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The Perfect Tax Storm of 2026: Letting U.S. Gift and Estate Tax Exemptions Sunset Combined with the Proposals to Eliminate the Stepped-Up Basis

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Introduction

The U.S. is one of the many countries in the world that charges gift and estate taxes on individual and estate at the time of the transfer of assets. Gift tax is imposed on transfers of assets between individuals and estates to others at the time of gift, if the amount exceeds a predetermined exemption. Inheritance tax has a similar structure, but the timing of the transfer is at death, again subject to the same exemption amount. The measurement of transfer cost also differs among the two. In the case of a gift tax, the transferred amount is valued at the historical cost to acquire the assets less certain adjustments (such as depreciation). For inheritance purposes, the transfer cost is valued at fair value of the assets on the day of deceased. In the past few years, there have been arguments for both an increase and a decrease of these exemptions amounts, irrespective of the measurement cost basis used for each. The arguments in favor of these proposed changes range from increased revenues to government to addressing social and economic inequality, among others. Some people have suggested minimizing or eliminating the gift and estate tax (Slemrod and Gale, 2001; Wampler, 2001). In recent years, proponents of increasing exemption amounts have had the upper hand, with exemption amounts rising from $1 million in 2001 to $11.9 million in 2021 (IRS 709, 2020). However, given the current budget deficits as the result from the COVID-19 pandemic, the federal government is under increased pressure to find ways to generate more revenue.

There are some limitations to this paper. The conclusions and discussions are applicable only to U.S. taxpayers who may be subject to these taxes. Additionally, we have limited our focus in this paper to gift and estate tax proposals and the elimination of the stepped-up basis. Therefore, other components unrelated to these topics have not been considered in this analysis. That is, we exclude other programs and components unrelated to this topic. In addition, in this paper, when discussing gift and estate taxes, we are referring only to residential taxpayers, as defined by the IRS. That is, we exclude nonresidents from this discussion. We note that for nonresidents, there are different sets of exemptions and treatments of transfer taxes. These would not be part of the discussion in this paper.

Gift and Estate Tax Overview

Prior to TJCA Act in 2018, the gift and inheritance tax allowances were greatly increased to $3.5 million (in 2010) and later to almost $5.45 million in 2016 (for single taxpayers) (IRS 709, 2020). The married couple allowance limits were double in size. These exemptions were all subject to annual inflation adjustments. In 2018, the TJCA Act increased these allowances to above $11.58 million and $23.16 million for singles and married couples, respectively (IRS 709, 2020). These limits are again subject to annual inflation adjustments. It is important to note these increases in the exemption amounts are not permanent. That is, these limits sunset in the year 2026 (IRS, 2019). Therefore, the higher exemptions allowed taxpayers to escape taxation and move along with inflation. These changes allowed many estates to forgo tax planning. This benefit is especially true for farmers and small business owners. These parties were some of the many beneficiaries of the tax changes (Brunet and Huang, 2010). The higher exemptions allowed small entities to continue family business and avoid being highly taxed at the point of transfer. Some have argued that these increases are not enough, and many have pushed for complete abolishment of the inheritance tax all together (Slemrod and Gale, 2001; Wampler, 2001). They argued that the estate tax lowers the incentives for people to save and accumulate wealth (Slemrod and Gale, 2001). In contrast, parties against the estate tax argue that it could lead to the forced liquidation of small businesses, particularly farms, to pay their tax liabilities. However, proponents of the estate tax contend that wealth is merely shifting from one generation to another, potentially exacerbating wealth inequality (Wolff, 2002; Elinder, Erixson, and Waldenström, 2016). There are pros and cons to both arguments. For the purposes of this study, we will skip this debate. Instead, we focus on analyzing the potential implications for taxpayers of the proposed model, which mimics recent proposals (JDSUPRA, 2021).

