



Private Companies Group
Approach

December 2010

Dear Clients and Friends:

The theme of our year-end issue of the *Approach* can be expressed in three words: “plan for change.” How do companies plan for the changes in legislation or financial circumstances that will impact their businesses? How do private owners and investors plan for the changes in estate tax laws that are coming in 2011? “Plan for change” is an oxymoron. It is also an imperative.

On a daily basis, we help our private company clients plan for the many changes that confront their businesses. In this issue of the *Approach*, we offer a few views on how to handle some of the changes in health care laws and imminent changes in estate tax laws, as well as how to navigate dynamic events that may confront the board of a private company in or around the “zone of insolvency.” If you have similar issues, we can help. Other stories are featured in previous issues of the *Approach*, which are posted at www.schiffhardin.com, under “Publications.”

Here at the *Approach* we are also planning for change. In 2011 our publications will be all-electronic and distributed via e-mail. If your e-mail address has recently changed and you would like to continue receiving copies of the *Approach*, please forward your new e-mail address to theApproach@schiffhardin.com.

Lastly, we are pleased to announce that Schiff Hardin has been recognized by the *Financial Times* Innovative Lawyers Report U.S. for outstanding achievement in innovative legal services in mergers and acquisitions. The firm was awarded this recognition based on the recent work of the Private Companies Group on behalf of its client EveryBlock LLC, an on-line news media start-up. Please see the back page for details.

We wish you a successful and safe New Year.



**Strong Advocates.
Trusted Advisers.**
Lasting Client Relationships.

Atlanta

Boston

Chicago

Lake Forest

New York

San Francisco

Washington

Under the 2001 Tax Act, the federal estate tax has been repealed.

However, that repeal lasts for only one year, and the return of the estate tax on January 1, 2011 appears very likely.

This, combined with a historically low gift tax rate and other conditions, makes an opportune time to consider making substantial gifts.

The Economic Growth and Tax Reconciliation Act of 2001 (“EGTRRA”) made extensive changes to the federal estate, gift and generation-skipping taxes, including the complete repeal of the estate and generation-skipping taxes, and a reduction in the gift tax rate to 35% — but only for one year, 2010. EGTRRA included a “sunset” provision that would undo the entire piece of legislation at the end of 2010 unless Congress made the law permanent or came up with a compromise on the transfer tax issue. However, EGTRRA has not been changed since 2001, and for this year only, no estate, regardless of size, will be subject to the tax.

The “year of repeal” raises some interesting planning opportunities. Given the likely return of the estate tax next year, many clients are considering making taxable gifts before December 31 in order to reduce their estates and transfer future growth to beneficiaries at a significantly reduced cost. Moreover, several strategies that use the mandatory federal interest rates, currently at historic lows, are particularly effective now. Although the signs of economic recovery are encouraging, persistent low asset valuations, particularly on real estate, make this an opportune time to consider substantial gifting strategies. Also, because the generation-skipping tax does not apply this year, some families with substantial assets held in non-tax-exempt trusts are considering terminating those trusts and distributing the assets out to grandchildren in order to avoid paying generation-skipping tax in the years to come.

If, as seems likely, the estate tax comes back into existence on January 1, 2011, it may feature the higher rates and lower exemptions that existed before the passage of EGTRRA in 2001, as well as a higher gift tax rate (up to 55%). As of the date this bulletin went to press, the Obama administration and Republican Congressional leaders reportedly reached an agreement on the estate tax that would implement a two-year modification of the tax, with a \$5 million per-person exemption and a 35% top rate. This would reduce the number of estates subject to the tax, and also reduce the tax burden on those estates. However, this agreement is not yet law, and it faces opposition in Congress. In any event, the persistence of the estate tax, in whatever form and at whatever level, still makes lifetime gifting strategies very much worth considering.

For further information: **Jim Robinson**, Private Clients, Trusts and Estates
404.437.7038, jrobinson@schiffhardin.com



Many provisions of the Patient Protection and Affordable Care Act (“PPACA”) become effective on January 1, 2011 for employer-provided group health plans operating on a calendar year basis.

There are a host of new coverage mandates, notice/disclosure obligations and reporting requirements that employers must understand and satisfy.

Employers preparing to comply with new health care coverage regulations should first determine the extent to which PPACA applies to their plans (see the August 2010 Schiff Hardin *Approach*). For compliance, the following lists of action items (*i.e.*, one for grandfathered health plans and one for non-grandfathered health plans) may assist you with these efforts.

With respect to grandfathered health plans:

- Include grandfathered status disclosure statement in all plan materials describing plan benefits.
- Extend coverage to adult children up to age 26 (including written notice and enrollment opportunity of at least 30 days); provided, however, that grandfathered health plans generally may exclude adult children who are eligible to enroll in another group health plan until 2014.

