TWO YEARS CAN LAST FOREVER PLANNING UNDER THE NEW TAX ACT BEFORE IT EXPIRES ON JANUARY 1, 2013

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I. Traditional Planning

A. Traditional estate planning took into account the use of the credit exemption amount (previously known as the unified credit equivalent) and the unlimited marital deduction. Most clients established plans directing that the maximum amount of their estates that could pass free of federal estate tax would fund a "credit trust" and the remainder would pass to the surviving spouse either outright or in trust. The plan was intended to use the first deceased spouse's exemption by placing the maximum amount of the exemption in trust so that the second spouse to die would have a full exemption applicable to his or her assets, thereby, sheltering two times the exemption amount in both estates.

B. The key to estate planning for most individuals was to be certain each spouse used his or her credit exemption amount. This was done primarily with the use of living trusts. In addition, most good estate plans included well-drafted wills, durable powers of attorney and health-care directives.

II. Changes to the Law

A. The so called Bush era tax cuts (enacted through the Economic Growth and Tax Relief Reconciliation Act of 2001) substantially increased the credit exemption amount available to estates over time and reduced the top marginal rate applied to taxable estates pushing toward eventual repeal of the federal estate tax. The chart below illustrates the changes:

Year of Death	Credit Exemption Amount	Top Rate
2001	$ 675,000	55%/60%
2002	1,000,000	50%
2003	1,000,000	49%
2004	1,500,000	48%
2005	1,500,000	47%
2006	2,000,000	46%
2007	2,000,000	45%
2008	2,000,000	45%
2009	3,500,000	45%
2010	Repeal	0%
2011	Sunset - 1,000,000	55%/60%

B. Under the Bush era tax cuts, the benefits of the tax act were to "sunset" after 2010. The federal estate law was then to be reinstated as it existed prior to the tax cuts with a $1 million federal estate tax exemption and tax rates of 55% to 60% on large estates.

C. All of us are familiar with the stories of the very wealthy dying in 2010 and not paying any federal estate tax. Most notably, George Steinbrenner, the owner of the New York Yankees died purportedly leaving his family a $500 million life insurance trust with which to pay the federal estate tax on his prized Yankees. Of course, there was no federal estate tax in 2010 and the family was able to keep the Yankees and the $500 million of life insurance as a windfall.

D. In response to the chaos created by the one year of estate tax repeal and then the return to the tax laws that existed before the Bush era tax cuts, Congress acted and on December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("2010 Tax Act"). The 2010 Tax Act made significant changes to the estate, gift and generation-skipping transfer ("GST") tax laws. These changes will remain in place for two years, 2011 and 2012, but can have an impact that lasts forever. The chart below illustrates the changes:

Year of Death	**Credit Exemption Amount**	**Top Rate**
2010	Repeal or $5,000,000	35%
2011	5,000,000	35%
2012	5,120,000	35%
2013	Sunset - 1,000,000	55%/60%

E. The changes in the 2010 Tax Act include:

- A reduction in the top tax rate for estate, gift and GST taxes to 35%.

- A reunification of the estate, gift and GST exemptions with all exemptions at the $5 million mark.

- Portability of the estate tax exemption for married couples so, for example, if one spouse dies having used only $1 million of a $5 million exemption, the surviving spouse will have a $9 million exemption comprised of the surviving spouse's own $5 million exemption and $4 million of unused exemption from the predeceased spouse.

F. The 2010 Tax Act by its terms will expire on January 1, 2013. Unless Congress acts before that date, the estate, gift and GST tax changes will sunset and the tax law in effect in 2001 will be reinstated subjecting estates over $1 million to taxes with top marginal rates on large estates at the 55% to 60% level.

III. Planning After the 2010 Tax Act

A. Existing estate plans should be reviewed to determine if it is still appropriate to place the maximum amount of a person's estate that can pass free of tax in the credit exemption trust. This formula was widely used when the maximum credit exemption amount was

scheduled to go no higher than $3,500,000. Under the new law, the exemption will be $5 million (indexed for inflation) until 2013.

