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Estate, Gift, and Generation-Skipping Tax Confusion

The transfer tax situation for 2010 could hardly be more confusing. A last-ditch effort in the Senate to extend the 2009 rates and exemptions was blocked by Senators who support repeal or higher exemptions and lower rates. Supporters of continuing the 2009 rules (\$1 million gift tax exemption, \$3.5 million estate and generation-skipping tax exemptions, and 45% maximum rates) promised action in 2010 that would be made retroactive to January 1, but no "official" statement of intent has been issued. If no retroactive law is passed in 2010, there will be no federal estate tax applicable to persons who die in 2010, and the generation-skipping tax will not apply to gifts or bequests during 2010. However, the gift tax is alive and well, with a \$1 million lifetime exemption and a reduced maximum rate of 35%.

Some estate planning professionals have advised high net worth clients that this is an opportunity to make generation-skipping gifts to grandchildren or great-grandchildren, or to trusts for children and their descendants, without imposition of the 45% generation-skipping tax. However, for any gift in excess of the transferor's \$1 million gift tax exemption, a gift tax of 35% will be payable to the IRS. Since legislation may be passed during 2010 that attempts to resurrect the generation-skipping tax and/or higher gift tax rates retroactive to January 1, any large gift to grandchildren or great-grandchildren carries the risk of later assessment of a 45% generation-skipping tax in addition to the gift tax. Although there is Supreme Court precedent for retroactive tax increases, it is not clear how the Supreme Court might rule in this case.

If you have been considering transfers (by gift or sale) to children or grandchildren, this could be an opportune time to make such a transfer. However, the potential tax impact of a retroactive imposition of higher gift tax rates and the generation-skipping tax must be considered.

If you have any questions, please feel free to contact one of the attorneys listed below.

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