2021 Year-End Estate Planning Advisory

November 22, 2021

Overview

During 2021, COVID-19, the new Biden administration, the Tax Cuts and Jobs Act (TCJA), the Coronavirus Aid, Relief and Economic Security Act (CARES ACT), the American Rescue Plan (ARP), and the uncertainty about the Build Back Better Plan (BBB Plan) dominated the planning landscape.

As outlined in our previous four Year-End Estate Planning Advisories, the TCJA made significant changes to individual and corporate income taxes, restructured international tax rules, provided a deduction for pass-through income and eliminated many itemized deductions. Most significantly for estate planning purposes, the TCJA temporarily doubled the estate, gift and generation-skipping transfer (GST) tax exemptions. Absent legislative action by the BBB Plan, which may or may not occur prior to the end of the year (discussed below), many of the changes imposed under the TCJA — including the increased exemptions — will sunset after December 31, 2025, with the laws currently scheduled to revert back to those that existed prior to the TCJA. Given the uncertain political landscape, practitioners continue to view this temporary increase in exemption amounts as an unprecedented opportunity for valuable estate planning.

While the permanency of the TCJA's provisions still remains uncertain, the current environment provides a great deal of opportunity for new planning. We are encouraging clients to build flexibility into their estate plans and to use this window of opportunity, where appropriate, to engage in planning to take advantage of the increased estate, gift and GST tax exemptions.

As the existing tax landscape is still in effect as of the date of this advisory, we will review some key aspects of existing legislation before discussing how they might be changed by the BBB Plan. The following are some key income and transfer tax exemption and rate changes under the TCJA, including inflation adjusted amounts for 2021 and 2022:

Federal Estate, GST and Gift Tax Rates

For 2021, the federal estate, gift and GST applicable exclusion amounts are $11.7 million. The maximum rate for federal estate, gift and GST taxes is 40 percent. For 2022, the federal estate, gift and GST applicable exclusion amounts will be $12.06 million. Absent any change by Congress, the maximum rate for federal estate, gift and GST taxes will remain at 40 percent.

Annual Gift Tax Exemption

Each year individuals are entitled to make gifts using the "Annual Exclusion Amount" without incurring gift tax or using any of their lifetime applicable exclusion amount against estate and gift tax. The Annual Exclusion Amount is $15,000 per donee in 2021. Thus, this year a married couple together can gift $30,000 to each donee without gift

tax consequences. In 2022, the annual exclusion for gifts will rise to $16,000. The limitation on tax-free annual gifts made to noncitizen spouses will increase from $159,000 in 2021 to $164,000 in 2022.

Federal Income Tax Rates

- The TCJA provides for seven (7) individual income tax brackets, with a maximum rate of 37 percent. The 37 percent tax rate will affect single taxpayers whose income exceeds $518,400 (indexed for inflation, and $539,600 in 2022) and married taxpayers filing jointly whose income exceeds $622,050 (indexed for inflation and $647,850 in 2022). Estates and trusts will reach the maximum rate with taxable income of more than $12,950 (indexed for inflation, and $13,450 in 2022).
- A zero percent capital gains rate applies for single filers with income up to $40,000 (indexed for inflation, and $41,675 for 2022) or married taxpayers filing jointly with income up to $80,000 (indexed for inflation, and $83,350 in 2022). A 15 percent capital gains rate applies for income above this threshold up to $441,450 for single taxpayers (indexed for inflation, and $459,750 in 2022) and $496,600 for married taxpayers filing jointly (indexed for inflation, and $517,200 in 2022). The 20 percent capital gains rate applies above these thresholds.
- The standard deduction was increased to $24,800 (indexed for inflation, and $25,900 in 2022) for married individuals.
- In 2021, the threshold for the imposition of the 3.8 percent Medicare surtax on investment income and 0.9 percent Medicare surtax on earned income is $200,000 for single filers, $250,000 for married filers filing jointly and $12,500 for trusts and estates (adjusted for inflation, so the $13,050 threshold will increase in 2022).

Tax Cuts and Jobs Act

The TCJA has proven to have many implications for domestic corporate and individual income tax, as well as federal gift, estate and GST tax, fiduciary income tax and international tax. Since the TCJA's enactment, various technical corrections have been issued, as has the Internal Revenue Service's (IRS) guidance on certain aspects of the new tax regime. In light of the TCJA and recent IRS guidance, it is important to review existing estate plans, consider future planning to take advantage of the increased exemption amounts, and maintain flexibility to allow for future strategic planning. Because of the continued importance of the TCJA's new tax laws, the most significant changes and recent guidance are summarized below.

Gift, Estate and GST Exemptions, Rates and Stepped-Up Basis

The TCJA retained the federal estate, gift and GST tax rates at a top rate of 40 percent, as well as the marked-to-market income tax basis for assets includible in a decedent's taxable estate at death.

While the federal gift, estate and GST taxes were not repealed by the TCJA, fewer taxpayers will be subject to these transfer taxes due to the TCJA's increase of the related exemption amounts. Under the TCJA, the base federal gift, estate and GST tax exemptions doubled from $5 million per person to $10 million per person, indexed for inflation. As noted above, the relevant exemption amount for 2021 is $11.7 millionper person, resulting in a married couple's ability to pass $23.4 million worth of assets free of federal estate, gift and GST taxes. These amounts will increase each year until the end of 2025, with inflation adjustments to be determined by the chained Consumer Price Index (CPI) (which will lead to smaller increases in the relevant exemption amounts in future years than would have resulted from the previously used traditional CPI). The exemption amount in 2022 will be $12,060,000 per individual. Without further legislative action, the increased exemption amounts will sunset, and the prior exemption amounts (indexed for inflation, using the chained CPI figure) will be restored beginning in 2026.

While the federal estate tax exemption amount has increased, note that multiple US states impose a state-level estate or inheritance tax. The estate tax exemption amount in some of these states matches, or will match, the

increased federal estate tax exemption amount. However, in other states, such as Illinois and New York, the state estate tax exemption amount will not increase with the federal estate tax exemption amount, absent a change in relevant state law. Additionally, states may have their own laws that impact planning in that state.

The federal estate tax exemption that applies to non-resident aliens was not increased under the TCJA. Under current law, the exemption for non-resident aliens remains at $60,000 (absent the application of an estate tax treaty).

"Anti-Clawback" Regulations

While there is uncertainty about whether future legislation will address the sunset, either by extending the new exemption amounts beyond 2025 or changing the exemption amounts further, the IRS has issued guidance on how it will address differences between the exemption amounts at the date of a gift and exemption amounts at the date of a taxpayer's death (often referred to as a "clawback"). In Proposed Regulations REG-106706-18, the IRS clarified that a taxpayer who takes advantage of the current lifetime gift tax exemption will not be penalized, if the exemption amount is lower at the taxpayer's death. If a taxpayer dies on or after January 1, 2026, having used more than the statutory $5 million basic exclusion (indexed for inflation) but less than the $10 million basic exclusion (indexed for inflation), the taxpayer will be allowed a basic exclusion equal to the amount of the basic exclusion the taxpayer had used. However, any exemption unused during a period of higher basic exclusion amounts will not be allowed as an additional basic exclusion upon death. Additionally, the IRS clarified that if a taxpayer exhausted his or her basic exclusion amount with pre-2018 gifts and paid gift tax, then made additional gifts or died during a period of high basic exclusion amounts, the higher exclusion will not be reduced by a prior gift on which gift tax was paid.

The Proposed Regulations do not permit gifts made during the period that the basic exclusion amount is $10 million (indexed for inflation) to "come off the top" of the higher basic exclusion amount. For example, if a taxpayer who has never made a taxable gift makes a gift of $5 million, and then dies after the basic exclusion amount has decreased back to $5 million, the gift will not be deemed to use the "extra" (indexed) $5 million of basic exclusion amount available until 2026. Instead, the gift would be deemed to use the taxpayer's $5 million basic exclusion amount. The IRS could have provided that any gifts prior to 2026 come "off the top" of the $10 million exclusion amount. In that case, a taxpayer who made a $5 million gift when the basic exclusion amount is $10 million would still have retained all of the taxpayer's $5 million exclusion amount after the basic exclusion amount is reduced to $5 million in 2026. Additionally, the Proposed Regulations did not address how the reduction in the basic exclusion amount would affect portability of estate tax upon the death of a spouse.

Income Taxation of Trusts and Estates

The TCJA added new Code Section 67(g), which applies to trusts and estates, as well as individuals and provides that no miscellaneous itemized deductions (all deductions other than those specifically listed in Code Section 67(b)) are available until the TCJA sunsets after December 31, 2025. While the TCJA doubled the standard deduction for individuals, taxpayers that are trusts and estates are not provided a standard deduction. Under the TCJA, trust investment management fees are no longer deductible. After the enactment of the TCJA, there was uncertainty about the deductibility of fees directly related to the administration of a trust or estate (e.g., fiduciary compensation, legal fees, appraisals, accountings, etc.). Historically, these fees had been deductible under Code Section 67(e) and without regard to whether they were miscellaneous itemized deductions or not. In Notice 2018-61, the Treasury Department (Treasury) issued guidance on whether new Code Section 67(g) eliminates these deductions. This notice provides that expenses under Code Section 67(e) are not itemized deductions and therefore are not suspended under new Code Section 67(g). Note that only expenses incurred solely because the property is held in an estate or trust will be deductible. While the notice was effective July 13, 2018, estates and non-grantor trusts may rely on its guidance for the entire taxable year beginning after December 31, 2017.

New Code Section 67(g) may also impact a beneficiary's ability to deduct excess deductions or losses of an estate or trust upon termination. Prior to the TCJA, it was common tax planning to carry out unused deductions of a trust or estate to the beneficiary upon termination, so the deductions could be used on the beneficiary's personal income tax return. Under new Code Section 67(g), these deductions are arguably miscellaneous itemized deductions and therefore would no longer be deductible by the beneficiary. Notice 2018-61 notes that the IRS and Treasury recognize that Section 67(g) may impact a beneficiary's ability to deduct unused deductions upon the termination of a trust or an estate, and the IRS and Treasury intend to issue regulations in this area and request comments on this issue. In the interim, taxpayers should consult with their advisors about whether it would be prudent to engage in planning to utilize (to the extent permissible) these deductions at the trust or estate level.

Finally, the TCJA made a number of taxpayer-friendly changes to the taxation of electing small business trusts (ESBTs). Non-resident aliens are now permissible potential beneficiaries of ESBTs, as discussed below. Also, the charitable deduction rules for ESBTs are now governed by Code Section 170 instead of Code Section 642(c), which means that several restrictions imposed by Code Section 642(c) (e.g., that the charitable donation be paid out of income and pursuant to the terms of the trust) no longer apply. Additionally, an ESBT's excess charitable deductions can now be carried forward five years, but the percentage limitations and substantiation requirements will now apply.

Income Tax

The TCJA made significant changes to the federal income tax. While many federal income tax changes under the TCJA are beyond the scope of this advisory, some are particularly relevant to estate planning. The deduction for state and local taxes (the SALT deduction) was retained but is now limited to $10,000 for jointly filing taxpayers or unmarried taxpayers. The $10,000 limit also applies to trusts. Almost immediately after the TCJA's passage, a number of states implemented workarounds to the SALT deduction limit by allowing residents to "contribute" to state-controlled charitable funds in exchange for SALT credits. The aim of these workarounds was to allow residents to characterize such contributions as fully-deductible charitable contributions for federal income tax purposes, while simultaneously permitting a credit for state or local income, real estate or other taxes for the same contribution. In the final regulations issued in August 2018 and published on June 13, 2019, the IRS responded to these workarounds by limiting federal income tax deductions that taxpayers, including trusts or estates, are able to take upon charitable contributions to such state-controlled charitable funds under Section 170 of the Code.

Under these regulations, a taxpayer who makes payments or transfers property to an entity eligible to receive tax deductible contributions would have to reduce the taxpayer's charitable deduction by the amount of any state or local tax credit the taxpayer receives or expects to receive. Therefore, a tax credit received in return for the contribution is treated as a quid pro quo benefit for the contribution, reducing the amount of the charitable income tax deduction otherwise available dollar-for-dollar. However, there is a de minimis exception — if the amount of the SALT credit does not exceed 15 percent of the amount of the contribution, the taxpayer's charitable income tax deduction is not required to be reduced.

In response to inquiries about how these rules would apply to businesses making charitable contributions, Rev. Proc. 2019-12 was issued to provide safe harbors for C corporations and pass-through entities that make charitable contributions, receive a state and local tax credit, and deduct the payments as a business expense. Under the Revenue Procedure, C corporations may deduct the entire payment as a business expense, even if the corporation receives a state tax credit. Pass-through entities may deduct the payment as a business expense if the credit offsets a state or local tax other than an income tax (for example, franchise tax or property tax).

The TCJA also has implications for married couples who are divorcing or contemplating a divorce. The TCJA changed prior law to provide that alimony payments will not be deductible by the payor and will not be deemed to be income to the recipient. The TCJA also repealed Code Section 682, which generally provided that if a taxpayer created a grantor trust for the benefit of his or her spouse, the trust income would not be taxed as a grantor trust as to the

grantor-spouse after divorce to the extent of any fiduciary accounting income the recipient-spouse is entitled to receive. Due to the repeal of Section 682, a former spouse's beneficial interest in a trust may cause the trust to be taxed as a grantor trust as to the grantor-spouse even after divorce. These changes to the taxation of alimony and the repeal of Code Section 682 do not sunset after 2025; they apply to any divorce or separation instrument executed after December 31, 2018, or any divorce or separation instrument executed before that date but later modified, if the modification expressly provides that changes made by the TCJA should apply to the modification.

As an alternative to this, a number of states (including California and New York, discussed below), have begun allowing qualifying entities required to file tax returns in these states to make an election to pay a pass-through entity tax, as opposed to the income tax being passed through to the individuals who own the entity. This SALT workaround gives eligible pass-through owners a tax credit to be applied to their personal state income tax. For federal income tax purposes, the entity level tax reduces the pass-through's net income, which in turn reduces the net income of the pass-through owners on their federal income tax returns.

Charitable Deduction

The TCJA increases the percentage limitation on cash contributions to public charities from 50 percent of the donor's contribution base (generally, the donor's adjusted gross income) to 60 percent. This 60 percent limitation applies if only cash gifts are made to public charities. The deduction limitations remain the same for donations of other assets, such as stock, real estate, and tangible property.

Business Entities

The TCJA reduced the top corporate income tax rate to 21 percent. To decrease the discrepancy in the tax rates between C corporations and pass-through entities, the TCJA also addressed taxation of pass-through entities (partnerships, limited liability companies, S corporations or sole proprietorships) that would typically be taxed at the rate of the individual owners. Generally, new Section 199A provides a deduction for the individual owner of 20 percent of the owner's qualified business income (QBI). This deduction has the effect of reducing the effective income tax rate for an owner in the highest tax bracket from 37 percent to 29.6 percent. The deduction is subject to numerous limitations and exceptions. Notably, the deduction may be limited for taxpayers over a certain taxable income threshold ($326,000 for married taxpayers filing jointly, and $163,300 for other taxpayers, to be adjusted for inflation in future years). For these taxpayers, the deduction may be subject to limitations based on whether the entity is a "specified service business" (an SSTB, which is generally a trade or business involving the performance of services in health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, investing and investment management, trading, or where the principal asset is the reputation or skill of one or more employees), the W-2 wages paid by the business entity, and the unadjusted basis immediately after acquisition (UBIA) of qualified property held by the trade or business. The IRS issued Final Regulations on Section 199A on January 18, 2019, followed by a slightly corrected version on February 1, 2019. The IRS also issued Rev. Proc. 2019-11 providing guidance on calculating W-2 wages for the purposes of Section 199A, and Notice 2019-07 providing a safe harbor for when a rental real estate enterprise will qualify as a business for purposes of Section 199A. The rules surrounding the deduction, as well as the Final Regulations, are very complex, and taxpayers should consult with their tax advisors to determine the implications of the Section 199A deduction. Section 199A is effective until December 31, 2025.

Qualified Opportunity Zones

The TCJA provides federal income tax benefits for investing in businesses located in "Qualified Opportunity Zones." Opportunity zones are designed to spur economic development and job creation in distressed low-income communities in all 50 states, the District of Columbia, and US possessions. By investing eligible capital in a Qualified Opportunity Fund (a corporation or partnership that has at least 90 percent of its assets invested in qualified

opportunity zone property on two measuring dates each year) that has invested in qualified opportunity zone property in any of these communities, and meeting certain other requirements, investors can gain certain tax benefits, including the deferral or exclusion of existing gain or non-recognition of gain. The IRS issued proposed regulations and Rev. Rul. 2018-29 on October 19, 2018, and a second set of proposed regulations on April 17, 2019 which addressed, among other issues, what transactions would trigger recognition of previously deferred gains. The Qualified Opportunity Zone regime is complex and may impact the tax and estate planning of investors. Taxpayers should consult with their tax and estate planning advisors to discuss the potential tax benefits and implications.

