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Estate Tax Legislation in the 110th Congress

Nonna Noto, Government and Finance Division

July 2, 2008

Abstract. There are several reasons why Congress might address the estate tax sooner rather than later. The law governing the estate tax over the next four years is highly erratic. The applicable exclusion amount (popularly known as the exemption) under the estate tax is \$2 million for people who die in 2008. The exclusion is scheduled to rise to \$3.5 million in 2009. The estate tax is repealed for people who die in 2010 only. Then, because the current law governing the estate tax is scheduled to sunset on December 31, 2010, the estate tax is set to be reinstated in 2011, with an exclusion of \$1 million per person for 2011 and beyond.

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CRS Report for Congress

Estate Tax Legislation in the 110th Congress

Updated July 2, 2008

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Prepared for Members and
Committees of Congress

Estate Tax Legislation in the 110th Congress

Summary

Under provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA, P.L. 107-16), the estate tax exemption is scheduled to continue to rise, from \$2 million for decedents dying in 2008, to \$3.5 million in 2009. The estate tax is repealed for decedents dying in 2010 only. The gift tax is to remain in place in 2010, with an exclusion of \$1 million. In addition, when the estate tax is repealed in 2010, there is scheduled to be a significant change in the method used to determine the “basis” of all capital assets transferred at death — from “step-up in basis” to “modified carryover basis.”

The estate tax provisions of EGTRRA are scheduled to sunset at the end of 2010. That explains why the repeal of the estate tax is currently scheduled to last for only one year. If Congress does not change the law beforehand, on January 1, 2011, estate and gift tax law will return to what it would have been had EGTRRA never been enacted. The unified estate and gift tax will be reinstated with a combined exclusion of \$1 million. The maximum tax rate will revert from 45% in 2007-2009 to 55%. These large year-to-year differences in the estate tax law mean that wealthy individuals face a wide and erratic variation in their potential estate tax liability over the next four years, 2008-2011, depending upon which year they might happen to die.

Following EGTRRA, in each of the past three Congresses, the House passed a bill to permanently repeal the estate tax, but the Senate did not pass any legislation addressing the estate tax. In the second session of the 109th Congress, the House also passed two bills that would have modified and retained the estate tax.

The concurrent budget resolution for FY2009, approved by the Senate on June 4 and the House on June 5, 2008, provides “budget room” for extending the 2009 estate tax law, with an exclusion of \$3.5 million per decedent and a top tax rate of 45%. But separate legislation must be enacted in order to change the tax law. Thus far in the 110th Congress, eight bills to permanently repeal the estate tax have been introduced in the House and four in the Senate. Seven bills to retain but modify the estate tax have been introduced in the House and two in the Senate. The repeal bills differ on whether or not they would preserve the other changes made by EGTRRA to the taxation of gifts and the basis for inherited assets. The modification bills differ on the level of the exemption, what year it would take effect, whether or not it would be indexed for inflation, and whether any unused exemption could be carried over to the estate of the surviving spouse. They also differ on the tax rates, whether special relief would be given to family-owned farms or businesses, and whether the gift tax would be defined separately from, or unified with, the estate tax.

The Treasury Department’s February 2008 estimates show the annual revenue loss from total repeal of the estate tax rising steadily from \$58 billion in FY2012, up to \$84 billion in FY2018. Although estate and gift taxes account for less than 2% of federal revenue, permanent repeal of the estate tax accounts for one quarter of the estimated revenue loss of the Bush Administration’s proposal to make permanent the group of tax cuts enacted in 2001 and 2003, measured over the 10-year forecast period, FY2009-FY2018. This report will be updated in the event of new legislation.

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Estate Tax Legislation in the 110th Congress

Underlying Issues

There are several reasons why Congress might address the estate tax sooner rather than later. The law governing the estate tax over the next four years is highly erratic. The applicable exclusion amount (popularly known as the exemption) under the estate tax is \$2 million for people who die in 2008. The exclusion is scheduled to rise to \$3.5 million in 2009. The estate tax is repealed for people who die in 2010 only. Then, because the current law governing the estate tax is scheduled to sunset on December 31, 2010, the estate tax is set to be reinstated in 2011, with an exclusion of \$1 million per person for 2011 and beyond.

These changes result in dramatic variations in the potential estate tax liability, depending upon which year a wealthy person might happen to die. As shown in **Table 1**, the approximate estate tax due on a taxable estate of \$4 million, for example, would be \$900,000 if the owner died in 2008, \$225,000 in 2009, \$0 in 2010, and \$1,495,000 in 2011 and subsequent years. Furthermore, there is uncertainty about the law that may govern in future years. It is difficult for individuals and families to do long-term tax planning for their estates under a law which contains such large year-to-year differences.

Table 1. Estate Tax Exclusion and Approximate Tax on a Taxable Estate of \$4 Million, 2008 to 2011 and Beyond

Year of Death	Estate Tax Exclusion Per Decedent	Top Marginal Tax Rate	Approximate Tax on a Taxable Estate of \$4 Million ^a
2008	\$2 million	45%	\$900,000
2009	\$3.5 million	45%	\$225,000
2010	No estate tax	0%	\$0
2011 and beyond	\$1 million	41% to 55%	\$1,495,000

Source: Tax liability calculated by CRS. See CRS Report RL33718, *Calculating Estate Tax Liability: 2001 to 2011 and Beyond*, by Nonna A. Noto.

- a. The taxable estate is equal to the gross estate (the aggregate value of assets) minus eligible deductions (including administrative expenses of the estate, state death taxes, debts, charitable bequests, and transfers to the surviving spouse). The tax liability is described as approximate because other items could affect the final calculation. For example, not taken into account here are gift taxes that may already have been paid on lifetime taxable gifts and foreign taxes paid on the estate.

Such large differences in anticipated estate tax liability could even influence the timing of deaths, or at least the officially recorded date of death.¹ Indeed, there is evidence that when Australia eliminated its estate tax on July 1, 1979, “Over half of those who would have paid the estate tax in its last week of operation managed to avoid doing so.”² Taking this evidence into account, Congress may choose to address the estate tax well before the tax is repealed on January 1, 2010, and before the estate tax provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 sunset on December 31, 2011.

Bills addressing the estate tax generally fall into one of two categories: those that would permanently repeal the tax; and those that would retain the tax, but modify it. Here are some of the hotly debated claims commonly made by opponents and proponents, respectively, of the estate tax.

Supporters of permanently repealing the estate tax maintain that the tax:

- reduces savings and investment, thereby reducing long-term economic growth;
- is a form of double taxation, taxing money that has already been subject to the income tax;
- leads wealthy individuals to undertake economically unproductive efforts and expenses in order to reduce their potential tax liability; and
- unduly burdens family farms and businesses³ and penalizes successful entrepreneurship.

Supporters of maintaining the estate tax argue that the tax:

- does not significantly discourage saving and investment;
- is an important component of a progressive tax system;
- is needed to break up the concentration and dynastic transmission of wealth;
- is a backup for capital gains taxes not collected on the increase in asset values during a decedent’s lifetime;
- encourages charitable bequests;
- generates revenue that helps reduce the federal budget deficit; and

¹ Wojciech Kopczuk and Joel Slemrod, “Dying to Save Taxes: Evidence from Estate-Tax Returns on the Death Elasticity,” *Review of Economics and Statistics*, vol. 85, no. 2 (May 2003), pp. 256-265.

² Joshua Gans and Andrew Leigh, “Toying with Death and Taxes: Some Lessons from Down Under,” *Economists’ Voice*, vol. 3, issue 6 (April 2006). Available at [<http://www.bepress.com/ev>], visited on July 2, 2008.

³ Two reports prepared for Congress concluded that very few estates containing farms or small businesses lacked sufficient liquid assets to pay the estate tax that may have been due. U.S. Congressional Budget Office, *Effects of the Federal Estate Tax on Farms and Small Businesses*, July 2005, cites evidence from estate tax returns filed in 1999 and 2000. CRS Report RL33070, *Estate Taxes and Family Businesses: Economic Issues*, by Jane G. Gravelle and Steven Maguire, cites evidence from estate tax returns filed in 2006.

- can help states levy estate or inheritance taxes.⁴

If the choice is to repeal the estate tax, questions still remain as to whether assets transferred at death should have a carryover basis or step-up in basis⁵ and whether there should be a gift tax. The definition of basis has important implications for the capital gains tax liability of heirs when they sell an inherited asset. The presence of a gift tax protects the income tax but discourages the transfer of assets during a person's lifetime.

If the choice is to retain the estate tax but modify it, there are numerous design elements to consider. In addition to setting the level of the exclusion, there are the questions of whether the dollar amount should be indexed for inflation and whether any unused exclusion should carry over to the surviving spouse. To date, little attention has been given to the tax rate structure. Is it important to have a schedule of several graduated tax rates instead of just one or two rates at a high level? Should the thresholds between the rate brackets be indexed for inflation? Should the estate tax rate be established on its own, or should it be set in terms of another tax rate, such as the top income tax rate or the rate on long-term capital gains? Should there be special treatment for family-owned farms and businesses? Should there be a credit or a deduction for state death taxes? Should there also be a gift tax and, if so, should it be separate from or unified with the estate tax? It may also be appropriate to design an estate tax that is consistent with income tax policy toward saving and toward income from investments. The underlying economic question is: What is the optimal way to tax assets transferred at death?

Current Law: The Economic Growth and Tax Relief Reconciliation Act of 2001

Title V of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA, P.L. 107-16, enacted June 7, 2001) gradually phased out the estate tax by raising the “applicable exclusion amount” or “exemption” under the estate tax, in large increments. The exclusion increased from \$675,000 in 2001 before EGTRRA, to \$1 million for decedents who died in 2002 or 2003, \$1.5 million for 2004 or 2005, and \$2 million for 2006-2008. The exclusion is scheduled to rise one last time, to \$3.5 million in 2009. Then the estate tax and generation-skipping transfer (GST) tax are repealed for 2010 only, because the provisions of EGTRRA sunset on December 31, 2010. The gift tax is to remain in place in 2010, with a cumulative lifetime exclusion amount of \$1 million and with a maximum marginal tax rate of 35% (this is equal to the highest rate for the individual income tax in 2006 and thereafter under EGTRRA).

In addition, when the estate tax is repealed in 2010, there is scheduled to be a significant change in the method used to determine the “basis” of capital assets

⁴ For further discussion of these arguments, see CRS Report RL30600, *Estate and Gift Taxes: Economic Issues*, by Donald J. Marples and Jane G. Gravelle.

⁵ See pages 4-5 for an explanation of step-up and carryover basis.

transferred at death — from “step-up in basis” to “modified carryover basis.” The basis is the “cost” of a capital asset that is subtracted from the sales proceeds in order to calculate the “capital gain” that is subject to income tax after an asset is sold.⁶

Under the law in place through 2009, and scheduled to resume in 2011, a *step-up in basis* rule applies to assets transferred at death.⁷ Under this rule, the cost basis of an asset is set at the value of the asset on the decedent’s date of death.⁸ If the heir sells the asset, his or her capital gain is calculated as the difference between the sales price and the stepped-up basis, not the decedent’s original purchase price (which is called the *carryover basis*). The effect of this practice is to permanently forgive the income tax liability on the increase in value of the asset (the capital gain) during the decedent’s period of ownership.⁹

The estate tax is sometimes defended as a substitute for the capital gains tax at death.¹⁰ Consistent with this argument, an important tradeoff that EGTRRA made for the repeal of the estate tax in 2010 was the return to a carryover basis for assets transferred at death.¹¹ However, two important exceptions were made. In what is called a *modified carryover basis*, an aggregate step-up in basis of \$1.3 million per decedent¹² is permitted in the original adjusted basis of assets transferred at death (\$60,000 for nonresident aliens). An additional step-up of up to \$3 million is permitted for assets transferred to a surviving spouse. (These dollar amounts are indexed for inflation.¹³) The executor of the estate is left with the task of allocating the step-up allowance to specific assets.