- $ In many second marriage situations, the credit shelter amount was left to the children of the prior marriage and the remainder to the surviving spouse. This formula may drastically reduce the benefits of the surviving spouse as a result of the new law.

- $ Many plans use the same formula to leave the credit exemption amount to family or other individuals with the remainder to charity. The formula could substantially reduce the amount that passes to charity because of the increasing exemption under the new law.

- $ For those who are not in favor of using trusts but consider them a "necessary evil" the formula may result in too much of the estate passing into trust when it otherwise could pass to the surviving spouse free of trust.

- $ Many wealthy individuals should consider using their $5 million gift tax exemption to transfer wealth before the exemption reverts to $1 million. There are creative techniques for transferring wealth to generation skipping trusts (discussed below) that will allow the wealth to pass from generation to generation in perpetuity with no further transfer taxes.

- $ The 2010 Tax Act also extended certain charitable giving incentives that otherwise would have expired.

B. Asset holdings of spouses should be reviewed and re-balancing considered. Many individuals with large estates transferred enough assets to the "less wealthy spouse" to avoid wasting the exemption at his or her death. Because of the increased exemption it is important to be certain, in larger estates, that each spouse has sufficient assets to fully use the credit exemption amount under the new law. This is true regardless of portability. There are still good reasons to fully fund a credit shelter trust at the death of a spouse. These include the following:

- There is no guarantee that portability will continue after 2012.

- The estate tax exemption could revert to $1,000,000 in 2013.

- The unused exemption of a predeceased spouse will be lost if the survivor remarries to a person who has already fully used the exemption.

- Credit trust assets are protected from creditor claims, including claims of a divorcing spouse for property division, and will pass tax free at the survivor's death.

- Future growth is guaranteed to escape estate taxation at the death of the surviving spouse

- Assets can be earmarked to pass to the first deceased spouse's children avoiding loss of the assets to a new spouse.

C. As the credit exemption amount increases, consideration should be given to the following:

$ The use of a "joint trust" to simplify the estate plan and still avoid probate (even in joint death situations) where the combined estates of a husband and wife are clearly under the credit exemption amount.

$ Different formulas in trusts so that the maximum credit exemption is not put into a trust for the surviving spouse but a lesser amount determined by a formula, e.g., the lesser of the credit exemption amount or one-half of the decedent's estate.

$ Some practitioners are recommending disclaimer provisions so that everything is left to the surviving spouse except the amount disclaimed to fund the credit trust. The disclaimer approach postpones the decision and leaves it to the surviving spouse to decide how much, if anything, will fund the credit trust. There are some practical problems with this approach, as well as, the loss of the survivor's ability to direct how the funds will pass if a change in circumstances occurs, i.e., a second look power.

IV. **Dynastic Planning Through Gifts: Making Transfers Last Forever**

A. While it is clear that the new law allows tax free lifetime gifts to children, grandchildren and more remote descendants of $5,000,000 per donor and $10,000,000 per married couple, there is additional planning that can make these transfers last forever passing tax free from generation to generation with no future transfer tax. For those not interested in perpetual wealth transfer, there are still benefits from direct gift giving:

- Wealthy individuals are purchasing homes for their children and grandchildren as outright gifts.

- Family loans and the imputed interest and income tax problems associated with such loans can now be cleaned up by forgiving the debts.

- Parents and grandparents can create investment funds for their descendants to teach them the benefits of stewardship.

- In all of these cases, the assets transferred and their future appreciation in value will be out of the donor's estate.

B. Most significantly, however, in states like Delaware that have abolished the rule against perpetuities, Dynasty (perpetual) Trusts are being created with married couples transferring $10,000,000 in trust to which they allocate their gift tax exemption and generation-skipping transfer tax exemption.

- These trusts may continue in perpetuity with no future gift, estate or GST taxes.

