SIMPSON THACHER

MEMORANDUM

Estate Planning Update

September 30, 2010

MAKING GIFTS IN 2010 IN ADVANCE OF PROBABLE GIFT TAX RATE INCREASE AND REINSTATEMENT OF GST TAX

While lifetime gifts in any year generally are more tax efficient than bequests at death, this year's historically low Federal gift tax rate and lapse in Federal generation-skipping transfer ("GST") tax provide an especially appealing opportunity for efficient wealth transfer.

Lifetime gifts in excess of $1,000,000 are subject to Federal gift tax. In 2010, the top gift tax rate is 35%. By comparison, the top 2009 gift tax rate was 45% and the top 2011 gift tax rate (if no superseding legislation is enacted) will be 55%; indeed, the 35% rate is the lowest Federal gift tax rate since 1934. Loan forgiveness or direct gifts to grandchildren in 2010 are particularly tax efficient because not only does the donor take advantage of the historically low gift tax rate, but such planning also avoids the GST tax that a transfer to grandchildren in any other year would incur.

While the risk remains that new legislation will retroactively increase the 2010 gift tax rate and/or retroactively reinstate the GST tax, this possibility becomes more remote as the year draws to a close (and there are ways to structure gifts so as to attempt to limit the effect of any retroactive legislation).

CREATING GRATS IN ADVANCE OF POSSIBLE RESTRICTIVE LEGISLATION

Provisions restricting the Grantor Retained Annuity Trust ("GRAT") technique were introduced or passed by the House of Representatives or Senate seven times so far this year. While none of these attempts reached President Obama's desk, recent history suggests that the restrictions will continue to be re-introduced and may ultimately be enacted into law. The new law likely would require any GRAT created after enactment to have a term of at least ten years and to result in a taxable gift on creation (the size of the required gift is unclear). Under current law, there is no minimum term and a GRAT can be created with little or no taxable gift.

In addition to taking advantage of the current rules governing GRATs, now is good time to create GRATs because of the low interest rates and possibility of transferring assets with depressed values.

MAKING INTRA-FAMILY LOANS IN CURRENT LOW INTEREST RATE ENVIRONMENT

The IRS-mandated interest rate on loans to family members is unusually low at present (for October 2010, the rate is 1.73% for a loan with a term of three to nine years with annual compounding). Low interest rates make this an attractive time to consider using loans as a wealth transfer technique—either by loaning money to family members or trusts for their benefit or by selling assets to family members or trusts in exchange for a note.

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If you have any questions or would like to discuss the ideas presented in this update in greater detail, please contact Pamela L. Rollins (prollins@stblaw.com; 212-455-3468), Laura M. Twomey (ltwomey@stblaw.com; 212-455-3120) or any other member of our Personal Planning Department.

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