⁶ For a detailed explanation, written before EGTRRA was enacted, see CRS Report RL30875, *Step-Up vs. Carryover Basis for Capital Gains: Implications for Estate Tax Repeal*, by Nonna A. Noto, April 20, 2001.

⁷ IRC Section 1014, relating to the basis of property acquired from a decedent.

⁸ Or the value may be determined as of the alternate valuation date, six months after the date of death, if that value is lower.

⁹ For an asset that has decreased in value since the decedent purchased it, such as an automobile, or stocks or real estate after a decline in the market, the stepped-up basis can be lower than the original cost. As a consequence of the step-up in basis rule, the loss in value during the decedent’s period of ownership cannot be claimed as a capital loss when an inherited asset is sold.

¹⁰ For a discussion of this tradeoff, written prior to the enactment of EGTRRA, see CRS Report RL30875, *Step-Up vs. Carryover Basis for Capital Gains: Implications for Estate Tax Repeal*, by Nonna A. Noto, April 20, 2001.

¹¹ For property acquired from someone dying after December 31, 2009, the basis for the person acquiring the property is to be the lesser of (1) the adjusted basis of the decedent, or (2) the fair market value of the property at the date of the decedent’s death. Under both prior law and EGTRRA, property transferred by gift during the donor’s life has a carryover basis.

¹² This limit may be increased by the amount of unused built-in losses and loss carryovers that the decedent may have had.

¹³ The minimum increments are \$100,000 for the \$1.3 million amount, \$6,000 for the \$60,000 amount, and \$250,000 for the \$3 million amount.

These basis offsets apply to the *net* increase in value of the assets, not the *gross* value of the assets. Thus, the \$1.3 million step-up might cover all the gains in a gross estate valued at \$2 million or \$3 million or more. The spousal step-up of \$3 million alone could cover the gains in an estate with a gross value of \$4 million or \$5 million or more. The practical effect of these two exceptions to carryover basis is to maintain a step-up in basis for smaller estates.

Note that whatever basis-valuation rule is in effect for the year of death applies to all capital assets transferred after any person's death, whether or not their estate is large enough to be liable for the estate tax.

As mentioned above, the estate tax repeal, and all other provisions of EGTRRA, are scheduled to sunset at the end of 2010.¹⁴ If Congress does not change the law beforehand, on January 1, 2011, estate and gift tax law will return to what it would have been had EGTRRA never been enacted. The unified estate and gift tax will be reinstated with a combined exemption of \$1 million.¹⁵ The special deduction for qualified family-owned business interests (QFOBI) will be restored, with a value of \$1.3 million in combination with the applicable exclusion amount. The maximum tax rate will revert (from 45% in 2007 through 2009) to 55%, with a 5% surtax on taxable estate values over \$10.0 million and up to \$17.184 million. Step-up in basis will again be the rule.

Main Differences Among the Bills in the 110th Congress

A variety of bills to either repeal or modify the estate tax have been introduced in the 110th Congress. In addition, six amendments offered to the Senate budget resolution for FY2009 (S.Con.Res. 70) proposed to modify the estate tax. A brief summary of each of these bills and proposed amendments is presented in later sections of this report. This section discusses the bills and proposed amendments grouped according to their major distinguishing characteristics.

¹⁴ Title IX or Section 901 of EGTRRA states that the provisions of the act do not apply after December 31, 2010. The text of the sunset clause is as follows:

TITLE IX — COMPLIANCE WITH CONGRESSIONAL BUDGET ACT

Sec. 901. Sunset of Provisions of Act.

(a) IN GENERAL. — All provisions of, and amendments made by, this Act shall not apply —

(1) to taxable, plan, or limitation years beginning after December 31, 2010, or
(2) in the case of title V, to estates of decedents dying, gifts made, or generation skipping transfers, after December 31, 2010.

(b) APPLICATION OF CERTAIN LAWS. — The Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 shall be applied and administered to years, estates, gifts, and transfers described in subsection (a) as if the provisions and amendments described in subsection (a) had never been enacted.

¹⁵ The Taxpayer Relief Act of 1997 (P.L. 105-34) provided for an “applicable exclusion amount” or exemption of \$1 million for 2006 and beyond.

Bills to Permanently Repeal the Estate Tax

The bills to permanently repeal the estate tax differ in four main ways. One is whether or not they would preserve the other changes made by EGTRRA to the taxation of gifts and inherited assets. A second is whether the extension of estate tax repeal is part of a broader effort to extend the income tax cuts enacted by the Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16) and the Jobs and Growth Tax Relief and Reconciliation Act of 2003 (P.L. 108-27). A third is whether the repeal of the estate tax is part of a fundamental tax reform effort to replace the income tax and possibly the payroll tax with some form of consumption-based tax. A fourth is when permanent repeal would take effect.

Preserving Other Changes Made by EGTRRA: The Taxation of Gifts and the Use of Modified Carryover Basis for Inherited Assets. Some bills to permanently repeal the estate and generation-skipping transfer (GST) taxes take the approach of repealing the sunset provision of EGTRRA with respect to Title V. These bills would thereby also preserve the other changes to the taxation of gifts and bequests made by EGTRRA. Among these changes are the modified gift tax and the modified carryover basis (instead of a step-up in basis) for assets transferred at death. H.R. 411 (Mario Diaz-Balart) and H.R. 2380 (Hulshof) would remove the sunset provision of EGTRRA.

Other bills to permanently repeal the estate and GST taxes take the approach of repealing Subtitle B of the Internal Revenue Code of 1986 (Estate and Gift Taxes). These bills would allow EGTRRA to sunset. This would have the effect of repealing other changes made by EGTRRA to parts of the Internal Revenue Code other than Subtitle B, such as the modified carryover basis treatment of assets transferred at death. Repealing Subtitle B would repeal the gift tax, in addition to repealing the estate tax and the generation-skipping transfer tax. The step-up in basis treatment for assets acquired from a decedent would remain as provided in Subtitle A (Income Taxes) of the Internal Revenue Code. H.R. 25 (Linder), H.R. 1040 (Burgess), H.R. 1586 (Thornberry), H.R. 5105 (Dreier), H.R. 6110 (Ryan), S. 1025 (Chambliss), S. 1040 (Shelby), S. 1081 (Specter), and S. 2547 (Bond) would all repeal Subtitle B.

Still another approach to permanently repealing the estate tax is to amend the U.S. Constitution. H.J.Res. 23 (Paul) proposes an amendment that would prohibit Congress from levying taxes on personal incomes, estates, and gifts. This would repeal not only the estate and gift taxes, but also the individual income tax.

Modified Gift Tax. Under the provisions of EGTRRA a gift tax is retained even when the estate tax and generation-skipping transfer tax are repealed in 2010. The main reason given for maintaining the gift tax when the estate tax is repealed is to protect income tax revenues. The gift tax is intended to discourage people from giving income-generating or appreciated assets to someone in a lower income tax bracket and/or with offsetting losses, who face lower income taxes. In the case of appreciated property, the donee could sell the assets and pay a lower capital gains tax rate than the donor, and then gift or bequeath the sales proceeds back to the original donor.

If Subtitle B of the Internal Revenue Code (IRC) were repealed, the gift tax would be repealed along with the estate tax and GST tax. H.R. 25 (Linder), H.R. 1040 (Burgess), H.R. 1586 (Thornberry), H.R. 5105 (Dreier), S. 1025 (Chambliss), S. 1040 (Shelby), S. 1081 (Specter), and S. 2547 (Bond) would all repeal Subtitle B. The gift tax would also be repealed under the constitutional amendment proposed in H.J.Res. 23 (Paul).

If, instead, the sunset clause of EGTRRA were repealed, the gift tax — as modified by EGTRRA — would remain in effect after 2010. The cumulative lifetime exclusion amount for any one donor would be \$1 million.¹⁶ This amount is not indexed for inflation. The top gift tax rate is scheduled to fall from 45% to 35% in 2010.¹⁷ The modified gift tax would continue after 2010 under H.R. 411 (Mario Diaz-Balart) and H.R. 2380 (Hulshof).

If the provisions of EGTRRA are permitted to sunset and we return to prior law, the unified estate and gift tax exclusion would be \$1 million. The maximum estate and gift tax rate would return to 55% for taxable gifts and bequests combined (with a 5% surtax over the \$10.0 million to \$17.184 million range).

Modified Carryover Basis at Death for Capital Gains Purposes. If the sunset provision were repealed with respect to Title V of EGTRRA, then the modified carryover basis rules introduced by EGTRRA would continue in effect after 2010 when the estate tax is permanently repealed. H.R. 411 (Mario Diaz-Balart) and H.R. 2380 (Hulshof) would remove the sunset provision of EGTRRA.

If EGTRRA is permitted to sunset, then the tax law would revert to the step-up in basis rules found in Subtitle A, section 1012 of the Internal Revenue Code. The return to step-up in basis would also hold if the estate tax were permanently repealed by repealing Subtitle B of the Internal Revenue Code, with no accompanying changes in the basis rules. H.R. 25 (Linder), H.R. 1040 (Burgess), H.R. 1586 (Thornberry), H.R. 5105 (Dreier), S. 1025 (Chambliss), S. 1040 (Shelby), S. 1081 (Specter), and S. 2547 (Bond) would all repeal Subtitle B.

Part of Fundamental Tax Reform. Several of the bills to implement fundamental tax reform would repeal the estate and gift taxes. Proponents generally indicate that the intent of these proposals is to favor savings and investment relative

¹⁶ This lifetime exclusion is in addition to the annual exclusion available for gifts of up to \$12,000 in 2008 (indexed for inflation) per donor, per donee (IRC section 2503(b)). There is also an exclusion from the gift tax for qualified transfers of payments for tuition or medical expenses on behalf of another individual (section 2503(e)) or transfers to political organizations, as defined in section 527(e)(1), for use by those organizations (section 2501(a)(4)).

¹⁷ The 35% maximum rate on gifts is equal to the maximum tax rate on individual income scheduled by EGTRRA for tax year 2006 and subsequent years. For a fuller explanation of the gift tax provisions of EGTRRA, see CRS Report RL31061, *Estate and Gift Tax Law: Changes Under the Economic Growth and Tax Relief Reconciliation Act of 2001*, by Nonna A. Noto, January 29, 2002.

to consumption.¹⁸ Repealing estate and gift taxes is theoretically consistent with a consumption-based tax system. Under such a system, bequests and gifts would be taxed not when transferred or received, but only when the proceeds are spent by recipients.

Companion bills H.R. 25 (Linder) and S. 1025 (Chambliss) would repeal the estate and gift taxes, along with the income, self-employment, and payroll taxes. These taxes would be replaced with a national sales tax.

Five bills would restructure the income tax, in addition to repealing the estate, gift, and generation-skipping transfer taxes. These include H.R. 1040 (Burgess), H.R. 6110 (Ryan), S.1040 (Shelby), S. 1081 (Specter), and companion bills H.R. 5105 (Dreier) and S.2547 (Bond).

