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Estate Planning Considerations Under the Tax Cuts and Jobs Act of 2017

Second Quarter 2018

By Amanda Afshar

If you are a regular reader of Business Briefs, you may recall Jeff Moore's March 2017 article, *Here We Go Again: The Repeal of the Federal Estate Tax is Once Again on the Political Stump*. A little over a year later, we have answers to some of the questions Jeff raised, such as whether reform of the federal estate tax—let alone a full repeal—would happen at all under the Republican-controlled legislative and executive branches.

Amid much speculation and media attention, Republicans in Congress passed the Tax Cuts and Jobs Act ("**Act**") in just under two months, and the President signed it into law on December 22, 2017. The Act created sweeping tax reforms. The Congressional Budget Office reported that the Act would give individuals and pass-through entities (such as partnerships and S-corps) approximately \$1.125 trillion in net benefits over 10 years, while corporations would receive approximately \$320 billion in benefits. While the corporate tax cuts were made permanent, the individual and pass-through tax cuts fade over time and eventually sunset, and will become net tax increases beginning in 2027.

Some of the major elements of the Act include reducing tax rates for businesses and individuals, simplifying personal taxes by increasing the standard deduction and family credits (while eliminating personal exemptions and making it less beneficial for people to itemize their deductions), and repealing the individual mandate of the Affordable Care Act.

The Act also changed the federal estate tax. Many were left wondering: How does this affect my estate planning and gifting? Some estate planning changes, both from the Act and from the transition to a new tax year, include the following:

- The exemption for gift, estate, and Generation-Skipping taxes doubled, from \$5 million to \$10 million per person, adjusted for inflation from 2011. Previously, the exemption would have been \$5.6 million per person for 2018. It is now \$11.18 million. This increase means that a couple can potentially pass \$22.36 million free of federal estate tax upon their deaths. However, this increase sunsets on December 31, 2025, and it is currently unclear (albeit doubtful) whether there is a risk that

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In This Issue:

Estate Planning Considerations Under the Tax Cuts and Jobs Act of 2017.....	1
2020 Deadline for Defined Benefit and 403(b) Plan Restatements	2
The Importance of the Fine Print: Contract Terms & Conditions ...	3
The Importance of Written Change Orders	5
Events and Announcements	6

gifts made during the effective period will be “clawed back” under a potentially less-favorable exemption, whatever that may be, after the sunset date.

- The annual exemption for gifts has increased from \$14,000 to \$15,000 per donee for 2018.
- Most property passing at death (except IRD assets such as traditional IRA accounts or retirement plans) will continue to receive a full adjusted basis to the date-of-death value, so long as the property is included in the decedent’s taxable estate.
- The gift, estate, and Generation-Skipping tax rate will remain at 40% on assets in excess of the exemptions.

These changes present some planning opportunities for clients with high net-worth. Although we don’t have “official” guidance from the IRS on whether there will be a retroactive “clawback” of gifts, the Act mandates that the IRS must provide guidance on whether there will be clawback, which is doubtful. We hope to have an official answer sometime this year. If there will not be a retroactive clawback, it may be an appropriate strategy to engage in gifting during life under this higher federal estate tax exemption, so as to use it fully before the higher exemption sunsets. This is a particularly effective strategy in Oregon, because while Oregon continues to have a \$1 million estate tax exemption, Oregon does *not* have a gift tax. In other words, while gifts over the federal annual exclusion reduce your federal estate tax exemption at death, such gifts do not reduce Oregon’s estate exemption.

Despite the increase to the federal estate tax exemption, however, Oregon’s low estate tax exemption is not adjusted for inflation and continues to be a challenge for many households, particularly because life insurance is included in a person’s taxable estate at death.

Gifting can be an effective strategy to remove assets from your estate while you are alive, but it is still

important to have an estate plan that implements all of the best strategies to maximize your Oregon estate tax exemption. Oregon’s estate tax rate continues as a marginal rate of 10–16% on the excess passed over \$1 million. For Washington clients, the estate tax exemption is adjusted for inflation annually and is currently \$2,193,000 for 2018. Although Washington provides a larger cushion, many of the planning strategies that are effective and important for Oregon clients are equally important for Washington clients.

While the Act can provide some great new planning opportunities, particularly during life, it is still important to utilize estate tax strategies under Oregon and Washington’s regulatory framework. The attorneys in Saalfeld Griggs’s Estate Planning practice group are happy to answer any questions you may have about how the Act has affected your estate plan.

