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The MICHIGAN TAX LAWYER is a publication of the Taxation Section of the State Bar of Michigan that is designed to be a practical and useful resource for the tax practitioner. Input from members of the Taxation Section is most welcome. Our publication is aimed toward involving you in Section activities and assisting you in your practice. The Taxation Section web address is www.michigantax.org. If you have suggestions or an article you wish to have considered for publication, please contact Jennifer Watkins, Warner Norcross + Judd LLP, 2715 Woodward Avenue, Suite 300, Detroit, MI 48201; (313) 546-6192; jwatkins@wnj.com

SUBSCRIPTION INFORMATION

Any member of the State Bar of Michigan may become a member of the Section and receive the MICHIGAN TAX LAWYER by sending a membership request and annual dues of \$30 to the Taxation Section, State Bar of Michigan, 306 Townsend Street, Lansing, MI 48933. In addition, any person who is not eligible to become a member of the State Bar of Michigan may obtain an annual subscription to the MICHIGAN TAX LAWYER by sending a request and a \$30 annual fee to the Taxation Section at the aforementioned address.

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Letter from the Chair

Dear Taxation Section Members:

It is an honor to serve as Chair of the Taxation Section for the 2024–2025 term. The Section continues to plan and host any of its signature events. Earlier this term on November 14, 2024, we held our 3rd Annual Pre-Holiday Party at Eddie Merlot's in Bloomfield Hills. It was a great way to kick off the holiday season by networking with other tax professionals. This event always has great attendance and typically includes some new faces, so it's a good way to meet new people in the area. Thank you to Gene Magidenko for planning the event for the second year in a row.

The Taxation Section held its 37th Annual Tax Conference on May 22, 2025, at The Inn at St. John's in Plymouth, Michigan. We had great tax-focused educational content planned as well as a networking opportunities to connect with other tax practitioners. Patrick Robertson of Confluence Government Relations is a nationally known speaker and will spoke on the latest tax developments in his Washington Tax Update. The Tax Section was also excited to hear from Rachel Eubanks and Lance Wilkinson from the Michigan Department of Treasury. Thanks to Nick Papasifakis for all the work he put in to pull together a great lineup.

The Tax Section has been successful in hosting and planning for future seminars and events during the year. At the start of the year, it was a goal to schedule events in advance so that members could better plan to attend events. Tax Council and Committee chairs have rallied around this initiative and several events have been posted on the Taxation Section's website at a given point of time. They are typically a mix of in-person and virtual events so members across the state can participate. I would like to thank our Committee chairs who are working hard to host events they think are impactful to their groups. These chairs are:

- Employee Benefits — Samantha Kopacz
- Estates and Trusts — Kate Ringler
- Federal Income Tax — Christopher Attar
- State and Local Tax — Seth O'Loughlin
- Young Tax Lawyers — Bella Jordan

I would encourage everyone to consider joining a Tax Section committee. Most committees have at least one event scheduled in the coming months. Committee membership is free and helps ensures that you will receive notice of upcoming events. You can join a committee by logging into SBM Connect at connect.michbar.org/tax/committees/joincommittee.

Additional thank you to our program administrator, Barb Barratt. She has helped us to continue to make improvements to our infrastructure and practices to help get out save the dates for upcoming events and make registration for the events easier.

Finally, I would like to thank all the Tax Council members and Committee Chairs for their support of the Tax Section so far this year. I am highly appreciative of everyone's time and efforts to provide content to the Tax Section's membership. It has been great working with you. I look forward to seeing you at future events.

Sincerely,

Rebecca Pugliesi
Chair, Taxation Section

Section Committee Reports

YOUNG TAX LAWYERS

Bella Jordan

Committee Chair, Young Tax Lawyers Committee

Bella Jordan is a member of the National Tax Office at Plante Moran specializing in federal tax consulting for corporations and partnerships in the context of mergers and acquisitions, accounting methods, and tax legislation.

On January 30th, the Young Tax Lawyer Committee hosted a networking event at Lansing Brewing Company in partnership with the Student Outreach council. The Committee is currently planning a similar networking event in Southeast Michigan in July.

Additionally, the Committee is planning to host a webinar in partnership with the SBM Young Lawyers Council on tax M&A and implications of new tax policy.

