

McGUIREWOODS

**The “Top Ten” Estate Planning and  
Estate Tax Developments of 2017**

By Ronald D. Aucutt

Prepared for the  
Southern Arizona Estate Planning Council  
Tucson, Arizona

Wednesday, December 13, 2017

[www.mcguirewoods.com](http://www.mcguirewoods.com)

**NUMBER TEN: Challenges to the Substantiation  
of Charitable Contributions, Including Continued  
Challenges to Conservation Easements**

McGuireWoods | 2

## Tax Court Denies Charitable Contribution Deductions Because of Inadequacies in the Documentation

- **Oatman:** No contemporaneous written acknowledgement.
- **Luczaj:** No contemporaneous written acknowledgement.
- **Izen:** Tough rules for contributions of vehicles (§170(f)(2)).
  - \$338,080 claimed for a ½ interest in a 40-year-old private jet.
  - The entire plane was purchased 3 years earlier for \$42,000.
- **RERI:** Failure to disclose donor's basis in an LLC interest.
  - Purchased by donor 17 months earlier for \$2,950,000.
  - Sold by donee two years later for \$1,940,000.
  - Claimed deduction was \$33,019,000!
- **Ohde:** Taxpayers' claimed 2011 contributions to Goodwill Industries of over 20,000 items with a value of \$145,250.
  - Total claimed deductions 2007-2013 were \$542,363.
  - The Tax Court found none of their testimony to be credible.

McGuireWoods | 3

## Syndicated Conservation Easements Now a Listed Transaction: Notice 2017-10

- Treasury and the IRS identified transactions they described as “conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested.”
- As listed transactions, they require certain reporting under sections 6111 and 6112 by taxpayers, other participants, and advisors.

McGuireWoods | 4

## Conservation Easements: Taxpayer Losses

- ***RP Golf*** (Eighth Circuit affirming Tax Court) and ***Palmolive Building Investors*** (Tax Court):
  - Liens weren't subordinated to easement.
- ***Ten Twenty Six Investors*** (Tax Court):
  - The easement was not perpetual because the deed was not recorded in the year the deduction was claimed.
- ***Partita Partners*** (Southern District of New York):
  - The entire façade was not preserved.
  - PLUS a gross overvaluation penalty was upheld.
- ***Salt Point Timber*** (Tax Court):
  - Permitted replacement by a “comparable conservation easement” could permit the holder of the replacement easement to be an entity other than a “qualified organization” as defined in section 170(h)(3).

McGuireWoods | 5

## Conservation Easements: Taxpayer Wins (sort of)

- ***310 Retail*** and ***Big River Development*** (Tax Court):
  - Contemporaneous written acknowledgment is needed, but the deed itself can serve that purpose.
- ***BC Ranch, II*** (Fifth Circuit reversing Tax Court):
  - The boundaries of 5-acre “homesites” within the donated easement property could be modified (with the donee's approval).
  - After almost 4 weeks of trial, the Tax Court held that the easement therefore was not perpetual and did not qualify, and upheld a gross valuation misstatement penalty.
  - In a 2-1 decision, the Fifth Circuit vacated that holding of the Tax Court because the “tweaking” of the boundaries of the homesites could change neither the size of the homesites nor the ultimate exterior boundaries of the easement property.
  - But the Fifth Circuit remanded the case to the Tax Court to consider other issues, including valuation.

McGuireWoods | 6

## Conservation Easements: REPRISE

Conservation easements – aren't they odd?  
They save a view AND save a wad.  
Two will win and five will lose,  
While BC Ranch FOREVER sues,  
And some are just about façade.

## NUMBER NINE: Decline of State Estate Taxation

## Changes to State Transfer Tax Laws in 2017

- DELAWARE's estate tax sunsets January 1, 2018.
- NEW JERSEY's estate tax is repealed as of January 1, 2018, but its inheritance tax remains.
- MINNESOTA increased its exemption from \$1,800,000 to \$2,100,000 retroactively for 2017, to \$2,400,000 for 2018, to \$2,700,000 for 2019, and to \$3,000,000 after 2019.
- Leaving only 16 states (and DC) with a state estate or inheritance tax.