2020 Deadline for Defined Benefit and 403(b) Plan Restatements

By Christine Moehl

If you are an employer who sponsors either a defined benefit plan (which includes cash balance plans) or a 403(b) plan, you have a deadline coming up in 2020. By spring of that year, you must “restate” your retirement plan. A plan restatement is basically a complete re-write of the plan document that incorporates legislative and regulatory changes, as well as the individual plan amendments (both optional and required), that have occurred since the plan’s last restatement. A plan restatement presents a unique opportunity for plan sponsors to review their plan provisions to make sure they are operating the plan in accordance with the written documents. It is also a perfect time to explore adding optional plan features to the plan.

Defined Benefit Plans:

IRS rules state that qualified retirement plans (e.g., 401(k) plans, defined benefit plans, etc.) must be updated periodically to reflect legislative and regulatory changes. In 2006 the IRS implemented a new, 6-year restatement cycle for most retirement plans. One cycle is for "defined contribution" plans, which include profit sharing, 401(k), and money purchase pension plans. The other cycle is for "defined benefit" plans, which include traditional pension plans and cash balance plans.

The current plan restatement cycle for defined benefit plans opened on May 1, 2018. This restatement is called the "PPA Restatement." PPA is short for the "Pension Protection Act." Although this is referred to as the PPA Restatement, a whole host of other regulatory changes are also included in the restatement. The PPA restatement will be a complete re-write of the plan document to incorporate 100+ changes that have occurred since the last defined benefit plan restatement. Defined benefit plan restatements must be completed by April 30, 2020.

403(b) Plans:

Historically, the IRS has not required plan restatements for 403(b) plans and did not have written document requirements. Recently, however, the IRS has been pushing 403(b) plan sponsors to formalize their plan documents. In 2007, the IRS required that all 403(b) plan sponsors adopt a written plan document by December 31, 2009. To meet the written plan requirement, many plan sponsors pieced together plan documents out of existing contracts, agreements, and participant communications. Now, the IRS is going one step further.

In 2017, the IRS announced that 403(b) plan sponsors need to restate their plans onto a "real" plan document. This 403(b) plan restatement will incorporate all of the legislative and regulatory changes that have occurred since January 1, 2010 and must be completed by March 31, 2020. Since many 403(b) plan documents have been relatively informal up to this restatement period, we suggest

that 403(b) plan sponsors start the restatement process early so they are sure to complete it by the deadline.

Next Steps:

Although plan restatements can be cumbersome, we encourage our clients to think of them as presenting an ideal opportunity to revisit plan design issues. During a plan restatement, plan sponsors should review their plan's provisions and compare them to how the plan is being operated. If there are any discrepancies, these provisions should be fixed in the restated plan. Plan restatements are also a good time to examine optional plan provisions that may not be in the current plan. For example, 403(b) plan sponsors might consider adding "Roth" (i.e., post tax) deferrals or automatic enrollment to their 403(b) plans. Similarly, sponsors of cash balance plans might consider changing the interest crediting rate in their plan to actual rate of return.

If you are already in our "corral" of clients, you will receive a letter from us soon explaining the restatement process in greater detail. If you have questions in the interim, or if you are not in our corral of clients but would like to discuss using Saalfeld Griggs as your plan document provider, please contact a member of the Employee Benefits Practice Group.

**The Importance of the Fine Print:
Contract Terms & Conditions**

By Joshua D. Feil

Through our industry and practice groups, Saalfeld Griggs is fortunate to serve many clients that are "producers." Agricultural clients throughout the Pacific Northwest produce grass seed, berries, trees, hops, and many other crops. Other clients mill trees into lumber or transform fruit into numerous goods. Because of the trust clients place in Saalfeld

Griggs, we understand the time, effort, and planning required to be a “producer” in a complex and evolving business world.

