Estate Planning Tax Update—Highlights of Current Developments

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[Page numbers in square brackets refer to Akers & Nipp, "LOOKING AHEAD – Estate Planning in 2025 & Current Developments (Including Observations from Heckerling 2025) (EP), available at www.bessemertrust.com/for-professional-partners/advisor-insights.]

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1. Trending in 2025 [EP1-2]

a. Basic estate planning and coordination

b. Transfer planning trends in 2025: The exclusion amount likely will not be decreased on January 1, 2026, so the pressure clients may feel to use the bonus exclusion during the window of opportunity is greatly diminished; transfer planning is still important for clients comfortable making gifts (but we will likely see less SLAT planning); consider structuring trusts and planning ownership now to be in a position to make gifts when appropriate; GRATs still important (but not to utilize bonus exclusion)

c. Traditional transfer planning activities: Transfer planning to use "bonus exclusion" (first assure lifestyle needs); grantor trusts with GST planning; SLATs; defined value clauses; adequate disclosure; "topping off" gifts; utilizing "bonus" GST exemption

d. Ownership planning in 2025 to facilitate gifts in 2026

e. Corporate Transparency Act

f. Decanting; trust modification

g. Trust flexibility; directed trusts

2. Legislative Tax Changes in 2025 [EP2-29]

a. Greenbooks

(1) The Biden administration's FY 2023, 2024, and 2025 budget proposals (popularly called the "Greenbooks") have included detailed extensive legislative tax proposals (with broad sweeping changes for transfer taxes and grantor trusts)

(2) The Trump administration budget proposals during President Trump's first term did not include detailed legislative tax proposals. Whether they will in his second term remains to be seen.

b. Tax Legislative Issues in 2025

(1) Executive Summary. A major facet of tax legislation in 2025 will be extending the Tax Cuts and Jobs Act (TCJA) enacted in 2017. The Trump administration is proposing other tax cuts as well.

The legislation will proceed as a "reconciliation act." Once each fiscal year, Congress may adopt a reconciliation act that requires only majority vote approval in the Senate (rather than the traditional 60-vote requirement). Republicans have a majority of both the House and Senate in 2025; if they come to agreement, the House and Senate could pass a reconciliation act without bipartisan involvement.

Extension of the TCJA and other tax measures come with a big fiscal price tag. An extension of the TCJA would cost about $4.6 trillion over ten years (decreased revenues and additional interest expense). Other tax proposals have large revenue impacts as well. For example, extending the $10,000 limitation on the deduction for state and local taxes

(SALT) to $15,000 for individuals and $30,000 for joint filers would cost over $600 billion over ten years, and some members of Congress have been adamant that further relief for SALT taxes must be included in the tax package.

The U.S. has a $36 trillion national debt, and it is anticipated to grow to $58 trillion even without the extension of the TCJA. The deficit for the current fiscal year, through February 2025, is 17 percent higher than the prior fiscal year for the same period, largely due to spending increases in Medicare, Social Security, and interest on the public debt. Some members of Congress are very concerned about deficits and the growing national debt.

The Republicans have razor-thin margins in the Senate and especially in the House. Republicans hold a 218-213 majority in the House. The margin will be 220-214 after special elections are held in April and May to replace two Republican Representatives and one Democratic Representative who have died or resigned (assuming the successors are from the same party). If Democrats should win all three positions, the margin would be reduced to 218-216. (The Texas governor has delayed calling a special election to replace another deceased Democratic Representative from Texas, and the time has likely passed to be able to use the next scheduled election on May 3; it is a solidly Democratic district and a Democratic successor is likely. Rep. Elise Stefanik (R-NY) will remain in the House rather than being appointed as ambassador to the United Nations to assure that her seat remains Republican.) If the margin is 220-214 or 220-215, any three Republican Representatives could prevent a bill from passing because there is no method for breaking a tie vote in the House.

The reconciliation process begins with the adoption of a budget resolution, agreed to by both the House and Senate. The budget resolution sets a “budget window” (traditionally ten years), gives instructions to committees, and sets an overall deficit limitation. The House and Senate have each adopted their own budget resolutions, with big differences to be negotiated.

The Senate budget resolution only addresses border security and defense, while the House version also addresses taxes. The House budget resolution leaves $4.5 trillion for tax cuts and calls for $2 trillion of spending cuts over ten years. (The amount allocated to tax cuts will move down or up, dollar for dollar, to the extent spending cuts are less than or more than $2 trillion.) The House budget resolution would add $2.8 trillion to the national debt over ten years (but the resolution says it anticipates that $2.6 trillion of additional revenues will come from economic effects of the tax cuts, far more than most economists predict). One might anticipate that “budget hawks” in the House would be reluctant to agree to legislation that adds $2.8 trillion to the national debt over ten years, but Rep. Thomas Massie (R-KY) was the sole Republican in the House to vote against the budget resolution. He did so because the act would produce additional budget deficits, saying “Why would I vote for that?” On the other hand, one of the conservative members of the House Freedom Caucus responded, “It’s a new day.”

The “Byrd rule” applies in the Senate. Any Senator can call point of order as to (1) any item that does not have fiscal impact, (2) any item affecting Social Security, or (3) if the act

would increase deficits outside the budget window. (That third item is the reason most reconciliation acts "sunset" and revert to the prior law at the end of the budget window.)

Negotiations are underway to resolve the differences between the Senate and House budget resolutions. The Senate has agreed to add tax provisions (unless negotiations break down over the tax provisions). Some of the negotiations are about what additional tax provisions would be addressed in addition to extending the TCJA. Items being considered include the President's tax priorities, including exclusion of tips, overtime pay, and Social Security from income taxation. Senate Finance Chair Mike Crapo (R-ID) has acknowledged that the possible additions could cost between $800 billion and potentially several trillion dollars. He has noted that Senate Republicans have suggested nearly 200 tax proposals; he identified only three of them, one of which is "repeal, or at least reduction of the estate tax, as 'rather prominent senators' want." Doug Sword, *Crapo Says Tax Package Will Be Bigger and Broader Than Expected*, 186 TAX NOTES FEDERAL 2076 (Mar. 13, 2025).

A major difference between the House and Senate resolutions is that the Senate uses a "current policy" baseline (which assumes that the current tax rates or provisions continue indefinitely) to gauge the economic impact of the act, whereas the House uses a current law approach (which assumes that the tax system will revert to its pre-TCJA state as is called for under current law (on January 1, 2026, for the individual and estate tax provisions)). The Senate version would allow the TCJA to be extended permanently (because the system currently in effect is the baseline for judging the fiscal impact of the act). Some members of the House and Senate view that as "intellectually dishonest" and "magic math." Even if the current policy baseline assumes no revenue impact, passage of the act would still increase deficits by $4.6 trillion (less whatever spending cuts are included) over ten years. To avoid the Byrd rule if a current policy approach is used, each of the approximately 40 provisions in the TCJA would have to be tweaked in some way that is more than "merely incidental" so that each of those provisions would have a fiscal impact (compared to the current policy). The Congressional Budget Office and the Joint Committee on Taxation are required to "score" fiscal bills using a current law baseline approach. The current policy baseline approach has never been used for a reconciliation act, and the Congressional Budget Act (which sets out the reconciliation process) in §257 defines the baseline using a current law approach. However, the budget resolution conceivably could, in setting the limit on the amount by which deficits may be increased under the act, direct that the deficits be calculated for purposes of that limit using current policy as a baseline.

The current policy baseline issue will have a vitally important impact: "Just how jarring the eventual price tag will be depends on whether Crapo and Senate leadership can win approval from the Senate parliamentarian – or proceed without that approval – for the reconciliation bill to be scored on a current-policy basis. *Id*.

Assuming, consistent with the Congressional Budget Act, that the current law approach is used, tax cuts might last less than the full ten years of the budget window. That happened in the 2017 Act, when the individual tax provisions ended after 8 years in order to meet the overall $1.5 trillion deficit impact number set in the budget resolution for the TCJA.

The TCJA (including the $10 million (indexed) estate and gift tax exclusion amount) likely will be extended, but it may be for just ten years, or it may be for less than ten years, or it may be "permanent" if the current policy approach is used (although any tax law can be changed by the next Congress). But that cannot be certain. Lots of negotiation remains, and negotiations around specific spending cuts may be very intense. Negotiations may include whether the estate tax will be repealed or reduced (but it seems unlikely that the estate tax could be repealed in a reconciliation act because of the Byrd rule). The Republicans' goal is to have the act completed by late May, but negotiations may extend that process to substantially later in 2025.

In the meantime, many clients who do not want to lose the opportunity of using the large (now almost $14 million) gift exclusion amount, but are not eager to make large gifts, may take a wait-and-see approach. If willing to do so, a client may consider engaging in planning, structuring trusts, etc., so the planning will be in place when the client decides to make large gifts (especially if it appears at some point that the large exclusion amount may not be extended). Clients who have enough wealth that they are comfortable making gifts are best advised to make the gifts currently, so that future appreciation can be removed from their estate.

Bills to repeal the estate tax (but leave the gift tax with a lower 35% rate) have been filed in the House and Senate, but those bills would require a 60-vote approval in the Senate (unless long-term spending cuts were to offset the lost revenue from the estate tax repeal), and at this point appear unlikely to be enacted.

(2) Republican Sweep. The Republican sweep of the Presidency and majorities in the Senate and House in the 2024 elections (the "Republican trifecta") will lead to major anticipated legislative changes.

(3) Extremely Brief Overview of Tax Proposals. The Republicans' primary tax focus will be to make permanent the individual and business income tax cuts and the transfer tax cuts in the 2017 Tax Act, sometimes referred to as the Tax Cuts and Jobs Act (TCJA). Most of those provisions would otherwise sunset on January 1, 2026. (As discussed below, however, most of those cuts would only be extended for 10 years, or even less, because of the legislative "reconciliation" process.)

The Trump administration has not identified its position on transfer taxes other than extending the 2017 Tax Act cuts (i.e., keeping the exclusion amount at $10 million, indexed for inflation).

The Trump administration has also suggested additional cuts at various times including (1) cutting the corporate income tax rate from 21% to 15% (perhaps only for companies having their activities in the United States), (2) expanding the SALT deduction, (3) providing income exclusions for tips for certain industries (but tipped income would still be subject to payroll taxes), overtime pay (which could cost $750 billion over 10 years), and Social Security payments, (4) creating new tax cuts for made-in-America products, (5) "tax incentives" for shipbuilding (mentioned in President's address to Congress on March 4, 2025), and (6) making interest payments on car loans for American-made vehicles tax deductible. The administration has proposed increasing revenues by adding additional

tariffs (which may be in executive orders rather than in a reconciliation act), ending the carried interest break used by private equity fund managers, and ending tax breaks for sports team owners. *See* Gardner, *Trump Will Seek to End Carried Interest, Expand SALT in Tax Bill*, BLOOMBERG DAILY TAX REPORT (February 7, 2025); Edmondson & Duehren, *Medicaid and More May Be Cut to Pay for Trump's Agenda*, NEW YORK TIMES, Section A at 15 (January 23, 2025).

(4) Financial Impact.

- The following are summaries of financial impacts over 10-years (generally, 2025-2034)
- Full extension of TCJA: $4.6 trillion ($3.973 trillion of tax and $606 billion of interest) (Congressional Budget Office, May 2024); $5.429 trillion ($4.719 trillion after considering economic effects((Tax Foundation Feb. 26, 2025)
- TCJA individual provisions: $3.37 trillion, with $372 billion offsetting from growth, net effect of about $3 trillion (Joint Committee on Taxation Dec. 2024); $3.72 trillion ($3.256 trillion of tax and $467 billion of interest) (Congressional Budget Office May 2024)
- TCJA individual and estate tax provisions: $4.154 trillion (tax, no interest amount is supplied) (U.S. Department of the Treasury Office of Tax Analysis Jan. 10, 2025); $3.9 trillion ($4.5 trillion with interest) (Committee for a Responsible Federal Budget, Dec. 2024)
- TCJA individual provisions only for individuals with income below $400,000 (assuming business and estate tax cuts would expire): $1.8 trillion (Treasury Office of Tax Analysis, Jan. 10, 2025)
- Extending $10 million (indexed) estate tax exclusion: $223 billion (Treasury Office of Tax Analysis, Jan. 10, 2025); A prior estimate was $167 billion plus $22 billion additional interest, total of $189 billion (Congressional Budget Office May 2024)
- Full extension of TCJA and other Trump proposals (including repealing the SALT deduction limitation): $6.6 trillion (Tax Foundation Nov. 2024); $7.5 trillion (Committee for a Responsible Federal Budget, Oct. 2024)
- Cutting taxes on tips: $100 billion to $550 billion depending on how applied (Committee for a Responsible Government, Feb. 2025)
- Cutting taxes on overtime: $150 billion to $3 trillion depending on how applied (Committee for a Responsible Government, Feb. 2025)
- Cutting taxes on Social Security: $550 billion to $1.5 trillion depending on how applied (Committee for a Responsible Government, Feb. 2025)
- Cutting corporate tax rate to 15% for domestic manufacturing: $100 billion to $200 billion depending on how applied (Committee for a Responsible Government, Feb. 2025)
- Closing carried interest loophole: Additional revenue of $20 billion to $100 billion depending on how applied (Committee for a Responsible Government, Feb. 2025)

(5) Do Tax Cuts Pay for Themselves? The Joint Committee on Taxation's unofficial conventional revenue estimate for extension of just the individual expiring provisions of the TCJA is a loss of $3.37 trillion, and $372 offsetting revenue from extra economic growth would reduce the loss to about $3 trillion. Accordingly, the beneficial effects of tax cuts on the economy are an 11% reduction of the revenue cost, far short of the 100% needed to claim that tax cuts pay for themselves.