H.J.Res. 23 (Paul) proposes an amendment to the Constitution that would repeal the sixteenth amendment to the Constitution and thereby deny Congress the power to levy personal income taxes, along with estate and gift taxes.

Extending Other Tax Cuts Made in 2001 and 2003. Permanent repeal of the estate tax could be part of a broader bill to make other tax cuts permanent. The Bush Administration's budget for FY2009 once again proposes to make permanent the tax cuts enacted in 2001 (P.L. 107-16) and 2003 (P.L. 108-27). Repealing the estate tax was just one of those tax cuts.

In addition to permanently repealing the estate tax and generation-skipping transfer tax, H.R. 411 (Mario Diaz-Balart) would make permanent five individual income tax provisions which are currently scheduled to expire.¹⁹ Companion bills H.R. 5105 (Dreier)/S. 2547 (Bond) would make all of the provisions of the 2001 and 2003 tax acts permanent by repealing the sunset provisions of those acts.

When Permanent Repeal Would Take Effect. In the bills that remove the sunset provision with respect to Title V of EGTRRA, the repeal of the estate and generation-skipping transfer taxes would first take effect in 2010, as scheduled by EGTRRA. The bills would simply extend the repeal into the years 2011 and beyond. These bills include H.R. 411 (Mario Diaz-Balart) and H.R. 2380 (Hulshof).

The bills to repeal Subtitle B of the Internal Revenue Code (Estate and Gift Taxes) would typically take effect earlier. H.R. 1586 (Thornberry) would take effect upon enactment. H.R. 1040 (Burgess), S. 1040 (Shelby), and S. 1081 (Specter) would take effect in 2008. Companion bills H.R. 25 (Linder)/S. 1025 (Chambliss) and H.R. 5105 (Dreier)/S. 2547 (Bond), and H.R. 6110 (Ryan), all would take effect in 2009.

¹⁸ For more information on these proposals, see CRS Report RL34343, *Tax Reform: An Overview of Proposals in the 110th Congress*, and CRS Report 98-529, *Flat Tax: An Overview of the Hall-Rabushka Proposal*, both by James M. Bickley.

¹⁹ These are the deduction for state and local sales taxes; the modifications to the child credit; marriage penalty relief; the deduction for certain expenses of elementary and secondary school teachers; and the deduction for tuition and related expenses.

The abolition of personal income, estate, and gift taxes under H.J.Res. 23 (Paul) would not take effect until possibly 2018. The resolution allows seven years for ratification of the proposed constitutional amendment, plus three years for the ensuing changes in tax law to take effect.

Bills to Retain a Modified Version of the Tax

A number of bills, as well as six amendments proposed to the Senate budget resolution for FY2009, would retain the estate tax but would modify the tax in diverse ways. The following discussion highlights the major differences among these bills and proposed amendments in the design of a future estate tax. Fewer details are available about the amendments, compared to the bills.

Repeal of Elements of EGTRRA. Most of the bills to modify and retain the estate tax would repeal the provisions of EGTRRA that repeal the estate and generation-skipping transfer taxes in 2010 and that replace the step-up in basis with a carryover basis at that time. These include H.R. 3170 (Mitchell), H.R. 3475 (Capuano), H.R. 4235 (Lowey), H.R. 4172 (Moore), and S. 3049 (Alexander). Several of the bills would reunify the estate and gift taxes, thereby subjecting estates and lifetime gifts to the same unified tax credit (exemption) and the same tax rates; these bills would repeal the separate provisions of EGTRRA regarding the gift tax. These include H.R. 3170 (Mitchell), H.R. 3475 (Capuano), H.R. 4235 (Lowey) and S. 3049 (Alexander). But some of the bills would leave in place the separate gift tax created by EGTRRA and prevent the sunset provision from applying to it, such as H.R. 4172 (Moore).

In addition, under H.R. 3170 (Mitchell), the December 31, 2010, sunset date would continue to apply to the three subtitles of EGTRRA regarding conservation easements, modifications to the generation-skipping transfer tax, and the extension of time for payment of the estate tax. H.R. 3170 also would repeal EGTRRA's deduction for state death taxes.

Exclusion Amount. The bills differ on the level of the applicable exclusion amount per decedent, what year it would take effect, whether or not it would be indexed for inflation, and whether any unused exclusion could be carried over to the estate of the surviving spouse.

H.R. 4235 (Lowey) would raise the estate tax exclusion to \$3 million upon enactment. After 2007, the \$3 million amount would be indexed for inflation.

H.R. 4042 (McNerney) expects that the estate tax will be repealed in 2010. In the meantime, it would accelerate the phase-out of the estate tax by raising the exclusion to \$3.5 million in 2008 instead of 2009 as currently scheduled. The \$3.5 million figure would be indexed for inflation in 2009. The repeal of the GST tax would be accelerated to 2008.

H.R. 4242 (Pomeroy) would raise the estate tax exclusion to \$3 million for 2007 and 2008, and set it at \$3.5 million for 2009 and beyond. The exclusion amount is not indexed for inflation.

H.R. 4172 (Moore) would increase the estate tax exclusion to \$3.5 million, effective in 2008, and index it for inflation each year thereafter.

S. 3049 (Alexander) would set the exclusion at \$3.5 million, indexed for inflation after 2009.

H.R. 3475 (Capuano) would increase the unified estate and gift tax credit to an exclusion-equivalent of \$5 million per decedent effective in 2010, and index it for inflation each year thereafter.

H.R. 3170 (Mitchell) would raise the unified estate and gift tax exclusion amount in annual increments of \$250,000, over six years. The exclusion would be \$3.75 million for people dying in 2010 and would reach \$5 million for 2015. The \$5 million amount would be indexed for inflation each year after 2015. H.R. 3170 is the only bill to provide that the “deceased spouse unused exclusion amount” could be carried over to the estate of the surviving spouse.

Among the six estate tax amendments offered to S.Con.Res. 70, only the Baucus amendment (S.Amdt. 4160), the one that was adopted, endorsed an exemption of \$3.5 million per decedent. The other five proposed amendments all endorsed an exemption of \$5 million per decedent.

Tax Rates. S. 3049 (Alexander) would levy a single rate of 15% on gifts and estates.

Under H.R. 3170 (Mitchell) the rate of tax on the first \$25 million of taxable estate would be equal to the maximum capital gains tax rate in effect on the decedent’s date of death. The amount in excess of \$25 million would be taxed at twice that rate. The \$25 million figure separating the two tax brackets would be indexed for inflation. Gifts would be subject to the same tax rates.

H.R. 4235 (Lowey) would reduce each of the marginal estate tax rates by 20% (by one-fifth, not 20 percentage points).

H.R. 4242 (Pomeroy) would “freeze” the maximum estate tax rate at its 2005 level of 47% for taxable amounts over \$2 million. The bill would restore the 5% surtax on taxable amounts over \$10 million, up to the estate value sufficient to phase out the savings from the unified credit (exclusion amount) as well as the graduated tax rates.

H.R. 4042 (McNerney) would establish 45% as the maximum tax rate for 2008 and 2009 and would remove the references to the 49% and 50% marginal rates in the Internal Revenue Code.

H.R. 3475 (Capuano) and H.R. 4172 (Moore) would not adjust the tax rates set by EGTRRA.

The adopted Baucus amendment (S.Amdt. 4160) to S.Con.Res. 70 endorsed a top tax rate of 45%. The other five proposed estate tax amendments endorsed a top tax rate of 35%.

Special Treatment for Family-owned Businesses and Farms. Two bills target benefits to family-owned farms and ranches. Both H.R. 1929 (Salazar) and S. 1994 (Salazar) would exclude from the gross estate the adjusted value of qualified farmland that continues in farmland use by a qualified heir, subject to requirements that gross income from farming contributed over half of the decedent's gross income in his last taxable years and/or, in the case of S. 1994, that the qualified farmland accounted for over half the value of the gross estate.

Effective in 2008, H.R. 4042 (McNerney) would reinstate the qualified family-owned business deduction (QFOBI, section 2057) that was eliminated by EGTRRA. It would increase the amount of the QFOBI deduction from \$675,000 to \$8 million. The \$8 million figure would be indexed for inflation in 2009, before the estate tax is repealed in 2010. H.R. 4042 would introduce a new deduction of up to \$2 million from the value of the gross estate for the adjusted value of the decedent's principal residence, under certain restrictions. The \$2 million figure would be indexed for inflation in 2009.

H.R. 4242 (Pomeroy) would not permit a minority discount in the valuation of a business entity because the transferee does not have control of the entity if the transferee and members of his or her family have control of the entity.

Treasury Department and JCT Estimates of Revenue Loss from Permanent Repeal

Among the revenue proposals in its FY2009 budget, the Bush Administration has once again proposed to make permanent most of the tax relief provisions enacted in 2001 and 2003. This includes making the repeal of the estate tax permanent beyond calendar year 2010. The Administration's proposal to remove the sunset provision of EGTRRA would make permanent both the repeal of the estate tax and the generation-skipping transfer tax, as well as the modifications to the gift tax currently scheduled to be in effect for 2010 only.

Table 2 presents estimates of the changes in federal receipts expected each year, through FY2018, if legislation to repeal the sunset provision of EGTRRA with respect to the estate and gift taxes were enacted in 2008, to take effect in 2010. These estimates were issued by the U.S. Treasury Department in February 2008 and by the Joint Committee on Taxation (JCT) in March 2008. The Treasury's estimates of revenue loss begin in FY2008. The JCT's estimates begin in FY2009. These estimates do not include the reduction in revenue expected as a result of impending changes made by EGTRRA, namely the increase in the estate tax exemption to \$3.5 million for 2009.

According to Treasury Department analysts, the estimated revenue losses for FY2008 through FY2010, which are modest in size, stem primarily from a projected decline in gift tax revenues. They are based on the assumption that taxpayers would immediately begin to reduce taxable gifts during their lifetimes if they knew that the estate tax would be permanently repealed in 2010.

Table 2. Treasury Department and JCT Estimates of Revenue Losses from Permanent Repeal of the Estate Tax

Fiscal Year	Treasury Department	Joint Committee on Taxation
	(millions of dollars)	
2008	-422	—
2009	-2,502	-1,401
2010	-3,453	-2,288
2011	-26,409	-30,521
2012	-57,639	-69,388
2013	-59,670	-76,957
2014	-64,670	-84,174
2015	-69,371	-90,728
2016	-74,379	-97,431
2017	-79,285	-104,890
2018	-84,604	-112,038
2009-2013	-149,673	-180,555
2014-2018	-372,309	-489,261
2009-2018	-521,982	-669,816

Sources: U.S. Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2009 Revenue Proposals* (referred to as the Bluebook), Washington, Feb. 2008, p. 129. U.S. Congress, Joint Committee on Taxation, *Description of Revenue Provisions Contained in the President's Fiscal Year 2009 Budget Proposal*, 110th Cong., 2nd sess., JCS-1-08 (Washington: GPO, Mar. 2008), p. 311. The second five-year subtotal for FY2014-FY2018 was added by CRS.

Notes: These estimates are based on the assumption that Congress acts in 2008 to permanently repeal the estate tax and generation-skipping transfer tax effective in 2010. The estimates include the projected accompanying loss of individual income tax revenue, in addition to estate and gift tax revenue, as explained in the text.

According to Treasury Department analysts, Treasury's estimates of revenue loss are lower than JCT's (for FY2011 and beyond) primarily because Treasury starts from a lower baseline (the projection of what revenues from the estate tax would otherwise be) than the Congressional Budget Office baseline used by JCT.