After production, however, an important and often overlooked step arises to ensure payment for the hard work and effort that goes into producing goods. The exchange of documents in the form of sales contracts, purchase orders and delivery confirmation documents can be crucial to ensure payment is received. Included in every well-drafted sales contract and other documents are “Terms & Conditions”—often colloquially referred to as the “fine print.” Because they are included in every contract for the sale of goods, it can be easy to overlook or forget about the terms and conditions—at least, until something goes sideways. Based on our experience, there are several things to consider when thinking about your terms and conditions:

- **Disclaimer of Warranties.**

“Warranty” is a legal term that describes the representations a seller makes about a product that may later be used against the seller if the product does not conform to the stated representation. Sellers will often disclaim certain warranties in the terms and conditions. Some types of warranties—specifically, express warranties—can’t be disclaimed. Generally, express warranties are created by an affirmation of a fact or a certain description and must be part of the reason the parties agree to the transaction. While you won’t be in trouble for calling your product “world famous” or “the world’s best,” if you’ve represented that a crop is “organic” or “HMO free,” you can’t disclaim that assertion in the terms and conditions. There are also implied warranties applicable to the sale of goods that can be disclaimed under certain conditions. However, these disclaimers must be conspicuous (think bold text, all caps, etc.) and in some cases must be specifically named.

- **Remedies for breach.**

The terms and conditions can limit the buyer’s and seller’s remedies in the event of breach

by the other party. If you want to have an “exclusive” remedy, the terms and conditions should provide that the remedy is exclusive.

- **Indemnification.**

Indemnification refers to a legal arrangement in which one party agrees to pay for the other’s losses and/or liabilities, shifting the risk of loss from one party to the other. Terms and conditions will often contain an indemnity provision, requiring one party to indemnify the other under certain circumstances. The wording of these provisions is key, and requirements vary from state to state. For example, Oregon distinguishes between specific and “broad but non-specific” indemnity provisions. If an indemnity clause uses a catch-all “any and all claims” standard, Oregon courts will use a legal test to determine whether a specific type of claim is actually covered under “any and all claims.” In other words, it won’t be certain which claims are covered and which aren’t. In contrast, the parties can specifically designate the types of claims covered by the indemnity provision and avoid surprises from a court’s interpretation. Some types of claims, like indemnification for a party’s own negligence, *must* be clearly, expressly and specifically provided for.

- **Risk of Loss.**

The buyer and seller will often allocate the risk of loss between them in the terms and conditions. The wording of these provisions can determine how long the seller bears the risk of lost, destroyed or damaged goods, and when that risk shifts to the buyer.

- **Termination.**

While most sales transactions begin with optimism, sometimes things go wrong. The terms and conditions will often provide a mechanism to terminate the contract when a transaction goes south. You should be aware of when and how termination can occur, and how losses associated with termination are allocated.

- **Ambiguities.**

The general default rule is that when a court interprets a contract, it will construe any ambiguity against the party who drafted the contract. This rule applies to the terms and conditions. If you or your attorney drafted the sales contract and it contains an ambiguity in a key provision, the court will interpret the ambiguity so as to benefit the other party if the contract ever ends up in court. However, this rule can be specifically waived by the parties in the contract.

- **Which law applies.**

Terms and conditions frequently include a clause providing that the law of a certain state will apply to interpretation of the contract. While laws governing the sale of goods are relatively uniform across the United States, there are often key differences. For example, Oregon law is substantially different from Washington related to security in transactions with agricultural products. Additionally, treaties may apply in international sales transactions.

- **Where and how disputes are resolved.**

Parties often include clauses in terms and conditions that require disputes be resolved through arbitration or that the parties must attempt mediation before filing a lawsuit. Terms and conditions can also provide that any lawsuit related to the contract must be filed in a certain court (i.e., the Circuit Court for Marion County, Oregon or the Superior Court for Clark County, Washington). Depending on where you (or your attorney) or the other party (and its attorney) is located, these clauses can greatly increase litigation costs for one party or the other if they must travel a long distance to the designated location.

These are just a few of the items to consider while reviewing the terms and conditions of your sales contract. Sometimes the terms and conditions can also be used to ensure payment by preserving lien or other security rights you might have in

the produced goods until paid. The attorneys at Saalfeld Griggs understand the unique challenges facing numerous industries and can tailor terms and conditions to meet those challenges. As the saying goes: "beware the fine print"!

The Importance of Written Change Orders

By Hunter B. Emerick

Surprisingly, attorneys can be creative. Sometimes, creativity with the law allows clients to achieve their goals or leads to important developments in our society. Unfortunately, that is not always the case. Sometimes, legal creativity can result in confusing or contradictory obligations.