As a component to the gift/estate taxes, there have been proposals to lower the exemption's amounts and to eliminate the stepped-up basis to fair value at the point of death (JDSUPRA, 2021). Such a proposal was made recently by the

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Biden's administration (JDSUPRA, 2021). The stepped-up basis has been labeled as one of the most significant 'loopholes' in the current U.S. tax code as it allowed individuals at 'their death beds' to transfer wealth to their heirs escaping capital gain taxes during the possession of such assets (Annick, 2010). Under the current tax code, capital gain tax is charged once an item is sold or exchanged, subject to limitations such as like-kind exchange limitations for real estate (to name only a few) (IRS, Publication, 544, 2020). That is, the gain is recognized at the point of sale or exchange of an asset. Given these restrictions, at a triggering 'death event,' the recognition principle is avoided, and the beneficiaries receive the assets at fair value free of capital gain tax. Such tax avoidance treatment is viewed, by many, as highly unfair. It allows completely escaping capital gains tax on highly appreciated assets over the possession of such assets. Some people argue that by not taxing high-value estates, wealth is simply transferred from one generation to the next without incurring capital gains or 'holding' taxes, which can further exacerbate social and economic inequality (Caron and Repetti, 2012). Historically, to achieve such equality, governments have relied on institutional tax instruments for redistribution. We can argue the elimination of the stepped-up basis provides another tool for targeting economic disbalances. The use of such a tool could achieve greater social and economic equality without taking the erroneous step of socializing private wealth. To determine such implications, we analyze a proposal based on lowering the exemptions and elimination of stepped-up basis as a control variable. This preset proposal is used to determine the potential implications of such changes. This preset control is primarily based on the most recent discussions on proposed changes to the tax code, made in 2021 (JDSUPRA, 2021).

Perfect Tax Storm

To determine the implications, we create and analyze (preset) proposal based on lowering the exemptions and elimination of stepped-up basis as a control variable. This preset proposal evaluation, subjected to this analysis, mimics the recent proposals (JDSUPRA, 2021). These proposals are used to determine the potential implications of such changes. In this controlled proposal, we lower the exemptions for gift and estate tax to pre-2009 levels or $1 million and $3.5 million, respectively. These numbers have been recently circulating as the new exemption amounts, in proposed changes by the Biden's administration (JDSUPRA, 2021). Note, these exemptions are for individuals. For married, the exemptions are doubled. For the purposes of this article, we eliminate the stepped-up basis and determine the potential tax on the capital gains upon death. This step is a critical implication for the tax code as it has never been successfully implemented before. In the past, if a person dies, his/her heirs inherit the fair value of the left properties (assets). These are than subject to potential estate tax, pending the exemptions and previous gifts made and the exemption limits. In the proposed (controlled) plan, upon death, the government would tax the difference between the fair value of the property left and the cost of acquiring these properties at their origination date (subject to capital improvement additions). In addition, in case of rental properties (as an example), the cost would further be decreased based on the accumulated depreciation. This decrease would result in tax on the unrealized gains on holding these assets. In addition, once the property is transferred to the new owners or heirs, it would be subject to original estate tax. Many of the properties were purchased decades ago and they might have also been subject to adjustments, such as capital improvements and rental expenses, like depreciation. Keeping track of all of these adjustments can be difficult to accomplish.

We understand there is the need for governments to fund their operations, and many experts have argued increasing revenue by taxing individuals would be the means to accomplish this goal. Many experts argue that by 'taxing the rich' there would be more fair distribution and inequality could diminish. This fact might be true; however, creating a program that would be nearly impossible to implement and monitor compliance therewith could make such endeavors much more difficult. Furthermore, when considering the purchase of assets and its potential impact on the gift/inheritance tax, it is crucial to recognize that individuals must utilize after-tax dollars to acquire these assets initially. This reality creates a risk of triple taxation. To demonstrate the potential effects of these proposed changes, it is most effective to examine a straightforward example.

For this purpose, we would evaluate the impact of the proposed changes on estates pre- and post- proposals for estates. To make the comparison relevant, we would pick three estates worth of $1 million, $5 million, and $10 million. We would compare them with a control variable of pre- proposal set of rules for estates. To make this example relevant, we would keep the cost of the estate at $100,000. On each estate (one to three), we would be applying the proposed changes to the estate exemption (the reduction to $3.5 million) and the elimination of the stepped-up basis. The tax rate for the estate tax over the exemption amount is set at 40 percent. The capital gain tax used in this example is 43.8 percent. This rate includes the proposed increase in the estate tax from 20 percent to 40 percent and the additional 3.8 percent of Obama Care Tax. We keep the capital gain tax at 43.8 percent for all estates, to make more meaningful comparison.

