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Disclaimers

Disclaimer Planning: No Coin Toss Needed for Unpredictable Tax Law

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Examining an important planning option with upcoming changes to the exclusion amount.

A coin toss is used to randomly choose between two alternatives by flipping a coin to see which side shows after it lands, heads or tails. Predicting whether the basic exclusion amount under [Section 2010\(c\)](#) will increase or decrease in the future can feel like a flip of a coin because the amount is currently in a state of flux. ¹ The exclusion was \$675,000 in 2000, increased to \$3.5 million by 2009, increased to \$5 million in 2011, increased to \$10 million in 2018, and is scheduled to decrease to \$5 million in 2026. These changes reflect swings of the political pendulum with respect to the amount that is transferrable free of federal estate tax.

Fortunately, a disclaimer provides flexibility. An estate plan with disclaimer planning is not bound by a prediction of the future basic exclusion amount because the decision of whether to fund a trust designed to be excluded from the gross estate is made after death. The final funding decision is made after death (rather than before) using hindsight (rather than prediction) in response to existing tax law (rather than in anticipation of future law).

Unfortunately, risks exist with respect to all disclaimers because a disclaimer that fails to be a qualified disclaimer under [Section 2518](#) results in unfavorable gift tax consequences. A mistake costs a pretty penny, and many pennies.

This article summarizes disclaimer requirements, presents potential disclaimer trust structures with

drafting language, and analyzes the disclaimer decision for small, medium, and large estates. With disclaimer planning, there is no need to resort to a coin toss to address the unpredictable basic exclusion amount.

Disclaimer

It is useful to first consider the tax implications of a disclaimer, which depend on whether a disclaimer is qualified. **Section 2518** provides a safe harbor so that gift tax is not imposed on a qualified disclaimer. **2** If the requirements of a qualified disclaimer are satisfied, then disclaimed property is treated as if it had never been transferred to the disclaimant and, therefore, the disclaimant is not treated as making a gift. **3**

The statutory framework for disclaimers is as follows. **Section 2518(a)** provides the general rule that a qualified disclaimer of property is treated as if the disclaimed property had never been transferred to the disclaimant. **Section 2518(b)** and the regulations thereunder define what constitutes a qualified disclaimer. **Section 2518(c)(1)** provides a special rule for a disclaimer of an undivided portion of an interest.

Qualified disclaimer.

Section 2518(a) provides that if a person makes a qualified disclaimer with respect to any interest in property, then, for purposes of the federal estate, gift, and generation skipping transfer taxes, the disclaimed interest is treated as if it had never been transferred to the disclaimant. **4** Instead, the disclaimed property is considered as passing directly from the transferor to the person entitled to receive the property as a result of the disclaimer without imposition of gift tax. **5**

The requirements of a qualified disclaimer are set forth in **Section 2518(b)**, which provides that a "qualified disclaimer" is a refusal by a person to accept an interest in property, but only if:

- (1) the disclaimer is in writing, irrevocable, and unqualified;
- (2) the writing is timely delivered;
- (3) the disclaimant has not accepted the interest or any of its benefits; and
- (4) as a result of the disclaimer, the interest passes without any direction on the part of the disclaimant, and passes to a person other than the disclaimant, or passes to the decedent's surviving spouse. **6**

Writing.

Section 2518(b)(1) requires a qualified disclaimer to be in the form of a writing. **7** The refusal to accept an interest in property must be in writing. **8** Failure to reduce a disclaimer to writing is not a mere technical defect lightly overlooked. **9** The writing is irrevocable and unqualified, identifies the disclaimed property, and is signed by either the disclaimant or his or her legal representative. **10**

Timely delivery

Section 2518(b)(2) requires a qualified disclaimer to be received by the transferor of the interest, the transferor's legal representative, or the holder of legal title to the disclaimed property no later than the date which is nine months after the date on which the transfer creating the interest in such person is made. **11** The time limitation is generally determined with reference to the transfer creating the interest in the disclaimant. **12** With respect to inter vivos transfers, a transfer creating an interest occurs when there is a completed gift for federal gift tax purposes, regardless of whether a gift tax is imposed on the completed gift. **13** With respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of death, even if an estate tax is not imposed on the transfer. **14**

EXAMPLE:

A and B are married, and A owns real property. On January 3, A dies. A's will bequeaths A's interest in the property to B. On March 15, B delivers a written disclaimer. The disclaimer is timely because it is made within nine months of A's date of death. **15**

EXAMPLE:

A and B are married. On June 1, A executes a revocable trust for the benefit of B. The creation of the trust is not a completed gift for federal gift tax purposes because A has not released dominion and control with respect to the trust. **16** On September 1, A dies and the trust becomes irrevocable. Property of the trust is includible in A's gross estate. **17** If B wishes to make a qualified disclaimer with respect to the trust, then B must do so no later than nine months after September 1, rather than June 1. On May 1 of the following year, B delivers a written disclaimer. The disclaimer is timely because it is made within nine months of A's date of death. **18**

No acceptance by disclaimant.

Section 2518(b)(3) requires the disclaimant to not accept the disclaimed property or any of its benefits. A qualified disclaimer is not made with respect to an interest in property if the disclaimant accepts the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. **19**

A surviving spouse is not precluded from disclaiming community property. The acceptance of one interest in property is not, by itself, acceptance of any other separate interest created by the transferor and held by the disclaimant in the same property. **20** For example, with respect to a residence owned by spouses as community property, the surviving spouse can retain his or her one half community property interest in the residence and make a qualified disclaimer of the deceased spouse's one half community property interest. **21** The surviving spouse's continued occupancy of the residence prior to making the disclaimer is not by itself treated as an acceptance of the benefits of the disclaimed property. **22**

Two potential traps for the unwary exist with respect to the no acceptance requirement. First, the surviving spouse should delay accepting any distributions from an estate or trust where the surviving

spouse is considering a disclaimer because acceptance of an interest or any of its benefits prior to making a disclaimer fails **Section 2518(b)(3)**. **23** Estate and trust distributions should instead be withheld, if possible, during the nine months following the deceased spouse's death, unless the surviving spouse disclaims or makes a decision against disclaimer. Second, the disclaimant should not serve as trustee of a disclaimer trust that provides for discretionary distributions. **24** A fiduciary cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. **25** A fiduciary's disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercises or retains a discretionary power to allocate enjoyment of that interest among members of a designated class. **26**

No direction by disclaimant.

Section 2518(b)(4) imposes two requirements with respect to the transfer of property following disclaimer:

- (1) that the disclaimed property passes without any direction on the part the disclaimant; and
- (2) that the disclaimed property passes to a person other than the disclaimant, or passes to the decedent's surviving spouse.

A disclaimer is not a qualified disclaimer unless the disclaimed property passes without any direction on the part of the disclaimant. **27** If there is an express or implied agreement that the disclaimed property is to be given or bequeathed to a person specified by the disclaimant, then the disclaimant is treated as directing the transfer of disclaimed property. **28**

A disclaimer is not a qualified disclaimer unless the disclaimed property passes to a proper person. In general, **Section 2518(b)(4)** requires a transfer of disclaimed property to a person other than the disclaimant. This requirement is not satisfied if disclaimed property passes to or for the benefit of the disclaimant. **29** An exception exists for a surviving spouse. In the case of a disclaimer by a surviving spouse, a disclaimer satisfies the requirements of **Section 2518(b)(4)** even though the disclaimed property passes to the surviving spouse if the disclaimed property passes to the surviving spouse without direction on the part of the surviving spouse. **30** Where a trust is involved and the surviving spouse retains the right to direct the beneficial enjoyment of disclaimed property, whether as trustee or otherwise, the surviving spouse is not treated as directing the beneficial enjoyment of the disclaimed property if the power is limited by an ascertainable standard. **31** This exception thus permits use of a disclaimer trust for the benefit of a surviving spouse where the surviving spouse is also the disclaimant.