- They are designed as grantor trusts with the grantors being treated as the owner of the trust for income tax purposes (but not for estate tax purposes), thereby allowing the grantors to pay all of the income tax on the trust as an additional tax free transfer to the beneficiaries of the trust.

C. If a client wishes to create a non-grantor trust, by carefully choosing a favorable situs for the non-grantor Dynasty Trust, it is possible to avoid state fiduciary income tax on the trust. In Delaware, for example, a resident trust will receive a deduction for any trust income that is held for future distribution to non-residents of Delaware. Therefore, so long as the trust does not own Delaware real property or tangibles, or have income from a Delaware business, then the trust will not pay any separate fiduciary income tax. This will further augment the value of any lifetime gifts that are made to such a Dynasty Trust.

D. Dynasty Trusts are being leveraged by gifts of $10,000,000 used to purchase large life insurance policies. The chart below illustrates the use of the new gift and generation-skipping transfer tax exempt amounts to purchase life insurance on a survivorship basis for couples at various ages with standard or preferred underwriting ratings:

STANDARD UNDERWRITING FOR BOTH INSUREDS (Guaranteed to age 125)

Ages	L/E (Life Expectancy)	Death Benefit Purchased	IRR (%)	Pre-Tax Equiv.
55/55	91/91	$63,492,316	5.27%	8.11%
60/60	92/92	$51,279,473	5.24%	8.06%
65/65	93/93	$41,534,760	5.22%	8.03%

PREFERRED UNDERWRITING FOR BOTH INSUREDS (Guaranteed to age 125)

Ages	L/E (Life Expectancy)	Death Benefit Purchased	IRR (%)	Pre-Tax Equiv.
55/55	91/91	$74,866,392	5.75%	8.85%
60/60	92/92	$60,651,620	5.79%	8.91%
65/65	93/93	$48,106,976	5.77%	8.88%

- Once again, the full value of the insurance proceeds held in a trust, such as a Delaware Dynasty Trust, will continue in perpetuity free of future transfer tax for the benefit of the grantor's descendants.

- Some insureds prefer to seed the trust with $10,000,000 and use the fund as an investment fund paying a fixed guaranteed premium (such as $500,000 annually) thereby hedging their bets with an investment fund as well as the insurance product.

- For single individuals, the same planning can be done using $5,000,000 on a single to die policy with either a one-time premium payment on the seed funding with annual premium payments while the seed money is being invested.

E. Dynasty Trusts which are grantor trusts are often referred to as "intentionally defective income trusts" or "intentionally defective grantor trusts" also called "IDITs" or "IDGTs." These trusts are used by wealthy individuals for installment sale transactions of existing closely held businesses or investment limited partnerships/investment limited liability companies funded entirely with marketable securities. Using the new gift tax and generation-skipping transfer tax exemptions, these individuals may now transfer up to $150,000,000 in business interests which, once again, will continue in trust for the benefit of the grantor's family perpetually with no future transfer tax.

- These transactions are scalable and need not be for the full $150,000,000. The same principles work with lower amounts.

- For example, Grantors seed a Dynasty Trust with $10,000,000 in cash. Their $150,000,000 business is valued with lack of control and lack of marketability discounts of one-third so the fair market value of the entire business is $100,000,000. The business ownership interests are then sold to the Dynasty Trust in exchange for a return of the $10,000,000 in cash as a down payment and a $90,000,000 note at the Applicable Federal Rate which is currently less than 2% for a nine year term with a balloon. The note can be amortized over as many years as necessary to allow the cash flow from the full $150,000,000 business to cover the $90,000,000 note.

- Future appreciation in the value of the business escapes the grantor's estate.

- The grantors will remain liable for the income tax on the Dynasty Trust (which is a grantor trust for federal income tax purposes) even after the note is paid, thereby allowing them to deplete their remaining estates by paying the income tax on the income earned by such trust as an additional tax free gift to the beneficiaries.

