



■ Shenkman

PRACTICAL PLANNER®

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD

LOTS OF 12/31/24 DEADLINES! CRUNCH IS COMING!

Summary: End of year 2024 is lookin' like more of a crunch than a stale granola bar. Are you ready? Probably not. The following are some of the topics that should be on radar. **The crunch is coming.**

■ **Intro.** Lots of planning developments are coming to a head soon. There could be a massive crush of planning steps to be completed before the end of 2024, and it doesn't seem that folks are talking about this enough. The pressure to get steps taken will differ for everyone based on their unique planning considerations. But many taxpayers, business owners, and others face a bunch of requirements or opportunities that won't last. The list below is far from all but hopefully makes the point. **The crunch is coming.**

■ **Dramatic Tax Change.** OK, so I sound like the little boy who cried tax-wolf! I've been cautioning about harsh income and estate tax changes that could devastate estate tax planning for many years and most of them just haven't happened. And maybe they never will. Unless you have a political crystal ball it may be better to be prepared rather than lose planning opportunities. Dems introduced the American Housing and Economic Mobility Act of 2024 on July 29, 2024. Estate tax rates could be increased to 65%+. The basic exclusion amount reduced to \$3.5M. Grantor retained annuity trusts (GRATs) will require a 10% remainder and a minimum 10-year term, which will effectively eliminate this planning technique. Other common planning techniques could suffer a similar fate. Grantor trust assets could be included in the grantor's estate. If a trust ceases to be characterized as a grantor trust, all assets in the trust could be deemed gifted, triggering a significant gift tax cost. Distributions from grantor trusts could all be taxed as gifts. These changes might not only eliminate favored estate planning techniques but could create significant tax burdens on estate planning that was completed many years or decades earlier. While there may be no means to circumvent these changes if enacted, it may be beneficial to plan as soon as possible in case some planning is "grandfathered" (respected) under new law changes. The Dems have consistently introduced similar legislation for many years, and if they have the votes, this could be passed. President Biden's Green Book even included retroactive effective dates. So don't rule out that 1/1/25 could be the effective date of tax law changes if the Dems can pass it. The smart move is to plan now. There is no assurance that planning done before year end will be grandfathered and exempt from new changes, but it may be worth a shot. **The crunch is coming.**

■ **Noncompete Agreements.** Have you given notice as required to all current and former employees and consult-

ants whose noncompetes are no longer valid? If you own interests in a closely held or family business, have you reassessed your succession plans? Have you reviewed and begun to restructure restrictions on key persons that may protect your business? Any restriction that is the functional equivalent of a noncompete will be invalid and needs to be rethought. **The crunch is coming.**

■ **Corporate Transparency Act (CTA).** Most closely held businesses will have to file with FinCEN by 12/31/24. Most Reporting Companies that are required to file haven't. Year-end is going to be a crunch. The FinCEN website may have

issues handling the filing traffic. Advisers will be swamped. Address these requirements ASAP. This stuff will be simple for most but burdensome and complicated for many. If you have trusts that own a business that must report, who will have to file? What about the trust protector you haven't spoken to in a decade? Will they readily submit to the invasive FinCEN reporting? Not! You might need to have the people in certain positions resign before filing or have them replaced. That won't always be easy, and in some instances, you might need to decant the trust to

(Continued on page 2)

CHECKLIST: LIABILITIES!

Summary: Might liabilities that you may not even be aware of torpedo your estate plan? Is your estate so big that you're worried about estate taxes eroding what the kiddies might get? Estate taxes may not be the only issue that could change that silver spoon you thought you were leaving the munchkins into a plastic one.

✓ **Young Drivers.** Young adults and cars are a potentially costly liability cocktail. Do you have proper liability coverage? Can you retitle the car into the kid's name so if there is an accident the claim is their liability not yours (even if you pay for the car and insurance coverage)?

✓ **Liability Insurance.** And

while you're speaking to your property, liability, and casualty insurance consultant, make sure your umbrella or excess personal liability policy is enough. Many people have dollar coverage that is too low relative to their wealth. Review the possible liability risks you face, and be sure that if you need specialized coverage, you have it. Do this for your business as well as personal. Serving on a charitable board is admirable but does your homeowners or business liability policy cover those risks? Maybe. Does the charity have adequate coverage? Find out. Insurance gaps can be devastating to wealth.

✓ **Tax Filing Errors.** Not

(Continued on page 3)

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(Continued from page 1)

make the changes needed. For your corporation, when was the last time you had bylaws done? Where is the corporate kit? Who are the officers? Which of the officers, directors, or key employees have substantial control that triggers filing? **The crunch is coming.**

■ **Using Exemption.** The estate tax exemption will be cut to ½ after 2025. This is on the books to occur. Too many people that should be planning for this are waiting to see. They're forgetting the old tax maxim: "If you snooze, you lose (tax planning opportunities)." It may be important to take tax actions now in 2024 for planning you want to be done before the end of 2025. Retitle assets to put more time between steps in a plan to possibly deflect a step-transaction doctrine under which the IRS collapses steps in a plan into fewer steps and recharacterizes the result (and not favorably!). If you're married and both you and your spouse want to use exemption, and if non-reciprocal SLATs are on your

agenda, set one up in 2024 and the second in later 2025. Also, good planning is often complicated and could be preceded by financial forecasts to fine-tune what you do, etc. That all takes time. You might want insurance (life, disability long-term care) to fill financial gaps in your plan. That takes time to evaluate and apply for. Get started now. As we get near the end of 2024, advisers may be so swamped that it may be hard to get help. **The crunch is coming.**

