The Financial and Estate Planning Council of Metropolitan Detroit, Inc.

January 2011

30600 Northwestern Hwy., Suite 208, Farmington Hills, MI 48334 • (248) 538-7654 • FAX: (248) 538-7656

President's Message

We begin 2011 with a two year extension of prior gift and estate tax law, along with some major changes, including the increase of the gift and estate exemptions to $5 million. While the resulting legislation does not provide a "permanent fix" to our gift and estate tax laws, it is a start in the right direction. We have certainty only for the next two years, and the 2013 looming expiration date makes for challenges in providing our clients with professional services. Many of the mainstream financial planning strategies from the last few years are still in place; however, the increase in exemption amounts provides our professions with opportunities to help our clientele develop new or revised financial and estate plans. Future FEPCMD programs will address ongoing technical and planning developments.

Before moving on to further comments, I need to acknowledge the contributions of immediate past-president, Steve Moore, and the FEPCMD Board and Committee members over the past 18 months. With the change in the FEPCMD fiscal year from June 30 to December 31, FEPCMD leaders extended their commitments for an additional six months. My thanks to all Board and Committee members for their willingness to continue in their roles and make the transition seamless. And a special "thank you" to our FEPCMD administrator, Kris Wolfe, for all her work on behalf of our organization.

The upcoming year's programs are in place into the summer months. The February 8th Spouses' Night will be held in a new venue, Zazio's, located in downtown Birmingham and feature a program presented by Elaine Banks Stainton of Doyle, New York. The evening's program is planned to provide our members with an overview of art and other collectibles valuation, and an insight into the services of our local valuation colleagues. Please note that capacity is limited for this event, so I recommend that you make your reservations promptly.

May will bring our annual Charity Golf Outing. The Golf Committee is well into its event timetable. Look for advance materials for this event, most likely arriving in late February to mid-March. Last year's event raised more than $9,000 for Michigan Special Olympics.

Steve Moore, Brad Kreiner and I attended the NAEPC Annual Conference in San Diego, and as in past years, came away with more insight into the workings of comparable size councils. FEPCMD continues as one of few major councils that holds evening meetings, and whose meetings are designed for both networking time and technical matters. We also came away with additional access to nationally recognized speakers; these contacts allow us to provide programs such as the November 2010 event with Stacey Eastland's CPE seminar preceding the networking hour and the dinner meeting. Similar presentations are on the Programs Committee's agenda for the upcoming September and/or November programs. The Board is also looking at the possibility of joint meetings with other professional groups.

An outgrowth of attendance at prior Annual Conferences was the recent change approved to the FEPCMD by-laws allowing associate memberships. This non-voting membership classification permits interested individuals who do not meet regular membership requirements to participate in FEPCMD activities on a regular basis. As always, your officers, Board and Committee member ask each of you to continue to promote FEPCMD to your work and professional associates. Recent increases in membership applications, both regular and the new associate category, are a direct result of your efforts to obtain new members.

Wishing all a healthy and prosperous New Year….

Andrew A. Dincolo, CPA, President

Finally! A New Estate Tax Law... Now What?

"We believe the estate tax in the bill is a bridge too far."
Speaker of the House Nancy Pelosi/December, 2010

"There is never a perfect bipartisan bill in the eyes of a partisan."
President Bill Clinton/December, 2010

"If you had to pay estate tax and you had to die, this was the year."
Morbid joke of 2010

EXECUTIVE SUMMARY:

With the signing of "The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010" ("TRA 2010") into law by President Obama on December 17, 2010, clients and their advisors alike, are no longer in the dark as to how to plan (at least for the next two years). At long last, one can begin to take some action without fear as to whether the estate tax law will be changed retroactively for this year or prospectively for next.

While in the days and weeks to come there will surely be much written about TRA 2010, with much greater detail and with further clarity, the following passages underscore some of the more pertinent aspects of TRA 2010, and provide some planning pointers to consider.

Political Drama to the Passage of the 2010 Act

The supposed "lame-duck" session of 2010 may have been a lot of things, but it was not lame. There was plenty of political theater to be had. President Obama, who actively campaigned against extending the Bush tax cuts for the wealthy, suddenly broke ranks with many in the Democratic Party and yielded to the Republicans new-found political capital.

By most all accounts, the most controversial parts threatening passage of TRA 2010 were the provisions relating to the often overlooked estate tax. Many Democrats argued that the estate tax was a costly tax break for the rich. Republicans countered (and without much empirical evidence), that a higher "death tax" would unduly burden farmers and small businesses.

