



REGULATIONS PROPOSED BY IRS WOULD ELIMINATE LINGERING CONCERNS ABOUT CLAWBACK

November 19, 2018

On November 20, 2018, the Internal Revenue Service issued proposed regulations to address one of the lingering concerns of using the increased gift tax exemption on gifts prior to 2026 - the so-called “clawback.”

As background, the Tax Cuts and Jobs Act of 2017 (the “2017 Tax Act”) substantially increased the estate, gift and generation-skipping transfer (“GST”) tax exemptions to \$10,000,000 (indexed for inflation from 2011). For 2018, this exemption amount is \$11,180,000 and is scheduled to increase to \$11,400,000 in 2019 when the inflation adjustment is taken into account. Because the gift and estate tax exemptions are “unified,” this \$11,400,000 exemption can be used during lifetime or at death or some combination of both.

However, the same 2017 Tax Act provides that beginning January 1, 2026, the estate, gift and GST tax provisions of the Internal Revenue Code will revert to \$5,000,000 as adjusted for inflation. Due to the 2017 Tax Act’s temporary nature, Congress authorized the IRS to provide new regulations to address the potential difference in the exemption amounts at the time a person makes gifts and at the time of that person’s death. Without such regulations, the tax code provided that using the increased exemption amount prior to 2026 by making lifetime gifts would result in those lifetime gifts would be included or “clawed back” into the estate tax calculation if the donor died after 2025 which would result in an increase of the estate tax due.

The proposed IRS regulations alter the method for calculating the estate tax due to provide that gifts made at any time before 2026 which were sheltered from federal gift tax when made due to the use of gift exemption will not be included or clawed back into the estate of the donor at his or her death in a manner that retroactively imposes tax on those gifts even if the exemption amount at that time is lower than the total gifts made during the donor’s lifetime.