A disclaimer trust satisfies the requirements of **Section 2518(b)(4)** regardless of whether created under a will or trust agreement. For a will, the will provides that any disclaimed property passes to a disclaimer trust for the benefit of the surviving spouse. **32** For a trust agreement with only the deceased spouse as settlor, the trust agreement provides that any disclaimed property passes to a disclaimer trust for the benefit of the surviving spouse. **33** For a trust agreement with both spouses as settlors, the trust agreement provides that any disclaimed property passes to a disclaimer trust for the benefit of the surviving spouse. **34**

A power of appointment is a potential trap for the unwary in disclaimer trust planning. The requirements of **Section 2518(b)(4)** are not satisfied if the disclaimant directs the redistribution or transfer of disclaimed property to another person. **35** A disclaimer trust should thus be drafted without a testamentary power of appointment. If, however, a disclaimer trust is drafted with a testamentary power of appointment, then the surviving spouse should also disclaim the power of appointment with respect to disclaimed property. **36** The requirements of **Section 2518(b)(4)** are satisfied if a power of appointment is disclaimed so long as there is no direction on the part of the disclaimant with respect to the transfer of the disclaimed property subject to the power or with respect to the transfer of the power to another person. **37**

EXAMPLE:

A and B are married. A executes a will that bequeaths property to a marital trust for the benefit of B. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. B holds no power of appointment over the trust. A dies, and B disclaims property otherwise passing to the marital trust. As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer passes without any direction from the disclaimant. **38**

EXAMPLE:

A and B are married. A executes a will that bequeaths property to a marital trust for the benefit of B. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. B holds a testamentary nongeneral power of appointment over the trust. A dies, and B disclaims property otherwise passing to the marital trust, as well as the power of appointment with respect to the disclaimed property. As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer passes without any direction from the disclaimant. **39**

EXAMPLE:

A and B are married. A executes a will that bequeaths property to a marital trust for the benefit of B. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. B holds a testamentary nongeneral power of appointment over the trust. A dies, and B disclaims property otherwise passing to the marital trust. B does not disclaim the power of appointment. As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer does not pass without any direction from the disclaimant and, thus, B's disclaimer is not a qualified disclaimer. **40**

Another potential trap for the unwary exists where the surviving spouse serves as trustee and the trust provides for discretionary distributions. The requirements of **Section 2518(b)(4)** are not satisfied if the disclaimant, either alone or in conjunction with another, has the power to direct the redistribution or transfer of disclaimed property to another person, unless the power is limited by an ascertainable standard. **41** A person may make a qualified disclaimer of a beneficial interest in property even if after the disclaimer the disclaimant has a fiduciary power to distribute to designated beneficiaries, but only if

the power is subject to an ascertainable standard. **42** A disclaimer trust should thus be drafted with distributions subject to an ascertainable standard such as health, education, maintenance, and support. **43**

EXAMPLE:

A and B are married. A executes a will that bequeaths property to a marital trust for the benefit of B. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. Distributions are made for health, education, maintenance, and support. B is named as trustee. A dies, and B disclaims property otherwise passing to the marital trust. As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer passes without direction of the disclaimant. **44**

Nonqualified disclaimer.

Not all disclaimers are within the **Section 2518** safe harbor. If a disclaimer is not a qualified disclaimer, then, for purposes of the federal estate, gift, and generation skipping transfer taxes, the disclaimer is disregarded and the disclaimant is treated as having received the interest. **45** A disclaimer that is not a qualified disclaimer is therefore subject to gift tax. **46** A mistake that causes a disclaimer to fail a requirement under **Section 2518(b)** leads to disastrous gift tax implications because gift tax is imposed on a nonqualified disclaimer and could have been otherwise avoided with no disclaimer at all. Common errors include untimely disclaimers, distributions from an estate or trust prior to disclaimer that fails the no acceptance requirement of **Section 2518(b)(3)**, and powers of appointment that fail the no direction requirement of **Section 2518(b)(4)**. **47** A disclaimer deserves extreme diligence. Out of an abundance of caution, a private letter ruling on the tax implications of a proposed disclaimer should be considered. **48**

EXAMPLE:

A and B are married. A executes a will that bequeaths property to B, outright and free of trust. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. A dies. During estate administration, distributions of all income from the estate are made from A's estate to B. B thereafter disclaims \$10 million. As a result, the disclaimed property passes to a disclaimer trust. B's disclaimer is not a qualified disclaimer because B accepted benefits of disclaimed property prior to making the disclaimer. **49** B is treated as making a gift of \$10 million. **50**

EXAMPLE:

A and B are married. A executes a will that bequeaths property to a marital trust for the benefit of B. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. B holds a testamentary nongeneral power of appointment over the trust. A dies, and B disclaims property otherwise passing to the marital trust. A does not disclaim the

power of appointment. As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer is not a qualified disclaimer because B holds a power of appointment and, thus, can direct the passing of disclaimed property. **51**

Disclaimer trust structure

A disclaimer trust structure consists of three components implemented before and after death:

- (1) a disclaimer trust;
- (2) a disclaimer provision; and
- (3) a disclaimer.

Disclaimer trust.

The foundation of a disclaimer trust structure is a disclaimer trust. Terms are set forth in either a will or trust agreement.

Will.

Under the simplest structure, a will includes a disclaimer trust paired with an outright bequest to the surviving spouse. With this approach, the will includes a bequest to the surviving spouse and establishes a disclaimer trust if the surviving spouse disclaims any property. To avoid application of **Section 2041** and satisfy the requirements of **Section 2518(b)(4)**, distributions from the disclaimer trust are limited to the ascertainable standard of health, education, maintenance, and support, and the surviving spouse holds no testamentary power of appointment over the trust.

EXAMPLE:

A and B are married. A executes a will that bequeaths property to B, outright and free of trust. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. Distributions are made for health, education, maintenance, and support. B does not hold a power of appointment over the trust. B is named as trustee. A dies, and B timely disclaims a pecuniary amount equal to the basic exclusion amount under **Section 2010(c)**. As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer is a qualified disclaimer. **52**

Alternatively, a will establishes both disclaimer and marital trusts. With this approach, the will includes a bequest to the marital trust. To qualify for the marital deduction under **Section 2056(b)(7)**, all income is payable to the surviving spouse annually or at more frequent intervals, and no person has a power to appoint any part of the trust to any person other than the surviving spouse. **53** The will also establishes a disclaimer trust if the surviving spouse disclaims any property otherwise passing to the marital trust. To avoid application of **Section 2041** and satisfy the requirements of **Section 2518(b)(4)**, distributions from the disclaimer trust are limited to the ascertainable standard of health, education, maintenance, and

support, and the surviving spouse holds no testamentary power of appointment over the trust.

EXAMPLE:

A and B are married. A executes a will that bequeaths property to a marital trust for the benefit of B. All income is required to be distributed to B, and B has a testamentary nongeneral power of appointment over the trust. B is named as trustee. The will also provides that if B disclaims any property, then the disclaimed property is bequeathed to a disclaimer trust for the benefit of B. Distributions are made for health, education, maintenance, and support. B does not hold a power of appointment over the disclaimer trust. B is named as trustee. A dies, and B timely disclaims a pecuniary amount equal to the basic exclusion amount under [Section 2010\(c\)](#) . As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer is a qualified disclaimer. **54**

Trust agreement.

A disclaimer trust can also be set forth in a trust agreement. Although more complex, this approach is favored by those preferring probate avoidance or privacy from public probate records. With this approach, the trust agreement pairs a disclaimer trust with an outright transfer to the surviving spouse. The trust agreement provides for transfers to the surviving spouse, outright and free of trust. The trust agreement also establishes a disclaimer trust if the surviving spouse disclaims any property. To avoid application of [Section 2041](#) and satisfy the requirements of [Section 2518\(b\)\(4\)](#) , distributions from the disclaimer trust are limited to the ascertainable standard of health, education, maintenance, and support, and the surviving spouse holds no testamentary power of appointment over the trust.

EXAMPLE:

A and B are married. A executes a will and trust agreement. The will bequeaths the residuary estate to the trust. The trust agreement transfers property to B, outright and free of trust. The trust agreement also provides that if B disclaims any property, then the disclaimed property is transferred to a disclaimer trust for the benefit of B. Distributions are made for health, education, maintenance, and support. B does not hold a power of appointment over the disclaimer trust. B is named as trustee. A dies, and B timely disclaims a pecuniary amount equal to the basic exclusion amount under [Section 2010\(c\)](#) . As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer is a qualified disclaimer. **55**

Alternatively, the trust agreement establishes both disclaimer and marital trusts. To qualify for the marital deduction under [Section 2056\(b\)\(7\)](#) , all income is payable to the surviving spouse annually or at more frequent intervals, and no person has a power to appoint any part of the trust to any person other than the surviving spouse. **56** The will also establishes a disclaimer trust if the surviving spouse disclaims any property otherwise passing to the marital trust. To avoid application of [Section 2041](#) and satisfy the requirements of [Section 2518\(b\)\(4\)](#) , distributions from the disclaimer trust are limited to the ascertainable standard of health, education, maintenance, and support, and the surviving spouse holds no testamentary power of appointment over the trust. The same structure is available regardless of whether the trust agreement is executed by one spouse as settlor, or both spouses as settlors.

