

The No Claw-Back Rule

May 26, 2022

By: [Paul Chmielewski](#), Partner | Denver

To quote Forrest Gump, estate and gift planning regulations “are like a box of chocolates, you never know what you’re going to get.” Making sure you are creating the right strategies requires tracking the latest developments that may dramatically affect your wealth. In April 2022, the IRS issued proposed regulations creating exceptions to the No Claw-Back Rule. This threatens the ability to benefit from the current all-time high estate tax exclusion amounts.

WHAT IS THE NO CLAW-BACK RULE?

Under current law, anyone can gift up to \$12,060,000 to another party without having the amount subject to estate or gift taxes. However, in 2026, that total exemption limit will be reduced to \$5 million, adjusted for inflation (that will equate to an exemption amount of about \$6 million).

But what happens if you gift someone \$12,060,000 prior to 2026 but pass away in 2026 when the exemption amount drops to only \$6,000,000? The worry is that more than half of that amount – \$6,060,000 - will be subject to estate tax even though the exemption amount in effect at the time of the gift was \$12,060,000.

In 2019, the IRS created the No Claw-Back Rule that says the higher exclusion amount will remain in effect if death happens after 2025.

So, if an individual makes a gift of \$8 million in 2022 and dies after 2025 when the exclusion amount has reverted to \$6 million, their estate will get the full benefit of the estate tax exclusion of \$8 million, not the \$6 million.

WHAT HAS CHANGED?

Nothing yet. But the IRS is proposing certain exceptions to the No Claw-Back Rule.

That means certain gifts made under the current \$12,060,000 gift and estate tax exemption amount may be subject to the lower estate tax exemption amounts applicable in 2026, so the “excess” amount of the gift could be “clawed-back” into the donor’s estate.

WHAT IS AFFECTED?

The strategies targeted by the exceptions to the No Claw-Back Rule include:

- Certain gifts made within three years of death
- Transfers with a retained life estate
- Transfers where possession or enjoyment of the property by the transferee can be obtained only at or after the transferor’s death
- Transfers in contemplation of death
- Grantor-retained income trusts
- Gifts in the form of a promissory note
- Gifts made under the preferred partnership freeze technique
- Transfers that would have been included above, but for the transfer, relinquishment, or elimination of an interest, power, or property, within 18 months of the date of a decedent’s death

WHICH TRUSTS ARE POTENTIALLY SUBJECT TO THE CLAW-BACK AND WHICH ONES ARE NOT?

Two popular strategies that could potentially become (but are not automatically) subject to claw-back under the new proposed regulations are Grantor Retained Annuity Trusts and Qualified Personal Residence Trusts.

Exceptions to the No Claw-Back Rule under the new proposed regulations will not affect stand-alone strategies such as Spousal Lifetime Access Trusts (“SLATs”) and Dynasty Trusts. You can still gift \$12,060,000 to these planning vehicles now without fear of a “claw-back” when the estate tax exemption amount is reduced in 2026.

Having said that, if SLATs or Dynasty Trusts incorporate promissory notes or other strategies targeted by the exceptions to the No Claw-Back Rule, they could also be (but are not automatically) subject to the reduced exemption amounts in 2026.

IS IT CERTAIN THIS PROPOSAL WILL BECOME FINAL?

No, but it is likely, even if the final version contains slight modifications. Proposed regulations are binding on the IRS but are not binding on taxpayers until the regulations become final. Regardless, it isn't wise for taxpayers to engage in planning strategies that are prohibited by the proposed regulations because at some point, they may become final.

The proposed regulations are new so more guidance will come as the proposed regulations are further scrutinized and taxpayer comments are evaluated by the IRS.

WHAT SHOULD I DO NEXT?

As these regulations evolve, please know our planning specialists are available to answer any questions you may have. They have extensive experience helping clients implement advanced wealth transfer solutions to achieve their estate planning goals and mitigate taxes.

If you would like to consult with a Cerity Partners Estate Planning Advisor, please [CLICK HERE](#).

Cerity Partners LLC ("Cerity Partners") is an SEC-registered investment adviser with offices in California, Colorado, Florida, Illinois, Ohio, Pennsylvania, Massachusetts, Michigan, New York and Texas. Registration of an Investment Adviser does not imply any level of skill or training. This commentary is limited to general information about Cerity Partners' services and its financial market outlook, which may not be suitable for everyone. The information contained herein should not be construed as personalized investment, tax, or legal advice. Contact your tax or legal advisor before taking any actions. Past performance is no guarantee of future results. There is no guarantee that the views and opinions expressed in this commentary will come to pass. Investing in the financial markets involves risk, including the risk of loss of the principal amount invested; and may not be appropriate for everyone. The information presented is subject to change without notice and should not be considered as an offer to sell or a solicitation of an offer to buy any security. All information is deemed reliable but is not guaranteed. For information pertaining to the registration status of Cerity Partners, please contact us or refer to the Investment Adviser Public Disclosure website (www.adviserinfo.sec.gov). For additional information about Cerity Partners, including fees and services, send for our disclosure statement as set forth on Form CRS and ADV Part 2A using the contact information herein. Please read the disclosure statement carefully before you invest or send money.