The Sun Also Sets: Planning for the Reduction of the Lifetime Exemptions in 2026

Andrew J. Reinhart IV, JD, MBA, CTFA, AEP®
Managing Director and Chief Fiduciary Officer
Wells Fargo Bank, N.A.

I. Introduction

In 2017, Congress passed the Tax Cuts and Jobs Act ("TCJA"), the largest overhaul of the Internal Revenue Code in over thirty years. The changes significantly impacted income tax rates, deductions and credits, as well as estate, gift and generation-skipping transfer tax exemptions. As it stands today, exemptions are at an all-time high, providing significant wealth transfer opportunities to our high-net worth and ultra-high-net worth clients.

Of course, in true congressional fashion, nothing can ever be permanent. In order to reach a compromise which would pass through both houses of Congress and win support of the President, several provisions in the TCJA are set to expire (or "sunset") after December 31, 2025. Unless Congress acts before that time, these provisions will revert back to what they were before the TCJA was enacted, effective January 1, 2026. For many estate planners, shades of the fiscal cliff nothingburger of 2012 are in the air, and many clients are reluctant to take action with so much uncertainty in our political environment.

Regardless, now is always the right time to think about estate planning for our clients and, no matter what happens in Congress, 2024 and 2025 are major opportunities for us to help them maximize the transfer of their wealth down the generations.

II. Overview of the Tax Cuts and Jobs Act

As noted above, the TCJA made significant changes to a number of aspects of the Internal Revenue Code, impacting both individuals and businesses. The major changes include:

a. Corporate Income Tax Changes

i. Corporate Income Tax Rate: The TCJA permanently reduced the corporate tax rate from 35% to 21%. Historically, the United States has had one of the highest corporate tax rates in the world. The reduction included in the TCJA was intended to make U.S. businesses more competitive in the global marketplace.

ii. Corporate Alternative Minimum Tax ("AMT"): The Corporate AMT was repealed.

iii. Bonus Depreciation: Companies could fully and immediately deduct the cost of new equipment for five years (100% bonus depreciation). This provision phased out gradually after 2022.

iv. Repatriation Tax: To encourage companies to bring overseas profits back into the United States, the TCJA introduced a one-time tax on repatriated income, with a 15.5% rate on cash and 8% on non-cash assets.

b. Individual Income Tax Changes

i. Income Tax Brackets and Rates: Most income tax brackets were adjusted, and rates were generally lowered. The top individual rate dropped from 39.6% to 37%.

ii. Increased Standard Deduction: The standard deduction nearly doubled, going up to $12,000 for single filers and $24,000 for married couples filing jointly (indexed to inflation).

iii. Personal Exemption Elimination: The personal exemption, previously allowing a deduction per household member, was removed.

iv. Mortgage Interest Deduction Limits: New mortgage interest deductions were limited to loans up to $750,000 (down from $1 million).

v. State and Local Tax ("SALT") Deduction Cap: Deductions for state and local taxes (including property taxes) were capped at $10,000. This controversial provision affected taxpayers in high-tax states, such as New York, the most.

vi. Charitable Deductions: Deductions for cash gifts to public charities were increased to 60% of AGI from 50%.

vii. <u>Qualified Business Income ("QBI") Deduction</u>: IRC Section 199A allows for a deduction of up to 20% of QBI realized by sole proprietorships and pass-through entities such as partnerships, LLCs, and S Corporations.

viii. <u>Child Tax Credit Increase</u>: The Child Tax Credit was doubled to $2,000 per child.

c. *Estate, Gift and Generation-Skipping Transfer Tax Changes*

i. The TCJA doubled the gift, estate and generation-skipping transfer ("GST") tax lifetime exemption amounts from $5 million to $10 million, effective January 1, 2018. The exemptions were also indexed for inflation and have been adjusting upward each year in January. The transfer tax rates remained unchanged at 40%.

ii. For 2024, the exemptions stand at $13.61 million per person ($27.22 million for a married couple).