Other estimates of revenue from extra economic growth for extending the TCJA: Congressional Budget Office (Dec. 2024) – "little budgetary impact"; Tax Foundation (Nov. 2024) – 7.5%; Urban-Brookings Tax Policy Center (Feb. 2025) – 6%; Penn Wharton Budget Model (Feb. 2025) – "low"

The House Budget resolution assumes $2.6 trillion in revenue from macro-economic effects of the TCJA extension (discussed below).

(6) Deficit and National Debt Concerns are Growing.

- 2001: $128 billion surplus; on schedule to pay off the national debt by 2009
- 2005: $4.6 trillion
- 2015: $13.1 trillion
- 2025: $36 trillion
- 2035: Even without extension of tax cuts, national debt is on course to grow to $58 trillion (Congressional Budget Office June 2024).
- The CBO's latest estimate (as of March 2025) is that the debt will grow from 100% of GDP in 2025, to 107% in 2029 (exceeding the historical peak of 106% of GDP it reached in 1946 immediately after World War II), to 118% of GDP in 2035, and to 156% of GDP in 2055. The CBO's prediction is that GDP would grow at an average rate of 1.8%, down from a predicted rate of 2% a year ago, because of projections of lower growth in private investment and consumer spending.
- The CBO estimates (as of March 2025) that if the TCJA were extended and there were no other changes to fiscal policy, debt held by the public would reach 214% of GDP in 2054 (47 percentage points higher than if the TCJA were not extended).
- Revenues in 2025 would be $700 billion higher if they were 19.5 percent of GDP, as in the years before the Bush tax cuts. (Center on Budget and Policy Priorities, Feb. 2025)
- The Congressional Budget Office predicts extending the TCJA would result in annual deficits exceeding $2 trillion (6.6 percent of projected GDP) starting in 2027 and rising from there. The budget deficit for FY 2024 (ending Sept. 30, 2024) was $1.8 trillion (6.4 percent of GDP). Treasury Secretary Scott Bessent has argued that reducing annual deficits below 3 percent of GDP should be a priority.
- The budget deficit for the current fiscal year, through February 2025, is $1.15 trillion, 17% larger than the prior year after adjusting for differences in the calendar. Revenue is up an adjusted 2%, but outlays were up 7% for the fiscal year through

February 2025, adjusting for calendar differences. The biggest increases in spending, compared to the prior fiscal year through February, came from the Medicare program ($124 billion more), interest on public debt ($45 billion), and Social Security ($49 billion more).

(7) Interest Payments.

- 2020: $345 billion annually
- FY23: $704 billion
- FY24: $950 billion
- Interest on national debt is now the second largest federal expenditure (after Social Security, which costs $1.5 trillion) (Tax Foundation, Oct. 2024)

(8) Inflation.

- Tax cuts can be inflationary by increasing demand in an already tight economy, though their actual impact on inflation can vary based on how they are implemented and the prevailing economic conditions
- Tariffs, cutbacks on immigration, and additional borrowing are all inflationary

(9) Thin Political Margins.

- "Razor-thin" is the political buzzword in 2025 (House: 218-213; Senate 53-47). The margin was 218-215 prior to the deaths of two Democratic Representatives, who will be replaced in special elections. Elections in April 2025 will fill two Republican seats. After the elections to replace the two Republican seats and one Democratic seat, the margin will be 220-214, if elected replacements are from the same party. If Democrats should win all three seats, the margin would be 218-216.
- (The Texas governor has delayed calling a special election to replace another deceased Democratic Representative from Texas, and the time has likely passed to be able to use the next scheduled election on May 3; it is a solidly Democratic district and a Democratic successor is likely. Rep. Elise Stefanik (R-NY) will remain in the House rather than being appointed as ambassador to the United Nations to assure that her seat remains Republican.) If the margin is 220-214 or 220-215, any three Republican Representatives could prevent a bill from passing because there is no method for breaking a tie vote in the House.
- Recent article: "[t]he paper-thin GOP majority will introduce complications not seen in 2017, leaving little room for disagreement with the ranks…. Last month's government funding debate provided an early taste of what's likely to come"
- A recent article referred to "the reality that the tiny House GOP majority – a fractious group of lawmakers willing to torch members of their own party during heated disputes – will have a hard time passing even one bill, let alone two"
- Budget hawks campaigned primarily on reducing the federal deficit. Rep. David Schweikert (R-Ariz.) who chairs the House Ways and Means subcommittee on

oversight, has said he would oppose his party's signature tax bill this year if it is "debt-financed."

- Some Republicans in high-tax states have demanded an expansion of SALT deductions
- "Every House Republican has a veto. Peace in the Middle East will be easier." Douglas Holtz-Eakin, former director of the Congressional Budget Office
- If the Act is not completed by September, campaign season starts for the 2026 mid-terms, and reaching compromise will be more difficult

(10) SALT Cap Repeal.

- Trump administration favors some relief from the $10,000 limit on SALT deductions
- Full repeal of SALT cap: $1.2 trillion (over 10 years) (Committee for Responsible Federal Budget, August 2024)
- Boosting cap to $15,000 for individuals and $30,000 for joint filers: $636 billion (Tax Foundation, December 2023)
- The very narrowly divided Senate and House means that a few Congressmen from New York, California, and other high income tax states could threaten to buck the entire reconciliation package without a concession on the SALT issue. Lawmakers critical of the SALT cap will have more sway than when TCJA became law because of razor-thin margins.

(11) Pay-Fors.

- Some Republican tax leaders believe a "current policy" approach should be applied, which would not require an offset
- "No one leads with offsets. Offsets are released later because they are just not attractive."
- The House Ways and Means Committee has circulated a 50-page document listing a wide variety of possible spending cuts.
- Offsetting $4.6 trillion of revenue losses, however, will be difficult; instituting structural reform of entitlements would be a heavy political lift. President Trump campaigned to some degree on not touching Medicare or Social Security.
- Cutting the federal workforce other than the Departments of Defense, Veteran Affairs, and Homeland Security by 10% will save about $10 billion annually. Cutting the entire federal workforce by 10% could save up to $600 billion over 10 years (including both salaries and health benefits).
- Tariffs may add additional revenue, but tariffs added by executive orders would not be in the reconciliation act and could not be recognized as pay-fors to offset the revenue losses from extending tax cuts. Suggested 25% tariffs for Mexico and Canada would raise $1.3 trillion over 10 years and additional 10% tariffs for China would raise $200 billion over 10 years (if they are applied broadly and kept in place for the full 10 years).

- House Freedom Caucus (budget hawks) are requesting $2.5 trillion of spending cuts over 10 years, and tax cuts would be reduced by the amount spending cuts are less than $2 trillion
- Other tax increases mentioned by the Trump administration that would act as pay-fors are ending the carried interest break used by private equity fund managers and ending tax breaks for sports team owners. *See* Doug Sword, *Trump Has Pay-Fors Too: Carried Interest, Sports Teams*, 186 TAX NOTES FEDERAL 2092 (Mar. 17, 2025).

(12) Reconciliation Legislative Process. The Senate can pass tax legislation with a mere majority under the reconciliation legislative process enacted in the Congressional Budget Act of 1974. That Act was used for the first half of its existence to *reduce* deficits; starting in 2021, it has been used to grow deficits more than half the times it has been used.

- Budget Resolution; Deficit Limit. The process begins in the House with the passage of a budget resolution that specifies a budget window (at least five, but typically ten years), the maximum amount the bill could add to deficits, and general budget instructions for each committee. The budget resolution must then be passed by the Senate.
- Negotiations over the deficit amount can be difficult. (2017: not agree until Oct. 5, 2017)
- The deficit limit number will be very telling as to how long extensions may last
- Senate "Vote-a-Rama." The Senate allows unlimited debate and amendments on reconciliation bills. The minority introduces amendments that are embarrassing to vote against. (Example: In 2010 Democrats had to take hard-to-defend positions, such as voting down an Affordable Care Act rider that would have prohibited qualified plans from providing an erectile dysfunction treatment to sex offenders.)
- Byrd Rule. While the reconciliation act is not subject to Senate filibuster, under the "Byrd rule" any single Senator can call a point of order against any provision or amendment that is "extraneous" to the reconciliation process for various prescribed reasons, including (1) provisions without fiscal impact (the measure can only be for the purpose of implementing budget changes [spending and revenue provisions]; for example, a provision mandating an increase of the minimum wage would not be germane to fiscal matters), (2) provisions that impact Social Security, and (3) any provision that raises deficits beyond the budget window of the reconciliation bill unless other provisions in the bill fully offset these costs.
- Scoring Rules. Current law vs. current policy baseline
  - Current Policy baseline presumably allows TCJA extension to be permanent (the baseline would assume TCJA remains in place because it is current policy)
  - Treasury Secretary Scott Bessent has stated that a current policy approach will be used
  - Nine Republicans on the Senate Finance Committee, led by Senators Crapo and Thune, sent a letter to President Trump on Feb. 13, 2025, vowing they "would not support a tax package that only provide temporary relief from taxes"

- Some Republicans disagree: "It is an intellectual fraud to say, 'Let's ignore the actual law and let's just keep doing what we're doing because it's convenient,'" (Rep. David Schweikert (R Arizona), who chairs House subcommittee overseeing the IRS); Rep. Chip Roy (R-TX) said of the current policy baseline approach, "This is fairy dust, and they're full of crap. And I'm gonna call them out on it"; the House Republican Study Committee released an official position statement in Jan. 2025 that reconciliation legislation must reduce the federal deficit.
- Even if extending the TCJA is viewed for legislative purposes as having no budgetary impact, it still would increase deficits by $4.6 trillion over 10 years compared to not extending it, which could rattle financial markets. *See* Reshma Kapadia, *This Technical Accounting Debate Could Rattle Debt Markets. Here's Why.*, BARRONS (Mar. 28, 2025) ("'Once you do this, there is no turnoff of the spigot. Fiscal restraint is over,' [Henrietta Treyz, Veda Partners] says. That could rattle investors already worried about the deficit, potentially pushing investors to short the U.S. dollar and push bond yields higher, she adds.").
- Budget resolution can define budget deficit impact using current policy baseline
- If a current policy approach is used, each of the 40 expiring provisions in the TCJA may need to be tweaked to have a revenue impact and not be "extraneous" under the Byrd rule. But the tweaks must be more than "merely incidental."
- Even if a current policy baseline is used, House Budget Committee Chair Jodey Arrington (R-TX) has questioned whether it would also apply for purposes of determining if deficits would be increased outside the budget window for purposes of the Byrd rule. *See* Tobias Burns, *Tax, spending rankle Republicans despite momentum on reconciliation*, THE HILL (Mar. 27, 2025) ("Well, even though there's no impact to the budget, there is an increase to the deficit outside the 10-year window," quoting Rep. Arrington).
- Sen. Crapo has lamented that "spending is under current policy baseline that's intended to protect the spending, so it goes on perpetually," but tax extensions are treated differently. *See* Maureen Leedy, *Tax Reform Scoring Tactic Risky, Say Experts*, RIA CHECKPOINT (Mar. 17, 2025). However, Bobby Kogan, director of the Center for American Progress, disagrees, saying, in effect, that the spending was scored when initially adopted, and the key point of scoring is that all costs are recognized at some point. "It's not the case that spending gets one treatment, and revenue gets a different treatment. I don't think anyone is trying to be misleading. I think it comes from lack of education in this area." *Id.*
- Precedent concern – "Congressional Republicans must recognize that a future Democratic Congress and President will use that precedent to enact Medicare for All, the Green New Deal, and Universal Basic Income for just one year, and then come back a year later and make it all permanent at "zero cost" because, "those programs are reality." *Heads I Win, Tails You Lose: The Myths Behind "Current-policy Baseline,"* Arnold Ventures (Feb. 27, 2025). A letter from the

Joint Committee on Taxation confirms that if it were asked to score legislation using a current policy baseline, it would assume that maintaining current spending levels would have no reportable budgetary effect.

