



# TUCKER ELLIS LLP

CLIENT ALERT

FEBRUARY 2013

## NEW TAX ACT OFFERS ESTATE PLANNING-FRIENDLY PROVISIONS TO TAXPAYERS

How “permanent” is “permanent”? For more than a decade, estate tax planning has been complicated by “sunsets” of significant estate planning statutory provisions scheduled to lapse unless Congress extended them. The American Taxpayer Relief Act (ATRA), passed on January 1, 2013, made many estate planning provisions “permanent” by eliminating the “sunset” or lapse of the provisions. ATRA, which is very estate planning friendly, eliminated exposure to federal estate taxes for many taxpayers. This Client Alert offers suggestions for estate planning based on the tax provisions that apply now.

Persons with a net worth below \$5.25 million (or married couples with net worth below \$10.5 million) no longer need to be concerned about federal estate tax. These amounts are reduced by past taxable gifts and are increased in future years based on the rate of inflation. Also, Ohio and Florida do not impose a state estate tax. The result is that many people can plan their estates in a manner that they consider appropriate without the provisions in estate planning documents that were used solely for estate tax purposes.

“Portability” is one provision that is very helpful for estate planning. Portability permits a surviving spouse to utilize the unused exemption for gift and estate tax of the first spouse to die. Thus, if a spouse dies in 2013, leaving all assets outright to the surviving spouse, and has not used any of the exemption from gift tax during lifetime, the entire \$5.25 million exemption of the deceased spouse can be used by the surviving spouse. The surviving spouse can pass \$10.5 million during lifetime or at death without payment of gift or estate tax. The result of this liberal provision is that couples with a net worth below \$10.5 million have a choice of (1) foregoing the marital trust/family trust (A-B Trusts) technique that has been a basic estate planning technique for decades or (2) continuing to

use the trust technique primarily for reasons other than reducing exposure to estate taxes; however, there are multiple reasons other than estate tax reduction to use the trust technique.

Some reasons to use a trust include protecting assets from creditors, unwise decisions of family members, and spouses of trust beneficiaries in cases of divorce. Trusts can provide benefits to a broad group of beneficiaries, and will remain popular vehicles for avoiding the probate process. Trusts can provide for management of assets as a trust beneficiary’s capacity decreases later in life. Trusts can be designed to permit a trust beneficiary to qualify for government assistance under the Medicaid program. Also, in estates with high asset value, it may be appropriate to establish trusts that will last for many generations. Trusts can be designed to permit a step up in income tax basis at the death of both spouses. Late last year, Ohio adopted a new law, H.B. 479, which permits a person to establish a trust under which such person may be named one of the trust beneficiaries and that provides a degree of creditor protection. Ohio now joins several other states that have authorized such asset protection trusts.

Some reasons to not use a trust include: (1) to simplify accounting and tax reporting and (2) to provide unrestricted use of assets by beneficiaries.

Also, it is now easier to transfer ownership of closely held businesses to younger family members without incurring gift tax. Business succession planning is facilitated by the \$5.25 million (\$10.5 million for a married couple) exemption from federal gift tax. Therefore, now may be a good time to transfer partnerships and limited liability companies that were established for management of assets to younger family members.

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For persons with a net worth exposed to federal estate tax (single persons with a net worth over \$5.25 million, and married couples with net worth over \$10.5 million, less past taxable gifts), traditional estate planning techniques are still available; however, future federal legislation could impair the ability to use some of the techniques.

For instance, the ability to obtain discounts on the gift or sale of certain assets could be eliminated; the effectiveness of certain grantor retained annuity trusts (GRATs) could be eliminated; and other adverse changes could be enacted. Therefore, a person may want to consider the use of such estate planning techniques sooner rather than later.

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## ADDITIONAL INFORMATION

Our estate planning attorneys will be pleased to meet with you to discuss how your estate plan fits into the new estate planning environment and how your estate planning objectives can be achieved. Please contact any of the following Tucker Ellis attorneys:



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