III. The Sunset

If Congress does not act to extend the TCJA in 2024 or 2025, many of these changes will revert back to what they were under pre-2017 law. As such, estate planners should be mindful of the potential impacts to their clients as they are considering how to design tax strategies in advance of the potential sunset of these provisions in 2026.

a. *Individual Income Taxes*

i. <u>Rates</u>: The current individual tax rates will return to pre-TCJA levels:

Taxable Income (Married filing jointly)	Current Marginal Rate	2026 Marginal Rate (if Sunset Occurs)
Up to $23,200	10%	10%
Up to $94,300	12%	15%
Up to $201,050	22%	25%
Up to $383,900	24%	28%
Up to $487,450	32%	33%
Up to $731,200	35%	35%
Over $731,200	37%	39.6%

ii. Deductions and Credits

1. Standard Deduction: The standard deduction will be reduced to its 2017 level ($12,700, adjusted for inflation) and the personal exemption will be reinstated.

2. Mortgage Interest: Under the TCJA, taxpayers can deduct mortgage interest up to the first $750,000 of indebtedness. If the sunset occurs, that amount will increase to $1 million.

3. SALT: If the TCJA sunsets in 2026, the $10,000 limitation on state and local taxes will be eliminated.

4. Charitable Donations: Taxpayers who itemize deductions may deduct amounts contributed to charities subject to certain income limits. Under the TCJA, the amount which can be deducted for cash gifts to public charities was increased to 60% of AGI. After the sunset, the deductible limit for such cash contributions reverts to 50%.

5. QBI: IRC Section 199A, which provides for a deduction of up to 20% of qualified business income realized by sole proprietorships, partnerships, LLCs and S Corporations, will be eliminated.

6. Child Tax Credit: The Child Tax Credit will revert to $1,000 per child, from $2,000.

b. *Federal Estate, Gift and GST Taxes*

i. If the sunset of the TCJA occurs, the current lifetime transfer tax exemptions will revert back to their pre-2017 levels, adjusted for inflation, effective January 1, 2026, to approximately $7 million for individuals and $14 million for married couples.

1. Importantly, the IRS will not “claw back” amounts gifted between 2018 and 2025 up to the TCJA exemption amounts should the law sunset in 2026. This essentially means clients and planners have an opportunity to maximize their use of the higher exemptions now without fear the IRS will attempt to apply the lower exemption amounts in the future, such as if the client passes away after the sunset occurs.

ii. The federal, estate and GST tax rates will remain at 40% in 2026 and beyond if the sunset occurs.

IV. What Might Happen?

The real answer is "Who knows?". However, the sunset is coming and our new President and Congress are going to have to decide what to do about it. Based on past experience and the current political climate, there are a few foreseeable scenarios:

a. <u>Extend the TCJA</u>. Each presidential candidate has expressed views on the lifetime exemptions. Donald Trump frequently notes he would like to see the TCJA changes made permanent, while Kamala Harris has only noted more generally she would not raise taxes on Americans making less than $400,000 a year.

b. <u>Compromise on Transfer Tax Rates and/or Exemption Amounts</u>. Many Republicans support lowering the estate, gift and generation-skipping transfer tax rates and making the current exemption amounts, adjusted for inflation, permanent. Many Democrats strongly oppose either of these options. A compromise position would allow the rates and exemption amounts to be made permanent with the support of both parties. Of course, this path would require Congress and the President to agree on a new rate and/or exemption amount, which may be unlikely if the chambers remain strongly divided.

c. <u>Repeal the Estate, Gift and/or Generation-Skipping Transfer Tax</u>. This idea comes up about once every ten years from the Republicans in Congress, with little success over the decades. The closest they came was back in 2001 when the Economic Growth and Tax Relief Reconciliation Act (or "EGTRRA") was enacted, although the repeal was allowed to sunset in 2010.

d. <u>Do Nothing</u>. Cynically speaking, perhaps the likeliest option. If Congress follows this path, the TCJA would expire and the estate, gift and generation-skipping transfer tax exemptions would return to their pre-2017 levels, indexed for inflation.

