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PRIVATE WEALTH ADVISORY

2022 Year-End Estate Planning Advisory

November 17, 2022

Overview

During 2022, COVID-19, the war in Ukraine, global inflation, the Tax Cuts and Jobs Act (TCJA), the uncertainty about the Build Back Better Act (BBBA), the Corporate Transparency Act (CTA), and the Inflation Reduction Act (IRA) dominated the planning landscape.

In our 2021 Year-End Estate Planning Advisory, there was a lot of uncertainty about whether the BBBA would be enacted and, if so, whether it would bring about a change in the estate, gift and generation-skipping transfer (GST) tax exemptions. At the end of the day, while a form of the BBBA passed the House (which form did not include a change to the aforementioned exemption amounts), the BBBA ended up being dead on arrival in the Senate.

As outlined in our previous 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 Congress, 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, and looks unlikely to change before the end of the year, particularly in light of the results of the midterm elections, the following are some key income and transfer tax exemption and rate changes under the TCJA, including inflation adjusted amounts for 2022 and 2023:

Federal Estate, GST and Gift Tax Rates

For 2022, the federal estate, gift and GST applicable exclusion amounts are $12.06 million. The maximum rate for federal estate, gift and GST taxes is 40 percent. For 2023, the federal estate, gift and GST applicable exclusion amounts will be $12.92 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 $16,000 per donee in 2022. Thus, this year a married couple together can gift $32,000 to each donee without gift tax consequences. In 2023, the annual exclusion for gifts will increase to $17,000. The limitation on tax-free annual gifts made to noncitizen spouses will increase from $164,000 in 2022 to $175,000 in 2023.

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 $578,125 in 2023) and married taxpayers filing jointly whose income exceeds $622,050 (indexed for inflation and $693,750 in 2023). Estates and trusts will reach the maximum rate with taxable income of more than $12,950 (indexed for inflation, and $14,450 in 2023).
- A zero percent capital gains rate applies for single taxpayers with income up to $40,000 (indexed for inflation, and $44,625 for 2023) or married taxpayers filing jointly with income up to $80,000 (indexed for inflation, and $89,250 in 2023). A 15 percent capital gains rate applies for income above this threshold up to $441,450 for single taxpayers (indexed for inflation, and $492,300 in 2023) and $496,600 for married taxpayers filing jointly (indexed for inflation, and $553,850 in 2023). The 20 percent capital gains rate applies above these thresholds.
- The standard deduction was increased to $12,000 for single taxpayers (indexed for inflation, and $13,850 for 2023) and $24,000 for married taxpayers filing jointly (indexed for inflation, and $27,700 in 2023).
- 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 taxpayers, $250,000 for married taxpayers filing jointly and $12,500 for trusts and estates (adjusted for inflation).

Tax Cuts and Jobs Act

The TCJA, which was signed into law on December 22, 2017, and most of which became effective on January 1, 2018, 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 2022 is $12.06 million per person, resulting in a married couple's ability to pass $24.12 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 2023 will be $12.92 million per individual, or $25.84 million per married couple. 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.

The IRS issued further proposed regulations in April 2022. In REG-118913-21, the IRS proivded an exception to the anti-clawback rule that preserves the benefits of the temporarily higher basic exclusion amount for certain trasnfers that are includable, or treated as includable, in a decedent's gross estate under Internal Revenue Code (IRC) Section 2001(b). These transfers include, but are not limited to:

- Gifts subject to a retained life estate or subject to other powers or interests as described in IRC Sections 2035 through 2038 and IRC Section 2042;
- Gifts made by enforceable promise, to the extent they remain unsatisfied as of the date of death;
- Transfers of certain applicable retained interests in corporations or partnerships (IRC Section 2701) or trusts (IRC Section 2702); and

- Transfers that would have been described in the preceding three bullet points but for the transfer, relinquishment, or elimination of an interest, power, or property, effectuated within 18 months of the date of the decedent's death, by the decedent in conjunction with any other person, or by any other person.

Income Taxation of Trusts and Estates

The TCJA added new IRC Section 67(g), which applies to trusts, estates, and individuals, and provides that no miscellaneous itemized deductions (all deductions other than those specifically listed in IRC 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 IRC Section 67(e) and without regard to whether they were miscellaneous itemized deductions or not. In Notice 2018-61, the US Department of the Treasury (Treasury) issued guidance on whether new IRC Section 67(g) eliminates these deductions. This notice provides that expenses under IRC Section 67(e) are not itemized deductions and therefore are not suspended under new IRC 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 IRC 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 IRC 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. Also, the charitable deduction rules for ESBTs are now governed by IRC Section 170 instead of IRC Section 642(c), which means that several restrictions imposed by IRC 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

As discussed in detail in our previous Year-End Estate Planning Advisories, the TCJA made significant changes to the federal income tax, including by limiting the state and local taxes deduction (the SALT deduction) to $10,000 for jointly filing taxpayers, unmarried taxpayers, and trusts. In response to the cap on the SALT deduction, 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. Other states began to allow qualifying entities required to file tax returns within the state to make an election to pay a pass-through entity tax (PTET), as opposed to the income tax being passed through to the individuals who own the entity.

Over the last year, there was some optimism that Congress would either repeal the cap on the SALT deduction or otherwise raise the cap, and there was a belief that the IRA would be the vehicle to either overturn or defang the TCJA's cap. However, such optimism proved to be misplaced as the IRA was signed into law without any changes

being made to the SALT deduction, which remains capped at $10,000 until the law sunsets at the end of 2025. In response to both the TCJA and the disappointment of the IRA, at least 31 states, including California, Illinois, New York, New Jersey, and North Carolina, have either passed a PTET election bill, or have proposed PTET bills making their way through state legislatures.

Under the common PTET election regime, owners of a pass-through entity can bypass the SALT deduction cap by electing to pay tax at the entity level, with a corresponding proportionate share of the PTET being claimed as a credit at the individual partner, member or shareholder level, as the case may be. It is important to note that while most state PTET elections follow the standard workaround formula for the SALT cap, each state's PTET election is distinct and must be examined on an individual basis.

For example, determining whether the entity itself, the entity's governing board, or the individual partner, member or shareholder makes the election to opt into the PTET varies from state to state. In California, for example, the individual taxpayer makes the election, while other states, like New York, require the entity to make the election without the consent of the entity's members and each resident partner, member or shareholder is allowed a credit of their distributive share of the tax paid by the entity. Still, other states, such as Maryland, are silent on this issue. Further, states vary considerably on significant issues related to the election, such as whether an election made by an entity to opt into the PTET is binding on all of the entities partners, members or shareholders, whether the election is revocable or irrevocable, whether nonresident members of electing entities are required to file returns, how individual credits are calculates, how the election is reported, and other important and often complex issues. Further still, states vary significantly in how the PTET's tax base is calculated.

This advisory does not provide a detailed, state-by-state analysis of the PTET election or workaround but rather provides guidance as to the complexity of this now widely accepted strategy. As the PTET appears, for now, to be the sole workaround to the TCJA's SALT deduction cap, it is crucial for each individual taxpayer and entity to discuss the benefits and potential pitfalls of the election with experienced counsel before electing to opt-in or out of this tax regime.

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 IRC Section 682, which generally provided that if a taxpayer created a grantor trust for the benefit of their 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 IRC 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.

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 the 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 reduces 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, $163,000 for single taxpayers (indexed for inflation, and $182,100 for 2023) and $326,000 for married taxpayers filing jointly (indexed for inflation, and $364,200 in 2023). For these taxpayers, the deduction may be subject to limitations based on whether the entity is a "specified service trade or 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

Passed into law in 2021, the CTA set out to create a beneficial ownership registry for certain domestic entities and foreign entities doing business in the U.S (i.e., entities that are either created by a filing with a secretary of state in the United States or are required to file a document to do business in a state in the United States). The goal behind the new beneficial ownership registry is to combat tax evasion, money laundering, and other unsavory acts perpetuated through dealings in the United States. Specifically, the CTA requires a Reporting Company (defined below) to file information regarding itself, its Beneficial Owners (defined below), and its Company Applicant (defined below). While enacted on January 1, 2021, practitioners waited for over a year and a half for the Financial Crimes Enforcement Network of the US Department of the Treasury (FinCEN) to publish final regulations regarding the CTA and its reporting requirements. On September 30, 2022, FinCEN issued such final regulations implementing the CTA's beneficial ownership reporting requirements (the Final Rule).

For purposes of the CTA, "Reporting Companies" include domestic (including US territories such as the United States Virgin Islands) corporations, limited liability companies (LLC), or other entities created by a filing with a secretary of state or tribal office, as well as foreign corporations, LLCs, or other similar entities that are registered

to do business in the United States by a filing with the applicable secretary of state or other state or tribal office. Currently, there are 23 categories of entities that are exempt and not deemed "Reporting Companies" for purposes of the CTA, including large operating companies that have 20 or more fulltime United States employees, more than $5 million in US revenue in the prior year, and a physical operating presence in the United States. While these entities are exempt from reporting, they may be subject to heightened regulation (i.e., banks). Importantly, however, common law trusts are not considered Reporting Companies for the purposes of the CTA.

For purposes of the CTA, a "Beneficial Owner" of a Reporting Company is an individual who either (i) owns or controls at least 25 percent of the ownership interest of the Reporting Company (the so-called Ownership Test) (ii) or exercises "substantial control" over the Reporting Company (the so-called Substantial Control Test). In respect of a trust that owns a Reporting Company, assuming such trust owns, directly or indirectly 25 percent of such Reporting Company, a Beneficial Owner of such trust under the Ownership Test includes: (i) a beneficiary who is the sole permissible individual who can receive income and principal of a trust, or who can demand distributions or withdraw substantially all of the assets of such trust or (ii) a grantor or settlor who has retained the power to revoke or otherwise withdraw assets. On the other hand, "substantial control" includes many different forms of control. For example, the Substantial Control Test is met for individuals who serve as senior officers of a Reporting Company or who have the authority to appoint or remove senior officers. In addition, "substantial control" may be exercised through serving on a board of managers of an entity.

For purposes of the CTA, a "Company Applicant" of a Reporting Company is the person who filed a Reporting Company's incorporation/formation documents with the applicable state or tribal office, and any person who directs or controls such filing. Thus, it is possible to have multiple Company Applicants.

Reporting Companies shall be required to submit the following information regarding their Beneficial Owners and Company Applicant: (1) full legal name, (2) current street address, (3) date of birth, and (4) identification number (e.g., driver's license number) and an image of the document from which such identification number was obtained. Reporting Companies shall also be required to submit the following information regarding themselves: (i) full entity name, (ii) any DBAs, (iii) principal place of business, (iv) jurisdiction of formation (or, if a foreign Reporting Company, the jurisdiction in which it registers to do business), and (v) taxpayer identification number.

Reporting Companies formed before January 1, 2024, must file their initial reports with FinCEN by January 1, 2025, provided that such Reporting Companies shall not be required to submit information regarding their initial Company Applicant. Reporting Companies formed on or after January 1, 2024, must file their initial reports with FinCEN within 30 days of formation. Any changes to a Reporting Company's Beneficial Owners must be reported within 30 days of such change. Failure to comply with the CTA's requirements may result in stern penalties.

