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# Special Trust Provisions Add Flexibility to Transfer Tax Reduction Strategies

Wealth transfer planning often involves strategies designed to minimize income, estate, and gift taxes. In recent years, frequent but temporary changes in the tax law have created uncertainty for affluent individuals and their advisors. However, experts resoundingly agree that the current opportunity to transfer up to $5.12M per individual, free from federal estate, gift, and generation-skipping transfer (GST) taxes, is unlikely to last. Therefore, limited time remains to take advantage of it. Since the complex nature of planning can require substantial time, the process should be initiated now to ensure the value of this provision can be maximized before year-end.

## Overview

Despite the significant tax advantages related to this opportunity, many are hesitant to commit substantial portions of their net worth to *lifetime* transfer strategies.

Their caution may involve concerns about maintaining the ability to financially cope with an unforeseen change in circumstances. Their reasons may also be philosophical—believing that intended heirs are not yet ready to deal with the responsibilities of wealth. Further, they may be focused on retaining complete control of their financial assets so that they may take advantage of opportunities to invest.

Fortunately, a planning approach exists that enables individuals to fully utilize the current exemption while simultaneously addressing these concerns. In essence, the strategy involves transferring funds to an irrevocable trust before the end of 2012 (to take advantage of the expiring transfer exemption), while incorporating flexible trust provisions that may allow the trustee to lend or sell assets back to the Grantor should the need arise.

This bulletin explores many of the elements of this strategy, which should only be considered with the guidance of appropriate tax and legal counsel.

## Continued Uncertainty of the Federal Estate Tax

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRA 2010) provided two years of certainty for the estate/gift tax exemption, raising the corresponding credit to historic highs and allowing $5M ($10M per couple) to be exempt from federal estate, gift, and generation-skipping transfer (GST) taxes. The amount was indexed to increase with inflation in 2012, allowing an exemption of $5.12M. For taxable gifts made on or after January 1, 2011, the estate and gift tax are reunified with a top estate and gift tax rate of 35 percent.

Various legislative proposals would reduce the amount of estate tax exemption after current law sunsets on December 31, 2012, possibly to $3.5M or less. If no agreement is reached and no new law or additional stopgap measure is passed, a **$1M exemption (with a 55 percent top tax rate) will *automatically* become the law**.

## Adding Flexibility to an Irrevocable Trust

An irrevocable trust is an estate planning instrument used to hold property outside of the taxable estate of the trust's Grantor.[1] When drafting the trust, it is possible to include

1 An irrevocable trust is a separate taxable entity. As such, the trust should have its own tax identification number and its own bank account. Ownership of property within an irrevocable trust will generally exclude the value of the property from the taxable estate. However, certain powers or rights to the property retained by the Grantor or another party may cause inclusion.

a provision that permits the trustee the non-obligatory power to make loans to the Grantor. The trust may also contain a provision that permits the Grantor to substitute assets of equal value to the trust, effectively allowing previously gifted assets to be repurchased for full consideration.

By making sheltered gifts to an irrevocable trust while providing the trustee the ability to periodically loan money or sell assets back to the Grantor, several key tax and planning benefits may be accomplished:

- Assets are removed from the reach of estate taxes without paying gift taxes.
- Wealth may be insulated from estate taxation in successive generations by use of the GST tax exemption.
- Access to the funds by the next generation may be controlled according to the Grantor's wishes.
- Availability of funds or assets may potentially be retained.
- No income taxes should be incurred on any transactions between the Grantor and the trust while it has Grantor Status (see Grantor Trust Status below).[2]

## Trust Planning Considerations Overview

Establishing an irrevocable trust, which achieves the flexibilities described above, while minimizing the risk of estate inclusion, requires sophisticated planning and expert counsel. Careful attention must be paid to the inclusion rules defined in Internal Revenue Code Section 2036 (transfers of property where rights or powers are retained incident to the transfer) and Section 2038 (property transferred and power over the property subsequently returns to the transferor).

