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### The Future of Estate Planning: Approaching the Sunset of EGTRRA

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When one talks about estate planning, often the focus is on wealth transfer taxes, otherwise known as estate, gift, and capital gains taxes. The current wealth transfer tax rules are a result of the legislation Congress passed in 2001 called the Economic Growth and Tax Relief Reconciliation Act (EGTRRA). EGTRRA drastically changed the way wealth transfer is taxed and created a large amount of uncertainty regarding the future of wealth transfer taxation. Under EGTRRA the estate and generation-skipping transfer taxes have been gradually phased out so that in 2010 there will be no estate tax or generation-skipping tax but there will be an increase in capital gains tax in the form of eliminating the step-up in basis heirs received at the grantor's death. However, under EGTRRA in 2011 the estate and generation-skipping tax is scheduled to be back with a \$1 million exemption unless Congress passes new legislation. So now that 2009 is coming to the end, where does the wealth transfer tax stand?

On December 3, 2009 the House passed Bill 4154 The Permanent Estate Tax Relief for Families, Farmers, and Small Business Act of 2009. Bill 4154 permanently ex-

tends the wealth transfer tax in its current form. This means that the first \$3.5 million of an individual's estate and the first \$1 million of an individual's gifts will be exempt from taxes. This bill also locks in the current tax rate so that any amount above those exclusions will be taxed at a 45% tax rate. The bill will now move to the Senate to be voted on.

The fate of this bill in the Senate is unclear, primarily because there are many competing ideas of what permanent estate tax reform should look like among Senate members. The Republicans are mostly in agreement in arguing for the lowest estate tax possible. The Democrats are not in accord the way the Republicans are. Any permanent changes to the wealth transfer taxes in 2009 are unlikely mainly because the Senate is currently preoccupied with health care reform. However, the Senate is expected to pass a stop-gap measure in the form of a one-year extension of the current tax schedule.

Even though permanent changes are not likely in 2009, there are bills in Congress proposing many different changes to the wealth trans-

fer tax. Below are some of the proposed bills.

#### HR 436 Certain Estate Tax Relief Act of 2009

The House Bill 436 proposes to restore the tax on estates and generation-skipping transfers and the step-up in basis provisions for property acquired from a decedent, previously repealed by EGTRRA. It repeals the sunset provision which causes the estate tax to go away in 2010. It provides an estate tax exclusion of \$3.5 million and sets the maximum tax rate at 45%. Unlike the other bills, Bill 436 subjects estates valued in excess of ten million dollars (\$10 million) to an additional five percent (5%) tax. It also disallows the use of valuation discounts in transfers of non-publicly traded entities holding passive assets. This is a crack down on Family Limited Partnerships and other business entities being used to hold non-business assets purely for estate tax purposes. Furthermore, Bill 436 eliminates minority interest valuation discounts with respect to any interest in family controlled, non

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### **HR 498 Capital Gains and Estate Tax Relief Act of 2009**

House Bill 498 proposes to make the reduction in capital gains tax to 15% permanent. It also restores the unified credit against gift tax liability, provides for annual increases in the estate tax exclusion amount between 2010 and 2015, and establishes a permanent exclusion amount of \$5 million for 2015 and thereafter. This bill provides for an inflation adjustment to the estate tax exclusion amount after 2015 to reduce estate tax rate brackets and allow a surviving spouse to use the unused unified estate tax credit of a deceased spouse.

### **S. 722 Taxpayer Certainty and Relief Act of 2009**

Senate Bill 722 amends wealth transfer tax to make permanent the increased alternative minimum tax (AMT) exemption amounts and the offsets against such tax for nonrefundable tax credits, adjusts such AMT exemption amounts for inflation after 2009, makes reductions in individual income tax rates and capital gains and dividend tax rates enacted by EGTRRA permanent, and makes expanded eligibility for the child tax credit permanent. The Bill also proposes to increase the earned income tax credit rate for taxpayers with three or more children, make estate, gift, and generation-skipping transfer provisions in effect in 2009 permanent, and adjust estate and gift

tax unified credit amounts for inflation after 2010. Bill 722 further proposes to make the estate and gift tax unified credit portable which means surviving spouses will be allowed to increase their estate and gift tax unified credit by any unused credit amounts of a deceased spouse. Finally, it repeals EGTRRA sunset dates for: (1) marriage penalty relief provisions; and (2) increases in the dependent care, adoption assistance, and earned income tax credit.

### **HR 2023 Sensible Estate Tax Act of 2009**

House Bill 2023 proposes to repeal provisions of EGTRRA relating to the estate and gift tax and to set the estate tax exclusion at \$2 million, adjusted for inflation in calendar years after 2010. The Bill also revises the estate tax rates for larger estates, restores the estate tax credit for state estate, inheritance, legacy, or succession taxes, and restores the unified credit against the gift tax. Finally the Bill 2023 proposes to make the unified estate tax credit portable which will allow a surviving spouse an increase in the unified estate tax credit by the amount of any unused credit of a deceased spouse.

### **S. 2784 Permanent Extension of Estate Tax as In Effect In 2009**

Senate Bill 2784 proposes to freeze the estate tax at 2009 levels and index the tax rate to inflation.

### **Conclusion**

It looks like we will have to wait until 2010 to find out what the Congress will do to permanently address the wealth transfer tax rules. So should you even bother to do your estate planning with all this uncertainty? Yes. Estate planning is much more than tax planning. An estate plan appoints guardians for minor children, addresses the terms of the disposition of your assets, arranges the ownership of your assets to protect them from risks and liabilities, determines the succession of management and ownership of your business, and makes arrangements for the needs of beneficiaries with special needs or circumstances. In short, it does much more than avoid taxes. The primary purpose of estate planning is to ensure the orderly distributions of your assets that reflect your wishes, values and needs. Estate planning is more than tax planning, it is planning for life.

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