The CTA's filing requirements require practitioners to implement policies and procedures to ensure the collection and timely submission of the required reports. The CTA will also require M&A and Investment practitioners to expand their due diligence efforts to capture CTA non-compliance.

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

President Trump signed the SECURE Act into law 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 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 such IRA owner's death. The 10-year term would apply regardless of whether such 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 such 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 rules for Roth IRAs are slightly different. Because Roth IRAs have no lifetime RMDs, by definition, the death of the Roth IRA owner is before the required beginning date. Accordingly, if the beneficiary of the Roth IRA is a designated beneficiary, the Roth IRA must be fully-distributed within 10 years of the Roth IRA owner's death. In the case of a non-designated beneficiary, the Roth IRA must be fully-distributed within five years of the Roth IRA owner's death.

On October 7, 2022, Notice 2022-53 announced that the Treasury and the IRS intend to issue final regulations related to RMD's under IRC Section 401(a)(9) that will apply no earlier than the 2023 distribution calendar year. In addition, this notice provides guidance related to certain provisions of IRC Section 401(a)(9) that apply for 2021 and 2022, in particular, that there will be no penalty for failure to take the required minimum distribution in 2021 and 2022 from a plan which had become subject to the SECURE Act's 10-year rule discussed above. If a taxpayer has already paid an excise tax for a missed RMD, that taxpayer may request a refund of that excise tax.

The Coronavirus Aid, Relief and Economic Security Act (CARES Act), the Consolidated Appropriations Act, and the American Rescue Plan of 2021

The CARES Act — signed into law on March 27, 2020 — was a $2.2 trillion economic stimulus to counter the adverse economic impacts of COVID-19. The bill provided relief to businesses in the form of loans and tax benefits and relief to individuals in the form of stimulus checks, unemployment benefits and tax benefits. The last couple of years, we summarized the key provisions of the CARES Act as they relate to closely held businesses and high net worth individuals, as well as certain provisions of the following:

- The Consolidated Appropriations Act — a $2.3 trillion spending bill (made up of a $900 billion fiscal stimulus package and a $1.4 trillion government funding deal) — 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 signed into law on March 11, 2021, building on both the CARES Act and the Consolidated Appropriations Act; and then
- The Infrastructure Investment and Jobs Act – a $1.2 trillion bill ($550 billion in new spending) signed by President Biden on November 15, 2021.

Many such provisions have already expired but it is worthwhile to highlight certain provisions for purposes of 2022.

Business Relief

Deferment of Social Security Taxes

The CARES Act allowed an employer to defer paying the employer's portion of an employee's Social Security taxes from March 27, 2020, through the end of 2020. Half of the deferred taxes were due December 31, 2021 (extended to the next business day on Monday, January 3, 2022), and the remaining half are due on December 31, 2022 (again extended to January 3, 2023).

Individual Relief

Charitable Deductions

The CARES Act and then the Consolidated Appropriations Act temporarily allowed taxpayers claiming the standard deduction to also deduct (as an above-the-line deduction) $300 of cash contributions made to qualifying charitable organizations each year ($600 for those married filing jointly), <u>but such charitable deductions by taxpayers claiming the standard deduction are no longer allowed beginning in tax year 2022</u>.

Excess Business Loss Limitation

The excess business loss limitation of IRC Section 461(l) prevents taxpayers, such as individuals, trusts and estates, from deducting a business loss in excess of certain threshold amounts indexed for inflation. This limitation was temporarily repealed by the CARES Act, but returned January 1, 2021. The threshold amounts for the 2022 tax year (for purposes of the excess business loss limitation) are $270,000 for single filers or $540,000 for those married filing jointly.

Retirement Plans and Accounts

The CARES Act allowed qualified individuals (including those diagnosed with COVID-19 or experiencing adverse financial effects due to COVID-19) to withdraw up to $100,000 from qualified retirement plans in 2020, **<u>giving such individuals three years to re-contribute the distribution (sometimes referred to as a “coronavirus-related distribution”) to the qualified plan to unwind the taxability of the distribution</u>**. The Consolidated Appropriations Act provided a similar withdrawal exemption through June 25, 2021. Accordingly, anyone who received a coronavirus-related distribution is still within the window to re-contribute such distribution.

Otherwise, if a qualified individual does not re-contribute the distribution to the qualified plan, the distribution is subject to federal income tax, which may be paid ratably over a three-year period or included entirely in income in the year of the distribution. To the extent that any part or all of the distribution is re-contributed to the qualified plan during the three-year period, the income to the taxpayer (from the distribution) for the taxable year of the re-contribution will be offset, to the extent possible, 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.

The Inflation Reduction Act

On August 16, 2022, President Biden signed the IRA into law. In the estate-planning context, the IRA is significant more for what did not end up in the finalized version, rather than what did. For additional context, it is important to first note what was contained in the BBBA, which passed the House in November 2021. The BBBA contained provisions that would have (1) decreased the estate, gift and GST tax exemptions, (2) changed the grantor trust rules to significantly limit the wealth transfer technique of selling assets to an intentionally defective grantor trust, and (3) eliminated valuation discounts for non-operating business property when valuing ownership interests in privately held companies. The BBBA also had provisions increasing the top marginal income tax rate and the top long-term capital gains rate. None of these proposals made it into the IRA. Additionally, another item missing from the IRA is the elimination of the current SALT limit. The current federal deduction of $10,000 for SALT was left in place, but it is important to be reminded that the limit is scheduled to sunset at the end of 2025.

The “big ticket” estate planning items may have been left out of the IRA, but the IRA does have provisions that could have an impact on estate planners and their clients. The following provisions included in the IRA may be notable for certain individuals:

- Alternative minimum corporate tax of 15 percent of a domestic corporation’s average annual adjusted financial statement income that exceeds $1 billion over a three-year period (excludes S corporations, real estate investment trusts and regulated investment companies);

- Excise tax of 1 percent on fair market value of stock repurchased by a domestic corporation after 2022 (some exceptions may apply);
- Increase in the research tax credit to $500,000 to be applied against payroll taxes for certain small businesses;
- Extension of the Limitation on Excess Business Losses law to 2028, which disallows owners of S corporations and partnerships to use losses above $250,000, indexed for inflation (for single taxpayers) to offset nonbusiness income; and
- Allocation of $80 billion to the IRS budget over a 10-year period, with a significant amount (57 percent) expected to be used for enforcement/audits – but the intent is for the new funds to be used exclusively for audits of taxpayers with income in excess of $400,000.

Although estate planners and clients alike are able to breathe a little easier considering what was not in the IRA, it is important to keep in mind that the absence of certain proposals from the IRA does not foreclose the possibility of the next Congress trying to bring provisions similar to the BBBA in future tax-focused legislation.

Treasury Priority Guidance

On November 4, 2022, Treasury released its 2022-2023 Priority Guidance Plan, which contains 205 guidance projects that are priorities for allocating Treasury and IRS resources during the 12-month period from July 1, 2022, through June 30, 2023. Of these 205 projects, the following 11 were included in the gifts and estates and trusts section:

- Final regulations under §§1014(f) and 6035 regarding basis consistency between estate and person acquiring property from decedent. Proposed and temporary regulations were published on March 4, 2016.
- Guidance regarding availability of §1014 basis adjustment at the death of the owner of a grantor trust described in §671 when the trust assets are not included in the owner's gross estate for estate tax purposes.
- Regulations under §2010 addressing whether gifts that are includible in the gross estate should be excepted from the special rule of § 20.2010-1(c). Proposed regulations were published on April 27, 2022.
- Guidance on portability regulatory elections under §2010(c)(5)(A).
- Regulations under §2032(a) regarding imposition of restrictions on estate assets during the six-month alternate valuation period. Proposed regulations were published on November 18, 2011.
- Final regulations under §2053 regarding the deductibility of certain interest expenses and amounts paid under a personal guarantee, certain substantiation requirements, and the applicability of present value concepts in determining the amount deductible. Proposed regulations were published on June 28, 2022.
- Regulations under §20.2056A-2 for qualified domestic trust elections on estate tax returns, updating obsolete references.
- Regulations under §2632 providing guidance governing the allocation of GST exemption in the event the IRS grants relief under §2642(g), as well as addressing the definition of a GST trust under §2632(c), and providing ordering rules when GST exemption is allocated in excess of the transferor's remaining exemption.
- Final regulations under §2642(g) describing the circumstances and procedures under which an extension of time will be granted to allocate GST exemption. Proposed regulations were published on April 17, 2008.
- Final regulations under §2801 regarding the tax imposed on US citizens and residents who receive gifts or bequests from certain expatriates. Proposed regulations were published on September 10, 2015.
- Regulations under §7520 regarding the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary interests. Proposed regulations were published on May 5, 2022.

Important Cases Decided in 2022

Estate of Levine v. Comm'r, T.C. Memo 2022-158

On February 28, 2022, the Tax Court issued a decision in Estate of *Levine v. Comm'r*, T.C. Memo 2022-158, which determined the viability of an economic benefit split-dollar transaction that reduced the size of the taxpayer's gross estate. A split-dollar transaction generally involves two parties who come to an agreement regarding a life insurance policy with such agreement containing the details as to how the parties will pay for the premiums on the life insurance policy and how the insurance benefits will be enjoyed. Ultimately, in an opinion that relied heavily on the specific facts of the case, the Tax Court ruled in favor of the taxpayer on issues regarding IRC Sections 2036, 2038 and 2703.

By way of background, the matriarch of the Levine family, Marion Levine (the Decedent), owned and invested in a variety of high-valued properties, ranging from mobile home parks to shopping centers and Renaissance fairs. The Decedent's entrepreneurial success translated into a net worth of approximately $25 million at the time of the planning in question. The Decedent instituted a succession plan that involved the creation of a revocable trust and an Irrevocable Life Insurance Trust (ILIT). The ILIT had an independent trustee. The beneficiaries of the Decedent's ILIT were her children and more remote descendants.

As designed, the Decedent's revocable trust made a taxable gift of $6.5 million to the ILIT and the ILIT then purchased $17 million in life insurance policies on the lives of the Decedent's daughter and her daughter's husband in the form of two second-to-die policies. The ILIT entered into a split-dollar agreement with the Decedent's revocable trust and only the ILIT had the ability to terminate the split-dollar agreement. Pursuant to the terms of the split-dollar agreement, the $6.5 million paid by the revocable trust would serve as the funding for the life insurance policies' annual premiums and, in return, the revocable trust would receive the greater of the premiums it paid and the cash surrender value of policies upon such policies' termination, whether upon the insureds' death or an earlier termination. The ILIT would receive the net death benefit (i.e., the difference between the death benefit and the amount owed to the revocable trust under the split-dollar agreement). For estate tax purposes, the Decedent's estate valued the receivable pursuant to the split-dollar agreement at approximately $2.2 million after taking into account applicable discounts.

The IRS wanted to include the full value of the $6.5 million gift in the Decedent's estate for estate tax purposes or, in the alternative, the approximate $6.1 million cash surrender value of the underlying policies at the time of the Decedent's death under IRC Sections 2036, 2038 and 2703.