EXAMPLE:

A and B are married. A executes a will and trust agreement. The will bequeaths the residuary estate to the trust. The trust agreement transfers property to a marital trust for the benefit of B. All income is required to be distributed to B, and B has a testamentary nongeneral power of appointment over the trust. B is named as trustee. The trust agreement also provides that if B disclaims any property, then disclaimed property is transferred to a disclaimer trust for the benefit of B. Distributions are made for health, education, maintenance, and support. B does not hold a power of appointment over the disclaimer trust. B is named as trustee. A dies, and B timely disclaims a pecuniary amount equal to the basic exclusion amount under [Section 2010\(c\)](#) . As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer is a qualified disclaimer. **57**

EXAMPLE:

A and B are married. A and B both execute wills and a trust agreement. The wills bequeath the residuary estate to the trust. The trust agreement transfers property to a marital trust for the benefit of the surviving spouse. All income is required to be distributed to the surviving spouse, and the surviving spouse has a testamentary nongeneral power of appointment over the trust. The surviving spouse is named as trustee. The trust agreement also provides that if the surviving spouse disclaims any property, then disclaimed property is transferred to a disclaimer trust for the benefit of the surviving spouse. Distributions are made for health, education, maintenance, and support. The surviving spouse does not hold a power of appointment over the disclaimer trust. The surviving spouse is named as trustee. A dies, and B timely disclaims a pecuniary amount equal to the basic exclusion amount under [Section 2010\(c\)](#) . As a result, the disclaimed property passes to the disclaimer trust. B's disclaimer is a qualified disclaimer. **58**

Division of trust.

A situation may arise where a surviving spouse wishes to implement a disclaimer trust but the will or trust agreement, as applicable, establishes only a marital trust (or lacks a disclaimer provision). A disclaimer trust is otherwise absent from the estate planning documents. This situation occurs where the gross estate exceeds the basic exclusion amount because property appreciates more than expected or the basic exclusion amount is reduced to an amount lower than expected. In that situation, a disclaimer trust is created with a division of the marital trust combined with a disclaimer of certain rights and powers. First, the marital trust is divided into two trusts, one trust that is intended to be a disclaimer trust satisfying the requirements of [Section 2518](#) and the other a marital trust satisfying the requirements of [Section 2056](#) . **59** Second, the surviving spouse disclaims rights and powers that otherwise cause the disclaimer trust to fail [Section 2518\(b\)](#) . Examples of problematic powers include a power to alter, amend, revoke, or terminate the trust, a power of appointment, and discretionary distributions.

EXAMPLE:

A and B are married. A executes a will and trust agreement. The will bequeaths the residuary estate to

the trust. The trust agreement transfers property to a marital trust for the benefit of B. All income is required to be distributed to B, and B has a testamentary nongeneral power of appointment over the trust. B is named as trustee. The trust agreement omits a disclaimer trust. A dies. B divides the marital trust into two trusts, a disclaimer trust and a marital trust. The disclaimer trust is funded with an amount equal to the basic exclusion amount under [Section 2010\(c\)](#) , and the marital trust is funded with the remaining property. B timely disclaims the power of appointment over the disclaimer trust. B's disclaimer is a qualified disclaimer. **60**

Disclaimer provision.

The second component of a disclaimer trust structure is the disclaimer provision that addresses funding of the disclaimer trust. The disclaimer provision is typically set forth in the will or trust agreement that creates the disclaimer trust. Funding depends on whether the surviving spouse disclaims. Without a disclaimer, the disclaimer provision provides for no transfers to the disclaimer trust. With a disclaimer, the disclaimer provision transfers disclaimed property to the disclaimer trust. The disclaimer provision thus redirects the transfer of disclaimed property from the surviving spouse or marital trust (which is not excluded from the surviving spouse's gross estate) to the disclaimer trust (which is designed to be excluded from the surviving spouse's gross estate) without any direction from the surviving spouse. In other words, the disclaimer provision transfers property by default so that the property is later included in the surviving spouse's gross estate, but redirects any disclaimed property to a disclaimer trust so that the disclaimed property is later excluded from the gross estate.

The disclaimer provision in a will bequeaths disclaimed property to a disclaimer trust.

EXAMPLE:

Section [x.x]. Bequest of residuary estate.

(a) In general. Except as provided in paragraph (b) of this section, if my spouse survives me, then I devise and bequeath all of my residuary estate to my spouse, outright and free of trust.

(b) Disclaimer provision. Notwithstanding paragraph (a) of this section, if my spouse survives me and disclaims any bequest under my will, then I devise and bequeath all of my residuary estate in TWO (2) shares as follows: (1) ONE (1) share consisting of such disclaimed property to the disclaimer trust; and (2) ONE (1) share consisting of the balance of the property of my residuary estate remaining after satisfaction of the share for the disclaimer trust to my spouse, outright and free of trust.

Similarly, the disclaimer provision in a trust agreement transfers disclaimed property to a disclaimer trust.

EXAMPLE:

Section [x.x]. Allocation of trust property following death of predeceasing settlor.

(a) In general. Within a reasonable period of time after the death of the predeceasing settlor taking into account the administration of his or her estate, the trustee shall allocate the property of the trust and any additional property transferred to the trustee as a result of the death of the predeceasing settlor to TWO (2) shares as follows: (1) ONE (1) share for the disclaimer trust consisting of disclaimed property, if any, as provided under paragraph (b) of this section; and (2) ONE (1) share for the marital trust consisting of the balance of property of the trust remaining after satisfaction of the share for the disclaimer trust.

(b) Disclaimer provision. Notwithstanding paragraph (a) of this section, if the surviving spouse disclaims any interest under this trust agreement, then the trustee shall allocate such disclaimed property to the share for the disclaimer trust.

The disclaimer provision also helps satisfy a segregation requirement for partial disclaimers. Disclaimers take the form of either a complete disclaimer or a partial disclaimer. **61 Section 2518(c)(1)** provides that a disclaimer of an undivided portion of an interest meeting the requirements of **Section 2518** is a qualified disclaimer. A disclaimer of a specific pecuniary amount out of a bequest is a qualified disclaimer provided that no income or other benefits of the disclaimed amount inures to the benefit of the disclaimant before or after the disclaimer. **62** It is thus possible to make a qualified disclaimer of a pecuniary amount held in trust provided that the disclaimed portion is segregated from the remaining interest. **63** When making a disclaimer of a pecuniary amount, the disclaimed portion and corresponding income is segregated from the remaining interests in order to be a qualified disclaimer. **64** For example, a disclaimer of \$200,000 out of a \$1 million bequest is set aside with its interest earned in a separate fund so that no income is paid to the disclaimant. **65**

Disclaimer.

The final and most important component of a disclaimer trust structure is the disclaimer itself, which is set forth in a separate writing executed by the surviving spouse after the death of the deceased spouse. The disclaimer process is initiated soon after death, particularly if a private letter ruling is requested. Time pressure exists to complete the disclaimer process within nine months of death due to requirements under **Section 2518(b)(2)**. The process begins with drafting.

The disclaimer is in writing and expressly states that it is "irrevocable and unqualified." **66**

The disclaimer identifies the disclaimed property. **67** For a disclaimer trust, a disclaimer often takes the form of a pecuniary amount equal to the basic exclusion amount under **Section 2010(c)**. **68** Several

drafting approaches are available. The simplest approach states a dollar amount disclaimed. A variation of this approach uses a fraction with a dollar amount disclaimed over the value of bequeathed property.

EXAMPLE:

I hereby disclaim a specific pecuniary amount equal to THIRTEEN MILLION SIX HUNDRED TEN THOUSAND DOLLARS (\$13,610,000) out of the bequest to the marital trust under section [x.x] of the trust agreement. **69**

EXAMPLE:

I hereby disclaim a specific pecuniary amount equal to a fraction, the numerator of which is equal to THIRTEEN MILLION SIX HUNDRED TEN THOUSAND DOLLARS (\$13,610,000), and the denominator of which is the total value of the bequest to the marital trust under section [x.x] of the trust agreement. **70**

Alternatively, the disclaimed amount is identified by reference to **Section 2010(c)** .