V. American Housing and Economic Mobility Act of 2024

The American Housing and Economic Mobility Act of 2024 was proposed in July 2024 by Sen. Elizabeth Warren of Massachusetts. While most of the Act focuses on housing-related matters, it also includes a proposal for further changes to be made to the estate, gift and generation-skipping transfer tax system. Key components of the proposed legislation include:

a. Lower the estate, gift and GST tax exemptions. The exemptions would be lowered to 2009 levels at $3.5 million.

b. Introduce a progressive estate and gift tax rate. The rate for estates and gifts valued between $3.5 million and $13 million would be increased to 55%, 60% for transfers valued between $13 million and $93 million and 65% for transfers above $93 million. The bill would also impose a 10% surcharge on estates valued at $1 billion or more.

c. The GST tax rate would be raised to 65% from 40%.

d. Reduce the annual gift tax exclusion to $10,000 per donee. It is currently at $18,000, indexed for inflation.

e. Limit GRAT terms to no less than 10 years. The proposed law would also restrict GRATs from including annuity payments which do not decrease during the first 10 years of the term and require a remainder interest equal in value to at least 10% of the value of the assets transferred to the trust.

f. The use of grantor trusts in estate planning would be significantly restricted.

g. Valuation discounts for nonbusiness assets would also be restricted.

Vice President Kamala Harris recently endorsed the proposed estate tax changes, although given the timing of the bill relative to an election year, it is unlikely to gain any traction until later in 2025.

VI. Why Plan Now?

As previously noted, reviewing your clients' estate plans now is always the right thing to do, regardless of what is going on in Congress. Client situations are fluid and changes occur all of the time which might drive them to consider updates to their plans. However, the uncertainty around what Congress may do about the expiring provisions of the TCJA is enough to give one pause.

For example, a client with a taxable estate of $25 million can currently transfer up to $13,610,000 estate, gift and GST tax-free. Assuming the client fully utilizes their exemption amount in 2024 and then passes away after the TCJA sunsets in 2026, their taxable estate would be $11,390,000, resulting in estate tax of $4,556,000 (at a 40% rate) and a distributable estate of $20.4 million. If the same client fails to engage in any wealth transfer planning prior to their death in 2026, their taxable estate would be $18,000,000, resulting in tax of $7,200,000 and reducing the distributable estate to $17.8 million.

VII. What Should You Do?

Maximize the use of the higher exemption amounts in 2024 and 2025. The sunsetting of the TCJA presents estate planners and clients with a tangible impetus to review estate plans and engage in techniques which will leverage the higher exemption amounts to transfer as much wealth as possible to their heirs. There are a number of strategies which can be employed, some simpler than others, and each potentially beneficial to the right client in the right circumstance. We will explore several of these strategies which clients can employ to take advantage of this dwindling opportunity.

a. Direct Gifts

Clients can consider making direct gifts up to their current remaining exemption amount before the TCJA sunsets. Gifts can be of cash and/or property, recalling there is no income tax impact from gifting assets. Cost basis on gifted assets carries over to the donee.

