PROSKAUER ROSE LLP®

Personal Planning Strategies

A report for clients and friends of the firm

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Pension Protection Act of 2006 Makes Changes To Qualified State Tuition Programs Permanent

On August 17, 2006, President Bush signed into law the Pension Protection Act of 2006 (the "Pension Protection Act"), which makes permanent a significant number of changes to Qualified State Tuition Programs (commonly referred to as "529 Plans" because they are sanctioned by section 529 of the Internal Revenue Code) included in the 2001 Economic Growth and Tax Relief Reconciliation Act (the "Tax Act"). As reported in the Personal Planning Strategies newsletter in December 2003, the Tax Act provisions were scheduled to expire on December 31, 2010, at which time 529 Plans would revert to their pre-Tax Act status.

The most significant change to 529 Plans under the Tax Act was that, when funds are withdrawn from a 529 Plan to pay for college, the earnings in the 529 Plans are not subject to income tax. Prior to 2002, when the funds were withdrawn from a 529 Plan, the income was taxed to the beneficiary (who, as a student, may have been in a lower tax bracket) in a manner similar to an annuity. One part of each withdrawal was a non-taxable return of principal, and the other part was taxable deferred earnings. This significant change was made permanent by the Pension Protection Act.

How 529 Plans Work

529 Plans offer a tax-advantaged way to save for college and post-graduate education. Although 529 Plans are created under the Internal Revenue Code, the individual states have been given some latitude with respect to the implementation of their particular 529 Plans. Accordingly, 529 Plans may vary significantly from state to state, but in all programs the funds transferred to a 529 Plan grow free from Federal and state income tax.

The majority of states have adopted 529 Plans and a recent newsletter states that about 93 billion dollars are currently invested in 529 Plans. Federal tax rules prohibit contributors and beneficiaries from directing the investments of 529 Plan funds. Funds are invested by the Plan manager in one of several mutual funds that the account owner chooses. Another significant change in the Tax Act, now made permanent by the Pension Protection Act, is that the account owner has the ability to rollover the 529 Plan into a different 529 Plan once every twelve months. Thus, account owners can now change the way the funds are invested even though they can't pick individual stocks for the account.

Plan Administrators

Each state selects a provider to administer their 529 Plan. New York State's 529 Plan is run jointly by the state Comptroller and the Higher Education Services Corporation which, as of November 14, 2003, designated Upromise Investments, Inc., which includes the Vanguard Group and Fleet Bank's Columbia Management Group, to manage the funds. Contributions can only be made in cash. Funds are invested by Upromise in one of several mutual funds chosen by the account owner. There is no residency requirement; non-residents of New York are eligible to open a 529 Plan under New York's program.

Florida's 529 Plan is sponsored by the State of Florida and is managed by the Florida Prepaid College Board. Florida's 529 Plan currently offers five investment options, which, depending on the investment option selected, is managed by Deutsche Asset Management, Northern Trust Investments, Trusco Capital Management and U.S. Trust Company of New York. As with the New York State 529 Plan, contributions can only be made in cash and there is no residency requirement.

State Income Tax Deductions

New York, along with some other states such as Connecticut, offers additional state income tax benefits to its residents (of course, in states, such as Florida, where there is no state income tax, this discussion is not applicable). Under New York State's 529 Plan, the first $5,000 of funds contributed each year may be deducted on an individual's New York State income tax return ($10,000 in the case of a married couple filing jointly) for funds contributed to New York State's 529 Plan (this deduction is not available if you contribute funds to a 529 Plan offered by another state). Thus, if you and your spouse are New York residents and contribute a total of $10,000 to a 529 Plan, and you are in the top income tax bracket, you will save nearly $700.00 in New York State income tax - and even more if you are also New York City residents. Additionally, even before the Tax Act, the earnings were wholly exempt from New York State income tax when withdrawn for college or other related educational expenses. A few states, including Pennsylvania, have approved a state income tax deduction for contributions made to 529 Plans even if the funds are contributed to 529 Plans offered by other states.

