IS IT TIME TO REVIEW YOUR EXISTING ESTATE PLAN?

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Have you reviewed your estate plan since passage of the Tax Cuts and Jobs Act?

We are nearly at the one-year anniversary of the Tax Cuts and Jobs Act ("The Act"), signed into law in December of 2017. The new law makes sweeping changes to the rules governing the taxation of gifts and estates. Whether you have a taxable estate or not, the Act has created unprecedented planning opportunities that should be factored into your current Estate Plan.

Changes to the Estate and Gift Tax

The Act temporarily doubles the exclusion amount for estate and gift taxes to $11.18 million per individual or $22.36 million per married couple. It is important to note that this increase is set to expire on December 31, 2025, unless Congress acts to extend it, at which time the base exclusion amount will revert back to $5 million, indexed for inflation.

As was the case under prior law, to the extent an individual uses his or her federal gift tax exemption during life, it will reduce the exemption available for federal estate tax purposes. The

federal estate and gift tax rate (for that portion of an estate exceeding the exclusion amount) remains at 40 percent.

The annual gift tax exclusion has been increased from $14,000 to $15,000, meaning gifts of $15,000 or less to each individual will not erode an individual's exemption amount (and will not need to be reported as gifts).

Effect on estates valued at less than the exclusion amount

Most living trusts for married couples created prior to the Act did not contemplate the possibility that no estate tax would be owed. Therefore, most of those trusts contain complicated tax-avoidance provisions, including a mandatory requirement to divide the trust into two or more subtrusts upon the death of the first spouse to pass.

Under the new laws, this type of trust may harm families who will not be subject to estate taxes, in the following ways:

- Significant legal and accounting fees are incurred to implement the mandatory trust split. Often, the surviving spouse has to pay for appraisals and an additional income tax return each year;
- The surviving spouse's control over his or her assets is significantly reduced; and
- Splitting the trust into two (2) eliminates the benefit of a step-up in basis on certain assets at the death of the second spouse to pass.

If you haven't had your existing trust reviewed in a few years, you may be able to update your current trust to be much simpler and less costly for the surviving spouse to administer.

For estates valued at close to or over the exemption amount

Because The Act sunsets on December 31, 2025, many tax specialists have discussed the strong possibility that a Democratic Congress and President may either allow The Act to expire (the effect of which is to reduce the current exemption amount back to $5 million) or even seek to further reduce the exemption amount below the pre-2017 levels. Many urge higher net worth individuals to make lifetime transfers of assets before changes occur to the current tax laws in order to take advantage of the large exemption amounts. Before such lifetime transfers are

made, however, higher net worth individuals should consider income tax consequences on said gifts.

There is some concern that the sunset provisions of the new law could potentially pose a “clawback” risk if an individual were to gift away his or her entire gift tax exemption during that person’s lifetime and then die after December 31, 2025, at a time at which the unified estate and gift tax exemption was less than the amount that the individual had gifted away during that person’s lifetime. The Act declined to formalize how gifts made between 2018 and 2025 will be treated if the estate and gift tax exemption is later reduced, but the Act does direct the U.S. Department of Treasury to issue guidance on this issue at some later date.

The Act did not change the very beneficial rules relating to tax basis of assets owned at an individual’s death. Assets included in an individual’s estate on death are entitled to a “step-up” in basis equal to their fair market values at the individual’s death, even if no estate tax is imposed on those assets. Thus, retaining an appreciated asset in an individual’s estate eliminates the taxable gain that would be realized if that same property were transferred by gift during the owner’s life and the property were later sold (subjecting the owner to capital gains tax).

In light of the changes made by the Act, individuals should review their current estate plans to determine whether there are alternative strategies available to them now which may better address their goals. We encourage you to reach out the attorneys in Trainor Fairbrook’s estate planning department if you would like to discuss available strategies for estate tax avoidance under the Tax Cuts and Jobs Act.