Corporate Transparency Act (CTA)

On January 1, 2021, the CTA was enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021. The purpose of the CTA is to prevent the use of United States entities for criminal activities, such as money laundering. The CTA requires corporations, limited liability companies and other similar entities that are formed within the United States and foreign entities that are registered to do business within the United States to disclose information regarding an entity's beneficial owners to the Financial Crimes Enforcement Network (FinCEN). Required to be reported to FinCEN are the full legal name, current residential or business street address, date of birth and identification number of each applicable beneficial owner. Exempt from such reporting requirements are: (1) entities that are already closely regulated (e.g., entities regulated by the SEC); (2) publicly traded companies; (3) companies that are "dormant" as defined within the CTA; (4) tax-exempt entities; (5) taxable entities that have (i) more than 20 fulltime United States employees, (ii) a physical office in the United States and (iii) more than $5 million in gross receipts or sales; (6) any entity owned or controlled, directly or indirectly, by an exempt entity; and (7) additional entities that FinCEN may determine on an ongoing basis. While the information would not be accessible by the general public, the information would be available to governmental bodies and federal agencies for certain limited uses (e.g., law enforcement, national security and intelligence purposes).

The CTA will become effective on the date that regulations regarding the CTA are presribed and issued by the Treasury, which shall be no later than one year after the enactment of the CTA. As of the time of this writing, regulations regarding the CTA have not been prescribed and issued by the Treasury.

Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)

The SECURE Act was signed into law by President Trump on December 20, 2019 as part of the Consolidated Appropriations Act. Under the prior law, an IRA owner had to begin withdrawing required minimum distributions (RMDs) from a traditional IRA by April 1 of the year following the year the account owner turned 70 1/2. The SECURE Act increased the required minimum distribution age for taking RMDs from traditional IRAs from 70 1/2 to 72. This change is effective for distributions required to be made after December 31, 2019, for individuals who attain age 70 1/2 after that date.

Additionally, the SECURE Act changed the distributions of retirement accounts after the death of an IRA account owner. Under the prior law, a non-spouse designated beneficiary of an IRA was able to take distributions over the beneficiary's own life expectancy. Under the SECURE Act, non-spouse beneficiaries would generally be required to take complete distribution of inherited IRA benefits by the end of the tenth calendar year following the IRA owner's death. The 10-year term would apply regardless of whether the IRA owner died before his or her required beginning date. A designated beneficiary who is a spouse, minor child, disabled or chronically ill person, or person not more than 10 years younger than the IRA owner would be exempt from this rule. However, with respect to a minor child, the benefits must be distributed within 10 years from when the child attains the age of majority. This change is generally effective for persons dying after December 31, 2019.

The Coronavirus Aid, Relief and Economic Security Act (CARES Act) and the Consolidated Appropriations Act

The CARES Act — the largest stimulus package in history — was signed into law on March 27, 2020 as a $2.2 trillion economic stimulus to counter the adverse economic impacts of COVID-19. Among many other things, the CARES Act provided relief to businesses in the form of loans and tax benefits, as well as to individuals in the form of stimulus checks, unemployment benefits and tax benefits. The key provisions of the CARES Act as they relate to closely held businesses and high net worth individuals are summarized below.

Meanwhile, since the CARES Act:

- The Consolidated Appropriations Act — a $2.3 trillion spending bill (made up of a $900 billion fiscal stimulus package and a $1.4 trillion governing funding deal) — was signed into law on December 27, 2020, building on the CARES Act;
- The American Rescue Plan Act of 2021 — a $1.9 trillion economic stimulus bill — was signed into law on March 11, 2021, building on both the CARES Act and the Consolidated Appropriations Act; and
- President Biden signed the $1.2 trillion Infrastructure Investment and Jobs Act on November 15, 2021.

Business Relief:

Paycheck Protection Program:

The Paycheck Protection Program (PPP) was established under the CARES Act as a $349 billion business loan program administered by the Small Business Administration. The funds allocated to the PPP were subsequently increased by an additional $320 billion and the Paycheck Protection Program Flexibility Act (PPP Flexibility Act) further broadened the terms of the program. A third round of PPP funding commenced in January 2021 with the introduction of the Consolidated Appropriations Act, but the allocated funds were depleted as of May 31, 2021. The Consolidated Appropriations Act clarified, for example, that, effective as of the dates of the CARES Act, gross income does not include any amount that would otherwise arise from the forgiveness of a PPP loan and that deductions are allowed for otherwise deductible expenses paid with the proceeds of a PPP loan that is forgiven. The PPP ended on May 31, 2021, but existing borrowers may be eligible for PPP loan forgiveness.

Main Street Lending Program:

The Main Street Lending Program (MSLP), authorized under both the CARES Act and the Federal Reserve Act, was established by the Federal Reserve to facilitate lending to certain small and medium-sized for-profit businesses and nonprofit organization. Ultimately, through its intermediary banks, savings associations and credit unions, the MSLP lent $17.5 billion of the $600 billion that could have been lent through the program, and the MSLP terminated on January 8, 2021.

Deferment of Social Security Taxes:

Pursuant to the CARES Act, an employer could defer paying the employer's portion of an employee's Social Security taxes from March 27 to January 1, 2021. Half of the deferred taxes is due on December 31, 2021 and the remaining half is due on December 31, 2022.

Employee Retention Credit:

The employee retention tax credit was originally enacted under the CARES Act and later expanded and extended under the Consolidated Appropriations Act and then the ARP. It is a refundable credit intended to encourage businesses to keep employees on their payroll, as follows:

1. Provisions under the CARES Act for wages paid between March 13, 2020 and December 31, 2020: For employers who qualify (meaning operations were fully or partially suspended by a governmental order (i.e., a lockdown order) or gross receipts were down 50 percent (e.g., compared to same quarter in 2019), *and ultimately including employers who took a loan under the initial PPP*), the credit can be claimed against 50 percent of all qualified wages (including qualified health plan expenses, up to $10,000) paid to the employee during the applicable period (meaning the credit was capped at $5,000 per employee for the applicable period). Further, if the employer averaged 100 or fewer full-time employees during 2019, the company is eligible for the credit even if its employees are working in 2020; *whereas, if the employer averaged more than 100 full-time employees during 2019, no credit is available for wages paid to an employee that is still working* (even if at a reduced capacity).

2. Provisions under the Consolidated Appropriations Act for wages paid between January 1, 2021 and June 30, 2021 (the first two quarters of 2021): The credit amount is increased for employers who qualified (meaning operations were fully or partially suspended by a governmental order or gross receipts are down 80 percent (e.g., compared to the same quarter in 2019)) to 70 percent of qualified wages paid *per quarter* (capping the credit at $7,000 per quarter per employee). Further, the 100-employee threshold was raised to a 500-employee threshold (meaning that for the first two quarters of 2021, a company that had 500 or fewer employees in 2019 will be eligible for the credit even if its employees are working). Originally, under the CARES Act, a company that received a PPP loan was not eligible to claim the employee retention tax credit, but this was repealed retroactively by the Consolidated Appropriations Act to allow the credit *for wages that were not paid with the proceeds of a PPP loan*; the credit is not allowed for wages paid with the proceeds of a PPP loan.

3. Provisions under the ARP for wages paid between July 1, 2021, and December 31, 2021 (the last two quarters of 2021): (a) retained the 70 percent credit for qualified wages paid per quarter per employee and the 500-employee threshold, but (b) added an additional category of employers that would be eligible for the credit even if the employer had more than 500 employees in 2019 and its employees are working (e.g., Severely Financially Distressed Employers whose gross receipts in the last two quarters of 2021 are less than 10 percent of the gross receipts for the same quarter in 2019 (a reduction of more than 90 percent), and also (c) added a separate $50,000 *per quarter* maximum aggregate credit (totaling $100,000 for both quarters, depending on number of employees and wages paid) for certain recovery startup businesses that began operations on or after February 15, 2020, whose average annual gross receipts do not exceed $1 million for the prior three years, and is not otherwise eligible for the credit because the business was not shut down by a lockdown order and did not have a significant reduction in gross receipts compared to 2019).

However, when President Biden signed the $1.2 trillion Infrastructure Investment and Jobs Act on November 15, 2021, this legislation included an early retroactive termination of the employee retention credit as of September 30, 2021 (except for wages paid by a recovery startup business, for which the credit will continue through the end of this year).

Net Operating Losses:

The CARES Act reverts the TCJA's limitation on the deductibility of net operating losses arising on or after the 2018 taxable year from 80 percent of taxable income to 100 percent and allows for a five-year carryback of net operating losses incurred in the 2018, 2019 and 2020 taxable years.

Individual Relief:

Charitable Deductions:

The CARES Act increased the adjusted gross income limitation for cash contributions made to qualifying charitable organizations (i.e., not supporting organizations or donor advised funds, and not most private foundations) from 60 percent to 100 percent of adjusted gross income and permitted taxpayers claiming the standard deduction to deduct (as an above-the-line deduction) $300 of cash contributions made to qualifying charitable organizations each year. For 2021, the Consolidated Appropriations Act extended the charitable contribution limitation, i.e., for those who itemize their deductions, 100 percent of adjusted gross income, and for those who don't itemize their deductions, an allowance for up to $300 of an individual taxpayer's charitable contributions to qualify as an above-the-line deduction ($600 for married taxpayers who file joint returns). According to the IRS, cash contributions to most charitable organizations qualify, but not the following: cash contributions made either to supporting organizations or to establish or maintain a donor advised fund and also cash contributions to most private foundations, and cash contributions to charitable remainder trusts.

Excess Business Loss Limitation:

The CARES act repealed the excess business loss limitation under IRC Section 461(l) created by the TCJA. This section was intended to take effect for tax years beginning after December 31, 2017 and before January 1, 2026, but the CARES Act retroactively delayed the implementation of Section 461(l) until tax years beginning after December 31, 2020. Until the CARES Act, certain losses generated by a trade or business in 2018 could only be used to offset up to $250,000 of non-trade or business income realized by an individual taxpayer (or $500,000 for married taxpayers filing jointly) and additional losses would be carried forward. The excess business loss limitation returns for taxable years beginning in 2021, but the threshold amounts are $262,000 (or $524,000 in the case of a joint return).

Business Interest Limitation:

Prior to the enactment of the CARES Act, certain taxpayers were only permitted to deduct business interest for a given taxable year up to the greater of (1) the taxpayer's business interest income; (2) 30 percent of the donor's adjusted taxable income; or (3) floor plan financing interest. The CARES Act increased the 30 percent limit on the donor's adjusted taxable income to 50 percent for 2019 and 2020. Taxpayers with average gross receipts of less than $25 million (adjusted for inflation) over the prior three years are not subject to the business interest limitation. This Section 163(j) limitation returned to 30 percent for 2021.

Retirement Plans and Accounts:

The CARES Act provided that "qualified individuals" are eligible to withdraw up to $100,000 from qualified plans in 2020, giving such qualified individuals three years to recontribute such distribution to the qualified plan to unwind the taxability of such distribution (and the Consolidated Appropriations Act provided a similar withdrawal exemption through June 25, 2021, avoiding the 10 percent additional tax for distributions received before age 59 1/2). If a qualified individual does not recontribute such distribution, the distribution will be subject to federal income tax, which will be paid ratably over a three-year period. To the extent that funds are recontributed, the ratable tax for the taxable year of the recontribution will be offset, and any excess may be carried forward to a subsequent taxable year or carried back to a prior year by filing an amended return for that prior year.

In addition, the CARES Act (i) suspended a taxpayer's 2020 required minimum distribution (RMD) from a defined contribution retirement plan or IRA, and (ii) suspended a taxpayer's 2019 RMD for taxpayers required to take a first time RMD in 2019 by no later than April 1, 2020. IRS Notice 2020-51 permitted taxpayers who took said RMDs prior to the enactment of the CARES Act to rollover the RMDs previously taken into an IRA by August 31, 2020. However, in addition to changes made by the SECURE Act, RMDs returned in 2021.

The American Rescue Plan Act (ARP)

The American Rescue Plan Act — one of the largest stimulus packages in history — was signed into law on March 11, 2021 as a $1.9 trillion economic stimulus to counter the adverse economic impacts of COVID-19 and to build upon many of the measures of the CARES Act and the Consolidated Appropriations Act. Among many other things, the ARP provided relief to businesses in the form of loans and tax benefits, as well as to individuals in the form of stimulus checks, unemployment benefits and tax benefits. The key provisions of the ARP as they relate to businesses and individuals are summarized below.

Expanded Unemployement Benefits

Under the ARP, the $300 weekly unemployment benefits were extended through September 6, 2021, preventing benefits from expiring on March, 31, 2021. The ARP also makes the first $10,200 of unemployment benefits received in 2020 not taxable for households with incomes below $150,000.

Direct Payments to Individuals

The ARP provided $1,400 direct payments to individuals. However, as a result of pressure from Senator Manchin, the ARP phased out these payments for high-income taxpayers, including some who received stimulus checks in previous rounds under the CARES Act and the Consolidated Appropriations Act.

Tax Provisions

The ARP expanded the child tax credit from $2,000 per child to $3,000 per child up to age 17 and $3,600 per child under age six. The ARP also made the credit fully refundable.

Further, the ARP expanded the earned income tax credit by removing the upper age limit and lowering the lower age limit to 19. The maximum benefit for adults not claiming a qualifying child will also be increased to $1,502. These provisions are for 2021 only. A permanent change was made to raise the limit on investment income from $3,650 to $10,000, indexed for inflation, and to allow adults with children who do not qualify to claim the credit to claim it for themselves.

For large corporations and wealthy individuals, the ARP limits publicly traded companies' ability to deduct executive compensation from their corporate taxes, repeals the right for multinational corporations additional discretion in accounting for interest expenses, and extends the "loss limitation" restrictions on unincorporated businesses.

For small businesses, the ARP granted $28.6 billion for the Restaurant Revitalization Fund and an additional $7 billion for PPP.

The Build Back Better Plan

Overview

At the time of this writing, much is in flux regarding potential changes to the private wealth practice area. Previously, we had seen a proposal from the House of Representatives Ways and Means committee that would have significantly impacted our practice area, including (1) reducing the estate, gift, and GST tax exemption amounts back to the 2010 level of $5 million, indexed for inflation, (2) treating transactions with grantor trusts as taxable events for income tax purposes and including the value of grantor trusts in the grantor's estate for estate tax purposes, (3) eradicating certain valuation discounts for gift tax purposes, (4) eliminating the basis step-up at death, (5) imposing GRAT limitations, and (6) imposing a wealth tax on unrealized capital gains. However, after numerous developments in Congress, that initial proposal now seems more ambitious than the legislation that may ultimately be enacted. While much remains to be seen, a summary of the proposed changes that are currently being discussed as part of

the BBB Plan follows. We will of course issue another advisory at such time as any change does in fact occur, but in the meantime, everyone should bear in mind that any or all of these changes are under consideration.

Income Surcharge Tax

Currently, the BBB Plan provides for an income surcharge tax of 5 percent for individual taxpayers with a modified adjusted gross income exceeding $10 million, plus an additional 3 percent surcharge tax for individual taxpayers with a modified adjusted gross income exceeding $25 million. Modified adjusted gross income is defined as adjusted gross income less investment interest expense. However, when applied to estates and trusts, the threshold amounts are much lower. The 5 percent surcharge tax would apply to estates and trusts with over $200,000 modified adjusted gross income and the additional 3 percent surcharge tax would apply to estates and trusts with over $500,000 modified adjusted gross income. This appears to be an attempt by Congress to incentivize distributing trust income.

Retirement Accounts

There are also proposed changes for large retirement accounts. Beginning in 2029, regardless of a taxpayer's age, taxpayers earning more than $400,000 (or $450,000 for joint filers) with a combined traditional IRA, Roth IRA and defined contribution retirement account balance exceeding $10 million would be required to withdraw 50 percent of the balance over $10 million. For any aggregate traditional IRA, Roth IRA and defined contribution retirement plan balance over $20 million, 100 percent of the excess over $20 million must be withdrawn from Roth accounts up to the lesser of (1) the amount needed to bring the total balance of such accounts below $20 million and (2) the aggregate balance of the taxpayer's Roth accounts. Additionally, for such high-income taxpayers, the new provisions would prohibit any additional contributions to traditional and Roth IRAs if the aggregate balance of a taxpayer's retirement accounts exceeds $10 million.

SALT Deductions

Under the current BBB Plan, the $10,000 cap on SALT deductions would be increased to $80,000, which would be applicable in 2021 and continue through 2030.