Maximum Account Balance and Withdrawals

Under New York's 529 Plan, the maximum account balance is currently $235,000 and will be adjusted periodically by the state to reflect higher education costs (under Florida's 529 Plan, the maximum amount is $341,000 and will also be adjusted periodically).

When an individual enrolls in a United States accredited college or university, the funds may be withdrawn to pay for higher education expenses, which include tuition as well as fees, supplies, room and board, books, and equipment. Funds may be withdrawn for undergraduate or graduate education and approved trade, technical or other occupational education. To make a qualified withdrawal, the account owner submits a withdrawal form to the Program Manager setting forth the educational expenses of the designated beneficiary. Those funds are then transferred directly to the institution of higher learning. The account does not have to be open for any certain period of time before a qualified withdrawal may be made.

Designated Beneficiary

At the time you open an account you must designate a beneficiary of the 529 Plan - you can even name yourself. If a beneficiary does not attend college or does not fully use his or her account funds, the account owner can name another member of the beneficiary's family as the beneficiary instead. In fact, the account owner can change the beneficiary of a 529 Plan at any time. The Pension Protection Act permanently expands the definition of "member of the beneficiary's family" to include first cousins.

Limitations and Penalties

There are no income limitations imposed on individuals wishing to establish 529 Plans. If funds withdrawn from a 529 Plan are not used for educational expenses, the earnings will be subject to Federal and state taxation (assuming that the particular state has a state income tax), plus a Federally mandated ten percent penalty imposed on the investment income. The penalty is waived if the withdrawal was made (a) because of the death or disability of the designated beneficiary or (b) because the beneficiary received a scholarship, but only to the extent that the amount withdrawn does not exceed the scholarship amount. State rules vary. In New York, amounts withdrawn not exceeding the scholarship amount, will be subject to New York income tax. Neither New York nor Florida imposes a penalty if funds are not used for educational expenses.

The rules with respect to rollovers also vary among the different states. Rollovers from New York's 529 plan to another state's plan are considered non-qualified withdrawals for New York income tax purposes and the earnings and contributions for which previous state tax deductions were taken will be subject to New York income tax.

Transfers to another account for a member of the family of the designated beneficiary of the prior account will not be subject to New York income tax. As indicated above, "member of the family" now permanently includes first cousins of the original designated beneficiary.

Gift, Estate and Generation-Skipping Tax Consequences

Under Federal gift tax laws, every individual is entitled to give as much as $12,000 per year, indexed for inflation, to any person without gift tax consequences. This is known as the "annual exclusion" from gift tax. Thus, a married couple can give away as much as $24,000 per year to any person (or any number of people) without gift tax consequences. To take advantage of the $12,000 "annual exclusion," the gift tax laws require the recipient to have complete control of the property (this is known as having a "present interest," in the property and prevents many transfers in trust from qualifying for the "annual exclusion"). Contributions to 529 Plans of up to $12,000 ($24,000 in the case of a married couple) on behalf of an individual are specifically exempt from this "present interest" requirement and, therefore, will not utilize any portion of the donor's gift tax exemption (and will not be subject to gift tax). Additionally, transfers to a 529 Plan within this limitation are exempt from generation-skipping transfer taxes. A change of designated beneficiary will not be subject to additional gift tax but may be subject to generation-skipping transfer tax if the new beneficiary is in a younger generation than the original beneficiary.

Extra Incentives under the Gift Tax Law

As a further incentive to establish 529 Plans, the law allows an individual to utilize immediately five years of annual exclusion amounts. This means, for example, that you and your spouse may establish a 529 Plan account, and transfer $120,000 ($24,000 x 5 years) to a 529 Plan account immediately. This transfer would qualify for the "annual exclusion" ratably over the next five years even though the transfer is made today. Accordingly, such a transfer (and all income earned) passes free of all gift and generation-skipping transfer taxes. An election to treat such a transfer as qualifying for the annual exclusion must be made on a timely filed Federal gift tax return.