(Continued)

- Eliminate preexisting condition exclusions on enrollees under age 19.
- Eliminate lifetime dollar limits on “essential health benefits” and provide special notice and enrollment opportunity of at least 30 days.
- Restrict annual dollar limits on “essential health benefits.”
- Preclude rescissions of coverage, except in cases of fraud or intentional misrepresentation of material fact.
- Eliminate reimbursement for over-the-counter drugs and medicines (other than insulin) purchased without a prescription (*e.g.*, cold medicine and aspirin) under health flexible spending arrangements (FSAs), health reimbursement arrangements (HRAs), health savings accounts (HSAs) and Archer medical savings accounts (MSAs).

In addition to the above items, if your company has a non-grandfathered health plan, you should do the following:

- For fully insured plans, satisfy Code Section 105(h)(2) non-discrimination requirements.
- Provide first-dollar coverage for preventative care.
- For plans that require or allow designation of primary care providers (“PCPs”), permit designation of any available PCP and provide written notice of such right.
- For plans that require or allow designation of a PCP for a child, permit designation of a pediatrician and provide written notice of such right.
- Eliminate authorization or referral requirements to access an obstetrician or gynecologist.
- Eliminate prior authorization requirements for emergency services and provide coverage for those services at in-network rates.
- Revise internal claims and appeals procedures and adopt external review processes.

Because PPACA’s application and impact will likely vary based on plan type and terms, these lists may need to be tailored (and in some cases, expanded) to achieve complete and timely compliance and to avoid possible penalties.

For further information: **Ed Spacapan**, Employee Benefits and Executive Compensation
 312.258.5788, espacapan@schiffhardin.com



A manufacturer began experiencing credit challenges, worrying whether it could meet its current obligations, and whether its assets could be worth less than its liabilities. The company sought counsel from Schiff Hardin on its board’s obligations.

Our Private Companies attorneys assisted this client with respect to the “zone of insolvency,” reviewing its financial status, debt obligations and asset values. We provided the board with a primer on its roles and obligations around the zone of insolvency, including a discussion of its duties of loyalty and care to the company’s stakeholders. We also reviewed organizational documents to ensure that they used the proper exculpation clauses and complied with the relevant state corporate statutes.

The company’s board is now confident in making decisions near the “zone.” They understand how best to document their activities, maintaining a proper record of their careful deliberations.

For further information: **Jon Viganò**, Restructuring, Bankruptcy and Creditors’ Rights
 312.258.5792, jvigan@schiffhardin.com

A manufacturing company faces financial issues in the midst of tight credit markets. The board of directors needs to review its duties and obligations in unusually challenging circumstances.



Schiff Hardin LLP Recognized by the *Financial Times* Innovative Lawyers Report U.S. for its Mergers & Acquisitions Work

Schiff Hardin LLP is one of only 11 law firms recognized for outstanding achievement in innovative legal services in mergers and acquisitions by the *Financial Times* Innovative Lawyers Report U.S. The firm was awarded this recognition based on its work advising the online news media start-up EveryBlock LLC in its acquisition by MSNBC.com.

The *FT* Innovative Lawyers Report, which has been published in Europe for five years, launched its inaugural U.S. edition this year. All submissions were thoroughly researched by the *FT* and report rankings are based on originality, rationale and the impact and results of implementing the innovation.

In preparation for its initial funding grant coming to an end, EveryBlock needed to determine the best growth strategy for its next stage of development, and turned to Schiff Hardin for advice. The Schiff Hardin team, led by Matthew Galo, co-leader of the firm's Private Companies group, together with Robert Sieland, who focuses on early-stage companies, worked with the client to maximize the value of its innovative, scalable "micro-news" platform, including the evaluation of potential private equity investment and acquisition opportunities. Additionally, Chris Bollinger advised the client with respect to critical issues surrounding open-source code and the protection of its intellectual property rights. Ultimately, EveryBlock agreed to be acquired by MSNBC.com, where it operates today (www.everyblock.com), and Schiff Hardin handled the negotiations and successful closing of the transaction.

Please visit our Web site to learn more about Schiff Hardin.

www.schiffhardin.com

Steve Dragich
Chicago
312.258.5692
sdragich@schiffhardin.com

Brian Gannon
Atlanta
404.437.7059
bgannon@schiffhardin.com

Matt Galo
Chicago
312.258.5643
mgalo@schiffhardin.com

Bob Mullen
San Francisco
415.901.8783
rmullen@schiffhardin.com

Nicole Finitzo
Lake Forest
847.295.4308
nfinitzo@schiffhardin.com

Todd Eskelsen
Washington
202.778.6420
teskelsen@schiffhardin.com