Likelihood of Enactment of the BBB Plan

Whether any of the measures included in any of the iterations of the BBB Plan will become law has yet to be seen. As of now, the House has a Democratic majority, while the Senate is split 50-50 between the Republicans and the Democrats. While Biden will need at least 10 Republicans to cross the aisle to pass any measure, the Democrats could attempt to pass the BBB Plan through "Budget Reconciliation," which is a streamlined process for approving bills impacting revenue or spending and requires only a simple majority for passage. With a Senate divided 50-50, the tie-breaking vote would be in the hands of Vice President Kamala Harris, and the BBB Plan could be passed into law. Even were that the case, however, it is unclear what measures in the BBB Plan would receive unanimous Democratic support in the Senate, and what the final BBB Plan will look like (as noted above, it has changed significantly in the past few months). Finally, one needs to consider the effective date of any measures in the BBB Plan that may ultimately be enacted. Typically tax legislation is prospective and might not be effective until January 1, 2022 or later (depending upon how long the enactment process takes). Sometimes, however, tax legislation is retroactive, in which case it would either be effective as of the date of introduction (which would in all events be sometime after the inauguration) or possibly even effective as of January 1, 2021.

Important Cases Decided in 2021

Estate of Morrissette v. Comm'r, T.C. Memo. 2021-60

In *Morrissette II*, the Tax Court determined the viability of an economic benefit split-dollar transaction that attempted to substantially reduce the size of the taxpayer's estate. Despite favorable rulings for the taxpayer on certain 2036, 2038, and 2703 issues, the Tax Court assessed a 40 percent gross valuation misstatement penalty on the split-dollar receivable, calling into question whether intergeneration split-dollar planning will be utilized by practitioners on a going-forward basis.

The Morrissette family owned Interstate Group Holdings, Inc. (Interstate), a national moving and storage business and, despite all of the family strife, desired to keep ownership within the family. In an effort to keep the business within the family, and to ultimately equalize the ownership among the parents' three children, the family formalized succession plan that involved amending the mother's revocable trust and making payments of $30 million to three dynasty trusts created for the children. The dynasty trusts purchased $58 million in life insurance on the lives of the children and entered into a split-dollar agreement with the mother's revocable trust. Under the terms of the split-dollar agreements, in return for contributing the premiums, the mother's revocable trust was to receive the greater of the premiums it paid or the cash surrender value of the policy on the death of the insured or the split-dollar agreement's termination. The dynasty trust, in turn, would receive the net death benefit (the difference between the death benefit and the amount owed to the mother's revocable trust under the split-dollar agreement). For estate tax purposes, the mother's estate valued the $30 million of premiums at roughly $7.5 million.

The IRS attempted to argue that the full $30 million of the premium payments should be includable in the mother's estate, or alternatively the $32.6 million cash surrender value of the underlying policies under Internal Revenue Code Sections 2036(a)(1), 2036(a)(2), and 2038.

The Tax Court held that neither Internal Revenue Code Section 2036 nor Section 2038 would effect a clawback of any amounts transferred from the mother's revocable trust pursuant to the split-dollar agreements because the transfers qualified for the bona fide sale exception to both sections. The Tax Court further held that the cash surrender values of the underlying policies weren't included in the mother's estate under Section 2703 because there was a bona fide business arrangement that was born from serious and long-standing business needs for the mother's trust to have entered into the split-dollar agreements.

Those favorable rulings notwithstanding, the Tax Court adopted the discounted cash flow method to determine the fair market value of the split-dollar rights. In analyzing the rights, the Tax Court noted that the policies were structured with high cash values and low death benefits, which would mean that most of the investment would return on an early termination. Additionally, in planning the structure, the family's advisors suggested additional discounts that could be taken. The Tax Court took a very negative view on this practice, and suggested that the entire structure was "marketed" to reduce estate taxes. Lastly, the Tax Court noted that the family had control over the determination of when the policies would be surrendered. Normally, life expectancies would gover the valuation of a split-dollar receivable in an economic benefit split-dollar arrangement, which would have provided a much longer time period (and a much lower current value) than the four year period in Morrissette. The Tax Court accordingly held the value of the rights was equal to about $7.5 million, and further held that the mother's estate was liable for a 40 percent gross valuation misstatement penalty, regardless of any reasonable reliance on counsel defense because they had known the claimed value was unreasonable and not supported by the facts.

Estate of Michael J. Jackson v. Comm'r, T.C. Memo 2021-48

In *Jackson*, the Tax Court issued its long-awaited opinion regarding the valuation of Michael Jackson's right of publicity (including his image and likeness) as well as his interests in two separate trusts that held his ownership interests in Sony/ATV (NHT II) and Mijac Music (NHT III). On the estate's tax return, Jackson's estate valued his

image and likeness at $2,105 and the interests in the two trusts at $0 (NHT II) and $2,207,351 (NHT III). After an audit of Jackson's estate, the IRS issued a notice of deficiency, asserting that Jackson's image and likeness was actually worth $434,264,000, NHT II was actually worth $469,005,086, and NHT III was actually worth $60,685,944. This would have been an underpayment of estate tax by approximately $500 million and penalties of roughly $200 million.

In ultimately determining that Jackson's image and likeness was worth $4,153,912, NHT II was worth $0, and NHT III was worth $107,313,561, the Tax Court's ruling and commentary provides practitioners, clients, and valuation experts with valuable insight regarding a number of issues they must address when obtaining valuations.

Reliance on historical financials versus management projections to forecast cash flows when performing an income approach.

In determining the value of NHT II using an income approach and discounted cash flow method, the Tax Court looked at whether it was more appropriate to predict the future with the historical financials or with the prediction of a third party that had an interest in getting it right. The Tax Court noted that projections of future cash flow, if made by businessmen with an incentive to get it right, are more likely to reflect reasonable estimates of the short- to medium-term effects of the wild changes in the music industry than even experts, much less judges, are unlikely to intuit correctly. The Tax Court accordingly favored the estate's position on this particular valuation.

Accounting for taxes when performing an income approach

In valuing all three of the assets in question, the Tax Court looked at whether tax affecting was taken into account in the valuations. Because pass-through entities do not pay tax at the entity level, their projected cash flows will not account for any tax consequences. The Tax Court acknowledged that "if, in determining the present value of any future payment, the discount rate is assumed to be an after-shareholder-tax rate of return, then the cash flow should be reduced ('tax affected') to an after-shareholder-tax amount. If, on the other hand, a preshareholder-tax discount rate is applied, no adjustment for taxes should be made to the cash flow." Citing *Estate of Jones v. Commissioner*, T.C. Memo. 2019-101, the Tax Court further stated that "[t]here has, it seems, been only one case where we allowed tax affecting in a valuation.

Reliance on information known or knowable as of the valuation date

In its opinion, the Tax Court often rejected the use of certain information on the basis that valuations must rely on information that is known or knowable as of the valuation date. In particular, the commissioner's expert, Weston Anson, said that while he didn't rely on events after Jackson's death in his valuation, he did look at them to assess the reasonableness of his projections. In rejecting the commissioner's expert's testimony, the Tax Court stated that "[w]e also find that Anson included revenue streams that were unforeseeable at the time of Jackson's death. Even if these potential revenue streams were traceable to Jackson's image and likeness, they were not foreseeable when Jackson died, which means we should not include them in the estate's gross value."

The commissioner's expert was not the only expert relying only on what wasn't necessarily known or knowable at the valuation date. The Tax Court noted that the estate's expert, Owen Dahl, relied heavily on a 2011 research paper from the University of Zurich, which included the death of Jackson in its study and would not have been available at the time of death, to determine the amount of a post-death spike.

Credibility of the valuation experts and the information they rely upon

Relying on information that was or wasn't known or knowable at the time of the valuation date wasn't the only aspect of the experts' testimony that was disqualifying. The Tax Court also took issue with the experts' credibility based on the statements they made while testifying.

As it related to the commissioner's expert's credibility, the Tax Court noted that his credibility suffered greatly at trial, documenting at least two areas of his testimony that were "lies." Nevertheless, the Tax Court allowed his expert testimony anyway, finding that excluding Anson's testimony as the sole expert witness for the commissioner was "too severe" a consequence. Instead, the Tax Court simply discounted the credibility and weight given to his opinions.

The Tax Court also took issue with the estate's expert's credibility, noting that "Dahl failed to adequately explain his reasoning or methodology, and we even spotted several blatant mathematical errors… This persistent divergence between his verbal explanations and his numbers undermine Dahl's overall credibility."

As a result of the lack of credibility between both experts, the Tax Court ultimately rejected both experts' opinions and determined that the value of NHT III and Jackson's image and likeness were somewhere in the middle of what both the estate and the commissioner asserted.

Important Planning Considerations for 2021 and 2022

Given the changes implemented by the TCJA and the potential for the implementation of some iteration of the BBB Plan in 2021, taxpayers should review their existing estate plans and consult with their tax advisors about how, where appropriate, to best take advantage of the higher exemption amounts while they are, in all events, available. The following is a summary of several items that should be considered:

Review Formula Bequests

Many estate plans utilize "formula clauses" that divide assets upon the death of the first spouse between a "credit shelter trust," which utilizes the client's remaining federal estate tax exemption amount, and a "marital trust," which qualifies for the federal estate tax marital deduction and postpones the payment of federal estate taxes on the assets held in the marital trust until the death of the surviving spouse. While the surviving spouse is the only permissible beneficiary of the marital trust, the credit shelter trust may have a different class of beneficiaries, such as children from a prior marriage. With the TCJA's increase in the exemption amounts, an existing formula clause could potentially fund the credit shelter trust with up to the full federal exemption amount of $11.7 million in 2021 and $12.06 million in 2022. This formula could potentially result in a smaller bequest to the marital trust for the benefit of the surviving spouse than was intended or even no bequest for the surviving spouse at all. There are many other examples of plans that leave the exemption amount and the balance of the assets to different beneficiaries. Taxpayers should review any existing formula clauses in their current estate plans to ensure they are still appropriate given the increase in the federal exemption amounts and the implications of the potential sunset of these exemption amounts. In addition, taxpayers should consider alternative drafting strategies, such as disclaimers, to maintain flexibility in their plans.

Income Tax Basis Planning

Taxpayers should consider the potential tradeoffs of utilizing the increased exemption amounts during their lifetimes to gift assets to others, as opposed to retaining appreciated assets until their death so that those assets receive a stepped-up income tax basis. Taxpayers may want to consider retaining low basis assets, which would then be included in their taxable estates and receive a step-up in income tax basis, while prioritizing high-income tax basis assets for potential lifetime gift transactions. In addition, if a trust beneficiary has unused federal estate tax exemption, consideration should be given to strategies that would lead to low-income tax basis assets currently held in trust, and otherwise not includible in a beneficiary's taxable estate, being included in the beneficiary's taxable estate, such as:

- granting the beneficiary a general power of appointment over the trust assets;

- utilizing the trust's distribution provisions to distribute assets directly to the beneficiary, so that the assets may obtain a step-up in basis upon the death of the beneficiary to whom it was distributed; or
- converting a beneficiary's limited power of appointment into a general power of appointment by a technique commonly known as "tripping the Delaware tax trap."

Consequently, the assets included in the beneficiary's estate would receive a step up in income tax basis at the beneficiary's death and would take advantage of the beneficiary's unused federal estate tax exemption amount. Whether these techniques should be implemented depends on a careful analysis of the basis of the assets held in trust and the beneficiary's assets and applicable exclusion amounts, and should be discussed with advisors.

529 Plan Changes

The TCJA expanded the benefits of 529 Plans for federal income tax purposes. Historically, withdrawals from 529 Plans have been free from federal income tax if the funds were used towards qualified higher education expenses. Under the TCJA, qualified withdrawals of up to $10,000 can now also be made from 529 Plans for tuition in K-12 schools. As a result, the owner of the 529 Plan can withdraw up to $10,000 per beneficiary each year to use towards K-12 education. The earnings on these withdrawals will be exempt from federal income tax under the TCJA. However, because each state has its own specific laws addressing 529 Plan withdrawals, and not all states provide that withdrawals for K-12 tuition will be exempt from state income taxes, taxpayers should consult with their advisors to confirm the rules in their respective states.

Planning to Utilize Increased Federal Exemptions

Given that the increased federal exemption amounts are currently set to sunset at the end of 2025, it may be prudent to make use of these increased amounts before they disappear (with the caveat that the law may, of course, change, and as part of a deal to make other changes, the exemptions may remain where they are). Depending on the ultimate makeup of the BBB Plan, and its potential for passage in 2021, it may be prudent to make use of the increased amount in 2021 and/or early in 2022.

Gifting Techniques to Take Advantage of the Increased Applicable Exclusion Amount

Taxpayers may want to consider making gifts to utilize the increased federal exclusion amount. It is less expensive to make lifetime gifts than to make gifts at death, because tax is not imposed on dollars used to pay gift tax, but estate tax is imposed on the dollars used to pay estate tax. In addition, taxpayers may benefit by removing any income and appreciation on the gift from their estate. However, taxpayers should seek advice if they have used all of their applicable exclusion amount and would pay federal gift tax on any gifts. Making gifts that result in significant gift tax payments may not always be advisable in the current environment.

A countervailing consideration of lifetime gifting is that the gifted assets will not get a step-up in basis upon death (as would assets held at death) and will thus generate capital gains tax if they are subsequently sold for an amount higher than their basis. Accordingly, the decision of whether and how to embark on a lifetime gifting strategy depends on a number of factors, including the bases of the transferor's various assets, their projected income and appreciation, the total amount of the transferor's assets, and the transferor's remaining applicable exclusion amount. For individuals with assets far exceeding their applicable exclusion amounts, lifetime gifting of high-basis assets generally may be recommended. However, individuals with total assets close to or below their applicable exclusion amounts should exercise caution before making gifts of low basis assets. Instead, those individuals should consider holding their assets until death in order to achieve a step-up in basis upon death while minimizing estate taxes. Of course, maintaining a comfortable standard of living is a factor that also must be considered. We are available to discuss this analysis with you in more detail.

If undertaking a gifting strategy, gifts to utilize the increased exemption may be made to existing or newly created trusts. For instance, a taxpayer could create a trust for the benefit of the taxpayer's spouse (a spousal lifetime access trust, or a SLAT) and gift assets to the SLAT utilizing the taxpayer's increased federal exemption amounts. The gifted assets held in the SLAT should not be includible in the taxpayer's or spouse's respective taxable estates, and distributions could be made to the spouse from the SLAT to provide the spouse with access to the gifted funds, if needed, in the future. Of course, marital stability needs to be considered. Additionally, gifts could be made by a taxpayer to dynasty trusts (to which GST exemption is allocated), which would allow the trust property to benefit future generations without the imposition of estate or GST tax.

Absent legislative reform, the federal applicable exclusion amount will increase by $360,000 ($720,000 for a married couple) in 2022. Therefore, even if a taxpayer uses some or even all of the available applicable exclusion amount before the end of 2021, additional gifts may be made in 2022 without paying any federal gift tax. Based on current law, the applicable exclusion amount also will be adjusted for inflation in future years. Those residents in Connecticut should be mindful that Connecticut is the only state with a state-level gift tax.

Other Techniques to Take Advantage of the Increased Applicable Exclusion Amount

In addition to making gifts to utilize the increased exemption, below is a summary of several other broadly applicable recommendations:

- **Sales to Trusts.** Taxpayers should also consider using the increased federal exemption amounts through gifts to grantor trusts followed by sale transactions to such grantor trusts for a down payment and a note for the balance while interest rates are at historic lows. The increased federal exemption may provide a cushion against any asset valuation risk attendant with such sales. Taxpayers who enter into such sale transactions should consider taking advantage of the adequate disclosure rules to start the three-year statute of limitations running.
- **Loan Forgiveness/Refinancing.** If taxpayers are holding promissory notes from prior estate planning transactions, from loans to family members, or otherwise, they should consider using some or all of the increased federal exemption amounts to forgive these notes. Alternatively, consideration should be given to refinancing existing notes at the current, historically low interest rates.
- **Allocation of GST Exemption to GST Non-Exempt Trusts. I**f a taxpayer's existing estate plan utilizes trusts that are subject to GST tax (GST non-exempt trusts), consideration should be given to allocating some or all of the taxpayer's increased GST exemption amount to such trusts.
- **Balancing Spouses' Estates.** For married taxpayers, if the value of the assets owned by one spouse is greater than the increased federal exemption amounts and greater than the value of the assets owned by the other spouse, consideration should be given to transferring assets to the less propertied spouse. Such a transfer would provide the less propertied spouse with more assets to take advantage of the increased federal exemption amounts, especially the increased GST exemption, which is not portable to the surviving spouse upon the first spouse's death. Taxpayers should be mindful, however, that transfers to non-US citizen spouses are not eligible for the unlimited marital deduction for federal gift tax purposes, and such transfers should stay within the annual exclusion for such gifts ($159,000 in 2021) to avoid federal gift tax. Note that the annual exclusion for gifts (to donees other than a spouse) is $15,000 in 2021.
- **Life Insurance.** Taxpayers may wish to review or reevaluate their life insurance coverage and needs with their insurance advisors.
- **Other Planning Options.** Taxpayers should also consider other means for utilizing the increased federal exemption amounts, such as triggering a transfer under Section 2519 of the Code of a surviving spouse's qualified terminal interest property in a marital trust or the formation and funding of an entity that purposely violates Code Section 2701, in each case utilizing the increased federal gift tax exemption amount.