In addition, it is expected that enactment in 2008 of permanent repeal of the estate tax (effective in 2010) would modestly affect revenues from the individual income tax, in two opposing ways, starting right away. First, lifetime charitable donations and accompanying tax deductions would fall, thereby increasing income tax revenue. Second, and larger in effect, capital gains realizations by the elderly would fall as they waited to pass on their assets tax-free after death, thereby decreasing current income tax revenue. For FY2009 and FY2010 Treasury projected that net reductions in income taxes would add to the decrease in revenue from gift taxes. For FY2011 and beyond, the loss in income taxes would add to the decrease in revenue from estate taxes as well as gift taxes.

For the fiscal years when the effects of estate tax repeal would be fully reflected,²⁰ the Treasury Department projected that the annual revenue loss would rise by about \$5 billion per year, from \$58 billion in FY2012 up to \$85 billion in FY2018. The JCT estimates annual revenue losses rising by about \$7 billion per year, from \$69 billion in FY2012 to \$112 billion in FY2018.

According to the Treasury Department's estimates, repeal of the estate tax accounts for nearly one-quarter (23.9%) of the revenue losses associated with making permanent the group of tax cuts enacted in 2001 and 2003, measured over the 10-year forecast period, FY2009-FY2018 (\$522 billion out of \$2,185 billion). The projected revenue loss from permanent repeal of the estate tax is just over half the size of the most costly component of the package, extending the reductions in marginal individual income tax rates (\$522 billion compared to \$1,008 billion, or 52%).²¹

According to the Joint Committee on Taxation, the estate tax accounts for just over one-quarter (27.8%) of the projected revenue cost of making the set of 2001 and 2003 tax cuts permanent (\$670 billion out of \$2,414 billion for the 10-year period, FY2009-FY2018). JCT estimates that permanent estate tax repeal would cost nearly two-thirds as much as making the individual income tax rate cuts permanent (\$670 billion compared to \$1,401 billion, or 64%).²²

²⁰ The estimators expect that FY2012 would be the first full fiscal year in which revenues are likely to reflect the repeal of the estate tax beginning in calendar 2010. The estate tax return is not due until nine months after the date of death. A filing extension of six months is not uncommon, and longer extensions may be granted for complex returns. The fiscal year runs from October 1 of the previous calendar year until September 30 of the same-numbered calendar year.

²¹ U.S. Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2009 Revenue Proposals* (referred to as the Bluebook), Washington, February 2008, p. 129. Percentage calculations by CRS.

²² U.S. Congress, Joint Committee on Taxation, *Description of Revenue Provisions Contained in the President's Fiscal Year 2009 Budget Proposal*, 110th Cong., 2nd sess., JCS-1-08 (Washington: GPO, Mar. 2008), p. 311. Percentage calculations by CRS.

The large contribution of estate and gift taxes to the projected loss of revenues may seem surprising given that estate and gift taxes account for under 2% of federal revenue.²³

Measures Approved by the 110th Congress

Heroes Earnings Assistance and Relief Tax (HEART) Act

P.L. 110-245 (H.R. 6081, Rangel). Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008. Introduced May 16, 2008; referred to the Ways and Means Committee. Passed the House as amended, under a suspension of the rules, by a unanimous vote of 403-0 on May 20, 2008. Approved by the Senate (without amendment) by unanimous consent on May 22, 2008. Enacted June 17, 2008.

Most of H.R. 6081 provides tax benefits to members of the military, their families, and veterans. One section, however, levies a new form of estate and gift tax on gifts and bequests received from expatriates.²⁴ It imposes a tax on any U.S. citizen or resident who receives a covered gift or bequest from an expatriate. The tax is levied at the highest estate tax rate in effect on the date of receipt (or, if greater, the highest gift tax rate in effect on that date). The tax is based on the value of the covered gift or bequest. The tax is to be paid by the recipient of the gift or bequest. The annual gift tax exclusion per donee (\$12,000 in 2008, indexed for inflation) would apply, as would the deductions permitted for gifts or bequests to spouses or charities. The tax does not apply to transfers that were otherwise subject to the U.S. estate or gift tax. The tax due may be reduced by the amount of any gift or estate tax paid to a foreign government with respect to the gift or bequest.

This new tax differs from the regular gift and estate taxes in taxing the recipient of the gift or bequest, instead of the giver or the giver's estate. It thus resembles an inheritance tax. This approach was needed because the United States cannot directly tax an expatriate giver of a gift or the estate of an expatriate.

Concurrent Budget Resolution for Fiscal Year 2009

Conference Report on S.Con.Res. 70, the Concurrent Resolution on the Budget for Fiscal Year 2009. The Senate approved the conference report on the concurrent budget resolution for FY2009²⁵ by a vote of 48-45 on June 4, 2008. The House approved the conference report by a vote of 214-210 on June 5. A

²³ For additional information, see CRS Report RL34418, *Estate and Gift Tax Revenues: Past and Projected in 2008*, by Nonna A. Noto.

²⁴ Section 301(b) adds a new chapter, 15, to Subtitle B of the Internal Revenue Code. See H.R. 6081, Title III, Revenue Provisions, Sec. 301, Revision of Tax Rules on Expatriation, section (b).

²⁵ U.S. Congress, House, *Concurrent Resolution on the Budget for Fiscal Year 2009*, conference report to accompany S.Con.Res. 70, 110th Cong., 2nd sess., H.Rept. 110-659, May 20, 2008.

concurrent resolution does not have the force of law and does not need to be approved or signed by the President.

The budget resolution itself cannot change the tax law. It can only provide financial “room” within the overall budget to fund proposed changes in the tax law. Separate legislation would be required to amend the tax code.²⁶ The budget resolution has been described as “a largely nonbinding blueprint for tax and spending priorities.”²⁷

In the debate on the Senate floor about proposed estate tax amendments to the budget resolution, in the context of pay-as-you-go (PAYGO) budgeting rules, there was a difference of opinion about whether extending the 2009 estate tax law (with an exemption of \$3.5 million per decedent and a top tax rate of 45%) would need to be “offset” or “paid for” by increases in other taxes or cuts in expenditures. Both chambers decided yes. The House-passed budget resolution provided for the creation of a “deficit-neutral reserve fund for middle-income tax relief and economic equity.” The approved Baucus amendment to the Senate budget resolution (S.Amdt. 4160 to S.Con.Res. 70) used the projected surpluses for FY2012 and FY2013 to extend the Bush tax cuts for the middle class, including making 2009 estate tax law permanent. Both the House and Senate language included in the conference report on the budget resolution provided room in the budget for reducing the burden of, and anticipated revenue from, the estate tax.²⁸

²⁶ The need for subsequent legislation to accomplish any tax change is explained in remarks by Senator Hatch regarding the Baucus amendment (S.Amdt. 4160), *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1866. Also explained in remarks by Senator Kyl when introducing his amendment (S.Amdt. 4191), *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, pp. S1923-S1924.

²⁷ Brett Ferguson and Heather Rothman, “Senators Seek to Amend Budget Proposal With Credit Extensions, Higher Top Tax Rates,” *Daily Tax Report*, no. 47, Mar. 11, 2008, p. G-6.

²⁸ The following excerpts from the conference report on S.Con.Res. 70 contain the language that makes room in the budget for estate tax reform. The conference report includes parallel subtitles, drawn from the separate budget resolutions previously approved by the House and the Senate, that establish reserve funds for a wide variety of purposes.

Title II. Reserve Funds

Subtitle A — House Reserve Funds

...

Sec. 206. Deficit-Neutral Reserve Fund for Middle-Income Tax Relief and Economic Equity.

In the House, the Chairman of the Committee on the Budget may revise the allocations, aggregates, and other appropriate levels in this resolution for any bill, joint resolution, amendment, or conference report that provides for tax relief for middle-income families and taxpayers or enhanced economic equity, such as extension of the child tax credit, extension of marriage penalty relief, extension of the 10 percent individual income tax bracket, *elimination of estate taxes on all but a minute fraction of estates by reforming and substantially increasing the unified credit*, extension of the research and experimentation tax credit, extension of the deduction for small business expensing, extension of the deduction for State and

(continued...)

H.Con.Res. 312. The House’s concurrent resolution on the budget for FY2009 provided enough room in the budget for the estate tax to be repealed “on all but a minute fraction of estates.” It was approved 212-207 on March 13, 2008.²⁹

Unlike in the Senate, there was no discussion on the House floor about the specific form that a modified estate tax might take. But, unlike the Senate budget resolution, H.Con.Res. 312 did contain explicit language making room in the budget for estate tax reform. Section 306, which created a “deficit-neutral reserve fund for middle-income tax relief and economic equity,” lists among its numerous examples of tax relief “...elimination of estate taxes on all but a minute fraction of estates by reforming and substantially increasing the unified credit...”

S.Con.Res. 70. The Senate’s concurrent resolution on the budget for FY2009. S.Con.Res.70 was adopted by a vote of 51-44, in the early hours of March 14, 2008

²⁸ (...continued)

local sales taxes, or a tax credit for school construction bonds, by the amounts provided in such measure if such measure would not increase the deficit or decrease the surplus for the period of fiscal years 2008 through 2013 or for the period of fiscal years 2008 through 2018. [Emphasis added.]

Subtitle B — Senate Reserve Funds

...

Sec. 221. Deficit-Neutral Reserve Fund to Strengthen and Stimulate the American Economy and Provide Economic Relief to American Families

(a) Tax Relief. — The Chairman of the Senate Committee on the Budget may revise the aggregates, allocations, and other appropriate levels in this resolution for one or more bills, joint resolutions, amendments, motions, or conference reports that would provide tax relief, including extensions of expiring and expired tax relief and refundable tax relief, by the amounts provided in that legislation for those purposes, provided that such legislation would not increase the deficit over either the period of the total of fiscal years 2008 through 2013 or the period or the total of fiscal years 2008 through 2018.

The language expressed above in the creation of the House reserve fund is repeated below in Sec. 401(3)(D) of Title IV, on House policy:

Title IV — Policy...

Sec. 401. Policy of the House on Middle-Income Tax Relief

It is the policy of the House to —

(3) support extension of middle-income tax relief and enhanced economic equity through policies such as —

(D) *elimination of estate taxes on all but a minute fraction of estates by reforming and substantially increasing the unified tax credit; ...*[Emphasis added.]

²⁹ Rollcall vote no. 141, *Congressional Record*, daily edition, vol. 154, no. 43, March 13, 2008, pp. H1683-H1684. Text of Section 501(D) which restates the policy, first expressed in Sec. 306, of “elimination of estate taxes on all but a minute fraction of estates by reforming and substantially increasing the unified tax credit;” also, at the end of Sec. 501, the paragraph stating the assumption that the cost of the middle-income tax relief proposals will be offset by other reforms of the tax system; both on p. H1632.

(legislative day March 13).³⁰ More than 100 amendments were considered. The Senate took more than 40 votes over a 15-hour period. Of the six amendments that addressed the estate tax, only S.Amdt. 4160, introduced by Senate Finance Committee Chairman Max Baucus, was adopted.³¹ The Senate-passed budget resolution did not explicitly mention the estate tax. But Section 301 created a “deficit-neutral reserve fund to strengthen and stimulate the American economy and provide economic relief to American families.” Estate tax reform fell under this category.

