, and would rise as high as 65% for estates over \$1B. Thus, the potential federal estate tax burden on large estates would be enormous if the bill passes in its present form.

The Biden Plan

While he hasn't publically indicated support for the Sander's bill, President Biden has expressed a strong interest in decreasing the federal exemption from its current level. He has also supported increasing the top individual income tax rate to 45 percent. Further, Biden has suggested that he may attempt to repeal the stepped-up basis and tax unrealized

capital gains (at newly elevated income tax rates) at death – meaning heirs may be subject to capital gains tax, in addition to estate tax, when they receive highly appreciated assets (like stock and real estate). These proposed changes could radically alter the landscape of estate planning, and the heirs of wealthy individuals and families could face punitive tax exposure when receiving legacy gifts and inheritances.

So what is the likelihood that the Biden administration will be able to pass new tax legislation? With the Democrats controlling both houses, President Biden will face less rigorous challenges to potential tax reforms. It is important to note that, historically, the federal estate tax exemption has never decreased and all previous attempts to repeal the stepped-up death basis have failed. Nonetheless, anything is possible, particularly if the filibuster is repealed, which could reduce (and possibly eliminate) any congressional opposition to Biden's plans.

Another important consideration is the effective date of Biden's potential tax reforms. If Biden's plan is implemented retroactively, the effective date could be backtracked to January 1, 2021. While a possibility, the effects of this retroactivity could be considered unfairly punitive since it deprives individuals and families the opportunity to plan accordingly.

A Good Time to Review Your Estate Plan

While we can only speculate on what might happen in the future with regard to Biden's tax agenda, we can be fairly confident in predicting

that changes are coming down the beltway. Being aware of the negative impact that tax reforms could have on your estate can help you plan accordingly, respond quickly, and take appropriate and calculated measures when necessary. Trust and estate planning is essential to protect the assets you have worked hard to build, and your estate might be able to avoid wasting millions of dollars on taxes with proper planning and proven strategies. The Estate Planning/Asset Protection Group at Johnson Fistel would be happy to help you build a comprehensive and integrated estate plan, and/or review your current plan and help make any changes required to provide you and your family with the highest level of protection and comfort in these uncertain times.

“Someone's sitting in the shade today because someone planted a tree a long time ago.” - Warren Buffet.

ASSET PROTECTION — ONE SIZE DOES NOT FIT ALL



I was recently reminded that one size does not fit all when it comes to estate planning and asset protection.

After more than 25 years of practicing law and establishing a retirement nest egg, I decided last year that I should research the best asset protection strategies. I know firsthand that we live in a litigious society and accidents do happen. For example, in 2019 there were five verdicts between \$20 and \$70 million arising out of car accidents in California alone. While I do have an umbrella policy, it has several pages of exclusions and only covers the amount of that policy. My concern was that a significant accident could result in a lawsuit wiping out much of my savings even with an umbrella policy. As Benjamin Franklin said, “an ounce of prevention, is worth a pound of cure.”

So, in mid-2020, after doing my research, I hired a lawyer who held himself out to be an “expert” in asset protection with 30 plus years of experience and the author of several books on the subject. I paid him a substantial fee (far more than an ounce) to put together an asset protection strategy and plan for my personal estate. However, I was pre-

sented with a set of “cookie-cutter” documents with literally dozens of typos, with several paragraphs cut and pasted from some other plan that did not apply to me, and a retirement plan that was inconsistent with recently published case law. His response: “You’re the first client to read these documents. Thanks for your help.” I presume they are the same set of documents he has used for 20 or more years.

The asset protection plan and the supporting documents were actually very good conceptually; they were just not up to date, they had not been carefully reviewed in a while, and some of the provisions did not apply to me. So, I spent 20-30 hours researching the law and revising the documents to both comply with recent legal developments and fit my personal circumstances and requirements.

Interestingly, I had a nearly identical experience two years ago when I retained a highly recommended estate planning lawyer to reevaluate my will and family trust documents given the significant changes in my life (second marriage, more assets, community vs. separate property, etc.). After identifying several typos

and a few paragraphs that had no application to me, again I was told “You may be the first client ever to actually read these documents. I’m glad I have a lawyer as a client. I’ve had clients worth hundreds of millions of dollars just say ‘where do I sign?’” This lawyer also had more than 30 years of experience and I presume had been recycling the same document templates for his clients, probably for decades.