Review and Revise Your Estate Plan to Ensure it Remains Appropriate

As noted above, any provisions in wills and trust agreements that distribute assets according to tax formulas and/or applicable exclusion amounts should be reviewed to ensure that the provisions continue to accurately reflect the testator's or grantor's wishes when taking into account the higher applicable exclusion amounts. Consideration should also be given to including alternate funding formulas in wills or trust agreements that would apply if the federal estate tax exemption amounts do sunset in 2026.

Additionally, in light of the increased exemption amounts, taxpayers should also consider whether certain prior planning is now unnecessary and should be unwound, such as certain qualified personal residence trusts (QPRTs), family limited partnerships (FLPs) and split-dollar arrangements.

Allocation of GST applicable exclusion amounts should be reviewed to ensure that it is utilized most effectively if one wishes to plan for grandchildren or more remote descendants. In addition, due to the increased GST exemption amounts available under the TCJA, allocation of some or all of one's increased GST exemption amounts to previously established irrevocable trusts that are not fully GST exempt may be advisable.

Taxpayers should continue to be cautious in relying on portability in estate planning, as portability may not be the most beneficial strategy based on your personal situation. In addition, a deceased spouse's unused exclusion (DSUE) may not be available upon remarriage of the surviving spouse. However, portability may be a viable option for some couples with estates below the combined exemption amounts. Portability can be used to take advantage of the first spouse to die's estate tax exemption amount (which, for taxpayers dying before 2026, should be $10 million adjusted for inflation), as well as obtain a stepped up basis at each spouse's death. Portability can also be used in conjunction with a trust for the surviving spouse (a QTIP trust) in order to incorporate flexibility for post-mortem planning options. Factors such as the asset protection benefits of utilizing a trust, the possibility of appreciation of assets after the death of the first spouse to die, the effective use of both spouses' GST exemption, and state estate tax should be discussed with advisors in determining if relying on a portability election may be advisable.

Same-sex couples should continue to review and revise their estate planning documents and beneficiary designations now that same-sex marriages must be recognized by every state as well as by the federal government. Same-sex couples may want to ensure that the amount and structure of any bequests to the spouse are appropriate, as well as consider the benefits of split-gifting for gift tax purposes. Same-sex couples should also consider amending previously filed federal estate, gift and income tax returns and state income tax returns, as well as reclaiming applicable exclusion and GST exemption amounts for transfers between the spouses made before same-sex marriages were recognized for federal tax purposes (assuming any applicable statutes of limitations have been tolled).

Unmarried couples should particularly continue to review and revise their estate planning documents and beneficiary designations, as since the advent of same sex marriage, it is now clear that domestic partners, even if registered as such, do not qualify for the federal (and in many cases state) tax and other benefits and default presumptions that are accorded to married couples.

Finally, in view of the potential sunset of many pertinent provisions of the TCJA, estate plans should provide for as much flexibility as possible. As noted above, formula bequests should be reviewed to ensure they are appropriate under current law and consideration should be given to granting limited powers of appointment to trust beneficiaries to provide flexibility for post-mortem tax planning. A Trust Protector (or Trust Protector committee) may also be appointed to give a third party the ability to modify or amend a trust document based on changes in the tax laws or unforeseen future circumstances, or to grant certain powers to trust beneficiaries that may have tax advantages under a new tax regime (such as the granting of a general power of appointment to trust beneficiaries in order to obtain a stepped-up basis in trust assets at the beneficiary's death).

Mitigate Trust Income Tax and Avoid the Medicare Surtax With Trust Income Tax Planning

Non-grantor trusts should consider making income distributions to beneficiaries. Trust beneficiaries may be taxed at a lower taxed rate, especially due to the compressed income tax brackets applicable to non-grantor trusts. Additionally, a complex, non-grantor trust with undistributed annual income of more than $12,500 (adjusted for inflation, so the $13,050 threshold will increase in 2022) will be subject to the 3.8 percent Medicare surtax. However, some or all of the Medicare surtax may be avoided by distributing such income directly to beneficiaries who are below the individual net investment income threshold amount for the Medicare surtax ($200,000 for single filers, $250,000 for married couples filing jointly and $125,000 for married individuals filing separately).

Careful evaluation of beneficiaries' circumstances and tax calculations should be made to determine whether trusts should distribute or retain their income.

Transfer Techniques

Many techniques that have been utilized in prior years continue to be advantageous planning techniques under the TCJA. Due to potential sunsetting of many applicable provisions of the TCJA, consideration should be given to planning that minimizes the risk of paying current gift taxes but still allows taking advantage of the increased exemptions amounts to shift assets and appreciation from the taxable estate. Additionally, consideration should be given to selling hard-to-value assets due to the increased exemption available to "shelter" any valuation adjustment of these assets upon audit. Lifetime gifting and sales transactions remain very important in providing asset protection benefits for trust beneficiaries, shifting income to beneficiaries in lower tax brackets, and providing funds for children or others whose inheritance may be delayed by the longer life expectancy of one's ancestors.

Grantor Retained Annuity Trusts (GRATs)

Grantor retained annuity trusts (GRATs) remain one of our most valuable planning tools, particularly in times of historically low interest rates. Due to the current historically low interest rates and the fact that prior administrations' presidential budget proposals frequently called for adverse changes in how GRATs may be structured (while initial versions of the BBB Plan called for changes in this regard, and more, the current iteration of the BBB Plan does not address GRATs), consideration should be given to creating GRATs as soon as possible. Under current law, GRATs may be structured without making a taxable gift. Therefore, even if one has used all of his or her applicable exclusion amount, GRATs may be used without incurring any gift tax. Because GRATs may be created without a gift upon funding, they are an increasingly attractive technique for clients who want to continue planning to pass assets to their descendants without payment of gift tax in the uncertain tax environment.

A GRAT provides the grantor with a fixed annual amount (the annuity) from the trust for a term of years (which may be as short as two years). The annuity the grantor retains may be equal to 100 percent of the amount the grantor used to fund the GRAT, plus the IRS-assumed rate of return applicable to GRATs (which for transfers made in November 2020 is 1.40 percent). As long as the GRAT assets outperform the applicable rate, at the end of the annuity term the grantor will be able to achieve a transfer tax-free gift of the spread between the actual growth of the assets and the IRS assumed rate of return. Although the grantor will retain the full value of the GRAT assets, if the grantor survives the annuity term, the value of the GRAT assets in excess of the grantor's retained annuity amount will then pass to whomever the grantor has named, either outright or in further trust, with no gift or estate tax.

Sales to Intentionally Defective Grantor Trusts (IDGTs)

Sales to intentionally defective grantor trusts (IDGTs) have become an increasingly popular planning strategy due to the increased exemption amounts under the TCJA.

In utilizing a sale to an IDGT, a taxpayer would transfer assets likely to appreciate in value to the IDGT in exchange for a commercially reasonable down payment and a promissory note from the trust for the balance. From an income tax perspective, no taxable gain would be recognized on the sale of the property to the IDGT because it is a grantor trust, which makes this essentially a sale to one's self. For the same reason, the interest payments on the note would not be taxable to the seller or deductible by the trust.

If the value of the assets grows at a greater pace than the prevailing applicable federal rate (which for sales in November 2020 is as low as 0.17 percent for a short-term note), as with a GRAT, the appreciation beyond the federal rate will pass free of gift and estate tax. Due to the current low interest rates, now is an opportune time to structure sales to IDGTs.

The current environment creates a window of opportunity for sales to grantor trusts. The increased federal exemption amounts may provide a cushion against any asset valuation risk attendant to such sales. Additionally, the increased exemption amounts permit the sale of a substantially larger amount of assets to grantor trusts. Typically, grantor trusts should be funded with at least 10 percent of the value of the assets that will be sold to the trust. With the higher exemption amounts, those who have not used any of their exemptions could contribute up to $11.7 million (or $23.4 million, if splitting assets with a spouse) to a grantor trust in 2021. This would permit the sale of up to $117 million (or $234 million) of assets to the trust in exchange for a promissory note with interest at the appropriate AFR.

Consider a Swap or Buy-Back of Appreciated Low Basis Assets from Grantor Trusts

If a grantor trust has been funded with low basis assets, the grantor should consider swapping or buying-back those low basis assets in exchange for high-basis assets or cash. If the grantor sold or gave (through a GRAT or other grantor trust) an asset with a low basis, when that asset is sold, the gain will trigger capital gains tax. However, if the grantor swaps or purchases the asset back from the grantor trust for fair market value, no gain or loss is recognized. The trust would then hold cash or other assets equal to the value of the asset that was repurchased. Alternatively, many grantor trust instruments give the grantor the power to substitute the trust's assets with other assets, which would allow the low basis assets to be removed from the trust in exchange for assets of equal value that have a higher basis. Then on the grantor's death, the purchased or reacquired asset will be included in the grantor's taxable estate and will receive a step-up in basis equal to fair market value, eliminating the income tax cost to the beneficiaries. Those whose estates may not be subject to estate taxes due to the current high exemption amounts may utilize swaps or buy-backs to "undo" prior planning strategies that are no longer needed in today's environment.

Consider the Use of Life Insurance

Life insurance presents significant opportunities to defer and/or avoid income taxes, as well as provide assets to pay estate tax or replace assets used to pay estate tax. Generally speaking, appreciation and/or income earned on a life insurance policy accumulates free of income taxes until the policy owner makes a withdrawal or surrenders or sells the policy. Thus, properly structured life insurance may be used as an effective tax-deferred retirement planning vehicle. Proceeds distributed upon the death of the insured are completely free of income taxes. Taxpayers should consider paying off any outstanding loans against existing policies in order to maximize the proceeds available tax-free at death, although potential gift tax consequences must be examined. Note that the decision to pay off such loans requires a comparison of the alternative investments that may be available with the assets that would be used to repay the loans and the interest rate on the loans.

Use Intra-Family Loans and Consider Re-Financing Existing Intra-Family Loans

Because interest rates are currently low (and the exemption amounts are so high), many techniques involving the use of intra-family loans should be considered, including:

- The purchase of life insurance on the life of one family member by an irrevocable life insurance trust, with premium payments funded by loans from other family members.
- The creation of trusts by older generation members for the benefit of younger family members, to which the older generation members loan funds. The spread between the investment return earned by the trust and the interest owed will create a transfer tax-free gift.
- Forgiving loans previously made to family members. The amount that is forgiven in excess of the annual gift tax exclusion amount will be a gift and thus will use a portion of one's applicable gift tax and/or GST tax exclusion amount. This may be a beneficial strategy considering the increased exemption amounts.

Installment Sale to Third Party Settled GST Tax-Exempt Trust

Unique planning opportunities and transfer tax benefits may be available if a relative or friend of the taxpayer has an interest in creating and funding a trust for the benefit of the taxpayer and/or the taxpayer's family. For example, a third party grantor (e.g., a relative or friend of the taxpayer) could contribute cash to a trust for the benefit of the taxpayer, allocate GST tax exemption to that gift, and then that trust could purchase assets from the taxpayer in exchange for such cash and a secured promissory note in the remaining principal amount of assets purchased. While this sale could result in payment of capital gains tax to the taxpayer (ideally at an earlier, lower value), this planning could present the following potential benefits:

- there should be no transfer tax concerns for the third party grantor if the grantor's other assets, even when added to the value of the foregoing gift, would not be sufficient to cause the estate tax to apply at the grantor's death (this depends on what the estate tax exemption amount is at the grantor's subsequent death);
- the taxpayer could receive a step up in basis as of the date of the initial sale;
- the taxpayer could be a beneficiary, hold a limited power of appointment over, and control who serves as trustee, of the trust; and
- the appreciation in the value of the asset being sold from the date of the initial sale above the interest rate on the promissory note (e.g., 0.86 percent is the mid-term AFR for a sale done in November 2020) would accrue transfer tax free for the benefit of the taxpayer and/or the taxpayer's family; and
- the trust could be structured in such a way as to provide protection from the taxpayer's creditors and remove the trust assets from the taxpayer's and his/her family members' taxable estates.

In order to achieve the foregoing benefits, it is important that only the third party grantor makes any gratuitous transfers to the trust and that the third party grantor not be reimbursed for any such transfers.

Purposely Triggering Application of Section 2701

A taxpayer may desire to utilize the increased gift and estate tax exemption prior to the scheduled sunset and may also desire to shift appreciation on this amount to a trust for the benefit of the taxpayer's children that is removed from the estate tax system. This desire may be met with hesitation to part with $11.7 million of assets. The taxpayer may also be concerned about losing cash flow from the transferred assets and not having the option of taking the property back if needed in the future. Finally, the taxpayer may also have concerns that assets available for transfer have a low-income tax basis, which will carry over if a traditional gift is made.

A planning alternative exists which can potentially address each of these concerns. The strategy is to create and fund a preferred partnership, which is structured to purposely violate Section 2701 of the Code.

Assume taxpayer gifts $1.1 million to an irrevocable trust for the benefit of the taxpayer's children (Family Trust). Taxpayer and the Family Trust create a preferred partnership (PP). Taxpayer transfers to the PP $9.9 million of low basis assets in exchange for a preferred interest, entitling the taxpayer to a 5 percent non-cumulative preferred

return and the right to put the preferred interest to the PP for an amount equal to its associated capital account. The Family Trust contributes $1.1 million to the PP in exchange for a common interest, entitling the Family Trust to all cash flow above the 5 percent payment made to the preferred interest and all appreciation on the PP's assets.

Structuring the preferred interest in this manner violates Section 2701 of the Code. The result is a deemed gift of $9.9 million, which combined with the taxpayer's gift of $1.1 million to the Family Trust means the taxpayer has consumed $11 million of gift and estate tax exemption. Also, when the taxpayer dies, the preferred interest will be included in the taxpayer's estate under Section 2033 of the Code, resulting in an income tax basis step up of the preferred interest. The estate tax calculation will include a reduction in the taxpayer's tentative taxable estate of $9.9 million, to account for the prior taxable gift and avoid double taxation.

This structure has addressed each of the taxpayer's concerns. The taxpayer has consumed the increased exemption amount but has done so in a manner that preserves an income tax basis step up. The taxpayer has also retained a 5 percent return on the preferred interest and the right to put the interest back to the PP and take back the value of the taxpayer's capital account. Finally, cash flow above the 5 percent preferred return and appreciation on the PP's assets have been shifted to the Family Trust free of transfer taxes.

Gifts to a preferred partnership may become the target of future anti-abuse regulations. Anti-abuse regulations could cause the original gift to the preferred partnership to be included in the donor's estate for federal estate tax purposes. Gifts made prior to the adoption of any potential anti-abuse regulations are not likely to be "grandfathered" or otherwise protected from the potential anti-abuse regulations because it is likely that the regulations applicable to such a gift would be the regulations in effect at the time of the donor's death. While clients may wish to utilize a preferred partnership structure to consume an increased exemption amount, it is important to take into consideration the potential risk that future anti-abuse regulations may create.

Consider Charitable Planning

As noted above, the TCJA increased the AGI percentage limit for cash contributions to public charities from 50 percent to 60 percent. Because of the increased percentage limitation, consideration should be given to accelerating charitable giving to possibly obtain a current income tax deduction and potentially reduce one's taxable estate (of both the contributed asset, as well as future appreciation).

A planning tool that is very effective in a low interest rate environment is a Charitable Lead Annuity Trust (CLAT), which combines philanthropy with tax planning. A CLAT is an irrevocable trust that pays one or more named charities a specified annuity payment for a fixed term. At the end of the charitable term, any remaining assets in the CLAT pass to the remainder, noncharitable beneficiaries. As with a GRAT, to the extent the assets outperform the IRS assumed rate of return (1.4 percent for November), those assets can pass transfer tax free to the chosen beneficiaries. Alternatively, a strategy that works better in a high interest rate environment is a Charitable Remainder Annuity Trust (CRAT). A CRAT is an irrevocable trust that pays an annual payment to an individual (typically the grantor) during the term of the trust, with the remainder passing to one or more named charities. The grantor may receive an income tax deduction for the value of the interest passing to charity. Because the value of the grantor's retained interest is lower when interest rates are high, the value of the interest passing to charity (and therefore the income tax deduction) is higher. A CRAT may become an attractive option if interest rates rise.