Amendments Offered to S.Con.Res. 70, the Senate FY2009 Budget Resolution, That Addressed the Estate Tax. Only one amendment offered to the Senate budget resolution explicitly mentioned the estate tax, S.Amdt. 4196 (Conrad for Salazar). Even that reference was only general in nature. The text of the other five amendments that reportedly addressed the estate tax did not mention the estate tax. These included S.Amdt. 4160 (Baucus), which was adopted, as well as S.Amdt. 4170 (Graham), S.Amdt. 4191 and S.Amdt. 4372 (Kyl), and S.Amdt. 4378 (Landrieu).³²

With the exception of the adopted Baucus amendment (S.Amdt. 4160), the statement of purpose that preceded the text of each amendment did mention reform of the estate tax, in varying amounts of detail. Remarks by the sponsor when the amendment was introduced on the Senate floor mention only the key changes in the estate tax that the Senator had in mind. This includes, at most, the size of the exemption per decedent, whether the exemption amount is indexed for inflation, the maximum tax rate, and whether bequeathed assets would receive a step-up in basis. Although the statement of purpose for each amendment expressed the particular intention of protecting family farms, ranches, and/or small businesses from the estate tax, none of the proposals targeted tax benefits on these types of assets. Both the sponsor’s introductory remarks and the stated purpose of each of these six amendments were published in the *Congressional Record*.

The Baucus amendment, which was adopted, endorsed an extension of 2009 estate tax law, with an exemption of \$3.5 million per decedent and a top tax rate of 45%. All of the other proposed amendments endorsed an exemption of \$5 million and a top tax rate of 35%.

³⁰ *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), p. D289.

³¹ For a summary of the Senate votes on amendments to the budget resolution, particularly those related to the estate tax, see the *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), pp. D289, D293, D294.

³² These five amendments made changes to the dollar amounts of the following nine items in the Senate budget resolution as introduced: recommended levels of federal revenues, amounts by which the aggregate levels of federal revenues should be changed, total new budget authority, total budget outlays, the deficit, the public debt, debt held by the public, and new budget authority and outlays for net interest payments. Some started their changes in FY2008 (Graham as modified), others in FY2009 (Baucus, Graham as introduced), and still others in FY2010 (Kyl, Landrieu). All made changes through FY2013.

S.Amdt. 4160 (Baucus). Adopted 99-1 on March 13, 2008.^{33, 34} S.Amdt. 4160 used most of the projected budget surpluses for FY2012 and FY2013 to provide \$323 million over five years in tax breaks to extend the Bush tax cuts for the middle class.³⁵ It allowed for making permanent the estate tax rules scheduled to take effect in 2009 — with an exemption of \$3.5 million per decedent and a maximum tax rate of 45%. It also allowed for extending other tax breaks for the middle class. The purpose of the Baucus amendment was stated as follows: “To provide tax relief to middle-class families and small businesses, property tax relief to homeowners, relief to those whose homes were damaged or destroyed by Hurricanes Katrina and Rita, and tax relief to America’s troops and veterans.”³⁶

Neither the text nor the statement of purpose of the Baucus amendment mentioned the estate tax. The text contained only a detailed enumeration of the decrease or increase it would make in certain aggregate dollar amounts contained in the Senate budget resolution, as introduced, for each of the next five fiscal years, 2009 through 2013.³⁷ The implication of the Baucus amendment for the estate tax can only be gleaned from remarks offered by Senator Baucus and Senator Conrad on the Senate floor when the amendment was introduced and debated.³⁸

S.Amdt. 4170 (Graham). In addition to the extensions of middle class tax cuts included in the Baucus amendment (S.Amdt. 4160), the Graham amendment also would have extended other expiring provisions, including the lower tax rates for dividends and capital gains and the lower current income tax rate structure. The Graham amendment was not paid for. That is, it included no offsets — no spending reductions and no additional revenues.³⁹ The original Graham amendment was

³³ Rollcall vote no. 42, *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, pp. S2040-S2041; vote summary, p. D289.

³⁴ Senator Baucus introduced a similar amendment to the FY2008 budget resolution in March 2007, which was also adopted overwhelmingly. Jonathan Nicholson, “GOP Focusing on Pay-Go, Tax Gap Revenues in Budget Blueprint Battle,” *Daily Tax Report*, no. 45, Mar. 7, 2008, p. G-6. Jonathan Nicholson and Kurt Ritterpusch, “Senate Votes to Preserve Some Tax Cuts As House Budget Committee Starts Markup,” *Daily Tax Report*, no. 55, Mar. 22, 2007, p. G-14.

³⁵ Remarks by Senator Hatch, *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1866.

³⁶ *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1839.

³⁷ For the text of S.Amdt. 4160, see *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, pp. S1839-S1840; also on pp. S1884-S1885.

³⁸ *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, remarks by Senator Baucus, pp. S1832; remarks by Senators Baucus and Conrad, p. S1840. Also, remarks by Senator Baucus immediately preceding the vote on S.Amdt. 4160, *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, pp. S2040, and vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), p. S2093.

³⁹ Remarks by Senator Conrad, *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, p. S2041.

introduced on March 11, 2008.⁴⁰ A slightly modified amendment was introduced and rejected 47-52, on March 13, 2008.⁴¹

Like the Baucus amendment, the text of the Graham amendment did not specifically mention estate taxes. The modified Graham amendment would have changed the same aggregate budget items in the original Senate concurrent resolution as the Baucus amendment (S.Amdt. 4160), but by different dollar amounts, and starting in FY2008 instead of FY2009.⁴²

The purpose of S.Amdt. 4170 was stated as follows:

To protect families, family farms and small businesses by extending the income tax rate structure, *raising the death tax exemption to \$5 million and reducing the maximum death tax rate to no more than 35 percent* (emphasis added);⁴³ to keep education affordable by extending the college tuition deduction; and to protect senior citizens from higher taxes on their retirement income, maintain U.S.

⁴⁰ The text of S.Amdt. 4170, as introduced, is in the *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1855, and again on p. S1886; Senator Graham's explanation is on pp. S1855-S1857.

⁴¹ Rollcall vote no. 43, *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, text of modified amendment and record of vote, pp. S2041-S2042; vote summary, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), pp. D293-D294.

⁴² The original Graham amendment proposed additional reductions in revenues, relative to the original Senate budget resolution, for FY2009 through FY2013. To these changes, the modified Graham amendment also proposed an additional decrease in revenues of \$245 million for FY2008. The proposed decreases in revenue were accompanied by corresponding increases in new budget authority and outlays for interest payments, and an increase in the deficit, the public debt, and debt held by the public.

⁴³ The *Congressional Record* contains conflicting descriptions of the estate tax proposal. When explaining current law, Senator Graham referred to the "exemption per couple," when the dollar amounts he cited are the current exemption per person (per decedent). When explaining his own proposal, he again referred to the exemption being "\$5 million per couple," when he probably meant \$5 million per decedent. *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1856.

When he introduced his original amendment on March 11, Senator Graham said that he was proposing "...a top rate of 35 percent for the death tax." *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1856. Thirty-five percent is equal to the top marginal income tax rate under current law, in effect through 2010. Senator Graham's proposal also provided for extending the lower income tax rates.

In contrast, when he introduced his modified amendment on March 13, Senator Graham said that the provisions for estate tax relief "...will keep the rate at 45 percent versus 50 percent." *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, p. S2041. The top marginal estate tax rate is scheduled to revert to 55% (not 50%) in 2011 if current law sunsets, as scheduled, at the end of 2010.

financial market competitiveness, and promote economic growth by extending the lower tax rates on dividends and capital gains.⁴⁴

S.Amdt. 4191 (Kyl). The Kyl amendment would have raised the estate tax exemption to \$5 million per decedent and lowered the top tax rate to 35%, without any funding offset.⁴⁵ Rejected 50-50, on March 13, 2008.⁴⁶

Like the Baucus and Graham amendments, the text of the Kyl amendment did not specifically mention estate taxes. The Kyl amendment would have changed the same aggregate budget items in the original Senate concurrent resolution as did the Baucus and Graham amendments, but by different dollar amounts, and starting in 2010 (not 2008 or 2009) through 2013.

The purpose of S.Amdt. 4191 was stated as follows: “To protect small businesses, family ranches and farms from the Death Tax by providing a \$5 million exemption, a low rate for smaller estates and a maximum rate no higher than 35%.”⁴⁷ According to Senator Kyl’s comments that accompanied the introduction of the amendment, the exemption of \$5 million per decedent would be indexed for inflation. There could be one or possibly two marginal tax rates, but the top rate could not be more than 35%. There would be a step-up in basis for property transferred at death. The Center on Budget and Policy Priorities reported that the Joint Committee on Taxation estimated that the Kyl proposal would cost at least 77% as much as full repeal of the estate tax.⁴⁸

S.Amdt. 4196 (Conrad for Salazar). The intent of the Salazar amendment regarding the estate tax was the same as the Kyl amendment (S.Amdt. 4191), except that its cost would have been offset, albeit in a generalized way. The Salazar amendment would have allowed up to \$45 billion for estate tax relief over six years, provided that it would not increase the deficit over the next six years or 11 years (starting in FY2008). Senator Salazar emphasized that his amendment would not lock in the structure of the estate tax reform.⁴⁹ He nonetheless outlined an exemption

⁴⁴ *Congressional Record*, daily edition, vol. 154, no. 41, Mar. 11, 2008, p. S1855.

⁴⁵ See remarks by Senator Kyl and Senator Salazar debating whether a cut in estate taxes needs to be paid for. *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, pp. S1944-S1945; also, remarks by Senator Conrad, p. S1925.

⁴⁶ Rollcall vote no. 50, *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, pp. S2044-S2045; vote summary and purpose, p. D294.

⁴⁷ Purpose and text of amendment and Senator Kyl’s introductory remarks, *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, pp. S1922-S1926; text of amendment also on pp. S2012-S2013.

⁴⁸ Aviva Aron-Dine, “Kyl Estate Tax Amendment Would Cost Nearly As Much As Estate Tax Repeal,” Center on Budget and Policy Priorities, Washington, Mar. 12, 2008. Available at [<http://www.cbpp.org>].

⁴⁹ *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1943.

of \$5 million per decedent, indexed for inflation, a 35% tax rate,⁵⁰ and a stepped-up basis.⁵¹ The modified Salazar amendment was rejected 38-62, on March 13, 2008.⁵²

The purpose of S.Amdt. 4196 was stated as follows: “To reform the estate tax to avoid subjecting thousands of families, family businesses, and family farms and ranches to the estate tax.”⁵³ The amendment, as introduced,⁵⁴ was modified slightly to express a particular concern for family ranchers, farmers, and business owners.⁵⁵

Unlike the other five amendments described, the Salazar amendment did not enumerate specific dollar changes in certain lines of S.Con.Res. 70. While the text of the amendment did explicitly mention the estate tax, it did not specify the parameters of the intended estate tax reform.⁵⁶ That explanation was provided in Senator Salazar’s remarks, made after Senator Conrad had introduced the amendment on his behalf.⁵⁷

S.Amdt. 4372 (Kyl). S.Amdt. 4372 was identical to the other Kyl amendment, S.Amdt. 4191, described above. The purpose of the Kyl amendment was, once again, stated as follows: “To protect small businesses, family ranches and farms from the Death Tax by providing a \$5 million exemption, a low rate for smaller estates and a maximum rate no higher than 35%.”⁵⁸ S.Amdt. 4372 was rejected 48-50, the night of March 13, 2008.⁵⁹

S.Amdt. 4378 (Landrieu). The Landrieu amendment would have allowed an estate tax exemption of \$5 million per decedent and a top tax rate of 35%. It would have required that the revenues lost from the estate tax be offset by an

⁵⁰ *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1926.