- The current policy baseline has never been used in reconciliation; indeed, it has never been used for official scoring of any legislation in the Senate (other than extending excise taxes dedicated to a trust fund, pursuant to a specific statutory authorization). The Obama administration promoted the current policy baseline rhetorically to justify extending Bush tax cuts set to expire at the end of 2012, but the CBO and Joint Committee on Taxation used the current law baseline to score the legislation, as required by congressional rules. The Obama administration did that to highlight that they were raising revenue compared to current policy by increasing income taxes on wealthy taxpayers by allowing certain tax cuts to expire.

  The Senate Parliamentarian rules on procedural issues such as whether an item is extraneous in reconciliation; she ruled in 2017 that the individual tax cuts that will expire at the end of 2025 were "explicitly temporary" and therefore would not violate the Byrd rule; she might view an approach treating an extension as having no cost in the 2025 act as being inconsistent. She also rejected requests to change scoring procedures by Republicans in 2017 and Democrats in 2021. *See* Zach Cohen, *Tax Bill's 'Magic Math' Approaches Inflection Point in Congress*, BLOOMBERG DAILY TAX REPORT (Mar. 18, 2025). The Senate could overrule the parliamentarian's decision, or replace her with a more "sympathetic umpire," but that could set a bad precedent. Some commentators have suggested that effectively would emasculate the Byrd rule; financial commentators have suggested that could "rattle debt markets." *See* Reshma Kapadia, *This Technical Accounting Debate Could Rattle Debt Markets. Here's Why.*, BARRONS (Mar. 28, 2025) ("What else could get investors' attention and create some volatility in bond markets: If there is a move to overrule the Senate parliamentarian or a growing view that the administration is 'monkeying around' with how the CBO scores legislation, says George Pearkes, macro strategist at Bespoke Investment.").

- Cumbersome Process. Reconciliation is a cumbersome time-consuming process, requiring involvement of CBO and Joint Committee on Taxation

- One or Two Reconciliation Acts in 2025? Two reconciliation acts are possible for 2025, one for FY 2025 and one for FY 2026. The Senate prefers two acts, so the first one dealing with border control and defense. The House prefers one bill. Senate leaders have conceded they will proceed with a one-bill approach (unless negotiations over the tax provisions break down).

- Senate Budget Resolution The Senate passed its budget resolution for fiscal year 2025 on Feb. 21, 2025,. The resolution was approved by a vote of 52 to 48 and serves as a blueprint for reconciliation legislation focusing on border security, military spending, and energy production. Sen. Graham (R-S. Carolina) released the

Chairman's Mark of a budget resolution on February 7, 2025, that would address border security ($175 billion), defense ($150 billion) , with a cost of $85.5 billion annually for 4 years (total of $342 billion), that would be paid for with a reduction in annual spending of up to $520 billion over four years.

- A major discussion issue between the Senate and House will be whether to use the current policy baseline approach so the TCJA can be extended permanently. Republican House taxwriters have said that much of the focus of ongoing meetings will be on maximizing the permanency of TCJA extensions. House Ways and Means Committee member Ron Estes (R-KN) seems open: "I think the big thing is we want to make as much permanent as possible, so we don't have to have these battles every so often." *See* Cady Stanton, *House Taxwriters to Start Work Despite Stalemate With Senate*, TAX NOTES TODAY FEDERAL (Mar. 5, 2025).
- House Budget Resolution The House passed the budget resolution by a vote of 217-215 on Feb. 25, 2025. It addresses taxes as well as border security, immigration, and defense. Leadership has struggled with reaching measures that are acceptable to the both the "Freedom Caucus" members (budget hawks who want to reduce spending and reduce deficits) as well as more moderate members of the Republican party. Key elements are highlighted.
  - Budget window: 2025-2034
  - Ways and Means Committee (tax cuts): $4.5 trillion (sliding scale; will go up or down to the extent spending cuts are more than or less than $2.0 trillion; so, if spending cuts are $1.5 trillion, the tax cuts number would be cut to $4 trillion, and if spending cuts are $2.5 trillion, the tax cuts number would be increased to $5 trillion)
  - Additional allocation to Defense: $100 billion
  - Additional allocation to Homeland Security and Judiciary Committees (border and immigration enforcement): $200 billion
  - Spending cuts: $2.0 trillion (Those spending cuts may impact Medicaid and Affordable Care Act ($880 billion), food assistance programs ($230 billion), student loan programs, Medicare, etc.)
  - Total of tax cuts and spending increases: $4.8 trillion (because the tax cuts are not needed for 2025, this translates to $5.5 trillion to $6 trillion of ten-year increases, see *Taking a Closer Look at the House Budget's Reconciliation Instructions*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Feb. 12, 2025))
  - Uses current law approach
  - Estimates that the reconciliation bill will generate revenue of $2.6 trillion in macroeconomic impacts over 10 years, much larger than predicted by economists (see Item 2.b(4) above). The resolution assumes GDP growth would be 2.6 percent per year for the coming decade instead of the Congressional Budget Office's 1.8 percent estimate.

- Assumed net financial impact: $4.5 trillion for tax cuts and $300 billion for border security and defense total $4.8 trillion; to be offset by $2 trillion in spending cuts and $2.6 trillion in revenues coming from higher than projected economic growth; nets to $200 billion short of paying for itself The $4.5 trillion for tax cuts may not include any amount for SALT relief or the Trump administration's other tax cut goals (no tax on tips, overtime pay, Social Security); without the $2.6 trillion from projected economic growth, the plan results in $2.8 trillion added to the national debt over ten years
- By comparison, the budget resolution for the 2017 TCJA allowed for a deficit increase of $1.5 trillion over the 10-year budget window
- $4 trillion increase in debt ceiling (which could be controversial with budget hawks)
- Mixed messages: Freedom Caucus members say they support the budget resolution despite the deficit increases. Statement from Republican Study Committee Steering Group stated, "Reconciliation legislation must reduce the federal budget deficit. Our national security depends on our ability to bring about meaningful fiscal reform." Elizabeth Elkind, *Scoop: Key Conservative Caucus Draws Red Line on House Budget Plan*, FOX NEWS (Jan. 29, 2025), available at **https://www.foxnews.com/politics/key-conservative-caucus-draws-red-line-house-budget-plan**; "Republicans are going to have to square the two arguments – that tax cuts pay for themselves and that the growing deficit is a concern – in order to succeed." Doug Sword, *What to Expect From Scoring the 2025 Tax Bill*, 186 TAX NOTES FEDERAL 35 (Jan. 6, 2025).
- Much negotiation ahead; for example –
  - Some Republicans say they will not vote for a plan that does not include SALT deduction relief and some Republicans likely will not vote for a plan that makes substantial cuts to Medicaid in a way that would harm rural hospitals and nursing homes
  - Rep. Murphy (R-North Carolina) says some provisions are "sacrosanct," including the §199A deduction and the doubled estate tax exemption
  - Rep. Thomas Massie (R-KY), the lone Republican to vote against the House budget resolution, said it would increase deficits – "Why would I vote for that?"
  - Reflecting on the fact that the House budget resolution would add nearly $3 trillion to deficits over 10 years, Rep. Ralph Norman (R-SC), a member of the House Ways and Means Committee and member of the conservative House Freedom Caucus (and considered a "budget hawk"), remarked, "It's a new day."

- Budget hawks will be demanding in negotiations (and with the razor-thin Republican majority in the House, a small handful of them hold a veto power).

- Just because representatives voted for the budget resolution does not mean they would vote to enact the same provisions: (1) there was pressure to pass a House budget resolution so the Senate budget resolution would not drive the process; and (2) passing the budget resolution is the first step so that further negotiations can proceed (Rep. Tim Burchette (R-TN) expressed this viewpoint colorfully – "It's not everything I wanted, but in this game, you're either at the table or on the menu. It's time to get at the table.")
- The House budget resolution initial draft suggests it would support extension of much or all of TCJA for 10 years, but a lot of negotiation remains.

(13) Negotiations to Resolve Differences Between Senate and House Budget Resolutions. As discussed above, the Senate has agreed to a one-bill approach that will address taxes as well as border security and defense. Additional tax provisions are being considered in addition to an extension of the TCJA. Senate Finance Committee Chair Mike Crapo (R-ID) has said "It's a bigger deal than everybody is focused on," itemizing between $800 billion and potentially several trillion dollars of tax provisions that might be added to extension of the TCJA. *See* Doug Sword, *Crapo Says Tax Package Will Be Bigger and Broader Than Expected*, 186 TAX NOTES FEDERAL 2076 (Mar. 13, 2025). Some or all of the President's tax priorities will be included, adding $300-$500 billion or up to $3 or $4 trillion of cost, depending on specific features. Id. In addition, Senate Republicans have suggested nearly 200 tax proposals that will be considered. Crapo named only three of them, (1) "repeal or at least reduction of the estate tax, as 'rather prominent senators' want," (2) increases to the low-income housing credit, and (3) changes to tax-favored Opportunity Zones. Id.

The current policy baseline issue will have an important impact on what additional items might be added: "Just how jarring the eventual price tag will be depends on whether Crapo and Senate leadership can win approval from the Senate parliamentarian – or proceed without that approval – for the reconciliation bill to be scored on a current-policy basis. *Id.*

Like the House budget resolution, the Senate is also looking at the argument that $2.6 trillion of additional revenue would be produced from economic growth spurred by the package. *Id.*

(14) Shortened Extension to Reduce Deficit Impact. One way of dealing with the cumulative deficit impact of tax cuts is to reduce the period of the extension. The 2017 Tax Act reduced its deficit impact (to $1.5 trillion) by shortening the extension to eight years rather than the full ten years of the budget window. Three ways of reducing the bill's deficit impact are to (i) make it shorter, (ii) make it skinnier by reducing the tax cuts, and (iii) include pay-fors. The two likely approaches in 2025 will be making it shorter and adding some pay-fors.

Some experienced lobbyists had predicted the extension of tax cuts will be 3 to 5 years. But the House budget resolution initial draft issued February 12, 2025, would support much or all of the TCJA extension for 10 years (but much negotiation remains).

(15) Estate and Gift Tax Measures; Impact on Planning. Because of the Byrd Rule, the extension of the $10 million (indexed) exclusion amount will probably only last for 10 years (or less), perhaps as few as 3-5 years. Whether it will be further extended may depend on how the political winds are blowing at that time.

Repeal? But that would take 60 votes in the Senate. (Death Tax Repeal Act bills were filed in the Senate and House in February 2025.)

The greatly increased likelihood that the $10 million (indexed) exclusion amount will be extended has reduced the perceived pressure on clients to take advantage of the large exclusion amount before it may be slashed in half.

- Many clients may wait to see what Congress does.
- Less emphasis on SLATs than we had predicted earlier
- Clients who have enough wealth that they are comfortable making gifts are best advised to make the gifts currently, so that future appreciation can be removed from the estate.

(16) Conclusion. The $10 million indexed estate and gift tax exclusion amount will likely be extended, possibly limited to less than 10 years. But that is not a given, significant hurdles exist, and the legislation may not be passed until late in the year (or even into early 2026). The budget impact number that is agreed to in the budget resolution will be telling as to how extensive and how long the extension may be. The House budget resolution initial draft suggests it would support extension of much or all of TCJA for 10 years, but a lot of negotiation remains.

c. Additional IRS Funding in Inflation Reduction Act. The continuing resolution to avert a government shutdown enacted March 15, 2025, rescinded $20.2 billion of funds that had been allocated for enforcement. In total, $41.8 billion of the $45.6 billion in IRS enforcement funds under the Inflation Reduction Act have been clawed back. *See* Cady Stanton, *Senate Passes Stopgap Stripping $20B From IRS, Avoiding Shutdown*, TAX NOTES TODAY FEDERAL (Mar.17, 2025).

The Congressional Budget Office Economic Outlook Report in January 2025 estimates that the $20 billion of rescinded funds for enforcement would reduce individual and corporate income tax receipts over the 2025-2034 period by $66 billion, resulting in a net increase in the projected cumulative deficit of $46 billion. Congressional Budget Office, THE BUDGET AND ECONOMIC OUTLOOK: 2025 TO 2035, at 14 (released January 17, 2025). Other estimates are that audits of high-income taxpayers can have a yield of up to 12-to-1 (added revenue compared to IRS enforcement cost).

The Trump administration is aiming to cut up to **half** of the IRS's roughly 100,000 workforce. *See* Erin Stowey, *Trump Aims to Cut IRS Workforce in Half by End of Year*, BLOOMBERG DAILY TAX REPORT (Mar. 4, 2025).