The Qualified Charitable Distribution rules were made permanent by the Tax Hikes (PATH) Act of 2015 on December 18, 2015. The PATH Act permanently extended the ability to make IRA charitable rollover gifts, which allow an individual who is age 70 1/2 or over to make a charitable rollover of up to $100,000 to a public charity without having to treat the distribution as taxable income. Other types of charitable organizations, such as supporting organizations, donor advised funds, or private foundations, are not eligible to receive the charitable rollover. Therefore, if a taxpayer needs to take a required minimum distribution for 2021, he or she may arrange

for the distribution of up to $100,000 to be directly contributed to a favorite public charity and receive the income tax benefits of these rules. Due to new limitations on itemized deductions (i.e., the cap on the state and local tax deduction), some taxpayers may no longer itemize deductions on their personal income tax returns. Without itemizing deductions, these taxpayers could not receive the income tax benefit of a charitable deduction for charitable contributions. The Qualified Charitable Distribution rules allow taxpayers who are claiming a standard deduction to still obtain a financial benefit from charitable donations.

Year-End Checklist for 2021

In addition to the above planning ideas, consider the following before 2021 is over:

- Make year-end annual exclusion gifts of $15,000 ($30,000 for married couples).
- Make year-end IRA contributions.
- Create 529 Plan accounts before year-end for children and grandchildren and consider front-loading the accounts with five years' worth of annual exclusion gifts, taking into account any gifts made during the year to children and grandchildren.
- Pay tuition and non-reimbursable medical expenses directly to the school or medical provider.
- Consider making charitable gifts (including charitable IRA rollovers) before year-end to use the deduction on your 2021 income tax return.

Below is an overview of national, international and local developments that occurred in 2021.

International Developments in 2021

Uncertainty is once again in clear sight. The Internal Revenue Service (IRS) and Treasury Department (Treasury) continue to prioritize which international tax aspects of the post-TCJA Code deserve regulatory attention, particularly in the wake of the IRS slow-down due to the COVID-19 pandemic. At the same time, the US House of Representatives, the US Senate, and President Biden have been trying — at times together and at times separately — to write new tax legislation. Currently, as previously discussed, the most developed proposal on the table is the BBB Plan. All the while, practitioners in the international private client field have been navigating various iterations of the tax legislative proposals, predicting their chance of being passed, and advising their clients in light of the uncertainty. Below is a snapshot of the proposals in the most recent iteration of the BBB Plan affecting the international private client landscape as of the date of this publication.

Income Surcharge Tax

As previously discussed, the BBB Plan provides for an income surcharge tax of 5 percent for individual taxpayers with a modified adjusted gross income exceeding $10 million, plus an additional 3 percent surcharge tax for individual taxpayers with a modified adjusted gross income exceeding $25 million. These surcharges hit estates and trusts particularly hard, with the 5 percent surcharge tax applying to estates and trusts with over $200,000 of modified adjusted gross income and the additional 3 percent surcharge tax applying to estates and trusts with over $500,000 of modified adjusted gross income.

It is clear from the proposed language that the income surcharge tax generally applies to any taxpayer other than a corporation; however, special rules apply to non-resident aliens (viz., non-US individuals who are not holders of a so-called "green card" or not otherwise resident in the US for income tax purposes), as well as US citizens or residents eligible for the foreign earned income exclusion under Section 911. For non-resident aliens, the income surcharge tax only applies to income that is effectively connected with the conduct of a United States trade or business. As such, these income surcharge taxes will not apply to most capital gains earned by non-resident aliens (which continue to enjoy tax-free treatment), as well as passive income such as interest and dividends. For US

citizens or residents eligible for the foreign earned income exclusion under Section 911, the dollar amount used in calculating the income surcharge tax is reduced by the excess of the amounts excluded from gross income under Section 911 over the amount of deductions disallowed under Section 911(d)(6).

What is unclear in respect of the proposed legislation is how the income surcharge tax would apply to a foreign non-grantor trust. Presumably, since Section 641(b) treats a foreign non-grantor trust as a non-resident alien individual for purposes of computing its taxable income, the income surcharge tax would only apply to income earned by a foreign non-grantor trust that is effectively connected to the conduct of a United States trade or business. Notwithstanding, it seems that a foreign non-grantor trust would be subject to the lower dollar thresholds in determining the surcharge tax (e.g., 5 percent if it has over $200,000 of modified adjusted gross income and 3 percent if it has over $500,000 of modified adjusted gross income).

Portfolio Interest

The portfolio interest exemption is a very common planning tool for international private wealth attorneys in the context of tax planning into the United States. Such exemption has provided a means to pay US source interest on a tax-free basis, provided that certain criteria are met. One of such criteria is that the interest may not be received by a "10 percent shareholder." Where the debtor is a US corporation, a "10 percent shareholder" under existing law is any person who owns 10 percent or more of the *voting power* of all classes of stock in such debtor corporation. This, of course, lends itself to a common planning tool because the definition does not include *value*. In other words, a non-US person could theoretically own all of the value of a domestic corporation, loan money to that same corporation, and strip out interest on such loan, so long as such non-U. person owned less than 10 percent of the voting power of such corporation (taking into account constructive attribution rules). The BBB Plan intends to close this planning strategy by now including *value* in the definition of "10 percent shareholder." Such amendment would be effective for obligations issued after the date of enactment of the BBB Plan. If enacted, many non-US persons holding debt instruments that are structured in the planning strategy above will now need to rely on treaty relief for exemption or a reduced rate of withholding tax on the US source interest associated with the loan, or be prepared to be subject to the normal 30 percent tax that applies to this type of income.

Changes Impacting U.S. Shareholders of Controlled Foreign Corporations

Over the past three years, the IRS and Treasury have been working to clarify various aspects of the TCJA as it relates to Section 951A (which created a tax on global intangible low-taxed income (GILTI)) and the removal of Section 958(b)(4) (which precluded downward attribution of ownership in a controlled foreign corporation (CFC) from a non-United States person to a United States person). The BBB Plan would create additional complexity with the changes it is suggesting to the application of GILTI as well as the reinstatement of former Section 958(b)(4).

GILTI

The changes to GILTI are mainly technical and generally aimed at increasing revenue to support other non-tax provisions in the BBB Plan. For example, effective for tax years beginning after December 31, 2022, the BBB Plan reduces to the deduction allowed under Section 250 of the code in respect of GILTI from 50 percent to 28.5 percent. Additionally, the BBB Plan requires that the GILTI computation be done on a country-by-country basis, which effectively narrows the planning opportunities currently available since GILTI is calculated on a worldwide basis in respect of CFCs. Moreover, the BBB Plan decreases the percentage of the deemed tangible return on qualified business asset investment (QBAI) excluded from tested income from 10 percent to 5 percent. In other words, this percentage reduction causes more tested income, which correspondingly increases the amount of tax on GILTI.

Reinstatement of Section 958(b)(4) of the Code

The TCJA's removal of Section 958(b)(4) had far-reaching implications that Congress never anticipated, which in turn forced the IRS and Treasury to clarify how such removal impacted a multitude of international private client structures and nuanced provisions in the code. The BBB Plan will reinstate Section 958(b)(4), as well as create several new definitions to address the initial purpose behind removing Section 958(b)(4) under the TCJA—attacking certain tax planning maneuvers involving inverted companies (described below).

In short, prior to the TCJA, certain strategies were used by an inverted US company with respect to the inverted US company's foreign subsidiaries. Under these strategies, following an inversion of a US company, the new foreign parent company would make a greater than 50 percent investment in the inverted US company's foreign subsidiaries, resulting in such subsidiaries ceasing to constitute CFCs. By removing Section 958(b)(4) under the TCJA, such foreign subsidiaries would continue to constitute CFCs because the inverted US company would be treated as owning the stock in the foreign subsidiaries owned by the foreign parent. Treasury promulgated detailed regulations to articulate this complexity due to the removal of Section 958(b)(4).

The new BBB Plan proposes to reinstate Section 958(b)(4) and create a new Section 951B. Proposed Section 951B directly addresses the inversion strategy highlighted above, creating definitions such as "foreign controlled foreign corporation" and "foreign controlled United States shareholder." Treasury will be required to provide guidance as to the application of this new Section 951B, but at least it appears Congress' approach is to enact a new section of the code to attack the specific problem (the inversion strategy) rather than make a surgical edit—removing Section 958(b)(4) — to fix such problem (while seemingly creating many more).

Foreign Tax Credits

The BBB Plan proposes to add a new Section 904(e), which would require that the foreign tax credit be determined on country-by-country basis within each separate limitation category based on so-called "taxable units." In other words, the new provision assigns items of income and loss to a certain "taxable unit" based on tax residency in a foreign country (whether that be an entity or branch), then the new provision aggregates all taxable units tied to such foreign country. In addition, the BBB Plan proposes to repeal the foreign branch income basket; this repeal may be intended to supplement the fact that the tax tied to a specific foreign branch should theoretically be picked up via the taxable unit concept previously mentioned. In addition to the foregoing, the one-year foreign tax credit carryback would be eliminated, but the 10-year foreign tax credit carryforward period would remain (which is a change from a previous iteration of the BBB Plan that proposed to reduce the carryforward period to five years). That said, while foreign tax credits in the GILTI basket would be permitted to be carried forward, such credits would be subject to a special five-year limitation where the tax was paid or accrued in tax years beginning after December 31, 2022 and before January 1, 2031, after which time the normal 10-year carryforward would apply. The changes to foreign tax credits as well as the changes to the calculation of GILTI income reflect an overarching trend in the United States' approach to cross-border taxation toward a country-by-country tax calculation, which no doubt ties into the movement toward a global minimum corporate tax.

In light of the evolving (but narrowing) tax legislative landscape, please contact your Katten international private wealth attorneys for assistance and guidance in addressing existing structures — and planning for new structures — when the dust settles with Congressional negotiations and the final tax proposals become enacted law, if not sooner, based upon the structure of your estate plan and US income tax strategy.

Local Developments in 2021: State-Specific Considerations

California

Small Business Relief Act and the SALT Deduction Workaround

Prior to the 2018 tax year an individual taxpayer could deduct certain state and local taxes (including state income taxes) for federal tax purposes. The TCJA capped the SALT deduction at $10,000 per year until the end of 2025. The limitation imposed by the TCJA had a disproportionate impact on taxpayers in high tax states such as California.

In order to counteract the effect of the TCJA on California taxpayers, California's legislature passed Assembly Bill 150 which established the Small Business Relief Act. The act allows qualifying entities required to file tax returns in California to make an election to pay a pass-through entity tax of 9.3 percent on qualified net income, as opposed to the income tax being passed through to the individuals who own the entity. This SALT workaround gives eligible pass-through owners a tax credit to be applied to their personal California income tax. For federal income tax purposes, the entity level tax reduces the pass-through's net income, which in turn reduces the net income of the pass-through owners on their federal income tax returns.

Qualified entities include entities taxed as a partnership or S corporations where such entity's partners, shareholders, or members in a taxable year are exclusively corporations or taxpayers. R&TC section 19902(a). Qualified entities do not include publically traded partnerships, an entity owned by a partnership, or an entity that is permitted or required to be in a combined reporting group. R&TC section 19902(b).

A pass-through tax election is irrevocable. If an entity opts in to the tax, the tax is deductible by the entity for federal tax purposes and allows eligible entity owners to elect to have the entity pay the tax on the owner's share of the entity's income which in effect works around the SALT limitation applied to the individual taxpayers. Eligible entity owners include individuals, trusts, estates, and corporations, and excludes partnerships.

California's workaround to the SALT limitation will be in effect for tax years beginning January 1, 2021 and ending January 1, 2026. If the Federal SALT deduction limitation is repealed, the pass-through entity tax would become inoperative on the following January 1.

For the tax year beginning on or after January 1, 2021 and before January 1, 2022, the elective 9.3 percent tax is due and payable on or before the due date of the original tax return for the entity without regard to any extensions — March 15, 2022 for a calendar year entity. For tax years beginning on or after January 1, 2022, the tax payments will be due in the following two installments:

- The first installment is due on or before June 15 of the taxable year, and the amount due is the greater of either 50 percent of the elective tax paid the prior taxable year, or $1,000.
- The second installment is due on or before the due date of the original return without regard for any extensions and equals the remaining tax due for the tax year.

If any payment is not remitted timely, the qualifying entity forfeits its pass-through entity tax election for that tax year.

The consenting pass-through entity owners can also claim a nonrefundable credit for the amount of tax paid on the owner's distributive share of the entity's net income. The credit is allowed in full for residents, non-residents and part-year residents and is not required to be pro-rated. The unused credits can be carried forward for up to five years.

Americans for Prosperity Foundation v. Bonta: End of Requirement to Disclose Donors by Non Profit Organizations

The US Supreme Court issued its ruling in *Americans for Prosperity Foundation v. Bonta*, No. 19-251 on July 1 concerning California's requirement for the disclosure of major donors by nonprofit charitable organizations. Under California law, the Attorney General maintains a registry of charitable organizations in California that solicit tax deductible contributions from California residents. As a condition of registration the Attorney General requires that renewing charities submit a complete copy of IRS Form 990, including Schedule B on which 501(c)(3) organizations report the names and contributions of donors who contributed more than $5,000 in a particular year or more than 2 percent of the organizations' total contributions. California's stated reason for the requirement is to investigate and deter charitable misconduct or fraud.

In *Americans for Prosperity Foundation v. Bonta*, petitioners were two conservative tax-exempt charities, Americans for Prosperity Foundation and the Thomas More Law Center, that solicit contributions in California and are subject to the Form 990 Schedule B reporting mandate. Since 2001, each petitioner had renewed its registration and had filed a copy of its Form 990 with the Attorney General. However, to preserve their donors' anonymity, the petitioners had declined to file unredacted Schedule B forms. The California Attorney General had, as the court put it, not been zealous in enforcing the Schedule B requirement for some time, but in 2010 the state increased its enforcement of charities' Schedule B disclosure obligations, and the Attorney General ultimately threatened the petitioners with suspension of their registrations and fines for noncompliance. The charities sued, alleging that the compelled disclosure requirement violated their First Amendment rights and the rights of their donors. They prospectively alleged that disclosure of their unredacted Schedule B's, would make their donors less likely to contribute and would subject them to the risk of intimidation.

The district court ruled in favor of the charities, applying an "exacting scrutiny" standard, which requires a "substantial relation between the disclosure requirement and a sufficiently important governmental interest," and holding that the disclosure requirement of Schedule B was not "narrowly tailored" to the state's interest in investigating charitable misconduct. The court found little evidence that the state relied on the information contained on the Schedule B's to detect fraud, and found that the disclosure burdened the charities' First Amendment right of association. The court also found that California was unable to ensure the confidentiality of donors' information, as prior information required to be held confidential had been accidently released by the AG's office.

The Ninth Circuit Court of Appeals reversed, also applying an exacting scrutiny standard but finding that the district court erred in applying a narrow tailoring requirement and reasoned that the disclosure regime satisfied exacting scrutiny because the up-front collection of charities' Schedule B's promoted investigative efficiency and effectiveness. The panel also found that the disclosure of Schedule B's would not meaningfully burden donors' associational rights.

The Supreme Court reversed and remanded in a 6-3 opinion along ideological lines finding that California's disclosure requirement is facially invalid. Much of the court's opinion concerns the "exacting scrutiny" standard, which the court held applies to First Amendment challenges to compelled disclosure. In so doing the court held that while exacting scrutiny does not require that the governmental disclosure requirement be the least restrictive means of achieving its goal, it does require that it be "narrowly tailored to a sufficiently important governmental interest." The court found the Ninth Circuit erred in not applying a narrow tailoring requirement and found that California's up-front collection of donor names was not narrowly tailored because in most cases the disclosures did not assist California in combating fraud and that California fell short of overcoming the countervailing burden on the free association rights of the charitable organizations.

***Breslin v. Breslin:* Compelled Attendance at Private Mediation and Forfeiture of Inheritance Rights**

In *Breslin v. Breslin*, (2021) 62 Cal.App.5th 801, California's Fifth District Court of Appeal controversially and radically altered the probate court's power to compel trust beneficiaries to attend private mediation and held that beneficiaries are bound by the resulting settlement if they receive notice of the mediation but elect not to attend.

In *Breslin*, David Breslin was the successor trustee of decedent Don Kirchner's trust, which had been amended and restated on November 1, 2017. The restated trust made certain specific gifts and directed the residue of the trust estate to be distributed to persons and charities listed on exhibit A. However, the restated trust did not include an Exhibit A. Breslin did find a document titled "Estate Charities (6/30/2017)" in a pocket of Kirchner's estate planning binder, which listed 24 charities with handwritten notations thought to be percentages that each beneficiary would be entitled to from the trust estate. Breslin filed a petition to be confirmed as successor trustee and to determine the beneficiaries of the trust, providing notice to all of the charities listed on the Estates Charities (6/30/2017) document. Of the 24 charities receiving notice, only three filed responses to the petition. The probate court confirmed Breslin as the successor trustee and ordered the interested parties attend a mediation, including Kirchner's intestate heirs and all 24 charities who received notice of the petition. One such charity sent notice of the mediation to all interested parties. The notice included the following warning:

"Mediation may result in a settlement of the matter that is the subject of the above-referenced cases and of any and all interested persons' and parties' interests therein. Settlement of the matter may result in an agreement for the distribution of assets of the above-referenced Trust and of the estate of Don F. Kirchner, Deceased, however those assets may be held. Settlement of the matter may also result in an award of attorneys' fees to one or more parties under *Smith v. Szeyller* (2019) 31 Cal.App.5th 450 [242 Cal.Rptr.3d 585]. Interested persons or parties who do not have counsel may attend the mediation and participate.