■ **Audits.** IRS plans to increase audit rates of wealthy taxpayers by 50%. The IRS is going to show more love to wealthy taxpayers. Are you ready for the audit hug? What are some of the hotspots auditors may pay attention to? What can you do to try to clean up your planning before the audit notice arrives? When was the last time you set up a meeting with your CPA to review your record-keeping, tax positions, and similar points? Too many clients of CPAs focus on getting their tax returns done or financial statements prepared. That's vital, but so is sharpening the tax saw. Call your CPA and set up an appointment now. Do you have an S corporation? Have you been underpaying salary to save payroll tax? Have you had your CPA help you build a file supporting the positions taken? Are you using your business as a personal piggy bank? It may be one thing to deduct expenses that are in the gray zone, but not purely personal expenses. Do you keep proper records? Is your kid's personal car owned by your business? The list is long. Your CPA can identify more than a few issues that pertain to you. But they cannot help you do that if you don't give them the opportunity to do so. It seems to make sense to identify issues and clean up what can be done before you get the audit letter. Some of the issues your CPA might help you with may just pertain to better record-keeping to help you on an audit. From an estate tax perspective, too few taxpayers make the effort to maintain their plans properly. It may be tedious, expensive, and as unpleasant as a root canal, but if you don't address the administrative details of your plan, the IRS won't re-

spect it either. Meet with your planning team (estate planning attorney, CPA, wealth adviser, insurance consultant, etc.) and review your plan. Complex or big-dollar plans must be done yearly. **The crunch is coming.** ■ **Entity Redemption Agreements.** The Supreme Court, in the Connelly case, held that a corporation had to

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include the value of life insurance it owned to redeem shares in the value of the entity and could not reduce the valuation by the obligation to redeem a deceased shareholder's shares. For many business succession plans, that will mean higher estate taxes. Oh, and if you think estate taxes don't apply to you did you read the comments above about yet the latest proposal to reduce the exemption to \$3.5M? Don't rely on the current high exemptions, or even ½ the current high exemption after 2025, to save the day. It may not. But that may not be the worst of it. The language in your buyout agreement, coupled with this new tax holding, may even change how much has to be paid out. Review all entity redemption agreements ASAP and evaluate how they might be changed, especially considering possible tax changes. Don't assume an insurance LLC is the answer. The insurance LLC itself seems to be subject to the Connelly rationale. **The crunch is coming.** ■ **Protective Refund Claims.** Federal Courts no longer defer to the interpretation in IRS regulations of ambiguous laws unless Congress directed the issuance of Regs. Instead, the courts themselves must now interpret the ambiguous law. *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024). Ask your CPA whether protective claims for refunds should be filed. **PP**

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...CHECKLIST: HIDDEN LIABILITIES!

(Continued from page 1)

properly handling tax, FinCEN and other reporting can expose you to penalties. A few are listed below. Have your CPA review your overall financial picture and be sure you are not missing any requirements.

✓ **Missing FBAR Filings.** You may be required to file special reports concerning certain foreign assets. The "Report of Foreign Bank and Financial Accounts," FinCEN Form 114, is required if total foreign financial accounts exceed \$10,000. The penalties can mount quickly. If your failure to file was non-willful: \$10,000 per. If you were bad, willfully, the civil penalty can be greater than \$100,000 or 50% of the account balance. If that isn't scary enough, if you're really naughty, criminal penalties can reach \$250,000 (and jail time).

✓ **Failure to file Form 5471.** This is an Information Return for U.S. Persons with Respect to Certain Foreign Corporations. US persons who are officers, directors, or shareholders in certain foreign corporations and others must file. Penalties can be \$10,000 and as much as \$60,000 for continued failure to file.

✓ **Failure to file Form 8938.** This is a Statement of Specified Foreign Financial Assets and is required if the value of certain foreign financial assets exceeds the reporting threshold. For married couples who are US persons, the threshold is \$150,000 any time during the year or \$100,000 at year-end. The penalties are \$10,000 and as much as \$50,000 for continued failures. A 40% penalty might also apply.

✓ **Failure to file Form 5471.** This is an Information Return for U.S. Persons with Respect to Certain Foreign Corporations. US persons who are officers, directors, or shareholders in certain foreign corporations and others must file. Penalties can be \$10,000 and as much as \$60,000 for continued failure to file.

Form 3520. This is an Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. You may be required to report the receipt of a gift or bequests over \$100,000. The penalty may be 35% of gross value.