3. Miscellaneous IRS Guidance; Proposed Regulations

a. Trump Election. An executive order dated January 31, 2025, reinstates an April 11, 2018 memorandum of agreement between the Treasury and OMB to allow OIRA to review proposed

regulations. The order also stipulates that for every new regulation, 10 other regulations should be identified for repeal. **[EP29-30]**

b. An executive order dated Feb. 19, 2025, titled "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Regulatory Initiative," charges agency heads to identify the following types of regulations: (i) unconstitutional regulations and regulations that raise serious constitutional difficulties, such as exceeding the scope of the power vested in the Federal Government by the Constitution; (ii) regulations that are based on unlawful delegations of legislative power; (iii) regulations that are based on anything other than the best reading of the underlying statutory authority or prohibition; (iv) regulations that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority; (v) regulations that impose significant costs upon private parties that are not outweighed by public benefits; (vi) regulations that harm the national interest by significantly and unjustifiably impeding technological innovation, infrastructure development, disaster response, inflation reduction, research and development, economic development, energy production, land use, and foreign policy objectives; and (vii) regulations that impose undue burdens on small business and impede private enterprise and entrepreneurship.

   The first three of (those items seem tied to the *Loper Bright* Supreme Court decision). With another nod to *Loper Bright*, section 3 of the executive order also directs that "agencies shall preserve their limited enforcement resources by generally de-prioritizing actions to enforce regulations that are based on anything other than the best reading of a statute and de-prioritizing actions to enforce regulations that go beyond the powers vested in the Federal Government by the Constitution."

c. Inflation Adjusted Amounts for 2025 (based on the relevant chained CPI factors published by the Bureau of Labor Statistics for August 2024) were published in Rev. Proc. 2024-40

   (1) Basic exclusion amount and GST exemption –$13,990,000 for 2025 (up from $13,610,000 in 2024) Gift tax annual exclusion – $19,000 (up from $18,000 in 2024)

   (2) Top 37% income tax bracket for estates and trust will begin at $15,650 in 2025 (up from $15,200 in 2024)

   (3) The increase of the basic exclusion amount to almost $14 million in 2025 suggests that if the estate and gift exclusion amount decreases from $10 million (indexed) to $5 million (indexed) in 2026, it would be some amount over $7 million in 2026.

d. 2024-2025 Treasury-IRS Priority Guidance Plan (for July 1, 2024-June 30,2025) adds three new projects in the "Gifts and Estates and Trusts" section. **[EP30-32]**

   (1) Guidance regarding amounts qualifying as distributions of income exempt from estate tax under §2056A (Number 6).

   (2) Regulations under §2642 regarding the redetermination of the inclusion ratio on the sale of an interest in a trust for GST exemption purposes (Number 9). (For example, if G1 creates a trust for G2 and G2 sells its beneficial interest to G3, are trust distributions to G3 taxable distributions? Are they indirect distributions to G2? If G2 sold the interest for fair value, there is no gift so no change of transferor occurs for GST purposes. *See* Bramwell and

Weisbart, *The Dueling Transferors Problem in Generation-Skipping Transfer Taxation*, 41 ACTEC L.J. 95 (Spring 2015).)

(3) Guidance updating the user fee for estate tax closing letters (Number 12). (The project about establishing a user fee for estate tax closing letters (Reg. §300.13 (T.D. 9957)) was finalized on September 27, 2021, effective October 28, 2021. Charging a user fee for closing letters was the only way to keep issuing them at all. Informal indications are that the price will be going down; the IRS has corrected a lot of issues with the closing letter system. Closing letters are obtained through pay.gov.)

e. Final regulations under §2801 were issued on January 10, 2025 (T.D. 10027). Section 2801 was enacted as part of the Heroes Earnings Assistance and Relief Tax Act of 2008 (the HEART Act). **[EP45-48]**

(1) Section 2801 Background. The estate and gift tax provision of the Code are in chapters 11-14. New chapter 15 consists solely of §2801. Section 2801 very generally imposes a tax on certain transfers of property by gift (covered gifts) and on certain transfers of property by bequest (covered bequests) from certain individuals who expatriate on or after June 17, 2008 (covered expatriates).

The §2801 tax is imposed on each United States (U.S.) citizen or resident receiving (directly or indirectly) a covered gift or covered bequest on or after June 17, 2008. (This is very different from the gift and estate tax, which imposes the tax on the donor or decedent. This tax is imposed on the recipient (who may not even be aware of the gift or bequest).)

If the aggregate value of the covered gifts and covered bequests received by the U.S. recipient during the calendar year exceeds the amount of the inflation-adjusted annual exclusion under §2503(b) ($19,000 for 2025), the §2801 tax is computed by multiplying the excess by the highest estate tax rate specified in §2001(c) in effect on the date of receipt (currently 40%), and then reducing the product by any gift or estate taxes paid to a foreign country with respect to the covered gifts and covered bequests. The value of each covered gift and covered bequest is its fair market value as of the date of its receipt. Limited exemptions apply (for example for transfers to U.S. spouses or to a charity, or for a gift or bequest that is reported on a timely filed gift or estate tax return.

Covered gifts and bequests are gifts and bequests received from a "covered expatriate" or from a trust funded by a covered expatriate. A "covered expatriate" (as defined in §877A(g)(1)) is a U.S. person who expatriates on or after June 17, 2008, and who meets at least one of the following criteria – a net income test, a net worth test, or failing to certify compliance with U.S. tax obligations for the preceding five years.

Notice 2009-85 stated that satisfaction of the reporting and tax obligations was deferred pending the issuance of separate guidance by the IRS.

(2) General Overview of Final Regulations. In very general terms, the final regulations include important definitions, guidance on computing the §2801 tax, the effective tax rate, the treatment of foreign gift or estate taxes, the value of covered gifts or covered bequests, the date of receipt, non-electing foreign trusts, treatment of distributions from non-electing foreign trusts as subject to the §2801 tax (but without applying the deemed distribution rules of §643(i)), the election by a foreign trust to be treated as a domestic trust, income tax

effects of the §2801 tax, information reporting and §6039F and §6048(c), recordkeeping requirements, powers of appointment not in trust, the effect of estate and gift tax treaties, the ability to file a protective claim for refund of the §2801 tax in case foreign gift or estate tax is paid after payment of the §2801 tax, and reminding that the filing of Form 708 to report a distribution from a non-electing foreign trust is in addition to and not a substitute for filing Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*.

(3) Effective Date. The final regulations apply to covered gifts and bequests received on or after January 1, 2025. Accordingly, covered gifts or covered bequests received by U.S. recipients on or after January 1, 2025, must be reported on Form 708 (which has not yet been issued). The final regulations are silent as to transfers in the 16 years from June 17, 2008 to January 1, 2025.

(4) Treatment of Covered Gifts or Bequests Received Between June 17, 2008 and December 31, 2024? Significant uncertainty exists about the obligation to report and pay tax, and the procedures for doing so, for gifts or bequests received between June 17, 2008, and December 31, 2024. The recipient has a statutory obligation under §2801 to report and pay the tax, but that obligation was deferred until final regulations are issued. The final regulations are now issued but make no provisions regarding covered gifts made before January 1, 2025. One commentator concludes that "the final regulations' deafening silence on this topic seems to indicate that it is at least possible that recipients of covered gifts or bequests between June 17, 2008, and January 1, 2025, may be off the hook entirely from a tax and reporting standpoint." Ian Weinstock & Heather Fincher, *Treasury Finalizes Regulations Taxing Gifts and Bequests from Covered Expatriates*, Kostelanetz News (January 16, 2025(available at **https://kostelanetz.com/treasury-finalizes-inheritance-regulations-taxing-gifts-and-bequests-from-covered-expatriates/?utm_medium=email&_hsenc=p2ANqtz-8ntbHi-JNFzrNYymV04FReH7C_ADN48AP_BeDaK-r-vBc99YP74qxJ8dHG7LM3qvlY312eeOoDgaK_sqhrXlgKyAqsfw&_hsmi=342824446&utm_content=342824446&utm_source=hs_email**.

(5) Uncompensated Use of Trust Property. A loan from or the uncompensated use of property of a non-electing foreign trust is treated as a distribution for purposes of §2801 only to the extent that the loan or uncompensated use of property would be treated as a gift for traditional gift tax purposes under chapter 11 of the Code. (The deemed distribution rules of §643(i) do not apply for purposes of §2801.)

f. Final basis consistency regulations were published in the Federal Register on Sept. 17, 2024. Planners have anxiously been anticipating these final regulations (now issued 8 years after the proposed regulations were published in March, 2016). In particular, three issues in the proposed regulations were highly criticized by planners, and the IRS has reversed course as to all three of those issues. Highlights of the final regulations are summarized. **[EP35-41]**

(1) Reporting of Undistributed Property. The Form 8971 and beneficiary "Statements" (attached as Schedules A to the Form 8971) generally must be filed within 30 days after the estate tax return is due (or is filed before the due date). But for many estates large enough

to file estate tax returns, the executor does not know what assets will be distributed to particular beneficiaries, and the proposed regulations required that each such beneficiary's Statement include *all* estate assets that might be distributed to the beneficiary (which might include most of the estate assets). Commentators complained that would cause duplicate reporting, may confuse beneficiaries by leading them to expect to receive all the property reported to them, and would require disclosure of private information about many if not most estate assets to all potential beneficiaries resulting in conflicts and litigation among beneficiaries with competing interests.

- The final regulations adjust the due date of Statements for property that beneficiaries have not received by 30 days after the estate tax return is due or is filed before the due date; such Statements are due by January 31 of the calendar year following the year of acquisition.
- If the executor anticipates that a beneficiary will receive certain property, the executor has the option to furnish Statement(s) to any such beneficiaries within 30 days of filing the estate tax return.
- Coordinating changes are made to the information that must be included in the initial and supplemental Information Returns (Form 8971).
- The final regulations do not explicitly authorize giving notices to all beneficiaries of all property that might be distributed (in case the executor does not have a privacy concern with making the information available to all beneficiaries and prefers to file just one Form 8971 with Schedule A's to all beneficiaries rather than filing Schedule A's later when property is distributed.

(2) Removal of Zero Basis Rule for Unreported Property. The proposed regulations surprisingly took the position that after-discovered or omitted property gets a basis of zero if the property is not reported on an estate tax return before the period of limitations on assessments has expired, Prop. Reg. §1.1014-10(c)(3)(i)(B). Among other things, comments about the proposed regulations urged that the practical effects of the zero basis rule are onerous, unduly harsh, and unfair (beneficiaries do not control reporting on estate tax returns by executors and unreported property is more likely to arise by an inadvertent omission or as a result of being undiscovered, rather than willful omission).

- The final regulations delete the zero basis provisions in proposed regulation §1.1014-10(c)(3)(i)(B).
- These issues are discussed in detail in the preamble to the final regulations, but the substantive regulations do not specifically address after-discovered or omitted property.

(3) Eliminating the Subsequent Transfer Reporting Requirement for All Beneficiaries Other Than Trustees. The proposed regulations also surprisingly included a subsequent transfer reporting requirement. If a recipient of an asset in the gross estate makes a subsequent gift or distribution to a "related transferee" the proposed regulations required that the recipient must file a beneficiary Statement with the IRS and the transferee. Comments to the IRS about this requirement included that the IRS lacks authority to require reporting of subsequent transfers, the reporting requirement could continue for generations, the

requirement would be impossible for the IRS to monitor and enforce, and the requirement would be particularly unfair to unsophisticated individual recipients who would likely be unaware of the reporting requirement and would be more likely to become subject to noncompliance penalties.

- The IRS and Treasury concluded that the burden of the requirement, including penalties for noncompliance, is too heavy to impose on individual beneficiaries, and the final regulations omit the subsequent transfer reporting requirement for individual recipients.
- However, the requirement continues to apply to trustees of beneficiary trusts when they make distributions, including direct distributions to trust beneficiaries and distributions pursuant to the exercise or lapse of a person's power of appointment (whether general or limited).
- The subsequent transfer reporting requirement would apply to trustees of trusts that receive property from beneficiary trusts (so the reporting obligation continues until property is distributed to an individual not in trust).
- The subsequent transfer report by trustees is due by January 31 of the calendar year following the year of distribution. Reg. §1.6035-1(h)(2).

(4) Miscellaneous Issues. The final regulations clarify exceptions from the consistent basis and reporting requirements and add additional exceptions (including for various cash equivalents, taxable termination property, the surviving spouse's one-half of community property, notes forgiven by the decedent, annuity contracts, income in respect of a decedent, installment obligations, retirement plans and IRA, property included in the gross estate of a beneficiary who died before the due date of the Form 8971. The final regulations also include additional various clarifications regarding information to be reported on initial and supplemental Information Returns (Form 8971), including the situations for which supplemental Information Returns must be filed (generally due 30 days after information becomes available to conclude that supplemental reporting is required).

