

# DON'T SIT BACK AND ASSUME CONGRESS WILL EXTEND OR AMEND THE ESTATE TAX LAWS! TAKE STEPS NOW TO COVER YOUR ESTATE PLANNING GOALS

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As you have probably heard by now, Congress failed to address estate tax reform in 2009. As a result, unless Congress retroactively applies the 2009 laws that expired on December 31, 2009, no estate tax and no generation skipping transfer tax exist for deaths occurring in 2010. Although some attempt was made by Congress in 2009 to temporarily or permanently tackle estate tax issues, the Senate and House of Representatives were unable to agree to implement meaningful estate tax reform. We are now left with confusion and anger over our elected leaders who have failed to resolve estate tax issues that may end up forcing us to address their inaction through our own estate plans.

Many knowledgeable tax and estate planning gurus stated in early 2010 that Congress would soon focus on their failure to implement estate tax reform in 2009 and would reinstate the estate tax retroactively to January 1, 2010. We are now one-third of the way through 2010 with no apparent attention being given to estate tax reform. There have been talk show hosts and certain media articles indicating that if Congress passes estate tax legislation with language applying it retroactively, we can expect constitutional challenges to their retroactive application. Whether or not this occurs, the more important issue for individuals is to review your estate planning documents to determine if your goals have been skewed by Congress' inaction. Pay particular attention to the following situations:

1. Gift Tax Planning – In theory, gift tax for 2010 remains in place. Each individual still has a \$1 million lifetime exemption equivalent (no change from 2009). However, laws have changed regarding the “step up” in tax basis during 2010 so that each estate can only step up \$1.3

million in basis to date of death values, a significant reduction. A surviving spouse will be allowed a \$3 million step up in basis of assets. There are many other technical nuances with respect to gift tax changes in the laws that are worth considering.

2. Failure of Congress to Act during 2010 – If Congress does not reinstate the estate tax retroactively, there will be no estate taxes owing for a death occurring during 2010. If nothing is done by Congress this year, on January 1, 2011, an estate tax exemption of only \$1 million will be reinstated (instead of the \$3.5 million that existed for estates during 2009) and the maximum rate for estate taxes will be increased from 45% to 55%. In addition, the old step up in basis laws will be reinstated on January 1, 2011. Not knowing if this scenario will occur, you should look at the size of your estate and analyze whether you should consider selling real estate parcels now (when values are low) rather than having them pass upon your death. Although a sale now may subject you to a 15% capital gains tax, you may be better off selling real estate assets when property values are low, rather than having your estate pay a 55% estate tax on assets above the \$1 million estate tax exemption after 2010. Every estate is unique, but weighing your options now may save estate, gift, income, or property taxes in the future.

3. If a loved one is ill and may not survive 2010, that individual should focus on whether estate planning documents need to be revised to reflect the original estate planning goals and intent. In many estate plans that contain subtrusts to be funded upon the death of the first spouse, pay particular attention whether formula clauses or other language used in your trust will financially benefit or hurt the surviving spouse or other beneficiaries. Depending on when your estate plan was drafted, what was contemplated then may not achieve your goals now, given the lack of exemptions or possible reduced exemptions if Congress fails to act. Revisions can be made to your estate planning documents that allow for alternate results, depending on what laws may be changed in the future.

4. In blended family situations, with children from previous and existing marriages, you should pay particular attention to how formula clauses and subtrusts will be applied if an unforeseen death occurs. Language that was originally drafted may no longer achieve your desired result. If no revisions to tax laws are made in 2010 or 2011, an untimely death may result in a spouse obtaining virtually all of an estate with no amount passing to children from a previous marriage, or the spouse receiving significantly less than what was contemplated when you created your original estate plan.

5. Should Congress fail to do anything, keep in mind that your estate may have substantially increased estate taxes that will be due. Consider lifetime estate planning options that will reduce future estate taxes or segregate liquid assets to pay the estate taxes without your trustee having to sell assets you want to leave to your loved ones.

6. Revisit whether it is appropriate to make gifts to relatives or beneficiaries in 2010 – With the possibility that the estate tax in 2011 will only have an exemption equivalent of \$1 million, you should give serious thought to whether lifetime gifts may be beneficial to your estate plan.

Conclusion: We cannot stress enough the need for you to read your wills and revocable trusts given these uncertain times. If you feel it is appropriate, you are welcome to contact our firm to discuss your unique estate plan. We can also assist you with specific minor amendments to provide the executor or trustee with more flexibility to increase the basis for certain assets, minimize the recognition of taxable gain when funding subtrusts, and clarify contingencies in your documents should our elected officials in Washington turn their backs on estate tax reform and simply allow the old law to come back into effect.