IRC Section 2036 generally includes in a decedent's taxable estate the value of any property that the decedent transfers if, after the transfer, the decedent retains the possession or enjoyment of, or the right to receive income from, the property or retains the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or income therefrom. IRC Section 2038 generally includes in a decedent's estate the value of property that the decedent transferred during life in which the decedent retains an interest or the right to alter, amend, revoke or terminate (either alone or in conjunction with any person) the recipient's enjoyment of the transferred property. For IRC Sections 2036 and 2038, there is an exception for transfers that are a bona fide sale for full and adequate consideration. The IRS argued that pursuant to IRC Section 2036, the Decedent retained the right to income or the right to designate who would possess the income by way of the split-dollar agreement. The IRS further argued that pursuant to IRC Section 2038, the Decedent retained the power to alter, amend, revoke or terminate the enjoyment of the benefits from the split-dollar agreement. However, the Tax Court held that the sole owner of the policies was the ILIT and that there was no transfer from the revocable trust to the ILIT of the policies. Additionally, the receivable retained by the revocable trust that was included in the Decedent's estate was never transferred; it was simply retained. Because the Decedent could not terminate the split-dollar agreement and could not affect the retention or termination of the policies held by the ILIT, the cash value of the policies held in the

ILIT were not includable in her estate. The only asset related to the life insurance policies that were includable in her estate was the right to the receivable under the split-dollar agreement, which she could not alter, accelerate or terminate.

IRC Section 2703 contains instructions as to how to value property for gift, estate and generation-skipping transfer tax purposes. The IRS argued that the full cash surrender values of the policies should be included in the Decedent's estate and that, therefore, the valuation approach that had been taken in connection with the receivable was incorrect. However, because the cash surrender value of the policies was not included in the Decedent's estate at the time of her death, the IRS' argument regarding IRC Section 2703 was moot.

While the *Levine* decision was very fact-specific, this may create an opportunity for taxpayers who wish to establish ILITs and utilize split-dollar transactions to maximize the benefit of their life insurance planning. If this is of interest to you, please reach out to your contact on our team and we are happy to provide further guidance and personalized recommendations.

Important Planning Considerations for 2022 and 2023

Given the changes implemented by the TCJA, 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 $12.06 million in 2022 and $12.92 million in 2023. 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. Depending on the class of beneficiaries of the credit shelter trust, if the taxpayer lives in a state where the federal and state exemption amounts are decoupled, the taxpayer's estate may inadvertently find itself subject to estate tax at the state level. 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 toward 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). While a change in the federal exemption amounts has not taken place so far under the Biden administration, it nevertheless may be prudent to make use of the increased amount in 2022 and/or early in 2023.

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 and the health of the other spouse need 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 $860,000 ($1,720,000 for a married couple) in 2023. Therefore, even if a taxpayer uses some or even all of the available applicable exclusion amount before the end of 2022, additional gifts may be made in 2023 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, although the Connecticut state-level gift tax exemption is $9,100,000 in 2022 and scheduled to match the federal exemption level in 2023. New York residents, on the other hand, should be mindful that, notwithstanding the fact that New York does not have a state-level gift tax, gifts made within three years of death are added back to the decedent's taxable estate for New York state estate tax purposes.

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 to consider:

- **Sales to Trusts.** Taxpayers should 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. Consideration could be given to refinancing existing notes, but given the higher interest rates, that may not be the best plan at the moment.
- **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 ($164,000 in 2022) to avoid federal gift tax. Note that the annual exclusion for gifts (to donees other than a spouse) is $16,000 in 2022.

- **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 IRC Section 2519 of a surviving spouse's qualified terminal interest property in a marital trust or the formation and funding of an entity that purposely violates IRC 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. For taxpayers looking to make a portability election, effective July 8, 2022, Rev. Proc. 2022-32 provides certain taxpayers with a more simplified method to make the portability election, allowing them to be able to elect portability of a DSUE up to five years after the decedent's date of death.

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 gift-splitting 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) 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 taxpayers, $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 the 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, though, given the higher interest rates as of late, their practicality has decreased since this time last year. 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 2022 is 4.80 percent, up significantly from November 2021's rate of 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 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 2022 is 3.05 percent for a short-term note, up significantly from the applicable federal rate for a sale in November 2021 of 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.

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 $12.06 million (or $24.12 million, if splitting assets with a spouse) to a grantor trust in 2022. This would permit the sale of up to $120.6 million (or $241.2 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. Particular care should be taken when considering swapping hard-to-value assets. In that circumstance, an appraisal from a qualified appraiser should be obtained to support the valuation of the swapped assets. This not only helps limit fiduciary liability claims but also helps against an argument that the swap was not done for assets of equal value, which could potentially result in a gift being made by the grantor to the trust.

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

While these techniques work better when interest rates are low, because 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., 2.93 percent is the mid-term AFR for a sale done in November 2022) 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 $12.06 million of assets in 2022, or $12.92 million of assets in 2023. The taxpayer may also be concerned about losing cashflow 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 IRC Section 2701.

Assume the taxpayer gifts $1.1 million to an irrevocable trust for the benefit of the taxpayer's children (Family Trust). The taxpayer and the Family Trust create a preferred partnership (PP). The 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 cashflow 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 IRC Section 2701. 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 IRC Section 2033, 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, cashflow above the 5 percent preferred return and appreciation on the PP's assets have been shifted to the Family Trust free of transfer taxes.

As discussed earlier, as a result of REG-118913-21, the IRS provided an exception to the anti-clawback rule for transfers of certain applicable retained interests in corporations or partnerships (IRC Section 2701). While clients may wish to utilize a preferred partnership structure to consume an increased exemption amount, it is important to take these new regulations into account.

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 high-interest rate environment is a Charitable Remainder Annuity Trust (CRAT), which combines philanthropy with tax planning. 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.

Alternatively, a strategy that works better in a low-interest rate environment is a Charitable Lead Annuity Trust (CLAT). 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, those assets can pass transfer tax-free to the chosen beneficiaries. A CLAT may become an attractive option if interest rates fall.

The Qualified Charitable Distribution rules were made permanent by the Protecting Americans From 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 2022, 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 2022

In addition to the above planning ideas, consider the following before the end of 2022:

- Make year-end annual exclusion gifts of $16,000 ($32,000 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 2022 income tax return.

Below is an overview of national, international and local developments that occurred in 2022.

International Developments in 2022

As the world enters the post-COVID era, everything has started returning back to normal, and the IRS and the Treasury are no exception to this reemergence. The IRS had some difficulty adapting to the pandemic, but this will likely not be the case going forward due to billions in new funding allowing for the hiring of thousands of new employees and necessary updates to existing technology. In preparing to take full advantage of their increased resources, the predominate theme in respect of actions taken by the IRS, Treasury, and United States appears to be focused on identifying the individuals or entities ultimately responsible for tax and reporting obligations in respect of any given structure. The U.S. is not alone in this endeavor, as countries worldwide are making efforts to understand and tax the worldwide operations and structures of large multinational enterprises as well as the individuals behind them. Below is a summary of the more material developments affecting the international private client landscape.

Corporate Transparency Act

While a more thorough analysis of the final regulations under the CTA be found earlier in this advisory, the following paragraphs describe CTA provisions relevant to international individuals and their structures involving entities organized in the United States.

As previously described, a Reporting Companies must report a number of items of personal information in respect of individuals who constitute "Beneficial Owners," including a photograph of an identifying document. There is a preference for US documents over foreign documents for this reporting. Individuals may also apply for a FinCEN identifier, which is an identifier that individuals may submit in lieu of the required information. Applying for a FinCEN identifier requires submitting the relevant reporting information under the CTA to FinCEN. A FinCEN identifier provides for compliance with the provisions of the CTA, while limiting unnecessary disclosures of personal information. Importantly, however, unless future guidance is promulgated that states otherwise, no value or income information is required to be disclosed by a Reporting Company.

International private wealth structures utilizing entities organized in the United States typically have a trust at the top of the ownership chain. In this regard, it is common for a non-US individual to settle a trust in a manner that such trust constitutes a "foreign grantor trust" — such trust must be revocable or distributions of income and principal must be limited to the settlor or the settlor's spouse during the settlor's lifetime. Thus, if the trust is revocable, or if the settlor is the sole permissible beneficiary during the settlor's lifetime, such settlor will constitute a "Beneficial Owner" via the "Ownership Test" (again, assuming that such trust directly or indirectly owns 25 percent of a Reporting Company). Alternatively, for example, if the non-US settlor of the trust wholly owns a "Reporting Company" (e.g., wholly owns a limited liability company organized in a US possession), and such settlor retains the right to remove and replace the trustee, who in turn holds the power to remove and replace the managers of such Reporting Company, it is arguable that the settlor has "substantial control" over such Reporting Company. As a last example, it may be the case that the non-US settlor serves on the board of managers of a Reporting Company, desiring to retain a level of control over the assets held by such Reporting Company. In this circumstance, it could be argued that such settlor retains "substantial control" over the Reporting Company due to his or her representation on the board of managers.

As can be seen, a thorough analysis of the facts and circumstances of any given international private wealth structure that holds "Reporting Companies" is necessary to ensure compliance with the CTA, and the Katten international private wealth attorneys stand ready to assist.

Netherlands Trust Registry

Similarly to the United States's efforts with the CTA, the Netherlands has created a trust registry to collect information on the ultimate beneficial owners (UBOs) of trusts and similar legal arrangements, Dutch Mutual Funds (Fonds voor gemene rekening or FGR), with trustees in the Netherlands or having business relationships with the Netherlands. This register applies to trusts or similar legal arrangements if the trustee resides or is established in the Netherlands or the trustee is outside of the EU and enters into a business relationship or purchases real estate in the Netherlands. Examples of business relationships that can give rise to a reporting obligation are utilizing Dutch banks, lawyers, accountants, tax advisers, or notaries. Entities or Trusts already registered with the Dutch Trade Register or with a trust register of another EU member state are not required to register with the new Netherlands trust registry.

Trustees will need to provide information on the UBOs of their respective trust including settlors, beneficiaries, trustees, and protectors. Personal information similar to that required by the CTA will need to be reported, but beneficiaries will also require their beneficial interest in the trust to be reported as well along with supporting documentation to show the accuracy of the reporting. Some of this information will be made accessible through

public access to the trust registry. Trusts will also be provided with a unique reference number following registration that they must disclose on all written statements, declarations, and letters made on behalf of the trust even if the document does not have any connection to the Netherlands. This trust registry seems indicative of a shift towards a world with increased disclosure of individuals and their personal dealings.