## State Estate Taxes: REPRISE

A state death tax once was a credit  
'Till Congress said they wouldn't let it;  
Since Two Thousand and One,  
We've been having such fun,  
As one by one states say "Forget it!"

## NUMBER EIGHT: Measured Retroactive Relief for Same-Sex Married Couples

McGuireWoods | 11

### Issue

- *United States v. Windsor* (2013) required, as a constitutional right, federal recognition of same-sex marriages recognized by state law.
- Presumably that means that such marriages have always been constitutionally entitled to recognition.
- But some federal tax benefits were not available, and now statutes of limitations have run.

McGuireWoods | 12

## Response: Notice 2017-15

- Allows retroactive recalculation of marital deductions and generation assignments for purposes of determining the remaining applicable exclusion amount and GST exemption.
- But not claims for refund of tax paid, if the applicable statute of limitations has run.
- This seems to be a reasonable balance between constitutional rights and the need for repose.
- It works both ways: For example, the IRS won't collect gift tax on the creation of a GRIT for a same-sex spouse (now a member of the family under section 2702).

McGuireWoods | 13

## NUMBER SEVEN: Growing Legislative Acceptance of Asset Protection Trusts

McGuireWoods | 14

## Michigan Legislation Authorizing Self-Settled Asset Protection Trusts

- Michigan legislation became effective February 5, 2017.
  - A solvency affidavit (called a “Qualified Affidavit”) is required.
- There are now 18 states with such statutes: Alaska, Colorado, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.
- But still no court has ruled that a resident of a state without such a statute may invoke the statute of another state.

## NUMBER SIX: Developments with Portability on Several Fronts



## Background

- The 2010 Tax Act provided for the portability of a deceased spouse's unused exclusion amount (called the "DSUE amount" in the regulations) to the surviving spouse.
- The 2012 Tax Act made portability permanent.
- Under section 2010(c)(5)(A), portability is not allowed unless elected on a timely filed estate tax return for the estate of the predeceased spouse.

## Executor's Duty To Elect Portability: *Vose* (Oklahoma)

- In *In re Vose*, the Oklahoma Supreme Court held that making a portability election is part of the executor's duty to preserve estate assets.
  - The decedent and spouse had a premarital agreement waiving survivors' rights, but it predated portability.
  - The surviving spouse had agreed to pay the costs of making the portability election.
- There could be reasons in some cases not to elect portability.
- Portability is a good topic to address, both in any premarital agreement and in estate planning documents.

## Relief for Late Elections: Rev. Proc. 2017-34

- For estates below the threshold requiring the filing of an estate tax return, Notice 2012-21 granted an automatic six-month extension of time to file a return (a “portability-only return”) and make a portability election.
- Rev. Proc. 2014-18 provided a simplified method for obtaining an extension of time to file a portability-only return through December 31, 2014.
- Rev. Proc. 2017-34 further extended the time to file portability-only returns—
  - through January 2, 2018, for all decedents dying after December 31, 2010, and before January 3, 2016 (extended transitional relief); and
  - through the second anniversary of the decedent’s death for all decedents dying after January 2, 2016 (limited permanent relief).

McGuireWoods | 19

## Limited Re-Examination of the First Return: *Sower*

- Section 2010(c)(5)(B) allows the IRS to re-examine the first estate tax return, even after the statute of limitations has run, for the limited purpose of determining the correct DSUE amount available to the surviving spouse.
  - This seems like a reasonable and balanced approach.
- In *Sower v. Commissioner*, a surviving spouse’s executor resisted that re-examination on grounds that—
  - the first estate had received a closing letter,
  - this was an improper second examination, and
  - it was an unconstitutional denial of due process.
- The Tax Court rejected all these arguments, allowed the re-examination, and reduced the DSUE amount on the basis of the findings of that examination.
- Wasn’t portability supposed to be **simplifying**?

McGuireWoods | 20

## Portability: REPRISE

The survivor went to court  
To force DSUE to port.  
The courts said yes,  
But what a mess  
When simple concepts we contort.