FEDERAL INCOME TAX

Christopher Attar

Committee Chair, Federal Income Tax Section

Christopher Attar is a tax attorney at General Motors where he advises on strategic transactions, M&A, joint ventures, cross-border transactions, and more.

- On April 10, 2025, the Federal Income Tax Committee hosted a joint panel discussion with the International Law Section on the topic of doing business abroad (titled Expanding your Business Globally: Key Legal and Tax Considerations).
- On June 5, 2025, the Federal Income Tax Committee and the Employee Benefits Committee hosted a round table discussion on the topic of profits interest.
- The Federal Income Tax Committee is working on a July/August event on the topic of M&A and selling a business. More details will be provided soon.

EMPLOYEE BENEFITS

Samantha Kopacz

Committee Chair, Employee Benefits

Samantha Kopacz of Honigman continues to act as Chair of the Employee Benefits Committee.

On February 6, 2025, the Employee Benefits Committee met virtually for a “Roundtable Discussion on Employee Benefits Hot Topics” and hosted another roundtable discussion on July 17, 2025.

The Employee Benefits Committee is currently developing its schedule of future events. For information on upcoming events, or to become involved with the Employee Benefits Committee, please register for the Employee Benefits Committee on SBM Connect or contact Samantha Kopacz at skopacz@hongiman.com.

First, Do No Harm: The Missing Justification for Stock Acquirors' Requiring Target Companies to Terminate 401(k) Plans Before Closing

By Nicholas Nahat and Andrew Stumpff



INTRODUCTION

Like physicians, lawyers sought in general to have good reasons for extraordinary steps they urge upon their clients. In both professions the obligation applies with particular force to a recommended action that brings client-disadvantages and potential adverse side-effects of its own. In such a case, a bare “It seems better to me for you to take this step” – let alone “This is the way we generally do it” – is difficult to accept as a matter of practice.

However straightforward this “Legal-Hippocratic” principle (let’s call it),¹ there exists a context in which it currently sometimes seems to be disregarded by employee benefits advisors working on corporate mergers and acquisitions. The M&A environment is characteristically fraught, of course, in that the negotiating and drafting circumstances can be tense and time sensitive. Transacting parties are often keen to pursue two potentially contradictory goals: that of consummating the transaction quickly, and that of minimizing the transaction’s day-to-day impact on the target company’s workforce – whose undisturbed expectations about carrying on their responsibilities may be a predicate to the economic value of the company as assessed by the buyer, and hence to the transaction itself.

Into this environment, in the authors’ experience, counsel for the acquiror not uncommonly inject an expressed preference that the seller procure, as a condition to closing the acquisition, the formal termination of any active 401(k) plan maintained by the target company. In the case of smaller transactions, the demand may even be posed as categorical and nonnegotiable. The justification for the preference is (again, in the authors’ experience) usually vaguely stated, along the lines of “This is generally understood to be the best way to insulate our client [the acquiror] and by extension its controlled group from liability for legal noncompliance by the target’s plans.” The short-hand recurring reference-term for this concern is that, depending on the circumstances, the acquiror’s own retirement plans themselves may otherwise acquire the “taint” of any legacy noncompliance with the Internal Revenue Code by the target’s plan, unless the latter has ceased to exist before its sponsor joins the buyer’s controlled group.

None of this, we suggest, withstands scrutiny as a default contractual practice to be followed as an article of faith, regardless of cost or human-resource disruption. To be sure, there may be (and possibly less infrequently were, in past years) circumstances where the balance of likely benefits and harms to the acquiror could support a similar request: for example, perhaps, involving unusual considerations of plan-distribution options, or conceivably target-sponsored defined-benefit plan liability under the Employee Retirement Income Security Act (“ERISA”). The authors do not intend to argue that it is *never* better for the acquiror to impose such a requirement. There should, however, at least be an identifiable reason for it in the transaction at hand.² Given the work-force disruption and resource-demands associated with a target company’s rushing to terminate a retirement plan in the (typically durationally uncertain, and often quite short) time-interval between signing and closing, the default practice ought to be not to advise that.