Supreme Court to Decide on "Per Form" or "Per Account" FBAR Penalties

Another recent development related to international information compliance and generally combatting tax evasion, following conflicting decisions in 2021, the Supreme Court will decide two cases related to penalties for non-willful failure to file FinCEN Form 114 Report of Foreign Bank and Financial Accounts commonly known as an FBAR. These two cases reached opposing conclusions to the question of if the penalty should be assessed on a "per form" or "per account" basis. The IRS has continuously asserted the per account basis, which can lead to exceptionally high penalties as the $10,000 penalty is assessed for each account that was not reported in each year. The per form basis would leave taxpayers with a single $10,000 penalty for failing to file an FBAR or filing an incomplete FBAR regardless of the number of unreported accounts. The two cases in question are *United States v. Boyd* from the US Court of Appeals for the Ninth Circuit and *United States v. Bittner* from the Fifth Circuit. While the cases do not directly deal with the disclosure of individuals, they put front and center the consequence of US individuals not disclosing non-US assets (i.e., foreign financial accounts) in a timely manner.

Swiss UBO Registry and Compulsory Share Changes

The Swiss Federal Counsel has also taken note of this shift toward increased disclosure of beneficial owners worldwide. Citing the creation of beneficial owner registries in many other countries with a particular focus on EU member states, the Swiss Federal Counsel has ordered legislation to be drafted by the end of June 2023 for the creation of a Swiss UBO registry. Currently, in Switzerland, shareholders of LLC's are visible in a public commercial register, but corporate shareholders and UBOs are not. This new UBO registry will provide access only to relevant authorities and not the public. Further details on who is obligated to report and what information is required to be reported should be available following the end of the drafting period in June 2023.

While UBO registry legislation is being drafted, the Swiss will see new changes to their inheritance laws take effect at the beginning of 2023. This previously enacted legislation reduces the compulsory shares of Swiss inheritance for family members and changes rules regarding the compulsory shares of couples going through a divorce. Currently, individuals subject to Swiss inheritance law with a spouse and children may only freely dispose of three-eighths of their total estate. The compulsory share amount allocated to descendants has been reduced, allowing for free disposal of half of the total estate. The compulsory share for parents of the deceased has also been abolished, allowing married individuals with no children to leave their entire estate to their spouse or partner. Lastly, individuals going through a divorce proceeding may now disinherit their spouse once proceedings have begun, as the protection to their spouse's compulsory share is now lifted at the beginning of proceedings instead of upon the final decree of divorce. The application of these rules begins on January 1, 2023, and is applied based on the date of death of an individual rather than the date of the creation of the will. These inheritance law updates, along with the planned creation of the UBO registry, show a willingness by Swiss authorities to adapt to the changing world around them.

Schedules K-2 and K-3 for Forms 1065, 1120-S and 8865

Partnerships and S corporations with an "item on international relevance" need to prepare Schedules K-2 and K-3 along with their relevant Form 1065, 1120-S or 8865. Schedule K-2 reports relevant international items for a partnership or S corporation as a whole, while Schedule K-3 reports, among other things, relevant international items for each partner or shareholder. An individual Schedule K-3 must be prepared and delivered to each partner or shareholder. Items of international relevance include foreign tax credit-related information, interests or distributions

from foreign entities, US source income or Effectively Connected Income of foreign partners, and information related to foreign investments including GILTI, Subpart F income, and Foreign Derived Intangible Income.

Schedules K-2 and K-3 increase the already burdensome filing obligations of partnerships and S corporations with foreign partners or shareholders, investments, or income. Nevertheless, these new schedules should help partners or shareholders more easily prepare their own taxes by knowing their distributive share of relevant international partnership or S corporation items. The IRS is also cognizant of the increased complexity created by the addition of the new schedules. IRS Notice 2021-39 provides relief in 2021 from a number of failure-to-file and furnish penalties relevant to Schedules K-2 and K-3 for those partnerships and S corporations who make a good faith effort to prepare these schedules correctly. In determining good faith, the IRS will look at the extent to which entities have implemented systems to collect required information, made reasonable assumptions in the absence of information, and changed their governing documents to facilitate the sharing of information. The 2021 tax year has provided many taxpayers an opportunity to learn these new schedules with some leeway from the IRS, but it is unlikely that this same lenience will be granted in future years.

The clear effort in promulgating these new forms is that the IRS is attempting to equip itself with better transparency of cross-border structures. We suspect that, with increased focus on international structures involving certain pass-through entities, coupled with the increasing funding and resources, there will be a corresponding increase in routine audits or examinations in respect of such international structures.

Final Regulations under IRC § 958 and Proposed Passive Foreign Investment Company (PFIC) Regulations

Coinciding with the release of the new Schedules K-2 and K-3, the IRS has finalized regulations under IRC § 958. The final regulations under IRC § 958, which were first proposed in 2019, provide for the treatment of domestic partnerships as aggregates of their partners for determining Subpart F and global intangible low-taxed income (GILTI) inclusions. The final regulations operate by extending the aggregate treatment currently imposed on foreign partnerships that own interests in foreign corporations to domestic partnerships that own interests in foreign corporations. However, aggregate treatment of partnerships does not apply for all purposes. The final regulations specifically exclude the use of aggregate treatment of domestic partnerships for determining if a US person is a US shareholder, if a foreign corporation is a controlled foreign corporation (CFC), for determinations of pro rata amounts of US property held by a CFC, for determining gain from certain sales of foreign corporation stock, and for purposes of determining if a US shareholder is a controlling domestic shareholder.

In addition to the final regulations, further proposed regulations were issued regarding the treatment of PFICs owned by domestic partnerships and S corporations as well as clarifying additional CFC and PFIC regulations. Like the previously discussed final regulations, much of the proposed regulations apply aggregate treatment to domestic partnerships and S corporations that own interests in PFICs. This change moves not only the inclusions arising from PFIC ownership but also the choice of qualified electing fund elections (QEF elections) and Mark-to-Market elections out of a partnership or S corporation's hands and into the hands of its partners or shareholders. The proposed regulations also discuss pre-existing elections and allow partners and shareholders to preserve existing elections. The proposed regulations also clarify that the CFC overlap rule, which applies the rules of the CFC regime instead of the PFIC regime when an entity is both a CFC and a PFIC, will also be applied at the partner level instead of the partnership level. This change will lead to the application of the PFIC rules to US investors with a less than 10 percent interest in entities that are both a CFC and a PFIC.

Inflation Reduction Act Corporate Alternative Minimum Tax and Organisation for Economic Co-operation and Development (OECD) Pillar II

On a more global scale, in connection with the increased focus on international structures, in August of this year, President Biden signed the IRA into law as part of an effort to curb the increasing inflation across the United

States. Among other items, the IRA includes a new 15 percent corporate alternative minimum tax (AMT) for US corporations and multi-national enterprises with US operations. The IRA'S AMT is based off of Adjusted Financial Statement Income (AFSI) and applies to US corporations with over $1B in AFSI for three taxable years. Foreign parented groups are subject to the same rules with the additional condition that their US enterprise must have at least $100M for three years in order to be subject to the AMT.

While the IRA's AMT may be reminiscent of OECD's Pillar II proposals, the IRA's new AMT is more narrow than the proposed Pillar II global minimum tax with the $1B of AFSI test casting a much smaller net than Pillar II's EUR 750M test. Additionally, the IRA AMT operates on blended global income and not on a country-by-country basis. The IRA also does not include any provision for a country-by-country top-up tax, which is a key proponent of OECD's plans. It was thought that GILTI could be modified to operate on a country-by-country basis to serve as the US's version of the top-up tax; however, this has never come to be. While the IRA's new changes do bring the US closer to compliance with the OECD Pillars, it is also thought that this may be the closest the US will come to Pillar II compliance.

Temporary Spanish Wealth Tax

In another update affecting the global tax landscape, Spain has introduced a new temporary wealth tax for 2023 and 2024 imposed on the value of net assets. The rate of tax is graduated based on net asset value at a rate of 1.7 percent on EUR 3-5M in net assets, 2.1 percent for EUR 5-10M in net assets, and 3.5 percent for amounts more than EUR 10M in net assets. In order to avoid double taxation with existing wealth taxes imposed by the Autonomous Regions of Spain, payments against existing wealth taxes will be deductible from the new wealth tax. Spanish residents should expect to be subject to this tax on the value of their worldwide assets. It is unclear if non-residents of Spain and those subject to the so-called "Beckham" regime will be subject to this tax on the value of their Spanish assets. While this tax is currently only temporary for 2023 and 2024, Spain's willingness to impose a national wealth tax may see this tax extended or similar taxes reappearing in future years.

Conclusion

In an era of increasing transparency, the IRS will have a clearer picture of your business or trust structure. This greater understanding will likely be accompanied by clarification of existing regulations and an increased number of audits enabled by the increasing size of the IRS. Proactive planning will help to resolve or mitigate any potential issues in a structure, or allow for the creation of new structures enabling you to manage new compliance obligations. As we enter a new year, please contact your Katten international private wealth attorneys to evaluate your existing structures, or plan for new structures, in order to help you understand and analyze compliance in this increasingly transparent environment.

Local Developments in 2022: State-Specific Considerations

California

Duty to Notify Beneficiaries upon Incompetency of Last Person Holding Power to Revoke Trust

Under California law, during the period of time when a trust is revocable, the trustee must provide periodic accountings to anyone who has the power to revoke the trust. In most circumstances, only the settlor holds the power to revoke, in which case the trustee has a duty to account solely to the settlor. During the incompetency of the settlor, prior law was unclear as to whom the trustee was obligated to provide accountings and information.

Effective January 1, 2022, California Probate Code sections 15800 and 16069 were amended to impose a new duty on a trustee to provide periodic accountings to each beneficiary who would be entitled to receive distributions of income or principal after the death of the settlor when either the settlor or the last person holding the power to revoke the trust is "incompetent."

Probate Code section 15800 subdivision (a) as amended specifies that the duties of the trustee are owed to the person holding the power to revoke, provided that at least one person holding the power of revocation over the trust, in whole or in part, is competent. The revised section clarifies that the trustee's new duties apply only when no competent person holds the power to revoke the trust.

Under the revised statute, except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, upon the last person empowered to revoke the trust becoming incompetent during the time that the trust is revocable, the trustee must provide notice of such incompetency and a complete copy of the trust instrument to each beneficiary who would be entitled to receive a mandatory or discretionary distribution of trust income or principal if the settlor had died. Notice must be provided within 60 days of the trustee "obtaining information establishing the incompetency of the last person" holding the power of revocation. The trustee is required to account to those beneficiaries at least annually and to provide information to beneficiaries upon request.

Finally, the amendment adds Probate Code section 15800, subdivision (c), which specifies that when determining the incompetency of the person holding the power to revoke the trust, the trustee *may* rely on either the method specified in the trust instrument, if any, or a judicial determination of incompetency.

While the revised statute attempts to clarify when certain beneficiaries are entitled to receipt of notice and a copy of the governing trust instrument, there remain unresolved ambiguities in the statute. First, the statute does not provide guidance as to what information is *necessary* to establish a power holder's incompetency. A trustee is *permitted* to use a method set forth in the trust or a judicial determination of incompetency, however neither method is mandatory, and a trustee is not directed to seek a judicial determination when the trust is silent as to the methodology for establishing incompetency. Second, while the trustee is permitted to use a method set forth in the trust to determine *incompetency*, many trusts provide for a method to determine *incapacity*. A successor trustee may believe a settlor or other power holder is incapacitated, thereby triggering the successorship provisions of a trust, but not statutorily incompetent which would therefore not trigger the notice requirement of section 15800.