## NUMBER FIVE: Continued Tension Between Congress and the IRS

## “The Broken IRS”

- Described in the House Republican leadership’s June 2016 “Blueprint” as “a broken tax collection agency that continues to fail the American people.”
- Fallout from years (if not decades) of suspicion.
- Aggravated by allegations in 2013 of politically-motivated discriminatory treatment of citizens, destruction of emails, etc.
- Aggravated by partisanship in Congress.
- Reflected in relentless reductions of the IRS budget.
  - Approximately \$1 billion cut from an approximately \$11 billion budget since Fiscal Year 2010.
  - Another \$149 million cut in appropriations bill reported June 29.

McGuireWoods | 23

## Consequences

- Policy distractions for Congress.
- Decline in professional resources, resulting in—
  - Failure to collect taxes that should be paid.
  - Decline and delay in guidance projects.
  - Difficulties in obtaining closing letters and lien releases.
  - Occasional suspension of the issuance of letter rulings.
  - Terrible telephone service.
  - Dramatic reductions in training.
- Forcing upon taxpayers a shrinking, untrained work force.
  - We are used to audit encounters being adversarial.
  - But dealing with examiners unfamiliar with the law and basic estate planning techniques is unusually exasperating.
  - And the result can sometimes be “throwing everything against the wall to see what sticks.”
  - Case law bears this out.

McGuireWoods | 24

## Tension Between Congress and the IRS: REPRISE

The Internal Revenue Service  
Made some in Congress nervous,  
But when training funds tumble,  
Making auditors stumble,  
The public will grumble,  
“What did WE do to deserve this?”

- Okay, it's too big, but what do we cut?

## NUMBER FOUR: The Withdrawal of the Proposed Section 2704 Regulations

## What Went Wrong?

### History of the Proposed Regulations

- Chapter 14, including section 2704, was enacted 11/5/90.
- Regulations proposed 4/9/91 and 9/11/91, were finalized 1/28/92.
- This new regulation project first appeared in the 2003-2004 Treasury-IRS Priority Guidance Plan.
- “Modify Rules on Valuation Discounts” included in Budget proposals (“Greenbooks”) 5/11/09, 2/1/10, 2/14/11 & 2/13/12.

McGuireWoods | 27

## President Obama’s 2013 State of the Union Address (February 12, 2013)

“Now, the good news is we can make meaningful progress on this issue while driving strong economic growth. I urge this Congress to get together, pursue a bipartisan, market-based solution to climate change, like the one John McCain and Joe Lieberman worked on together a few years ago.

**But if Congress won’t act soon to protect future generations, I will.”**

- The 2013 Greenbook (April 10, 2013) dropped the proposal to “Modify Rules on Valuation Discounts.”
- The regulation project remained in the 2013-2014 Treasury-IRS Priority Guidance Plan (Aug. 9, 2013).
- And the narrative of overreaching began.
  - Aggravated when proposed regulations were expected in 2015.

McGuireWoods | 28

## Oops! What Were They Thinking?

- **“Minimum value”** that is not minimum transfer tax value?
- **“Disregarded restrictions”**? The Greenbooks had stated:

This proposal would create an additional category of restrictions (**“disregarded restrictions”**) that would be ignored in valuing an interest in a family-controlled entity transferred to a member of the family if, after the transfer, the restriction will lapse or may be removed by the transferor and/or the transferor’s family. **Specifically, the transferred interest would be valued by substituting for the disregarded restrictions certain assumptions to be specified in regulations.**

McGuireWoods | 29

## Executive Order 13789 (April 21, 2017)

- Within 60 days (by June 20, 2017), Treasury must identify the tax regulations issued on or after January 1, 2016, that
  - impose an undue financial burden on United States taxpayers,
  - add undue complexity to the Federal tax laws, or
  - exceed the statutory authority of the Internal Revenue Service.

McGuireWoods | 30

**Treasury's First Report (dated June 22, 2017)  
Notice 2017-38 (July 7, 2017), 2017-30 I.R.B. 147**

- Identified eight regulations that meet at least one of the first two criteria specified by the Executive Order (undue financial burden and undue complexity).
- The fourth of those eight sets of regulations was the proposed regulations under section 2704.

