

JANUARY 2010

**This alert is to advise you of the temporary repeal of the federal estate and generation-skipping transfer taxes for 2010, and the possible need for review of your estate planning documents.**

We thought Congress would extend the 2009 rates and exemptions for 2010, but instead, Congress let the federal estate tax law (and generation-skipping transfer "GST" tax law) lapse for this year only. If no action is taken by Congress, there will be no federal estate tax or GST tax on deaths occurring in 2010, but in 2011, the estate tax and GST tax will return, with a \$1 million exemption (instead of the \$3.5 million exemption that applied in 2009) and a top rate of 55% (instead of the top rate of 45% that applied in 2009).

We do not know if Congress will act during 2010 to reinstate the estate tax and GST tax, although that is being discussed. If Congress does act, we do not know the amount of the exemption or the top tax rate that Congress might enact, or if the changes will be retroactively applied to those dying or making transfers in the interim. If Congress does not act to reinstate these taxes, the estate of a decedent who dies in 2010 will not be subject to estate tax or GST tax, but the estate's assets will be subject to a new set of "carry-over" basis rules for income tax purposes.

Unlike the federal estate tax and GST tax, the federal gift tax has not been repealed. However, the gift tax rate was reduced from 45% to 35% for 2010. The annual gift tax exclusion amount remains at \$13,000 per donee, and the lifetime gift tax exemption amount remains at \$1 million.

### **How These Tax Law Changes May Adversely Affect Your Estate Plan**

The repeal discussed above could adversely impact provisions of Wills and Trusts that are dependent upon the existence of the repealed taxes. For example, if the provision for a surviving spouse (often referred to as the Marital Share or Marital Trust) is based upon a tax formula that makes reference to the estate tax exemption existing at death, the repeal could cause the Marital Trust not to be created. This may disrupt an estate plan if death occurs in 2010, particularly if the surviving spouse is inadequately provided for in the Family Share or Family Trust or in other provisions of the decedent's documents. This could be particularly troubling in second marriage situations if the Family Trust provides for children of the prior marriage and not for the surviving spouse. Florida's elective share of 30% may only partially alleviate the loss of the Marital Trust to the surviving spouse.

It is possible that the temporary repeal of the estate and GST taxes for 2010 also may present estate planning opportunities, which we would be happy to discuss with you. We encourage you to review your estate planning documents and asset holdings to determine if an untimely death in 2010 might result in unintended consequences.

Please contact your Trenam Kemker lawyer or one of our Wealth Planning and Preservation lawyers listed to the right to review your documents and to answer any questions you might have.

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