PRIVATE CLIENTS ALERT
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Estate and gift tax changes under the Tax Cuts and Jobs Act

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The Tax Cuts and Jobs Act proposes an increase in the estate, gift and generation-skipping transfer (GST) tax exemptions to $10,000,000 (indexed for inflation) per person beginning January 1, 2018, with full repeal of the estate and GST taxes effective as of January 1, 2024. The gift tax exemption is also scheduled to increase to $10,000,000 (indexed for inflation) in 2018, but this tax is not scheduled to be eliminated.

As the Act is only a proposal at this time, there is a strong likelihood that many of the provisions of the Act as filed, will change.

Estate and GST tax exemption

- The current (2017) estate and GST tax exemption is $5,490,000 per person. Under the Act, it will increase to $10,000,000 (plus an annual adjustment for inflation) per person beginning January 1, 2018 where it will remain until December 31, 2023.
- The estate and GST tax will be eliminated for decedents dying on or after January 1, 2024.
  - Step-up in basis of a decedent's assets to the fair market value on the date of death will remain for decedents dying on or after January 1, 2024

Gift tax

- The current (2017) gift tax exemption is $5,490,000 per person. Under the Act, it will increase to $10,000,000 (plus an annual adjustment for inflation) per person on January 1, 2018.
  - From January 1, 2018 to December 31, 2023 the gift tax rate remains 40%.
  - Beginning January 1, 2024, the Gift Tax rate will drop to a rate of 35%.
- The current gift tax annual exclusion amount is $14,000 (plus an annual adjustment for inflation) and will remain the same going forward.

Qualified domestic trusts (QDOTs)

- QDOTs are used to defer payment of estate tax on transfers to a surviving spouse at the death of a U.S. taxpayer when the taxpayer's spouse is a non-U.S. citizen. Estate tax is assessed as principal distributions are made from the QDOT during the non-U.S. citizen spouse's lifetime and on the balance remaining at the spouse's death.

— Under the Tax Cuts and Jobs Act, distributions from QDOTs established from the assets of decedents dying on or before December 31, 2023 will continue to be assessed an estate tax until December 31, 2033.

Estate planning moving forward (assuming the Act passes)

— Under the Act's provisions, most taxpayers will never pay a federal estate tax. This is a great opportunity for planning if you have already maxed out your current federal exemption.

— The Portability Election, which allows a surviving spouse to use his/her deceased spouse's unused estate and gift tax exemption, is unchanged. This means a married couple can use the full $20,000,000 (indexed for inflation).

— Individuals will want to consider whether making intervivos gifts is the right tax planning for them. Such gifts will still exist under the current basis carry-over regime, meaning the donee receives the gift with the donor's tax cost. Instead, it may make sense for a donor to hold off making inter vivos gifts of assets that have significant unrealized gain until the donor's death in order to give the beneficiary the asset *and* the step-up in tax cost. Of course, there are many other considerations in gift tax planning, and individuals should consult with their estate planning attorney before embarking on or changing a gift program.

— Even with the enlarged exemption and ultimate repeal, trusts still make great sense for non-tax reasons. For example, trusts can provide protection from creditors and divorcing spouses as well as provide control over how beneficiaries inherit wealth and help preserve wealth for generations.

Let's not forget that the Tax Cuts and Jobs Act has not been passed by Congress. In addition, the Act does not call for the immediate repeal of the estate and GST tax—there will be a six-year delay for full repeal. With several election cycles, including a presidential election, in the next six years, the tax laws can change again before January 1, 2024.

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