(5) Effective Date. The final regulations generally are effective for estates for which estate tax returns are filed after Sept. 17, 2024. However, the consistent basis and reporting requirements continue to apply to estates for which estate tax returns are filed after July 31, 2015.

g. Final regulations with new procedures for extensions regarding GST exemption allocations or elections, Reg. §26.2642-7 **[EP42-45]**

(1) Extension requests regarding GST exemption allocations or elections made on or after May 6, 2024, must use the new procedures and 9100 relief is no longer available

(2) Additional proposed regulations will be forthcoming to address the practical effect of a grant of an extension of time for making elections and the interplay between affirmative and automatic allocations. They will include examples applicable to this new final regulation and the newly proposed regulations.

(3) Relief from certain affirmative elections is permitted under the final regulations (electing out of automatic allocation for lifetime direct skips, electing out of lifetime allocations to

"GST trusts," and treating a trust as a GST trust as to transfers to the trust made by such individual)

(4) The final regulations narrow the list of persons who must provide affidavits (for example, not including advisors who were consulted about "any aspect of the transfer [or] the trust")

(5) The (i) good faith and (ii) no prejudice to the interests of the government (mainly not using hindsight to the taxpayer's advantage) tests are applied a little more rigorously.

h. Some pending proposed regulations

(1) Section 2053 (discounting to PV administration expenses paid more than three years after death; deductibility of post-death interest) **[EP32]**

(2) Anti-abuse exception to the anti-clawback regulation **[EP41-42]**

(3) Keep in mind current legal effect of proposed regulations: "carry no more weight than a position advanced on a brief"

i. Form 709 Changes for 2024

(1) The mechanics of making the gift-splitting election are dramatically different.

(2) The manner of making the "reverse QTIP election" for gifts to QTIP trusts has also changes (and the election may easily be missed).

(3) Software platforms do not seem to be coordinating well with the new forms.

4. Final Regulations Under SECURE Act, Required Minimum Distribution Rules for Retirement Plans and IRAs; Proposed Regulations Under SECURE 2.0 [EP48-52]

a. Long-awaited final regulations for distributions from retirement plans and IRAs, including implementation of changes made by the SECURE Act (and some changes by the SECURE 2.0 Act) were released July 18, 2024, and published in the Federal Register on July 19, 2024.

b. The final regulations largely follow the 2022 proposed regulations but include various clarifications and some significant changes. The regulations generally are effective for distributions beginning in 2025. Some of the changes reflected in the final regulations are briefly summarized.

c. Retention of requirement that annual payments must be made during the 10-year period for making distributions to designated beneficiaries (DBs) if the owner dies on or after the required beginning date (RBD). Reg. §1.401(a)(9)-5(d)(1). IRS Notices have stated that no excise taxes are imposed for failure to take such required annual distributions in 2021-2024, and footnote 11 of the preamble to the final regulations clarifies that make-up distributions are not required in 2025 for any such annual distributions that were not made in 2021-2024, but the 10-year deadline is still determined from the date of the participant's death.

d. The increased ages that were enacted in SECURE 2.0 for the RBD of an owner (age 73 for those reaching age 72 after 2022 and age 74 for those reaching age 74 after 2032) are reflected in Reg. §1.401(a)(9)-2(b)(2).

e. An important change in the final regulations is to apply the separate account rule to plan interests passing to a *trust* if the terms of that trust provide that it is to be "immediately divided" upon the death of the owner into separate trusts for one or more trust beneficiaries. "Immediately divided" is defined to mean that the trust must terminate, the trustee can have no discretion as to how the plan interests are allocated to separate trusts, and administrative delays are permitted only if plan benefits ultimately are allocated as if the trust had been divided on the date of the owner's death. The separate account rule is important; otherwise, all plan beneficiaries are generally counted for purposes of determining if the plan had a DB, and the oldest DB's life expectancy is used to determine the minimum annual distributions to all beneficiaries. Previously, the separate account rule applied only if the plan *beneficiary designation* left the plan interests to separate individuals or separate see-through trusts. Under the final regulation, the plan beneficiary could be a revocable trust, for example, which would be split at the owner's death into separate trusts for separate beneficiaries. (Under the final regulation, the trust must be divided into separate see-through trusts, and none of the interests could be allocated outright to certain individuals.) Reg. §1.401(a)(9)-8(a)(iii)(B-C).

5. QTIP Trust Planning, *Estate of Anenberg v. Commissioner*, 162 T.C. No. 9 (May 20, 2024) [EP65-74]

a. Background—A "ticking time bomb"; at the spouse's death all assets will be subject to estate tax.

(1) Distributions to spouse followed by freezing transactions

(2) IRS might argue it should ignore unauthorized distributions

- *Estate of Lillian Halpern v. Commissioner*, T.C. Memo. 1995-352 (distributions from general power of appointment marital trust to descendants; spouse consented but the distributions were not authorized; court recognized the distributions that were made when the spouse was competent but did not recognize distributions made after the spouse had become incompetent because a guardian could have set aside the distributions, so those distributions were included in the spouse's estate under §2041)
- *Estate of Hurford v. Commissioner*, T.C. Memo. 2008-278 (beneficiary-trustee made distribution to self, contrary to standards in trust, and sold those assets for private annuity; trust assets included in decedent's gross estate under §2036 and the distributed assets were not excluded from the decedent's gross estate merely because of ascertainable standards in the trust)
- *Estate of Hartzell v. Commissioner*, T.C. Memo. 1994-576 (court rejected IRS argument that assets distributed from marital trust to decedent during her lifetime and given to family were includable in her gross estate because the distributions were improper transfers from the trust; Ohio court would have approved the transfers because distribution standard of "comfort, maintenance, support, and general well being" would include distributions to assist her desire to continue giving gifts to family members to ensure family control of family businesses)
- *Estate of Council v. Commissioner*, 65 T.C. 594 (1975) (IRS argued that trustee did not have the authority to distribute trust assets to spouse for gifting purposes; court stated that the issue was not whether a state court would have approved the

distributions beforehand but whether a state court would rescind the distributions after made; conclusion that trustees acted within the bounds of reasonable judgment)

- *United Food & Commercial Workers Unions v. Magruder Holdings, Inc.*, Case No. GJH-16-2903 (S.D. Md. Mar. 27, 2019) (failure to comply with fiduciary constraints regarding trust distributions caused a trust to be treated as a grantor trust for non-tax purposes)
- *SEC v. Wyly,* 2014 WL 4792229 (S.D.N.Y. September 25, 2014) (SEC recoupment case; court reasoned that a failure to comply with fiduciary constraints regarding trust distributions caused a trust to be treated as a grantor trust for non-tax purposes)

(3) Section 2519 addresses the manner in which a transfer tax is applied to QTIP assets when there is a disposition during life rather than at death. For gift and estate tax purposes, §2519 treats a disposition of any of the spouse's income interest as if the surviving spouse transferred 100% of the remainder interests in the QTIP.

(4) *Kite v. Commissioner*, T.C. Memo. 2013-43 (*Kite I*) held that the distribution of QTIP assets to the wife-beneficiary in connection with a sale of the assets by her in return for a deferred private annuity (that was equal in value to the assets that were sold) triggered §2519 resulting in a deemed transfer of the value of the QTIP remainder interest. *Kite II* was an unpublished order on Oct. 25, 2013, finding that the deemed transfer under §2519 could not be offset by assets received by the spouse (i.e., by the value of the deferred private annuity). In fact, the spouse died before receiving any annuity payments.

b. *Estate of Anenberg v. Commissioner* was a unanimous reviewed opinion issued just three months after hearing on motions for partial summary judgment

c. Facts. QTIP trusts judicially terminated and distributed to surviving wife (with consent of sons as remaindermen). Five months later, wife gave a small portion to trusts for sons and six months later wife sold all remaining stock of Company to trusts for sons and grandchildren.

d. Opinion emphasized "QTIP regime," purpose to defer transfer tax until spouse dies or makes gift; creates "a legal fiction under which the surviving spouse is treated as receiving all the QTIP"

e. HELD: Termination and distribution to wife did not result in taxable gift of remainder under §2519; whether or not that is a disposition of a qualifying income interest for life that triggers §2519, no taxable gift results because the wife received all QTIP assets and there is no "transfer of property by gift" for the imposition of gift tax under §2501. Alternatively, the gift was an incomplete gift because of the spouse's total control over the assets.

f. HELD: No deemed transfer of the remainder interest under §2519 applied upon the sale of the assets because following the termination of the QTIP trusts, the qualifying income interest for life terminated, and there could be no disposition of something that did not exist

g. Appears to be a repudiation of *Kite II* (which said the deemed transfer of the remainder interest under §2519 could not be offset by amounts received by the spouse)

h. Whether the sons made a gift by consenting to wife receiving all assets was not addressed

i. IRS did not make a step transaction claim to treat the termination and sale as an integrated transaction

6. QTIP Trust Planning; Do Remainder Beneficiaries Make Gifts By Consenting to Spouse Receiving All QTIP Assets?, *McDougall v. Commissioner,* 163 T.C. No. 5 (Sept. 17, 2024) [EP74-82]

a. *McDougall* is the case (actually three consolidated cases) that was addressed in CCA 202118008 (family settlement under which all QTIP assets were distributed to surviving spouse who immediately gave and sold assets to trusts for descendants; IRS concluded that [1] two children who were the remainder beneficiaries made gifts of the remainder interest to surviving spouse, [2] surviving spouse made a gift of QTIP trust remainder interest under §2519, and [3] spouse used gift exclusion and would have notes from the sale included in his gross estate).

b. The Tax Court issued a reviewed opinion on September 17, 2024, addressing motions for summary judgment. All the gift issues have been resolved regarding the father, and a final order and decision for the father's case was entered December 26, 2025. (Taxpayers resided in Washington, so an appeal would be heard by the Ninth Circuit Court of Federal Appeals. Any notice of appeals must be filed with Tax Court clerk within 90 days of the entry of the final decision; that would be March 26, 2025.)

c. No Gift by Spouse of Remainder Under §2519. Neither (1) the termination of the trust and distribution of all assets to the surviving husband (H) nor (2) the distribution of assets to H coupled with the sale of almost all the assets to trusts in return for notes resulted in a taxable gift under §2519. Relying on *Anenberg*, the court reasoned that it did not decide whether those events gave rise to any "disposition" that triggered §2519, because H ended up with all the trust assets (or notes reflecting the value of the trust assets); therefore, he made no gratuitous transfer. (The *McDougall* majority opinion did not mention the alternative "incomplete gift" rationale discussed in *Anenberg*.)

d. Gifts by Children. *Anenberg* did not discuss whether the remainder beneficiaries made gifts by agreeing to have all assets distributed to the spouse. The IRS did raise that issue in *McDougall*, however, and the court concluded that the two children (the remainder beneficiaries) made gifts by agreeing that all assets could be distributed to H.

- The "QTIP fiction" treating H as owning the property focuses on deferring, imposing, and collecting a single transfer tax, not on transactions that persons other than the spouse may take with respect to their own interests in QTIP.
- There are no "reciprocal gifts" between H and the children because H is not treated as making a gift to the children under §2519; furthermore, they already owned the remainder interests and a deemed transfer of remainder interests to them under §2519 "added nothing to their bundle of sticks."
- H's existing interest in the QTIP does not negate a gift by the children; he was deemed to hold rights to the QTIP assets for purposes of determining *his* transfer tax liability, not whether others made gifts to him of their interests in the trust.

- The economic positions of the parties changed as a result of the distribution of all assets to H.

e. Value of Children's Gifts. The court will determine the value of the children's gifts to H in a later proceeding. H held a testamentary power of appointment to appoint trust assets to the wife's descendants. The court specifically observed that "under the terms of [the wife's] will, [H] could have decided in his own will to reduce one of the children's shares significantly," and added in a footnote that "[t]he import **(if any)** of these terms for the value of [the children's] remainder rights remains to be decided." (emphasis added) The valuation issue raising various interesting elements.

- The trustee may make discretionary principal distributions to H, which would reduce the value of the remainder interest.
- Because of H's testamentary power of appointment, any particular remainder beneficiary has significant contingencies on actually receiving trust assets. H could cut off any particular remainder beneficiary's interest. How will the court value those contingencies?
- The IRS dismissed the impact of H's power of appointment in CCA 202118008 and apparently is taking the position in *McDougall* that the early termination of the trust means the power of appointment no longer exists and is irrelevant to the valuation issue.
- Why did the IRS take the position that the gifts were made merely by the two children rather than allocating gifts among all of the descendants who were remainder beneficiaries?
- The valuation issue may likely be settled (most valuation disputes are settled), so we may never know how the court would have viewed the valuation issue.
- Will the valuation issue will be settled (most valuation disputes end up being settled)? If so, we will never know how the court would have addressed the valuation issue. However, attorneys for the parties anticipate that the valuation issue will go to trial.