✓ **Corporate Transparency Act penalties:** Reporting companies are required to report to FinCEN about themselves and their Beneficial Owners. There are severe penalties, including possible jail time, if someone fails to comply with these new rules. This is not a risk that should be taken lightly. Civil penalties are \$500/day which, with a COLA for 2024, are now up to \$591 per day. And that will rise in 2025. Criminal penalties can be a fine of up to \$10,000 and imprisonment of up to two years.

✓ **FTC Penalties for Inappropriate Noncompete.** The FTC enacted a ban on the use of non-compete agreements with very limited exceptions. If a business fails to comply, what liability might it face?

✓ **Searches.** Have you obtained lien, judgement and other searches (like credit reports) before transferring

significant assets out of your name to identify potential issues? If not, your transfers to LLCs, FLPs, irrevocable trusts, etc., might be more readily challenged. Before such transfers, whether for asset protection, estate planning or other reasons, document your net worth, known liabilities, or claims, and get an independent report corroborating the soundness of your financial position.

✓ **Stealth State Income Taxes.** Have you failed to realize and report income to a state that might be entitled to it? If you have multi-state contacts with your business or profession, state income tax rules can vary considerably, and navigating that patchwork is really complicated. If you might face issues, have you consulted with a state and local tax (SALT) expert? Perhaps that is worthwhile.
PP

RECENT DEVELOPMENTS

■ **Modifying Irrevocable Trusts gets riskier.** The IRS, in CCA 202353018, held that modifying a trust to add a tax reimbursement clause to permit the trustee the discretion to reimburse the settlor for income tax the settlor paid on trust income is a deemed gift by the remainder beneficiaries to the settlor. In the CCA, a discretionary trust was required to be distributed to the child. The child consented to the modification, adding the tax reimbursement, and the IRS concluded that there was a gift. The IRS did not believe the difficulty of estimating the value of that gift. How do you estimate income? How do you estimate tax to be paid? How can you determine whether a discretionary power will be exercised? How do you apportion the value among the various current and future beneficiaries? What if the grantor could relinquish the power? What if the grantor relinquishes the power to make it a non-grantor trust? What if the trustee and beneficiaries agreed to permit a tax reimbursement power in exchange for the grantor not relinquishing the power? No clarity.

■ **Does the above CCA have Wider Applicability?** Say you created a self-settled trust (DAPT) or a hybrid DAPT (a trust to which you can be added back as a beneficiary). What if you renounce that right? Well, that sure seems like a gift. Assume a trust has an independent trustee, and you are, at most, a discretionary beneficiary, where it is solely in that independent trustee's discretion to give you anything. Many would argue that while a gift might have occurred from your renunciation, there is no value that can be put on that gift. But if the rationale of CCA 202353018 is followed (and it seems pretty impossible to calculate the gift there), might that affect renunciations that might not have had a determinable value? What about even other transactions?

■ **Single Member LLCs May Not Get Charging Order Protection.** Charging order protection prevents the non-debtor LLC members from having to be members with the debtor/member's creditor. Whether the remaining member has charging order protection depends on state law and perhaps the discretion of the court. 245 Park Member LLC v. HNA Group, 2024 WL 1506798 (2nd Cir., April 8, 2024). PP

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■ **Simple Obsession.** If I had to identify one mistaken goal that undermines more planning than anything else, it would be the absurd prioritization of simplicity. Too many people, and even advisors, elevate simplicity above all. Life is not simple, and rarely is good estate planning. The approach should be to pursue real goals like asset protection planning, an overall reduction in all forms of tax, protection of vulnerable loved ones, etc. A common culprit in this obsession in the search for simplicity is a revocable trust (everything you read online isn't true!). Revocable trusts are powerful planning tools, but gaining the benefits requires more than signing a boilerplate form and doing nothing more. But even a reasoned application of a revocable trust doesn't substitute for proper asset protection and tax planning (revocable trusts provide neither). Is it even plausible to reduce estate taxes on an estate of hundreds of millions or billions of dollars "simply?" Focus

on important objectives. Then, use schematics of your plan, executive summaries, and organized compilations of all documents to make planning understandable, accessible, and easy to administer. That is a prudent way to find simplicity and accomplish real goals.

■ **Malpractice Insurance.** Contrary to the fantasy of many physicians, policy limits don't limit your liability. In a recent New Jersey malpractice case, an anesthesiologist was tagged for \$4.2M, \$2.2M more than the policy limits. The moral of this story is simple, don't rely on fairy tales and pursue asset protection planning before you need it. In an article quoting the victorious plaintiff's attorney in this case he encouraged others to pursue more than just the insurance coverage. Expect fellow litigators to listen! Plan early in your career and continue planning as your wealth and risks grow. Real asset protection planning is not simple. Putting assets in your spouse's name is simple but not suffi-

cient protection. Suit by the estate of Michelle Crisafulli in Essex County, NJ, settled in Aug 2024.

■ **Account Titles.** Financial firms setting up accounts for trusts and entities often have to truncate actual names to fit the fields available in their computer systems. Problems can arise when a clerk with no familiarity with overall family planning truncates names making different trusts/entities indistinguishable. For example, "Smith Trust" or "Smith Irrev Trust" could refer to any one of many different family trusts. If the names are confusing, deposits or payments will be made from the wrong accounts, thereby undermining the planning. PP



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