EXAMPLE:

I hereby disclaim a specific pecuniary amount equal to the largest amount that can pass free of federal estate tax by reason of the remaining basic exclusion amount under **I.R.C. Section 2010(c)** out of the bequest to the marital trust under section [x.x] of the trust agreement. **71**

EXAMPLE:

I hereby disclaim a specific pecuniary amount equal to a fraction, the numerator of which is equal to the largest amount that can pass free of federal estate tax by reason of the remaining basic exclusion amount under **I.R.C. Section 2010(c)** , and the denominator of which is the total value of the bequest to the marital trust under section [x.x] of the trust agreement. **72**

The Service also permits a qualified disclaimer of a pecuniary amount expressed as a reverse pecuniary amount. **73**

EXAMPLE:

I hereby accept a specific pecuniary amount out of the bequest to the marital trust under section [x.x] of the trust agreement equal to the smallest amount that, if allowed as a marital deduction for federal estate tax purposes, would result in the least possible federal estate tax being paid by reason of the death of the predeceasing settlor, taking into account the applicable exclusion amount under **Section 2010(c)** . I hereby disclaim all other property under the bequest to the marital trust under section [x.x] of the trust agreement. **74**

The disclaimer is signed and dated by the disclaimant or his or her legal representative, and delivered to the proper person within nine months of the date of death. **75** Although not required by **Section 2518** , the disclaimer should include an acknowledgement of delivery that is signed and dated by the person

receiving delivery of the disclaimer to help prove timely delivery, and notarization to help prove the date that the disclaimer and acknowledgment are executed.

To satisfy the segregation requirement under [Section 2518\(b\)\(4\)](#) , the disclaimed property and corresponding income are thereafter segregated by transfer to the disclaimer trust in accordance with the disclaimer provision. [76](#) When making a disclaimer of a pecuniary amount, the disclaimed portion must be segregated from the remaining interest in order to be a qualified disclaimer. [77](#) Segregation of assets comprising the disclaimer of a pecuniary amount is made on the basis of the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of value changes that may have occurred between the date of transfer and the date of the disclaimer. [78](#)

Implementation of disclaimer planning

Implementation of disclaimer planning occurs before and after death and depends on a comparison of the gross estate with the basic exclusion amount under [Section 2010\(c\)](#) . In the estate planning process, the anticipated gross estate is compared with the anticipated basic exclusion amount and a decision is made by the spouses to either include a bypass trust, disclaimer trust, or neither. After death, the actual gross estate is compared with the actual basic exclusion amount and a decision is made by the surviving spouse to either disclaim or not. [79](#)

Why include a bypass trust or disclaimer trust?

Traditional estate planning for spouses often includes a bypass trust as well as a marital trust. First, a bypass trust is established for the benefit of the surviving spouse, children, and more remote descendants. The bypass trust is funded with an amount equal to the deceased spouse's remaining basic exclusion amount under [Section 2010\(c\)](#) . The bypass trust is designed to be excluded from the surviving spouse's gross estate. To avoid application of [Section 2041](#) , distributions are limited to the ascertainable standard of health, education, maintenance, and support, and powers of appointment are limited to a defined class of persons that does not include the surviving spouse, creditors of the surviving spouse, the estate of the surviving spouse, or creditors of the estate of the surviving spouse. Second, a marital trust is established for the benefit of the surviving spouse. To qualify as a qualified terminal interest property trust and, thus, the marital deduction under [Section 2056](#) , all income is payable to the surviving spouse annually or at more frequent intervals, no person has a power to appoint any part of the trust to any person other than the surviving spouse, and the executor of the settlor's estate makes a QTIP election on an estate tax return. [80](#)

The tax implications of a bypass trust and a marital trust are like two sides of the same coin. The trusts lead to opposite tax results. Property of a bypass trust is excluded from the surviving spouse's gross estate and does not receive a new basis under [Section 1014\(a\)](#) . [81](#) In contrast, property of a marital trust is includible in the surviving spouse's gross estate and receives a new basis under [Section](#)

1014(a) . 82

Not all estate plans should include a bypass trust because it leads to unfavorable income tax results. **83** A bypass trust foregoes the benefit of a new basis under **Section 1014(a)** on the death of the surviving spouse. Moreover, fewer estates pay estate tax due to the dramatic increase of the basic exclusion amount under **Section 2010(c)(3)** since 2000, as well as new rules for portability of the deceased spousal unused exclusion amount under **Section 2010(c)(4)** and (5) effective since 2011. Taking this into account, only the largest estates should include a bypass trust in the estate plan. If the anticipated estate tax computation under **Section 2001** and **Section 2010** results in no estate tax due on the death of the surviving spouse, then a bypass trust should be omitted from the estate plan. Property should instead pass to either the surviving spouse outright or a marital trust so that property held by the surviving spouse or in the marital trust receives a new basis under **Section 1014(a)** when the surviving spouse dies without estate tax.

The decision of whether to include a bypass trust in an estate plan is clear where the anticipated gross estate is significantly less or more than the anticipated basic exclusion amount. The decision is not as clear in other situations. Where uncertainty exists, flexibility is needed and disclaimer planning is used for post death adjustments of the estate plan. Rather than draft a will or trust agreement that requires funding of a bypass trust or, alternatively, omits a trust designed to be excluded from the surviving spouse's gross estate all together, the will or trust agreement instead includes a disclaimer trust that is funded only if the surviving spouse takes an additional step of disclaimer.

Smaller estate.

Simplicity is generally preferred on the lower end of the range of estates. The estate planning decision of whether to include a bypass or disclaimer trust is clear because the anticipated gross estate is predictably less than the anticipated basic exclusion amount. For example, a smaller estate with an anticipated gross estate of \$1 million is predictably less than the anticipated basic exclusion amount. **84** The estate plan should omit bypass and disclaimer trusts and the surviving spouse should not disclaim so that property receives a new basis under **Section 1014(a)** when the surviving spouse dies. The income tax implications under these circumstances are more favorable without a trust designed to be excluded from the surviving spouse's gross estate compared to including such a trust.

EXAMPLE:

A and B are married and own various property interests with a total value of \$1 million. A executes a will that includes a marital trust, but omits a bypass trust, disclaimer trust, and disclaimer provision. A dies. Property with a value of \$500,000 is includible in A's gross estate. **85** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B does not disclaim. The property passes to the marital trust. No estate tax is due, and such property receives a new basis under **Section 1014(a)** . **86** Fifteen years later, B dies when the value of B's property increases to \$1 million, and property of the marital

trust also increases to \$1 million. The gross estate includes B's property (\$1 million) and property of the marital trust (\$1 million), and such property receives a new basis under [Section 1014\(a\)](#) . **87** Assuming that the applicable estate tax rate is 50% and the remaining basic exclusion amount plus DSUE is \$20 million ($10,000,000 + 10,000,000 = 20,000,000$), estate tax of \$0 ($(1,000,000 + 1,000,000 \# 20,000,000) \times 0.50 = 0$) is imposed at B's death.

EXAMPLE:

A and B are married and own various property interests with a total value of \$1 million. A executes a will that includes a disclaimer trust, marital trust, and disclaimer provision, but omits a bypass trust. A dies. Property with a value of \$500,000 is includible in A's gross estate. **88** The basic exclusion amount under [Section 2010\(c\)](#) is assumed to be \$10 million. B disclaims the property passing to the marital trust. The disclaimed property passes to the disclaimer trust pursuant to the disclaimer provision. No estate tax is due, and such property receives a new basis under [Section 1014\(a\)](#) . **89** Fifteen years later, B dies when the value of B's property increases to \$1 million, and property of the disclaimer trust increases to \$1 million. The gross estate does not include property of the disclaimer trust, and such property does not receive a new basis under [Section 1014\(a\)](#) . **90** The gross estate includes B's property (\$1 million), and such property receives a new basis under [Section 1014\(a\)](#) . **91** Assuming that the applicable estate tax rate is 50% and the remaining basic exclusion amount plus DSUE is \$19.5 million ($10,000,000 + 10,000,000 \# 500,000 = 19,500,000$), estate tax of \$0 ($(1,000,000 \# 19,500,000) \times 0.50 = 0$) is imposed at B's death.

A risk exists with a smaller estate that the gross estate does in fact exceed the basic exclusion amount. This risk is addressed with a trust division combined with a disclaimer. After the death of the deceased spouse, a marital trust is divided into two trusts - a disclaimer trust and a marital trust - and the surviving spouse disclaims any problematic powers over the disclaimer trust that otherwise fail the requirements of a qualified disclaimer under [Section 2518](#) , such as a power of appointment.

EXAMPLE:

A and B are married. Twenty years ago, A and B own various property interests with a total value of \$1 million. A executes a will and trust agreement that includes a marital trust, but omits a disclaimer trust and a disclaimer provision. All income is required to be distributed to B, and B has a testamentary nongeneral power of appointment over the trust. B is named as trustee. In 2024, A dies when the value of the property increases to \$30 million. \$15 million is includible in A's gross estate. **92** The basic exclusion amount under [Section 2010\(c\)](#) is assumed to be \$10 million. B divides the marital trust into two trusts, a disclaimer trust and a marital trust. The disclaimer trust is funded with an amount equal to the basic exclusion amount under [Section 2010\(c\)](#) , and the marital trust is funded with the remaining property. B timely disclaims the power of appointment over the disclaimer trust. B's disclaimer is a qualified disclaimer. **93**

Medium estate.