Death of Account Owners and Beneficiaries

Even though an owner of a 529 Plan retains the right to name a new member of the beneficiary's family as the beneficiary of a 529 Plan and control the timing of distributions, the 529 Plan will not be included in the owner's taxable estate. One exception to this rule, as discussed above, is if you utilize more than one year's annual exclusion to fund the account and do not live until the year in which you could have utilized that annual exclusion amount, then those contributions are brought back into your taxable estate. Upon the death or incompetence of the 529 Plan owner, decisions with respect to the account are made by a designated successor as a contingent owner. If the designated beneficiary dies and funds are withdrawn due to his or her death, those funds will then be included in the beneficiary's estate and earnings will be subject to income tax.

Caveat

In addition to the "annual exclusion" from gift tax (which applies to transfers made to a 529 Plan), an unlimited gift tax exclusion is available to pay someone's tuition expenses. To be exempt, the payment must be made <u>directly</u> to the educational institution. However, in this regard only tuition payments qualify for this exception - fees, supplies, room and board, books, and equipment will not qualify (although those payments can be made directly to the student and qualify for the "annual exclusion"). Accordingly, some individuals' estate plans may include making "annual exclusion" gifts to individuals outside of a 529 Plan account (or only utilizing a 529 Plan account to pay non-tuition related expenses) and then simply paying fees for tuition to educational institutions when those bills are due.

Impact of 529 Plan Accounts on Eligibility for Financial Aid

The Deficit Reduction Act of 2005 provided that 529 Plans would not be considered a student's asset for purposes of determining eligibility for financial aid. The Department of Education clarified that 529 Plan accounts owned by a student (or his or her spouse) who is not a dependent will be considered an asset of the student, but if the student account owner is a dependent, the 529 Plan account will not be reported as an asset. All 529 Plan accounts owned by a dependent student's parent, regardless of who the beneficiary is, will be considered assets of the parent.

Although a 529 Plan account is not reported as an asset if the parent or student is not the account owner, educational institutions are permitted to exercise professional judgment, and if it is determined that special circumstances exist, to include the account as an asset of the student in determining the student's expected family contribution. Unlike 529 Plans owned by a dependent student, accounts held under the Uniform Transfer to Minors Act ("UTMA") and trusts in which the student has a beneficial interest are reported as assets of the student.

Conclusion

The permanent changes made by the Pension Protection Act make 529 Plans even more attractive than they were after the

Tax Act. You should consider establishing a 529 Plan for your family members. They provide a tax advantaged means of providing the necessary funds to pay for your loved ones' educational expenses while allowing you to maintain control over the account during your lifetime.

Florida's Homestead Exemption: Should Your Home Be Owned By Your Trust?

The Constitution of the State of Florida protects the home of a Florida resident from forced sale in order to satisfy his or her creditors. This is commonly referred to as the "homestead exemption." Generally, the homestead exemption is limited to a residence located on one-half acre or less if the residence is located within a municipality and 160 contiguous acres if the residence is located outside a municipality. In order to be entitled to the homestead exemption, the debtor must be a Florida resident. In addition, the manner in which the home is titled is very important. The Constitution requires that the residence be owned by a "natural person."

During the course of their estate planning, it is very common for Florida residents to transfer their homes to revocable trusts in order to avoid probate. If a residence is owned by a revocable trust rather than in a person's individual name at the time of death, it is not necessary to submit the individual's will to the Probate Court in order to transfer the home to his or her beneficiaries. There have been many recent court decisions discussing whether ownership by a revocable trust satisfies the rule that requires the residence to be owned by a natural person to be protected from creditors. Accordingly, many Florida residents have been hesitant to transfer their homes to their revocable trusts.

In a 2001 Bankruptcy Court case (*Crews v. Bosonetto*), the Middle District held that a debtor was not entitled to the homestead exemption because her residence was owned by her revocable trust. Most practitioners disagreed with the holding of the case and no subsequent case followed it. However, the case gave lawyers and clients a reason to worry about transferring a home to a revocable trust.

A subsequent Florida case which addressed whether ownership of a homestead by a revocable trust is valid for homestead exemption purposes is *Callava v. Feinberg*. The Third District Court of Appeals held that the property in question was protected from creditors, as it was the debtor's homestead, regardless of the fact that such property was owned by the debtor's revocable trust. It is interesting to note that in its opinion the court did not mention the *Bosonetto* opinion and, thus, the opinion did not give practitioners the confidence to begin advising clients to proceed with transferring their homesteads to their revocable trusts.