"Non-participating persons or parties who receive notice of the date, time and place of the mediation may be bound by the terms of any agreement reached at mediation without further action by the Court or further hearing. S*mith v. Szeyller* [, supra,] 31 Cal.App.5th 450 ... Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.

"All represented parties (or his, her or their counsel) and all unrepresented parties that intend to participate in the mediation are requested to advise the undersigned of his, her or their intention to be present and participate by making contact via either email ... or U.S. Mail. Notice to participate in mediation will not be accepted via telephone."

Only five of the charities attended the mediation along with the intestate heirs. The appearing parties reached a settlement that awarded specific amounts to various parties, including the appearing charities, and attorney fees with the residue to the intestate heirs. The settlement did not include the parties who failed to appear. One of the appearing charities filed a petition to approve the settlement, which was granted by the probate court over the objections of certain non-participating charities. The probate court denied the charities' objections on grounds that the charities did not file a response to Breslin's petition, and did not appear at mediation, having received notice of both.

In affirming the probate court's order approving the settlement, a divided Fifth District Court of Appeal found that the probate court has statutory authority to order parties into mediation under its discretionary powers set forth in Probate Code section 17206, which confers on the probate court the discretion to "make any orders and take any other action necessary or proper to dispose of the matters presented by the petition." The appellate court held that the probate court acted within its authority in ordering the charities to attend mediation as a prerequisite to an evidentiary hearing on the factual issues, such as the intent of the settlor. By failing to participate in mediation, the appellants waived their right to an evidentiary hearing and forfeited their interest in the proceedings. The appellate court further held that the trustee did not breach his fiduciary duties by entering into the agreement, even though he benefitted from it, because he provided notice of the mediation and an opportunity to participate to all interested persons.

Following its ruling, the Fifth District Court of Appeal denied a request that the case be decertified for publication, ensuring that the decision is, for now, good law. Moving forward, any clients attending a California mediation in which the rights of a beneficiary will be impacted, must be mindful to send out a notice of mediation to all current and future beneficiaries of a trust or will to put such beneficiaries on notice that failure to attend mediation may result in their forfeiture of their inheritance rights. Clients must be similarly advised to participate in any court ordered mediations in which they have or may have an interest. The pre-mediation Breslin notice is already being used to great effect by probate litigators in their efforts to settle around recalcitrant beneficiaries when resolving disputes over trusts and estates.

Non Resident Entities Invested in California: Interpretation of *Swart Enterprises, Inc v. Franchise Tax Board*

Foreign or non-resident entities doing business in California are required to pay the same annual $800 franchise tax that is payable by domestic LLCs, as well as the same annual fees based on gross income that is derived from or attributable to California. California Revenue and Taxation Code R&TC sections 17941, 17942(a) and 18633.5.

Pursuant to R&TC section 23101(a), a taxpayer is considered to be "doing business" in California if it is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Section 213101 was revised in 2012 to include R&TC section 23101(b) which provides that, for taxable years beginning on January 1, 2011, a taxpayer is doing business in California if it satisfies certain bright-line nexus thresholds, including: (1) The taxpayer is organized or commercially domiciled in this state; (2) Sales of the taxpayer in this state exceed the lesser of $500,000 or 25 percent of the taxpayer's total sales; (3) The real property and tangible personal property of the taxpayer in this state exceed the lesser of $50,000 or 25 percent of the taxpayer's total real property and tangible personal property; or (4) The amount paid in this state by the taxpayer for compensation exceeds the lesser of $50,000 or 25 percent of the total compensation paid by the taxpayer.

On January 12, 2017, the appeals court issued a published decision in *Swart Enterprises, Inc. v. Franchise Tax Board 7* Cal. App. 5th 49. In *Swart*, an Iowa Corporation, Swart Enterprises, Inc. (Swart) operated a small farm in Kansas, and had no physical presence in California. Swart's sole connection to California was through an investment of $50,000 in Cypress Equipment Fund XII, LLC (Cypress LLC) in which Swart became a member with a 0.2 percent ownership interest. Cypress LLC was formed in California in 2005 for the purposes of acquiring, holding, leasing, and disposing of capital equipment. Cypress LLC was manager-managed, and its articles of organization and operating agreement gave the manager exclusive and complete authority in the management and control of the business. Members other than the manager were prohibited from taking part in the control or operation of the business, and they had no right or authority to act on behalf of or bind Cypress LLC. In 2009 and 2010 Cypress LLC elected to be taxed as a partnership under federal and state law.

In 2010, Swart passively held its 0.2 percent investment. However, based on its ownership interest in Cypress LLC, the Franchise Tax Board (FTB) demanded that Swart file a California corporate franchise tax return for the tax year ending June 30, 2010, and pay the $800 minimum franchise tax due on that return. Swart paid the tax, which amounted to $1,106 with penalties and interest, but contested it and requested a refund, which was denied by the FTB. Swart timely filed a complaint seeking a refund and declaratory relief. The trial court entered an order granting summary judgment to Swart. The FTB filed a notice of appeal.

On appeal, a California Courts of Appeal, held in favor of Swart finding that Swart was not doing business in the State of California. The court held that passively holding a 0.2 percent ownership interest, with no right of control over the business affairs of the LLC, does not constitute "doing business" in California within the meaning of section 23101. The court noted that Swart's interest in Cypress LLC closely resembled that of a limited, rather than general, partnership as evinced by the fact Swart had no interest in the specific property of Cypress LLC, it was not personally liable for the obligations of Cypress LLC, it had no right to act on behalf of or to bind Cypress LLC and, most importantly, it had no ability to participate in the management and control of Cypress LLC.

In response to the *Swart* decision, on February 28, 2017, the FTB issued Notice 2017-01. In this notice, FTB explained that it would not appeal the *Swart* decision and would follow it in situations with the same facts. Notice 2017-01 also provided that to the extent taxpayers believe their situation has the same facts as in *Swart*, they should take that into consideration in determining if they have a California tax return filing obligation and/or whether to file a claim for refund, as appropriate. Finally, Notice 2017-01 provided that in any claim for refund, taxpayers should cite the holding in Swart and explain how their factual situation is the same as the facts in Swart.

In the Matter of Consolidated Appeals of LA Hotel Investments

On May 13, the California Office of Tax Appeals (OTA) issued a decision concerning the effect of R&TC section 23101(b) on non-resident entities doing business in the State of California. In *LA Hotel Investments*, two LLCs, LA Hotel Investments #3, LLC (Hotel #3) and LA Hotel Investments #2, LLC (Hotel #2) were organized in Louisiana and were not registered to do business in California. Hotel #3 had a 5.41 percent interest in Irvine Center Hotels, LLC (Irvine Center), in 2013. Hotel #2 had a 2.56 percent interest in Tustin Gateway SPE LLC (Tustin Gateway), in 2013 and a 5.13 percent interest in both Irvine Center and Tustin Gateway in 2014 and 2015. Both Irvine Center and Tustin Gateway were California LLCs that owned hotel properties in Orange County, California. Hotel #2 timely paid the $800 annual LLC tax for the years 2013, 2014, and 2015. Hotel #3 late paid the $800 annual LLC tax for the year 2013.

Hotel #3 filed a refund claim for the $800 tax it paid for 2013 and Hotel #2 filed refund claims for all three years. Both hotels filed their claims pursuant to the *Swart* decision and stated they were not doing business in California in those tax years under R&TC section 23101(a).

The OTA held that Section 23101(a) was not the relevant statutory authority. Rather, based on the percentage interests held by both Hotel #3 and Hotel #2 in the Irvine Center, the OTA determined that each of Hotel #3 and Hotel #2 had a distributive share of California real and tangible property in excess of the $50,000 “nexus” threshold under R&TC section 23101(b)(3), and both were doing business in California. The OTA found that even though Hotel #3 and Hotel #2 were “passive” investors they were still liable for the annual LLC tax for the tax years at issue.

Non-resident taxpayers can be treated as doing business in California and can be subject to California’s $800 annual LLC tax even if they are passively invested in real estate in California through domestic companies if there is a sufficient nexus pursuant to R&TC section 23101(b). The protections afforded by the Swart decision are only applicable to cases where a non-resident taxpayer has similar facts to that of the taxpayer in Swart and where the taxpayer does not satisfy the provisions on section 23101(b).

***Conservatorship of Farrant:* Fiduciary Relationship Not Required to Order a Party to Account**

In *Conservatorship of Farrant* 2d Civil No. B307338, the Second District Court of Appeal held that a fiduciary relationship between the parties is not required to state a cause of action for accounting and the right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant’s relationship with the plaintiff, the defendant is obliged to surrender. Further, the appellate court held that the probate court did not abuse its discretion in denying appellant’s request for an evidentiary hearing under the circumstances.

In *Farrant*, Norma executed a durable power of attorney in 2008 granting her son, Duane, broad authority to manage her estate. In 2015, a Missouri court ordered Duane to account for all transactions he had conducted on behalf of Norma from September 2014 to September 2015.

In 2017, a conservator was appointed over Norma’s person and estate, and the conservatee’s daughter, Diana, filed a petition to compel Duane to account for his actions on Norma’s behalf from September 2014 to the date of filing. The California probate court ordered Duane to prepare a formal accounting for the period of September 2014 through January 2018 to be filed by March 30, 2018 and to set forth transactions concerning Norma’s pension. After

Duane failed to file the accounting, the court set an order to show cause regarding Duane's failure to file for October 2018 and ordered Duane's personal appearance. At the hearing on the order to show cause, Duane failed to appear and the court set an order to show cause why sanctions should not be imposed for failure to file an accounting and for failure to appear. An accounting was ordered for December 2018. On January 29, 2019, Duane still had not filed the accounting and the court imposed sanctions of $1,000 per day until the accounting was filed. On May 31, Duane filed an accounting attaching blank pages of bank statements that were fully redacted and omitting any reference to Norma's pension. Duane was ordered to file a supplemental accounting and failed to do so. In July 2020, Duane appeared in court and insisted he could explain his litany of failures to provide the court with a proper accounting and to otherwise comply with court orders and requested an evidentiary hearing to present his proof. The court denied the request for an evidentiary hearing and ordered Duane to pay $63,448.90 and sanctions in the amount of $121,000 to the conservatorship estate.

Duane appealed the court's decision and argued that the court erred in ordering an accounting because Duane was not in a fiduciary relationship with the conservatorship estate. The appellate court affirmed the probate court's decision finding that it is within the discretion of the probate court to order an accounting, and the only prerequisite is that some relationship exists that requires one. The mere fact that Duane owed a debt to the conservatorship estate was sufficient grounds to order an accounting. Duane further argued that the court's decision to deny him an evidentiary hearing was an abuse of discretion. Again, the court disagreed, finding that Duane had failed to specify the factual issues he intended to litigate at the hearing, or explain why a hearing was necessary, nor did he identify the witnesses who would testify at the evidentiary hearing or make an offer of proof as to the substance of the evidence he would present at the hearing.

Illinois

Illinois Notary Public Act Revisions

On July 26, Illinois Senate Bill 2664 was signed into law as Public Act 102-160. Most of these changes to the Illinois Notary Public Act (Notary Act) will not take effect until the earlier of January 1, 2022, and the announcement of administrative rules by the Secretary of State. However, there are three revised provisions of the Notary Act that will not take effect until July 1, 2022 (Sections 1-106, 2-103, and 2-106).

This major revision of the Notary Act authorizes the use of both Remote Ink Notarizations (RINs) and Remote Online Notarizations (RONs). The Notary Act provides for a new course requirement to become a notary public and electronic notary public, as well as a new journaling requirement. Generally speaking, a RIN is a procedure whereby the notary public physically affixes the required information and notary stamp to a copy of the executed instrument, whereas with a RON, the notarial act is completed using exclusively electronic means (i.e., there is no "original" physical notary stamp).

As the Notary Act stands currently, without any further guidance from the Secretary of State, RINs require that the notary public and the person whose signature is being notarized be physically in the State of Illinois. There are several administrative requirements that must be satisfied in order for the notarization to be valid (e.g., the remote notarial must take place over a real-time, two-way audio-visual platform, the remote notarial act must be recorded and the recording maintained for at least three years, the signatory must attest to being located in the state of Illinois, each page of the document that is being notarized must been shown on camera). Upon completion, the signatory must send the entire signed document to the notary public by email, fax or overnight delivery no later than the day after the document was executed. The notary public must then execute the transmitted copy within 24 hours of receipt and execute the original copy within 30 days of the remote notarization.

RONs allow for the notary public to notarize the document electronically and the Notary Act provides for some of the same standards as the RINs. The electronic notary public must confirm that any technology used must be

preregistered and secure. During RONs, the electronic notary public must be in the state of Illinois during the electronic notarization but, in contrast to RINs, the signer(s) of the document(s) only need to be in the United States (aside from some small exceptions).

Due to the fact that there is such weight given to the guidelines that will be released by the Secretary of State in order to implement the changes proposed under the Notary Act, the full scope of the revision is still unknown.

Electronic Wills and Remote Witnesses Act

On July 26, Governor Pritzker signed into law the Electronic Wills and Remote Witnesses Act (EWRWA). In contrast to the Notary Act, the EWRWA became effective immediately upon signing. The EWRWA has two main purposes: (a) to allow electronic wills to be executed in Illinois; and (b) to provide a mechanism in Illinois for remotely witnessing wills and other documents. The most notable application of EWRWA is that Illinois now allows electronic wills (a relatively recent phenomena that is being considered or has already been enacted in a handful of other states). Electronic wills are wills that are created and maintained in a "tamper-evident" electronic record. In order for a will to qualify as tamper-evident, the documents must be electronic in nature, but also display any revisions made to the document. This is a security measure put in place to stop the fraudulent creation of electronic wills and provides for common products such as DocuSign to qualify for the creation and storage of these type of wills.

The general requirements to electronically sign a will are similar to those of signing a paper will (i.e., the formal execution requirements), the major difference being that the execution occurs over a real-time, two-way, audio-visual electronic platform.

As for the procedure for remote execution of wills, the process is relatively similar to those processes outlines in Governor Pritzker's previously entered executive orders, with a bit more clarity and flexibility in some aspects. All remotely executed wills must designate Illinois as the place of execution, be signed by the testator or someone in the testator's presence (whether through videoconference or physical presence) and at the testator's direction, and be witnessed by two or more credible, disinterested witnesses who are present via videoconference and located in the United States. Note that the testator may be located anywhere during the execution; it is only required that the witnesses be in the United States.

The witnesses are both required to provide statements which indicate that: (a) the witness was present and saw the testator sign the will in the presences of the witness and the testator acknowledged to the witness the act of signing, (b) the will was attested to by said witness in the presence of the testator, (c) the witness believed the testator to be of sound mind and memory at the time of signing, and (d) the witness is a remote witness and the witness must indicate how said witness was able to identify the testator. These statements can be made in a variety of ways, including testimony in court or an affidavit attached to the will.

After the testator and witnesses have all executed the will, the testator has 10 business days to attach each of the witnesses' signature pages (and any written statements/affidavits prepared by the witnesses as discussed above) to the will signed by the testator.

The testator and the witnesses should be able to establish a real-time videoconference that is sufficient to allow each of them to know the testator and witnesses are all signing simultaneously. Illinois is also one of a few states that allows for both electronic and wet-ink signatures in remote singings of wills — while many states only allowed electronic signatures.

The requirements for witnessing documents other than a will (including trusts and powers of attorney) are a slightly less stringent, but still require real-time, two-way videoconferencing. The signatures of the principal and witnesses may be on the same or different pages provided the master document is compiled within 10 business days.

Illinois Residential Real Property Transfer on Death Act Revisions

On July 9, Governor Pritzker signed a bill amending the Illinois Residential Real Property Transfer on Death Instrument Act (Act) to be effective January 1, 2022. Historically, the Act has allowed the transfer of residential real estate through a transfer on death instrument (TODI), allowing residential real estate to be transferred at death without going through probate. The amendment most significantly expands the scope of the Act to commercial real estate — the owner of a commercial building may now transfer the building through a TODI and avoid probate at death.

The amendment introduces a few new things into the Act and clarifies some preexisting provisions. The amendment introduces the concept of renunciation by an owner's surviving spouse to a TODI. If a surviving spouse renounces the TODI, it is given the same treatment as a renunciation of a will (the spouse is entitled to one-third of the real estate if the owner also left a descendant or one-half if there is no descendant).

