

## Estate and Gift Tax Alert

### Estate Planning Opportunities for 2010 Year-End

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It is advisable in any year to take stock and consider estate planning before the year draws to an end. In 2010, in particular, the current uncertainties surrounding the federal gift, estate and generation-skipping transfer (GST) tax law, coupled with Congress' failure to resolve these uncertainties, have created additional potential opportunities and incentives to transfer wealth to heirs this year. Some strategies to take advantage of the 2010 year-end window of opportunity to transfer wealth at a reduced tax cost are discussed below.

#### Make Substantial Taxable Gifts

- If you have already "used up" your \$1 million lifetime gift tax exemption on previous lifetime gifts or if you wish to make aggregate gifts that exceed this exemption, you may wish to consider making additional taxable gifts before the end of 2010. The top federal gift tax rate applicable to taxable gifts made in 2010 to your descendants and other individuals is 35 percent (down from 45 percent last year). The 35 percent rate is currently scheduled to increase to 55 percent for gifts made in 2011 and thereafter. In addition, because the federal estate tax, repealed for 2010, is scheduled to return in 2011, also at a top rate of 55 percent, making gifts and paying gift tax now may result in your heirs receiving significantly more than they would receive from your estate by reason of your death after 2010.
- Like the federal estate tax, the GST tax is not in effect in 2010, but is scheduled to be reinstated in 2011 at a flat rate of 55 percent. Therefore, 2010 year-end may be a particularly opportune time to make substantial gifts directly to adult grandchildren and/or more remote descendants.
- It should be noted that the current transfer tax laws favoring substantial gifts in 2010 could change. There has been a great deal of speculation regarding the possibility that Congress will attempt to enact retroactive changes to the 2010 transfer tax laws, although such changes seem increasingly unlikely. It is also possible that Congress will take action to reinstate for 2011 the federal estate and GST taxes as they existed in 2009, with an exemption of \$3.5 million and a top rate of 45 percent or with a greater exemption and lower top rate.

#### Create GRATs

- A grantor retained annuity trust (GRAT) is an estate planning device that enables you to transfer to your children or other beneficiaries, at a near-zero gift tax cost, potential future appreciation earned on property over a specified term. A GRAT is successful if you survive the specified term and the appreciation in value of the transferred property over the term exceeds the relevant IRS imputed interest rate. A very short-term GRAT—two or three years—is potentially advantageous because a short term (i) decreases the risk that you will die during the term and (ii) reduces the possibility that poor investment performance in some years will cancel out good performance in others. In addition, under current law, it is possible to create a GRAT with a zero, or nominal, gift, thereby minimizing the consequences in the event the GRAT fails because of the premature death of the grantor or because the gifted property fails to appreciate over and above the IRS' imputed interest rate.



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- The 2010 year-end is an especially favorable time to establish a short-term GRAT.
  - The IRS imputed interest rate is at a historic low—2 percent for a transfer to a GRAT in November 2010—so there is a greater likelihood that investment performance will exceed the imputed interest rate and the GRAT will be successful.
  - The opportunity to create short-term GRATs may be coming to a close in the near future. Earlier in 2010, several legislative proposals targeted short-term GRATs as a means to raise revenue. These proposals would, among other things, require (i) a GRAT to have a minimum term of 10 years and (ii) a GRAT's remainder interest to have a value greater than zero, requiring the grantor to make a taxable gift. It is anticipated that when Congress finally does act regarding federal estate and GST taxes, the resulting legislation may well impose these restrictions on GRATs. If passed, these restrictions could be made retroactive effective January 1, 2011 and reduce the estate planning benefits of GRATs in the future.

## Maximize Annual Exclusion Gifts

- So-called "annual exclusion" gifts of cash or other property are effective transfer tax-saving strategies in any year, and 2010 is no exception. Under current law, the annual exclusion permits each individual to give up to \$13,000 (\$26,000 if you are married and your spouse consents to "split" the gift) each year to as many individuals as you wish. Annual exclusion gifts do not count against your \$1 million lifetime gift tax exemption and are a transfer tax-free means to boost lifetime transfers to children or other beneficiaries and reduce your taxable estate. In light of the scheduled reinstatement of the federal estate tax in 2011, you might give particular consideration to maximizing your annual exclusion gifts before the end of this year.

Given the general uncertainty of the estate, gift and GST tax laws, we believe this is a critical time to review your estate planning and consider the effects of both the temporary rules still in effect and possible future changes to those rules, both prospective and retroactive. It is also an opportune time to consider and possibly take advantage of some valuable estate planning techniques that may not be as favorable in the future. Akin Gump Strauss Hauer & Feld LLP will monitor any proposed legislation and keep you informed of developments in this area on a real-time basis. And, of course, before engaging in any estate planning, you should consult with your Akin Gump advisor to determine whether any of the above or other estate planning techniques makes sense for you and your family at this time, as well as to identify the optimum manner in which to structure and implement these techniques.

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