In what follows, the authors focus in particular on one type of transaction involving one type of retirement plan: the 100% stock-acquisition of a target corporation, where each of the acquiror and target maintains a defined-contribution plan intended to qualify as a cash-or-deferred arrangement under Section 401(k) of the Code. We choose this focus as illustrative for two reasons: First, because it is a common scenario and one in which we have heard the “taint problem” raised as a rationale for requiring termination of the target’s plan pre-closing. Second, in this 100%-stock-acquisition context specifically, we are actually unable to locate *any* legal or logical support for the idea that the acquiror’s compliance risks might be lessened – even in theory – by terminating the plan prior to the transaction’s consummation.

In transaction- and plan-scenarios other than this one, our concern may be limited to mere failure, on a case-by-case basis, to advise the acquiror about weighing a possible increase in one legal risk against the disruptive, abrupt and rushed termination of a major in-place workforce compensation arrangement (consistent with the way other, non-employee-benefit transaction risks will be presumably being weighed by that acquiror in the same transaction). But in this particular situation – the 100%-stock acquisition – benefits advisors who insist on instant plan termination may be more or less routinely causing *per se* affirmative harm with no compliance-risk benefit whatsoever, a disservice not just to the seller and the target but to everyone involved in the transaction, including their own clients. The reasons (beyond unreflective reliance on the consistency of past practice) may involve either a misunderstanding of liability risk, or an underestimation of the cost and “administrative risk” of requiring pre-closing termination, or both.

I. ASSESSMENT OF THE NONCOMPLIANCE “TAINT PROBLEM” AS AN ARGUMENT FOR REQUIRING TARGET PLAN TERMINATION BEFORE CLOSING

In the central illustrative case considered here, the owner or owners (“Seller”) of 100% of the stock of a corporation (“Target”) have agreed in principle to sell that stock to a corporate acquiror (“Buyer”). Following usual transactional practice, the parties negotiate to memorialize their agreement in the form of a detailed signed contract (a “Stock Purchase Agreement”), in which the Buyer undertakes to exchange cash or other consideration for the shares of Target on some future date (“Closing”),³ as soon as all conditions to Closing specified in the Stock Purchase Agreement have been satisfied. After Closing, the Target will be a 100%-owned subsidiary of Buyer, having joined whatever other affiliated companies comprise Buyer’s already existing controlled group.⁴

The question presently of interest is the justification for one closing condition in particular sometimes demanded on behalf of Buyer.⁵ Namely, Buyer’s counsel may insist that Seller have terminated the Target’s 401(k) retirement plan by Closing (or, more precisely, instantaneously before and conditioned upon Closing⁶). As already outlined, Buyer or its counsel may take the position that this request characterizes Buyer’s (or, for that matter, most everyone’s) “standard practice” even in stock purchases, because it better insulates the Buyer from noncompliance liability.

The remainder of this article interrogates this rationale as systematically as we are able.

A. CLARIFYING THE ALTERNATIVES

The conceptual alternatives to pre-Closing termination available to the Buyer appear initially to break down into three categories, according to the Buyer’s longer-term integration intentions for the Target’s 401(k) plan:

1. Buyer can cause the Target’s plan to be terminated, but after Closing.
2. Buyer can merge the Target’s plan with an existing 401(k) plan maintained somewhere in Buyer’s controlled group, after Closing.
3. Buyer can allow the Target’s plan to continue in existence on its own, indefinitely after Closing, either on a “frozen basis”⁷ or as a separate continuing 401(k) plan within Buyer’s newly constituted controlled group.

This list is amenable to simplification for our purposes, however, since both of Options #2 and #3 involve, like Option #1, the Target’s continuing to maintain the plan for at least some non-zero period after Closing. Logically, then the question whether pre-Closing termination would be at all helpful to compliance risk can be reduced to this one:

Is there any compliance-risk advantage for the Buyer to requiring the Target’s plan be terminated plan pre-Closing, relative to the Buyer’s simply waiting and terminating the plan after Closing?

We have been unable to identify in the stock-acquisition context any such compliance-risk advantage. Furthermore, deferring the decision until after Closing not only appears to have no material *per se* deleterious effect on Buyer’s other Options #2 and #3, the reverse is actually true: Pre-Closing termination irrevocably eliminates any possibility for the Buyer to choose Option #2, the plan merger, which may otherwise have been preferred.⁸

B. SIMPLER SAID THAN DONE: TERMINATION

It may be useful at the start briefly to review what is involved with the formal termination of a qualified retirement plan – both in order to assess the cost of what is really being asked of the Seller, and to allow for more precise analysis of the claimed benefit to Buyer.