Recently, the Middle District issued an opinion in *In re Alexander* that is in direct conflict with the *Bosonetto* opinion. The Alexander court held that a debtor was entitled to the homestead exemption even though her residence was owned by a revocable trust. The court concluded that it was not necessary for an individual to own his or her home individually so long as he or she has an ownership interest in the residence which gives him or her the legal right to use and possess the property as a residence. While the Judge in *Alexander* refused to follow the Bosonetto opinion, and clearly stated that *Bosonetto* was wrong, such opinion was not overturned.

Although the *Alexander* opinion is a step in the right direction, there is still no clear answer on whether a home owned by a revocable trust will be protected under Florida's constitutional homestead protection provisions. In light of *Alexander*, the home should be protected, but until an appellate court overturns *Bosonetto*, there may still be a risk that the homestead protection may not apply to a home owned by a trust.

Pension Protection Act of 2006 Permits Gifts To Charities From Individual Retirement Accounts

The recently enacted Pension Protection Act of 2006 includes a provision that permits a person aged 70 1/2 or older to direct distributions directly from an Individual Retirement Plan ("IRA") of up to $100,000 per year to charity in 2006 and 2007. The benefit of making a direct distribution from an IRA to charity is that the IRA owner can exclude up to $100,000 of the distribution from his or her gross income, and such distributions are counted as part of their annual minimum required distributions. Because the IRA distribution is excluded from gross income, the IRA owner is not entitled to a charitable income tax deduction for the charitable gift. There are several requirements that must be met in order to ensure that the charitable IRA distribution will be excluded from gross income.

Technical Requirements

First, the IRA owner must be at least age 70 1/2 on the day of the transfer from the IRA to the charity.

Second, the donation must be made directly from an IRA. Donations from other types of retirement plans such as 401(k) plans, profit sharing plans, pension plans or Section

403(b) annuities will not qualify. However, amounts rolled over from such a "non-qualifying" plan to an IRA, and then distributed to a charity should qualify.

Third, the donation must be made directly from the IRA to the charity. This means that a donation to a charity will not qualify if a check is paid from the IRA to the IRA owner who then endorses the check to the charity.

Fourth, the recipient charity must be a public charity. Contributions to donor advised funds, charitable trusts and supporting organizations will not qualify.

Fifth, a distribution will only qualify if the donor would normally be able to claim a charitable income tax deduction for the entire payment. This means that IRA distributions that are used for certain types of donations such as auctions, raffle tickets, and fund-raising events will not qualify. For instance, suppose you make an IRA distribution to purchase a ticket for a fundraising dinner for a charity and a portion of the ticket price covers the cost of your dinner and the balance of the ticket price would normally qualify for a charitable income tax deduction. In that case, no part of your IRA distribution will qualify since you would normally be able to claim a charitable income tax deduction for only a portion of the ticket price.

Finally, the donation must be made from assets which would otherwise be considered a taxable distribution from the IRA. In general, distributions from IRAs are taxable. However, if an IRA owner made any nondeductible contributions to the IRA, then distributions from those amounts to the IRA owner are generally not taxable. Accordingly, only that portion of the IRA distribution that is considered taxable will qualify.

Example of a Qualifying IRA Distribution

John, age 73, is the owner of a $2 million IRA. John would like to make a $100,000 gift to charity. John directs his IRA administrator to make a direct distribution of $100,000 from his IRA to the Juvenile Diabetes Foundation (a qualifying charity). The IRA administrator issues a check for $100,000 payable from the IRA to the Juvenile Diabetes Foundation and sends it to the charity. John would be allowed to exclude the $100,000 charitable IRA distribution from his gross income in 2006.

Who Benefits

IRA owners who are at least age 70 1/2 and who do not itemize their deductions may benefit the most from the new provision. This is because a donor who makes a charitable gift from his or her IRA has to report the entire distribution as taxable income, but does not receive an offsetting income tax deduction since he or she does not itemize deductions. Taxpayers who do not itemize their deductions are often middle and lower income taxpayers or residents of states that do not have a state income tax (such as Florida).