**Treasury's Second Report (dated October 2, 2017)  
(released October 4, 2017)**

- Described the Proposed Regulations, including a reference to **"a web of dense rules and definitions."**
- "After reviewing these comments, Treasury and the IRS now believe that the proposed regulations' approach to the problem of **artificial** valuation discounts is **unworkable.**"
- "In light of these concerns, Treasury and the IRS currently believe that these proposed regulations should be **withdrawn in their entirety.**"



## What Next?

- Treasury's Report (Oct. 2, 2017, released Oct. 4, 2017)
  - No reference to modifications.
    - Unlike the discussion of the other seven regulations.
  - Neither is the door closed to re-proposal with modifications.
  - But “after reviewing these comments, Treasury and the IRS now believe that the proposed regulations’ **approach** to the problem of artificial valuation discounts is **unworkable**.”
- The proposed regulations are now withdrawn. 82 FED. REG. 48779 (Oct. 20, 2017).

## The 2704 Regs: REPRISE

The Service thinks people need more  
Regulations for 2704,  
But the public mistook them  
And wrongly forsook them,  
And now they're not here anymore.

## The 2704 Regs: REPRISE TWO

The Service thinks people need more  
Regulations for 2704,  
But what were they thinking  
That the draft was so stinking  
That now it's not here anymore?

## NUMBER THREE: An Extreme Family Limited Partnership Case: *Powell*

## A Classic “Bad Facts” Marketable Securities FLP Case

- The decedent’s son, acting under a power of attorney from the decedent, contributed approximately \$10 million in cash and marketable securities to a limited partnership and took back, on the decedent’s behalf, a 99% limited partner interest.
- The son and his brother contributed unsecured promissory notes and took back a 1% general partner interest.
- On the same day, the son with the power of attorney contributed the decedent’s limited partner interest to a charitable lead annuity trust (CLAT).
- The decedent died seven days later, with the same son as executor.
- Seven concurring judges viewed this as “what is best described as aggressive deathbed tax planning.”

McGuireWoods | 37

## The Outcome

- Judge Halpern, writing for a slim majority, found that section 2036(a)(2) applied to the decedent’s transfer.
  - Unprecedented in a case of only a limited partner interest.
  - He therefore did not address section 2036(a)(1) or 2038.
  - The executor’s counsel apparently did not contest the application of section 2036 or 2038, other than to point out that the limited partnership interest had been given to the CLAT and was not held by the decedent at death.
    - But the power to make gifts was limited to annual exclusion gifts to the decedent’s issue.
    - And wouldn’t section 2035 have applied then anyway?
    - Even assuming the annuity interest would have had any value.
- On his own, Judge Halpern explored a convoluted section 2043 analysis, which had not been raised, argued, or briefed by either of the parties, and which he admitted could result in “double inclusion” in some cases.

McGuireWoods | 38

***Powell*—Bad Facts Make Bad Law: REPRISE**

There once was a case named *Powell*  
That made all estate planners howl,  
'Cause the court's logic got twisted  
When the PR persisted  
Instead of just throwing in the towel.

**NUMBER TWO: The Regulatory Environment in  
the Trump Administration**

## Executive Order 13771 (January 30, 2017) “Reducing Regulation and Controlling Regulatory Costs”

- For every significant regulation added, two must be eliminated.
- And the net cost of compliance (the cost of one added minus the savings from two eliminated) must be “no greater than zero.”
- It is not easy to see how these principles apply to **tax** regulations.

## Executive Order 13777 (February 24, 2017) “Enforcing the Regulatory Reform Agenda”

- A Regulatory Reform Officer and a Regulatory Reform Task Force in each agency.
- Scrubbing existing regulations for those that
  - eliminate jobs, or inhibit job creation;
  - are outdated, unnecessary, or ineffective;
  - impose costs that exceed benefits;
  - are inconsistent with regulatory reform initiatives;
  - are not transparent; or
  - are based on Executive Orders, etc. that have been rescinded or substantially modified.

