In the Holiday Spirit, Give While You Can

The 2017 Tax Cuts and Jobs Act (the "Act" or "Tax Reform") increased the basic exclusion amount for decedents dying and gifts made between January 1, 2018 and December 31, 2025, from $5 million to $10 million, before adjustment for inflation. For 2018, the inflation-indexed basic exclusion amount is $11.18 million per spouse, and for 2019, it will be $11.4 million per spouse. Unless new legislation is enacted, as of January 1, 2026, these exemptions will sunset and the basic exclusion amount will revert back to $5 million, as adjusted for inflation.

Since Tax Reform was passed, tax professionals and commenters have expressed some concern regarding the tax treatment of gifts completed while the current exclusion amount is in effect. In particular, the main concern was whether an estate tax, for an individual dying after December 31, 2025, could be imposed on a portion of gifts that were previously sheltered from gift tax by the increased exclusion amount. These concerns also relate to the possibility that the Act could be changed even sooner than December 31, 2025. This scenario is often referred to as a "clawback".

Just prior to Thanksgiving, the Internal Revenue Service issued Proposed Regulations (REG-106706-18) that if finalized would have the effect of removing that uncertainty and renewing confidence in the ability of taxpayers to continue to engage in substantial estate planning gift transactions without a "clawback" of these gifts for tax purposes. The proposed regulation provide that a taxpayer's estate may utilize the higher of the basic exclusion amount at either the time when gifts were made or the exclusion amount in effect at the time of the taxpayer's death, when calculating estate tax.

In sum, the proposed regulations provide that gifting will not be subject to potentially adverse tax laws at a later time when the basic exclusion amount is lower than it is at the time of the gift. A public hearing on the proposed regulation is scheduled for March 13, 2019. In light of optimism for ultimate finalization of these regulations, now is the time to review your estate plan and consider with your tax and legal advisors how substantial gifting may be incorporated before the current taxpayer-friendly laws sunset or are sooner changed. Please do not hesitate to contact us so that we can review these matters in detail with you and assist you in making fully informed decisions.

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