We distinguish first a different, intermediate step that Buyer might request, which would be merely to “freeze” the Target’s plan. Freezing means that the plan and its associated trust continue in legal existence, but new benefit accruals are halted (which, in practical terms, for a 401(k) plan means no new contributions are to be made post-Closing). Participants in a frozen plan become fully vested in their accrued benefits as of the date of freezing, continue to be permitted to change their account-investment-instructions and to withdraw funds at retirement, and will usually commence (as to future deferrals or other plan contributions) to participate in a Buyer-sponsored plan immediately after Closing.

We do not quarrel with routine requests for plan-freezing, as opposed to termination, as an acquisition closing condition. That is

indeed understandably “standard practice” in the many transactions, regardless of corporate or acquisition form, where Buyer intends (and is in position administratively to carry out the execution of the intention⁹) that Target employees will participate in the Buyer’s own plan effective immediately upon Closing.

An actual, formal plan termination – which seems to be what those worried about the post-Closing “taint problem” are after – is quite different.

What does the full-scale, formal termination – in contrast to freezing – of a qualified plan actually require? In general, the plan administrator must (among other things):¹⁰

- notify plan employee-participants; and
- distribute plan assets to the plan employee-participants as soon as administratively feasible (generally, within one year).

As with freezing, upon plan termination, each employee is 100% vested in their account balance, which may include matching or profit-sharing accounts, regardless of the plan’s nominal vesting schedule. If the plan allows for participant loans, at termination all participant loans become due. If a participant doesn’t have the resources to pay off their loan, the loan balance becomes a taxable distribution. (This consequence can be mitigated if the participant is immediately enrolled in the new Buyer-sponsored 401(k) plan, and both plans allow for rollovers of loans.)

“Missing participants” – those for whom the plan’s contact information is no longer current and who cannot be located by other means – will need to be addressed before termination as well. The sponsor/fiduciary must follow Department of Labor rules to locate missing participants, which involves several steps. The rules regarding plan terminations require Buyer to transfer any unaddressed individual account balances to Buyer’s surviving plan (if also an individual account plan). Buyer then has a duty to prudently search for the missing individual periodically, which has an associated cost, beyond the further administrative cost associated simply with holding these accounts if Buyer’s plan’s service provider charges by headcount.¹¹

Certain investments – such as a guaranteed investment contract – will likely entail imposition of additional fees upon withdrawal. Depending on those fees and how they are structured, at least a few conversations with investment advisors is warranted concerning the liquidation of same.

Several other details must be addressed with plan termination: Mid-year termination of a safe-harbor-design 401(k) plan is generally permitted only if it is in connection with certain business transactions or the employer incurs a substantial business hardship. If not, the employer cannot take advantage of the safe-harbor exception to the Code’s Actual Deferral Percentage and Average Contribution Percentage tests for the year of termination.¹²

Unallocated amounts or forfeiture accounts should be considered when distributing all assets, and a plan amendment may be needed to clarify what plan expenses may be paid with these amounts or allocated to participants. This is because expenses associated with terminating a plan may be paid using forfeiture accounts if permitted. (While termination is a settlor decision, the implementation steps are usually fiduciary actions, and may be paid for with plan assets, again, if permitted under the plan.)

Among these and the many other necessary administrative tasks,¹³ for rollover-eligible distributions, a 402(f) notice must be provided to participants describing distribution options and other matters.

There are also tax consequences to be considered for participants themselves. An individual who receives benefits when a plan terminates must include any part that was not previously taxed in his or her gross income for the year of distribution. If the individual is under 59 ½ years of age, then the amount received may be subject to 10% early withdrawal tax. However, the participant may be able to roll over the distributed assets into another qualified plan (perhaps to the retirement plan of the new company) or an individual retirement account. Either way, however, the upshot is that terminating a plan and distributing assets presents employees with a metaphorical apple whereby they may be tempted to take a bite out of the distribution rather than rolling it over, thereby setting back their retirement savings, for no reason other than a change having occurred in the ownership of their employer. (As with a plan freeze, employees would also immediately have to be offered, and make, deferral and investment elections under the Buyer plan in order to avoid an interruption in new accruals. This can raise unusual or inconvenient payroll challenges raised for the Target immediately pre-Closing.)

