

## Estate Planning in a Post Election World

### Summary:

For the last few years, estate planning attorneys have been urging their clients to utilize their lifetime exemptions prior to the sunset of the Tax Cuts and Jobs Act (TCJA) on December 31, 2025. It was a call to action where time was of the essence – “if you don’t use it, you lose it.” With Trump winning the presidency and Republicans taking the majority in the House of Representatives and Senate, has the crisis been averted? What does the planning conversation with our clients consist of today? This presentation will explore how the current political environment has impacted estate planning and discuss different approaches to continue those conversations with clients now hesitant to continue or conclude their planning.

### Objective of the Meeting:

The objective of the meeting will be to understand the election’s potential impact on the sunset of TCJA, explore planning techniques available with flexibility to benefit clients regardless of TCJA’s outcome, and how to change the conversation to keep estate planning at the forefront.

### Outline:

1. Legislative history of the TCJA – understanding reconciliation and the Byrd rule
2. Exploring Political Options – Will the TCJA expire, get extended, or be made permanent?
3. Understanding the Sunset
  - a. Which provisions will expire?
  - b. What the new landscape will look like
4. Changing the Conversation
  - a. Levels of Clients: Ultra high net worth, high net worth, emerging wealth
  - b. Importance of Planning Regardless of TCJA
    - i. Estate Tax
    - ii. Asset Protection
    - iii. Estate Appreciation
    - iv. Income Tax Planning
5. Exploring Flexible Planning Opportunities
  - a. Ready... Set... Wait and See Approach
    - i. Creation of irrevocable trust
    - ii. Establish account and create links for brokerage accounts/securities and/or creation of unsigned assignment agreement
    - iii. Wandry or King adjustment mechanism to account for lack of valuation
    - iv. Wait and See if the exemption is going to change
  - b. QTIP Planning – Step up in basis vs. estate tax planning
    - i. Creation of intervivos QTIP trust and funding
    - ii. Gift tax return not filed until up to October 15, 2026 and can make the decision to make the QTIP election or not based on TCJA sunset
    - iii. Option to include testamentary limited power of appointment to appoint back to Grantor or independent trust protector can distribute to Grantor (AKA Back-end SLAT through Texas Prop. Code §112.035(g)(2))
  - c. Disclaimer provisions

- i. Creation of trust with single beneficiary with the power to disclaim back to grantor or limited power to appoint to assets to secondary trust for multiple beneficiaries
    - d. Rescission
    - e. Portability
  - 6. Asset Protection
    - a. DAPTs, SPATs
    - b. Timing
  - 7. Income Tax Planning
    - a. Planning with general power of appointments for senior family members
    - b. Trust Residency
    - c. Step-up in Basis planning
    - d. CRTs for stock concentrations and inherited retirement accounts

# Estate Planning in a Post Election World

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# **Overview of Current Political Environment**

# Legislative History of the Tax Cuts and Jobs Act of 2017

2017

2025

- Trump became president on January 20, 2017
- Trump to become president on January 20, 2025
- Republicans held control of the **House (240 Rep/194 Dem) and the Senate (52 Rep/45 Dem/2 Indep/1 Vacant)**
- Republicans hold control of the **House (220 Rep/215 Dem) and the Senate (53 Rep/47 Dem)**
- Budget Resolution passed House and Senate October 2017. Tax Cuts and Jobs Act (TCJA) brought forward by the House on Nov 2, 2017, and signed into law on December 22, 2017
- Leaders in the House are laying the groundwork to use reconciliation within the first 100 days.

# Reconciliation

Avoids the normal 60 vote filibuster threshold required for most other legislation to pass the Senate. **Only requires 51 votes.**

- The Byrd Rule restricts what can be included in the reconciliation legislation:
  - **Must not worsen the deficit** beyond the “budget window” (usually 10 years)
  - Cannot make changes to Social Security
  - Extraneous provisions that do not produce a change in outlays or revenues or are merely incidental (ie non-budgetary provisions)

# 2017 TCJA Funding Compromises

2017	2025
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- Reconciliation instruction: Net tax cut of not more than \$1.5 trillion over 10 years + Arctic National Wildlife Refuge (ANWR) drilling
- Reconciliation instruction: ?
- Notable compromises to keep net costs within \$1.5 trillion: • Notable compromises ?
  - Sunset of multiple provisions
  - 21% corporate tax rate vs. original 20% proposed
  - Pass-through deduction reduced from 23% to 20%
  - R&D expenses amortized over a 5-year period beginning in 2022
  - Business interest deduction based on EBIT vs. EBITDA starting in 2022

# What's to Come?

## Sunsetting Provisions:

- Individual tax brackets
- SALT Cap
- Increased standard deduction
- Repeal of itemized deductions
- Increased AMT exemption and phaseout levels
- Increased gift and estate tax exemption
- Qualified Business Income Deduction
- Bonus depreciation

## Funding Options:

- Tariffs
- Elimination of Renewable Energy Tax Credits
- Increase GILTI and BEAT
- Others?