## Executive Order 13789 (April 21, 2017) “Identifying and Reducing Tax Regulatory Burdens”

- Treasury must take action to mitigate the burden of tax regulations issued on or after January 1, 2016, that
  - impose an undue financial burden on United States taxpayers,
  - add undue complexity to the Federal tax laws, or
  - exceed the statutory authority of the Internal Revenue Service.
- This led to the withdrawal of the proposed section 2704 regulations.
- Treasury and OMB must “review and, if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations from the review process set forth in Executive Order 12866....”
  - *I.e.*, a Regulatory Impact Assessment.

McGuireWoods | 43

## Regulatory Impact Assessment Executive Order 12866 (Sept. 30, 1993), § 6(a)(3)(C)

- A quantified assessment of benefits to the economy, health and safety, the environment, elimination of bias, etc.
- A quantified assessment of costs to the government in administering, to businesses and others in complying, and to the economy, health and safety, the environment, etc.
- A comparison to the costs and benefits of alternatives.
- Public disclosure of that information.
- Public disclosure of changes made in the draft after the draft and the impact assessment were submitted to OMB.
  - And Treasury and OMB must “review and, if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations ....”? Meaning:
    - More regulatory impact assessments.
    - Or fewer regulations.

McGuireWoods | 44

## The 2017-2018 Treasury-IRS Priority Guidance Plan

- Released October 20, 2017
- Covering the 12 months July 2017-June 2018
- Part 1: “E.O. 13789 – Identifying and Reducing Regulatory Burdens”
  - The same eight items, including the withdrawal of the proposed section 2704 regulations.
- Part 2: “Near-Term Burden Reduction”
  - 18 topics.
  - Two of particular interest to estate planners...

McGuireWoods | 45

## #4 “Regulations under §§1014(f) and 6035 regarding basis consistency between estate and person acquiring property from decedent”

- The statute was enacted on July 31, 2015.
- Proposed Regulations were published on March 2, 2016.
- Regulations should have been finalized by January 31, 2017.
  - Within 18 months of enactment of the statute, to permit them to be retroactive under section 7805(b)(2).
- Some welcome exceptions:
  - Cash.
  - Modest tangible personal property.
  - Property that is sold.

McGuireWoods | 46

## But Some Unwelcome and Burdensome Rules

- Form 8971 and its Schedule A are required whenever an estate tax return is required.
  - Due 30 days after the estate tax return is filed!
  - How can an executor know who gets what by then?
  - Section 6035(a)(1) requires this information to be furnished “to each person **acquiring** any interest in property included in the decedent’s gross estate for Federal estate tax purposes.”
- Successive transferors must furnish and file Schedule A for gifts and other carryover basis transactions.
  - Section 6035(a) applies to an “executor” and any other person required to file a federal estate tax return.
- After-discovered property might get a zero basis!
- Now **this** appears under the heading of “burden reduction”!

McGuireWoods | 47

## #8 “Final regulations under §2642(g) describing the circumstances and procedures under which an extension of time will be granted to allocate GST exemption.”

- Section 2642(g) allows the equivalent of “9100 relief” for GST exemption allocations and related elections.
  - Enacted in 2001, sunsetted in 2011 and 2013, now permanent.
- Notice 2001-50 made Reg. §301.9100-3 available.
- Proposed Reg. §26.2642-7 (April 16, 2008).
  - Provides a “nonexclusive list of factors” to consider.
  - Requires “detailed affidavits” from “[e]ach tax professional who advised or was consulted by the transferor or the executor of the transferor’s estate with regard to any aspect of the transfer, the trust, the allocation of GST exemption, and/or the election under section 2632(b)(3) or (c)(5).”
    - More comprehensive and onerous than Reg. §301.9100-3.
    - But section 2642(g)(1)(B) does cite “all relevant circumstances.”
- Now **this** appears under the heading of “burden reduction”!

McGuireWoods | 48



## Part 4: “General Guidance”

- 166 items.
  - Last year there were 281.
- Three under the heading of “Gifts and Estates and Trusts.”
  - Last year there were 12.