## The Responsibilities of the Trustee

Any provisions incorporated into the trust document that allow the trustee the ability to transact business with the Grantor must presume that such dealings will be handled on an "arms-length" basis. For example, in the case of a loan, this would include the willingness of the trustee to enforce all legal claims against the borrower.[3]

In addition, any business arrangements must be consistent with the trustee's fiduciary duty to invest trust assets prudently. Most states have adopted a form of the Uniform Prudent Investor's Act, which holds the trustee to a high standard in making investment choices with a trust's assets. State statutes, which vary by jurisdiction, may also be superseded by provisions of the trust instrument. Many trustees are also now directed by an investment policy statement, a supplemental document to the trust which serves as further guidance as to permissible actions of the trustee. Additionally, trustees must be familiar with the relevant powers granted to them and must always strive to comply with state and federal law.

## Selection of a Trustee

It is generally inadvisable for the Grantor to serve as trustee if the trust is to contain loan or substitution of property provisions. Such a situation would by its nature make arms-length transactions impossible. As stated above, the trustee must be able to exercise independent, commercially reasonable decision making with respect to any transactions with the Grantor. As such, careful consideration should be made as to the selection of the trustee.

## Grantor Trust Status

While a Grantor trust status may not be required, use of a Grantor trust can facilitate the flexible trust design.[4] A Grantor trust is one that violates one or more of the Grantor trust rules found in Internal Revenue Code Sections 671–678. As a result, the Grantor is deemed the owner of the trust property for federal income tax purposes. Traditionally, this was seen as a "defect" in the trust. However, practitioners soon discovered that by having the Grantor pay the taxes on the income of the trust, the trust itself was divested of this responsibility and assets within the trust were able to accumulate faster. These practitioners soon learned that with careful planning, they could create a trust that was "intentionally defective" for income tax purposes, but not for estate tax purposes (meaning the trust assets could be held outside of the taxable estate).

Commonly, practitioners look to Section 675 of the Internal Revenue Code, which provides that for income tax purposes, the Grantor shall be treated as owner of any portion of a trust in which he or she has:

- A power to borrow without adequate interest or security—Section 675(2)
- A power to reacquire the trust corpus by substituting other property of equivalent value—Section 675(4)(C); (See "Permitting the Grantor to Reacquire Trust Property" on page 5)

2 See Revenue Ruling 2004-64
3 See Revenue Ruling 77-299, 1977-2 CB 343
4 "Drafting a flexible Irrevocable Life Insurance Trust", Julius Giarmarco, Esq., Wealth Strategies Journal, June, 2009

## Special Trust Provisions Add Flexibility to Transfer Tax Reduction Strategies (continued)

It is important to note that these rules were not intended to authorize a Grantor to take private loans and/or reacquire assets from a trust. Rather, they were established to address a practice that was already occurring. Further, when Grantor Status is desired, many practitioners choose to include multiple violations so as to ensure Grantor Trust Status.[5]

On the surface it may appear that including language to intentionally violate the Grantor Trust Rule 675(2) would create a structure that allows for loans, and that the use of Section 675(4) would be helpful in creating a structure to support the reacquisition of assets. However, Section 675(4) has also been construed to permit loans from a trust to its Grantor.[6] In effect, instead of exchanging tangible property for the assets of the trust, the Grantor may substitute a note bearing an adequate rate of interest. Further, the use of loans without adequate interest or security as described in Section 675(2) may have estate tax inclusion consequences, as described below.

### Permitting the Trustee to Make Loans to the Grantor

It is of utmost importance that any potential loans made from a trust to its Grantor are legitimate, bona fide loans as defined by law. The case law regarding loans between family members and between trusts and their Grantors is extensive. In some instances, loans have been deemed to lack sufficient substance, which has resulted in severe adverse income, gift, and estate tax consequences.

A pair of court cases—Todd v. Commissioner[7] and Miller v. Commissioner[8]—indicated that the courts will look to a minimum of seven factors in determining whether or not a loan is bona fide:

1. existence of a written promissory note or other evidence of indebtedness
2. reasonable interest is both charged and paid
3. a fixed maturity date and schedule of repayment[9]
4. adequate security
5. repayment actually occurs
6. reasonable expectation of repayment in light of the economic realities
7. conduct of the parties indicating a debtor-creditor relationship, including the maintenance of any records in connection with the loan

Not all elements must be present in order to create a bona fide loan. Instead, should the courts intend to challenge the validity of a loan arrangement, they will evaluate the facts and circumstances of the transaction as a whole.

