

THE TECHNICAL CORNER

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Does an Estate Tax Repeal Really Matter?

President Trump's platform of tax reform includes repeal of the "death tax." What exactly that means in terms of the details is anyone's guess. There are lots of unknowns: Will the gift tax be changed or repealed? What will happen to basis at death? What about state estate taxes based on the federal tax? For nearly a year now, political commentators have been talking about expected tax reform, and with it, change in the estate tax.

At the end of September, the administration put out its "United Framework for Fixing our Broken Tax Code," which gave a broad overview of the President's tax reform plan. However, thus far, no specifics have been communicated and no actual changes have been instituted. But with tax reform allegedly "around the corner," how will estate planning really be affected?

1. Historically, any change in the wealth transfer laws will be temporary. In estate planning, there are always unknowns. We, as planners, do not know when a client is going to die. We do not know how a client's family will turn out or what their net worth will be years from now. And we do not know what the estate tax laws will look like at a client's death.

Historically, any estate tax repeal will likely be temporary. The estate tax has been repealed and reinstated (or exemption decreased or rate increased) approximately 27 times in our country's history. It is likely that if the estate tax is repealed this year, it will be reinstated sometime in the future whether because of a change in governing party or because of changing tax policy. Unless you live in Chicago, the dead are one constituency whose opinions politicians seem not to care a lot about.

So even with estate tax repeal, we still do not have any better information on what the estate tax law will be when a client dies. The bottom line is the same advice: we should plan with as much flexibility as possible. This means that, both in strategy selection and drafting, we should strive to employ as much ability to adapt to those unknowns as we can. This is true whether the issue is tax planning or some other issue.

2. Taxes are rarely the primary consideration in estate planning. Estate planning should avoid being tax driven. Transfer taxes are a consideration for some clients' planning, but even where taxes are a consideration, they should rarely be the focus. Rather, clients' objectives should drive estate planning.

Estate planning is about planning to take care of those people and organizations the client cares about, whether family, charities, or other objectives. Avoiding transfer taxes may be a way to further that objective, but it is typically not the objective itself. As planners, it is our job to help clients develop and discover their objectives and then to translate those objectives into a cohesive, effective plan. Planning to manage estate tax exposure is secondary.

Therefore, in a paradigm where estate taxes are no longer a consideration or worry, the essence of planning should not change. If anything, planners can get back to focusing on what they should have always focused on: planning.

3. Important planning objectives will still exist. Saving or avoiding estate tax, and even passing property to the right beneficiaries, are not the only objectives served by a sound estate plan. A well-crafted estate plan can provide asset protection to the beneficiaries, and even, in some cases, to the plan creators. That plan can and should address state estate taxes if the client lives in a jurisdiction that continues to have an estate tax. Estate planning can also incorporate business continuation and business succession planning. All of these will continue to be planning needs even under a repeal of the estate tax.
4. What to do about existing estate plans. With a repeal of the estate tax, it will be important for us, as planners, to help clients review their current estate plans. Some planning, particularly planning dependent on an exemption amount (i.e., credit shelter/marital trust funding clauses) will need to be updated. Clients, however, will want to be wary of eliminating existing planning, including life insurance, in light of an estate tax repeal. Given that any elimination of the estate tax will likely be temporary, for the reasons cited above, clients will want to retain this planning with the expectation the estate tax will be reinstated.
5. New opportunities may abound. Depending on how changes to the wealth transfer system are implemented, new, fantastic opportunities for clients may materialize. In some cases, those opportunities may be fleeting because of a government error or miscalculation. These opportunities are where estate planners can bring tremendous value to their clients if they seize the moment. Armed with skill, knowledge, and historical context, planning can change a family's future fortunes.

All this adds up to the fact that our clients will still need estate planning and will still need us to help them through that planning. While the planning we do will need to adjust somewhat to changes in the tax law (not unlike the way planning has shifted as the exemption amount has increased over the last twenty-five years), the majority of planning we do currently, and strategies we employ today, will remain the same. We will need to continue to plan with flexibility, knowing that the future is uncertain, including the future landscape of the wealth transfer tax regime, regardless of any estate tax repeal in the near future.