Also, every taxpayer may gift up to $18,000 (in 2024, increasing to $19,000 in 2025) to as many individuals they choose, without incurring any gift tax or reducing their lifetime gift tax exemption. This is called the “annual gift tax exclusion” and is an extremely simple method of gifting to reduce an individual’s taxable estate. Importantly, the annual gift tax exclusion remains in place after the TCJA sunsets in 2026.

b. Indirect Gifts

While annual exclusion gifting is simple, it is rather small scale. For many of our clients, true wealth transfer comes in the form of larger, indirect gifting through various forms of trusts. In addition, the ability to leverage different state jurisdictions across the country with favorable trust and income tax laws, such as Delaware, to create and administer trusts makes lifetime gifts to trusts more flexible than ever before, providing clients with greater ability to control investment, distribution and tax decisions. Gifting appreciating assets into trusts also allows for future gains to be excluded from the donor's taxable estate from the point of the gift, further increasing their power to transfer significant wealth without additional transfer tax impacts for generations.

i. Dynasty Trusts

1. Perpetuity: In the past, trusts created in most states were subject to the "rule against perpetuities", which limited the length of time a trust could remain in existence to two or three generations. From a transfer tax perspective, the application of the rule essentially pulled trust assets back into the estate, gift and generation-skipping transfer tax regimes, negatively impacting families' ability to retain generational wealth.

   With the advent of the so-called "modern" trust jurisdictions, such as Delaware, South Dakota and Nevada, the rule could be avoided (or extended nearly indefinitely) by simply engaging a trustee located in one of these jurisdictions to administer the trust. These "dynasty trusts" could then be funded up to the grantor's lifetime estate, gift and generation-skipping transfer tax exemption limits with assets expected to appreciate over time (such as real estate or closely-held business interests), resulting in a transfer of wealth which would last multiple generations free of transfer tax.

2. Intentionally Defective Grantor Trusts: To make dynasty trusts even more powerful, clients can structure them as "intentionally defective grantor trusts" (or "IDGTs"), which allows the taxable gifts to be completed for transfer tax purposes, but still have the trusts' income be taxed to the grantor, thereby allowing the trusts' assets to grow free of income taxes as well. Importantly, the trust documents are typically structured so the grantor has the option to release the power they retained which causes the trusts to be taxed to them (typically a power to substitute assets of equal value under IRC Sec. 675 (4)). This optionality provides the grantor with flexibility to determine the point at which they would prefer the trust to start paying its own income taxes, such as when they are approaching retirement or when their personal liquidity becomes limited.

Planning Point: IDGTs often also provide an independent trustee with the discretionary ability to reimburse a grantor for the taxes they pay on trust income, thereby providing more flexibility for grantors who may have inconsistent liquidity year-to-year (such as business owners and private equity investors).

3. Flexibility: One of the issues we often hear clients voice when considering placing certain assets into trusts is the relinquishment of control over those assets to the trustee. This is particularly true for clients who have built their wealth through a family business.

   For these business owner clients, the "modern" trust states (and many others which have adopted some form of the Uniform Trust Code) may still be able to transfer the economic benefits of a business interest, including future appreciation, but continue to control and operate the business in the same manner they did prior to making the gift to the trust. This flexibility comes in the form of the division of responsibility and discretion amongst several fiduciaries. While this division can take many forms depending on the needs of the client, there are a couple of basic structures to consider when a client is concerned about retaining control:

   a. Fully Directed Trusts: For clients who struggle with giving up control or who are concerned about having someone else (such as a corporate trustee) involved in decision-making, particularly if they are planning to contribute interests in their business to a trust, the "modern" trust states provide the ability to redirect responsibility over investment and/or beneficiary distribution decisions to an individual (either the client themselves, a family member or a trusted advisor), while a corporate trustee provides access to the favorable jurisdiction (because no one really *lives* in Delaware!) and administrative functions, such as accounting and custody. These individuals are typically referred to as "Advisors" and act in a fiduciary capacity with respect to the powers granted to them under the trust document. Concurrently, the trustee is absolved from any duty to monitor the Advisors' activities and any liability for actions taken at their direction.

Planning Point: If the grantor or a family member is contemplated to serve as an Advisor, the drafting attorney must take care to structure their authority to avoid the assets of the trust from potentially being included in their taxable estate. For example, distribution authority should be limited to an ascertainable standard (typically "health, education, maintenance and support" or "HEMS").

