

## ESTATE PLANNING AFTER THE 2004 ELECTION

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### I. INTRODUCTION

- A. In 2001, Congress passed and President Bush signed the Economic Growth and Taxpayer Relief Reconciliation Act (EGTRRA), which included the repeal of the estate and generation skipping (GST) taxes, but not the gift tax, for individuals dying in 2010.
  - 1. Although repeal was limited to 2010 because of budgetary reasons and the failure to muster 60 Senators to vote for permanent repeal, it was anticipated that well before 2010 Congress would revisit repeal of the estate and GST taxes to avoid the completely ludicrous result of having repeal last one year, followed by the reinstatement of the transfer tax system as it existed in 2001.
  - 2. While several attempts since 2001 have been made to make the repeal permanent, they all have failed because of the lack of 60 Senators who favored it.
- B. President Bush was reelected President on November 2, 2004 and the Republican control of both Houses of Congress was strengthened.
  - 1. The Republicans now have 55 Senators and 229 Congressmen.
  - 2. Many commentators now believe permanent repeal is more likely to occur as a result of the 2004 election.
- C. This outline discusses the following issues:
  - 1. What would permanent repeal mean for estate planning professionals?
  - 2. What are the possible scenarios?
  - 3. What are the political influences on the outcome?

## II. THE IMPACT OF REPEAL ON ESTATE PLANNING

### A. Areas of practice that will be unaffected include:

1. Planning for the disposition of the client's assets at his or her death
2. Asset protection planning
3. Planning for disability and incompetency
4. Business succession planning
5. Planning for marital and other dissolutions
6. Charitable giving (income tax considerations will still be relevant)
7. Life insurance planning (other than to provide funds to pay taxes)
8. Fiduciary litigation (enhanced because more to fight over)
9. Planning to cope with carryover basis (in whatever form it emerges)
10. Retirement planning
11. Planning to pay state death taxes (in most states)
12. Planning to avoid gift taxes (when client desires to gift more than the \$1,000,000 applicable exclusion amount for gift tax purposes)
13. Using business entities to accomplish non-tax objectives
14. Planning for handicapped children
15. Planning for spendthrift children
16. Planning for clients with real estate more in more than one state
17. Planning for clients who are U.S. citizens or resident aliens who own property in other countries
18. Planning for nonresident aliens with assets in the U.S. or who plan on moving to the U.S.

19. Planning for citizens who are planning to change their citizenship (although not to avoid transfer taxes, unless they think repeal will be short-lived)

20. Planning for possible reinstatement of the estate and GST taxes

B. Areas affected include:

1. Planning to pay federal estate and GST taxes

2. Planning to qualify for the marital deduction for estate tax purposes

3. Planning to qualify for the charitable deduction for estate tax purposes

4. Planning to make gifts and dispositions at death to avoid the federal estate and GST taxes, including using the annual exclusion and applicable exclusion, as well as other techniques, such as GRATS, QPRTs, FLPs, and dynasty trusts designed to avoid transfer taxes.

III. Possible Scenarios

A. No change in the law

1. Repeal of the estate and GST taxes for decedents dying and transfers in 2010.

2. Gifts tax remains, with a \$1,000,000 applicable exclusion amount and a 35% tax rate.

3. Reinstatement of the estate, gift and GST taxes as they existed before EGTRRA.

B. Permanent repeal

1. Immediate

2. Postponed

3. With or without carryover basis

C. Reduced rates and increased exemptions

1. Applicable exclusion amount likely to be somewhere between \$3,500,000 (where it will be in 2009) and \$5,000,000
2. Rates could be as low as the income tax rate on capital gains (15 or 20%)
3. Increased benefits for closely held businesses and farmers
  - a. Reinstatement of the qualified family owned business interest deduction with a higher deductible amount
  - b. Increased reduction in value under the special use valuation rules
  - c. Enhancements to the installment payment of estate taxes provision

D. Reform

1. Annual exclusion reform
  - a. Eliminate ability to use *Crummey* withdrawal rights to obtain the annual exclusion
  - b. Reduce the annual exclusion amount or the number of annual exclusions per donor, or both
2. Provide for portable applicable exclusion between spouses
3. Deal with valuation issues by eliminating discounts for family controlled entities, either for passive investments or any interest in a family-controlled entity

IV. Political Considerations

A. Bush Administration: Second Term Goals and Issues

1. Foreign policy goals and issues
  - a. War on terror
  - b. Iraq
  - c. Afghanistan
  - d. Iran

- e. North Korea
  - f. Middle East
  - g. Relations with Russia
2. Domestic goals and other issues
- a. Social Security reform
  - b. Medicare reform
  - c. Tort reform
  - d. Permanent income tax cuts
  - e. Tax simplification
  - f. Appointment of conservative judges
  - g. Deficit reduction
  - h. Repeal the AMT
  - i. Repeal of the estate (death) tax (and GST tax)

B. Lame Duck Issues

- 1. With so many goals, it is likely that President Bush's political capital will be used up fairly quickly.
- 2. After two years, it is likely that President Bush will be, in effect, a lame duck president, with little or no political capital.
- 3. Depending on what happens over the next two years, history indicates that the Democrats are likely to make gains in both Houses of Congress in the 2006 Congressional election.