Donors who lose tax deductions as their adjusted gross income ("AGI") increases may also benefit from the new provision. Itemized deductions are subject to a phase-out as the amount of the taxpayer's income increases over $150,500 ($75,250 if married filing separately). The phase-out of itemized deductions was lowered from 3% in 2005 to 2% in 2006 and 2007. By keeping AGI lower, a taxpayer can deduct more itemized deductions.

Donors who live in states that do not provide for income tax breaks for charitable gifts may also benefit from the new provision. For example, several states, including New Jersey and Massachusetts, do not permit itemized deductions. As a result, residents of those states get no state income tax breaks for making gifts to charity. Eligible donors in those states will save taxes at their highest marginal state income tax rate for every gift they make from their IRAs instead of from their checking accounts.

Donors who are subject to the 50% charitable deduction limitation may also benefit from the new provision. Generally, charitable deductions cannot exceed 50% of a taxpayer's AGI in any year. A donor who is subject to the 50% charitable deduction limitation and who makes a taxable distribution from an IRA to make an additional charitable gift would generally be able to deduct only 50% of the amount in the year of the gift (the excess is carried forward for up to five years). The other 50% of the IRA distribution would be subject to income tax that year. Under the new provision, if the charitable gift is made directly from the IRA, an eligible donor would not pay any additional income tax on that amount.

Conclusion

IRA owners who are at least age 70 1/2 in 2006 and 2007 should consider making a distribution from their IRA to a charity. Eligible donors who are most likely to benefit are those who do not itemize their deductions or who live in states that do not permit itemized deductions or who otherwise benefit by keeping their AGI lower.

An Endangered Species: "Fractional" Gifts To Charities

The Pension Protection Act of 2006 (the "Act") does not limit itself to strengthening pension and retirement benefits. It also includes several key provisions that affect charitable giving by individuals. In particular, the Act changes the rules for "fractional" gifts of tangible personal property to charities.

Fractional gifts work like time shares. For example, you can give a charity a fixed percentage of, or fractional interest in, your valuable tangible personal property rather than donating it all at once. This would allow you to keep and enjoy the property for part of the year while still obtaining a charitable deduction for it. The charity would also have the right to possess the property for part of the year (and would not even have to exercise that right, and take possession of it, for you to be eligible for the charitable deduction, according to the Tax Court).

Persons who spent a portion of the year at a second residence found this type of charitable gift particularly attractive. For instance, if you spent three months each year in Florida and the remainder of the year in New York, you could give your favorite museum a one-fourth undivided interest in a work of art. The museum would have the right to possess the work of art for one-fourth of the year and you would have the right to possess the work of art for three-fourths of the year.

Due to a concern that donors claimed big deductions for these types of charitable gifts while still retaining the tangible personal property, Congress included provisions in the Act that place limits on this gifting technique. Specifically, the new provisions require that if you make a fractional gift of tangible personal property to a charity, and you wish to take a charitable deduction, you must transfer your remaining interest in that property to the same charity before the earlier of (i) ten years from the initial gift and (ii) your death. As a result, you can no longer own a fractional interest indefinitely, but must eventually transfer your remaining ownership interest to the charity. In addition, the new provisions require that the charity must (i) have "substantial physical possession" of the property and (ii) use that property for its exempt purpose.

If these new restrictions are violated, the tax savings from your prior fractional gifts to a charity (plus interest on the tax) are "recaptured" and must be paid to the IRS. There is also an additional penalty equal to 10% of the amount recaptured.

For purposes of this new provision, if you made a fractional gift before the effective date of the Act's enactment (August 17, 2006), it will not be treated as the initial gift. However, the first fractional gift you make after that date will be considered as the initial gift even if you have made a prior fractional gift.

The Act also contains new provisions governing the amount deductible for additional gifts of fractional interests after the initial gift. The Act provides that the deduction for income, gift and estate tax purposes of additional gifts of a fractional interest is the relevant fraction of the lesser of (i) the fair market value of the property at the time of the initial gift or (ii) the fair market value of the property at the time of the additional gift.