Table 1: Illustration of the Impact of the Proposed Changes

Estate	**Estate 1**	**Estate 2**	**Estate 3**	**Control Estate**
Fair Value	1,000,000	5,000,000	10,000,000	10,000,000
Cost	100,000	100,000	100,000	100,000
Stepped up gain	900,000	4,900,000	9,900,000	9,900,000
Capital Gain tax	43.80%	43.80%	43.80%	Not applicable
Tax Liability	**394,200**	**2,146,200**	**4,336,200**	0
Estate leftover	605,800	2,853,800	5,663,800	10,000,000
Estate exemption amount	3,500,000	3,500,000	3,500,000	11,580,000
Estate subject to tax	-	-	2,163,800	-
Estate tax 40%	-	-	865,520	
Estate leftover	**605,800**	**2,853,800**	**4,798,280**	**10,000,000**
Total tax	394,200	2,146,200	5,201,720	-
Effective tax rate	39%	43%	52%	0%

The analysis in Table 1 indicates (in all cases) the estate would be worse off than under the control variable. The effective tax rates would range from 39 percent to 52 percent, compared to the pre-proposal rate of 0 percent. That is, the beneficiary of the estate has a larger liability to pay to the government. However, to pay the tax upon death, the heirs might need to make a "fire sale" to pay the tax, in order to satisfy their tax obligations. Such a sale would result in a significant discount to the fair value. Therefore, little is left for the heirs. This result is clearly a significant departure from the currently established policies of no capital gains upon death and the higher exemption amounts. Therefore, it is critical for tax preparers to start thinking of potential vehicles to help their clients with preserving wealth.

It is worth noting that proposals to eliminate the stepped-up basis would likely be met with significant opposition, particularly because many view the estate tax as already serving as a form of taxation on capital gains at the time of death. Many have argued that the estate tax technically acts as a vehicle of taxing taxpayers with capital gain tax at the point of death. As we know, estate tax is based on the fair value at death. The introduction of such capital gain tax on death could signal another layer of taxation of the same resources, and this tax might preclude individuals from accumulating wealth. The accruing (accumulation, build-up) of wealth and the higher rewards for risk and hard work have been one of the many proponents of capitalism and the pursuit of the American Dream. As such, in the past, there have been many advocates of such changes but with limited success in eliminating the stepped-up basis. In 1976, the first proposals came to impose the elimination of the stepped-up basis but would not be carried out as it was difficult to keep track of the costs (Collins et al., 1976). Therefore, it (the provision) was repealed. In 2001, the Economic Growth and Tax Relief Reconciliation Act gave the option to taxpayers to pick between paying the estate tax or the step-up in basis above $1.3 million in the year 2010 (Gorden et al., 2016). Many estates took advantage of this option.

There are supporters of other options of taxing wealth. For example, there is also a public discussion on creating a wealth tax. Such a tax would further act as an extra death tax; estates are considered tax entities at the point of filing their returns in the year of creation up until their disposition. While proposals for such tax have received little support from the public, current economic conditions and concerns around social inequality have led to a shift in political will towards implementing such changes. In these proposals primarily target the wealthiest individuals, but the middle class may also be impacted. History is a good indicator that taxes targeting the rich have shifted over time to the lower- and middle-class taxpayers. The most significant is the federal income tax enacted at the beginning of the 19th century. As we know, it was created to target the super wealthy, assuring that low- and middle-class taxpayers would be spared. With the expansion of government, such promises were quickly modified to reflect the economic conditions of the U.S. economy at the time. Therefore, it should not be surprising if certain estate, gift, and wealth proposals eventually hit the lower- and middle-class families in the years to come.

A recent report issued by consulting firm E&Y (2021) analyzed the potential impact of the removal of the stepped-up basis. They noted:

> …repealing the step-up in basis would result in:
>
> - 80,000 fewer jobs in each of the first 10 years;
> - 100,000 fewer jobs each year thereafter; and
> - A $32 reduction in workers' wages for every $100 raised by taxing capital gains at death. (E&Y, 2021, p.4)

In addition, the study discusses the potential for a decrease in GDP in relation to U.S. economy in 2021 by "roughly $10 billion annually" (E&Y, 2021). Furthermore, E&Y concluded:

> Analysis shows that this tax increase, whether via tax at death or carryover of basis, will have negative impacts on family-owned businesses, U.S. gross domestic product (GDP), and job creation both in the immediate and long term. Repeal of step-up of basis would impose a tax burden on top of the existing estate tax regime, further compounding these negative impacts (p.3).

As noted, there are significant implications not only for individual taxpayers but also for the economy. Therefore, this problem warrants further analysis prior to implementation of such legislation.