⁵¹ *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1945.

⁵² Rollcall vote 49, *Congressional Record*, daily edition, vol. 154, no. 43, part I, Mar. 13, 2008, p. S2044; vote summary and purpose, Mar. 13, 2008, part I or II, p. D294.

⁵³ *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1926.

⁵⁴ S.Amdt. 4196 as introduced, *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, pp. S1926-S1929. The amendment was initially introduced by Senator Conrad on behalf of Senator Baucus, p. S1926. Senator Conrad later restyled the amendment as being introduced on behalf of Senator Salazar, p. S1929.

⁵⁵ S.Amdt. 4196 as modified, *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1940.

⁵⁶ Text of the modified Salazar amendment, *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1940.

⁵⁷ *Congressional Record*, daily edition, vol. 154, no. 42, Mar. 12, 2008, p. S1943-S1946.

⁵⁸ Purpose and text of S.Amdt. 4372, *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), p. S2076.

⁵⁹ Rollcall vote no. 77, *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), pp. S2076-S2077; vote summary and purpose, p. D294.

assumed elimination of certain corporate tax provisions. Rejected 23-77, March 13, 2008.⁶⁰

Like the other amendments, the text of the Landrieu amendment did not specifically mention estate taxes. It would have changed the same aggregate budget items in the original Senate concurrent resolution as the other amendments, but by different dollar amounts. As in the two Kyl amendments, the changes were for FY2010 (not 2008 or 2009) through FY2013.

The purpose of S.Amdt. 4378 was stated as follows:

To protect family businesses and farmers without increasing our nation's debt by providing for an estate tax that sets the exemption at \$5 million and the rate at 35 percent, with the benefits of the exemption recaptured for estates over \$100 million, paid for by closing tax loopholes that allow offshore deferral on compensation and transactions entered into solely for the purpose of avoiding taxation.^{61, 62}

Other Bills Introduced in the 110th Congress

Following is a list and brief description of the bills introduced thus far in the 110th Congress regarding the estate tax. For each chamber, the bills are divided into two groups: first, the bills that would permanently repeal the estate tax, and second, the bills that would retain but modify the estate tax. To date, the bills introduced in the House are nearly evenly divided between eight that would permanently repeal the estate tax and seven that would retain but modify it. In the Senate, four bills would permanently repeal the estate tax. One bill would retain the tax, but with a single 15% rate, and another would modify the existing tax by adding special provisions for farms and ranches. The appendix contains a summary of legislative activity on the estate tax in prior Congresses, from 2000 through 2006.

House Bills to Repeal the Estate Tax

H.R. 25 (Linder). Fair Tax Act of 2007. Introduced January 4, 2007; referred to the Committee on Ways and Means. Companion to S. 1025 (Chambliss). H.R. 25 would permanently repeal the estate, gift, and generation-skipping transfer taxes by repealing Subtitle B of the Internal Revenue Code. H.R. 25 would also repeal the income, self-employment, and payroll taxes. It would replace these taxes with a

⁶⁰ Rollcall vote no. 76, *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), p. S2076; vote summary and purpose, p. D294.

⁶¹ Purpose and text of S.Amdt. 4378, *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), p. S2075.

⁶² In her remarks accompanying the introduction of the amendment, Senator Landrieu twice said that the unified (tax) credit would be increased to \$10 million. This is a misstatement. *Congressional Record*, daily edition, vol. 154, no. 43, part II, Mar. 13, 2008 (cont.), p. S2075.

national sales tax, with the tax rate set initially at 23% for 2009. These provisions would take effect January 1, 2009.

H.R. 411 (Mario Diaz-Balart). Introduced January 11, 2007; referred to the Committee on Ways and Means. H.R. 411 would make permanent six tax provisions which are scheduled to expire. It would repeal the estate tax by preventing the sunset provision (Section 901) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA, P.L. 107-16) from applying to Title V of the Act, which relates to estate, gift, and generation-skipping transfer taxes. This would permanently repeal the estate and generation-skipping taxes starting in 2010. It would leave in place the modified gift tax and modified carryover basis introduced by EGTRRA. H.R. 411 would also make permanent five provisions under the individual income tax. The provisions of H.R. 411 would take effect January 1, 2007.

H.R. 1040 (Burgess). Freedom Flat Tax Act. Introduced February 14, 2007; referred to the Ways and Means Committee and the Rules Committee. H.R. 1040 would permanently repeal the estate, gift, and generation-skipping transfer taxes by repealing Subtitle B of the Internal Revenue Code, effective January 1, 2008. H.R. 1040 would also introduce the option of a flat-rate income tax for individuals.

In addition, H.R. 1040 would offer individuals and persons engaged in business activities the chance to make an irrevocable election to be subject to a flat tax instead of the regular income tax and alternative minimum tax. The flat tax would be levied at a rate of 19% for the first two years after its election by the taxpayer, and at 17% for subsequent years. The income tax provisions would take effect January 1, 2008.

H.R. 1586 (Thornberry). Death Tax Repeal Act of 2007. Introduced March 20, 2007; referred to the Ways and Means Committee. H.R. 1586 would permanently repeal the estate, gift, and generation-skipping transfer taxes by repealing Subtitle B of the Internal Revenue Code of 1986, effective upon enactment.

H.R. 2380 (Hulshof). Death Tax Repeal Permanency Act of 2007. Introduced May 17, 2007; referred to the Ways and Means Committee. H.R. 2380 would permanently repeal the estate and generation-skipping transfer taxes as of 2010 by removing the sunset provision of EGTRRA with respect to the estate tax provisions. The changes made by EGTRRA to the gift tax and the substitution of a modified carryover basis for the step up in basis for assets transferred at death would remain in place. On October 10, 2007, Representative Hulshof introduced language identical to H.R. 2380 as part of a motion to recommit H.R. 3056, the Tax Collection Responsibility Act of 2007. The House voted 196-212 to defeat the motion. H.R. 3056 was passed by the House later on October 10.

H.R. 5105 (Drier). The Fair and Simple Tax (FAST) Act of 2008. Introduced January 23, 2008; referred to the Committee on Ways and Means. Companion to S. 2547 (Bond). H.R. 5105 would repeal the estate and gift taxes by repealing Subtitle B of the Internal Revenue Code, effective in 2009. H.R. 5105 would also make changes to the income tax.

H.R. 6110 (Ryan). Roadmap for America's Future Act of 2008. Introduced May 21, 2008; referred to the House Committees on Ways and Means, Education and

Labor, Rules, and Budget. Section 505 of H.R. 6110 would eliminate the estate and gift taxes by repealing Subtitle B of the Internal Revenue Code, effective in 2009.

H.J.Res. 23 (Paul). Introduced February 7, 2007; referred to the Judiciary Committee. House Joint Resolution 23 proposes an amendment to the Constitution that would repeal the sixteenth amendment (which allows Congress to tax incomes without apportionment). Thereafter, the Congress would no longer tax personal income, estates, or gifts. The amendment would also prohibit the United States Government from engaging in business in competition with its citizens. The resolution allows seven years for ratification of the proposed constitutional amendment, plus three years for the ensuing changes in tax law to take effect.

House Bills to Modify and Retain the Estate Tax

H.R. 1929 (Salazar). Save the Family Farm and Ranch Act of 2007. Introduced April 18, 2007; referred to the Ways and Means Committee. H.R. 1929 would exclude from the gross estate the adjusted value of qualified farmland that continues in farmland use by a qualified heir. The provision would apply only if the decedent's gross income from the trade or business of farming exceeded 50% of the decedent's gross income for three or more of the decedent's last five taxable years. In addition, either the decedent or a member of the decedent's family would have to have owned and materially participated in the operation of the farmland for periods aggregating five or more years during the eight years preceding the decedent's death. A recapture tax would be imposed if the qualified heir disposes of any interest in the qualified farmland (other than to a member of his family) or ceases to use the real property as a farm for farming purposes. These amendments would take effect upon enactment. H.R. 1929 is similar to S. 1994 (Salazar), with the differences noted in the summary of that bill below.

H.R. 3170 (Mitchell). Capital Gains and Estate Tax Relief Act of 2007. Introduced July 24, 2007; referred to the Ways and Means Committee. H.R. 3170 would modify and extend the estate tax after 2009. It would restore the unified credit for estate and gift taxes. It would raise the combined estate and gift exclusion amount to \$5 million per decedent, in annual increments of \$250,000, over six years. The exclusion would be \$3.75 million for people dying in 2010; \$4 million in 2011; \$4.25 million in 2012; \$4.5 million in 2013; \$4.75 million in 2014, and \$5 million for 2015. The \$5 million figure would be indexed for inflation each year after 2015. The inflation-adjusted amount would be rounded to the nearest multiple of \$50,000. For married couples, H.R. 3170 would permit the amount of the per-decedent exclusion that is not used by the first spouse to die to carry over to the estate of the surviving spouse.⁶³ H.R. 3170 would repeal the deduction for state death taxes.

The rate of tax on the first \$25 million of taxable estate would be equal to the maximum capital gains tax rate in effect on the decedent's date of death. The amount

⁶³ This provision was previously introduced in the 109th Congress in H.R. 5638 and again in H.R. 5970. Both bills were introduced by Representative William Thomas, chairman of the Ways and Means Committee at the time, and were approved by the House, but not voted upon in the Senate.

in excess of \$25 million would be taxed at twice that rate. The \$25 million figure separating the two tax brackets would be indexed for inflation each year after 2015. The inflation-adjusted amount would be rounded to the nearest multiple of \$50,000.

H.R. 3170 would repeal the provisions of EGTRRA that repeal the estate tax and GST tax; that establish a separate schedule of graduated rates for the gift tax, capped at 35% after 2009; and that limit the tentative gift tax credit to the exclusion equivalent of \$1 million.

The estate tax provisions of H.R. 3170 would take effect in 2010. All of the estate tax provisions of EGTRRA are currently scheduled to sunset on December 31, 2010. Under H.R. 3170, the sunset would continue to apply to the three subtitles of EGTRRA regarding conservation easements, modifications to the generation-skipping transfer tax, and the extension of time for payment of the estate tax. But the sunset would no longer apply to the remaining estate tax provisions of EGTRRA.

The Jobs and Growth Tax Relief Reconciliation Act of 2003 (P.L. 108-27) reduced the maximum tax rate that applies to long-term capital gains and dividends under the individual income tax (to 0% or 15%, depending on the amount of other income) through December 31, 2008. The Tax Increase Prevention and Reconciliation Act of 2005 (P.L. 109-222) extended the sunset date for two years, until December 31, 2010. H.R. 3170 would permanently extend the lower rates with respect to capital gains, but not extend them for dividend income.

H.R. 3475 (Capuano). Introduced September 5, 2007; referred to the Ways and Means Committee. H.R. 3475 would modify the estate and gift taxes by increasing the unified credit to an exclusion-equivalent of \$5 million per decedent, effective in 2010. The \$5 million exclusion amount would be indexed for inflation after 2010. The annual inflation-adjustment would be rounded to the nearest \$10,000. The bill would repeal the one-year termination of the estate tax and GST tax that is currently scheduled to take place in 2010 under the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA, P.L. 107-16). The sunset with respect to the estate tax provisions of EGTRRA would take effect one year earlier than currently scheduled — on December 31, 2009, instead of 2010. The sunset would not apply to the increases in the estate, gift, and GST exemptions that were in effect from 2002 through 2009. H.R. 3475 would also repeal the modified carryover basis for assets that was scheduled to replace step-up in basis in 2010 when the estate tax was eliminated. H.R. 3475 would repeal three provisions of EGTRRA relating to the gift tax: the scheduled reduction of the maximum gift tax rate to the maximum individual income tax rate in 2010 when the estate tax is repealed; treating transfers in trust as taxable gifts; and limiting the gift tax credit to the equivalent of tax on \$1 million.