## #1 “Guidance on basis of grantor trust assets at death under §1014”

- Rev. Proc. 2015-37 (published June 29, 2015) announced a no-rule policy on the issue of whether assets in a grantor trust that are **not includible in the grantor’s gross estate** receive a section 1014 basis at the grantor’s death.
  - Continued in Rev. Procs. 2016-3 and 2017-3.
- On June 30, 2015, PLR 201544002 ruled that assets in a **revocable** trust created by **foreign** grantors for their U.S. citizen children would receive a stepped-up basis under section 1014(b)(2) at the grantors’ deaths.
  - Noted that the ruling request had been submitted before the no-rule policy of Rev. Proc. 2015-37 was announced.
- So is the 2015 focus on basis in grantor trusts simply a clarification of the rules for **foreign** trusts?
- Or will the Trump Administration expand the focus?

## #2 “Final regulations under §2032(a) regarding imposition of restrictions on estate assets during the six month alternate valuation period”

- “Anti-Kohler” regulations.
  - Also aimed at fractionalization through serial distributions or contribution to an entity in the six months after death.
- Proposed regulations published November 18, 2011.

## #3 Personal Guarantees and Present Value Concepts

- “Guidance under §2053 regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate”
- Think *Graegin* loans.

## Deletions in 2017 from the 2016-2017 Plan (Numbers are from the 2016-2017 Plan.)

#2 Definition of income for spousal support trusts (§682).

#6 Valuation of promissory notes.

#9 Effect of defined value formula clauses.

#10 Administration of split-interest charitable trusts.

#12 Tax on gifts or bequests from certain expatriates (§2801)  
[statute effective June 17, 2008, proposed regulations Sept.  
10, 2015].

## The Regulatory Environment: REPRISÉ

In the Administration of Trump  
They want regulatory burdens to dump.  
Does it mean they'll abort  
The basis report  
That has to be done in one lump?

## NUMBER ONE: The Fate of Tax Reform and Estate Tax Repeal [as of December 11, 2017]

McGuireWoods | 55

### Provisions for Businesses (“Job Creators”)

	House Republicans’ “Blueprint” (6/23/2016)	President’s Outline (4/26/2016)	“Unified Framework” (9/27/2017)
Corporate rate (now 35%)	20%	15%	20%
Small/family businesses	25%	15%	25%
Alternative minimum tax	Repealed	Silent	Repealed

#### **H.R. 1 roughly follows the Blueprint and the Framework:**

- 20% corporate rate (but, in Senate version, not until 2019).
- Preferential taxation of business income of individuals:
  - House: 25% net rate.
  - Senate: 23% deduction.
- Corporate alternative minimum tax:
  - House: Repealed.
  - Senate: Exempts “qualified business income.”

McGuireWoods | 56

## Individual Income Tax Brackets and Rates Married Couple Filing Jointly, for example:

Current Law (in 2018)		House Version (2018)		Senate Version (2018)	
Rate	Starting at (taxable income)	Rate	Starting at (taxable income)	Rate	Starting at (taxable income)
10%	\$0	12%	\$0	10%	\$0
15%	\$19,050			12%	\$19,050
25%	\$77,400	25%	\$90,000	22%	\$77,400
28%	\$156,150			24%	\$140,000
33%	\$237,950	35%	\$260,000	32%	\$320,000
35%	\$424,950			35%	\$400,000
39.6%	\$480,050	39.6%	\$1,000,000	38.5%	\$1,000,000

**Standard deduction almost doubled.  
AMT: Repealed in House; Exemption increased about 27% in Senate.  
3.8% net investment income tax retained.  
Brackets indexed after 2018 by reference to "Chained CPI."**

McGuireWoods | 57

## And for Estates and Trusts:

Current Law (in 2018)		House Version (2018)		Senate Version (2018)	
Rate	Starting at (taxable income)	Rate	Starting at (taxable income)	Rate	Starting at (taxable income)
15%	\$0	12%	\$0	10%	\$0
25%	\$2,600	25%	\$2,550	24%	\$2,550
28%	\$6,100	35%	\$9,150	35%	\$9,150
33%	\$9,300			35%	\$9,150
39.6%	\$12,700	39.6%	\$12,500	38.5%	\$12,500

**The proposed 2018 brackets are the current 2017 brackets.**

McGuireWoods | 58

## Transfer Taxes (H.R. 1, House and Senate)

- All exemptions are doubled, effective January 1, 2018, and are still indexed and portable.
  - \$5,600,000 for 2018 becomes \$11,200,000 (plus or minus, after rounding, etc.).
- The current 40% rate is retained.