The amendment clarifies that if the beneficiary of a TODI is a trust, the trust must be either: (i) in existence when the owner executed the TODI, (ii) created under the owner's will, (iii) created by the TODI or (iv) created under the will of another individual if that individual predeceases the owner.

The amendment also retains the requirement that a licensed attorney draft the TODI but eliminates the requirement that the attorney be licensed in Illinois. However, the amendment specifies that despite this requirement, the Act does not prevent an owner from preparing his or her own TODI.

Overall, while the amendment to the Act adds a few new concepts and clarifies others, the expansion of the Act to include commercial real estate will likely have the biggest reach.

Trailer Bill for Illinois Trust Code

The Illinois Trust Code (ITC) became effective on January 1, 2020. On August 6, 2021, Governor Pritzker signed the ITC "trailer bill" into law to be effective January 1, 2022. The trailer bill provides some technical tweaks (which is common after the introduction of significant legislation) but also makes some substantive changes now that the Illinois Trust Code is in use.

Some of the more noteworthy changes include changes to the default and mandatory rules, trust creation, judicial modifications to achieve settlor's objectives and a trustee's duty to inform and account.

Default and Mandatory Rules: The trailer bill enumerates an additional exception to when the terms of a trust prevail over any provision of the ITC. Specifically, for trusts becoming irrevocable after the effective date of the ITC (i.e., January 1, 2020), a trust instrument cannot remove a beneficiary's right to request the portions of the trust instrument that set forth the terms of the trust in which the qualified beneficiary has an interest. That said, the trailer bill makes clear that a beneficiary does not have a right to request the entire trust instrument, but only the portion relevant to the beneficiary's interest, if the trust instrument so provides.

Trust Creation: The trailer bill adds two more methods by which a trust can be created. The first method added is by order of a court and the second method is by an authorized fiduciary exercising the powers granted in Article 12 of the ITC, which involves decanting.

Judicial Modifications to achieve settlor's objectives: The trailer bill modifies this section so not only can trusts be modified to achieve tax objectives, but now, trusts can be modified to allow the settlor to qualify for government benefits. These modifications can also be made retroactively. This can make administration of a trust significantly easier by allowing modification of existing trusts to qualify for programs such as Medicaid instead of requiring the formation of a new and separate trust.

Trustee's Duty to Inform and Account: The trailer bill clarifies which section of the ITC will control concerning the trustee's duty to inform and account, which will vary based on when the trust was created or when a trustee of a revocable trust began acting. A trustee's duty to inform and account under Section 813.1 applies to all trusts that became irrevocable after the effective date of the ITC and to all revocable trusts except those with a trustee who accepted their trusteeship before the effective date of the ITC. Alternatively, a trustee's duty to inform and account under Section 813.2 applies to all trusts created before the effective date of the ITC and to a trustee of a revocable trust who accepted their trusteeship before the effective date of the ITC.

***Dilenbeck v. Dilenbeck-Brophy*, 2020 IL App. (3d) 190541 (December 18, 2020)**

In *Dilenbeck*, two grantors created a joint revocable trust for the benefit of their three daughters. The trust contained an *in terrorem* clause as well as special provisions dealing with disputes. Upon the death of both grantors, one of the daughters was appointed sole trustee. In an attempt to begin the testamentary administration of the trust, the trustee relied on an appraisal report regarding the valuation of stock owed by the trust. All assets were to be distributed in equal shares to the three daughters. The two remaining daughters (i.e., the "non-trustee" daughters) opposed the appraisal and sought to have an independent trustee appointed to value the stock. The trustee (i.e., one of the daughters) filed a complaint seeking to enforce the trust's *in terrorem* clause and disinherit the other two daughters. At issue for the trial court was whether the trustee, in her capacity as trustee, had the authority to file said complaint.

The trust instrument included special provisions to resolve disputes and conflicts of interests between the beneficiaries of the trust. These provisions provided that a "Special Co-Trustee" may unilaterally resolve any dispute, claim or conflict between beneficiaries and a trustee. The provisions also provided that "[n]o one may file or instigate a claim in a court of law without first submitting a claim to the Special Co-Trustee for solution." The *in terrorem* clause provided that "notwithstanding the provisions regarding the resolution of disputes under the Special Co-Trustee provisions," certain actions by the beneficiaries would result in disinheritance.

The trial court found that the trustee did not have the authority to bring a suit under the *in terrorem* clause and that this authority was vested solely with the Special Co-Trustee. The trial court looked to the plain language of the trust instrument, which indicated that no one was entitled to file a claim in a court of law without first filing a claim with the Special Co-Trustee, and found that the trust instrument was unambiguous and the clear reading and meaning of the terms controlled. The trustee's complaint was denied based on the fact she clearly did not file a claim with the Special Co-Trustee. The trustee motioned for the court to reconsider, and also filed an entirely new complaint (under the same case number), alleging the same facts. The trustee's subsequent motions and complaint were all denied. The trustee then appealed, and the appellate court agreed with the trial court's analysis given above (but did disagree with a procedural component decided by the trial court).

***Cori v. Schlafly*, 2021 IL App (5th) 200246 (January 22, 2021)**

In *Cori*, upon John Fred Schlafly's (Mr. Schlafly) death in 1993, the John Fred Schlafly Testamentary Trust was created under Mr. Schlafly's will. The trust was for the benefit of Mr. Schlafly's spouse, Phyllis Schlafly (Mrs. Schlafly), during her lifetime, and after her death the trust was to be split into equal shares for Mr. Schlafly's six children. When Mrs. Schlafly died in 2016, two of Mr. Schlafly's children, Roger, a resident of California, and John, a resident of Illinois, became co-trustees of the trust.

While Mrs. Schlafly died in 2016, the trust was not terminated and distributed as required by the trust instrument which created the trust. In 2017, Mr. Schlafly's daughter, Anne, filed a petition to have the trial court adjudicate her rights as a beneficiary of the trust. Anne's petition to the trial court requested: (i) an accounting of the trust assets, (ii) that Roger and John be compelled to terminate the trust and distribute its assets equally and outright, (iii) damages from Roger and John based on breach of trust, and (iv) that Roger and John be removed as co-trustees. The appellate court focused on the first two requests.

In December of 2017, John resigned as co-trustee of the trust, making Roger the sole trustee. In January of 2018, Roger filed a motion to dismiss Anne's petition for lack of personal jurisdiction. Roger claimed that the trial court lacked personal jurisdiction over him in his representative capacity as trustee of the trust because the trust is not administered in Illinois. Roger pointed to the fact that: (i) Mr. Schlafly's will did not contain a choice of law provision indicating the trust must be administered under Illinois law, (ii) Roger is not a resident of Illinois, and (iii) Roger does not conduct business of the trust in Illinois, among other facts indicating Roger had no ties to the State of Illinois.

The appellate court agreed with the trial court's denial of Roger's motion, focusing on a couple facts. First, although Mr. Schlafly's will does not specify Illinois as governing law, it does not indicate the trust should be administered in any other particular state. Instead, the appellate court looked to the plain text of the will which indicates that the trustees have the power "to invest any part of the trust funds in property located outside of the State of Illinois," from which the appellate court inferred that Mr. Schlafly intended the trust to have a connection to Illinois specifically. Additionally, the appellate court emphasized that the trust owes its existence to the laws and courts of Illinois because Mr. Schlafly's will was probated in Illinois, forever creating a tie between the trust and the State of Illinois. Second, the appellate court acknowledged that while Roger was the sole trustee at the time his motion was filed, personal jurisdiction would be evaluated between the date Anne's claim for distribution arose (the date of Mrs. Schlafly's death) and the date Roger was served with Anne's complaint, which was in December 2017. John was still serving as co-trustee during the appropriate timeframe. Therefore, the trial court's jurisdiction over the trust is evident by John's administration of the trust from Illinois, prior to his resignation at the end of 2017.

As for Anne's request for termination and distribution of the trust as the will indicated, the appellate court once again looked to the plain language of the will. The court determined that it was clear that the sole purpose of the trust was to provide for Mrs. Schlafly during her lifetime and that upon her death, the trust should terminate and the assets be distributed according to the will. The appellate court affirmed the trial court's ruling that Roger be compelled to make an accounting of the trust and submit a proposed schedule of distribution of the trust's assets equally and outright to Mr. Schlafly's children. *Cori* presents an important reminder concerning the interpretation of estate planning documents — the court will always first look to the plain text, and only after finding an ambiguity will the court conduct additional analysis to determine intent.

***In re Estate of John W. McDonald*, 2021 IL App. (2d) 191113 (February 1, 2021)**

In *McDonald*, following the decedent's death, who died intestate, the decedent's brother filed a petition for letters of administration, which indicated the decedent's only heirs were the decedent's parents and siblings. Respondent in this matter, the alleged surviving spouse of the decedent, filed a motion to vacate the order appointing the decedent's brother as administrator and the order declaring heirship.

Prior to the decedent's death, the decedent and the alleged surviving spouse had a marriage ceremony, which took place at a time when the decedent was under a court ordered guardianship. The decedent had actual knowledge of the existence of the guardianship and was actively participating in litigation in the guardianship case to contest the appointment of a guardian. Additionally, at the time the marriage ceremony was performed, the alleged surviving spouse also had knowledge of the existence of the guardianship.

The trial court denied the alleged surviving spouse's motion and granted the decedent's brother's motion, finding that there was no legally sufficient basis, based on the evidence presented, for a reasonable jury to find the alleged surviving spouse had presented a *prima facie* case validating her relationship with the decedent. Additionally, the decedent's brother's motion *in limine* (which prevented the alleged surviving spouse from testifying or providing evidence as to the marital relationship the alleged surviving spouse had with the decedent), based on the grounds that such testimony would violate the Illinois Dead Man's Act (735 ILCS 5/8-201), was also granted. The trial court further denied the alleged surviving spouse's motion for judgment on the pleadings with regard to her subsequently filed petition for letters of administration, finding that the alleged surviving spouse had failed to present a *prima*

facie case on the validity of her marriage to the decedent. At issue in this case was whether the trial court erred in its ruling to grant the decedent's brother's motion *in limine*, thus preventing the alleged surviving spouse from testifying about the marriage between the decedent and the alleged surviving spouse.

The appellate court held that the trial court abused its discretion in barring the alleged surviving spouse from testifying or presenting evidence as to her marital relationship with (and subsequent heirship related to) the decedent.

To reach this conclusion, the appellate court relied on the revised Dead Man's Act, which provides for a less restrictive version of the original statute. Generally, a Dead Man's Statute states that in a civil action, a party with an interest in the litigation may not testify against a deceased party about communications with the deceased party. However, the 1973 amendment to the Illinois Dead Man's Act no longer bars all testimony by interested persons. Moreover, there is a specific carve-out which allows interested persons to testify as to any fact relating to the heirship of a decedent. Based on this, the appellate court concluded the alleged surviving spouse should have been allowed to testify as to her marriage to the decedent, and the trial court's error disallowed the alleged surviving spouse from presenting her full case, therefore substantially prejudiced her. On these grounds, the case was remanded for a new trial.

Noting that issues stemming from the decedent's brother's argument may arise on remand, the appellate court further ruled that the trial court also erred in granting the decedent's brother's motion asking the trial court judge to order that the jury find in his favor, based on the fact that the alleged surviving spouse failed to present a *prima facie* case as to the validity of her marriage with the decedent. The appellate court determined that the Illinois Probate Act does not expressly declare a marriage entered into by a ward of the court inherently void in the absence of a best-interests hearing. The appointment of a guardian under the Illinois Probate Act is not sufficient alone to show that the ward was unable to consent to marriage.

***In re Estate of Mohammed Sayeed Khan*, 2021 IL App (1st) 200278 (March 29, 2021)**

In *Khan*, brother, Muhammed Khan (Khan), and sister, Habeeba Shariff (Shariff), bought a commercial building in 1973. They each owned a 50 percent beneficial interest in the land trust that held title to the property. In 1983, Khan assigned his 50 percent beneficial interest to Shariff, leaving her as the sole owner. In 1988, Shariff assigned Khan's 50 percent beneficial interest back to him. Then, in 2016, before Khan's spouse was appointed as Khan's guardian due to his diagnosis with dementia and Alzheimer's disease, Khan assigned his 50 percent interest back to Shariff, once again making Shariff the sole owner. In 2017, Khan's spouse was appointed as Khan's guardian and filed a claim that Shariff took advantage of Khan's incapacity in 2016 and tricked him into assigning his 50 percent beneficial interest back to Shariff.

Shariff raised multiple counterclaims and the court considered three of them. One of the primary counterclaims sought a declaratory judgment that Shariff's 1988 assignment to Khan is "null and void" for lack of consideration. The appellate court agreed with the trial court's decision to dismiss this counterclaim because the 1988 assignment states it was made "For Value Received" (i.e. the statement alone is sufficient to prove consideration, absent facts to the contrary). Despite Shariff's claim there was insufficient consideration, she failed to allege any facts supporting her claim. The appellate court noted that "a deed, regular on its face, raises the presumption the consideration for the conveyance is that recited in the instrument" and in this case, "For Value Received" is sufficient evidence of consideration.

While the facts in this case did not discuss if any actual consideration traded hands in exchange for the 1988 assignment, the trial court and the appellate court both looked to text of the assignment which noted the interest was being assigned "For Value Received." Absent any specific facts to the contrary, both courts took the document on its face and ruled against Shariff. Once again, both courts looked to the text of the documents at hand above all else.

New York

2021 has been an active year for legislative reform in this area for New York State. A brief summary of the 2021 changes follows.

State Estate Taxation

For individuals dying on or after January 1, 2022, the basic exclusion amount will be equal to the federal basic exclusion amount indexed annually, but without regard to the passage of the Tax Cuts and Jobs Act of 2017 (i.e., approximately $6.02 million in 2022).

Post-Mortem Right of Publicity

Pursuant to a new addition to the New York Civil Rights Law, deceased performers and deceased personalities who died on or after May 29, 2021, and who were New York domiciliaries at the time of their death have a post-mortem right of publicity extending 40 years after the date of their death. This protects the estate of deceased performers and deceased personalities from unwanted and unauthorized port-mortem commercial exploitation and digital replica.

A deceased performer is defined as a deceased natural person domiciled in New York at the time of death who, for gain or livelihood, was regularly engaged in acting, singing, dancing or playing a musical instrument.

A deceased personality is defined as a deceased natural person domiciled in New York at the time of death whose name, voice, signature, photograph or likeness has commercial value at the time of death, or because of death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or services.

The rights recognized by this law are property rights that are freely transferable and descendible, in whole or in part, by contract, license, gift or by means of any trust or other testamentary instrument. Upon a deceased performer or deceased personality's death, if such rights had not been previously transferred during the individual's lifetime, such rights may be specifically bequeathed in such decedent's last will and testament or, if not specifically bequeathed, will pass with the decedent's residuary estate. If a deceased performer or deceased personality dies intestate, and such rights had not been previously transferred during such individual's lifetime, then such rights are to be distributed pursuant to the laws of intestate distribution and are enforceable by the person or persons holding at least 51 percent of the deceased individual's rights. If a deceased performer or deceased personality dying intestate who has not otherwise transferred such rights during his or her lifetime does not have any distributees, then such rights will terminate. Note that to the extent a deceased performer or deceased personality had contractually assigned publicity rights, whether in whole or in part, during lifetime, this new law does not undermine or invalidate such contract.

Any person who uses a deceased performer's digital replica in a scripted audiovisual work (defined in the law to be a newly created, original computer-generated electronic performance) either as a fictional character or for the live performance of a musical work will be liable for damages sustained by the person or persons injured as a result thereof, if such use was not previously consented to by the person or persons holding the decedent's publicity rights and no conspicuous disclaimer in the scripted audiovisual work and in any related advertisement appears. Note, however, it is not a violation of a deceased performer's digital replica rights if the work is of parody, satire, commentary or criticism, is a work of political or newsworthy value, or a similar work, such as a documentary, docudrama, historical or biographical work, regardless of the degree of fictionalization, except if such digital replica is used in a live performance of a musical work or a commercial exploitation of such works.

Any person who uses a deceased personality's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods and services will be liable for damages sustained by the person or persons injured as a result thereof, if such use was not previously consented to by the person or persons holding the decedent's publicity rights. Note, however, it is not a violation of a deceased personality's publicity rights if the work is a play, book, magazine, newspaper or other literary work; musical work or composition; work of art or other visual work; work of political, public interest, educational or newsworthy value; audio or audiovisual work, radio or television program, whether fictional or nonfictional; or an advertisement or commercial announcement of any of the foregoing works.