In sum, a full-scale plan termination is a large undertaking, disruptive alike to the parties, the Target and its employees, who will receive unexpected notices followed by a suddenly impending distribution of their entire account balance. The contrast is striking with the measured and highly communicated manner by which corporate human resource departments are usually at pains to roll out large-scale benefits changes.

Practically speaking, the full completion of formal termination – that is, the completion of all the requirements just listed – by Closing actually seems out of the question in virtually all cases (due to the necessity of employee notice, among other things). As a result, Buyer’s counsel will typically be persuaded to limit the specific pre-Closing condition to a more limited “all necessary corporate actions taken to irrevocably terminate the plan.” As a result, however, even were the “taint problem” real, it may already be too late for a Buyer to wall-off its plans with 100%-certainty from Target plan noncompliance.

But what makes the conventionally accepted acquiror preference particularly puzzling is the lack of identifiable benefit even if everything *is* done on time, by Closing.

C. THE CLOSING DATE IS NOT AN INFLECTION POINT FOR TERMINATED-PLAN COMPLIANCE RISK TAKEN ON BY BUYER

If Target's employees are to stop accruing new benefits as of the Closing (*i.e.*, the plan will be frozen) and begin participating in the Buyer's plan immediately thereafter, it is hard to see how the expected cost to Buyer of a compliance failure would be affected by the date of formal plan termination, whether before or after the Closing. Either way, the Buyer owns a 100% subsidiary with a terminated 401(k) plan. There is no *per se* additional or different threat of noncompliance infection of other plans in Buyer's post-Closing controlled group.

Note: A theoretical reason can be offered to terminate the plan pre-Closing if the Buyer, *ex ante*, wants to force an immediate in-service cash-out of Target plan balances (that is, wants to do so not to avoid a noncompliance "taint problem" but just because Buyer wants to *force plan distributions, as a matter of plan design or administration*). This is because (1) Buyer will likely eventually want the employees to begin participating in the Buyer's existing plan; and (2) in order to accomplish (1) without a 12-month interruption in plan participation, the termination has to occur pre-Closing, to avoid the Code's requirement that an employer not adopt a successor "alternative plan" within 12 months of plan termination. (Plan termination is not a distributable event for elective deferrals if any member of the Buyer's controlled group maintains an "alternative plan.") The specific rationale for (2) is then that the stock sale will result in the Seller's being part of a new controlled group, therefore becoming post-closing a different "employer" than pre-Closing.¹⁴

The authors are aware of acquirors who appear to have a standing preference for distributing all accounts out of the Target's plan in order not to be faced with protecting "benefits, rights and features" of that plan, post-Closing, under the "anti-cutback" rules of Code Section 411(d)(6). (Such protected features can extend to surprising corners of the Target's plan, including such things as the definition of participant "disability," where relevant.) If accounts are not distributed, these rules may complicate the Buyer's post-Closing plan administration, because the identical features may not align across all 401(k) plans in Buyer's controlled group.

But in the authors' experience this isn't usually the stated reason for the acquiror's demand (perhaps because limiting the acquiror's own post-Closing plan-administration burden is a less sympathetic rationale than noncompliance "taint" risk for forcing such a sudden and disruptive retirement-planning event on Target employees).

In any other transactional context, such an *ex ante* institutional motivation would in our experience be the rare exception rather than the norm. The Buyer's usual expressed general preference is the precise opposite: to *avoid* any unusual or rushed transaction-related disruptions to the day-to-day work or compensation of Target employees.¹⁵

D. STRATEGIES FOR MITIGATING NONCOMPLIANCE RISK ARE THE SAME, EITHER WAY

Let us continue to break down the "taint problem" hypothesis as finely as we can. By assumption, the concern involves Target plan's harboring some pre-existing noncompliance defect, either known or unknown at the time of negotiation of the Stock Purchase Agreement. That noncompliance defect is a potential tax and operational risk – one special case of the many such potential risks involved with anyone's buying a company – that must be considered by Buyer in evaluating the wisdom of proceeding with the acquisition. Keep in mind, however, that – assuming no particular reason obtains for not respecting the corporate form (and if it did, the Buyer's risks would extend far beyond the 401(k) plan) – the basic premise with a stock acquisition is that the liabilities of the Target will not become those of Buyer itself. The Target is its own entity; its legacy noncompliance issues – again, in general – simply diminish the economic value of Target's stock as an economic asset of Buyer.