In the middle of the range of estates, the estate planning decision of whether to include a bypass trust is not as clear because the anticipated gross estate is neither significantly less nor more than the anticipated basic exclusion amount. Accurately predicting the future tax law can be extraordinarily difficult, or even impossible. For example, an anticipated gross estate of \$10 million is less than the current basic exclusion amount of \$13,610,000 in 2024, but more than the basic exclusion amount of \$5 million scheduled for 2026. Taking portability into account further complicates the analysis. **94**

If the decision is unclear, then a disclaimer trust and disclaimer provision should be included in the estate plan in lieu of a bypass trust. The surviving spouse is thus provided an option to fund a trust designed to be excluded from the surviving spouse's gross estate. After death, the surviving spouse makes a final disclaimer decision after comparing the gross estate with the basic exclusion amount. Where the gross estate is less than the basic exclusion amount, the surviving spouse should consider not making a disclaimer so that property receives a new basis under **Section 1014(a)**. The income tax implications under these circumstances are more favorable without a disclaimer compared to a disclaimer.

EXAMPLE:

A and B are married and own various property interests with a total value of \$10 million. A executes a will and trust agreement that includes a disclaimer trust, marital trust, and disclaimer provision, but omits a bypass trust. A dies. Property with a value of \$5 million is includible in A's gross estate. **95** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B does not disclaim. The property passes to the marital trust. No estate tax is due, and such property receives a new basis under **Section 1014(a)**. **96** Fifteen years later, B dies when the value of B's property increases to \$10 million, and property of the marital trust also increases to \$10 million. The gross estate includes B's property (\$10 million) and property of the marital trust (\$10 million), and such property receives a new basis under **Section 1014(a)**. **97** Assuming that the applicable estate tax rate is 50% and the remaining basic exclusion amount plus DSUE is \$20 million ($10,000,000 + 10,000,000 = 20,000,000$), estate tax of \$0 ($(10,000,000 + 10,000,000 - 20,000,000) \times 0.50 = 0$) is imposed at B's death.

EXAMPLE:

A and B are married and own various property interests with a total value of \$10 million. A executes a will and trust agreement that includes a disclaimer trust, marital trust, and disclaimer provision, but omits a bypass trust. A dies. Property with a value of \$5 million is includible in A's gross estate. **98** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B disclaims property passing to the marital trust. The disclaimed property passes instead to the disclaimer trust pursuant to the disclaimer provision. No estate tax is due, and such property receives a new basis under **Section 1014(a)**. **99** Fifteen years later, B dies when the value of B's property increases to \$10 million, and property of the disclaimer trust also increases to \$10 million. The gross estate does not include property of the disclaimer trust, and such property does not receive a new basis under **Section 1014(a)**. **100** The gross estate includes B's property (\$10 million), and such property receives a new basis under

Section 1014(a) . 101 Assuming that the applicable estate tax rate is 50% and the remaining basic exclusion amount plus DSUE is \$15 million ($10,000,000 + 10,000,000 - 5,000,000 = 15,000,000$), estate tax of \$0 ($(10,000,000 - 15,000,000) \times 0.50 = 0$) is imposed at B's death.

A reduction of the basic exclusion amount under **Section 2010(c)** significantly impacts the analysis. Where the gross estate exceeds the basic exclusion amount, the surviving spouse should consider making a disclaimer. The estate tax implications under those circumstances are more favorable with a disclaimer compared to no disclaimer.

EXAMPLE:

A and B are married and own various property interests with a total value of \$10 million. A executes a will and trust agreement that includes a disclaimer trust, marital trust, and disclaimer provision, but omits a bypass trust. A dies. Property with a value of \$5 million is includible in A's gross estate. **102** The basic exclusion amount under **Section 2010(c)** is assumed to be \$5 million. B disclaims property passing to the marital trust. The disclaimed property passes to the disclaimer trust pursuant to the disclaimer provision. No estate tax is due, and such property receives a new basis under **Section 1014(a) . 103** Fifteen years later, B dies when the value of B's property increases to \$10 million, and property of the disclaimer trust also increases to \$10 million. The gross estate does not include property of the disclaimer trust, and such property does not receive a new basis under **Section 1014(a) . 104** The gross estate includes B's property (\$10 million), and such property receives a new basis under **Section 1014(a) . 105** Assuming that the applicable estate tax rate is 50% and that the remaining basic exclusion amount plus DSUE is \$5 million ($5,000,000 + 5,000,000 - 5,000,000 = 5,000,000$), estate tax of \$2.5 million ($(10,000,000 - 5,000,000) \times 0.50 = 2,500,000$) is imposed at B's death.

EXAMPLE:

A and B are married and own various property interests with a total value of \$10 million. A executes a will and trust agreement that includes a disclaimer trust, marital trust, and disclaimer provision, but omits a bypass trust. A dies. Property with a value of \$5 million is includible in A's gross estate. **106** The basic exclusion amount under **Section 2010(c)** is assumed to be \$5 million. B does not disclaim. The property passes to the marital trust. No estate tax is due, and such property receives a new basis under **Section 1014(a) . 107** Fifteen years later, B dies when the value of B's property increases to \$10 million, and property of the marital trust also increases to \$10 million. The gross estate includes B's property (\$10 million) and property of the marital trust (\$10 million), and such property receives a new basis under **Section 1014(a) . 108** Assuming that the applicable estate tax rate is 50% and that the remaining basic exclusion amount plus DSUE is \$10 million ($5,000,000 + 5,000,000 = 10,000,000$), estate tax of \$5 million ($(10,000,000 + 10,000,000 - 10,000,000) \times 0.50 = 5,000,000$) is imposed at B's death.

Large estate

On the higher end of the range of estates, the estate planning decision of whether to include a bypass or

disclaimer trust is clear because the anticipated gross estate is predictably more than the anticipated basic exclusion amount. For example, a large estate with an anticipated gross estate of \$100 million is predictably more than the anticipated basic exclusion amount. **109** The estate plan should include a bypass trust and omit a disclaimer trust, and the surviving spouse should not disclaim so that property is excluded from the gross estate when the surviving spouse dies. The estate tax implications under those circumstances are more favorable with a bypass trust compared to no bypass trust.

EXAMPLE:

A and B are married and own various property interests with a total value of \$100 million. A executes a will that includes a bypass trust and a marital trust, but omits a disclaimer trust and disclaimer provision. A dies. Property with a value of \$50 million is includible in A's gross estate. **110** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B does not disclaim. Property with a value of \$10 million passes to the bypass trust, and property with a value of \$40 million passes to the marital trust. No estate tax is due, and such property receives a new basis under **Section 1014(a)**. **111** Fifteen years later, B dies when the value of B's property increases to \$100 million, property of the bypass trust increases to \$20 million, and property of the marital trust increases to \$80 million. The gross estate does not include property of the bypass trust, and such property does not receive a new basis under **Section 1014(a)**. **112** The gross estate includes B's property (\$100 million) and property of the marital trust (\$80 million), and such property receives a new basis under **Section 1014(a)**. **113** Assuming that the applicable estate tax rate is 50% and the remaining basic exclusion amount plus DSUE is \$10 million ($10,000,000 + 10,000,000 \# 10,000,000 = 10,000,000$), estate tax of \$85 million ($((100,000,000 + 80,000,000 \# 10,000,000) \times 0.50 = 85,000,000)$) is imposed at B's death.

EXAMPLE:

A and B are married and own various property interests with a total value of \$100 million. A executes a will that includes a marital trust, but omits a bypass trust, a disclaimer trust, and disclaimer provision. A dies. Property with a value of \$50 million is includible in A's gross estate. **114** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B does not disclaim. Property with a value of \$50 million passes to the marital trust. No estate tax is due, and such property receives a new basis under **Section 1014(a)**. **115** Fifteen years later, B dies when the value of B's property increases to \$100 million, and property of the marital trust also increases to \$100 million. The gross estate includes B's property (\$100 million) and property of the marital trust (\$100 million), and such property receives a new basis under **Section 1014(a)**. **116** Assuming that the applicable estate tax rate is 50% and the remaining basic exclusion amount plus DSUE is \$20 million ($10,000,000 + 10,000,000 = 20,000,000$), estate tax of \$90 million ($((100,000,000 + 100,000,000 \# 20,000,000) \times 0.50 = 90,000,000)$) is imposed at B's death.