- There is no recognition event on the transfer of the family owned business to the trust because the trust is a grantor trust and is disregarded for income tax purposes but not for estate tax purposes.

- Enormous wealth may be transferred using an installment sale to such a Dynasty Trust.

F. Delaware is one of fourteen states that have enacted legislation allowing the creation of self-settled asset protection trusts. Based on two Private Letter Rulings issued by the Internal Revenue Service, it should be possible for a married couple to create a $10,000,000 asset protection trust (i) that permits discretionary distribution of income and principal to the married couple as well as their descendants; (ii) that will be treated as a completed gift for federal gift tax purposes (using their $10,000,000 exemption); and (iii) be excluded from their estates for federal estate tax purposes even though they are discretionary beneficiaries of the trust.

- The two Private Letter Rulings addressing the transfer tax consequences associated with self-settled asset protection trusts are: PLR 9837007 and PLR 200944002. Both involve the use of Alaska asset protection trusts.

- In PLR 9837007, the grantor created a trust for the benefit of herself and her descendants. The trustee could, but was not required to, distribute income and/or principal from the trust to any of the trust beneficiaries including the grantor. The IRS concluded that the transfer to the trust would be a completed gift for federal gift tax purposes because a creditor of the grantor would be precluded from satisfying claims out of the grantor's interest in the trust. However, this PLR did not rule on whether the assets would be included in the grantor's estate for federal estate tax purposes.

- In PLR 200944002, the grantor created a trust for the benefit of himself, his spouse and descendants. The trustee could, but was not required to, distribute income and/or principal to the beneficiaries, including the grantor. Once again, the IRS concluded that the transfer to the trust was a completed gift for federal gift tax purposes. The IRS went further, however, and also concluded that the trustee's discretionary authority to distribute income and/or principal to the grantor would not by itself cause the trust to be includable in the grantor's estate for federal estate tax purposes.

- The use of a completed gift asset protection trust offers the possibility that grantors can transfer assets, fully using the new gift tax and generation-skipping transfer tax exemptions, but retain a benefit in the trust. If the plan works, the assets and the future appreciation in the assets will be excluded from the grantor's estate for federal estate tax purposes.

Moreover, there is no harm in the planning because, if the grantors took no action at all, the assets would clearly be included in their estates.

- The use of the completed gift assets protection trust technique offers the possibility of a win with no downside if the IRS disregards its own position in the Private Letter Rulings.

V. **Charitable Giving**.

A. **Philanthropy**. The sagging economy has hurt virtually everyone. Perhaps no one has been hurt more than charitable organizations and those they serve. A report in *CNNMoney.com* determined that average charitable giving by wealthy households declined by 34.9% in 2008 and more than 40% of charitable organizations and private foundations said that contributions declined in the first five months of 2010. While there are tax incentives for charitable giving, most charitable giving is motivated by a donor's true desire to contribute to the public good and not by taxes. Nonetheless, there are certain tax and other economic benefits to be derived from charitable giving.

B. **Itemized Deductions**. Itemized deductions for wealthy individuals are generally phased out as certain income levels are attained. For calendar years 2011 and 2012, these itemized deductions will not be reduced.

C. **Cash Gifts**. Cash gifts to charity provide an immediate benefit to the charity. They may be deducted against 50% of the donor's adjusted gross income. Accordingly, these gifts provide both an income tax deduction and an estate tax benefit, because the cash gift is removed from the donor's estate.

D. **Gifts of Property**. A gift of appreciated property (such as appreciated stock) provides an even greater benefit to the donor. The donor is not taxed on the appreciation when the charity sells the stock. Nonetheless, the donor may deduct the full fair market value of the appreciated property against 30% of the donor's adjusted gross income. Amounts in excess of the 30% may be carried forward and used in later years.