After these experiences, I decided to look for and partner with a lawyer with extensive estate planning and asset protection experience for high-net-worth individuals to offer the level of service I wanted, a truly customized experience. Seth Schechter fit the profile and joined my firm in January 2021. Seth earned his Master of Laws (LLM) in Taxation twenty years ago and has extensive experience counseling high net worth clients (some over \$1 billion) with specialized and personalized asset protection strategies, wealth preservation ideas, tax mitigation, and estate planning. He also prepares estate plans for families with more modest estates who just need a basic revocable trust so that their assets can pass to their heirs without having to go through probate.

If you’re interested in asset protection documents designed to fit your unique needs in order to protect what you’ve worked hard to earn, if you need a new living trust to avoid having your assets go through probate, or if you think changes in circumstances warrant having your trust documents reevaluated, please let us know.

Frank Johnson, Managing Partner



ASSESSING LITIGATION TRENDS AGAINST NON-U.S. ISSUERS WITH LEVEL I ADRS IN THE WAKE OF TOSHIBA

ADRs as an Investment Vehicle

A common way for non-U.S. companies to allow U.S. investors to invest in their shares is through the issuance of American Depositary Receipts, commonly referred to as ADRs. An ADR is a derivative security issued by a depository bank and is a receipt for a negotiable certificate representing a beneficial interest in a specified number of shares in the non-U.S. company referenced by the ADR, whose common stock is typically held by the bank. An ADR allows U.S. investors to trade in non-U.S. companies in U.S. dollar denominations and during U.S. trading hours. ADRs frequently mirror characteristics of the underlying securities they represent, which include paying dividends and some sponsored ADRs even allowing voting rights.

Three types of ADRs exist: Level I, II, and III. A Level III ADR trades on a national exchange, the company has SEC reporting requirements, and the issuing company may raise capital on a U.S. exchange. A Level II ADR also trades on a national exchange and the company is still subject to SEC reporting requirements but may not raise capital on a U.S. exchange. The least regulated type of ADR is a Level I ADR, which is traded over the counter (“OTC”),

meaning it is not traded on a national exchange, and the non-U.S. issuing company is not subject to SEC reporting requirements. U.S. investors can currently purchase Level I ADRs for over 200 companies in the United Kingdom, over 900 companies in Europe, and over 1000 companies in the Asia-Pacific; most of these are large caps.

While foreign companies issuing Level I ADRs are not subject to SEC reporting requirements, they may still be exposed to the U.S. securities laws. Where ADRs are not sponsored by the company, but instead registered solely by the depository institution, the non-U.S. company may still be found liable for securities law violations.

Toshiba and the Immediate Reaction

Toshiba Corporation is a major Japanese manufacturer of computers and electronic devices for consumers and is headquartered in Tokyo. After Toshiba was involved in an accounting scandal, it was hit with a U.S. securities class action lawsuit. In early 2020, the U.S. District Court for the Central District of California denied a foreign defendant’s motion to dismiss securities law claims brought by U.S. purchasers of unsponsored, unlisted ADRs in Toshiba in a class action lawsuit

titled *Stoyas v. Toshiba Corp.*, 424 F. Supp. 3d 821 (C.D. Cal. 2020). The District Court held that plaintiffs sufficiently pled, inter alia, that their purchases of defendant’s Level I ADRs constituted domestic transactions in securities and the company’s connection with the “unsponsored” ADR program. Even further, the District Court allowed additional claims under Japanese securities laws to survive as well, finding that principles of international comity and forum non conveniens did not bar the exercise of supplemental jurisdiction over such claims.

As a result of the ruling, fears about increased litigation began to bubble up. AIG sounded the alarm, predicting “[t]he uncertainty around the outcome of the case may cause an increased number of claims to be brought by ADR holders against non-US companies. This could potentially lead to directors in the UK, Europe, Japan and other parts of the world facing litigation in US courts despite the companies themselves not seeking to sell shares to US investors.”¹

Others believed that “[t]he Toshiba decision will encourage an enter-

¹ U.S. Securities Class Actions, AIG, Knowledge and Insights (May 14, 2020), <https://www.aig.com/about-us/knowledge-insights/us-securities-class-actions>

prising plaintiffs' securities litigation bar to continue filing claims against foreign issuers for the sale of their securities in the US even when the companies are not directly involved. From the foreign issuer's perspective, claims that courts would have quickly dismissed in the past will likely become more frequent, more difficult, and more expensive."²