Until the statute is further reformed, a trustee's determination as to what constitutes "information establishing the incompetency" of a power holder and whether notice to beneficiaries is required under the statute will likely remain a subjective analysis. Further, as the statute provides that the notice requirement applies except to the extent that the trust provides otherwise, it is prudent for settlors of existing revocable trusts, and individuals contemplating creating revocable trusts, to expressly reference the statute in the trust instrument and either opt out of the notice requirement or limit the class of beneficiaries entitled to trust related information. Taking a proactive approach can help avoid unnecessarily providing trust-related information to each beneficiary entitled to receipt of any distributions regardless of the amount or degree of the beneficiary's beneficial interest.

Revisions to Spendthrift Trust Provisions

Assembly Bill No. 1866 (AB 1866) was signed into law on June 21, 2022, and will add a new section to the California Probate Code effective January 1, 2023, clarifying that a trustee's discretionary authority to reimburse a settlor for income taxes paid by the settlor does not allow a creditor to reach into the trust. The bill adds section 15304 subsection (c) to the California Probate Code, which provides "for purposes of this chapter the settlor shall not be considered to be a beneficiary of an irrevocable trust created by the settlor solely by reason of a discretionary authority vested in the trustee to pay directly or reimburse the settlor for any federal or state income tax on trust income or principal that is payable by the settlor, and a transferee or creditor of the settlor shall not be entitled to reach any amount solely by a reason of that discretionary authority."

Prior to the enactment of AB 1866, existing law invalidated provisions of a trust that restrict the transfer of the settlor's interest if the settlor is also a beneficiary of the trust. Existing law also authorized the creditors of a settlor who is also a beneficiary of the trust to reach the amount of income or principal of the trust that the trustee could, at the trustee's discretion, pay to or for the benefit of the settlor under the trust instrument, as specified.

AB 1866 ensures that a settlor of a grantor trust who irrevocably gives property to the trust for the benefit of others, but who is personally responsible for taxes on the trust property, may be reimbursed for those taxes without the settlor's creditors gaining access to the transferred property. The bill confirms that a settlor is not considered a beneficiary of an irrevocable trust created by the settlor solely by reason of a discretionary authority vested in the trustee to pay directly or reimburse the settlor for any federal or state income tax on trust income or principal that is payable by the settlor.

Settlors of California trusts may consider including a provision in an irrevocable trust instrument granting a disinterested trustee the ability to reimburse the settlor(s) for any federal or state income taxes paid by the settlor(s) that are attributable to trust income or principal, as such discretionary authority vested in the trustee no longer subjects the trust to the reach of creditors of the settlor(s).

Increase to Small Estate Probate Procedures

Assembly Bill 473 added section 890 to the Probate Code which requires the Judicial Council, beginning April 1, 2022, and every three years thereafter, to adjust the statutory amounts of the property values used to determine eligibility for various procedures to succeed to a decedent's interest in property without administration. The following adjustments were made to such small estate probate procedures as of April 1, 2022:

Petition to Determine Succession to Real and Personal Property (form DE-310): Probate Code sections 13100, 13101, and 13151 authorize the successor to a decedent's interest in real or personal property to petition for a court order determining that the petitioner has succeeded to that property subject to specific conditions, including that the gross value of the decedent's real and personal property in California does not exceed a certain threshold adjusted periodically in accordance with section 890. On April 1, 2022, the maximum value of such property was increased from $166,250 to $184,500 for decedents who die on or after that date.

Affidavit re: Real Property of Small Value (form DE-305): Probate Code section 13200 allows a petitioner to claim a particular item of a decedent's real property in California as the decedent's successor using Form DE-305. Effective April 1, 2022, the maximum allowable value of that property belonging to decedents who die on or after that date was increased from $55,425 to $61,500.

Property Excluded from Determining Value of Estate: Probate Code section 13050(c)(2) allows a fixed amount of a decedent's salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment to be excluded from a decedent's estate. On April 1, 2022, the maximum value of such salary or compensation was increased from $16,625 to $18,450.

Exclusion from Estate for Purposes of Small Estate Affidavit: Probate Code sections 6602 and 6609 allow a petitioner to request an order setting aside a decedent's estate to the decedent's surviving spouse and minor children if the net value of the decedent's estate does not exceed a certain threshold. On April 1, 2022, the threshold was increased from $85,900 to $95,325.

Revisions to Revocable Transfer on Death Deed Requirements and Clarification of Existing Law

Revocable transfer on death deeds are governed by California Probate Code sections 5600 – 5698 and allow a transferor to transfer ownership of real property to a designated beneficiary upon the transferor's death, while avoiding the probate process and without needing to execute a will or trust. The transfer on death deed is a

relatively recent statutory creation, coming into existence in January 2016. While revocable transfer on death deeds are inherently appealing due to the apparent easy avoidance of a costly and time-consuming probate administration or the costs associated with creating a revocable trust, since its enactment, critics of California's transfer on death deed statutory scheme have argued that the statutory procedures, which did not initially require witnesses or contain notice requirements, were ripe for abuse. The statute also failed to include provisions for correcting mistakes discovered after the death of the transferor. In response to these criticisms, the California Law Revision Commission reviewed the statutes, made recommendations and proposed substantive changes, which passed into law and became effective as of January 1, 2022.

Perhaps most notably, the revised statutory scheme adds a requirement that, in order to be effective, the revocable transfer on death deed, or a document revoking the deed, must be signed by two witnesses who were present at the same time and witnessed either: (1) the transferor signing the document, or (2) the transferor's acknowledgement that the transferor signed the document. The witnesses must be competent to provide evidence in an action to contest the validity of the deed. If a beneficiary of a revocable transfer on death deed also signs as a witness, the deed is presumed to be the product of fraud or undue influence. California Probate Code section 5625. These changes essentially mirror the requirements for a valid Will.

The revised statutes make the following additional changes and clarifications:

- The statute's sunset date is extended until January 1, 2032. The statute had originally contained a sunset provision automatically repealing the transfer on death statute on January 1, 2022.
- The beneficiary of the transferred property is required to provide notice to the transferor's heirs upon the death of the transferor.
- California courts are empowered to modify a transfer on death deed to prevent the deed's failure due to ambiguity or because a charitable beneficiary declines or is unable to accept the property.
- The definitions of "real property" and "beneficiary" are revised as follows: real property means either a parcel of land that is improved with one to four residential dwelling units or a residential separate interest and its appurtenant common area in a common interest development, regardless of the number of separate interests in the common interest development. Real property expressly does not include a separate interest in a stock cooperative or a parcel of agricultural land that is greater than 40 acres in size. Beneficiary means a person named in a revocable transfer on death deed as transferee of the property. A natural person, trust, or legal entity may be named as a beneficiary.
- The statute clarifies that the transfer on death deed statutes do not limit the application of other laws that impose a penalty or provides a remedy for the creation of a transfer on death deed by means of fraud, undue influence, menace, or duress.
- The statute clarifies that the beneficiary of a revoked transfer on death deed has standing to contest the validity of a revocation after the transferor's death.

Revision to California Partition Action

The Uniform Partition of Heirs Property Act (the Act) became effective January 1, 2022, and added new sections to the California Code of Civil Procedure governing partition actions for real property held by tenants-in-common under specific circumstances.

Prior to the enactment of the Act, an owner of real property was allowed to commence and maintain an action for partition of the property against all persons having or claiming interests in such property. If the court found that the petitioning party was entitled to partition, the court was required to enter judgment and to make a determination

concerning the interests of all owners of the property, and order the property either divided in accordance with such interests, or sold with the proceeds of the sale being distributed proportionally.

The Act created new procedures in an action to partition real property that is "heirs property." The Act defines "heirs property" as (a) property for which there is no agreement in a record which governs the partition of the property, (b) one or more of the cotenants acquired title from a relative, whether living or deceased, and (c) any of the following apply: (1) 20 percent or more of the interests are held by cotenants who are relatives; (2) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or (3) 20 percent or more of the cotenants are relatives. California Code of Civil Procedure section 874.312(e).

"Relatives" include ascendants, such as parents or grandparents; descendants, such as children and grandchildren; and "collateral" relations, such as siblings, cousins, aunts and uncles.

Under the Act, upon the filing of an action requesting partition by sale, the court must first determine if the subject property is heirs property. If so, the property will be partitioned unless all of the cotenants otherwise agree in a "record." If the property is subject to partition, the court will appoint a disinterested appraiser to determine the fair market value of the property (absent an agreement by all cotenants as to the fair market value).

Each cotenant is entitled to object and any non-partitioning party may provide notice of their intent to buy all the interests of the partitioning parties within 45-days of the court setting the fair market value of the property. After the 45-day period, the party or parties electing to buy out the partitioning parties' interest have 60 days to complete the transaction.

If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants, or if after conclusion of a buyout a cotenant remains that has requested partition in kind, the court shall order partition in kind, unless the court finds that partition in kind will result in great prejudice to the cotenants as a group.

The Act has now been adopted either entirely or substantially by 21 states and its primary purpose appears to be maintaining tenancy-in-common ownership arrangements for families whose main financial asset is a family residence and avoiding the sale of tenancy-in-common properties when such sale would not yield a fair market value return. The process created by the Act appears to be designed to facilitate a buy-out when the family members are unable to reach an agreement among themselves.

However, the legislation may also be found to have an impact on valuation for gift tax purposes, because the recipient may be subject to the provisions of this new law.

Appellate Court Split Concerning Procedure for Trust Modification

The California legislature created California Probate Code sections 15401 and 15402 in 1986, codifying common law procedures for revocation and modification of California trusts. Prior to the enactment of these sections, California's common law doctrine held that the power to amend a trust was not a standalone power but rather was derived from the power to revoke a trust, which inherently included a power to modify a trust. Following the enactment of Sections 15401 and 15402, each power has its own statutory authority. However, notwithstanding the seemingly straightforward provision of section 15402, a dispute has developed among California appellate courts concerning the procedure for modifying revocable trusts.

Section 15401, which governs revocation, provides two alternative methods for the revocation of a trust. Under the first method, a trust may be revoked by "compliance with any method of revocation provided in the trust instrument." Under the second method, a trust may be revoked in "a writing, other than a will, signed by the settlor . . . and delivered to the trustee during the lifetime of the settlor." But, if "the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation," that method must be used.

Section 15402, which governs modification, provides simply that "[u]nless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation."

In 2012, the Fifth District Court of Appeal ruled in *King v. Lynch* (2012) 139 Cal.App.4th 1186 that when a trust sets forth a method or procedure for trust modification, that method must be followed in order for a modification to be effective, regardless of whether the trust expressly provides that the method is the exclusive method of modification. In 2019, the Third District Court of Appeal made a similar ruling in Pena v. Dey (2019) 39 Cal.App.5th 546.