E. **Charitable Gift Annuity**. Sometimes, a donor is willing to give a valuable asset to a charity but is concerned about having sufficient income to support the donor's lifestyle. In this case, the donor can gift the appreciated property to the charity in exchange for a charitable gift annuity. A charitable gift annuity is a contract providing the donor with a stream of income in return for the gift. The actuarial value of the income stream is deducted from the value of the gift and the donor is entitled to deduct the actuarial value of the remainder interest which will benefit the charity. When the appreciated property has built-in capital gain, the capital gain is not realized by the donor upon the making of the gift. Instead, it is realized by the donor ratably over the term of the annuity payments.

F. **Charitable Lead Trusts**. Charitable lead trusts are most commonly created at death. The decedent establishes a trust that provides for distribution of income to charity over a period of time with remainder to the decedent's beneficiaries. The actuarial value of the income

interest to the charity is deducted from the value of the asset for purposes of determining the taxable value. If the earnings on the asset transferred beat the charitable lead payout and the property appreciates in value, substantial wealth can be transferred to the decedent's beneficiaries with very little gift or estate tax.

G. **Charitable Remainder Trusts**. Charitable remainder trusts permit a person to sell appreciated assets without recognizing taxable gain, diversify portfolios and increase income during lifetime while obtaining an income tax charitable deduction at the same time. For example, if a sixty year old couple contributes $300,000 worth of zero basis stock producing a 1.5% dividend to a charitable remainder unitrust with a 7% unitrust payment, the stock can be sold by the unitrust with no capital gain tax. The sale proceeds can be reinvested in higher income producing assets. The couple's income will increase from $4,500 per year to $21,000 per year. The couple will receive an income tax charitable deduction for the remainder interest that passes to charity valued at $50,865. The couple can establish an irrevocable "Wealth Replacement Trust" funded with $300,000 worth of second-to-die (survivorship) life insurance and pay the annual premium with some of the increased cash flow. The insurance will pass income and estate tax free to the couple's family.

H. **Donor Advised Funds**. Sometimes an individual can use a large charitable deduction in a particular year but desires to distribute funds to the individual's church or other charities over a period of years. That individual can transfer cash or appreciated property to a donor advised fund through an organization like a local Community Foundation and obtain an immediate charitable deduction. Thereafter, the donor can direct the fund to distribute the donor's account to the charities of the donor's choice over time.

I. **The Gift of IRAs**. The 2010 Tax Act extended a provision that originally was enacted by Congress in 2006. This provision allows an exclusion from gross income of up to $100,000 of transfers from an IRA directly to a charity. The IRA owner would have to be in pay status (over 70 1/2) at the time of the distribution. The distribution could be made directly from the participant's IRA to the charity or by a check given by the IRA custodian to the participant made payable to the charity so the participant has the benefit of delivering the check in person to the charity.

J. **Gifts Made Through Your Will or Trust**. You may wish to consider a charity of your choice when your estate planning documents are being prepared. Including a charitable bequest in your Will or trust will allow the charity to benefit at a time when you clearly no longer need the funds. The bequest will be deductible for federal estate tax purposes and is a good way for you to remember the charity of your choice.

VI. Using Directed Trusts for Dynastic Planning

A. **Introduction**. Directed trusts are not new. Delaware (for example) has statutorily recognized the power of the trustor of a trust to restrict a trustee's authority to dispose of or otherwise deal with specified trust assets for more than twenty years. 12 Del. C. § 3313 (65 Laws 1986, ch. 422, § 5). Prior to the statute, going back to the early 1900s, Delaware adopted the practice of allowing directed trusts to accommodate its wealthiest families by including special provisions in the trust instrument.

Today there is a statutory framework authorizing a trustor (or the trustee and the trust beneficiaries through appropriate trust modification proceedings) to include in trust instruments a new regime for the administration of specific trust assets. In addition to the traditional trustee, the new regime often includes trust advisers. See, Rachel Emma Silverman, *How Many Trustees Do You Need?* Wall St. J., July 12, 2007, at B5.

