

The Times They Are A–Changin’: Estate and Gift Tax Exemption Amount Doubles

In this world, things change, and clients need to adapt to those changes. A major change in gift and estate tax law has occurred and clients need to take notice, and adapt their estate plans accordingly.

A gift tax is imposed on certain lifetime transfers, and an estate tax is imposed on certain transfers at death. Under current law, the first \$5 million (as adjusted for inflation in years after 2011) of transferred property was exempt from estate and gift tax. For estates of decedents dying and gifts made in 2017, this “basic exclusion amount” was \$5.5 million (\$11.1 million for a married couple).

Under the Tax Cuts and Jobs Act of 2017 (the “Act”), for estates of decedents dying and gifts made after Dec. 31, 2017 and before Jan. 1, 2026, the Act doubles the base estate and gift tax exemption amount from \$5 million to \$10 million. The \$10 million amount is indexed for inflation occurring after 2011 and is expected to be approximately \$11.2 million in 2018 (\$22.4 million per married couple). The doubling also applies to the generation skipping transfer (“GST”) tax exemption. The doubling of the exemption sunsets after 2025 and the exemption reverts to \$5 million indexed for inflation from a base year of 2016.

Planning now while the gift tax exemption is doubled may be viewed as a limited opportunity to upgrade or improve existing estate plans. With no assurance that a future administration will not negate the doubling of the estate and gift exemption, and where a future administration may prefer to substantially lower the exemption amounts, planning should not be deferred to a later date.

Clients should review their will and revocable trust dispositive provisions to confirm any formula language in their existing documents will be interpreted as intended in light of the new law. For example, language in existing documents creating a marital trust for a spouse and a family trust for the children may now result in the marital trust receiving nothing simply because the estate exemption amount has doubled! Alternatively, leaving the amount that can pass free of GST tax to your grandchildren with the remainder of your estate going to your favorite charity may now result in the charity receiving nothing simply because the GST exemption amount doubled! Due to changes under the Act, will and revocable trust dispositive provisions may not function as planned; clients should confirm their documents will continue to function as intended.

For clients with net worth above \$22.4 million, a 40% tax bite can still destroy a closely held business or family legacy goals. For clients who continue to have estate tax exposure, re-calculating existing federal estate tax exposure under the new rules should be the first order of business. Thereafter, to the extent needed, the traditional wealth transfer strategies should continue to work. Continuing making gifts using the increased exemption will enable clients to remove further assets from their taxable estates and exempt any future appreciation from transfer taxation.

Clients should review whether transfers should be made from any trusts to which GST exemption had not been allocated to take advantage of the additional GST exemption amount available (whether distributions from GST non-exempt trust to GST exempt trusts would be a good idea). It may also be prudent to make a late allocation of GST exemption election to existing non-exempt trusts so that if a future administration rolls back the Act’s benefits, those trusts will be GST exempt trusts.

Finally, traditional tax planning is still required for those states such as New York which have decoupled and instituted their own state gift and estate tax system. Under current NYS legislation, the individual estate tax exemption is \$5.2 million in 2018. The exemption is scheduled to increase to the old federal exemption in 2019. However, NYS estate tax will not automatically adopt the doubling of the federal exemption. Also significantly NYS law does not provide for portability of the exemption between spouses as provided in federal law.

Clients should also consider the impact of the NYS estate tax cliff which provides that an estate which slightly exceeds the NYS exemption, incurs a tax on the entire estate without regard to the exemption.

Please review your estate plan and your estate planning documents. For he that gets hurt will be he who has stalled.

If you have any questions, please contact any of the [attorneys](#) in our [Trust and Estate Practice](#), or the attorney in the firm with whom you are regularly in contact.



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