  The case has been reassigned to Judge Halpern for trial of the valuation issue, and a trial date has been set in June, 2025.

f. A concurring opinion by Judge Halpern (who was the trial judge) reasoned that H did not dispose of a qualifying income interest in the property and therefore did not trigger §2519 (observing, among other things, that Reg. §25.2519-1(e) analogously provides that a distribution of QTIP assets to the spouse under a power of appointment does not result in a disposition of the income interest by the spouse that triggers §2519 even if the spouse subsequently disposes of the appointed property.) Because H made no deemed transfer under §2519 to the children, "their 'very real' transfers to him stand alone as taxable gifts."

g. Apparently, the IRS did not take the position in either *Estate of Anenberg* or *McDougall* that the early termination of the QTIP trust resulted in an income taxable transaction between the income and remainder beneficiaries. The IRS has made that argument sometimes in transactions involving early terminations of trusts. Amounts "paid" by the remainder beneficiaries to the spouse for the remainder interest of the QTIP trust may be gift (and not taxable under §102(a)), but amounts paid for the spouse's income interest may be fully taxable

because the spouse's basis in the income interest is zero under the uniform basis rules of §1001(e). On the other hand, it is hard to say the remainder beneficiaries "purchased" the income interest when the remainder beneficiaries did not receive anything. *E.g.*, PLRs 202509010, 201932001-201932010.

h. The holding that the children made gifts by consenting to the distribution of QTIP assets to the surviving spouse is consistent with CCA 202352018. It concluded that the judicial modification of an irrevocable grantor trust with beneficiaries' consent, to add a tax reimbursement clause providing the trustee with a discretionary power to reimburse the grantor for income tax attributable to inclusion of the trust's income in grantor's taxable income, would constitute a taxable gift by the beneficiaries of a portion of their respective interest in income and/or principal of the trust. (The CCA acknowledged that this was a change of position from that taken in Letter Ruling 201647001.)

i. QTIP Trust Planning in Light of *Estate of Anenberg* and *McDougall*

(1) The trustee may enter into estate freezing transactions directly with the QTIP trust assets (e.g., invest in fixed income portfolios or sell QTIP assets to other family trusts or entities for notes)

(2) Consider distributions to the beneficiary-spouse pursuant to the trust distribution standards; the spouse can then enter into estate freezing transactions

(3) Classic commutations, in which the spouse merely receives the value of the income interest, would result in a taxable gift under §2519 of the entire value of the remainder interest (that is the clear purpose of §2519 and the spouse receives nothing with respect to the remainder interest to offset the deemed transfer of the remainder interest)

(4) Terminating QTIP trusts early and distributing everything to the spouse should be viewed as an aggressive transaction; this is clearly on the IRS "hot list" (the Tax Court held that this approach did not result in a deemed gift of the remainder interest under §2519 by the spouse-beneficiary, but the IRS will likely appeal those decisions)

(5) Using decanting rather than judicial termination to transfer assets to the spouse (perhaps by adopting a broad distribution standard) may avoid having explicit consent from remainder beneficiaries, but there are fiduciary concerns and the IRS took the position in CCA 202352018 that failing to object would result in a gift, the same as with consent

(6) Planning with QTIP trusts to get assets to the spouse so the spouse can make gifts is especially significant in 2025 when the spouse may be looking for ways to make gifts to utilize the large gift exclusion amount before it may be reduced in 2026

(7) Another way for the spouse to transfer QTIP assets would be for the spouse to make a non qualified disclaimer of the income interest, which would be treated as a gift of the income interest and a deemed transfer of the remainder interest under §2519. See Letter Ruling 202504006-202504007 (non-qualified disclaimer by spouse of one of two QTIP trusts following severance, non pro rata severance did not cause gain recognition because trust agreement permitted trustee to make non pro rata division between trusts, disclaimer of all income interest of trust 1 will not cause a gift of trust 2, trust 1 will not be included in

taxpayer's gross estate, disclaimer will not cause interest in trust 2 to be valued at zero under §2702).

(8) In a planning mode, draft QTIP trusts to give someone a power to appoint assets to the beneficiary; Reg. §25.2519-1(e) says appointing assets to the spouse does not trigger §2519 even if the spouse subsequently disposes of the appointed property (assuming the client is comfortable giving someone that power); the power is not exercisable in a fiduciary capacity whereas a decision by the trustee to terminate the trust and distribute substantial assets to the spouse must be appropriate consistent with the trustee's fiduciary duty

(9) Similarly, in a planning mode give the spouse (or someone) a power to appoint the remainder interest at the spouse's death to minimize the possible gift by any particular beneficiary resulting from the beneficiary's consent to an early termination of the QTIP trust; however, the IRS dismissed the impact of the spouse's power of appointment in CCA 202118008 and apparently is taking the position in *McDougall* that the early termination of the trust means the power of appointment no longer exists and is irrelevant to the valuation issue

(10) Consider the possibility of adding such powers of appointment in a decanting action (if allowed under state law); but the failure of remainder beneficiaries to object might still raise gift concerns

(11) Dividing a single QTIP trust into separate QTIP trusts may minimize the §2519 risk; transfers to the spouse to allow transfer planning by the spouse could be made from just one of the trusts, not risking the application of §2519 to the assets of the other trust. Many PLRs have allowed taxpayers to sever QTIP trusts in anticipation of this type of planning. *E.g.*, Ltr. Ruls. 202504006-202504007 (described in subparagraph (7) above); 202146001

(12) Planning with large QTIP trusts is difficult. *See* Joy Miyasaki & Read Moore, *Estate Planning Strategies for QTIP Trusts: Do Good Things Come to Those Who Defer?*, AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL 2023 ANNUAL MEETING (Mar. 2023); Read Moore, Neil Kawashima & Joy Miyasaki, *Estate Planning for QTIP Trust Assets*, 44th U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 12 1202.3 (2010); Richard S. Franklin, *Lifetime QTIPs—Why They Should Be Ubiquitous in Estate Planning*, 50th HECKERLING INST. ON EST. PL. ch. 16 (2016); Richard S. Franklin & George Karibjanian, *The Lifetime QTIP Trust – the Perfect (Best) Approach to Using Your Spouse's New Applicable Exclusion Amount and GST Exemption*, 44 BLOOMBERG TAX MGMT. ESTATES, GIFTS & TR. J. 1 (Mar. 14, 2019)

7. Section 2036 Applied to "Eve of Death" Funding of Limited Partnership by Decedent's Agent, *Estate of Fields v. Commissioner*, T.C. Memo 2024-90 (Sept. 26, 2024) [EP109-116]

a. *Estate of Fields* is a classic "terrible facts" §2036 case for death-bed transfers by the decedent's agent to a limited partnership. LLC and limited partnership (LP) created by the decedent's great-nephew as agent under a power of attorney within a month of her death

b. Most of the funding occurred within 10 days of the decedent's death after doctors advised her Alzheimer's disease was in "end stage"

c. Section 2036(a)(1) applied because of: (1) express retention of access to LP assets through the great-nephew who was the owner of an LLC that was the general partner and was also the decedent's agent under a power of attorney; and (2) implied access to assets because of failure to retain assets outside the LP to pay post-death obligations (including cash bequests and estate taxes)

d. Section 2036(a)(2) applied under analysis of *Estate of Powell v. Commissioner*, 148 T.C. 392 (2017); partners could unanimously dissolve the LP, so the decedent, in conjunction with others, could acquire LP assets; (the *Powell* case was groundbreaking and planners were concerned it could be applied so broadly that all partnerships would be included because all partners could always agree to amend the partnership agreement, but *Estate of Levine v. Commissioner*, 158 T.C. 58 (2022) held the mere ability to amend a contract would not be caught by the "in conjunction with" clause in §2036(a) and §2038)

e. Bona fide sale for full consideration exception did not apply; "the timeline casts significant doubt … that he was actually motivated to undertake the … transactions for any reason other than reducing estate tax"

f. Nontax reasons asserted by the estate: (1) preventing financial elder abuse; (2) providing for management succession; (3) avoiding difficulties of managing assets under power of attorney; and (4) streamlining of management

g. Reasons the bona fide exception were not satisfied include: (1) lack of planning prior to the decedent's precipitous declining health; (2) lack of contemporaneous documentary evidence of motivations for the transaction of than the attorney's reference to "obtaining deeper discounts"; (3) absence of business interests requiring active management; and (4) depletion of liquidity to the point post-death death obligations could not be paid

h. Section 2043 analysis from *Estate of Moore v. Commissioner*, T.C. Memo 2020–40, was applied (but did not result in additional estate inclusion because the assets did not appreciate between the time of funding the LP and the time of death)

i. Under the §2043 analysis in *Moore*, a client could be worse off by funding an LP or LLC if §2036 applies at death and if assets appreciated after the formation; the estate would be worse off to the extent the date of death discounted value of the LP interest exceeds the date of funding discounted value of the LP interest

j. Accuracy-related penalty (20%) under §6662(a) & (b)(1) was applied because of the absence of express evidence of professional tax advice that the transactions would allow reporting the assets at a substantial discount; creating an LP on the eve of death to obtain a $6.2 million discount "would strike a reasonable person… as very possibly too good to be true"

8. Creative Alternative Approach That Might Avoid Section 2036 Attacks on Amounts Contributed to FLPs/LLCs [EP116]

Consider the following approach, coming from the ever-creative mind of Carlyn McCaffrey (New York). Rather than contributing assets directly to an FLP or LLC, the individual would transfer the assets to an incomplete gift trust that would, for example, give the individual a power to shift benefits from one beneficiary to another or to add or remove beneficiaries, Reg. §25.2511-2(c)). The

individual might be included as a discretionary beneficiary. The trustees of the incomplete gift trust, which would not include the individual, might then contribute assets to an FLP or LLC in return for units in the entity. The individual does not own any interest in or controls over the assets in the FLP or LLC; it would seem that the individual has not retained any interest or power over the assets of the FLP or LLC that would be subject to taxation under §2036 or §2038.

a. Assets of the incomplete gift trust (i.e., discounted interests in the FLP or LLC) will be included in the individual's gross estate, but the assets of the FLP or LLC should not be.

b. Even if the IRS makes a step transaction argument, the individual has never owned or retained anything with respect to the FLP or LLC. Any distributions from the FLP or LLC would pass to the trust, not to the individual. As discussed above, the individual is not the "owner" of the trust and the trust's interest cannot be attributed as ownership by the individual (unless the individual has "de facto" control over the trustee).

c. The same arguments presumably could be made even for deathbed transfers.

d. If the individual is a discretionary beneficiary of the trust, preferably the trust should be sitused in a "domestic asset protection trust" jurisdiction that does not give the individual's creditor access to the trust assets to satisfy the individual's debts merely because she is a discretionary beneficiary. Otherwise, the IRS might make the argument that the individual should be treated as the "owner" of the trust (because the individual could incur debts to be satisfied by the trust). The IRS might attempt (under a step transaction or substance over form argument) to treat the individual's deemed "ownership" of the trust as attributing the trust's contribution to the FLP or LLC as if the individual had made the contribution to the FLP or LLC while retaining the tax sensitive interest or power.

9. Does Mere Inclusion of Swap Power in GRAT as Triggering Section 16(b) Short-Swing Profits Rule?, *Nosirrah Management, LLC v. AutoZone, Inc.*, (W.D. Tenn. Nev. 15, 2024) [EP120-122]

a. William Rhodes III (Defendant) created a GRAT that gave him a power of substitution for fair consideration (generally referred to as a swap power).

b. The plaintiff alleged that Defendant was a company insider who received distributions of stock from the GRAT in satisfaction of a required annuity payment and subsequently sold stock in the company within six months for a profit, so the profit should be disgorged under Section 16(b) of the Securities Exchange Act of 1934.

c. But a prior SEC No-Action Letter (*Peter J. Kight*) ruled that the creation of a GRAT and subsequent return of stock to the settlor in satisfaction of annuity payments satisfied a "mere change of form and no change in pecuniary interest" exception to what constitutes a "purchase" under Section 16(b) where the individual was the settlor, trustee, and beneficiary.

d. Court denied summary judgment for Defendant because he had not submitted evidence that he was the settlor, trustee, and beneficiary.

e. The opinion also has confusing language suggesting that the "mere change of form" exception might not apply because of the mere existence of the swap power in the GRAT, even if the swap power is not exercised, and could somehow cause the distribution in satisfaction of the annuity to become a purchase that could trigger the short-swing profits rule.

f. In planning a GRAT for a company insider, consider using powers other than a swap power to confer grantor trust status on the GRAT.

g. "Carlyn McCaffrey notes that the gist of the Rule 16a-13 exemption is that an insider's economic position has not changed when the insider is the sole beneficiary of the GRAT and stock is used to satisfy the insider's annuity interest. A power of substitution would not have any bearing on this central question."