Our firm is defending a fairly standard breach of contract claim on a residential construction project. As with many residential construction projects, there were a number of change orders. In this case, the homeowner and the contractor discussed changing the type of siding from what the contract required, hoping to achieve cost savings. The contractor estimated the cost savings that might be realized from the siding change. However, no specific amount of savings was ever identified nor was the change order put in writing and/or signed by the parties.

However, the contractor proceeded with the change to the siding. The homeowner did not object to the change to the siding as it occurred, nor did the homeowner object to the quality of the siding. But, the homeowner now complains that the amount of savings that he hoped would be realized from the change in the siding are insufficient. So, the homeowner sued the contractor, in part, over this issue. Initially, the lawsuit turned on whether a change order was agreed upon and, if the parties

did not agree to a change order, what damages the homeowner might receive for the installation of a different type of siding than was required by the contract.

The creativity in this case involves the homeowner's assertion of an Unlawful Trade Practices Act ("**UTPA**") claim against the contractor concerning the siding change order. The UTPA is intended to protect consumers from a variety of unfair trade practices. The construction of a home certainly might be governed by the UTPA, but these claims are not frequently found in lawsuits over residential construction. In this case, however, the homeowner's attorney has contended that the contractor violated two provisions of the UTPA with respect to the siding change order.

First, the attorney contends that because a change order was not executed, the contractor did not have the authority to install a different type of siding than was provided for in the contract. Consequently, the attorney reasons that the contractor violated a provision of the UTPA that prohibits a person from performing service on goods or real estate if the owner of the real estate does not authorize the service. Also, because the actual savings for the change of the siding did not equal the estimated range of those savings, the attorney alleges that the contractor violated the UTPA by making a false or misleading representation of fact concerning the offering price or the person's cost for real estate goods or services. Under the UTPA, the prevailing party may recover attorneys' fees, and it is possible to state a claim for punitive damages against an individual who intentionally violates the UTPA. It seems unlikely that a court would find that a homeowner who discussed a change in the siding required by the construction contract and subsequently allowed a change in the siding to be installed on the residence to claim that the contractor performed service on real estate without the authority of the homeowner. The parties had previously entered into a construction contract allowing siding to be installed on a house. The parties discussed a change to the type of siding to be installed on the house. The homeowner allowed

that type of work to go forward. Even if a written change order did not exist, it appears that the homeowner had authorized the service.

Additionally, a violation of the UTPA requires a false representation of fact concerning an offering price for services. A contractor's good faith estimate as to a potential reduction of the agreed-upon contract price for the siding should not be found to be a false or misleading representation of fact concerning an offering price. An estimate is not a statement of fact; it is merely an opinion. The parties did not identify or bargain a specific reduction in the contract price for the change in the siding. The contractor did not guarantee a minimum amount of savings. The lack of specificity as to the savings should detail the argument concerning a misrepresentation of a fact.

Nonetheless, this issue will require a court's decision. This type of creativity should remind all contractors of the importance of obtaining signed, written change orders that detail the adjustment in the scope of work, any changes to the schedule and changes to the contract price. Contractors should understand that proceeding with extra work without a signed change order can create problems with collecting the value of the labor and materials expended. Now, the failure to obtain signed change orders in residential construction may create more problems than just collections. Apparently, in the residential construction area, change orders might create potential violations of the UTPA. Hopefully, that will not be the case.

Events and Announcements

On **April 18**, **Randy Cook**, **Randy Sutton**, and **Wayne Kinkade** all participated in a panel discussion at the **Samaritan Solutions Institute**. The topic of the discussion was negotiating executive compensation contracts for professionals in the healthcare industry.

On **May 24** the firm hosted a reception in honor of **Jennifer Paul** and **Freeman Green**, both of whom became partners in the firm this year.

Our **Construction Industry Group** attended the **Raise the Roof Auction** on **May 31** in support of **Advanced Construction Education**. Our attorneys were excited to demonstrate their commitment to expanding vocational education, particularly in association with the construction industry.

The **SEDCOR Golf Tournament** took place on **June 15** at **Illaha Hills Golf Club**. The firm sponsored a hole and the tournament's Around the World theme left ample room for fun stops along the course. Our team hosted Scotland, and as to be expected, there was ample Scotch available for interested parties.

Shannon Martinez attended the **Oregon Bankers Association Convention** in **Lake Tahoe, CA**. She had an opportunity to learn from some of the best and brightest in the western banking region.



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