As a result, if you give a fractional interest in tangible personal property to a charity and then make a later gift of a fractional interest in the same property at a time when the property has increased in value, you will have to pay a gift tax on, and will get no income tax deduction for, the difference. Likewise, if your remaining fractional interest is transferred to the charity at your death, the appreciation that occurred can result in an estate tax since the estate tax charitable deduction will not be as high as the estate tax value for the fractional interest you owned.

Given these new provisions, fractional gifts of tangible personal property to charities are far less desirable and are likely to be substantially diminished.

Transfers After Death from Company Pension Plans to Inherited IRAs: A New Way To Defer Income Tax

While the Pension Protection Act of 2006 will impact nearly all retirement savings plans, one of the most significant changes affects non-spouse beneficiaries of a deceased participant's employer-sponsored retirement plan, such as a 401(k) or a profit-sharing plan.

Current Law

If the beneficiary of your employer-sponsored retirement plan is not your spouse, then upon your death, many plans require the entire account balance be distributed to the beneficiary within a short period of time after your death, such as five years or less. Although employer-sponsored retirement plans are permitted under current law to allow a non-spouse beneficiary to receive distributions over the beneficiary's life expectancy, most plans do not permit this because they do not want to be responsible for administering the plan for that extended period of time. Therefore, since the beneficiary is required to take distributions immediately and those distributions are included in the beneficiary's income, the beneficiary will be subject to substantial income taxes upon receipt of the distributions over a relatively short period of time.

In comparison, if the beneficiary is your spouse, then upon your death, your spouse can make a tax-free rollover of the account balance to a new rollover IRA for his or her benefit. Your spouse will then be able to take the "required minimum distributions" (explained below) from his or her rollover IRA over his or her life expectancy, thereby allowing for continued tax-free compounding and the payment of income tax on smaller distribution amounts over time.

The minimum distribution rules apply to almost all retirement plans (for simplicity we will refer to these as IRAs for the remainder of this article, but they apply to all retirement plans). For your own IRA, Internal Revenue Service regulations requires that you start taking minimum distributions from your IRAs by your "required beginning date," which generally is April 1 of the year following your 70½ birthday (there is an exception for some people who continue working past that date and participate in their company's pension plan). The "required minimum distribution" is determined based on your age, the account balance of the IRA and an IRS table.

The minimum distribution rules also apply to rollover IRAs. If the beneficiary of your employer-sponsored retirement plan account is your spouse and he or she transfers the account balance to a rollover IRA, your spouse would not be required to begin taking minimum distributions until he or she attains age 70½. If the beneficiary of the account is not your spouse, he or she did not have the option of transferring the account balance to a new IRA, thereby forcing the beneficiary to take distributions immediately after your death under employer-sponsored retirement plans that did not allow for non-spouse beneficiaries to remain in the plan.

New Rules Under The Pension Protection Act Of 2006

Under the Pension Protection Act, a child or any other person who is not your spouse can transfer the account balance to a new inherited IRA. The new rules will allow a non-spouse beneficiary to take required minimum distributions based on his or her life expectancy. Unlike a spousal rollover, distributions from an inherited IRA must be made each year regardless of the beneficiary's age. However, taking distributions over a beneficiary's life expectancy will allow for continued tax-free compounding and the payment of income tax on smaller distribution amounts over time. This change will benefit those who designate, for example, their children, grandchildren or significant others, as the beneficiary of an employer-sponsored retirement plan. Additionally, even individuals who were designated beneficiaries under employer-sponsored retirement plans that allowed those individuals to remain in the plans during their lifetime may wish to utilize the new rules in order to avail themselves of different investment opportunities that are not available in their employer-sponsored retirement plans.

The new provision is effective for distributions after December 31, 2006. Therefore, anyone who has inherited an employer-sponsored retirement plan should wait until 2007 to take distributions because then you can transfer the account balance to an inherited IRA rather than taking a lump sum distribution and being subjected to substantial income taxes.

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