Current Litigation Landscape in the Aftermath of Toshiba

Although 2020 closed out seeing an increase of 24 securities class actions filed against non-U.S. issuing companies, the result may not have been a consequence of the ruling in Toshiba. "As reported in Dechert's Annual Survey, securities class actions filed against non-U.S. issuers actually increased in 2020—going from 64 filed in 2019 to 88 filed in 2020, an increase of 37.5%, and thus disrupting 2020's general trend of a decrease in securities litigation. Non-U.S. issuers based in China accounted for the largest percentage with twenty-eight complaints, followed by those based in Canada, with twelve."³ It remains highly likely that COVID-19 related litigation was a significant factor in the increased number of actions against Chinese issuers. Without a global pandemic affecting business worldwide, securities class actions filed against non-U.S. issuers may very

² Kevin Harnisch, David Ho, and Nepomuk Loesti, U.S. Securities Law Liability for Securities Issuers Outside the U.S., Harvard Law School Forum on Corporate Governance (Mar. 6, 2020), <https://corpgov.law.harvard.edu/2020/03/06/us-securities-law-liability-for-securities-issuers-outside-the-u-s/>.

³ Securities and Derivative Litigation: Quarterly Update, JDSUPRA (Apr. 15, 2021), <https://www.jdsupra.com/legalnews/securities-and-derivative-litigation-6021006/>.



well have followed the general trend of a decrease in securities litigation in 2020.

In fact, when looking at the first quarter of 2021 ("1Q21"), the ADR Securities Class Action "SCA") Rule 10b-5 Exposure Rate, which measures litigation risk exposure, decreased by 26 basis points to 0.01% relative to 4Q'20, which is the lowest ADR SCA Rule 10b-5 Exposure Rate since the data has been recorded.⁴ As of 1Q21, only four non-U.S. issuers that trade in ADRs in the U.S. public markets were sued for alleged violations of Rule 10b-5.⁵ This statistic is in line with statistics showing another drop in securities class action litigation for 2021.⁶

⁴ Global Corporate Exposure to Rule 10b-5 Securities Class Actions Amounts to \$37.8 billion in 1Q 2021, SAW (Apr. 9, 2021), <https://www.prnewswire.com/news-releases/global-corporate-exposure-to-rule-10b-5-securities-class-actions-amounts-to-37-8-billion-in-1q-2021--301265582.html>

⁵ *Id.*

⁶ Federal Securities Class Action Litigation 1996 - YTD, Securities Class Action Clearinghouse, Stanford Law School (May 2021), <https://securities.stanford.edu/charts.html>.

"Record-breaking U.S. equity markets combined with focused judicial scrutiny of securities class actions filed in federal courts led to a material decline in Rule 10b-5 exposure this past quarter," said Nessim Mezrahi, CEO of SAR.⁷

Despite fears to the contrary, there were no floodgates opened leading to increased litigation in the wake of the Toshiba decision and securities class actions against non-U.S. issuers have slowed similarly to those against U.S. issuers. That said, the Toshiba decision still confirms that holders of ADRs may have recourse against non-U.S. issuers that have violated the U.S. securities laws.

⁷ Note 4, *supra*.

Employment and Labor Litigation

The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

Johnson Fistel can help employers and employees with the following issues:

- Minimum Wage & Overtime Pay
- Misclassifications (Employee/Independent Contractor)
- Discrimination, Harassment, & Retaliation
- Employment Contracts, Severance & Separations, & Restrictive Covenants.

Whether you're an employee or an employer, please contact us today to determine whether we may be able to assist you.

Please visit our website for FAQs about employment law: <https://www.johnsonfistel.com/faq/>

Recent Accomplishments

Settlements

Glock v. FTS International, Inc., et al., DC-19-02668 (In the District Court, Dallas County, TX (160th Judicial District)). Johnson Fistel, serving as Co-Lead Counsel, helped negotiate and secure approval of a class settlement of \$9.875 million to be paid to shareholders in a case alleging violations of the Securities Act of 1933.

Peter D'Arcy, et al. v. Stephen P. Herbert, et al., Case ID: 2021-00638 (Court of Common Pleas, Chester County, PA). The firm served as a lead negotiator in a settlement involving sweeping corporate governance reforms to benefit the USA Technologies, Inc., including (i) the creation of a new Chief Compliance Officer or in-house General Counsel position; (ii) engagement of a new independent auditor; (iii) splitting the roles of Chief Executive Officer ("CEO") and Chairperson of the Board; (iv) the creation of the Com-

pliance Committee; and (v) the creation of a Disclosure and Controls Committee.