In the end, "just say no" in the House Democratic Caucus gave way to "no tax hikes for working-class Americans." Ultimately, with final resolution came the most favorable wealth transfer planning provisions in modern time. Ironically, TRA 2010›s generous provisions regarding the estate tax had virtually no chance of making its way through either House of Congress, until they became welded together with Obama›s pledge to protect the unemployed and working-class Americans.

A few years from now, if having not taken overt action to address the unsustainable fiscal path that we are on, we may look back with some remorse for not combining passage of this estimated $858 billion tax deal (which offers slim hopes for cutting the deficit) with a phased-in reduction of the deficit over the longer term. The costs for the more openhanded estate tax provisions in TRA 2010 are estimated by some experts to be $68 billion and $300 billion over a two and ten year period respectively. But in the political moment, it is much easier to have "compromise" that makes deficits bigger than it is to have "compromise" on spending restraints.

Two Roads Regarding Death in 2010

The new law allows the executor of the estate for a decedent who died in 2010 to choose between two roads in administering the estate. One road, which is automatic unless the executor elects out of it, subjects the estate to estate tax, a $5 million estate exemption, a 35% estate tax rate and a stepped-up income tax basis for appreciated assets.

The other road available by election of the executor would be to provide for no estate tax, but with appreciated assets in the estate receiving only a modified carryover basis ($1.3 million for non-spousal beneficiaries and $3 million for spousal beneficiaries).

While the choice is clear for estates under $5 million not to elect out of the first road and to "pay estate

FINANCIAL AND ESTATE PLANNING COUNCIL OF METROPOLITAN DETROIT

Presents

"Spouse's Night"

ELAINE BANKS STAINTON

Doyle New York: Executive Director of Paintings and Drawings

In the past year, the art market has been very strong for blue-chip artists. At a time when value is important in every field, the best works by these artists are selling to very enthusiastic bidders, for very high prices. We will explore this dynamic is a variety of fields, with examples from recent sales. Questions and answers will follow.

TUESDAY, FEBRUARY 8, 2011

Zazio's Birmingham

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Elaine Stainton completed her undergraduate work in history and French literature at Indiana University. Then, she studied classical archaeology at the University of Maryland, where she received a masters degree in this field in 1972. She worked in the department of Greek and Roman Art at the Museum of Fine Arts, Boston, before continuing her studies in archaeology at Princeton University. While at Princeton she studied both classical archaeology and Renaissance and Baroque art, eventually completing her doctoral work in Renaissance painting. She received her Ph.D. in Art and Archaeology in 1978, with a dissertation on the Venetian painter Jacopo Tintoretto.

In 1975, Dr. Stainton joined the faculty of the University of Delaware, where she taught for four years before moving to New York in 1979 to work at the auction house of Sotheby Parke Bernet. Since that time she has lived in New York and has worked for several art firms, including Sotheby's, Richard Feigen Gallery, P. & D. Colnaghi, and Doyle New York, where she was Director of the Paintings and Drawings Department from 1984-1993. In 1993, she formed her own company, Stainton Associates, specializing in fine arts research and appraisal. Since 1994, she has also taught art history and connoisseurship at New York University School of Continuing and Professional Studies. In 1994, she was appointed senior editor at Harry N. Abrams, Inc., a publishing house known for its fine illustrated books, where she has edited a number of distinguished art books.

In April 2006, Dr. Stainton returned to Doyle New York as the Executive Director of the Paintings and Drawings Department. As such she is responsible for the appraisals and auctions of important paintings and drawings in the fields of European Old Masters, European 19th Century Art, and European and American Modern and Contemporary paintings, drawings and sculpture.

AGENDA:	**5:30 p.m.**	**Complimentary Cocktails**
	6:30 p.m.	**Presentation**
	7:30 p.m.	**Dinner**

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NEW FEATURE: Log onto our website by February 1, to make your reservation and pay with VISA or Master Card.
www.metrodetroitfepc.org

OR PLEASE MAIL YOUR RESERVATION AND CHECK BY FEBRUARY 1 TO: **COST: $50.00 PER PERSON**

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TOTAL ENCLOSED: ______________________
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tax," considerable analysis may need to be done to decide which road to choose for the lowest overall tax consequences for estates above $5 million.