A risk exists with a large estate that the gross estate does not exceed the basic exclusion amount. To address this risk and, thus, avoid a potential trap for the unwary, a bypass trust is combined with a disclaimer provision. The will or trust agreement establishes a bypass trust and includes a disclaimer

provision. Without a disclaimer, the disclaimer provision provides for the transfer of property equal to the basic exclusion amount to the bypass trust. With a disclaimer, the disclaimer provision instead provides for the transfer of disclaimed property to a marital trust or the surviving spouse outright. Simplified examples of drafting language involving a marital trust are as follows.

EXAMPLE:

Section [x.x]. Bequest of residuary estate.

(a) In general. Except as provided in paragraph (b) of this section, if my spouse survives me, then I devise and bequeath all of my residuary estate in TWO (2) shares as follows: (1) ONE (1) share consisting of property equal to my remaining basic exclusion amount under **Section 2010(c)** to the bypass trust; and (2) ONE (1) share consisting of the balance of the property of my residuary estate remaining after satisfaction of the share for the bypass trust to the marital trust.

(b) Disclaimer provision. Notwithstanding paragraph (a) of this section, if my spouse survives me and disclaims any bequest under my will, then I devise and bequeath such disclaimed property to the marital trust.

EXAMPLE:

Section [x.x]. Allocation of trust property following death of predeceasing settlor.

(a) In general. Within a reasonable period of time after the death of the predeceasing settlor taking into account the administration of his or her estate, the trustee shall allocate the property of the trust and any additional property transferred to the trustee as a result of the death of the predeceasing settlor to TWO (2) shares as follows: (1) ONE (1) share for the bypass trust consisting of property equal to the predeceasing settlor's remaining basic exclusion amount under **Section 2010(c)** ; and (2) ONE (1) share for the marital trust consisting of the balance of the property of the trust remaining after satisfaction of the share for the bypass trust.

(b) Disclaimer provision. Notwithstanding paragraph (a) of this section, if the surviving spouse disclaims any interest under this trust agreement, then the trustee shall allocate such disclaimed property to the share for the marital trust and divide the marital trust accordingly.

A disclaimer provision for a large estate thus redirects the transfer of disclaimed property from the bypass trust (which is designed to be excluded from the surviving spouse's gross estate) to the surviving spouse or marital trust (which is not excluded from the surviving spouse's gross estate) without any

direction from the surviving spouse. In other words, the default position of a disclaimer provision for a large estate is to transfer property so that it is excluded from the gross estate, and disclaimed property is redirected so that it is includible in the surviving spouse's gross estate. **117** Without a disclaimer provision, a disclaimer by the surviving spouse reaches a different result. **118**

EXAMPLE:

A and B are married. Twenty years ago, A and B own various property interests with a total value of \$5 million. A executes a will and trust agreement that includes a bypass trust, a marital trust, and disclaimer provision, but omits a disclaimer trust. The trust agreement provides that, on the death of B, property of the bypass trust and marital trust passes to A's children. In 2024, A dies when the value of the property increases to \$10 million. \$5 million is includible in A's gross estate. **119** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B disclaims property otherwise passing to the bypass trust, and any power of appointment over such property. The disclaimed property passes to the marital trust pursuant to the disclaimer provision.

EXAMPLE:

A and B are married. Twenty years ago, A and B own various property interests with a total value of \$5 million. A executes a will and trust agreement that includes a bypass trust and a marital trust, but omits a disclaimer trust and disclaimer provision. The trust agreement provides that, on the death of B, property of the bypass trust and marital trust passes to A's children. In 2024, A dies when the value of the property increases to \$10 million. \$5 million is includible in A's gross estate. **120** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B disclaims property otherwise passing to the bypass trust. The disclaimed property passes to A's children. **121**

This risk can also be addressed after death where the surviving spouse and all remaindermen are willing to execute disclaimers.

EXAMPLE:

A and B are married. Twenty years ago, A and B own various property interests with a total value of \$5 million. A executes a will and trust agreement that includes a bypass trust and marital trust, but omits a disclaimer trust and disclaimer provision. The trust agreement provides that, on the death of B, property of the bypass trust and marital trust passes to A's children. In 2024, A dies when the value of the property increases to \$10 million. \$5 million is includible in A's gross estate. **122** The basic exclusion amount under **Section 2010(c)** is assumed to be \$10 million. B disclaims the property otherwise passing to the bypass trust, but does not disclaim B's intestate interest in A's estate. A's children also disclaim such property. The disclaimed property passes to B as A's heir under applicable state law. **123**

Conclusion

Disclaimer planning provides flexibility to address unpredictable tax law, particularly with respect to the basic exclusion amount under **Section 2010(c)** that is in a state of flux. With disclaimer planning that satisfies the requirements of **Section 2518**, the surviving spouse has the option to arrange for favorable estate and income tax results, including a new basis under **Section 1014(a)**. Components are implemented during the estate planning process and after death. For smaller estates, a disclaimer trust created by a trust division paired with a disclaimer of problematic powers after death addresses the risk that the gross estate exceeds the basic exclusion amount. For a medium estate, implementation of a disclaimer trust (rather than a bypass trust) and disclaimer provision in estate planning documents combined with a disclaimer after death provides the flexibility needed to respond to changes of the basic exclusion amount. For a large estate, a traditional bypass trust and disclaimer provision in estate planning documents address the risk that the gross estate is less than the basic exclusion amount. Regardless of the size of the estate, a disclaimer provides flexibility to all so that a coin toss is not needed to address unpredictable tax law.

1 The basic exclusion amount is the starting point for determining the unified credit against estate tax. **I.R.C. Section 2010(c)(2)(A)**.

2 The Internal Revenue Code sets forth disclaimer provisions in **I.R.C. Section 2518** of chapter 12 of the Code with respect to the federal gift tax, rather than chapter 11 of the Code with respect to the federal estate tax. For provisions relating to the effect of a qualified disclaimer for purposes of chapter 11, see **I.R.C. Section 2518**. **I.R.C. Section 2046**. **I.R.C. Section 2518** was added to the Code in 1976.

3 **Treas. Reg. 25.2518-1(b)**; PLR 9043055; PLR 200105058.

4 **Treas. Reg. 25.2518-1(b)**.

5 *Id.*

6 **Treas. Reg. 25.2518-2(a)**.

7 **Treas. Reg. 25.2518-2(b)(1)**.

8 *Id.*

9 *Chamberlain*, T.C. Memo 1999-181.

10 **I.R.C. § 2518(b)**; **Treas. Reg. 25.2518-2(b)(1)**; PLR 9015017 (executed by attorney in fact under

a durable power of attorney); but, see, PLR 8239002 (disclaimer is not irrevocable).

11 Treas. Reg. 25.2518-2(c)(1) . Or, if later, the date on which the person attains the age of twenty-one. *Id.* Timely mailing of a disclaimer to the proper person is treated as timely delivery if the mailing requirements under **Treas. Regs. 301.7502-1(c)(1)** , (c)(2), and (d) are met. **Treas. Reg. 25.2518-2(c)(2)** .

12 Treas. Reg. 25.2518-2(c)(3)(i) .

13 *Id.*

14 *Id.*; PLR 8607013.

15 I.R.C. § 2518(b)(2)(A) ; **Treas. Reg. § 25.2518-2(c)(3)(i)** . Compare with **Treas. Reg. 25.2518-2(c)(5)** (ex.5).

16 Treas. Reg. 25.2511-2(c) .

17 I.R.C. Section 2038 .

18 I.R.C. Section 2518(b)(2)(A) ; **Treas. Reg. 25.2518-2(c)(3)(i)** . **Treas. Reg. 25.2518-2(c)(5)** (ex. 6); PLR 8935024; PLR 9012053.

19 Treas. Reg. 25.2518-2(d)(1) . Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. *Id.* Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in property. *Id.*

20 Treas. Reg. 25.2518-2(d)(1) .

21 Treas. Reg. 25.2518-2(c)(4) (ex. 11); **Treas. Reg. 25.2518-2(d)(4)** (ex. 8).

22 *Id.*

23 Treas. Regs. 25.2518-2(d)(4) (ex. 1) & (ex. 10); PLR 8610032 (In this case, the third requirement of **I.R.C. Section 2518** is met because the taxpayer has received no distributions of income or principal from the estate or the trust.); PLR 8817061; PLR 9012053; PLR 200503024. However, a

beneficiary's disclaimer of a beneficial interest in a decedent's IRA is a qualified disclaimer even though, prior to making the disclaimer, the beneficiary receives the required minimum distribution for the year of the decedent's death from the IRA. The beneficiary may make a qualified disclaimer with respect to all or a portion of the balance of the account, other than the income attributable to the required minimum distribution that the beneficiary received, provided that at the time the disclaimer is made, the disclaimed amount and the income attributable to the disclaimed amount are paid to the beneficiary entitled to receive the disclaimed amount, or are segregated in a separate account. [Rev. Rul. 2005-36](#), [2005-1 C.B. 1368](#) ; PLR 201125009; PLR 201245004.