B. **Definition**. A directed trust is a trust that removes one or more powers or discretions traditionally held by the trustee and vests that power or discretion in a person who is either a special trustee or not a trustee at all. The power or discretion can relate to investment decisions, management decisions, distribution decisions and any other decision affecting the administration of the trust. The starting point for the creation of directed trusts is the statutory framework that permits them coupled with the carefully worded language of the trust instrument.

C. **Statutory Recognition of "Advisers"**. A trustor's statutory power to dictate the rights and obligations of the beneficiaries and trustee through the express terms of a trust instrument and the trustee's statutory right to rely in good faith on the terms of the trust instrument for protection from liability are essential to the effective use of directed trusts. Three different approaches are illustrated below.

- UTC. Section 808(b) of the Uniform Trust Code states:

  If the terms of a trust confer upon a person other than the trustee of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power **unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty** that the person holding the power owes to the beneficiaries of the trust. [emphasis added]

- Third Restatement. Section 75 of the Third Restatement of Trusts states:

  ...[I]f the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, **unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries**. [emphasis added]

- Delaware Provisions. The foregoing provisions for directed trusts should be compared with the more protective provisions adopted by Delaware and a few other states.

  - Delaware law recognizes a broad class of advisers including

direction advisers, consent advisers and trust protectors. Where one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decisions of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides. 12 Del. C. § 3313(a).

- When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its "willful misconduct".

  Direction Provision

  If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then **except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any such act. 12 Del. C. § 3313(b). [emphasis added] The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. 12 Del. C. § 3301(g) and 12 Del. C. § 3301(h)(4).

- The statutory standard of care required of a fiduciary acting on the consent of a Consent Adviser is only somewhat broader. When a trustee acts with the consent of a Consent Adviser, the trustee will only be liable for its "willful misconduct" or "gross negligence".

  Consent Provision

  If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then **except in cases of willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to provide such consent after having been requested to do so by the fiduciary. 12 Del. C. § 3313(c). [emphasis added]

- In all cases, there may be an adviser who is a "trust protector".

Trust Protector

... the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

(i) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;

(ii) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and

(iii) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument. 12 Del. C. § 3313(f).

- The statutory protection afforded trustees of directed trusts would be diminished if advisers or beneficiaries could sue the trustee on the theory that the trustee had a duty to keep them informed and to impart to them knowledge affecting their interests in the trust so they could perform their duties as advisers or otherwise protect their beneficial interests in the Trust.

Duty to Monitor, Communicate and Inform

Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary, then, except to the extent that the governing instrument provides otherwise, **the fiduciary shall have no duty to:**

(i) **monitor the conduct of the adviser;**

(ii) **provide advice to the adviser or consult with the adviser; or**

(iii) **communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser**. 12 Del. C. § 3313(e). [emphasis added]

* * *

> Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority. Id.

- Recognizing the multiple roles played by different fiduciaries of a Delaware trust, Delaware adopted 12 Del. C. § 3317 in 2010. The statue provides that, except as provided in the governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries) have a duty to keep the other fiduciaries reasonably informed about the administration of the trust with respect to the specific duty or function being performed by that fiduciary. The statute further provides that a fiduciary who requests and receives such information has no duty to monitor the conduct of the other fiduciary, provide advice or consult with the other fiduciary or provide information or communicate or warn any beneficiary or third party concerning instances in which the fiduciary receiving the information would or might have exercised the fiduciary's own discretion in a different manner. 12 Del. C. § 3317. This provision specifically restates the principle that one fiduciary does not have a duty to monitor, communicate and inform as provided in 12 Del. C. § 3313(e).

VII. **Conclusion**

The 2010 Tax Act makes substantial changes to the credit exemption amount and the tax rates applicable to estates and gifts. While these changes are scheduled to expire on January 1, 2013, there is a window of opportunity for gift giving and wealth transfer that should not be ignored.