

# So, What's Up With Estate Tax Repeal

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08/01/2017

Mid-Fall of last year I was working with a client on a sale of an interest in a closely-held business to a grantor trust. A detailed business valuation was in process when then candidate Trump became President-elect Trump.

Suddenly candidate Trump's campaign platform, which included the repeal of the estate tax, became much more relevant. Repeal would be great, but we all saw President George W. Bush campaign hard on the repeal of the estate tax in 2000, and are familiar where that ended up 13 years later. Nonetheless, respected estate planning experts were commenting that this time there is a real possibility, if not a probability, for repeal.

We decided that since we were three-fourths of the way through the process, we would go forward with the sale. Even if the estate tax is repealed, there surely would be a number of lingering issues – would the gift tax and generation skipping tax be repealed, if so, for how long, and would the income taxation of gifts and inheritance be changed?

**It's déjà vu all over again.** The most recent serious run at estate tax repeal was by George W. Bush and the Republican Party in 2001. At that time, the estate tax exemption was \$1,000,000 and the top estate tax rate was 55%. The President was in favor of estate tax repeal, the House consisted of 223 Republicans, 211 Democrats and 1 Independent, and the Senate consisted of 50 Republicans and 50 Democrats, with Vice President Dick Cheney holding the tie-breaking vote. The budget deficit in 2000 was actually a surplus of \$290 billion. And we were pre 9/11.

Now, the estate tax exemption is \$5,490,000 and is subject to a cost of living adjustment, and the top estate tax rate is 40%. The President is in favor of estate tax repeal, the House consists of 240 Republicans, 194 Democrats and 1 vacancy, and the Senate is made up of 52 Republicans, 46 Democrats and 2 Independents. The budget deficit for 2017 is projected to be \$693 billion.

Even with the seemingly favorable facts in 2001 – Republican control of the House, Senate and the Executive Office, and with the ability to invoke the reconciliation process in the Senate -- and a current budget surplus – President Bush still could not get permanent estate tax repeal. Why not? Because the "Byrd Rule" effectively overrode the reconciliation process and required a 60 vote majority in the Senate if the legislation increased the federal deficit beyond a ten-year term. This is why The Economic Growth and Tax Reconciliation Act of 2001 gradually increased the estate tax exemption from 2001 – 2009, repealed the estate tax in 2010, with EGTRA sunseting on January 1, 2011, with the pre-Act estate tax laws then applying.

**Back to the future.** Fast forward to April 25, 2017, President Trump released a one page outline titled “2017 Tax Reform for Economic Growth and American Jobs, The Biggest Individual and Business Tax Cut in American History,” which included the following detail on estate taxes: “Repeal the death tax.”

Since then health care and Russia have kept the President and the Congress focused on other things.

So, eight months in, here are some possibilities:

**Estate tax repeal.** Eight months ago a number of commentators were optimistic that estate tax repeal was going to happen. I’m not seeing as much optimism today; nonetheless, if the estate tax is repealed, a number of sub-issues arise. Is the gift tax is also repealed? If the gift tax is not repealed, the only way to take advantage of the estate tax repeal is to die. This is similar to what happened under EGTRA. This allows the possibility that a future administration and Congress could re-enact the estate tax.

Is the generation skipping transfer tax repealed? If not, even though there is no estate tax, will transfers to dynasty-type trust still be limited to the GST exemption, currently \$5,490,000?

What will happen on the income tax side? If the estate tax is repealed, you would expect to have a carryover basis, or maybe some form of the modified carryover basis we experienced in 2010, where a decedent gets a certain dollar amount of step up. Another possibility is the repeal of the income tax exclusion for gifts/inheritance. One of President Trump’s early estate tax repeal proposals contained an income inclusion element. [As a side note, my experience has been that although clients are incensed that there is such a thing as the “death tax,” many clients are surprised to know that the recipient of a gift or inheritance does not have to bring that gift/inheritance into income.]

**Estate tax repeal, with a 10 year sunset.** Dang that Byrd Rule!

**Full repeal of all transfer taxes.** Given the current state of the legislative processes, and if the health care debate is any indication, this would seem unlikely.

**No repeal, but a bump-up in the exemptions.** Another possible outcome is a compromise where the estate tax is not repealed; but the estate and gift tax exemption, and the generation-skipping transfer tax exemption, are simply increased. Similar to what eventually came out of the 2001 push to repeal the estate tax.

On July 27, the Speaker of the House, the Majority Leader of the Senate, the Treasury Secretary, the Senate Finance Committee Chairman and the House Ways and Means Committee Chairman released a Joint Statement on Tax Reform, laying out a broad set of guidelines for tax reform. *No reference to the estate tax was made in the Joint Statement, causing speculation that Congress will pass on repealing the estate tax to make up for lost revenue elsewhere.*

Momentum definitely seems to be gaining for the “no repeal, but a bump-up in the exemptions” option.

Who knew tax reform could be so complicated?