Further, it is important to be mindful of the location of the Advisor(s) if and when grantor trust status is discontinued. In many states, the location of a fiduciary is a factor in triggering state income taxation. In New York, for example, if the grantor is a New York domiciliary at the time of the trust's creation, it is considered a New York resident trust for income tax purposes. *See* N.Y. Tax Law Sec. 605. However, New York exempts certain resident trusts from taxation if they meet a three-prong test under N.Y. Tax Law Sec. 605(b)(3)(D):

i. All of the fiduciaries (trustees and Advisors) must be domiciled outside of New York;

ii. All of the trust property must be located outside of New York (intangible assets such as stocks and bonds are not considered located in any jurisdiction, so this prong essentially refers to tangible assets, such as real estate); and

iii. The Trust cannot receive any New York source income.

Based on the above criteria, in order to avoid New York State taxation, a non-grantor trust created by a New York domiciliary cannot have anyone serving in a fiduciary capacity located in New York. As such, if a New York-based grantor is serving as an Advisor, they must either relinquish their fiduciary authority to the trustee or appoint a new Advisor located outside of New York prior to converting the trust to non-grantor status. Retaining control over trust assets is never easy!

b. Partially Directed Trusts: Similar to the fully directed trust, the "modern" trust states also provide flexibility to further bifurcate responsibility among fiduciaries for trusts holding a mix of assets. For example, suppose a trust holds a mix of marketable securities and an interest in the client's operating business. The client wants the trustee (likely a bank or trust company) to professionally manage the liquid investments but is concerned about the trustee having any kind of potential involvement or oversight of their business. Instead of the trust document providing for an all-or-nothing form of bifurcation of fiduciary responsibilities, it can be structured to allow the trustee and the client the ability to "toggle" which assets are subject to the trustee's discretion and which are subject to the Advisor's. In Delaware, the Advisor is typically referred to as a "Special Holdings Direction Advisor" with the assets selected to be subject to their discretion dubbed "special holdings". Under this structure, either the trustee or the Advisor can "declare" a certain asset to be outside the purview of the trustee and subject to the discretion of the Advisor. The trust document would provide the trustee with all of the protections of a directed trustee with respect to that asset. If they choose down the road, discretion over the asset can be returned to the trustee without the need for the Advisor to resign. This structure is often preferred by corporate trustees, as it provides clients with maximum flexibility to allow the trustee to act in whatever capacity the situation calls for over time.

Planning Point: Another role to consider is that of a "Tax Advisor". Similar to other Advisor roles, this individual would have sole responsibility for tax-related decisions and tax compliance for the trust. This role is often advantageous to clients who have contributed business interests to a trust, as it allows them to control the tax positions taken on the trust's behalf without the involvement of the corporate trustee.

ii. Family Limited Partnerships and LLCs

For clients seeking to gift marketable securities and other assets during their lifetimes, the use of Family Limited Partnerships ("FLPs") or LLCs may provide additional wealth transfer power through potential valuation discounts (e.g. for lack of control or marketability) for estate, gift and generation-skipping transfer tax purposes.

By placing assets into a partnership or LLC structure, clients can retain control (by holding a small general partnership interest or serving as LLC manager), while gifting limited partnership or membership interests to family members. The lack of control these limited interests hold over the FLP negatively impacts their value in the marketplace, allowing them to be appraised at a discounted value from that of the underlying assets being transferred. This discount (often as high as 40%) reduces the value, for tax purposes, of the gifts being made and, in turn, the amount of the clients' lifetime exemptions being used. The net result is the transfer of more wealth in real terms, the excess being the delta between the discounted value reported on the gift tax returns and the actual value of the underlying assets held in the FLP.