Planning Pointer: According to Robert S. Keebler, CPA, MST, AEP® (Distinguished), partner with Keebler & Associates, large estates in excess of $30 million will likely choose to opt out of the automatic estate tax. However, for estates ranging between $5 and $30 million the estate tax cost will necessarily need to be weighed against the income tax cost. Keep in mind that the income tax calculation may likely be more than a simple capital gains analysis. For example, more complicated calculations regarding depreciation recapture for fully depreciated real estate are apt to be more challenging.

Planning Pointer: The IRS has finally posted the official draft of Form 8939, "Allocation of Increase in Basis for Property Acquired from a Decedent." Note, the deadline for filing the form is nine months from the date of enactment (December 17, 2010) of TRA 2010.

Favorable GST Tax Transfers Remain for 2010

TRA 2010 establishes a $5 million GST tax exemption and a GST tax rate of 35% for gifts made and decedents dying after January 1, 2010. However, GST transfers made in 2010 will be subject to a zero GST tax rate under IRC 2641(a).

With a zero GST tax rate, there is no GST tax on GST transfers (direct skips, taxable distributions or taxable terminations) in 2010. Nevertheless, does this mean that all transfers to trusts in 2010 have an inclusion ratio of zero and therefore are exempt from the GST tax in future years?

Fiduciary Counsel Steve R. Akers, JD, AEP® (Distinguished) of Bessemer Trust Company, N.A. pointed out generally in a December 17, 2010 presentation that the Joint Committee on Taxation Technical Explanation says the inclusion ratio is not zero: "...the generation skipping transfer tax rate for transfers made during 2010 is zero percent. The generation skipping transfer tax rate for transfers made after 2010 is equal to the highest estate and gift tax rate in effect for such year (35 percent for 2011 and 2012)."

Planning Pointer: If GST transfers in 2010 to grandchildren result in a gift tax, consider using lower basis assets to increase the basis under IRC 1015 by the amount of gift taxes paid. Note, in 2011 gifts of higher basis assets may make more sense since the new gift tax exemption of $5 million may likely cover any gift tax.

Planning Pointer: For GST transfers in 2010, one should consider exploring opting out of the automatic allocation of GST exemption under IRC 2632 (b) (3) on the 709 gift tax return, thereby preserving their 2010 GST exemption for additional gifts later on or to be used upon death.

Planning Pointer: Do not overlook annual exclusion gifts of $13,000 for early 2011.

Trusts and Spousal Portability

Executors will now be able to transfer to the surviving spouse any unused estate tax exemption ($5,000,000) from the first spouse›s death. This may have a chilling effect on the perceived need to do comprehensive estate planning since married couples may conclude that there is no longer a compelling need to do "A"/"B" tax planning trusts or will because they no longer have a tax problem.

The ability to pass on $10 million free of estate taxes through portability for at least the next two years should result in more than 99% of the estates in America remaining untaxed. Unfortunately, "I Love You" wills may become that much more prevalent as many families possibly will forgo the considerable non-tax benefits of using bypass and other types of trusts to provide asset, creditor and divorce protection to their loved ones.

In addition to compelling non-tax reasons, there are also sound tax reasons to fund a bypass trust. Funding a credit shelter trust on the first spouse›s death allows any increase in value in the assets of the trust to avoid estate taxation at the death of the surviving spouse. Further, because the GST exemption is not portable the estate of the first spouse to die should likely incorporate a bypass trust where the deceased spouse›s GST exemption can be applied. Finally, a bypass trust utilizes the first spouse's to die state estate tax exemption in States which have a separate estate tax like New York.

Planning Pointer: Although the need to equalize assets between "rich" spouse and "poor" spouse is lessened with portability, the need to balance wealth between the two spouses still exists if the goal is to maximize each spouse's GST exemption because there is no provision regarding portability to the surviving spouse of any unused GST exemption from the first spouse›s death.

Finally, there is no "stacking" of deceased spouses› unused estate tax exemptions and therefore no incentive to enter into "serial marriages" because only the most current spouse›s unused exemption can be used by the executor. A prior transfer of unused estate tax exemption by the death of a previous spouse is cancelled out and replaced by the death of the most current spouse and their unused estate tax exemption.

Planning Pointer: For many families, the use of disclaimer trusts may become much more prevalent. Although there may be no estate tax concerns over the next two years, providing flexibility for the surviving spouse to disclaim, with a potential $1 million estate tax exemption (as indexed for inflation) beginning in 2013, is an important consideration.

