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Estate Planning Update December 2016 - Election Update: Federal Estate Tax Repeal on the Horizon?

The Republican sweep of the presidency and both houses of Congress has led to increased speculation about the possible repeal of the federal estate, gift and generation-skipping transfer (GST) taxes.

President-elect Donald Trump has proposed full repeal of the federal estate tax. In exchange, the proposal would eliminate the current step-up in tax basis upon death, with a $10 million exemption. The proposal could either be interpreted as (1) a capital gains tax due upon death, to the extent that the fair market value of assets included in the estate exceeds their tax basis, or (2) a capital gains tax due upon the later sale of appreciated assets by the beneficiaries. The meaning of the $10 million exemption is also open to interpretation — it could be per individual or per couple, and it could apply to $10 million of fair market value or $10 million of gain.

While many details are missing from the proposal, including specifics of whether the gift and GST taxes would be repealed as well, it does seem that repeal will be a high priority of the new Congress. Many commentators expect that we will have a clearer picture by the middle of 2017. Various commentators also believe that the proposed regulations under Code Section 2704, described in our special September 2016 *Estate Planning Update*, are unlikely to be finalized.

See our accompanying article regarding the potential impact of federal estate tax repeal on certain state-level estate taxes.

Keeping in mind that speculating on the actions of Congress is generally a fool's game, until we have more certainty, you may wish to consider:

- Delaying major estate tax-motivated gifts and other transfers, particularly those that could result in gift tax. This would apply to clients who were planning major transfers in anticipation of the implementation of new regulations under Code Section 2704.
- Reviewing estate plans that contain marital deduction or other formulas. Many estate planning documents refer to the federal estate tax or GST tax in establishing, for example, the size of a marital or family trust or of a bequest. In the event of repeal, documents may be interpreted, and assets distributed, in a manner different from what was intended. Some of these documents would need to be changed to ensure that repeal does not lead to an unintended result.

For the time being, annual exclusion gifts should probably be continued. Larger gifts that do not generate a gift tax, including transfers to grantor retained annuity trusts (GRATs), may still make sense for many people.

If you have any questions about current gifting strategies or wish to review the impact of potential repeal on your estate planning documents, please contact your Day Pitney estate planning attorney.