For example, a client creates an FLP in which they retain a 1% general partnership interest and gift minority interests (each less than 49% of the total shares) to their children and grandchildren. As the client is the general partner with control over decision-making for the business, each of the children's and grandchildren's minority interests are worth less to an arm's length buyer in the marketplace, such interests having no authority to impact the direction of the business. As such, they should be valued at a discount on the fair market value of the underlying assets, which do not carry these restrictions, resulting in a lower value of the assets being gifted.

When combined with the use of the dynasty trust, the estate, gift and GST tax-free wealth transfer possibilities of the FLP are even more significant and can extend across multiple generations.

iii. Spousal Lifetime Access Trusts (SLATs)

A SLAT is an irrevocable trust, typically established as a grantor trust, in which one spouse transfers assets to a trust held for the benefit of the other spouse, while completing a taxable gift and ensuring the assets remain outside of their estate. This strategy essentially enables couples to utilize their lifetime exemptions without relinquishing indirect access to the trust assets, since the spouse named as the beneficiary can access the funds through the distribution mechanisms in the trust document. When each spouse creates a SLAT for the other, they can maximize the use of both of their lifetime exemptions, allowing them to transfer wealth to their children or other beneficiaries free of transfer tax.

When combined with the dynasty and directed trust strategies utilizing one of the "modern" trust jurisdictions, the use of SLATs can provide clients with the ability to maximize the use of their transfer tax exemptions during their lifetimes, retain control over the underlying assets, and provide them with indirect access to funds should the need arise.

<u>Planning Point</u>: *Beware the Reciprocal Trust Doctrine!* When both spouses create SLATs for each other, it is important to avoid the "reciprocal trust doctrine" imposed by the IRS. *See Lehman v. Commissioner*, 109 F.2d 99 (2d Cir. 1940); *United States v. Grace*, 395 U.S. 316 (1969). The reciprocal trust doctrine essentially states that the trusts are so similar in nature as to leave the grantors in approximately the same position they were in before the creation of the trusts. If applied to SLATs created by a couple for each other, the doctrine could lead the IRS to consider both SLATs as part of the spouses' estates, nullifying the tax benefits. To avoid application of the doctrine, planners should differentiate certain aspects of the trusts, including the terms, trustees and timing of funding of each SLAT. For example, one SLAT may include different distribution provisions or standards than the other.

It is also important to note SLATs should incorporate some form of independence or objectivity in discretionary distribution decisions. Often, the combination of an ascertainable standard (HEMS, for example) and an independent trustee (such as a corporate trustee) with broader distribution powers allows couples to retain a certain level of control, while avoiding the possibility the trust assets could be pulled back into their taxable estates. We often see SLATs created in one of the "modern" trust jurisdictions, such as Delaware, utilizing a combination of directed or partially-directed trust provisions and both individual and corporate trustees.

SLATs are often a good option for clients who are unsure whether fully relinquishing access to certain of their assets is advisable or for clients who may not have sufficient assets to fully utilize their lifetime transfer tax exemptions while still ensuring they have access to other funds during their lifetimes. Even though the expectation is that neither spouse will access the

SLATs, as with any gifting strategy, it is important for clients to avoid "over-gifting" to the extent they are left without sufficient assets to live their lives.

c. *Wealth Replacement*

i. Irrevocable Life Insurance Trusts (ILITs): An ILIT can help beneficiaries replenish the assets of an estate which is expected to exceed the lifetime exemption of the decedent. An ILIT essentially places a life insurance policy (or policies) in an irrevocable trust which is held outside of the grantor's taxable estate. The grantor contributes funds (often calculated to match the annual exclusion amount) each year to allow the trustee to pay ongoing premiums. Depending on the type of policy gifted to the trust, the value of the taxable gift is often negligible or far lower than the value of the death benefit proceeds. Upon the grantor's death, the death benefit proceeds are paid to the trust, outside of the grantor's estate and free of estate tax.