Fraud Risks Further Discussed

Given the nature of the heightened tax obligations resulting from this perfect tax storm, we anticipate an increased risk of fraud. According to the fraud triangle model, which comprises of incentives, rationalization, and opportunities, the incentives for individuals to engage in tax activities, to evade paying their fair share of taxes, may escalate. As previously discussed, the anticipated reduction in exemption amounts in 2026 would lead to exceptionally high tax liabilities for gifts and estates. Furthermore, the elimination of the stepped-up basis would provide an added incentive for individuals to seek ways to minimize their tax bills. In situations where the tax obligations could amount to over two-thirds of the asset value of the estate, as demonstrated in this study, the pressure to engage in fraudulent activities would increase. This pressure would likely compel individuals to explore illicit opportunities, potentially leading to fraud activities.

An example of fraudulent activity could involve seeking out the most favorable and undervalued estimate of asset worth at the time of death, especially in regard to estates. The valuation to fair value of the estate is determined by independent appraisers. The estate would have the incentive to engage in "valuation estimate shopping" activities with the appraisal company to lower the value of the assets at time of death, in order to decrease or avoid all together the tax liability. Detecting such fraudulent activities by the Department of Treasury would be particularly challenging, particularly when the estate value is just below the reporting threshold. To mitigate this problem, the IRS has established acceptable thresholds for valuations to minimize such fraudulent practices. However, in cases where the estate's value is below the reporting threshold and does not have to file an estate tax, the tax obligation could be altogether avoided. Potential approach to decrease these fraudulent activities would involve requiring estates to file reports regarding the value of the estate. The problem with this approach would be volumes of informational returns being filed every year.

Another possible activity that estates may engage in is changing their residential status. As we are aware, estates are subject to gift/estate taxes only if they are deemed to have tax residential status. If the estate is considered non-residential, it could avoid taxation entirely. To accomplish this avoidance, the estate must establish that its domicile or residency intent outside the U.S. Determining the actual domicile does not require any mandatory reporting to the U.S. Treasury. Instead, the estate makes the residency determination, and if requested by the IRS, they should be able to furnish such reports. Once the reporting status of the estate has been transformed, the entity could start transferring the assets back to the residential taxpayers and avoid paying the estate tax. The recipient of the gift from the estate would need to report the amount received from the nonresident. However, the origin such as the name of the sender is not required to be filed, in the currently used form 3520. In such activities, the nonresident who originated the gift would not be required to be disclosed. While such actions may appear to comply with laws and regulations, their ultimate goal is to engage in tax evasion and avoid paying gift/estate taxes. To address these fraudulent activities, one possible solution would be for the IRS to modify the reporting requirements on Form 3520. Beneficiaries of the estate can be required to report the name and the nature of the gift. By making such requirement, IRS would be able to reconcile the reporting information on Form 3520 with previously filed residential tax returns of estates. If there is a mismatch and a missing residential estate return (but already existing prior such filed return), the IRS could further investigate.

In cases where a tax situation could result in an increase in liabilities for individuals, the risk of tax evasion is heightened. Some individuals may use complicated and complex methods to avoid the gift and estate tax altogether. Tax authorities must be aware of such potential actions that could be undertaken by taxpayers and rethink their detection activities. However, it is important to question whether the benefits of higher tax collection are worth it if there are no proper and adequate tools to ensure compliance. The public is generally against spending public money on tax audits, and if the government were to increase gift and estate taxes, it might result in lower tax collections as people would be more willing to participate in tax avoidance. Therefore, it is crucial for tax authorities to strike a balance between collecting taxes and ensuring compliance while also considering the public's sentiments towards tax audits.

The authors believe that changes suggested in the preset proposal to the federal estate tax system have a low probability of being legislated. Currently, there is a missing majority by one party in both Senate and House of Representatives. Even if there are votes for such changes, they must go through a process called budget reconciliation. Note, even if no action is taken, the exemption amounts sunset in 2026 (IRS, 2019).