To clarify further, there is no violation of a decedent's right of publicity as it relates to the decedent's personality if there is use of a deceased personality's name, voice, signature, photograph or likeness in connection with any news, public affair, sports program or any political campaign. It is also not a violation per se of a decedent's right of publicity solely because the use of a name, voice, signature, photograph or likeness of the decedent was used in a commercial medium. Rather, it is a question of fact as to whether the use of such name, voice, signature, photograph or likeness was so directly connected with the commercial use as to constitute a use for which consent is required.

To have standing to enforce an action under this law, any successor in interest to the rights of a deceased personality or deceased performer must register with the New York Secretary of State and thereafter may register a claim with the New York Secretary of State using the form prescribed and paying a fee. Any such filed claim becomes a public record.

For any action brought under this law, the person or persons who violated the decedent's right of publicity shall be liable to the injured party or parties in an amount equal to the greater of $2,000 or the compensatory damages suffered by the injured party or parties, as well as any profits from the unauthorized use that are attributable to such use that are not taken into account in computing the compensatory damages.

Changes to Statutory Short Form Power of Attorney

The changes to the statutory short form power of attorney were to address the myriad complaints and complexities of preexisting law affecting powers of attorney that have been vexing practitioners since its overhaul in 2008. Specifically, this law: (a) simplifies the previous power of attorney form which was complex and prone to improper execution; (b) allows for substantially compliant language rather than the exact wording requirement of previous law which had proven unduly burdensome; (c) provides safe-harbor provisions for those who, in good faith, accept an acknowledged power of attorney without actual knowledge that the signature is not genuine; (d) provides for a mechanism to receive and address a rejection of a power of attorney and imposes sanctions upon those who unreasonably refuse to accept a valid power of attorney; (e) makes technical amendments to allow a person, other than any person designated as principal agent or successor agent, to sign at the direction of a principal who is unable; (f) clarifies an agent's obligation to keep records or receipts; (g) clarifies the agent's authority with regard to financial matters related to health care, including, notwithstanding any law to the contrary, to receive information from health care providers and health plans to determine legitimacy, accuracy and benefit to the principal of a plan; and (h) eliminates the requirement for a separate statutory gifts rider by expanding the agent's power to make gifts in the aggregate in a calendar year from $500 to $5,000 and to allow for additional gifting by way of a modification to the power of attorney form. In addition, it adds a new subdivision 18 to Section 5-1502D that provides that upon the principal's initialed consent, where two or more co-agents are required to act together, one or more of such agents may delegate to the co-agent authority to conduct banking transactions.

This law became effective on June 13. However, any statutory short form power of attorney and statutory gifts rider executed by the principal and valid at the time executed by the principal shall remain valid, as will any revocation of a prior power of attorney that was delivered to the agent, before the effective date.

Child-Parent Security Act

As part of the 2020-2021 Executive Budget, New York State established the Child-Parent Security Act (CPSA). The significant purpose of CPSA is to legally establish a child's relationship to the child's parents where the child is conceived through artificial reproduction. CPSA: (1) establishes legal rights of intended parents (an individual who manifests an intent to be legally bound as the parent of a child resulting from artificial reproduction) who use a third-party to conceive a child from the moment of the child's birth; (2) legalizes compensated gestational surrogacy in New York, provided, however, the surrogacy arrangement meets the requirements provided for in CPSA; and (3) establishes new procedures for obtaining a judgment of parentage through gamete or embryo donation or through the use of a gestational surrogate.

CPSA distinguishes between a donor of genetic material (a "participant") and the intended parent of a child. CPSA outlines the procedures by which the intended parents of a child can obtain a judgment of parentage of the child prior to or after the birth of a child, including by signing a voluntary acknowledgement of parentage form at the hospital during a child's birth for the non-genetic intended parent, but such judgment is not effective until the birth of the child. Additionally, CPSA adds a procedure through which a participant can obtain a judgment terminating any potential parentage rights of the participant. A judgment of parentage or nonparentage provides for clarity as to who the child's parents are from the moment of birth and establishes a legally binding financial and parental responsibility of the intended parents over the child.

CPSA enacts a Surrogate's Bill of Rights that serves to protect individuals acting as surrogates within New York State. The Surrogate's Bill of Rights provides that the surrogate has the right to: (1) make all health and welfare decisions regarding themselves and their pregnancy; (2) be represented throughout the contractual process and the duration of the surrogacy agreement and its execution by independent legal counsel of the surrogate's choosing that is paid for by the intended parent(s); (3) have a comprehensive health insurance policy that is paid for by the intended parent(s); (4) reimbursement for all co-payments, deductibles and any other out-of-pocket medical care associated with pregnancy, childbirth, postnatal care, a stillbirth, a miscarriage or a termination of the pregnancy by the intended parent(s); (5) obtain a health insurance policy that covers behavioral health care and covers the cost of psychological counseling to address issues resulting from the surrogate's participation in a surrogacy that is paid for by the intended parent(s); (6) be provided with a life insurance policy that provides a minimum benefit of $750,000, or the maximum amount the person acting as a surrogate qualifies for if less than $750,000, and has a term that extends throughout the duration of the expected pregnancy and for 12 months after the birth of the child, a stillbirth, a miscarriage or a termination of pregnancy, that is paid for by the intended parent(s); and (7) terminate a surrogacy agreement prior to becoming pregnant.

CPSA also provides clarification regarding stored embryos. Spouses or partners with joint dispositional control of the stored embryos will have the ability to enter into an agreement to transfer legal rights and dispositional control of any stored embryos to the other spouse or partner. Such an agreement must be in writing and each person must be represented by separate legal counsel. If the couple is married, such transfer can only occur after the couple is divorced. After the transfer of dispositional control, the transferor is not a parent of any child born thereafter from the stored embryos, unless they sign a writing, prior to the medical embryo transfer, stating that they want to be a parent of a child born of such embryos.

Regarding children born after the death of a genetic parent, CPSA allows for the decedent to be recognized as the child's parent, provided, however, the deceased genetic parent had signed a record consenting to be a parent if assisted reproduction were to occur posthumously during the decedent's lifetime.

Extended Support Period for Adult Dependents in Child Support Arrangements

A new law was passed in which a person who is obligated under law to support a minor child is also obligated to support any such individual who is considered to be developmentally disabled until such person reaches the age of 26, provided the person seeking such support lives with the person with the developmental disability and relies on such other person for maintenance.

Income Tax Changes

The state income tax rate for earners in the previous top tax bracket increased and two additional tax brackets for high income earners were added. For tax years starting in 2021, for single filers earning in excess of $1,077,550 (or joint filers earning in excess of $2,155,350) the state income tax rate increases from 8.82 percent to 9.65 percent. The law also creates two additional tax brackets for high income earners. For all taxpayers with income from $5,000,001 up to $25 million, the state income tax rate is now 10.3 percent For all taxpayers with income exceeding $25 million, the state income tax rate is now 10.9 percent. This tax scheme is in effect through December 31, 2027.

Elective Pass-Through Entity Tax

An addition to the New York State Tax Law provides for an elective pass-through entity tax to allow eligible partnerships (including LLCs taxed as partnerships) and New York S corporations to make an annual election to be subject to taxes at rates equivalent to the current New York State personal income tax rates. Through making this election, a qualifying pass-through entity allows its owners to avoid the $10,000 federal limitation on state and local tax (SALT) deductions and such owners may fully deduct their New York State income taxes on their federal income tax return.

Extension of Tax Deadlines

As a result of Hurricane Ida's effects in New York State, the New York State Department of Taxation and Finance extended the October 15, 2021, deadline for filing any tax returns and paying any tax or installment of tax for taxpayers in certain counties (including New York City, Long Island and Westchester) until January 3, 2022.

Not-for-Profit Organization Donor Disclosure

In August, the New York Attorney General suspended the state requirement to collect donor disclosure information in annual filings of not-for-profit corporations. This decision followed a US Supreme Court decision striking down a similar statute regarding California donor disclosure requirements.

On November 12, Governor Hochul signed into law an amendment to New York's Executive Law prohibiting the disclosure to the public of the names, addresses and telephone numbers of contributors and the amounts contributed by such contributors that are reported on financial disclosure reports of certain nonprofit organizations.

Remote Notarization and Remote Witnessing

New York State Executive Order 202.7 had allowed for the remote notarization of documents using video teleconferencing technology. New York State Executive Order 202.14 had allowed for the virtual witnessing of documents, including wills, through the use of video teleconferencing technology. However, as of June 24, 2021, remote notarization and virtual witnessing are no longer permitted.

At the time of this writing, there is a bill that has passed the New York Senate and the New York Assembly, but has yet to be signed by Governor Hochul, that would provide for the electronic notarization of documents using audio-video conferencing technology. The signing and notarization of the document would utilize electronic signatures and a digital signing certificate to produce a digitally notarized electronic document.

North Carolina

Video Notarization and Witnessing. In early 2020, temporary video notarization and video witnessing legislation was enacted. This legislation also temporarily waived the requirement for witnesses on Health Care Powers of Attorney and Advance Directives for a Natural Death. The original legislation on video witnessing and video notarization (but not the waiver of witness requirements for Health Care Powers of Attorney and Advanced Directives) was first extended through March 11, 2021 and later through 12:01 a.m. on December 31, 2021. There are now bills pending (H.B. 776 and S.B. 666) that may make some of these temporary laws permanent.

Living Probate for Revocable Trusts. New Article 4C of Chapter 36C creates a "living probate" process for Revocable Trusts, which is similar the existing living probate process for wills. This process permits a trust settlor to present a revocable trust to the court during lifetime, provide notice to interested parties, and to obtain a judicial declaration of the trust's validity. By establishing the validity of a trust during lifetime (and defending any challenges by interested parties), a settlor can prevent challenges to the truer after his or her death. These provisions were effective October 1, 2021.

Single Transaction Guardianship. Previously, there was no alternative to a full guardianship proceeding in cases where the needs of the minor or other incompetent person could be met with a single protective arrangement or other single transaction. Effective October 1, a "single transaction guardianship" process was created to be available in a limited set of circumstances (ie, where only a single transaction or protective arrangement is necessary). G.S. 35A-1121(a)(1) provides a non-exclusive list of transactions that could be the subject of a "single transaction guardianship" petition if they are the only needs of the minor or incompetent person. These transactions include:

- The payment, delivery, deposit, or retention of funds or property.
- The sale, mortgage, lease, or other transfer of property.
- The entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education.
- The establishment, funding, or addition to a suitable trust, including, but not limited to, a trust for the benefit of the minor or incompetent person pursuant to 42 U.S.C. § 1396p(d)(4).
- The establishment, funding, or administration of an ABLE account, as defined in section 529A of the Internal Revenue Code.

If the Clerk of Superior Court finds that there is no reason for an ongoing guardianship and that no formal and permanent guardianship is needed to serve the best interest of the minor or incompetent person, then the clerk may approve of a single transaction or protective arrangement without the appointment of a guardian. The clerk has the discretion to appoint a temporary guardian to be discharged upon completion of the transaction arrangement, impose bonding requirements and/or mandate an additional report or account upon completion of the ordered transaction or protective arrangement.

NC Uniform Powers of Appointment Act. S.L. 2021-53 updates the North Carolina Uniform Powers of Appointment Act (codified in Chapter 31D of the General Statute). The new N.G.G.S. 31D-2-201, which applies to powers of appointment created on after June 25, 2021, eliminates any requirement that a power of appointment be created by an instrument that transfers the appointive property. In other words, no transfer of the subject property is necessary to create a power of appointment over that property.

In addition, updates to N.C.G.S. 31D-3-305 address permissible appointees in the exercise of powers of appointment. Among other changes, the updated statute removes the requirement that the terms of a trust must authorize a power holder to create a certain new nongeneral powers of appointment and allows a power holder to confer a nongeneral power upon a permissible appointee, if the list of permissible appointees under the new

nongeneral power (created by the permissible appointee) include one or more permissible appointees of the original nongeneral power (and any other permissible appointees that the original power holder may add). This amended North Carolina statute applies to the exercise, on or after June 25, 2021 of the act, of a power of appointment created before, on, or after that date.

WE CAN HELP

We hope that this advisory helps you with your year-end estate and gift tax planning and also provides you with some interesting ideas to consider for the future. As always, the Private Wealth practice stands ready and able to assist you with these matters at any time.

For more information, contact your Katten attorney or any of these Private Wealth practitioners.

NAME	TITLE	PHONE	EMAIL
Joshua S. Rubenstein	National Chair	+1.212.940.7150	joshua.rubenstein@katten.com
CHARLOTTE			
Diane B. Burks	Special Counsel	+1.704.344.3153	diane.burks@katten.com
CHICAGO			
Charles Harris	Chicago Co-Chair	+1.312.902.5213	charles.harris@katten.com
Michael O. Hartz	Chicago Co-Chair	+1.312.902.5279	michael.hartz@katten.com
David M. Allen	Partner	+1.312.902.5260	david.allen@katten.com
Michelle R. Canerday	Partner	+1.312.902.5515	michelle.canerday@katten.com
Mackenzie Collins	Associate	+1.312.902.5438	mackenzie.collins@katten.com
Adam M. Damerow	Partner	+1.312.902.5250	adam.damerow@katten.com
Hadar R. Danieli	Special Counsel	+1.312.902.5581	hadar.danieli@katten.com
Jeffrey Glickman	Associate	+1.312.902.5227	jeffrey.glickman@katten.com
Stuart E. Grass	Of Counsel	+1.312.902.5276	stuart.grass@katten.com
Nicholas Heuer	Partner	+1.312.577.8317	nicholas.heuer@katten.com
Caitlin A. Kelly	Associate	+1.312.902.5419	caitlin.kelly@katten.com
Tye J. Klooster	Partner	+1.312.902.5449	tye.klooster@katten.com
Jonathan Kohl	Associate	+1.312.902.5619	jon.kohl@katten.com
Louis A. Laski	Associate	+1.312.902.5607	louis.laski@katten.com
Benjamin Lavin	Associate	+1.312.902.5670	ben.lavin@katten.com
Tracy E. Lyerly	Special Counsel	+1.312.902.5352	tracy.lyerly@katten.com
Andrew L. McKay	Partner	+1.312.902.5315	andrew.mckay@katten.com
Allan B. Muchin	Of Counsel	+1.312.902.5238	allan.muchin@katten.com
Maureen C. Mullen	Associate	+1.312.902.5209	maureen.mullen@katten.com
Kelli Chase Plotz	Special Counsel	+1.312.902.5347	kelli.plotz@katten.com
Matthew Sperry	Partner	+1.312.902.5557	matthew.sperry@katten.com
Bonita L. Stone	Partner	+1.312.902.5262	bonita.stone@katten.com

DALLAS

Nancy Collins	Associate	+1.214.765.3626	nancy.collins@katten.com

LOS ANGELES – CENTURY CITY

Abby Feinman	Los Angeles Chair	+1.310.788.4722	abby.feinman@katten.com
Carol A. Johnston	Partner	+1.310.788.4505	carol.johnston@katten.com
Avi Pariser	Associate	+1.310.788.4514	avi.pariser@katten.com
John W. Spellman	Associate	+1.310.788.4524	john.spellman@katten.com

NEW YORK

Ronni G. Davidowitz	New York Chair	+1.212.940.7197	ronni.davidowitz@katten.com
Mal L. Barasch	Of Counsel	+1.212.940.8801	mal.barasch@katten.com
Jason Benitez	Associate	+1.212.940.6498	jason.benitez@katten.com
Lawrence B. Buttenwieser	Of Counsel	+1.212.940.8560	lawrence.buttenwieser@katten.com
Jonathan C. Byer	Partner	+1.212.940.6532	jonathan.byer@katten.com
Bonnie Lynn Chmil	Partner	+1.212.940.6415	bonnie.chmil@katten.com
Alexandra Copell	Special Counsel	+1.212.940.8588	alexandra.copell@katten.com
Marla G. Franzese	Of Counsel	+1.212.940.8865	marla.franzese@katten.com
Robert E. Friedman	Of Counsel	+1.212.940.8744	robert.friedman@katten.com
Milton J. Kain	Of Counsel	+1.212.940.8750	milton.kain@katten.com
Dana B. Levine	Special Counsel	+1.212.940.6668	dana.levine@katten.com
Rebecca H. Lomazow	Associate	+1.212.940.6497	rebecca.lomazow@katten.com
Cynthia C. Reed	Associate	+1.212.940.6710	cynthia.reed@katten.com
Christina Romero	Associate	+1.212.940.6380	christina.romero@katten.com
Arnold I. Roth	Senior Counsel	+1.212.940.7040	arnold.roth@katten.com
Robert E. Smith	Senior Counsel	+1.212.940.8850	robert.smith@katten.com
Andrew Toporoff	Awaiting admission	+1.212.940.6356	andrew.toporoff@katten.com
Kathryn von Matthiessen	Partner	+1.212.940.8517	kathryn.vonmatthiessen@katten.com

Katten katten.com

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

©2021 Katten Muchin Rosenman LLP. All rights reserved.

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at katten.com/disclaimer.

11/22/2021