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## LEGISLATIVE INACTION CREATES ESTATE TAX UNCERTAINTY

### CONGRESS FAILS TO ADDRESS SCHEDULED YEAR-END REPEAL

With Congress in holiday recess, it now appears virtually certain that the federal estate and generation-skipping transfer (GST) taxes will “sunset” at the end of 2009. The repeal was scheduled in a 2001 law that steadily and significantly increased the exemption from estate taxes to the current \$3.5M, while reducing the top tax rate to 45%. In 2010, the estate and GST taxes disappear altogether, and the gift tax rate drops to 35% with the lifetime exemption remaining at \$1M.

The repeal looks more like a product of distraction than an intentional effort to abolish the estate tax. Throughout the year multiple bills were proposed in the House and the Senate, the most recent simply extending current law.

The most likely scenario now is for a retroactive extension of 2009 law when Congress reconvenes after the first of the year, though the political considerations may shift with repeal. Even assuming that Congress will enact an extension retroactive to January 1, 2010, the gap poses several concerns and perhaps some opportunities:

- *The Retroactive Effect May Not Stand* – The IRS has a long and successful track record defending retroactive tax rate changes in the courts, but enacting what will be a “new” tax to be effective before its passage may not be constitutional. The only certainty is that many taxable estates of decedents dying in the gap period will make that argument, and that it will take years to reach a final determination on the issue. Short of dying to exploit this confusion, there may be opportunities for generation-skipping transfers during the gap that could ultimately prove to be a tax advantage.
- *Taxable Gifts* – While the gift tax remains, a reduction in the maximum tax rate from 45% to 35% could alter the analysis in determining whether to make a taxable gift. Similarly, a transfer that could later be treated as a gift, such as an intra-family loan, might be best timed for the lower rate period.
- *Opportunity to Review Your Estate Plan* – Given the current uncertainties and recent gyrations in asset values and the estate tax exemption, we recommend a review of your estate plan to make sure it still accomplishes your family and charitable goals. Most tax-sensitive plans are written with formulaic allocations that adjust to the tax laws, but such provisions could now result in unanticipated outcomes in the distribution of your assets. An evaluation of how your assets are held and how they would now be distributed under your plan has become critical in light of these developments. In many cases, a straightforward codicil to your will (or amendment to your trust) could ensure that your plan still meets family objectives.

Please contact us if we can answer any questions or assist in a review of your plan.

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