

Accounting for Success



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Tax Cuts and Jobs Act Impact on Estate and Trust Planning

First things first. The official title of the legislation is “An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018.” However, I couldn’t come up with a good acronym for it, so let’s just go with “TCJA.”

With regard to the estate tax, TCJA follows the Senate’s version of the bill. For decedents dying after 2017 and before 2026, the Act doubles the base exemption for estates and lifetime gifts from \$5 million to \$10 million, with inflation calculated after 2011 bringing the 2018 exemption to about \$11,180,000 (as of the date of this writing), which is actually less than double the current \$5.6 million figure due to a change in the cost of living calculation. TCJA is silent as to the generation skipping transfer (GST) tax exemption amount, but it is assumed to increase to the same level as well since it is based on the basic exclusion rules. The Act retains the basis step-up provisions for inherited assets.

Unlike the House Ways and Means Committee version which would have repealed the estate tax altogether after 2023 and lowered the maximum rate to 35%, the final Act does not repeal the estate tax, and after 2025, without further legislation, would revert to the pre-TCJA \$5 million basic exemption amount. Furthermore, the Act retains the 40% maximum tax rate (House version would have reduced the rate to 35%). Thus, the temporary nature of the exemption increase raises several questions, including (1) would there be a clawback if the exemption sunsets and (2) what is the risk of reducing life insurance used to pay estate taxes if there is the possibility of the exemption being reduced in a few years?

An immediate negative impact will be felt by terminating trusts with an excess expense deduction. This deduction generally flows through to the beneficiaries and is deductible as an itemized deduction subject to the 2% of AGI floor. Since the Act specifically suspends itemized deductions subject to the 2% floor for individuals, the deduction for excess expenses is presumably lost. Careful planning will need to be done during the years leading up to the termination of the trust or estate.

Further complicating planning is the fact that the Act was silent on whether some issues which impact individuals would also apply to estates and trusts. Further IRS clarification or technical corrections legislation may be appropriate to address the following:

- Is it assumed that the state and local income and real estate tax deduction limitation is applicable to estates and trusts and if so, how would it be allocated?
- Is it assumed that the Section 691(c), deductions with respect to a decedent, is still deductible?
- Will trusts continue to be able to deduct tax return preparation fees and attorney fees?
- Is the new Section 199A flow-through business deduction available to electing small business trusts?
- Are estates and trusts still entitled to an exemption (\$600, \$300 or \$100) while personal exemptions are no longer allowed?

Stay tuned.