

November 30, 2016

**WILL THE ESTATE TAX BE TRUMPED?**  
**Year-End Planning Without Certainty**

I. The Election and Its Impact

As we all know by now, on November 8th, Donald J. Trump, won the presidential election – pulling off a surprising upset victory over Hillary Clinton. In addition to capturing the presidency, both houses of Congress remained in Republican control, likely paving the way for a conservative agenda.

It remains to be seen if this election will impact the current estate tax system in any manner. Our President-elect has repeatedly indicated his intention to completely eliminate the federal estate tax and, in fact, included it as part of his official tax plan.<sup>1</sup> Killing the estate tax would be a relatively easy starting-point for Trump’s promised tax overhaul, since as of 2014 the revenue it generates for the federal government is 0.6% of the total Federal revenue.<sup>2</sup>

II. Worsening before Improving?

In our August 2016 article titled “[Will Your Estate Increase by 30% in 2017?](#),” we discussed the new proposed regulations of Section 2704 of the IRC (scheduled to take effect early to mid-2017). The regulations would essentially eliminate valuation discounting for estate and gift tax purposes on transfers of interests in family owned entities. The overwhelming consensus from many experts is that even assuming the new

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<sup>1</sup> See Donald Trump’s Tax Plan on his website at <https://www.donaldjtrump.com/policies/tax-plan/>.

<sup>2</sup> It should be noted that the discussion in this article relates to the federal estate tax. Many states, including New York and New Jersey, have their own estate tax (but see our previous article (["The Impending Death of New Jersey Estate Tax"](#)) regarding New Jersey’s upcoming change to their estate tax system). If the federal government repeals the estate tax, individual states might follow their lead and repeal the tax as well.

administration does not repeal the estate tax, still it is extremely unlikely to allow regulations to take effect which make the existing laws more burdensome.<sup>3</sup>

### III. Estate Tax Repeal...Then What?

The question is – if the estate tax is eliminated, will some new alternative tax regime take its place?

One alternative that has been suggested by some and by the President-elect himself,<sup>4</sup> is something similar to the Canadian transfer tax system. In 1971, Canada enacted tax reform that replaced its estate tax (which until that time was similar to that of the United States) with a “deemed disposition” regime, subjecting the transferee to capital gains tax upon death (or during lifetime upon gifting an asset with “built-in” gain) on the imputed gain. This system, even if put into place, will likely only apply to estates with built-in capital gain of an amount exceeding the current exemption amount.<sup>5</sup>

### IV. Keep the Status Quo?

Although there is considerable uncertainty surrounding the future of the federal estate tax, the estate tax system could remain unchanged. The prognosticators often are wrong,<sup>6</sup> and it would be prudent to take simple affirmative steps that unquestionably expire at midnight on December 31, 2016. If stability reigns, it would be a shame to look back at year-end 2016 as a wasted opportunity to reduce an estate’s value. For instance, annual exclusion gifting that can be made with minimal collateral costs (i.e. cash gifts or insurance policy transfers) should still be made in 2016, on the considerable chance that the estate tax is not going away. If, however, there are significant costs associated with gifting (i.e. appraisals for real property or business interests) it might be wise to hold off on these gifts until the new tax laws, if any, take shape.

Even if the estate tax is repealed, your year-end transfers to trusts will not have been for nought as trusts also provide non-tax benefits such as creditor protection and allow for the reduction or complete avoidance of state income tax in certain instances. Furthermore, a trust does not necessarily need to hamper your lifestyle as a spouse can be

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<sup>3</sup> Even before the elections, there had been significant pushback against the Treasury Department due to the hardship that the proposed regulations would cause taxpayers. It reached the point that, following the receipt of significant negative feedback regarding the proposed regulations, a few officials in the Treasury mentioned (off the record) that the new regulations were not intended to be as draconian as ultimately understood.

<sup>4</sup> See Donald Trump’s Tax Plan, on his website, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> The reader may recall the 2012 year-end gifting rush based on forecasting that did not materialize.

included as a permissible beneficiary of the trust, so that the gift can be virtually “undone” (i.e., funneled back to the Settlor’s spouse) if the couple needs the assets.<sup>7</sup>

Additionally, regardless of the future state of the estate tax system, estate and trust planning remains important for a multitude of reasons. From a practical perspective, proper estate planning can be the difference of who benefits from your estate after death, whether that information becomes public, and who will care for your children in extreme circumstances. Finally, proper planning from an income tax perspective can shield your estate from onerous tax and other unintended consequences.<sup>8</sup>

Please feel free to contact our firm to discuss the above and to discuss estate planning strategies based on your specific circumstances<sup>9</sup>.

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*The information contained in this article is for general informational purposes only. It is not intended as professional counsel and should not be used as such.*

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<sup>7</sup> A trust created in certain jurisdictions would allow the creator of the trust to also be a beneficiary while still achieving the intended creditor protection.

<sup>8</sup> For example, confirming that beneficiaries are appropriately designated under an IRA, 401K, life insurance policies and other assets allowing for beneficiary designations.

<sup>9</sup> When the estate tax picture becomes clear and if remarkably different we plan to send a memo regarding planning strategies under the new system. Meanwhile we will wait and see.