It is worth noting that the IRS has been very aggressive in identifying and challenging loan arrangements that do not appear to be legitimate. A trustee therefore must exercise the sound judgment any third party lender would under similar circumstances. In establishing the terms of a loan, the trustee must take into account the reasonableness of the loan's duration relative to the borrower's age, the creditworthiness of the borrower, the rate of interest charged relative to current market conditions, and the form and value of collateral to be pledged. Loans that are either too vague in their terms or not reflective of an arms-length transaction will invite scrutiny.

### Loan Interest

Practitioners agree that loan interest must be charged in order for the loan to be considered bona fide. However, the determination of what constitutes a reasonable rate of interest can vary on a case-by-case basis. It has been established that no interest or low interest loans can give rise to both income and gift tax problems for the parties involved.[10] Conversely, if the Grantor "overpays" to further deplete his or her taxable estate, these payments could be deemed taxable gifts from the Grantor to the trust. The case of Frazee v. Commissioner[11] provided guidance in determining the minimum interest rate that could be charged in private loan transactions without creating gift tax consequences. Here, it was established that if a

5 "Burning Questions (and Even Hotter Answers) About Grantor Trusts"; Samuel A. Donaldson, Perkins Coie, LLP, Seattle, Washington

6 "Grantor Access to Funds in an Irrevocable Life Insurance Trust", Bob Ritter, Insmark: "The Insured/Grantor's power to borrow using secured demand notes at fair market interest rates is similar to the right to substitute property of equal value approved by the courts in [Jordahl]" (Estate of Anders Jordahl, 65 Tax Court 92, 10/15/1975)

7 Todd v. Commissioner, Tax Court Memo. 2011-123

8 Miller v. Commissioner, Tax Court Memo. 1996-3

9 Loans may also be structured as a "demand loan" – A demand loan has two key characteristics: 1) there is no specified period of time established for repayment and 2) the loan interest rate charged in connection in the loan must be routinely adjusted to reflect current market conditions. The use of demand loans is outside of the scope of this report.

10 In Dickman v. Commissioner, 465 U.S. 330 (1984), the court ruled that interest-free loans constitute gifts for federal gift tax purposes. Congress enacted Internal Revenue Code Sections 483 and 1274, which govern the gift and income tax treatment of most loans, to address private transactions that charge low interest or none at all. According to these sections, certain debt instruments must bear interest at the Applicable Federal Rate to ensure that the instrument provides "adequate stated interest."

11 Frazee v. Commissioner, 98 Tax Court 554, 587-90 (1992)

loan bears interest at the appropriate Applicable Federal Rate (AFR) described under Internal Revenue Code Section 1274 it will not be a "below market loan"[12] and therefore there will be no deemed gift attributable to the note.

Private term loan arrangements may therefore use a fixed interest rate at least equal to the appropriate AFR:

- Short-term AFR for a loan term less than 3 years
- Mid-term AFR for a loan term of 3 to 9 years
- Long-term AFR for a loan term of 9 years+

There are situations where the parties privy to, or involved with, a private loan transaction may wish to use a rate of interest that is higher than the AFR. In the case of a loan from a trust to a Grantor, interest payments on the loan reduce the taxable estate of the Grantor and increase the assets of the trust. Further, they may not be subject to income taxes (assuming the trust is a Grantor Trust—see Grantor Trust Status on page 2).[12] Therefore, it may be desirable for the Grantor to pay a higher rate of interest to increase wealth transfer results.

The laws affecting maximum interest rates are more complex. In general, each state defines its own parameters as to what constitutes "usury" (the practice of making loans with excessive or abusive interest rates). However, for federal purposes, determining whether a taxable gift takes place on the portion of the interest in excess of a reasonable rate, state usury laws have routinely been ignored.[13]

This was the result in Arbury v. Commissioner,[14] where the Tax Court substituted market rates of return on investment, rather than the maximum rates under the usury laws, in determining the impact of loans (in this case to relatives) for gift tax purposes.