VIII. New York Estate Tax

While we have focused on planning for the possible sunset of the Federal estate, gift and generation-skipping transfer tax exemptions, it should be noted that twelve states and the District of Columbia have an estate tax: Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, and Washington. States such as Iowa, Kentucky, Nebraska, New Jersey, and Pennsylvania have an inheritance tax. Maryland has both an estate tax and an inheritance tax. Any estate planning in which we engage should also take into consideration the impact of these tax regimes, which can be substantial.

a. *The New York Estate Tax Cliff*

For example, New York limits an individual's lifetime estate tax exemption to $6.94 million in 2024, indexed for inflation. This means that, even if a New York taxpayer's estate is lower than the $13.61 million Federal lifetime exemption amount, if it exceeds $6.94 million it is subject to some form of New York State estate tax. The New York rule, however, is particularly punitive for larger estates.

If a taxable estate exceeds the New York State exemption by less than 5%, it only pays taxes on the amount which exceeds the exemption amount. However, if the total value of the estate is more than 105% of the exemption amount, the New York State estate tax is levied against the entire estate! This is known as the dreaded New York State estate tax "cliff."

<u>The following illustrates the estate tax cliff in action</u>: Bear in mind that 105% of \$6.94 million is \$7,287,000. If an estate is between \$6,940,000 the New York State lifetime exemption limit for 2024) and \$7,287,000, only the assets that exceed \$6.94 million are subject to New York State tax. In other words, if an estate totals \$7 million, the taxable portion is only \$60,000. However, if the estate is over \$7,287,000, the entire estate is taxable in New York, regardless of the exemption amount remaining. As the New York State estate tax is a progressive system, rates for 2024 range between 3.06% to 16% for estates exceeding \$10.1 million.

b. *The "Clawback Rule"*

While there is no gift tax any longer in New York, the state applies a three-year "clawback" of any lifetime gifts made within three years of death for purposes of determining the value of the taxable estate for estate tax purposes, limiting the usefulness of near-death planning for New York-based taxpayers.

Importantly, the New York State "clawback" rule does not include annual exclusion gifts (\$18,000 per donee in 2024). As such, individuals nearing death can make annual exclusion gifts within the three year "clawback" window.

Further, as there is no New York gift tax and the "clawback" rule only applies to gifts made within three years of death, gifts made up to the Federal exemption made beyond that time period will not be pulled back into the taxpayer's estate for New York estate tax purposes. In other words, early planning can mitigate much of the pain associated with the New York estate tax and its nefarious cliff.

c. *Portability*

Another consideration when planning for New York clients is the lack of portability in the New York State tax regime. Said differently, while under the Federal system couples can aggregate their lifetime exemptions, allowing the surviving spouse to utilize the unused portion of their predeceased spouse's exemption in future planning, the same is not true in New York. In New York, any unused lifetime exemption dies with the spouse.

To plan for this possibility, planners should consider traditional estate tax avoidance strategies, such as credit shelter trusts, to ensure the lifetime exemptions of both spouses are utilized to the fullest extent possible. Other strategies, such as conditional gifts to charitable organizations, could be structured to avoid triggering the New York State estate tax, particularly for estates in danger of application of the estate tax cliff.

IX. Conclusion

The possible sunsetting of the TCJA and its historically high estate, gift and generation-skipping transfer tax exemption amounts presents a unique and urgent opportunity for clients to engage in planning in 2024 and 2025 to maximize the transfer of their wealth to future generations. Utilizing the flexibility of the "modern" trust states, the sophistication of professional fiduciaries with expertise in those jurisdictions, and various strategies to ensure assets remain accessible while avoiding estate inclusion, clients and planners can design an estate plan which allows clients to retain control today, while setting their families up for success long into the future.

For planners, you should be talking to your clients now about the possibilities presented to us all this year and next. While actions taken by Congress are challenging to predict, waiting to "see what happens" (a stance many of our clients prefer to take) only increases the risk they will miss out on the ability to control how their legacy is passed down the generations and the extent to which it will be lost to taxes.