In 2021, the Fourth District Court of Appeal came to a different conclusion in *Haggerty v. Thornton* (2021) 68 Cal. App.5th 1003. There, a settlor established a living trust and retained the permissive right "by acknowledged instrument in writing to revoke or amend this agreement or any trust hereunder." Settlor signed and acknowledged an amendment in 2016, and subsequently drafted a "list of beneficiaries" in 2017, which was not signed or notarized. Settlor then executed a 2018 amendment, which she signed but did not notarize. Settlor died in 2018 and a petition was filed to confirm the validity of the 2016, 2017 and 2018 documents. The court held that because the settlor included the powers to revoke and amend in a single provision, both powers could be exercised using the same procedure. The court further held that trust's provision which stated the settlor had the power "by acknowledged instrument in writing to revoke or amend this agreement" was *not* the exclusive method to amend the trust, and found that the 2018 amendment, which the settlor signed and delivered to herself as trustee, was valid despite it not being acknowledged.

The *Haggerty* court analyzed sections 15401 and 15402 and concluded that the statutory provisions served to codify the pre 1986 common law rule which held that unless a trust provides otherwise, the power to revoke includes the power to modify such that an available procedure of revocation is also an available procedure of modification.

On December 22, 2021, the California Supreme Court granted review of *Haggerty v. Thornton*.

***Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511**

In 2022, the First District Court of Appeal was afforded the chance to rule on the question of trust modification following the *Haggerty* decision in the case *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511. In *Balistreri*, husband and wife amended their revocable trust one day before husband passed, but did not have the amendment notarized in apparent violation of the trust's reservation of rights provision, which mandated that "[a]ny amendment, revocation, or termination . . . shall be made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee." Wife sought to confirm the validity of the amendment, arguing that the statutory procedure for *revocation* should be available for a *modification* despite the trust's language requiring any amendment or revocation to be signed and acknowledged. Wife further argued that the amendment reflected the settlors' intent for the disposition of their estate and the minor error in not having the amendment acknowledged should not serve to frustrate that intent. Decedent's son filed a petition to invalidate the trust amendment on grounds the amendment failed to comply with the trust's stated method for amendment.

The probate court concluded the amendment was invalid for lack of notarization and the appellate court affirmed, holding that when a trust provides for a specific method of modification, the specified method must be followed for a modification to be valid. By providing that any amendment to the trust had to be acknowledged before a notary for such amendment to be valid, the settlors manifested their intent to be bound by such a method and the statutory methods of modification did not control.

Wife sought review of the appellate court's decision by the California Supreme Court, which request was granted and deferred, pending the court's review of *Haggerty v. Thornton*.

As a result of the inconsistent rulings in *Balistreri* and *Haggerty*, it is not presently clear what language a trust instrument must include to limit the amendment procedure to that stated in the trust instrument. At this time, the First, Third, and Fifth Districts have all adopted a restrictive approach, requiring that the settlor strictly adhere to the terms of the trust, while the Fourth District has adopted a more lenient view, allowing for an expansive reading of the statutory procedures for both modification and revocation. Using a plain language analysis of section 15402, however, it would seem that including any method for amending the trust instrument should be sufficient to opt out of the statutory method allowed for revocations as a procedure by which to validly amend the trust instrument.

While the California Supreme Court considers this issue, it may be prudent to include an explicit statement that directly sets forth the method of amendment or modification and which provides whether such procedure is the exclusive method by which the trust may be modified. We will be closely monitoring the supreme court's decisions in these cases.

***United States v. Allison*, No. 120CV00269DADHBK, 2022 WL 583573 (E.D. Cal. 2022)**

In *Allison*, decedent created a revocable inter vivos trust approximately two weeks before his death. Defendants, as co-trustees of decedent's trust, transferred certain assets totaling $518,750 to the trust. On or about February 27, 2007, defendants filed an estate tax return on behalf of decedent's estate. The estate tax return reported that the total gross estate value at the date of decedent's death was $1,663,242. Defendants subsequently transferred and or distributed all the property of the trust and the estate, and the tax liability reported on the estate tax return — amounting to $192,425 — was paid in full.

Three years later, on or about February 9, 2010, defendants, acting as the estate's representatives and as trustees, executed a Waiver of Restrictions on Assessments agreeing to an immediate assessment of $96,808 in additional tax on the estate (the "additional assessment").

The additional tax assessments related to disallowed deductions or a recharacterization of a payment as a non-deductible transfer. The court found the defendants personally liable under IRC section 6324(a)(2) for the unpaid estate tax liabilities up to the value of property held in decedent's trust ***at the time of his death***, even though the trust was fully distributed.

The case is noteworthy as it highlights the importance of uncovering all of a decedent's assets while preparing the estate tax return, and the importance of maintaining adequate reserves and obtaining a refunding agreement to cover any potential future estate tax liability.

Illinois

Amendment of Powers Of Attorney For Health Care Article of the Illinois POA Act

On May 13, 2022, Governor Pritzker signed into law an amended Powers Of Attorney For Health Care Article of the Illinois Power of Attorney Act, to be effective January 1, 2023.

The primary change that the amended Article enacts is that, in the amended Illinois statutory short form power of attorney for health care (Form Health Care POA), there is a new provision allowing electronic presentation of a Form Health Care POA as proof of agency. Thus, in each case where a principal has executed a Form Health Care POA, and therein has authorized his or her agent to present it electronically, when the agent later presents an electronic device displaying an electronic copy of such executed Form Health Care POA as proof of the health care agency, attending physicians, emergency medical personnel, and other health care providers are prohibited from refusing to give effect to such health care agency.

Additional components of the amended Article include: (1) requirements that the Department of Public Health provide information on its website regarding physical or electronic possession of a Form Health Care POA, and

further, create an information campaign regarding the amended Article; (2) requirements that any person or entity that provides the Form Health Care POA to the public to post information on its website regarding changes made by the amended Article for at least two years; and (3) conforming changes to the Illinois Power of Attorney Act.

Illinois Notary Public Act – Implementation Still Pending

Changes to the Illinois Notary Public Act (the Notary Act) were signed into law in July of 2021 as Public Act 102-160. Three of the changes are now effective as of July 1, 2022, (each of them relating to fees or state budgetary matters). However, the other changes to the Notary Act (such as the new provisions governing Remote Ink Notarizations and Remote Online Notarizations) are not yet effective, and will remain paused until the Illinois Secretary of State publishes revised administrative rules regarding the Notary Act. That said, proposed rules were put forth in April 2022, and the commentary period ended in May 2022, so finalized rules may well be released soon.

Electronic Wills and Remote Witnesses Act – Illinois an Early Adopter

On July 26, 2021, Governor Pritzker signed into law the Electronic Wills and Remote Witnesses Act (the EWRWA). In contrast to the Notary Act, the EWRWA became effective immediately upon signing. The EWRWA has two main purposes: (1) to allow electronic Wills to be executed in Illinois; and (2) 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 phenomenon, as Illinois was just the tenth state to do so). Each of the nine states that preceded Illinois in allowing electronic Wills also permit electronic Wills to be admitted to probate in such states (whether such electronic Will was executed in accordance with the laws of the probate jurisdiction or the laws of another jurisdiction). However, uncertainty remains for almost all other states, and some have specifically prohibited electronic Wills (e.g., Oregon). Thus, it remains unclear whether an electronic Will can be admitted to probate in a jurisdiction that does not authorize the execution of electronic Wills.

Illinois Real Property Transfer on Death Instrument Act

As of January 1, 2022, the amended Illinois Residential Real Property Transfer on Death Instrument Act (the Act) became effective. The amended Act most significantly expands the scope of the Act to incorporate commercial real estate within the class of real estate that can be transferred via a transfer on death instrument (TODI), as well as provides several updates related to the construction and implantation of TODIs.

Trailer Bill for Illinois Trust Code

The Illinois Trust Code (ITC), as modified by the proposed "trailer bill" which was present in 2021, became effective January 1, 2022. The trailer bill was a combination of technical corrections and clarifications to the ITC that was originally presented, but did layer in some additional substantive edits to the ITC. Notable revisions which came out of the 2021 trailer bill included: clarifications to definitions used throughout the ITC, additional clarity and exceptions pertaining to the default and mandatory rules, revisions concerning judicial modifications to achieve grantor's objectives and trustee's duty to inform and account and narrowing of the scope of representation by certain powerholders.

Additional analysis of these updates can be found in the Illinois portion of our 2021 Year-End Estate Planning Advisory.

***Corcoran v. Rotheimer*, 2022 IL App (1st) 201374 (June 9, 2022)**

In this case, a father (Father) owning a beneficial interest in a parcel of land (held by an Illinois land trust) had amended the planned succession of such beneficial interest multiple times over his decades of ownership (most

notably changing it from 100 percent passing to two of his children as joint tenants with rights of survivorship to 100 percent passing to a limited liability company (an LLC) where Father's revocable trust was the sole member). Importantly, Father's revocable trust included all three of his children as beneficiaries (rather than just the two children, above) and named the third child as successor trustee after Father.

Father passed in 2015, and the third child (i.e., the child that receives assets under Father's revocable trust but not under the previously executed beneficiary designation described above), as trustee, brought an action for declaratory judgment in favor of Father's assignment to the LLC. The two children originally designated as beneficiaries (Original Beneficiaries) contested this, arguing that the assignment was not in compliance with the land trust's requirements for valid transfers, including that Father did not file (or lodge) such assignment with the land trustee. The trial court granted trustee's motion and denied Original Beneficiaries' motion. Original Beneficiaries appealed.

The appellate court affirmed the trustee's motion for summary judgment. The appellate court held that the assignment was not invalidated by Father's failure to lodge the assignment with the land trustee.

The primary provision in question (the lodging requirement of land trust agreement) stated that no assignment would be binding on the land trust trustee until the original or a duplicate of the assignment was lodged with the land trust trustee. The appellate court concluded that this language showed that the lodging requirement was only designed to protect land trust trustees against potential accusations of breach of fiduciary duty (for example, in situations where the trustee had to determine which assignment was entitled to priority), and no such determination was necessary in this situation.

***Palm v. Sergi*, 2022 IL App (2d) 210057 (June 13, 2022)**

In *Palm*, two spouses each created a revocable trust of which the respective grantor was the sole beneficiary during their lifetime. Under the terms of the two reciprocal trusts, upon the grantor's death, the surviving spouse was entitled to receive distributions during the surviving spouse's lifetime, with the remainder to be distributed equally among the grantors' two children upon the surviving spouse's death. The spouses' trusts both named the non-grantor spouse as an initial Co Trustee with the grantor spouse.

Husband's Trust was the owner of shares of stock and eventually sold said shares in exchange for a promissory note in the amount of $6,400,000 (the Note). Husband, as Co-Trustee of Husband's Trust, assigned a 20 percent interest in the Note to Wife's Trust and payments on the Note were initially deposited, 80 percent to a separate bank account for Husband's Trust and 20 percent to a separate bank account for Wife's Trust.

Subsequently, Husband, unilaterally and in his capacity as a Co-Trustee of Wife's Trust, redirected the monthly payments on the Note so that 100 percent of the payments on the Note were deposited into Husband's personal bank account, including the 20 percent that formerly went to the Wife's Trust account. Husband then divested the Wife's Trust's interest in the Note to purchase a business interest, without written authorization from Wife as Co-Trustee of Wife's Trust.