H.R. 4042 (McNerney). Family Farm, Small Business, and Home Tax Relief Act. Introduced November 1, 2007; referred to the Ways and Means Committee. The provisions of H.R. 4042 would take effect on January 1, 2008, and remain in effect for two years, until the estate tax is repealed on January 1, 2010, as scheduled under EGTRRA.

Under the provisions of EGTRRA, the applicable exclusion amount under the estate tax is scheduled to be \$2 million for decedents dying in 2007 or 2008, and rise to \$3.5 million in 2009. H.R. 4042 would accelerate the increase to \$3.5 million by one year, to take effect in 2008 instead of 2009. The \$3.5 million figure would be indexed for inflation in 2009. The inflation-adjusted amount would be rounded to the nearest multiple of \$1,000.

EGTRRA gradually reduced the maximum marginal estate tax rate by one percentage point per year, from 50% in 2002 down to 45% in 2007, where it is scheduled to remain for 2008 and 2009. The top two marginal tax brackets of 50% (for taxable amounts over \$2.5 million) and 49% (for taxable amounts over \$2 million, up to \$2.5 million) remain in the Internal Revenue Code as amended by EGTRRA. H.R. 4042 would establish 45% as the maximum tax rate and remove the references to higher rates, effective in 2008. (It would remove from the code the 49% and 50% rate brackets and the subsection that governed the phasedown of the maximum rate from 50% to 45%.)

Effective in 2008, H.R. 4042 would reinstate the qualified family-owned business deduction (section 2057) that was eliminated by EGTRRA and increase the amount of the deduction from \$675,000 to \$8 million. The \$8 million figure would be indexed for inflation in 2009. The inflation-adjusted amount would be rounded to the nearest multiple of \$10,000.

Under EGTRRA, the generation-skipping transfer (GST) tax is scheduled to be repealed, together with the estate tax, in 2010. H.R. 4042 would accelerate the repeal of the GST tax to 2008.

H.R. 4042 would introduce a new section into the estate tax law. It would permit a deduction of up to \$2 million from the value of the gross estate for the adjusted value of the decedent's principal residence. The residence must be located in the United States and be included in determining the value of the decedent's gross estate. The residence must have been owned by the decedent or a member of the decedent's family and used by the decedent or family member as their principal residence for periods aggregating (at least) five years during the eight years prior to the date of the decedent's death. The \$2 million figure would be adjusted for inflation in 2009. The inflation-adjusted amount would be rounded to the nearest multiple of \$1,000.

H.R. 4172 (Moore). Introduced November 14, 2007; referred to the Ways and Means Committee. H.R. 4172 would increase the estate tax exclusion to \$3.5 million, effective in 2008. After 2008, the exclusion would be indexed for inflation, with the annual adjustment rounded to the nearest \$10,000. The bill would repeal the subtitles of EGTRRA that repeal the estate tax and generation-skipping transfer tax in 2010 and that replace the step-up in basis with a carryover basis at death at that time. The other changes that EGTRRA made to the estate and gift taxes would remain in effect. H.R. 4172 would remove the sunset provision of EGTRRA from applying to those changes.

H.R. 4235 (Lowey). Estate Tax Reduction Act of 2007. Introduced November 15, 2007; referred to the Ways and Means Committee. H.R. 4235 would

raise the unified estate and gift tax exclusion to \$3 million upon enactment. After 2007, the \$3 million amount would be indexed for inflation. The annual adjustment would be rounded to the nearest \$10,000. H.R. 4235 would repeal the subtitles of EGTRRA that repeal the estate tax and generation-skipping transfer tax, create a separate gift tax, and replace the step-up in basis with a carryover basis at death in 2010. The other changes that EGTRRA made to the estate and gift taxes would remain in effect; the sunset provision of EGTRRA would no longer apply to them. In addition, H.R. 4235 would reduce each of the marginal estate tax rates by 20% (one-fifth, not 20 percentage points). The maximum tax rate would be 39.2%. The bill's provisions would take effect upon enactment.

H.R. 4242 (Pomeroy). Certain and Immediate Estate Tax Relief Act of 2007. Introduced November 15, 2007; referred to the Committee on Ways and Means. H.R. 4242 would raise the estate tax exclusion to \$3 million for 2007 and 2008, and set it at \$3.5 million for 2009 and beyond. The exclusion amount is not indexed for inflation. H.R. 4242 would repeal the subtitles of EGTRRA that repeal the estate tax and generation-skipping transfer tax in 2010 and that replace the step-up in basis with a carryover basis at death at that time.

Under EGTRRA, the maximum estate tax rate was reduced to 45% beginning in 2007. H.R. 4242 would “freeze” the maximum estate and gift tax rate at its 2005 level of 47%. The bill would repeal the separate 35% rate cap on the gift tax that is scheduled to take effect in 2010. The bill would restore the 5% surtax on taxable amounts over \$10 million, up to the level sufficient to phase out the savings from the unified credit (exclusion amount) as well as the graduated tax rates. (This would restore the policy that was in effect from 1988 through 1997, under provisions of the Revenue Act of 1987 (P.L. 100-203).) The aforementioned changes in the estate tax would take effect in 2007. Other changes that EGTRRA made to the estate and gift taxes would remain in effect. H.R. 4242 would remove the sunset provision of EGTRRA from applying to those changes.

In addition, H.R. 4242 would change the valuation rules for certain transfers of nonbusiness assets and family-controlled entities. No valuation discount would be allowed for nonbusiness assets and the nonbusiness assets would not be taken into account in determining the value of the business entity. With the exception of working capital, passive assets would generally not be considered as being used in the active conduct of a trade or business and, hence, would be considered nonbusiness assets. No minority discount in the valuation of a business entity would be permitted because the transferee does not have control of the entity if the transferee and members of his or her family have control of the entity. These changes in valuation rules would take effect upon enactment.

Senate Bills to Repeal the Estate Tax

S. 1025 (Chambliss). Fair Tax Act. Introduced March 29, 2007; referred to the Finance Committee. Companion to H.R. 25 (Linder). S. 1025 would permanently repeal the estate, gift, and generation-skipping transfer taxes by repealing Subtitle B of the Internal Revenue Code. It would also repeal the federal personal income, self-employment, corporate income, capital gains, and payroll taxes. It would replace these taxes with a revenue-neutral 23% personal consumption

tax on all retail sales of new goods and services. These changes would take effect January 1, 2009.

S. 1040 (Shelby). Tax Simplification Act of 2007. Introduced March 29, 2007; referred to the Finance Committee. S. 1040 would permanently repeal the estate, gift, and generation-skipping transfer taxes by repealing Subtitle B of the Internal Revenue Code, effective January 1, 2008.

The bill also would repeal the alternative minimum tax and all income tax credits. S. 1040 would replace the current income taxes with a flat tax levied at a rate of 19% in 2008 and 2009, and 17% in 2010 and thereafter. There would be new definitions of taxable income for individuals and businesses. The income tax changes would take effect January 1, 2008.

S. 1081 (Specter). Flat Tax Act of 2007. Introduced April 10, 2007; referred to the Finance Committee. S. 1081 would permanently repeal the estate, gift, and generation-skipping transfer taxes by repealing Subtitle B of the Internal Revenue Code, effective January 1, 2008. The bill also would repeal Subtitle H (relating to financing presidential election campaigns) and Subtitle J (relating to coal industry retiree health benefits). S. 1081 would replace the current income taxes with a flat tax of 20% on the taxable earned income of individuals and on business taxable income. The bill specifies the deductions that would be permitted in calculating the taxable base for each of these income taxes.

S. 2547 (Bond). The Fair and Simple Tax (FAST) Act of 2008. Introduced January 23, 2008; referred to the Finance Committee. Companion to H.R. 5105 (Drier). S. 2547 would repeal the estate and gift taxes by repealing Subtitle B of the Internal Revenue Code, effective in 2009.

S. 2547 would also establish an alternative income tax system, based on “simplified taxable income” taxed at three marginal tax rates of 10%, 15%, and 30%. Each taxable year a taxpayer could elect to pay according to either this alternative income tax system or the regular income tax.

S. 2547 would also make changes to the regular income tax system and the alternative minimum tax. Most of the income tax amendments would take effect in 2009. In addition, S. 2547 would make all of the provisions of the 2001 tax act (P.L. 107-16) and certain individual income tax provisions of the 2003 tax act (Title I of P.L. 108-27) permanent by repealing the EGTRRA sunset date of December 31, 2010.

Senate Bills to Modify and Retain the Estate Tax

S. 1994 (Salazar). Introduced August 3, 2007; referred to the Finance Committee. S. 1994 would exclude from the gross estate the adjusted value of qualified farmland that continues in farmland use by a qualified heir, under specified conditions. S. 1994 differs from H.R. 1929 (Salazar) in two ways: it has no short title and has one substantive difference. S. 1994 renumbers condition (2) for an estate to qualify for the provision as (2)(A): the decedent’s gross income from the trade or business of farming must have exceeded 50% of the decedent’s gross income

for three or more of the decedent's last five taxable years. S. 1994 then adds an either/or alternative, (2)(B): 50% or more of the adjusted value of the gross estate at the date of the decedent's death must consist of the qualified farmland. The rest of S. 1994 is identical to H.R. 1929, as summarized above.

S. 3049 (Alexander). Introduced May 22, 2008; referred to the Finance Committee. S. 3049 would restore the unified estate and gift tax credit. It would repeal the special gift tax provisions scheduled to take effect in 2010, including the separate \$1 million exclusion and the maximum tax rate of 35%. The bill would set the exclusion-equivalent of the unified credit at \$3.5 million per decedent, indexed for inflation after 2009. For nonresident non-citizens the credit would be based on an applicable exclusion amount of \$60,000. For residents of U.S. possessions, the credit would be based on the percentage of the entire gross estate that is located in the United States multiplied times an exclusion amount of \$175,000. There would be a single tax rate of 15% on estates and gifts. The bill would repeal the provisions of EGTRRA that repealed the estate and GST taxes and introduced the modified carryover basis at death. Other changes that EGTRRA made to estate and gift taxes would continue because the sunset provision of EGTRRA would no longer apply to the remaining parts of Title V. S. 3049 also would make permanent the reduced 15% rate of tax on capital gains and dividends.

Senate Finance Committee Hearings and Background Reports by the JCT

The Senate Finance Committee has held three hearings on the estate tax thus far in the 110th Congress. In the first session, the committee held a hearing entitled *Federal Estate Tax: Uncertainty in Planning Under the Current Law* on November 14, 2007. As background for the hearing, the Joint Committee on Taxation (JCT) published *History, Present Law, and Analysis of the Federal Wealth Transfer Tax System* (JCX-108-07) on November 13.

In the second session, the committee held a hearing on *Alternatives to the Current Federal Estate Tax System* on March 12, 2008. As background for the hearing, the JCT published *Description and Analysis of Alternative Wealth Transfer Tax Systems* (JCX-22-08) on March 10.