What constitutes a market rate of interest is not specifically defined by the IRS. Some practitioners suggest that a rate of interest charged in a private transaction could be on par with what would be charged in a loan from a commercial bank, taking into account the creditworthiness of the borrower, the form of pledged collateral, and the loan duration. With sufficient documentation and support, a rate of interest that exceeds the AFR but is nonetheless reasonable is likely to be respected by the IRS as "bona fide." However, as with below market interest rates, the IRS will continue to challenge loan terms it deems abusive.

## Use of Collateral

It is advisable that loans from a trust to its Grantor should be collateralized for three reasons:

1. It adds legitimacy to the loan, per the "bona fide" guidelines described above
2. If the trustee is relying on Section 675(4) regarding the substitution of assets, a note without security may fall short of satisfying the requirement that the assets are of equivalent value
3. Should the Grantor die before the loan is repaid, collateral provides a "built in" mechanism by which the trustee can collect on the note. This collection of collateral generally will reduce the taxable estate, provided it is treated as a legitimate claim.[15]

Collateral may not be required in every circumstance. Some practitioners have suggested that the lack of collateral in a private loan may justify a higher loan interest rate, which may be desirable for the reasons described above.

## Loan Duration

In the context of a transfer in return for a promissory note, demonstration of a bona fide loan can be achieved when there is a "real expectation of repayment and an intention to enforce the debt."[16] It is therefore necessary to create a loan duration that is reasonable taking into account the age of the borrower. For example, a 40-year loan to a 90-year old individual would probably lack validity due to the likelihood that such an individual would not survive to repay the loan. Other than to establish minimum rates of interest applicable to certain durations, specific loan durations are not prescribed by law. Rather, it is incumbent upon the trustee to use sound judgment and reasonable assumptions in establishing the duration of the loan(s).

12 Internal Revenue Code Section 7872

13 "Effects of Regulatory Restrictions," Bogdanski, Federal Tax Valuation

14 Estate of Arbury v. Commissioner, 93 Tax Court 136 (1989)

15 Internal Revenue Code Section 2053(a)(3); See also Estate of Roger D. Malkin, et al. v. Commissioner, Tax Court Memorandum 2009-212, in which the Service limited the deduction available to the estate to the value of the collateral securing a nonrecourse loan. This limitation was upheld by the Tax Court which stated that while the debt was a valid and enforceable debt, it was not enforceable against the decedent personally, and was therefore only enforceable against the collateral.

16 Estate of Van Anda v. Commissioner, 12 Tax Court 1158, 1162 (1949)

## Refinancing Loans

As circumstances may change, there may be a propensity to refinance the loan under new terms. Unfortunately, there are no cases, regulations, or rulings that address the gift tax effects of refinancing notes. However, some practitioners have suggested that refinancing should be possible without gift taxes.[17]

Again, consistency with bona fide debt arrangements is paramount. Careful consideration should be given to both the legitimacy and the frequency of restating the loan arrangement, adhering to the IRS guidance that it will take into account the conduct of the parties in the transaction and whether or not it indicates a true debtor-creditor relationship.

## Permitting the Grantor to Reacquire Trust Property

Recall from the section above on "Grantor Trust Status" that Section 675(4)(C) contains language that has been construed to permit a Grantor to substitute property of equal value as a means by which to reacquire trust property. This has in turn been interpreted as permitting a sale of assets or an exchange of cash in the trust for an interest bearing note (i.e., a loan).[6]

Again, it is important to understand that the Grantor trust rules were not intended to authorize a Grantor to take private loans and/or reacquire assets from a trust. Rather, they were established to address a practice that was already occurring.

Further, it is necessary to understand that a trust that is considered defective by violating one or more of the Grantor trust rules is defective for income tax purposes, meaning the Grantor is responsible for income tax on the income of the trust. It is important to keep in mind that this code explicitly affects the income taxation of trusts, not inclusion of trust assets for estate tax determination. Estate taxation of the assets of the trust is governed under various other sections of the Internal Revenue Code—primarily those between Sections 2030 and 2050.

