HERE WE GO AGAIN:
THE REPEAL OF THE FEDERAL ESTATE TAX IS ONCE AGAIN ON THE POLITICAL STUMP

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Some of you may recall how the federal estate tax was on the verge of repeal back in 2010. But the guessing game as to the final status of the estate tax started nearly a decade earlier in 2001. The Economic Growth and Tax Relief Reconciliation Act of 2001 ("***2001 Tax Act***") raised the federal estate tax exemption from $600,000 to $675,000 with a gradual increase to $3.5 million starting in 2009, followed by a complete repeal of the estate tax in 2010. But because the Congressional Budget Office determined that the estate tax repeal would create a deficit only one year later in 2011, federal law required that the estate tax repeal would itself be repealed effective January 1, 2011 and the exemption drop back down to $1 million. In short, federal estate tax law was a heap of uncertainty.

The incredible uncertainty made for a wild, decade-long roller coaster ride. Would the repeal be reinstated come 2011 or would a higher exemption amount be made permanent? Would planning strategies implemented before 2011 be honored or would a retroactive "clawback" of taxes be imposed? The American Taxpayer Relief Act of 2012 (***"2012 Tax Act***") was passed to finally put a stop to the never-ending roller coaster ride. The 2012 Tax Act was touted as the new and *permanent* law to put all questions as to the future of the federal estate tax to rest. The 2012 Tax Act, which is today's prevailing law, made the following significant changes:

- Set the federal estate tax exemption at $5.25 million, but was indexed for inflation so as to account for fairness over all future years (e.g., the inflation-adjusted exemption as of January 1, 2017 is $5.49 million);
- The estate tax rate on any amount in excess of the federal exemption was made a flat rate of 40%, as opposed to the marginal 40% to 55% rate that we were heading towards prior to the passage of the 2012 Tax Act;
- The federal lifetime gift exemption amount was made the same as the federal estate tax exemption amount (i.e., any aggregate gifts during life that do not exceed the exemption amount—$5.49 million—will not trigger any payable gift taxes; Retained the inflation-adjusted annual exemption amount (which is currently $14,000 per donor per donee per year);
- The Generation-Skipping Transfer Tax exemption amount was also increased to match the federal estate tax exemption amount; and
- "Portability" was implemented to allow a surviving spouse to utilize a deceased spouse's unused federal estate tax exemption amount on the surviving spouse's own death (although this portability is not available for the Generation-Skipping Transfer Tax exemption).

With the passage of these "permanent" estate tax laws, clients finally had some fixed guideposts to help navigate their estate planning.

Well, so much for permanency. President Trump, even prior to the election, made his position clear that he intended to completely repeal the estate tax. His position has not changed since the election. However, what many do not hear beyond the "repeal the estate tax" headline is that President Trump's proposal also comes with a different type of tax—a capital gains tax.

Under current law, when a decedent passes away his or her assets receive an adjusted basis to the date of death value (other than assets not yet subjected to income tax such as retirement accounts and IRA's). So if a decedent purchased real property for $100,000 during life, and the property was valued at $200,000 at the decedent's death, the basis would be adjusted to $200,000 upon the decedent's death. So although the real property would be subject to the estate tax under current law, the inherent capital gain of $100,000 would be washed away. That may no longer be the case if President Trump's proposal for the estate tax repeal is implemented.

It is certainly early in the political process, but President Trump's guidelines for the estate tax repeal reportedly include a limited basis adjustment. In other words, there would not be an estate tax but there would be a built-in capital gains tax liability for the heirs once they sell their inherited assets. Using the same real property example from above, there would not be an estate tax on the $200,000 value; there would instead be no basis adjustment and a resulting capital gains tax on the $100,000 gain.

The proposals are, of course, merely proposals at this point. But with a Republican-controlled Congress the chances of an estate tax repeal under President Trump—along with any interesting tax turns that may come with such a repeal—is a more likely possibility than ever before. However, talk of repeal is not a partisan issue. On January 24, 2017, Rep. Kristi Noem (a Republican from South Dakota) and lead co-sponsor Rep. Sanford Bishop (a Democrat from Georgia) introduced legislation in the House (H.R. 631) that would fully repeal the federal estate tax. Sen. Thule (a Republican from South Dakota) introduced similar legislation in the Senate (S. 205). A Policy and Taxation Group blog recently stated that "the introduction of [Noem's/Bishop's] and Thule's legislation is an important signal that estate tax repeal is a top priority in Congress, and thus continues to build momentum for the repeal movement." We'll see.

Regardless of any ultimate changes in federal law, Oregon is not slated for any changes and would not be affected by changes to federal law in any event. So no matter how wild the federal estate tax ride becomes, the Oregon exemption will remain at $1 million and its estate tax rate will continue as a marginal rate of 10% to 16% on the excess. It is also important to remember, unlike federal law, that Oregon does not permit portability. All that said, estate taxes will remain an important estate-planning issue for us Oregonians despite the federal roller coaster.