In any case, Buyers typically pursue a number of risk-mitigation practices – including due diligence, negotiated Seller contractual representations, and negotiated Seller indemnification – designed to avoid walking into any such costly unrecognized compliance error (or, the same thing, not discounting the purchase price enough to reflect it). The question is whether these steps depend in any way on the Target's 401(k) plan's having been terminated before Closing of a stock transaction. It doesn't appear so.

1. IRS Correction Procedures

If the Buyer timely identifies qualification errors or defects in the Seller's qualified retirement plans during the due diligence process, it may have the opportunity to require the Seller to correct these errors by means of the IRS's Employee Plans Compliance Resolution System (EPCRS). It will, of course, effectively never be possible to pursue an EPCRS correction process from start to finish during the interval between signing the Stock Purchase Agreement and Closing. The issue is then whether there is any disadvantage to the Buyer in pursuing the process post-Closing, for a plan that is now maintained by one of its 100%-owned subsidiaries.

As a reminder, certain qualification errors can be self-corrected without IRS approval under EPCRS, while others must be submitted to the agency for formal review and approval. The qualification failures eligible for EPCRS correction include both operational failures, where a plan has not been operated according to plan-document or Code requirements; and plan-document failures, where a plan does not comply with Code requirements for terms that must be included in qualified plan documents.

The amount of EPCRS-related expenses varies depending on:

1. The type of qualification error;

2. The time period over which the error occurred;

3. Whether the correction procedure used is a streamlined, pre-approved IRS correction or requires negotiations with the Service.

Of relevance here: None of these EPCRS cost- or penalty-factors depends on the magnitude of “the plan” as a whole, itself. How do we know this? The express terms of the Revenue Procedure comprising EPCRS itself state as follows:

.03 Transferred Assets. If the examination involves a plan with Transferred Assets and the IRS determines that no new incidents of the failures that relate to the Transferred Assets occurred after the end of the second plan year that begins after the corporate merger, acquisition, or other similar employer transaction, *the sanction under Audit CAP will not exceed the sanction that would apply if the Transferred Assets were maintained as a separate plan.*

Rev. Proc. 2021-30 (emph. added).

That is, the correction cost under EPCRS for a Target plan compliance failure does not increase even if the Target’s plan merges with the Buyer’s plan after Closing, let alone if it continues as a stand-alone plan elsewhere in the same controlled group, and this is true even if the compliance failure is not caught until identified by the IRS itself, on audit.

The existence and phrasing of this provision are incompatible with the fundamental premise of the “taint problem.” The IRS did not see a reason – presumably for the same reason we do not – to spell out, or even to mention, that compliance costs are applied on a plan-by-plan basis in the case of two parallel stand-alone plans, of which the one being corrected has been taken on board in an acquisition. Moreover, even if the Target’s plan is merged by Buyer with another plan its controlled group, whatever merger-related “taint” now exists in the Buyer’s plan can be addressed for a period extending at least two full years beyond the Closing.¹⁶ The Closing of the transaction itself is simply not a temporal plan-compliance-risk inflection point: for error-correction, for plan-merging, or for deciding between these two courses and/or any combination thereof.

2. Contractual Burden-Shifting

Of course, any acquiror should do its best, given the available time and resources, to ensure that the acquisition target’s qualified retirement plans are in legal and tax compliance at the date of the transaction. To the extent any qualification defects are discovered (before or after signing the purchase contract), the parties can specify or agree whether the defects should be corrected and by whom.

Depending on the complexity of the qualification error, Buyer may require that the Seller agree in the purchase agreement to be financially responsible for correcting qualification errors under EPCRS after Closing, as described just above. Alternatively, or if EPCRS is not available, the parties to a transaction involving retirement plans with known qualification errors may set out in the purchase agreement which party is financially responsible for the corrections and liability associated with the errors.