After Wife's death, Wife's sister sued Husband as the former trustee of Wife's Trust for breach of fiduciary duty, unjust enrichment, and accounting, and sued the bank who held the accounts for Husband and Wife's Trust for unauthorized distribution from Wife's Trust. Wife's sister sued as an agent of Wife's Trust — as she was not a trustee or beneficiary of Wife's Trust at the time of filing.

In this case, the trial court granted Husband's motion for summary judgment for Wife's sister's lack of standing to sue and as well as the argument that the action taken by Wife's sister was not timely filed and therefore barred, due to Wife's knowledge of the actions taken by Husband as the Co-Trustee. The trial court also granted the bank's motion for summary judgment based on the fact that the bank was merely following Husband's instructions about

where to direct the payments on the Note and Husband, as Co-Trustee, was authorized to issue those instructions unilaterally under the terms of Wife's Trust.

The trial court found the Wife's sister, suing as an agent of the Wife's Trust, did not have standing and only trustees have the power to sue on behalf of the trust's beneficiaries. The trial court also held that the terms of Wife's Trust allowed Husband to act unilaterally with respect to its assets, and thus Husband did not breach his fiduciary duty to the beneficiaries of Wife's Trust with respect to the redirection of monthly payments and the distribution of Wife's Trust's interest in the Note. The trial court also held that the claims related to the redirection of the monthly payments were time barred, based on Wife's apparent knowledge of the actions of Husband as Co-Trustee.

Wife's sister was subsequently appointed as a successor Co-Trustee of Wife's Trust. In that capacity, Wife's sister sought and was granted leave to file an amended complaint asserting the same claims but identifying herself as Co-Trustee of Wife's Trust and Husband as a former trustee of Wife's Trust. The trial court thereafter denied Husband's motion to dismiss, finding that Wife's sister had standing to sue and that the amended complaint was timely because it related back to the date on which the original complaint was filed; however Husband's motion for summary judgment was still granted.

On appeal, the appellate court found that the trial court erred when it found that Husband was authorized to take unilateral actions to divert and use trust assets. The appellate court remanded the case back to the trial court based on lack of evidence in the record to show that Wife had any knowledge of Husband's unilateral actions and suggested the discovery rule would apply to the date when Wife's sister and other beneficiaries of Wife's Trust learned of Husband's actions.

The appellate court also found Wife's sister (acting as agent to Wife's Trust and eventually Co Trustee) did at all times have standing to sue a former trustee as Wife's Trust was always the real party in interest. The appellate court indicated that in this case, Wife's sister as an agent and Trustee, was always acting on behalf of Wife's Trust and the trust's beneficiaries.

***In re Estate of John W. McDonald III*, 2022 IL 126956 (April 21, 2022)**

In *McDonald*, the Decedent prior to his death had been adjudicated disabled and the Decedent's brother was appointed as the Decedent's plenary guardian. Following the adjudication and five months prior to the Decedent's death, the Decedent engaged in a marriage ceremony with Decedent's alleged spouse. Upon Decedent's brother filing a petition for letters of administration upon Decedent's death, the Decedent's alleged spouse intervened. The Decedent's brother served as the Decedent's plenary guardian at the time the claimed marriage occurred, and the Decedent's brother disputed the legitimacy of the marriage (and therefore, the Decedent's alleged spouse's claims to the Decedent's estate) based on the fact that the marriage was entered into without the Decedent's brother's knowledge as guardian, or the knowledge of the probate court under which the Decedent was a ward. The Decedent's brother argued the marriage was void from its inception because the Decedent was a ward under a plenary guardianship at the time of the ceremony and lacked the capacity to enter into a valid marriage because the probate court never determined the marriage to be in the Decedent's "best interest" as required by Section 11a-17(a-10) of the Probate Act of 1975 (the Probate Act).

The issue for the trial court was boiled down to an heirship dispute — whether the Decedent's alleged spouse was able to establish that she was the Decedent's legitimate surviving spouse and therefore, sole heir to the Decedent's estate. The trial court agreed with the Decedent's brother and granted the Decedent's brother's motion for a directed finding at trial. The trial court barred the Decedent's alleged spouse from testifying at trial based on the Dead Man's Act and further held that the Decedent's alleged spouse failed to present a *prima facie* case establishing the validity of her marriage.

On appeal, the appellate court reversed and ruled the Probate Act did not require a best interest determination before a ward could enter into a marriage and that a ward of a plenary guardianship can enter into a marriage without approval from the ward's guardian. The case was further appealed to the Illinois Supreme Court by the Decedent's brother.

The supreme court reversed the appellate court's ruling, holding that under the Probate Act, a ward who wishes to enter into a marriage may do so only with the consent of his guardian. The supreme court held that in this case, because the Decedent was a ward under a plenary guardianship, the validity of the parties' marriage was governed by provisions of Probate Act (which provides for the process under which a guardian could obtain the ability to consent to ward's marriage) rather than by the provisions of Illinois Marriage and Dissolution of Marriage Act (which provides the standard for capacity to consent to a marriage in the state of Illinois).

The supreme court observed that the Decedent's alleged spouse bore the burden of proof to establish that the Decedent's alleged spouse and the Decedent had entered into a valid marriage, including that the Decedent had the capacity to marry. The supreme court did find that the trial court erred when it barred the Decedent's alleged spouse's testimony pursuant to the Dead Man's Act; however, the supreme court also found that the trial court's error was harmless and not reversible because no testimony provided by the Decedent's alleged spouse would have established that the Decedent had the capacity to enter into a valid marriage where only a court could authorize the marriage after conducting a best interest hearing (as required under the Probate Act).

***Providence Bank and Trust Company v. Raoul*, 2022 IL App (3d) 210037 (March 4, 2022)**

In this case, an appellate court affirmed a trial court's ruling in favor of the executor of an estate, who sought to make an Illinois qualified terminable interest property election (QTIP election) on behalf of the estate. The primary points of contention were, in the context of filing an amended Illinois estate tax return: (1) whether a QTIP election first made on an original estate tax return can be modified in an amended return, and (2) if so, whether such a modified QTIP election is effective when made after the (extended) deadline for the original estate tax return.

Husband, an Illinois resident, predeceased Wife in September of 2017, with an estate valued between $4,000,000 and $5,490,000. Such figures happened to equal the Illinois estate tax exemption and the federal estate tax exemption then in effect, respectively. Accordingly, the executor of Husband's estate (Executor) concluded that the estate would not be required to pay federal estate taxes but was potentially required to pay Illinois estate taxes.

Executor filed a timely Illinois estate tax return near the deadline for doing so in December of 2018 (but after having requested and receiving an extension of the initially applicable deadline of June 2018). Executor made a QTIP election in the original estate tax return, calculated by the Executor to equal $307,489. As is typical, the QTIP election was meant to defer any potential Illinois estate tax on the estate until after Wife, as the surviving spouse, had passed away.

However, there was a mistake in the original Illinois estate tax return concerning taxable gifts during Husband's lifetime. Although a worksheet that was attached to the original return indicated prior taxable gifts of $849,240, that amount was not carried forward to the return itself. So, by a mistake of the preparer, the amount of taxable gifts listed on the original return was $0.

Several months later, Executor received notice that an Illinois estate tax deficiency had been assessed by the Attorney General's office (AG's Office) after an audit of the original return. Executor promptly paid the deficiency, including interest, under protest in October 2019. At the same time, Executor filed suit seeking a declaratory judgment that no deficiency was owed and thus a refund of the protest payment plus interest was proper.

In November 2019, Executor filed an amended return. Therein, Executor corrected the amount of taxable gifts and also modified the amount of the QTIP election to account for the change in the value caused by the correction of the taxable gift amount.

The AG's Office rejected the amended return, asserting that the QTIP amount could not be changed or modified after the extended filing date for the original Illinois estate tax return had expired (December of 2018, in this case). Executor promptly filed an amended complaint.

In the ruling, the appellate court acknowledged that the AG's Office was correct that, after Executor filed the original return and the extended filing date had expired, the QTIP election was then irrevocable, and Executor was generally prohibited from trying to change it.

However, the court noted that in this case, Executor was not seeking a QTIP modification of its own volition, but rather in response to the notice of deficiency. Once the AG's Office had completed their audit and notified the Executor of the change in the amount of Illinois estate tax due, the Executor "was required under Section 7 of the Illinois Estate Tax Act to file an amended return to correct the mistakes that had been made, including the mistake in the QTIP election, if plaintiff was not going to merely accept the changes that the AG's Office had made to the original return."

Thus, the court held that, "Section 7 of the Illinois Estate Tax Act would allow for the filing of an amended Illinois estate tax return to correct an error in the original return, even if that error related to the amount of a QTIP election. To rule otherwise would lead to an absurd result where a taxpayer would be prevented from correcting an obvious mistake."

In short, the Executor was allowed to increase the amount of the decedent's estate subject to the QTIP election on the amended return, which was consistent with the decedent's general intent of reducing estate tax paid upon decedent's death.

New York

2022 has been an active year for legislative reform in this area for New York State. A brief summary of the 2022 changes follows.

State Estate Taxation

For individuals dying on or after January 1, 2023, the basic exclusion amount will be equal to the federal basic exclusion amount indexed annually, but without regard to the passage of the TCJA. At the time of publication, the 2023 New York estate tax exclusion amount has not been released, but is $6,110,000 in 2022.

Changes to Statutory Short Form Power of Attorney

As of June 13, 2021, New York's Statutory Short Form Power of Attorney took on a different form. One of several changes that were enacted added a requirement that the principal's signature be witnessed by two disinterested persons in addition to being notarized.

At the time of this writing, there are two amendments to the General Obligations Law regarding the Statutory Short Form Power of Attorney that have passed each chamber of the New York State Legislature but have yet to be delivered to Governor Kathy Hochul.

The first amendment to the General Obligations Law would clarify that a power of attorney executed by the principal in a manner prescribed by the law in effect at that time of execution is valid and enforceable, even if signed by the agents of the principal at a later date, including, but not limited to, after June 13, 2021.

The second amendment to the General Obligations Law would require that whenever a principal who is a trustee of a trust signs a power of attorney which allows the agent to affect such trust, and the agent is not a co-trustee of such trust, the principal shall notify in writing all other co-trustees of the signing of a power of attorney and identify

the person(s) assigned as the principal's agent(s). Similarly, whenever a principal who is a beneficiary of a trust signs a power of attorney which allows the agent to affect such trust, and the agent is not a co-beneficiary of such trust, the principal shall notify in writing all other co-beneficiaries of the signing of a power of attorney and identify the person(s) assigned as the principal's agent(s).

Elective Pass-Through Entity Tax

Last year, an addition to the New York State Tax Law provided for an elective pass-through entity tax to allow eligible partnerships (including LLCs taxed as partnerships) and 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 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.

Previously, for S corporations, the New York pass-through entity tax was applicable only to New York source income. However, as of April 9, 2022, effective for tax years beginning in 2022, New York resident S corporations can include non-New York source income when calculating the base for the application of the pass-through entity tax. In order to qualify as a New York resident S corporation, all shareholders must certify that they are New York residents.