On April 3, 2008, the committee held a hearing entitled *Outside the Box on Estate Tax Reform: Reviewing Ideas to Simplify Planning*. As background for the hearing, the JCT published *Taxation of Wealth Transfers within a Family: A Discussion of Selected Areas for Possible Reform* (JCX-23-08) on April 2.

Appendix. Legislative Activity in Prior Congresses, from 2000 through 2006

Preceding EGTRRA

Even before the enactment of EGTRRA, there were efforts in Congress to permanently repeal the estate tax. The 106th Congress approved H.R. 8, the Death Tax Elimination Act of 2000, but it was pocket vetoed by President Clinton on August 31, 2000. The House sustained the President's veto.⁶⁴ Early in the 107th Congress, the House passed H.R. 8, the Death Tax Elimination Act of 2001. Many provisions of that bill were included in EGTRRA enacted on June 7, 2001 (P.L. 107-16).⁶⁵

Remainder of the 107th Congress

H.R. 2143, the Permanent Death Tax Repeal Act of 2001, was introduced on June 12, 2001, just days after the enactment of EGTRRA. But the estate tax did not receive further congressional attention until the spring of 2002, in the second session of the 107th Congress. On April 18, 2002, the House passed an amended version of H.R. 586, the Tax Relief Guarantee Act of 2002, part of which would have removed the sunset provision of EGTRRA and thereby made permanent the repeal of the estate tax and all other provisions of the 2001 tax cut law. On June 6, 2002, the House passed H.R. 2143 which would have removed the sunset provision solely from the estate tax provisions of EGTRRA (Title V). The House defeated the Pomeroy Democratic substitute amendment which would have retained the estate tax but increased the exclusion to \$3 million per decedent in 2003.

On June 12, 2002, the Senate considered three amendments offered to H.R. 8 regarding the estate tax. The Conrad Democratic substitute amendment would have retained the estate tax but increased the applicable exclusion amount to \$3 million

⁶⁴ H.R. 8 was introduced in the 106th Congress on February 25, 1999, on a bipartisan basis by Representatives Dunn and Tanner. The version of H.R. 8 approved by the House Ways and Means Committee was an amendment in the nature of a substitute offered in the committee by Chairman Archer. This was the version approved by the House and the Senate. For further description of H.R. 8 in the 106th Congress, and the Democratic substitute amendments offered in its place, see CRS Report (archived) RS20592, *Estate Tax Legislation: A Description of H.R. 8, The Death Tax Elimination Act of 2000*, by Nonna A. Noto, Nov. 27, 2000, available from the author upon request.

⁶⁵ H.R. 8 was reintroduced in the 107th Congress on March 14, 2001, on a bipartisan basis by representatives Dunn and Tanner. It was replaced by an amendment in the nature of a substitute by the Ways and Means Committee on March 29 and passed by the House on April 4. For further discussion of H.R. 8 in the 107th Congress, and the Democratic substitute amendments offered in its place, see CRS Report (archived) RL30912, *H.R. 8: The Death Tax Elimination Act of 2001*, by Nonna A. Noto, April 9, 2001, available from the author upon request. For a brief description of H.R. 8 and three other bills introduced in the first session of the 107th Congress to permanently repeal the estate tax, see CRS Report RL30875, *Step-Up vs. Carryover Basis for Capital Gains: Implications for Estate Tax Repeal*, by Nonna A. Noto, April 20, 2001.

in 2003 and \$3.5 million in 2009, among other changes. The Dorgan amendment to the Democratic substitute amendment would have provided a full tax deduction for family-owned business interests and raised the applicable exclusion amount to \$4 million in 2009 for all estates, among other changes. The Gramm-Kyl (Republican) amendment was identical to H.R. 2143. None of these amendments received the 60 votes needed to waive the budget point of order as established by a unanimous consent agreement. On September 19, 2002, the House approved a resolution, H.Res. 524, which called upon the Senate to approve H.R. 2143 before the 107th Congress adjourned. The Senate did not act on the bill.⁶⁶

The 108th Congress

All together, 26 measures addressing the estate tax were introduced in the 108th Congress: 19 in the House and seven in the Senate. The bills can be grouped into three broad categories. First, eight House bills would have made the repeal of the estate tax permanent after 2010. Two Senate joint resolutions would have expressed the sense of Congress that the number of years during which the estate tax is repealed should be extended, pending permanent repeal of the tax. Second, one House bill and three Senate bills would have accelerated the repeal of the estate tax — to 2003 or 2005. Third, 10 House bills and two Senate bills would have retained but altered the estate tax. Some would have lowered the tax rates. Some would have increased the exclusion amount for all estates. Some would have forgiven the estate tax on family-owned businesses and farms but imposed a carryover basis in calculating the capital gain if the heir later sold the business. Some would have repealed the modified carryover basis instituted by EGTRRA and returned to the step-up in basis rule for assets transferred at death. One would have deposited revenues from the estate tax into the Social Security trust funds.

The House approved H.R. 8, the Death Tax Repeal Permanency Act of 2003 (Dunn) on June 18, 2003, by a vote of 264-163. H.R. 8 would have made the repeal of the estate and generation-skipping transfer taxes permanent from 2010 onward by exempting the estate tax provisions (Title V) from the sunset provisions of EGTRRA. Prior to its vote on H.R. 8, the House debated and defeated the Pomeroy substitute amendment. That amendment would have retained the estate tax but increased the exclusion amount to \$3 million per decedent, effective January 1, 2004. It included other changes to the estate tax laws to partially offset the cost of increasing the exclusion amount. The Senate did not take up H.R. 8 or any of its own bills addressing the estate tax.⁶⁷

⁶⁶ For additional information, see CRS Report RS21224, *Estate Tax: Legislative Activity in 2002*, by Nonna A. Noto, February 5, 2003.

⁶⁷ For additional information, see CRS Report RL31776, *Estate Tax Legislation in the 108th Congress*, by Nonna A. Noto, May 14, 2004.

The 109th Congress⁶⁸

On April 13, 2005, the House passed H.R. 8, which would have permanently repealed the estate tax starting in 2010. Over a year later, on June 8, 2006, the Senate voted on cloture on a motion to proceed to consider H.R. 8. The vote of 57-41 was three short of the 60 votes needed. On June 16, Senate Majority Leader Bill Frist proposed that the House pass a permanent estate tax reform compromise that could attract 60 votes in the Senate. The Chairman of the Ways and Means Committee, William Thomas, introduced two bills, H.R. 5638 and later H.R. 5970. Each was approved by the House but never taken up by the Senate.

Chairman Thomas introduced H.R. 5638 on June 19, 2006. That bill contained an estate tax reform proposal and a timber capital gains provision. The bill would have restored the unified estate and gift tax exclusion and raised the applicable exclusion amount (from \$3.5 million in 2009 under current law) to \$5 million per decedent in 2010. On June 21, the House Rules Committee adopted a manager's amendment that would have indexed the \$5 million exclusion to inflation after 2010, rounded to the nearest \$100,000. The bill would have lowered the tax rate on taxable assets up to \$25 million to the tax rate on long-term capital gains (currently 15% but scheduled to revert to 20% in 2011). For taxable assets over \$25 million, the tax rate would have been twice the prevailing capital gains rate. Married couples would have been able to carry over to the estate of the surviving spouse any exclusion unused by the first spouse to die. The deduction for state death taxes would have been repealed. The bill also would have repealed the provisions of EGTRRA that introduce a modified carryover basis regime starting in 2010; thus, the step-up in basis rules would have continued to govern assets transferred at death. The estate and gift tax provisions of H.R. 5638 would have taken effect January 1, 2010, and been permanent. In addition, H.R. 5638 would have created a new, temporary 60% income tax deduction for qualified timber capital gains effective from the date of enactment through calendar year 2008.⁶⁹ The House passed H.R. 5638 by a vote of 269-165 on June 22, 2006.

The Joint Committee on Taxation (JCT) estimated that the estate tax provisions of H.R. 5638 would have cost \$282 billion over the period FY2006-FY2016,⁷⁰ or 73% as much as total repeal. (Indexing the exclusion amount added \$3.25 billion to

⁶⁸ For additional information, see CRS Report RL32818, *Estate Tax Legislation in the 109th Congress*, by Nonna A. Noto, March 29, 2007.

⁶⁹ For further explanation of the bill, see U.S. Congress, Joint Committee on Taxation, *Technical Explanation of H.R. 5638, The "Permanent Estate Tax Relief Act of 2006" as introduced in the House on June 19, 2006*, 109th Cong., 2nd sess., JCX-20-06, June 20, 2006. Available at [<http://www.house.gov/jct/>].

⁷⁰ U.S. Congress, Joint Committee on Taxation, *Estimated Revenue Effects of H.R. 5638, as Amended, Scheduled for Consideration by the House of Representatives on June 22, 2006*, 109th Cong., 2nd sess., JCX-23-06, June 22, 2006. Available at [<http://www.house.gov/jct/>].

the original cost estimate.⁷¹⁾ The timber provisions were estimated to cost an additional \$940 million.

Next, Chairman Thomas introduced H.R. 5970 on July 28, 2006. H.R. 5970 was called the “trifecta” bill. In addition to reforming and extending the estate tax, the bill would have extended and expanded a number of popular tax relief provisions that had expired at the end of 2005 (the “tax extenders”) and would have increased the minimum wage. The bill also included a title of amendments to the Surface Mining Control and Reclamation Act (SMCRA).

H.R. 5970 would have reunified the estate and gift taxes. The estate tax exclusion would have increased (from \$3.5 million in 2009 under current law) to \$3.75 million in 2010 and by an additional \$250,000 each succeeding year until it reached \$5 million in 2015. After 2015, the \$5 million exclusion would have been indexed for inflation. Married couples could have transferred any of the exclusion amount unused by the first spouse to die to the estate of the surviving spouse. As in H.R. 5638, the tax rate on taxable assets up to \$25 million would have been equal to the tax rate on long-term capital gains (currently 15% but scheduled to revert to 20% in 2011). In contrast to H.R. 5638, the tax rate on taxable estate values over \$25 million would have been set in the law: at 40% in 2010, 38% in 2011, 36% in 2012, 34% in 2013, 32% in 2014, and 30% in 2015 and beyond. The \$25 million bracket divider would have been indexed for inflation, for the first time in the history of the estate tax. The deduction for state estate taxes would have been repealed. The estate and gift tax provisions of H.R. 5970 would have taken effect January 1, 2010, and been permanent. The House approved H.R. 5970 by a vote of 230-180 on July 29, 2006. The JCT estimated that the estate tax provisions of H.R. 5970 would have cost \$268 billion over FY2007-FY2016,⁷²⁾ or about 69% as much as total repeal.

While Congress did pass substantive tax legislation in the final days of the 109th Congress, the act did not include any estate tax provisions.⁷³⁾

⁷¹⁾ U.S. Congress, Joint Committee on Taxation, *Estimated Revenue Effects of H.R. 5638, the “Permanent Estate Tax Relief Act of 2006”*, 109th Cong., 2nd sess., JCX-21-06, June 20, 2006. Available at [<http://www.house.gov/jct/>].

⁷²⁾ U.S. Congress, Joint Committee on Taxation, *Estimated Budget Effects of H.R. 5970, the “Estate Tax and Extension of Tax Relief Act of 2006 (‘ETETRA’),” as introduced in the House of Representatives on July 28, 2006*, 109th Cong., 2nd sess., JCX-34-06, July 28, 2006, line I. Available at [<http://www.house.gov/jct/>].

⁷³⁾ The Tax Relief and Health Care Act of 2006, P.L. 109-432, enacted on December 20, 2006.