[24](#) PLR 9521032; PLR 9823043; PLR 200503024; PLR 201516056.

[25](#) [Treas. Reg. 25.2518-2\(d\)\(2\)](#) .

[26](#) *Id.* A discretionary distribution standard also risks failure of [I.R.C. Section 2518\(b\)\(4\)](#) . *Id.*

[27](#) [Treas. Reg. 25.2518-2\(e\)\(1\)](#) .

[28](#) *Id.*

[29](#) [Treas. Reg. 25.2518-2\(e\)\(1\)\(ii\)](#) .

[30](#) [Treas. Reg. 25.2518-2\(e\)\(2\)](#) . This surviving spouse rule was added in 1978.

[31](#) *Id.*

[32](#) PLR 8750023; PLR 9630034.

[33](#) PLR 200522012; PLR 200521033; PLR 201245004.

[34](#) PLR 9723028.

[35](#) [Treas. Reg. 25.2518-2\(e\)\(1\)\(i\)](#) .

[36](#) [I.R.C. Section 2518\(c\)\(2\)](#) .

[37](#) [Treas. Reg. 25.2518-2\(e\)\(1\)](#) , flush language.

38 I.R.C. Section 2518(b)(4) . Treas. Regs. 25.2518-2(e)(5) (ex. 4) & (ex. 7); PLR 201516056.

39 I.R.C. Section 2518(b)(4) . Treas. Reg. 25.2518-2(e)(5) (ex. 5); PLR 8309030; PLR 8337071; PLR 8935024 (lifetime power of appointment); PLR 9329025 (lifetime power of appointment); PLR 9818008 (power to amend or revoke); PLR 200003023 (lifetime power of appointment); PLR 200105058; PLR 200443030 (lifetime power of appointment); PLR 200521033; PLR 200522012; PLR 200832018.

40 I.R.C. Section 2518(b)(4) . Treas. Reg. 25.2518-3(e)(5)(ex. 5).

41 Treas. Reg. 25.2518-2(e)(1)(i) .

42 Treas. Reg. 25.2518-2(e)(1) , flush language.

43 A power to consume, invade, or appropriate income or corpus, or both, which is limited by an ascertainable standard relating to the health, education, maintenance, or support is not a general power of appointment. **Treas. Reg. 20.2041-1(c)(2)** . Although **I.R.C. Section 2518** and the regulations thereunder do not define "ascertainable standard," **I.R.C. Section 2041** and the regulations thereunder define the term and are presumably applicable because both sections address powers of appointment. PLR 201516056.

44 I.R.C. Section 2518(b)(4) . Treas. Regs. 25.2518-2(e)(5) (ex. 6) & (ex. 12); PLR 8824014; PLR 9630034; PLR 9723028; PLR 20044030.

45 Treas. Reg. 25.2518-1(b) .

46 I.R.C. Section 2511 ; PLR 200122036 (If the disclaimer is not a qualified disclaimer, for purposes of the federal estate, gift, and generation skipping transfer tax provisions, the disclaimer is disregarded and the disclaimant is treated as having received the interest. Thus, if the disclaimer is not a qualified disclaimer, then the disclaimant has made a gift of the value of the disclaimed interest.); PLR 200604006.

47 TAM 8804004 (untimely disclaimer).

48 Disclaimer is not listed as a no rule issue. **Rev. Proc. 2024-1, 2024-1 I.R.B. 1** .

49 I.R.C. Section 2518(b)(3) .

50 Treas. Reg. 25.2518-3(d) (ex. 18); PLR 202339008.

51 I.R.C. Section 2518(b)(4) . Treas. Reg. 25.2518-2(e)(5) (ex. 5).

52 I.R.C. Section 2518 . PLR 8750023; PLR 9630034.

53 I.R.C. Section 2056(b)(7)(B) .

54 I.R.C. Section 2518 . Treas. Regs. 25.2518-2(e)(5) (ex. 4) & (ex. 6); PLR 9232024.

55 I.R.C. Section 2518 . PLR 201516056.

56 I.R.C. Section 2056(b)(7)(B) .

57 I.R.C. Section 2518 . PLR 8935024; PLR 9012053; PLR 200442027 (disclaimer provision contemplates a series of disclaimers); PLR 200521033; PLR 200522012.

58 I.R.C. Section 2518 . PLR 9723028; PLR 200443030.

59 Treas. Reg. 25.2518-3(a)(1)(i) (A disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property.); Restatement Third, Trusts section 68 (The trustee may divide a trust into two or more trusts if doing so does not adversely affect the rights of any beneficiary or the accomplishment of the trust purposes.); Uniform Trust Code § 417 (A trustee may divide a trust into two or more separate trusts if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.); Tex. Prop. Code § 112.057 (The trustee may, unless expressly prohibited by the terms of the instrument establishing the trust, divide a trust into two or more separate trusts without a judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the original trust.).

60 I.R.C. Section 2518 . Treas. Reg. 25.2518-3(d) (ex. 21); PLR 9043055 (The fourth requirement of **I.R.C. Section 2518(b)** will be met because the taxpayer will not retain any powers to direct the beneficial enjoyment of the property subject to the disclaimer and, thus, the property will pass without any direction on the part of the taxpayer. Specifically, as a result of the disclaimers of the powers with respect to the property passing to the QTIP marital trust, the trust corpus will pass, on the taxpayer's death, pursuant to the terms of the trust agreement.); PLR 9048045; PLR 9218015 (In the instant case, the right to alter, amend, revoke, or terminate the trust, the right to withdraw principal from the

trust, and the power of appointment over the trust property (exercisable during life and at death) are powers separately created by the transferor decedent with respect to the trust. These powers are deemed created on the date of the decedent's death. The surviving spouse may disclaim these rights and powers of appointment with respect to a fraction or percentage of the trust assets equal to the disclaimed property. This disclaimer must be made within nine months of the decedent's death.); PLR 9424023; PLR 200105058 (Spouse will also disclaim her testamentary power of appointment under the trust agreement with respect to the disclaimed property. The disclaimed property will be segregated from the other trust assets and held in a separate account. We conclude that the proposed disclaimers will satisfy the requirements of **Treas. Reg. 25.2518-2(e)** and **Treas. Reg. 25.2518-3(a)** . Accordingly, assuming the disclaimer is made within the time prescribed under **I.R.C. Section 2518(b)(2)** and other requirements of **I.R.C. Section 2518** are satisfied, we conclude that the disclaimer is a qualified disclaimer under **I.R.C. Section 2518** .).

61 A disclaimant can make a partial disclaimer and is not required to disclaim an entire interest in order to make a qualified disclaimer. **Treas. Reg. 25.2518-3(a)(1)** .

62 **Treas. Reg. 25.2518-3(c)** .

63 **Treas. Reg. 25.2518-3(a)(2)** (A disclaimer is not a qualified disclaimer under **I.R.C. Section 2518** if the beneficiary disclaims income derived from a specific property transferred in trust while continuing to accept income derived from the remaining properties in the same trust unless the disclaimer results in such property being removed from the trust and passing, without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent.).

64 **Treas. Reg. 25.2518-3(c)** .

65 Compare, **Treas. Reg. 25.2518-3(d)** (ex. 18), with, **Treas. Reg. 25.2518-3(d)** (ex. 19).

66 **I.R.C. Section 2518(b)** ; **I.R.C. Section 2518(b)(1)** .

67 **Treas. Reg. 25.2518-2(b)(1)** .

68 **Treas. Reg. 25.2518-3(c)** . Identification with a percentage (i.e., I hereby disclaim TWENTY PERCENT (20%)) or a fraction (i.e., I hereby disclaim TWO THIRDS (2/3)) is also available. **Treas. Reg. 25.2518-3(b)** ; **Rev. Rul. 2005-36, 2005-1 C.B. 1368** ; PLR 8652016; PLR 200045026. However, a percentage or fraction is not typically used for a disclaimer trust because the basic exclusion amount under **I.R.C. Section 2010(c)** is a pecuniary amount.

69 [Treas. Regs. 25.2518-3\(d\)](#) (ex. 16) & (ex. 18); [Rev. Rul. 2005-36, 2005-1 C.B. 1368](#) ; PLR 9042042; PLR 9723028. The language "out of the bequest" tracks language used in the Regulations with respect to a disclaimer of a pecuniary amount. [Treas. Reg. 25.2518-3\(c\)](#) .