Additionally, a new tax is imposed on the city pass-through entity taxable income of every electing city partnership and every electing city resident S corporation at a rate of 3.876 percent of city pass-through entity taxable income. This tax is in addition to any other taxes imposed on such partnerships or S corporations.

Not-for-Profit Organization Donor Disclosure

In August of 2021, 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 the United States Supreme Court striking down a similar statute regarding California donor disclosure requirements.

In November 2021, an amendment to the New York Executive Law was signed by Governor Hochul changing the donor disclosure requirements of not-for-profit organizations. The amendment prohibits the disclosure to the public of the names, addresses and telephone numbers of contributors to a not-for-profit organization and the amounts contributed by such contributors that are typically reported on financial disclosure reports of certain not-for-profit organizations.

Remote Notarization

Permanent Regime

Remote online notarization (RON) is set to go into effect on January 31, 2023. The New York Secretary of State is expected to issue regulations on acceptable methods for authenticating the identity of a remote principal.

Remote notarization will only be available for documents which otherwise can be signed electronically under New York law.

Any Notary Public wishing to provide RON services must complete an additional registration process with the New York Secretary of State.

Temporary Regime

Prior to January 31, 2023, and ceasing upon such date, any Notary Public currently registered with the New York Secretary of State may conduct remote ink notarization (RIN). In order to notarize a document using RIN, the following requirements must be met:

- The Notary Public must verify the identity of the principal by (1) his/her personal knowledge of the principal; (2) remote presentation of the principal's credentials; (3) Credential Analysis, as defined within the law; (4) identity proofing; or (5) an oath or affirmation of a credible witness who personally knows the principal, who is either personally known to the Notary Public or has provided credentials.
- The communication technology must allow for real-time, direct audio and video interaction. The audio-video communication technology must provide reasonable security measures.
- An audio-video recording of the remote notarization must be retained by the Notary Public for a period of at least 10 years. The Notary Public or an authorized third party must also secure a backup of the recording from unauthorized use.
- If the remote notarization involves hard copy documents, the principal may transmit his/her signature by mail, fax or electronic means directly to the Notary Public. The Notary Public must notarize the record within a reasonable time and transmit it back to the principal by the same means in which it was received. Any electronically transmitted document notarized in this manner shall be considered an original document.
- The Notary Public must be physically located in New York State at the time of notarization. However, the principal can sign outside of New York State, inside or outside of the United States, provided, however, that the matter involves a United States court or government entity or the document involves property located in or a transaction related to the United States.
- The Notary Public must maintain a journal of each remote notarization. Each journal entry shall contain the date and approximate time of the notarial act; the name of the principal; the technology utilized; the number and type of notarial services provided; and the type of credential used to identify the principal.
- Remote notarizations must include language to help identify that the document was remotely notarized: "This remote notarial act involved the use of communication technology."

New York State Residency

***Matter of Obus v. New York State Tax Appeals Trib*. 2022, N.Y. Slip. Op. 04206, June 30, 2022**

Generally, an individual is a New York resident for tax purposes if that individual (a) maintains a permanent place of abode in New York and (b) is present in New York for at least 183 days during the tax year. In *Matter of Obus v. New York State Tax Appeals Trib*. 2022, N.Y. Slip. Op. 04206, June 30, 2022, a case before the Third Department of New York's Appellate Division, the court held that an individual who was domiciled in New Jersey and had a vacation home in New York was not a New York resident for tax purposes even though he spent more than 183 days in New York during the tax year. The taxpayer, in this case, commuted from New Jersey to New York City for work. The taxpayer's vacation home was in Fulton County, New York and was used by the taxpayer for two to three weeks each year. Further, a tenant occupied an apartment attached to the vacation home year-round, and the taxpayer did not keep any personal effects in the vacation home, instead choosing to bring with them everything that they would need for their visits. In determining that the taxpayer was not a New York resident for tax purposes, the court focused on the legislative intent of the law and noted that the taxpayer must have a residential interest in the property in order for the property to qualify as a permanent place of abode. Because of the aforementioned factors and the fact that the home was far from his workplace in New York City, the court held that the taxpayer did not have a residential interest in the vacation home and that, therefore, the vacation home did not qualify as a permanent place of abode for the taxpayer. However, the New York State Department of Taxation and Finance has appealed the decision.

Change to Audit Guidelines

In ascertaining whether an individual has a permanent place of abode in New York for purposes of determining whether a tax filing may be required, the requirement is that such permanent place of abode must have been maintained by the taxpayer for "substantially all of the taxable year." The previous requirment was a period of at least 11 months. For tax years starting January 1, 2022, "substantially all of the year" will generally mean a period exceeding 10 months, thus shortening the trigger period for a tax filing.

North Carolina

S.L. 2022-54, signed into law on July 8, 2022, creates a new permanent remote online notarization (RON) law in North Carolina. The law also restored emergency video notarization and remote witnessing, which had previously expired on December 31, 2021, as a stop-gap measure until the RON law is effective.

Under the new law, the temporary Emergency Video Notarization laws enacted in 2020 and codified in N.C.G.S 10B-25 are extended through June 20, 2023, at 12:01 a.m. In addition, remote witnessing laws provided pursuant to N.C.G.S. 10B-200-201 are extended until June 20, 2023, at 12:01 a.m. While remote notarization will be made permanent (as discussed below), there are no provisions allowing permanent remote witnessing in the new law. Therefore, remote witnessing will not be allowed after June 29, 2023.

RON will become effective on July 1, 2023, and will be codified as a new part 4A of Article 2 of Chapter 10B of the North Carolina General Statutes. However, additional action is required by the North Carolina Secretary of State before the provisions of this new part 4A will be available. Pursuant to the new N.C.G.S. 10B-134.3(c), wills, codicils and trusts may not be notarized using RON. However, durable powers of attorney, health care powers of attorney and advance directives for a natural death may be notarized under the new RON law.

The RON law contains a detailed and specific list of requirements that must be followed to use RON. For example, the notary must be located in the State of North Carolina, though the principal may be located outside of North Carolina. The remote notary and the principal must also follow certain requirements prior to the RON, including the verification of the identity and location of the principal as well as the determination by the notary that the principal is not under duress or being coerced to complete the transaction. A remote notary must also use a communication technology through a platform that is secure, capable of recording and geolocation, and licensed by the North Carolina Secretary of State. The Secretary of State is also developing rules necessary to establish standards, procedures, practices, forms, and records relating to remote electronic notarial acts to implement RON, which should be available in advance of the effective date.

Texas

Legislative Updates

The year 2022 has been lucrative for the Lone Star State. As of August, Texas has enjoyed $77.2 billion in tax revenue, a 25.6 percent increase from the same period last year, attributable to economic growth and record-high inflation. In addition, receipts remitted by the oil and gas mining sector saw an 80 percent increase due to increased energy prices resulting from inflation and the war in Ukraine. However, with a growing economy and a rapidly expanding job market, voters have begun to feel an economic burden. The housing market is surging, and many residents fear that so too will their already-high property taxes. As such, on May 7, 2022, Texas voters overwhelmingly approved two amendments to the state constitution aimed at lowering the cost of living. Proposition 1 imposed adjustments to school district tax limitations based on school district tax rate compression schedule, cutting school district property taxes for elderly homeowners and disabled homeowners. Proposition 2, which will take effect on January 1, 2023, permanently increased the residence homestead exemption for school districts from $25,000 to $40,000. Lawmakers estimate a savings of approximately $175 per year for the average homeowner. Besides Proposition 1 and Proposition 2, 2022 has been largely uneventful by way of legislative updates.

Judicial Updates

On the judicial front, the Texas Supreme Court ruled on whether beneficiaries of a class trust automatically have standing to sue the trustees. In the case of *Berry v. Berry* (65 Tex. Sup. Ct. J. 997 (2022)), a father, the named beneficiary in a trust, and his daughter, an unnamed class beneficiary of the trust, sued the trustees of the trust for breach of fiduciary duties and for an accounting, alleging that the trustees diverted trust funds to enrich themselves. The trial court dismissed the daughter's claims for lack of standing, holding that she did not have a sufficient interest in the trust to bring suit. The appellate court affirmed, adding that the daughter's only interest in the trust was contingent upon her father's death, and thus an expectant heir could not "maintain a suit for the enforcement or adjudication of a right in the property." (quoting *Davis v. First National Bank of Waco*, 161 S.W.2d 467, 472 (Tex. 1942))

The Texas Supreme Court overturned the appellate court and held that the daughter was an interested person with respect to her claims. Texas Property Code §111.004(7) underscores that "[w]hether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." Acknowledging that this statute means that unnamed class beneficiaries do not automatically have standing, the Texas Supreme Court first found that the daughter had a present financial interest in the trust property and therefore was an "interested person" with respect to the particular purpose of determining whether the trustees were diverting trust funds. Second, the Texas Supreme Court held that even though the daughter's interest in the trust property was contingent upon her father's death, contingency alone did not render it an insufficient interest to bring suit. Ultimately, the Texas Supreme Court remanded this part of the case to the district court for further proceedings.

The *Berry* opinion is important to note for practitioners who may represent trust beneficiaries in an action against trustees. If the beneficiaries are unnamed class beneficiaries, *Berry* reminds us that such beneficiaries do not have *carte blanche* standing to sue. Rather, counsel must be sure to specifically lay out the particular purpose for which the beneficiary is suing, as well as the specific interest the beneficiary has in the suit. Relatedly, a trustee's counsel may use this case to try to overcome a beneficiary's standing if such beneficiary fails to connect his or her interest to the particular purpose of the suit.

Rule Against Perpetuities

Within the realm of trusts and estates, it is worth noting that last year, in 2021, Texas made sweeping reforms to its statutory rule against perpetuities. Previously, Texas employed the tradition rule (lives in being plus 21 years). Now, however, Texas Trust Code §112.036(c) provides that an interest in a trust must vest "not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021." The effective date is the date the trust becomes irrevocable.

Reminder Regarding Texas Tax Benefits

No State Income Tax

Texas has no state income tax. With no state income tax brings higher property taxes, although it can be argued that an average effective real estate tax rate of less than two percent is preferable over a 10-plus percent state income tax rate on income.

Creditor Protection

Texas continues to afford homeowners some of the strongest protection against creditors in the country. For example, Texas Property Code Sec. 41.001(a) provides that one's homestead is exempt from seizure in respect of the claims of creditors (except for encumbrances properly fixed on homestead property). What constitutes one's homestead depends on whether it is urban or rural. Texas Property Code Sec. 41.001(c) provides this distinction:

a homestead is deemed to be urban if it is within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision, and enjoys public services such as a police and fire department, trash, sewage, public water, etc.; a homestead that is not urban is rural. If urban, then the homestead protected from creditors consists of the home and up to 10 contiguous acres on which the home sits. If rural, the homestead consists of the home and surrounding 200 acres for a family or 100 acres for an individual. There is no dollar limit to the value of one's homestead in Texas.

No Corporate Tax

Texas imposes a small franchise tax on businesses in lieu of a corporate tax. The calculations for the franchise tax vary depending on the method the business chooses, though even the highest franchise tax rate is less than one percent.

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.

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