A full analysis of the estate tax portions of the tax code is beyond the scope of this bulletin. However, it is sufficient to understand that in creating a structure that allows for substitution of assets that is effective for both income and estate tax purposes, it is important to separate the possible objectives:

- Permitting the substitution of assets, without causing estate inclusion of the assets in the taxable estate by virtue of the substitution power.
- Qualifying the trust for Grantor Status.

The ability to accomplish both objectives may prove challenging. The question involves whether or not including a substitution power so as to qualify for Grantor Status would also cause the assets of the trust to be included in the taxable estate of the Grantor, and if so, what possible solutions exist.

A recent case provides some guidance and authority. In Revenue Ruling 2008-22, the Grantor created an irrevocable trust and retained the power, exercisable in a *nonfiduciary* capacity, to acquire any property held in the trust by substituting other property of equivalent value. The Ruling concludes that the Grantor's retained power to substitute assets of equivalent value will not cause inclusion, provided the trustee has a fiduciary obligation to ensure the Grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the Grantor are in fact of equivalent value.

This result would seem to allow the Grantor a right of substitution in a nonfiduciary capacity, which is consistent with Section 675(4)—satisfying the defective trust objective, while relying on the fiduciary responsibility of the trustee to ensure that the substituted property is of equal value, which protects against a potential inclusion challenge by the IRS. Note that a literal reading of Section 675(4) makes it clear that in order for the trust to be considered defective, the ability to substitute property must be exercisable without the consent of a person in a fiduciary capacity. Therefore, practitioners relying on Section 675(4) must utilize careful wording so as to distinguish "independent verification of the comparable value of substituted property" from "required consent."

## Funding the Irrevocable Trust

In order to take advantage of the current $5.12M exemption, gifts must be made by the end of 2012. Traditionally, the ideal asset for gifting to an irrevocable trust has been high-growth and/or income-producing property, i.e., a very illiquid asset with a potentially high total rate of return. This would shift future capital appreciation outside the Grantor's taxable

17 "How Low Can You Go?" Jonathan Blattmachr, Elisabeth Madden, & Bridget Crawford 109 Journal of Taxation 21, 26 (July 2008): Although there is no specific case, ruling, or Code section that explicitly provides that promissory notes may be restated without gift tax effects, economic analysis of the transaction and Regulations strongly support the conclusion that it is possible to do so without a taxable gift being deemed to occur."

estate and/or create a regular income stream within the trust, used for new investments or funding a life insurance policy without new annual gifts to the trust.

Examples of such property would be real estate or shares of a family business operated as a flow-through entity (not C corporation), such as a Sub S corporation, family limited partnership, or LLC, in order to avoid the imposition of an entity-level tax in addition to the trust Grantor's income tax liability.

In situations where an individual may be uneasy regarding loss of access to gifted funds but incorporates the flexible trust provisions described above, cash may be an appropriate form of the gift. If assets are currently not liquid, this may be the right time to get into such a position by liquidating investments and realizing gains in 2012, in anticipation of the significant income tax increases scheduled to commence on January 1, 2013 (absent any stopgap legislation).

One further note of caution—just as a loan must be bona fide to be considered valid, it is important that any gift made to a trust be legitimate in its nature. The IRS position to assess the intent of the Grantor is perhaps best expressed in the review of the Estate of John Edward Connell:[18]

> *"We must examine the acts of the alleged donor to determine whether there was a bona fide gift to the trustee in each instance. If the decedent did not have a clear and unmistakable intention to divest himself of the title, dominion, and control of the funds, he failed to make such delivery of the subject matter of the gift as is required by the law for a gift."*

## Other Considerations: The Step Transaction Doctrine

Although this report addresses many possible transactions, each one is separate and distinct and should be considered on its own merits. The IRS will proactively pursue individuals entering into a prearranged plan to circumvent taxation. Specifically, the IRS' "step-transaction" doctrine states that for tax purposes, the IRS will consider all steps taken to achieve an intended result. Essentially, any interrelated series of transactions will be treated as parts of an entire plan, and evaluated accordingly.[20]

