IRS Issues Proposed Temporary Clawback Regulations

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IRS Issues Proposed Temporary Clawback Regulations: Large gifts made under Tax Cut and Jobs Act won't be clawed back when increased exclusions sunsets in 2025.

The 2017 Tax Cut and Jobs Act doubled an individual's lifetime federal gift and estate tax exclusion from $5 million ($5,490,000 as adjusted for inflation in 2017) to $10 million ($11,180,000 as adjusted for inflation in 2018). This significantly increased exclusion amount is set to sunset or expire at the end of 2025, with the estate and gift tax exclusion amount reverting to $5 million (as then adjusted for inflation) in 2026.

High net worth individuals and their legal and tax advisors faced uncertainly as to whether gifts made under the increased exclusion rules through 2025 could be "clawed back" upon death for individuals passing in 2026 and beyond after the exclusion amount is cut in half.

These concerns were assuaged on November 20, 2018 when the IRS announced that individuals taking advantage of the increased exclusion amount effective through 2025 will not be adversely impacted if they pass after 2025 when the exclusion will revert to the pre-2018 levels.

The IRS's proposed regulations published in the Federal Register on November 23, 2018 provide for a special rule whereby an estate is allowed to compute its estate tax credit using the higher of the exclusion amount applicable to gifts made prior to the end of 2025 or at death, such that, if the law is properly applied, a potential clawback of gifts made prior to the end of 2025 is avoided for those dying after 2025.

Absent a prospective change in the exclusions for 2026 and beyond, high net worth individuals or those with appreciating assets may choose to revisit their planning before the increase exclusion amount sunsets at the end of 2025 to take advantage of the tax-favorable gifting opportunities available to them.

The proposed regulations may be viewed here: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-25538.pdf

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