

The Jaffe Update

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A publication of Jaffe Raitt Heuer & Weiss

JANUARY 2010

CHANGES TO THE FEDERAL ESTATE TAX MAY REQUIRE UPDATES TO YOUR ESTATE PLAN

To everyone's surprise, the new decade has ushered in the repeal of the federal estate and generation skipping transfer taxes, but only for one year. Commencing January 1, 2011, the myriad estate, generation skipping transfer and gift tax provisions in place during 2001 will spring back into law. No one seriously thought that Congress would fail to rectify this ill-conceived chronology and some have called the Legislature's inaction to do so "Congressional malpractice." Various bills are being discussed to cancel retroactively (as of January 1, 2010) the estate/generation skipping tax repeal, but whether these get enacted, as well as their constitutional validity, remains unclear.

The significant provisions of the new transfer tax regime include the following:

- The federal estate tax and generation skipping transfer tax are repealed, although some states (not Michigan or Florida) have retained independent estate tax systems;
- The familiar rules regarding basis adjustment to fair market value on death are eliminated and a modified carry-over basis rule now applies. Certain property, however, may receive up to a \$1.3 million basis increase and property received by a surviving spouse may receive an additional basis increase of \$3.0 million, but only if specific conditions are met;
- The lifetime gift tax exemption remains at \$1 million and all lifetime gifts in excess of such amount are taxed at 35% (down from 45% in 2009);

- Commencing January 1, 2011, the estate and generation skipping transfer taxes will be re-imposed with a \$1 million lifetime exemption (generation skipping transfer tax exemption subject to cost of living adjustment) and 55% top tax rate; the historic basis adjustment to fair market value upon death for all assets will be restored and the gift tax will again be integrated with the estate tax (i.e., a \$1 million exemption and a 55% rate).

CLIENT ACTION STEPS

The absence of an estate tax in 2010 may create uncertainty as to how certain provisions of typical estate tax plan documents will be interpreted because they generally refer to terms and concepts of federal estate tax which, at this point, no longer apply. As well, existing documents likely do not contemplate a modified carry-over basis system and thus do not contain provisions to optimize tax planning in light of this new system. On a brighter note, the reduced gift tax rate (absent a retroactive rate increase) provides a substantial tax savings opportunity for lifetime gifting during 2010. We encourage you to contact your Jaffe attorney to review how your estate plan is affected by these changes and to explore wealth transfer opportunities.

This Update is intended to inform our clients of recent legal developments that may affect them. This is not intended, and should not be used, as legal advice or opinion. For more information contact Michael Weil at mweil@jaffelaw.com.