Three different tests have been adopted by which to determine whether the step-transaction doctrine applies to a particular set of facts:

- The **end result** test is used to determine if multiple steps are part of a single transaction that the parties always intended to complete in order to achieve a desired "end result." This test focuses on the taxpayer's actual subjective intent, as shown from both the taxpayer's actions and statements.
- The **mutual interdependence** test assesses whether the steps were so interdependent that the ramifications of an individual transaction would have been fruitless without completion of the

### The Role of Life Insurance

In addition to the removal of exemption-sheltered amounts of wealth beyond the reach of estate taxes, such gift and GST tax-free transfers can be magnified with a subsequent life insurance purchase by the trustee. Life insurance represents a tremendous opportunity to multiply the transfer of assets in an estate, offering key income tax benefits—tax-deferred policy growth, tax-free death benefits, and internal rates of return that in many cases surpass other assets when calculated on a net after-tax basis. In addition to the income tax benefits of life insurance, its design flexibility enables a policy to be utilized in markedly diverse client circumstances:

- For purely protection purposes in the case of highly illiquid estates needing cash infusions at death; or for more liquid estates seeking long term tax-advantaged growth as an alternative asset class strategy within a trust.

  With a trust of the type suggested, the trustee is given multiple avenues by which to fund a life insurance policy.
- First, trust assets may be used to fund the premiums, presuming the use of such funds is specified as permissible in the trust document.
- In addition, any income generated by the trust assets may be used to make premium payments. Note that under the Grantor Trust rules, the use of trust income to fund life insurance on the life of the Grantor or spouse is another "intentionally defective" power.[19]
- Finally, if the Grantor borrows the cash from the trust or buys assets from the trust on an installment basis, the interest flowing from the Grantor to the trust might be used to fund premium payments on the Grantor's life.

18 Estate of John Edward Connell, 20 Tax Court 917, Code Section 812, 08/25/1953

19 Internal Revenue Code Section 677(a)(3)

20 Minnesota Tea Co. v. Helvering, 302 US 609, 613 (1938); Helvering v. Alabama Asphaltic Limestone Co., 315 US 179, 184-185 (1942); Commissioner v. Clark, 489 US 726, 738 (1989); Redwing Carriers, Inc. v. Tomlinson, 399 F2d 652 (5th Circuit 1968); Carter Publications, Inc. v. Commissioner, 28 BTA 160, 164 (1933)

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entire series. Here, the focus is on the relationship between the steps, rather than on the end result. In practice, it has been invoked to attack situations where it is unlikely that any one step would have been undertaken except in contemplation of the other integrating acts.

- The **binding commitment** test applies the step-transaction doctrine only if there is a legally binding obligation to take an additional step upon the completion of a first step.

It is therefore important to note that the inclusion of flexible trust provisions described above are meant only to allow for future changes in circumstance, and not as an intended course of action. A specific planning implication here is that there should be **no prearrangements or binding obligations upon the trustee to lend or sell assets from the trust to the Grantor**.

## Acting Now to Maximize a Disappearing Exemption Opportunity

There is no better time than now to develop and fund an estate plan in order to maximize the tax efficiency of a large estate. Failing to act on the current opportunity of historically high estate/GST/gift tax exemptions is likely to represent a dramatic missed opportunity in the future.

Consider this—as much as $4,532,000 of transfer tax savings is at stake:

| | |
|---|---|
| Lifetime gift tax exemptions (both spouses): | $10,240,000 |
| Less 2013 lifetime gift tax exemption: | -2,000,000 |
| Potential lost exemption: | $8,240,000 |
| **Gift Tax at 55%** | **$4,532,000** |
| (+ potential tax on subsequent post-gift property growth) | |

In summary, it is possible to *both* seize the benefits of the high lifetime exemption *and* retain a degree of access that can make the wealthy individual comfortable with making a substantial gift.

As discussed, establishing provisions for the trust to loan back funds or sell assets to the Grantor, ***should appropriate occasions arise***, can significantly mitigate the anxiety felt by a wealthy estate owner, thus helping him seize this soon-to-disappear tax break.

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