## Estate and GST Tax Repeal in House Version Only, Effective January 1, 2025

- Gift tax retained:
  - 35% (2010) rate.
  - Post-2017 (doubled) exemption, still indexed.
- Current basis rules retained:
  - Carryover basis for gifts.
  - Date-of-death value for transfers at death (made explicit).
- Distributions from pre-2025 QDOTs taxed through 2034.

## Would Any Constituencies be Disappointed by Some Ways the Estate Tax Proposals Fall Short?

- Blueprint, Framework, and House bill retain the gift tax.
- Who knows what will happen to basis?
  - H.R. 1 explicitly preserves the applicability of section 1014.
    - But is this durable?
  - The Trump campaign proposal would have taxed capital gains.
- Senate Budget Reconciliation rules could require a “sunset” in 10 years.
- These diminish the political reward from the expenditure of political capital.

## Still the Conclusion (Conjecture Actually)

- **Repeal of the estate tax would require political capital that will probably be spent elsewhere.**

## Tax Reform: REPRISE (as of December 31, 2017!)

'Twas the month before Christmas, when the Senate and House  
Made the chances of tax cuts seem as small as a mouse.  
The tax reform frameworks were made with some care  
In hopes that somehow the votes would be there.

But some members were nestled so snug in their views  
That any hint of consensus would sure be big news.  
And Mitch with his frown and Paul with his grin  
Were about to despair it would ever begin.

McGuireWoods | 63

While on the White House lawn there arose such a twitter  
It just couldn't help making everyone bitter.  
And into this, lobbyists flew like a flash,  
Tore up all restraint and threw lots of cash.

But still we kept hearing from President Donald  
That this would be HUGER than President Ronald,  
When what to our wondering eyes should appear  
The notion that passage soon might be near.

McGuireWoods | 64



With a devious driver, with such a cynical mix,  
We knew it a moment it was Politics.  
With banners of eagles at podiums stood  
The congressional leaders to do what they could.

GOP leaders knew loss would mean shame,  
So they rallied their members and called them by name!  
Now Susan! Now Lisa! Now Corker and Ron!  
On, Rand Paul! On, Toomey!  
Hang on, Jeff and John!

And then, in a twinkling, we heard on the floor  
That some votes were missing that had been there before.  
As the march toward the tax cuts was turning around,  
Down the market and poll ratings came with a bound.

Leaders spoke not a word, but went straight to their work,  
And the trading and twisting went simply berserk.  
Forcing real reformers to just hold their nose,  
Tax BREAKS got a nod, and their prospects arose.

So the bill got restructured, from its head to its foot  
And changes were made that went straight to its root.  
A bundle of Pork on Uncle Sam's back,  
And he looked like a peddler, just opening his pack.

The tweaks how they twinkled! the phase-outs so merry!  
They all found it grand when it should have been scary!  
At the end of the night, when they added the score,  
The votes were enough, 'tho they won by just four.

What developed so slowly but finished so quick  
Was Reconciliation's arithmetic,  
That said trillions could be lost, but still it's all right,  
'Cause the economy simply will grow out of sight.

The markets came back, the President clapped,  
And true tax reformers just had to adapt.  
But I heard Congress exclaim, in a voice like St. Nick's,  
"Happy Tax Cuts to all,  
Until Twenty Twenty-Six!"

## Questions or Comments?

Copyright 2017 by McGuireWoods LLP. All Rights Reserved.

Ronald D. Aucutt: [raucutt@mcguirewoods.com](mailto:raucutt@mcguirewoods.com)  
[www.mcguirewoods.com](http://www.mcguirewoods.com)

See also “Estate Tax Changes Past, Present and Future”  
(<http://www.mcguirewoods.com/estate-tax-changes>).