70 PLR 9232024 (I hereby irrevocably and unqualifiedly disclaim in its entirety an undivided portion, expressed as a fraction, of my entire interest in and rights to the marital trust. The fraction of the marital trust that I disclaim is as follows: (a) the numerator of the fraction is the amount which will result in the family trust and the disclaimer trust having an aggregate value, after taking into account all taxes, administration expenses, claims, debts and other expenses that are properly chargeable against either the family trust or the disclaimer trust by reason of my spouse's death of \$1,333,333.00; (b) the denominator of the fraction is the value of the property, as finally determined for federal estate tax purposes in my spouse's estate, that would have passed to the marital trust at my spouse's death absent this disclaimer.); PLR 9447033 (fraction with a numerator of \$600,000 and denominator of value of property passing to disclaimant under will but for the disclaimer); PLR 9626049; PLR 9623064 (fraction with a numerator of fair market value of IRAs and denominator of value of residuary estate); PLR 9835005.

71 PLR 8610032 (In this case the disclaimer identifies the amount being disclaimed as a sum equal to the largest amount that can pass free of federal estate tax by reason of the federal estate and gift tax unified credit.); PLR 9203028; PLR 9731029.

72 [Treas. Reg. 25.2518-3\(d\)](#) (ex. 20)(disclaimer by a third party for the benefit of the surviving spouse pursuant to a fraction, the numerator of the fraction disclaimed is the smallest amount which will allow decedent's estate to pass free of federal estate tax, and the denominator is the value of the residuary estate); PLR 9630034.

73 PLR 8817061 (Provided that all other requirements are satisfied, the Service permits a qualified disclaimer made in the form of a disclaimer of a "reverse pecuniary amount." Such disclaimer may take the form of a disclaimer of the entire property interest less a specific pecuniary amount.).

74 *McInnes v. Comm'r*, TC Memo 1992-558 (Disclaimer provides that the disclaimant accepts her interest in that portion of said trust which is required to reduce the deceased spouse's taxable estate, as finally determined for federal tax purposes, to the pecuniary amount of \$500,000; and disclaims her and her estate's entire interest in (including her power to appoint) all other property which would benefit or be distributed to or for the benefit of her or her estate under said agreement. The tax court held that it is crystal clear that this language provides for a formula amount subject to a maximum of \$500,000 and that it does not constitute a pecuniary bequest of \$500,000.); PLR 8729008; PLR 8708069 (The surviving spouse renounces all interest in income or principal, disposition or power created by the will in excess of the sum of \$495,000.).

75 I.R.C. Sections 2518(b)(1) & (2); Treas. Regs. 25.2518-2(b) & (c).

76 Treas. Reg. 25.2518-3(c) .

77 *Id.*

78 *Id.*

79 Inaction reaches the same result as affirmatively making a decision against disclaimer.

80 I.R.C. Section 2056(b)(7) . Alternatively, a marital trust provides a general power of appointment to qualify for the marital deduction under **I.R.C. Section 2056(b)(5) .**

81 I.R.C. Section 2041 ; Treas. Reg. 20.2041-1(c) ; I.R.C. Section 1014(b)(9) ; Rev. Rul. 2023-2, 2023-16 I.R.B. 658 . The bypass trust is an example of a traditional estate planning technique that leads to favorable estate tax implications to the detriment of income tax implications.

82 I.R.C. Section 2044 ; I.R.C. Section 1014(b)(10) .

83 Conversely, not all estate plans should include a disclaimer trust. To satisfy the no direction requirement of **I.R.C. Section 2518(b)(4) ,** a disclaimer trust does not provide the surviving spouse a testamentary power of appointment. This is a significant disadvantage of a disclaimer trust because the surviving spouse will not have the power to direct the transfer of property at his or her death.

84 The basic exclusion amount of \$13,610,000 in 2024 is more than thirteen times larger than a \$1 million gross estate ($1,000,000 \times 13 = 13,000,000$), and the basic exclusion amount of \$5 million scheduled for 2026 is five times larger than a \$1 million gross estate ($1,000,000 \times 5 = 5,000,000$).

85 I.R.C. Section 2033 .

86 I.R.C. Section 2056(b)(7) ; I.R.C. Section 1014(b)(1) .

87 I.R.C. Section 2033 ; I.R.C. Section 2044 ; I.R.C. Section 1014(b)(1) & (10).

88 I.R.C. Section 2033 .

89 I.R.C. Section 2010(c) ; I.R.C. Section 1014(b)(1) .

90 I.R.C. Section 2041 ; I.R.C. Section 1014(b)(9) .

91 I.R.C. Section 2033 ; I.R.C. Section 1014(b)(1) .

92 I.R.C. Section 2033 .

93 I.R.C. Section 2518 . PLR 9218015; PLR 9424023.

94 Assuming that portability is elected and both spouses die in 2024, a \$10 million gross estate is less than the combined basic exclusion amount of \$27,220,000 ($13,610,000 \times 2 = 27,220,000$). Assuming that portability is elected and both spouses die in 2026, a \$10 million gross estate is equal to the combined basic exclusion amount of \$10,000,000 ($5,000,000 + 5,000,000 = 10,000,000$).

95 I.R.C. Section 2033 .

96 I.R.C. Section 2056(b)(7) ; I.R.C. Section 1014(b)(1) .

97 I.R.C. Section 2033 ; I.R.C. Section 2044 ; I.R.C. Section 1014(b)(1) & (10).

98 I.R.C. Section 2033 .

99 I.R.C. Section 2010(c) ; I.R.C. Section 1014(b)(1) .

100 I.R.C. Section 2041 ; I.R.C. Section 1014(b)(9) .

101 I.R.C. Section 2033 ; I.R.C. Section 1014(b)(1) .

102 I.R.C. Section 2033 .

103 I.R.C. Section 2010(c) ; I.R.C. Section 1014(b)(1) .

104 I.R.C. Section 2041 ; I.R.C. Section 1014(b)(9) .

105 I.R.C. Section 2033 ; I.R.C. Section 1014(b)(1) .

106 I.R.C. Section 2033 .

107 I.R.C. Section 2056(b)(7) ; I.R.C. Section 1014(b)(1) .

108 I.R.C. Section 2033 ; I.R.C. Section 2044 ; I.R.C. Section 1014(b)(1) & (10).

109 A \$100 million gross estate is more than seven times larger than the basic exclusion amount of \$13,610,000 in 2024 ($13,610,000 \times 7 = 95,270,000$), and twenty times larger than the basic exclusion amount schedule for 2026 ($5,000,000 \times 20 = 100,000,000$).

110 I.R.C. Section 2033 .

111 I.R.C. Section 2010(c) ; I.R.C. Section 2056(b)(7) ; I.R.C. Section 1014(b)(1) .

112 I.R.C. Section 2041 ; I.R.C. Section 1014(b)(9) .

113 I.R.C. Section 2033 ; I.R.C. Section 2044 ; I.R.C. Section 1014(b)(1) & (10).

114 I.R.C. Section 2033 .

115 I.R.C. Section 2056(b)(7) ; I.R.C. Section 1014(b)(1) .

116 I.R.C. Section 2033 ; I.R.C. Section 2044 ; I.R.C. Section 1014(b)(1) & (10).

117 This is the inverse of the typical disclaimer provision otherwise discussed above.

118 Uniform Disclaimer of Property Interests Act sections 6(b)(2) & (b)(3)(B) (The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general. If the instrument does not contain such a provision, then the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.); Tex. Prop. Code section 240.051(e) (If the instrument creating the disclaimed interest does not contain a disclaimer provision and if the disclaimant is an individual and the interest is passing because of the death of a decedent, then the disclaimed interest passes as if the disclaimant had died immediately before the time as of which the disclaimer takes effect.)

119 I.R.C. Section 2033 .

120 I.R.C. Section 2033 .

121 Treas. Reg. 25.2518-2(e)(5) (ex. 8); **Rev. Rul. 2005-36, 2005-1 C.B. 1368** ; PLR 8922082; PLR 9042042; PLR 9338010; PLR 9513011; PLR 9521032; PLR 9725005 (disclaimer provision redirects to children); PLR 9823043; PLR 200028020; PLR 200045026.

122 I.R.C. Section 2033 .

123 PLR 8708069; PLR 9310020; PLR 9427030; PLR 9623064; PLR 9626049; PLR 9733006; PLR 9835005; PLR 9847026; PLR 200006052; PLR 200303020.