10. Step Transaction Doctrine Discussed in Connection with Life Insurance Proceeds Inclusion Because of Alleged Lack of Insurable Interest, *Estate of Becker v. Commissioner*, T.C. Memo. 2024-89 (Sept. 24, 2025) [EP108-109]

a. Donor loaned money to irrevocable life insurance trust (Trust) to pay $1.7 million premiums on two life insurance policies with combined death benefit of $19.5 million

b. Donor borrowed from others who borrowed from others; three months later the notes (secured by the policies) were assigned to a third party entity that committed to advance loans for future premiums (the third party entity never actually advanced additional loans)

c. IRS argued the third party entity did not have an insurable interest in the policies and under Maryland law, the insured's estate was entitled to the death proceeds; however, the Trust that initially acquired the polices had an insurable interest, and under Maryland law a subsequent assignment of the policy would be legal whether or not the person had an insurable interest

d. Despite those Maryland law issues, IRS argued that the estate was the beneficiary of the policy under a convoluted step transaction doctrine argument

e. Step transaction doctrine has been applied under any of three separate tests:

(1) "Binding commitment test" – "at the time that the first step is undertaken, the taxpayer was under a formal commitment to complete the remaining steps, often when a substantial period has passed between the steps that are subject to scrutiny"

(2) "End result test" – "transactions will be collapsed if it appears that a series of formally separate steps are really prearranged parts of a single transaction intended from the outset to reach the ultimate result"; a "subjective test that focuses on the parties' actual intent at the time that the transaction was entered into"

(3) "Interdependence test" – "the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series"

f. None of those tests applied. (1) Parties agreed the "binding commitment test" did not apply (in part because there was no substantial period of time between the separate steps); (2) "end result test" did not apply because the third party "was unidentified at the time the … policies were issued"; (3) the "interdependence test" did not apply because no additional premiums would be required for 30 months, the decedent had enough assets to continue loans to the Trust to pay future premiums, and the commitment by the third party to advance loans for payment of future premiums was not a necessity

g. "Rather, the picture that emerges is that, of several financing options available to [the decedent] and the Trust to secure funding for possible future premiums, they simply chose the option that they viewed to be the most financially beneficial"

h. There has been no violation of Maryland's insurable interest doctrine, and the estate has no claim to the insurance proceeds, so no estate inclusion

i. Interesting aside: The financing agreement with the third party entity that committed to make advances to the Trust to pay future premiums provided the third party would be repaid its advances plus interest **plus 75% of the policy proceeds**. Why would anyone agree to that??? The third party argued after the decedent's death that it was entitled to $14.8 million of the $19.5 million of the death proceeds; it eventually settled at $9 million (and it never actually advanced any additional funds to the Trust)

11. Corporate Transparency Act, BOI Reporting Applies Only to Foreign Reporting Companies [EP54-61]

a. FinCEN posted a press release on March 2, 2025, stating that it will not enforce any penalties or fines on U.S. citizens or domestic reporting companies or their beneficial owners. It will narrow the scope of the rule to the BOI rule to foreign reporting companies only.

> Treasury takes this step in the interest of supporting hard-working American taxpayers and small businesses and ensuring that the rule is appropriately tailored to advance the public interest. "This is a victory for common sense," said U.S. Secretary of the Treasury Scott Bessent. "Today's action is part of President Trump's bold agenda to unleash American prosperity by reining in burdensome regulations, in particular for small businesses that are the backbone of the American economy."

The President has confirmed suspension of the enforcement of the CTA, citing it as an "economic menace" to U.S. citizens.

b. Various cases involving the constitutionality of the CTA are ongoing. Few if any of those cases involve foreign reporting companies. Query whether the plaintiffs will drop the cases to avoid further attorney fees. Oral arguments before the Fifth Circuit in the *Texas Top Chop, Inc. v. Garland* case are still scheduled for April 1, 2025. Plaintiffs in *Taylor v. Yellen*, No. 2:24-cv-00527 (D.C. Utah), have withdrawn their second motion for a preliminary injunction, pending the issuance of a final rule about how the scope of the CTA will be narrowed.

An interesting legal issue that has arisen is whether a district court can impose a nationwide injunction. The Supreme Court's interest in the *Texas Top Cop Shop, Inc. v. Garland* case could potentially result in the Supreme Court addressing that issue (if the case is not dropped by the plaintiffs).

c. Residential Real Estate Non-Financed Transfers. Real estate "all-cash" sales in certain geographic areas must currently be reported under the existing Real Estate Geographic Targeting Order program (GTO) under the Bank Secrecy Act. Regulated lenders are excluded because banks already have anti-money laundering (AML) programs and requirements of filing suspicious activity reports (SARs) under the Bank Secrecy Act.

FinCEN on February 7, 2024, filed Notice of Proposed Rulemaking (RIN: 1506-AB54) generally requiring that non-financed residential real estate transfers (including gifts) to trusts or entities be reported to FinCEN. Final rules were issued on August 28, 2024 (and published in the Federal Register on August 29, 2024) (RIN: 1506-AB58). FinCEN received 621 comments, and the preamble to the final rules responds to those comments. The rules are effective December 1, 2025.

FinCEN has not given any indication whether it will also stop enforcement of reporting these transactions with domestic entities.

(1) Overview of Final Rules. The final rules provide details about the purpose of reporting such transactions, the general reporting requirements, attorney-client privilege concerns, what constitutes residential real estate, what types of trusts are implicated, the beneficial owners of trusts, and exceptions from the reporting requirement (some of which are discussed immediately below).

(2) Exceptions (Including Gift Transfers to Certain Trusts). Various exceptions were included in the proposed rules including certain transfers involving an easement, transfers that occur as the result of the death of the property's owner, transfers that are the result of a divorce, and transfers that are made to a bankruptcy estate. The final rules retain those exceptions, with clarifications, and adds some additional exceptions.

The transfer resulting from death exception is clarified to include a broad range of transfers occurring as a result of the death of an individual.

The divorce transfer exception is clarified to include the dissolution of civil unions.

Exceptions are added for added for court supervised transfers and for transfers to an intermediary as part of a like-kind exchange transaction.

In response to various comments requesting exceptions for estate planning transfers, FinCEN refused to grant a broad estate planning transfer exception (for example, specifically refusing to except transfers where beneficial ownership does not change or where the transfer is an intra family one) because an overly broad exception would be open to significant abuse. Illicit actors are known to use estate planning techniques.

Instead, an exception is provided for (i) gift transfers (ii) by an individual (or an individual and his or her spouse) (iii) to a trust of which the same individual(s) are the settlor or grantor. The preamble explains that this will cover many common transfers for estate planning purposes. Such transfers are a lower risk for money laundering because the true owner is not obscured when the property is transferred.

Sales to trusts would not be excepted from the reporting requirements under this exception for gifts to trusts.

12. Buy Sell Agreement Value Does Not Fix the Estate Tax Value; Life Insurance Proceeds Payable to Corporation Under Corporate Redemption Arrangement Included in Estate Tax Value and Not Offset by Redemption Obligation, *Connelly v. United States*, 602 U.S. 257 (June 6, 2024) (Justice Thomas, unanimous), *aff'g* 131 AFTR 2d 2023-1902 (8th Cir. 2023), *aff'g* 128 AFTR 2d 2021-5955 (E.D. Mo. 2021) [EP83-88]

a. Buy-sell agreement did not fix estate tax value. District court reasoned that it did not satisfy the device test or comparability test under the §2703(b) safe harbor and did not meet case law requirements (no determinable price, not binding on estate, and was a substitute for a testamentary disposition for less than full consideration). Eighth Circuit reasoned that neither of the two pricing mechanisms in the agreement were followed and they did not constitute a "fixed or determinable price for valuation purposes." (Those two pricing mechanisms are often found in buy-sell agreements – [1] annual agreement, and [2] appraisal process.) A determinable price is "arrived at" by "formula," "a fair, objective measure," or "calculation." This issue was not addressed by the Supreme Court.

b. Was $3 million of life insurance proceeds includable in determining value of decedent's stock? Almost 20 years ago, the Eleventh Circuit said no, reasoning that proceeds were offset by an obligation to use the proceeds to buy stock. *Estate of Blount v. Commissioner*, 428 F.3d 1338 (11th Cir. 2005). The district court and Eighth Circuit disagreed with *Blount* reasoning and considered insurance proceeds as a corporate asset in determining stock value. Eighth Circuit: "In sum, the brothers' arrangement had nothing to do with corporate liabilities. The proceeds were simply an asset that increased the shareholders' equity."

c. U.S. Supreme Court affirmed June 7, 2024, in a unanimous opinion written by Justice Thomas. At oral argument, one Justice said he found the issues in the case "extremely difficult." The Court viewed the issue differently from *Blount*; instead of deciding whether the life insurance is included as a corporate asset in valuing the decedent's shares, the Court said that "all agree that life-insurance proceeds payable to a corporation are an asset that increases the corporation's fair market value." Instead, the issue was whether the corporation's contractual obligation to purchase the decedent's shares "offsets the value of life-insurance proceeds committed to funding that redemption." The Court's analysis is briefly summarized.

(1) A redemption of shares at fair market value does not affect any shareholder's economic interest. For example, if a $1,000 corporation with 1,000 shares (worth $1 per share) has an 80% and 20% shareholder, assume the 20% shareholder is redeemed for $200. The corporation's value is reduced to $800, but the remaining shareholder's 800 shares are still worth $1 per share.

(2) No willing buyer purchasing the decedent's shares would have treated the corporation's obligation to redeem the shares at fair market value as a factor that reduced the value of those shares.

(3) Offsetting value by the amount of redemption obligation values the corporation on a post-redemption basis, but "for calculating the estate tax, the whole point is to assess how much Michael's shares were worth at the time that he died—before Crown spent $3 million on the redemption payment."

(4) Treating the redemption obligation as a liability cannot be reconciled with the basic mechanics of a stock redemption. The estate argued that the corporation was worth only $3.86 million before the redemption and was worth $3.86 million after the redemption. That "cannot be reconciled with an elementary understanding of a stock redemption."

(5) The estate argued "that affirming the decision below will make succession planning more difficult" because a corporation would need policies with far more death benefits to have sufficient insurance proceeds to redeem a decedent's shares at fair market value. (Several of the amicus briefs made this same point.) "True enough, but that is simply a consequence of [using a redemption agreement]." Other planning options are available; there are advantages and disadvantages of each of the options, but one result of the redemption arrangement is that insurance proceeds paid to the corporation that are used to fund the purchase will increase the value of the shares.

d. Buy-sell agreement structuring. A very important issue in structuring a buy-sell agreement is whether an entity purchase or cross purchase arrangement will be used. For example, the Connelly agreement gave the surviving shareholders the first option to purchase a decedent's shares, but if that option was not exercised, the agreement required the corporation to buy the shares.

(1) Entity purchase – the parties may feel more comfortable with the entity taking steps to fund the purchase agreement rather than relying on other owners to accumulate funds (or purchase life insurance) to fund a purchase obligation, but the funding in the entity (such as life insurance) may increase the value of the entity (as in *Connelly*); for a corporation, tax considerations include whether the redemption of stock by the corporation will be given sale or exchange vs. dividend treatment.

(2) Cross purchase – the parties must rely on the remaining owners to purchase their interests at death, funding will be outside the entity, not increasing the entity's value at the death of an owner, and a basis step up for the units purchased will be permitted; these advantages are quite significant; if an entity has multiple owners, one approach is to have the owners form a separate partnership to own a life insurance policy on each owner's life rather than having each owner purchase a life insurance policy on each other owner's life. *See* Private Letter Ruling 200747002 (LLC owned life insurance for funding of cross-purchase buy-sell agreement of S corporation, with all shareholders of the S corporation as members of the LLC).

(3) Changing course – for corporations that have already purchased life insurance to fund an entity purchase, the parties may want to restructure the agreement in light of *Connelly* but will face the problem of how to move the policies out of the corporation (distributions will generally be treated as generating dividends). There are no easy answers.

13. Option Agreement Not Recognized for Gift Tax Purposes Under §2703, *Huffman v. Commissioner*, T.C. Memo. 2024-12 (Jan. 31, 2024) [EP88-92]

a. CEO of Company (in aerospace industry) signed option agreement in 1993 to purchase parents' Company stock that was in trusts (presumably revocable trusts). Strike price ($5 million) was over 23 times the current value of the stock at time the option agreement was signed.

(Apparently a significant purpose was to incentivize the son to build the Company.) The original option agreement was to purchase at the deaths of the parents with a right of first refusal. It was revised to allow the son to exercise the option at any time with the consent of various family members. Son exercised the option in 2007, paying with a $5 million note. The IRS alleged the stock was worth much more than $5 million, and parents made a gift in the amount of the difference.

b. Section 2703(b) safe harbor does not apply. The (1) business purpose and (2) not a testamentary device to transfer for less than full value tests were satisfied. Test (3), the comparability test, was not satisfied. A similar option agreement with the same company was offered as a comparable, but it was not submitted into evidence. Aside from the evidentiary issue, the similar option was not comparable enough because it was only exercisable at death, not at any time.

c. The court valued the stock, generally adopting the positions of the IRS's expert (which included 10% lack of control and 20% lack of marketability discounts).

d. This case is another example of courts applying the comparability test rather strictly. There were a lot of similarities with the offered comparable in this case (same company, options rather than a mandatory purchase, right of first refusal, options available through deaths of sellers, signed in same general time frame, both agreements were transferable (though different consents were required), no put rights, no drag along rights, no tag along rights) – all in all, a lot of similarities.