Yet again: None of that is dependent on whether the plan (a corporate undertaking, and therefore a potential source of noncompliance liability of the Target itself) has been terminated before or after the ownership of the Target changes hands.

E. LIMITING THE PRE-CLOSING REQUIREMENT TO TARGET BOARD RESOLUTIONS IS EVEN LESS JUSTIFIABLE

As argued in the previous section, whether or not any of the mitigation possibilities is destined ultimately to be effective for Buyer – either via compensation from the Seller or correction under EPCRS – the answer seems unaffected (at least in a stock transaction)¹⁷ by whether the plan is terminated before or after the transaction’s consummation.

In view of the daunting list of formal termination requirements described in Section A above, some buyers’ counsel will agree to limit what must be done by closing to an irrevocable corporate action terminating the plan (typically a board of directors or committee resolution). They assert that whatever benefits or protections they are seeking will be equally available if the necessary resolution terminating the plan is signed by Closing. But this seems even harder to justify, inasmuch as it involves conceding that the plan will not have been formally terminated, for IRS compliance purposes, at all.

II. TERMINATING THE TARGET PLAN PRE-CLOSING POINTLESSLY LIMITS THE BUYER’S POST-TERMINATION PLAN ALTERNATIVES

Even if the continued mere existence of the Target’s plan does not threaten Buyer’s other plans with noncompliance risk, perhaps (the conventional wisdom seems to run) it may still be that terminating the Target’s plan before Closing provides Buyer with the broadest range of risk-mitigating choices for incorporating that plan into Buyer’s post-Closing benefit framework. The reverse seems closer to being true.

If the Target plan remains in existence post-Closing, the Buyer will be in a position to evaluate its options, one of which is to merge the Target plan with an existing plan somewhere in the Buyer’s controlled group. As already noted, Buyer will have several years to do so, without changing the potential compliance-risk calculus. Straightforwardly, however, if the Target’s plan has been summarily terminated as a condition to Closing, that alternative option will have been irrevocably foreclosed, so the question isn’t even relevant.

Plan mergers are complex undertakings of their own, of course, requiring adherence to a host of protective requirements, including

“anti-cutback” provisions whereby already accrued benefits, rights and features (including, generally, distribution options) must be preserved, and sometimes complex workforce communications. Whatever the benefit or lack thereof of a merger, however, there is no point in simply requiring that that alternative be taken off the table out of adherence to a standing practice of insisting on pre-Closing plan termination. From an employee-relations perspective, plan-merger communications over some reasonably extended period are likely to be less alarming than being presented with a sudden notice of termination, along with having to confront the immediate choices involved with being offered distributions simultaneously with a sale of the employer.

In sum, it is challenging to identify a persuasive way in which the Buyer’s options are limited, or its risks increased, by refraining from terminating the Target’s 401(k) plan pre-Closing – certainly, at least, in the 100% stock-acquisition context.

III. THE COSTS, TANGIBLE AND INTANGIBLE, OF RUSHING THE PROCESS FOR NO REASON

A rushed, sudden retirement-plan termination is contrary to the basic principles that govern most going-concern business acquisitions. Indeed, a standard overall pre-Closing purchase-agreement covenant requires that the Target not *in any material way change* the benefits or compensation of its employees outside the “ordinary course of business,” without Buyer consent. The straightforward reason for this is the Buyer’s own desire not to unsettle the workforce, to increase their anxiety about the transaction itself in a way that could lead to increased turnover or other extraordinary outcomes that would call into question the valuation the Buyer has placed on the Target to begin with.

Even if that were not true – that is, even if all that has been said above is wrong or at least inapplicable to a particular transaction – Buyer’s approach should be one of balancing costs and benefits. Employee-benefits risk and administration questions do not inhabit a different conceptual universe from any other like issues germane to the transaction. The Target’s 401(k) plan compliance risks, such as they are, should simply be managed through the Stock Purchase Agreement in a coherent way like all other Target compliance risks.

CONCLUSION

Mergers are unique and detailed transactions. Since the best practices for managing benefits transition for one corporate acquisition may not be the best options available for another, it follows that immediate recourse to a usual plan-termination strategy should also be reconsidered.