Steps Taxpayers Can Take to Limit Their Exposure to This Proposal

Current tax regulation allows, as of 2021, individual taxpayers to give away up to $15,000 free of incurring gift tax (IRS 709, 2020). For married taxpayers, such limits are doubled. Taxpayers should give away highly appreciated in time assets utilizing these limits. The cost of such transfer is valued at historical cost rather than fair value. As such, individuals could transfer on a periodic basis an amount which would not reduce their limits. In addition, individuals could still utilize the high limits set by Trump's administration. As previously noted, the current limits are $11.58 million for individuals and $23.16 million for married couples (IRS 709, 2020). This higher exemption amount is scheduled to sunset and be reverted to the previously established pre-Trump amount of $5.4 million per person, subject to inflation adjustment, as of January 1, 2026 (IRS 709, 2019). In IRS Notice IR-2019-189, dated November 26, 2019, the IRS has confirmed that individuals who have used a portion of their exemption would not be penalized by the lower limited exemptions in the future, particularly:

> The Treasury Department and the Internal Revenue Service today issued final regulations confirming that individuals taking advantage of the increased gift and estate tax exclusion amounts in effect from 2018 to 2025 will not be adversely impacted after 2025 when the exclusion amount is scheduled to drop to pre-2018 levels. ... individuals planning to make large gifts between 2018 and 2025 can do so without concern that they will lose the tax benefit of the higher exclusion level once it decreases after 2025. (IRS, 2019)

Based on this new regulation, taxpayers can continue to make large gifts until 2025 without worries that the tax benefit could be lost. Suppose a taxpayer transfer $8 million into an irrevocable trust today. Subsequently, he dies owning an additional $5 million of other assets after the sunset date of January 1st, 2026. After 2026, the pre-exemption reverts to around $6.8 million (subject to inflation adjustments). Per the new proposed exemption, the exemptions would lower to $3.5 million (subject to inflation). In pre- case, based on the IRS clarification, the estate subject to the estate tax would be the left-over amount of $5 million. This figure is due to the taxpayer fully utilizing his gift tax exemption of $8 million out of the pre-'s modification of $11.58 million. As a comparison, after proposal (post-) and if the taxpayer did not transfer the assets to the Irrevocable Trust, the estate subject to the estate tax would be $9.5 million (the $13M less the $3.5M exemption). That is, we have a difference of $4.5 million between pre-($5M) and post- ($9.5M) proposal on the amount subject to the estate tax. Therefore, the use of this strategy provides a unique opportunity for taxpayers to utilize the higher limits and transfer away assets before they are being subjected to the lower exemption amounts and the removal of the stepped-up basis upon death. In addition, there are other special opportunities, such as "Installment Sale or Loan in Lieu of Current Gift" (JDSUPRA, 2021). This opportunity allows taxpayers to sell their "assets to irrevocable grantor trust in exchange for a promissory note." As JDSUPRA (2001) notes:

> The benefit of doing this is that if the exclusion were retroactively reduced, the property transferred to the trust should not be subject to the gift tax. In contrast, if Congress ultimately does not retroactively reduce the exclusion for 2021, the grantor can forgive the debt by December 31, 2021, and complete the gift. If the note is forgiven in whole or in part, this strategy will apply the grantor's remaining gift tax exclusion to the extent of the forgiven debt, thereby mitigating against the risk of incurring a gift tax. This is essentially a "freeze plan," meaning that any appreciation in the sold assets would belong to the trust (2021).

This strategy allows taxpayers to 'insure' themselves against such proposed changes as stated by JDSUPRA (2021). An alternative strategy would be the creation of "QTIPable Trusts" which would allow taxpayers to transfer assets to a "spouse as a sole beneficiary of the trust during the spouse's lifetime and requiring that all the trust income be paid to the spouse" (JDSUPRA, 2021). To ensure taxpayers benefits from the currently higher exemptions level, the trust "would be made to qualify the property transferred to the trust for the gift tax marital deduction and thereby protect against gift tax in the event that the gift tax exemption were retroactively reduced by subsequent legislation" (JDSUPRA, 2021).

Conclusion

The 'rich are getting richer' has been the moving slogan for generations. The argument for progressive taxation and 'paying their fair share' is not without its merits. To address these, proponents have proposed introduction of capital gain tax on the 'death event' as means of achieving great social equality without taking the erroneous step of socializing private wealth. The purpose of this study is to analyze such proposals and their potential impact on and implications for taxpayers. We understand there is the need for governments to fund their operations, and many experts have argued increasing revenue by taxing individuals would be the means to accomplish this. People have argued that by 'taxing the rich' there would be more fair distribution and inequality could diminish. This statement might be true; however, creating a program that would be nearly impossible to implement and monitor compliance therewith could make such endeavors more difficult. As part of this article, we would provide potential steps taxpayers can currently undertake to mitigate the effect of the proposed changes. These include the formulated strategies in this study as well the simple taking an advantage of the current exemption amounts prior to their sunset dates.

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