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Here Today, Gone in 2026 – Or Maybe 2021! – Planning to Use Estate, Gift and GST Tax Exemptions in 2020

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The following article appeared in the October 2020 edition of *Legacy*.

The transfer tax system (estate, gift and generation-skipping transfer taxes) taxes transfers during lifetime and at death, which, in effect, exceed a set exemption amount. That exemption was set at \$5,000,000 in early 2013, with annual increases based on an inflation adjustment. In 2017, as part of the “Trump tax cuts”, the exemption was increased to \$11,200,000, again with annual increases for inflation. Today, the exemption stands at \$11,580,000.

However, the Trump tax cut legislation provides that the increase “sunset” on January 1, 2026, so that the exemption will then revert to what it would have been had the increase not happened, which would be in the range of \$6,500,000, depending on inflation. And, the exemption could be reduced sooner if the Democratic Party takes control of the White House and Senate in November.

The Democratic Party platform states simply that “estate taxes should also be raised back to the historical norm.” No one really knows what that will mean. It could mean a reduction in the exemption back to where it would have been without the Trump tax cuts, which would mean something in the range of \$5,800,000 today. On the other hand, the platform of Bernie Sanders called for the exemption to be reduced to \$3,500,000, the level it reached in 2009 (as well as a top estate tax rate of 70%, as compared to today’s rate of 40%).

It is possible that a change could be effective as early as January 1, 2021.

For clients with estates large enough to benefit from the exemption at today’s level, the cost of seeing the exemption reduced could be significant. A husband and wife can pass \$23,160,000 tax-free during lifetime or at death today and can create a long term, “dynasty” type, generation-skipping trust with that amount that would essentially pass wealth to future generations tax-free forever. If the exemption is reduced to, say, \$6,000,000, the tax cost of passing that same \$23,160,000 would be \$4,464,000 and the maximum funding amount

of a generation-skipping trust would be \$12,000,000.

However, it is possible to “lock-in” the benefit of today’s high exemption level by making a gift today to use some or all of the exemption. If a gift is made today and exemption utilized, there is no loss or “claw-back” of that exemption if the exemption is reduced in a future year. This was discussed in the [December 2018 issue](#) of *Legacy*.

Note that in order to use any part of the portion of the exemption that is eliminated, the gift must be large enough that it first uses the portion of the exemption that is preserved. In other words, if the exemption is reduced to \$6,000,000, and a gift of \$6,000,000 is made, that gift is deemed to use only the \$6,000,000 of exemption that was preserved and no part of the \$5,580,000 portion of the exemption that has been eliminated. It does not “lock-in” any part of the exemption that was eliminated. A gift of \$10,000,000 would lock in \$4,000,000 of the \$5,580,000 portion of the exemption that has been eliminated.

Many clients will be concerned that they cannot make a gift at the required level without compromising their own continued financial security. However, it is possible in many cases to structure gifts in a manner that preserves access to the gifted assets. One gifting technique that is popular is to make a gift to what is known as a “spousal lifetime access trust” or “SLAT.” A SLAT is a trust created by one spouse that includes the other spouse as one of the beneficiaries. As long as the spouses are married and as long as the beneficiary spouse is alive, distributions can be made to that beneficiary spouse and used by him/her to benefit the couple.

Every situation is different, but clients with substantial estates who would like to consider means of “locking in” the exemption at its current high level should contact their Vorys attorney to discuss their options.