Review Formula Clauses & Family Liquidity Needs

Applying the new $5,000,000 estate, gift and GST exemptions beginning in 2011 to existing tax planning wills and trusts may result in unintended financial consequences to the surviving spouse or to the decedent›s heirs. Fractional share formulas and pecuniary formulas will likely produce dramatically different results, depending upon which one is used.

Formulas which provide for "the maximum amount that can pass free of estate tax," should now be interpreted to mean $5.0 million, rather than the entire estate. Conversely, formulas that dictate that the "amount equal to federal estate tax exclusion amount" will presently mean $5.0 million rather than zero.

Carefully consider whether it will be the surviving spouse or the bypass trust that will receive the deceased spouse›s unused estate tax exemption. What about second marriages and overfunding or underfunding a Q-tip trust? Now more than ever, estate planning practitioners must carefully review estate planning documents with their clients.

Similarly, the purpose for which a life insurance policy was purchased along with the policy itself ought to be reviewed. Was the policy for income replacement or to help pay for estate taxes?

Planning Pointer: With an increased estate tax exemption it may be tempting to cancel a second-to-die policy for example which is owned by an ILIT for an estate under $10 million. Keep in mind, however, that the increased estate exemption is not set in stone beyond 2012. Moreover, life insurance is likely to remain taxed-favored and a good hedge if one does not live until their life expectancy, and as such, deserves a place in one›s overall asset allocation. In reality, with increased unified exemptions the use of life insurance for the affluent may actually become even more popular.

A Windfall for Gifting

Presently, conditions for gifting have never been better in modern times. Under the new law we have a $5 million unified estate, gift, and generation skipping exemption (indexed for inflation) and a 35% combined estate, gift and GST tax rate. Add to that, historically low federal interest rates, relatively low asset values and no legislation at this time restricting the use of GRATs and/or valuation discounts on family controlled enterprises.

Planning Pointer: Barring any new restrictions, limitations or prohibitions, be they proactive or retroactive, the case from making significant wealth transfer between January 1, 2011 and December 31, 2012 is extraordinarily compelling. During this time, large gifts to Dynasty and Spousal Access trusts may become much more prevalent. Likewise, gifts and sales to Grantor Trusts, with easier seeding due to the increased gift tax exemption, have the potential to remove vast amounts of wealth. Note, at the end of 2012 many of the same concerns that we have had about 2011 will surface again in 2013 as we prepare to return to the estate tax law of 2001.

Planning Pointer: For more on the benefits of gifting, please see LISI Estate Planning Newsletter #1668 (July 1, 2010 by John J. Scroggin, JD, LL.M., AEP® and Charlie Douglas, JD, CFP®, AEP®; LISI Estate Planning Newsletter #1718 (November 29, 2010) by Jeffrey N. Pennell; and LISI Estate Planning Newsletter #1732 (December 15, 2010) by Robert S. Keebler, CPA, MST, AEP® (Distinguished) @ leimbergservices.com.

CONCLUSION:

Could things possibly get any better for wealth transfer planning? Well, with another election coming at the end of 2012 maybe Republicans will finally get their way and repeal the "death-tax" once and for all. At that point the minimal revenue from the estate tax portion of the TRA 2010 may give Republicans all the leverage they need to put the final nail in the estate tax coffin. On the other hand, the need for fiscal responsibility and higher taxes of all kinds, including estate taxes, or a Democratic controlled Congress may rule the day.

Whatever the political climate may be, with so many predictions by so many in our wealth transfer planning community having turned out to be so wrong over the last few years, I doubt there will be many who will be definitive as to where things will ultimately stand come January 1, 2013. In the meantime, planning opportunities should be plentiful. Seize the day!

This article is based upon an article that appeared on the website of the National Association of Estate Planners & Councils ("NAEPC") and is being reprinted with permission of the NAEPC. This article is intended to provide general information concerning tax developments. It is not intended to be and should not be regarded as a tax or legal opinion or tax or legal advice on which you should rely without seeking legal counsel.

Charlie Douglas, JD, CFP®, AEP® has practiced in the business, tax, estate and financial planning areas for over 25 years. He holds a J.D. from Case Western Reserve School of Law and possesses the Certified Financial Planner® and an Accredited Estate Planner® designation. As a senior vice president for Wells Fargo Private Bank, Charlie specializes in comprehensive planning solutions and fiduciary trust services for business owners, high net-worth individuals and their families. Charlie is a board member of the National Association of Estate Planners & Councils ("NAEPC") and is the current editor of the NAEPC Journal of Estate & Tax Planning.

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