14. Challenges to Validity of Tax Regulations, Supreme Court Rejection of 40-Year Old *Chevron* Doctrine, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (June 28, 2024) [EP92-105]

a. The Supreme Court, in a major shift of approach in analyzing the validity of actions of federal agencies (including regulations), overruled a 40-year rule announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Six justices joined in the majority opinion (written by Chief Justice Roberts).

b. *Chevron* announced a two-step approach: (1) first, determine if a particular statutory provision is ambiguous ("the statute is silent or ambiguous with respect to the specific issue"), and if so; (2) second, the regulation would be upheld if it is a "permissible" construction of the statute, even if a court would have reached a different interpretation. The Court held that approach is inconsistent with the Administrative Procedure Act (APA), which requires "the reviewing court" to "decide *all* relevant questions of law" and "interpret statutory provisions." (emphasis added, as quoted by the Court).

c. If a statute explicitly authorizes an agency to interpret or provide details about implementation of a statutory provision, courts will consider if the delegation was within constitutional limits and whether the agency acted within the scope of the delegation. Section 7805 authorizes the issuance of "all needful rules and regulations for the enforcement of" the Code. Various transfer tax statutes (but relatively few) include specific authorization for implementing regulations.

d. Prior cases addressing the validity of agency actions that relied on the *Chevron* framework are not called into question. The holdings of those cases are subject to *stare decisis*; they may be

overruled only if a "special circumstance" exists, and "[m]ere reliance on *Chevron* cannot constitute a 'special justification'…."

e. A dissenting opinion by Justice Kagan, joined by Justices Sotomayor and Jackson (this case actually involved two separate cases and Justice Jackson participated only in the second case) gives various reasons why *Chevron* deference is appropriate and criticizes overruling this 40-year doctrine.

f. Tax regulations have been subject to the *Chevron* analysis (*Mayo Foundation v. U.S.*, 562 U.S. 44 (2011)), and the overruling of *Chevron* may lead to more challenges on the validity of various tax regulations.

g. The Supreme Court followed *Loper Bright* with an opinion several days later saying that the six-year statute of limitations "after the right of action first accrues" under 28 U. S. C. §2401(a) regarding claims against the United States would not bar attacks on even very old regulations as being in violation of the Administrative Procedure Act; the statute does not begin to run until a plaintiff is injured by agency action. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799 (July 1, 2024) (J. Barrett writing for majority; Dissent by J. Jackson, joined by J. Sotomayor and J. Kagan).

h. An example of a case rejecting a tax regulation under the *Chevron* analysis is *Walton v. Commissioner*, 115 T.C. 589 (2000), reasoning that the infamous "Example 5" in the original GRAT regulations was not a reasonable interpretation of the statute.

i. The *Loper Bright* Court did not make clear what standard of review would be applied going forward. The *Skidmore* case (323 U.S. 134 (1944)) before *Chevron* said courts would consider the viewpoint of an agency in light of its thoroughness, reasoning, consistency, and power to persuade. More detail about that standard for reviewing a tax regulation was provided in *National Muffler* (440 U.S. 472 (1979) (factors include whether the regulation carries out the language, origin, and purpose of the statute; if it is a substantially contemporaneous construction; manner in which it evolved; length of time it has been in effect; reliance placed on it; consistency of the Commissioner's interpretation; and degree of Congressional scrutiny of the regulation during subsequent re-enactments of the statute).

j. Possible future implications regarding tax regulations include: (i) more challenges of regulations, (ii) the need for careful attention to procedural details for challenges; (iii) effect of regulations previously found to be valid; (iv) possibly less changing of agency interpretations in regulations; (v) possibly more emphasis on revenue rulings than on regulations; (vi) less declaring victory by regulation (e.g., the "anti-Hubert" regulations); (vii) impact on IRS's approach in administrative proceedings and position regarding settlement; (viii) taxpayer's approach on the relevant tax return, in the tax examination proceeding, and in litigation; and (ix) Congress's approach in crafting details of tax legislation, providing more legislative history, and giving careful attention to any express delegation of regulatory authority.

k. *Loper Bright* will have a transformative impact on administrative law. "The impact of *Loper Bright* on federal courts and agencies, Congress, and parties challenging agency action cannot be underestimated. The opinion will surely give rise to an increase in legal challenges to agency regulations and administrative actions and in forum shopping by litigants wishing to

get those cases before their desired judges and circuit courts. Federal agencies will lose the significant advantage in those cases that *Chevron* deference afforded them and they will likely take additional steps in issuing guidance and rulemaking to shore up the foundation and persuasiveness of their regulatory actions." Summary by Miller & Chevalier law firm (Washington D.C.).

15. Regulation Validity Issues Post-Loper Bright; Mechanisms for Attacking Regulation Validity; Anti-Injunction Act [EP105-107]

a. Tax Court approach going forward; IRS cannot fix statutory mistakes with regulations, *Varian v. Commissioner*. A "glitch" in the 2017 Tax Act created "allegedly) unintended benefits for certain corporate taxpayers. A Technical Correction Act was never passed, and the IRS tried to remove the advantage by regulations. The Tax Court, in a unanimous opinion issued soon after the *Loper Bright* case, reasoned that the statute was clear and applied the statute as written. *Varian Medical System, Inc. v. Commissioner*, 163 T.C. No. 4 (2024).

b. Possiblity of court attacks on taxpayer-friendly regulations. Section 501(c)(4) governs organizations "operated exclusively for the promotion of social welfare." Regulations state that the "operated *exclusively*" test will be met if the organization "is *primarily* engaged in promoting in some way the common and general welfare." The ordinary meaning of "primarily engaged" (at least 51%) is much less restrictive than an "operated exclusively" standard. The IRS did not argue against its own regulation but contended that the "primarily engaged" and "operate exclusively" standard were not meaningfully different. The court determined that the organization did not meet either test, but the court went on to reject the taxpayer's reliance on the regulation: "Importantly, we no longer are required to provide '*Chevron* deference' to the Treasury's interpretation of § 501(c)(4) (although we can certainly consider it)… [T]he IRS's embrace of a legal standard cannot supplant our independent interpretation of the statutory text." *Memorial Hermann Accountable Care Org. v. Commissioner*, 120 F.4th 215 (5th Cir. Oct. 28, 2024).

c. Under the Anti-Injunction Act, no one can bring an action questioning the validity of a tax regulation in a manner that might later foreclose a tax liability. Instead, an actual taxpayer must wait until a Notice of Deficiency has been issued or the taxpayer pays tax and files a claim for refund to argue that the regulation is invalid and the tax should not be enforced against the taxpayer.

d. A hotly debated issue is whether a nationwide injunction is an appropriate remedy if a court finds that a regulation is invalid. (The Supreme Court may address that issue in the context of the constitutionality claims against the Corporate Transparency Act regulations.)

e. One way of attacking regulations is that they do not comply with the Administrative Procedure Act. The Tax Court has reversed course and now holds that the "in perpetuity" regulation for conservation easements is invalid. *Valley Park Ranch, LLC et al. v. Commissioner*, 162 T.C. No. 6 (Mar. 28, 2024).

16. Summaries from Heckerling Institute 2025

a. Information from presentations at the 59th Annual Heckerling Institute on Estate Planning™ are included throughout this summary and in the LOOKING AHEAD paper (referred to immediately before the Table of Contents of this summary). In addition, brief selected highlights from a few of the presentations at the Heckerling Institute are summarized in the LOOKING AHEAD paper. These include the following topics.

b. Purpose Trusts: New Approaches to Business Succession Planning **[EP122-126]**

c. Disposition of Human Remains **[EP126-128]**

d. Estate Planning Issues for Real Estate Investors and Developers **[EP128-137]**

e. Potpourri of Planning Tips (and Traps) for Married Couples **[EP137-139]**

f. Defined Value Formula Transfers – Musings **[EP139]**

g. Business Succession Planning; Key Issues for Advisors **[EP140-141]**

h. Immediate Pre-Mortem and Post-Mortem Planning—Two Weeks Before and Two Weeks After Death **[EP141-143]**

i. Some Non-U.S. Trust Law Concepts Important for U.S. Attorneys **[EP143-145]**

j. Jurisdiction Diversification Throughout the World **[EP145-146]**

17. Other Relatively Recent Cases—Valuation, Formula, Indirect Gift, §2036-2038 Issues, Decanting, Assignment of Income, Personal Liability for Estate Tax, Loans

a. *Smaldino*, T. C. Memo. 2021-127 (indirect gift; "purported" gift of LLC interest to wife followed by gift the next day from wife to trust for descendants [to use wife's exclusion]) **[EP137]**

b. *Estate of Michael Jackson*, T.C. Memo. 2021-48 (valuation of publicity rights; undervaluation penalties; tax-affecting not appropriate because taxpayer's experts had not persuaded the court that the buyers would be C corporations)

c. *Nelson*, T.C. Memo. 2020-81, *aff'd*, 17 F.4th 556 (5th Cir. 2021) (appeal: assignments were not defined value transfers based on finally determined values)

d. *Estate of Moore*, T.C. Memo. 2020-40, *aff'd* 124 AFTR 2d 2021-6604 (9th Cir. 2021) (transfer to FLP included under §2036; discussion of §2043; charitable formula transfer not recognized by Tax Court; affirmed, but on narrow grounds) **[EP110]**

e. *Estate of Warne*, T.C. Memo. 2021-17 (valuation of majority interests in LLCs owning real estate [4% LOC & 5% LOM discounts]; charitable deduction based on values passing to each separate charity) **[EP138]**

f. *Estate of Levine*, 158 T.C. No. 2 (2022) (intergenerational split dollar life insurance in trust; mother advanced $6.5 million for premiums; unrelated business associate controlled insurance for ILIT and he alone (not in conjunction with decedent) could terminate the split dollar arrangement early; Sections 2036, 2038 not applicable because of fiduciary duties and mere ability to amend contract was not "in conjunction with" under §§2036(a)(2) and 2038); Section 2703 not applicable) **[EP112-113, 118]**

g. *Estate of Morrissette*, T.C. Memo. 2021-60 (no §2036, 2038 or 2703; valued reimbursement rights with very little discount; undervaluation penalties applied despite reputable appraisals) **[EP112-113]**

h. *Estate of Cecil v. Commissioner*, T.C. Memo. 2023-24 (2023) (tax affecting allowed in valuing S stock; marketability discounts of 19% for voting stock; 22% for 15.57% nonvoting stock; 27% for 23.36% nonvoting stock; business was valued at its going concern value with **zero** weight given to its asset value (roughly $15 million vs. $147 million

i. *Sorensen v. Commissioner*, T.C. Docket 24797-18, 24798-18, 20284-19, 20285-19 (2022) (*Wandry* clause gift tax case settled) **[EP139-140]**

j. *Estate of Horvitz v. Commissioner*, Dkt. No. 20409-19 (Order dated Feb. 7, 2023, Judge Gustafson) (recognition of decanting for tax purposes)

k. *Estate of Hoensheid v. Commissioner*, T.C. Memo. 2023-34 (Mar. 15, 2023); *Keefer v. U.S.*, 130 AFTR 2d 2022-5405 (N.D. Tx. August 10, 2022) (denying motion for reconsideration of Order), 130 AFTR 2d 2022-5002 (July 6, 2022) (assignment of income cases for sales soon after transfers to charity)

l. *United States v. Paulson*, 131 AFTR 2d 2023-1743 (9th Cir. May 17, 2023), *cert. denied* (U.S. Mar. 4, 2024) (No. 23-436) (personal liability for unpaid estate tax by successor trustees and beneficiaries of decedent's funded revocable trust)

m. *Schlapfer v. Commissioner,* T.C. Memo. 2023-65 (May 22, 2023) (gift tax adequate disclosure; substantial compliance analysis) **[EP132]**

n. *M. Joseph DeMatteo v. Commissioner*, Tax Court Docket No. 3634-21 (Stipulated Decision Feb. 22, 2024) (valuation of life insurance policies)

o. *Cinader v. Commissioner*, Tax Court Docket No. 13491-22 to 13496-22 & 5245-22 (Stipulated Decision Jan. 3, 2024) (reverse split dollar life insurance)

p. *Estate of Bolles v. Commissioner*, 133 AFTR 2d 2024-1235 (9th Cir. April 1, 2024) (unpublished opinion), *aff'g per curiam*, T.C. Memo. 2020-71 (treatment of advances to son as legitimate loans vs. gifts)

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