Significant Victories and Upcoming Trials

Gladstone v. John Haywood, et al., Case No. 37-2020-00047376-CU-BT-CTL (San Diego Superior Court). Johnson Fistel, on behalf of the plaintiff bankruptcy trustee for Garden Fresh Restaurants, LLC, (dba Souplantation) defeated the attempt by the company's former officers and directors to dismiss the case. The court found the plaintiff's allegations of mismanagement and wrongful conduct had been sufficiently pled and that the case could proceed. As a result, the case is moving ahead and the plaintiff is seeking over \$10 million in damages on behalf of the bankrupt company for actions these individuals took (or did not take) when they had a duty to safeguard the company's assets right before filing for bankruptcy.

Awards & Recognitions

Martindale-Hubbell: The following Johnson Fistel attorneys have received AV Ratings from Martindale-Hubbell Peer Review Ratings, the gold standard in attorney ratings for more than a century, for their strong legal ability and high ethical standards: Frank J. Johnson, Michael I. Fistel, and Mary Ellen Conner. The AV Rating is the highest rating bestowed on an attorney by Martindale-Hubbell Peer Review Ratings

Super Lawyers: Thomson Reuters awards this recognition to the top 5% of attorneys who have obtained a high-level of professional achievement and are highly regarded by their peers. In 2020, the following lawyers were named Super Lawyers: Frank J. Johnson, Brett M. Middleton, Ralph M. Stone, John J. O'Brien, and Kristen O'Connor.

Rising Stars: Thomson Reuters

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recognized Mr. O'Brien and Ms. O'Connor as Rising Stars, a designation awarded to no more than 2.5% of attorneys in each state.

San Diego Magazine Top Lawyers: In its March 2021 edition, San Diego Magazine included Mr. Johnson as one of the few 2021 Top Lawyers in complex business litigation in San Diego. This year is the eighth consecutive year that San Diego Magazine recognized Mr. Johnson as a Top Lawyer in San Diego.

America's Most Honored Lawyers Top 1%: In 2021, The American Registry honored Frank J. Johnson with this award. Each year, The American Registry certifies qualifying public recognitions of excellence including significant mentions in the press, honors by recognized trade groups, and acclaimed recognitions by peers or clients. It reserves this award for only the Top 1% of American Lawyers.

New Additions

The firm added three new lawyers to the team: In our San Diego, California location, the firm was pleased to welcome Seth M. Schechter, who is Of Counsel to the firm and will bolster the firm's new estate planning and asset protection practices, and Jonathan M. Scott, an associate, who will concentrate his practice on complex business and shareholder litigation. In our Marietta, Georgia office, the firm welcomed Enoch P. Hicks, an associate, to the complex business and shareholder litigation practice group.

Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Amdocs Limited	6/7/2021
Ebang International Holdings Inc.	6/7/2021
3D Systems	6/8/2021
Champignon Brands Inc.	6/8/2021
FibroGen, Inc.	6/10/2021
Canaan Inc.	6/14/2021
Credit Suisse	6/15/2021
Franklin Wireless Corp.	6/15/2021
Intrusion Inc.	6/15/2021
LifeMD, Inc.	6/15/2021
Romeo Power Inc.	6/15/2021
Acrimoto Inc.	6/18/2021
Emergent Bio Solutions Inc.	6/18/2021

Company	Deadline
Verus International Inc.	6/22/2021
Peloton Interactive, Inc.	6/28/2021
Pinterest, Inc.	6/28/2021
Volkswagon AG	6/29/2021
ChemoCentryx Inc.	7/6/2021
Skillz Inc.	7/7/2021
Aterian, Inc.	7/12/2021
PureCycle Technologies, Inc.	7/12/2021
Array Technologies, Inc.	7/13/2021
Danimer Scientific, Inc.	7/13/2021
ContextLogic, Inc.	7/16/2021
Ubiquiti Inc.	7/19/2021
Provention Bio, Inc.	7/20/2021

Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.



In-House Monitoring

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For more information call 619.230.0063

Click the link to learn more:

<https://www.JohnsonFistel.com/stockmonitor-free-portfolio-monitoring/>

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

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