



# eActionAlert

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## CONGRESS REINSTATES & EXTENDS ESTATE TAX

### Introduction

On December 17, 2010, the President signed into law the "Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010" (the Act). A sweeping tax package, the Act includes a two-year extension of the Bush-era tax cuts, temporary estate tax relief, a two-year patch to the alternative minimum tax, a two-percentage-point reduction in employee-paid payroll taxes and the self-employment tax for 2011, plus many other tax breaks for individuals and business.

What follows is a summary of the provisions of the Act *related to estate planning*. (No attempt was made to summarize all 1,900 pages of the bill.) Since most of the provisions are only one or two year extensions, prompt action will be required to maximize the Act's tax benefits.

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### Estate Tax 2010

Estates of 2010 decedents may elect to:

1. Pay no estate taxes and take a modified carryover basis; or
2. Pay up to a maximum 35% estate tax on amounts over \$5 million with a full step-up in basis.

2010 estate tax returns will be due nine months after the Act's enactment.

We expect that most estates *over* \$5 million will select the "no estate tax" option while estates *under* \$5 million will elect the estate tax so that there will be a step-up in basis and no federal estate taxes due on transfers less than or equal to the exemption amount.

Other provisions for 2010 include:

- The gift tax is 35% on amounts over \$1 million.
- The generation skipping transfer tax (GSTT) exemption amount is \$5 million with a 0% GSTT rate in 2010.

### Estate Tax 2011 and 2012

The Act also reinstates the estate tax for 2011 and 2012. The exemption amount for each individual will be \$5 million with a top tax rate of 35% and the step-up in basis rules will apply. Beginning in 2012, the \$5 million exemption is indexed for inflation.

There are provisions for the portability of the \$5 million estate tax exemption which will make it easier to transfer the exemption to a surviving spouse. This will enable married couples to protect up to \$10 million in assets from estate taxes without requiring complicated estate planning documents. Although this is a good feature, there are several "catches" to the portability - the surviving spouse may use only the *last* decedent spouse's carried over exemption; it is not indexed for inflation and the assets are not protected from the surviving spouse's creditors.

The gift and estate tax exemption amounts will be reunified in 2011 and 2012. This means that the gift and estate tax and GSTT exemption amounts will be \$5 million for each individual with a 35% top tax rate.

Because the Act's estate tax provisions "sunset" in 2013, there continues to be a lack of certainty as to what the future will bring. What we do know for now is that we have a two-year window of opportunity to do some creative planning that can protect assets from creditors, predators and estate tax collectors for

generations to come, while enabling you to maintain as much control and income as possible.

### **Amazing New Planning Opportunities Abound**

Literally hundreds of millions of dollars are at stake for families that act now to take advantage of the “once in a generation” planning opportunities available under the new law.

For example, if after January 1, 2011, Grandma and Grandpa were to each give \$5 million and their son and daughter were to each give \$5 million (for a total of \$20 million) to a GSTT-exempt Trust for their grandchildren and future generations of heirs and the trust corpus were to grow by 6% per year, the Trust would be worth \$200 million in 40 years. At an annual growth rate of 8%, the Trust could be worth \$400 million in 40 years. And all of this principal could be exempt from estate and GST tax for an additional 320 years in the state of Florida (360 years total exemption).

NOTE: This opportunity is not just for the super-rich; even those with more modest estates can take advantage of the enhanced lifetime gifting opportunities and leverage their wealth through life insurance to create similar results.

Individuals wishing to transfer more than \$5 million either outright to one or more grandchildren or to a GSTT-exempt trust for them, should do so before January 1, 2011.

Although you would pay a 35% gift tax on the amount in excess of the current \$1 million gift tax exemption amount, you would pay no GST tax nor any extra gift tax on the GST tax and save \$962,500 in total transfer taxes on the first \$10 million and an additional \$4,725,000 on the next \$10 million versus waiting and making the \$20 million transfer in 2011 or 2012.

### **Retains Favorite Existing Strategies & Techniques**

For families with wealth in excess of the new \$5 million per individual and \$10 million per married couple gift and estate tax exemption amounts, the new law retains all of the prior permissions and incentives to use Family Limited Partnerships, Limited Liability Companies and Grantor Retained Annuity Trusts (GRATs) and to incorporate

Charitable Planning strategies that can completely eliminate **all** of your estate taxes, regardless the size of your estate.

Back in the day when Congress used to make laws based on public policy, there was a sentiment that “those with relatively more have a responsibility to give something back to enrich the system that made their wealth accumulation possible and to help others with relatively less”. And so our transfer-tax system was created to provide incentives for people to make their own choices about what causes and concerns mattered most to them. Ever since Justice Brandeis first wrote about the “free bridges” in our tax code, the estate tax has always been the government’s default mechanism to capture and re-direct a portion of the wealth of those who elect not to take advantage of the built-in opportunities to make their own families wealthier by planning to help others as well. The question has always been where to draw the line? After all, how much is enough?

For all the talk about whether to reinstate or do away with the estate tax, the fact remains that it is still an optional tax and that with proper planning, wealth that would have otherwise been lost to taxes can be retained in Family Foundations and used to create incredible opportunities for children and grandchildren to have influence over and to positively impact their communities.

In the end, the choice is quite simple - would you rather be a taxpayer or a philanthropist?

### ***For additional information contact:***

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