## Campaign Initiatives:

- 15% corporate tax rate for domestic production
- Tax exempt tips, social security, and overtime
- Reduction/elimination of stock buyback tax and corporate AMT

## TCJA Options:

- Expire
- Extend
- Permanent



# Changing the Conversation

# Levels of Clients and the Importance of Planning Regardless of TCJA

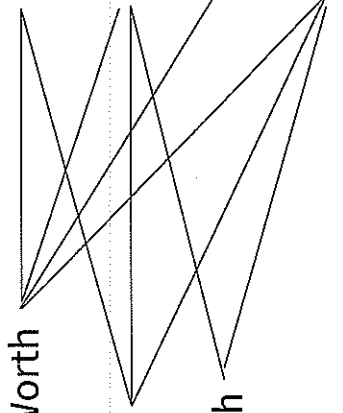
Match clients in Column A with benefits in Column B

Column A

- Ultra High Net Worth
- High Net Worth
- Emerging Wealth

Column B

- Estate Tax
- Asset Protection
- Estate freeze/Appreciation Transfer
- Step up in basis / income tax planning



# Exploring Flexible Planning Opportunities

## **Ready... Set... Wait and See**

- Creation of irrevocable trust
- Establish accounts and connect electronic transfer links to brokerage accounts and/or creation of unsigned assignment agreements
- Use Wandy or King provision to effectuate quick transfers that are not likely to have appraisals completed
- Wait and see if the exemption is going to change

## **QTIP Planning: Step-up Basis vs. Estate Tax Planning**

- Creation of inter vivos QTIP trust and funding
- QTIP election must be made on a timely filed gift tax return (April 15, 2026/October 15, 2026, with extension)
- Option to include testamentary limited power of appointment to Grantor and/or independent trust protector can distribute to Grantor (AKA Back-end SLAT through Texas Prop. Code §112.035(g)(2))

## Disclaimer

- Creation of irrevocable trust with single beneficiary
- Beneficiary can elect to disclaim within 9 months
- Disclaimed property reverts back to Grantor
- Beneficiary also holds an intervivos limited power of appointment and can appoint trust assets to a second irrevocable trust for the benefit of additional beneficiaries

## Rescission

- Rev. Rul. 80-58, 1980-1 C.B. 181 and Penn v. Robertson, 115 F.2d 167 (4th Cir. 1940)
- Must satisfy at least 2 conditions for rescission to be effective:
  - “the parties to the transaction must return to the status quo ante;” and
  - “this restoration must be achieved within the taxable year of the transaction
- IRS has issued a no-ruling policy in Rev. Proc. 2014-3 (Section 3.02(8)) and reaffirmed in Rev. Proc. 2015-3 (Section 3.02(8))

# Portability

Err on the side of caution and make a portability election



# Asset Protection

## **Domestic Asset Protection Trusts (DAPTs)**

- Texas does not have a DAPT statute
- Rev. Rul. 76-103: “if and when the grantor’s dominion and control of trust assets ceases, such as by the trustee’s decision to move the situs of the trust to a State where the grantor’s creditors cannot reach the trust assets, then the gift is complete.” See also Rev. Rul. 77-378; PLR 9332006 (offshore APT), PLR 9837007 (gift tax), PLR 200944022 (estate tax)
- Particularly effective for unmarried clients
- Must be sure that settlor’s creditors cannot reach trust assets to prevent estate inclusion under IRC §§ 2036 and/or 2038

## Special Power of Appointment Trusts (SPATs)

- Settlor makes a gift to an irrevocable trust
- Settlor grants an individual, acting in a non-fiduciary capacity, the power to direct the trustee to make distributions to the settlor
- Settlor should not be permitted to be added as a beneficiary
- Trustee cannot make discretionary distributions to the Settlor
- See *Abigail O'Connor, Mitchell Gans and Jonathan Blattmachr, "SPATs: A Flexible Asset Protection Alternative to DAPTs," 46 Estate Planning 3 (February 2019)*

# Income Tax Planning

## **Income Tax Planning**

- Upstream general power of appointments
- Trust residency
- Step-up in basis planning
- Charitable Remainder Trusts (CRTs) for stock concentrations and inherited retirement accounts

## Changing the Conversation

- Estate Tax Planning
- Asset Protection
- Estate Freeze/Appreciation Transfer
- Step-up in basis/income tax planning

Regardless of whether TCJA expires, is extended, or made permanent, the parties in control of Congress and the Presidency are perpetually changing. From 1980 to 2022 Congress has passed 27 reconciliation bills, 23 of which were signed into law. Waiting for a cliff to start planning could be deadly.

# Disclosures

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