The impulse to “terminate first and ask questions later” seems to stem from a misplaced desire to eliminate *any* risk for an acquiror regarding the target company’s plan. This results in unnecessary burdens for the acquiror’s human resource officials and unnecessary confusion (and perhaps difficult decisions) by target-company employees. A swift and peremptory termination is antithetical to the usual goal of any acquiror: having the transaction itself be as transparent and nondisruptive as possible to employees. The frequently asserted benefit of avoiding noncompliance “taint” for an acquiror’s other retirement plans (assuming there exists some qualification problem with the target plan) posits some difference between the unavoidable inheriting of that risk by virtue of having bought stock, and the possibly avoidable risk-increase associated with ultimately merging the target plan with the Buyer’s. As a general matter that difference seems unlikely to be greater than zero, let alone of a magnitude that could justify the inconvenience, disruption and difficulty of a forced pre-Closing termination.

ENDNOTES

- 1 “Epidemics, Book I, of the Hippocratic school,” from HIPPOCRATIC WRITINGS (Lloyd, Geoffrey, ed., 2nd ed.: London, 1983), p. 94. The same burden-of-justification idea, that before disturbing the status quo one ought to acquire some well-founded sense of the probable net calculus of resulting benefit and harms, is also recognizable in colloquial formulations like “The cure shouldn’t be worse than the disease.” and “If it ain’t broke, don’t fix it.”
- 2 Benefits advisors or their client counterparts may also in some cases be looking for a reason to distribute all existing accounts out of the target-company’s 401(k) plan, for the sake of simplifying the acquiror’s own ongoing plan administration (and in particular, to avoid having to undertake any special accounting that may be required to protect existing features of the target’s plan). See text at notes 16 - 17

infra. If that is the real motivation for the benefits advisor’s demand, however, it should be so expressed. The concern has nothing to do with noncompliance risk or “taint.”

- 3 More precisely (where relevant), “Closing” is effectively typically an agreed-upon instant, just before which Seller continues to own Target and just after which Buyer does.
- 4 Obviously, we are leaving out for simplicity many details and possible variants of stock purchase agreements, transactional structure and closing process, which are irrelevant to the simplified question under consideration here.
- 5 It is far from universally requested. The demand doesn’t appear very common in large transactions or even transactions among near equals, probably because in such scenarios the sheer impracticality of the request is so much more obvious to all involved. (That the preference is so readily

- discarded on purely practical grounds in larger transactions may be another ground for subjecting to question why anyone harbors the preference at all.) Even where the Target is small relative to the acquiror's controlled group, many acquirors (including, in the authors' experience, many large and frequently acquisitive controlled groups) do not adopt this approach. Nonetheless, the basic abstract premise that the safest way to avoid compliance "taint" is to terminate a plan pre-closing seems to have gone mostly unchallenged in the benefits M&A bar generally.
- 6 That is, effectiveness of both the plan termination and the Closing are made mutually conditional on each other's having occurred, as of the notional, alchemical instant of the Closing itself.
 - 7 See the discussion at the beginning of Part C below.
 - 8 See text at notes 16 - 17 *infra.*, however, for consideration of a constraining effect that should nonetheless not be considered *per se* deleterious, since it involves making more difficult a set of plan distributions that all of the parties, particularly from the Buyer's side, would in the usual case want to avoid.
 - 9 This will itself involve a potentially nontrivial combination of amendments to Buyer's plan and administrative-process preparation, by which the necessary payroll and other deferral machinery will be in place by 12:01 a.m. the day after Closing.
 - 10 A somewhat more detailed enumeration with citations follows: A variety of notices are required, including an explanation of distribution options. See, e.g. 26 C.F.R. § 1.411(a)-11(c)(2). Revenue Ruling 89-87, 1989-2 C.B. 81, requires that the plan administrator ensure that all plan assets are distributed as soon as administratively feasible after the plan termination date. In addition to these general considerations there are others, such as satisfying qualification requirements before termination (Revenue Procedure 2021-4, §15.05). See also 26 C.F.R. § 1.401-6 ("Termination of a qualified plan"). Also, hard-to-value assets will require a valuation, outstanding loans accelerate repayment, and account balances of affected employees must be 100% immediately vested. 26 U.S.C. § 411(d)(3).
 - 11 This also means, of course, that Buyer will be left with a trustee-to-trustee plan-asset transfer for certain participants, even if the Target's plan is otherwise terminated. Internal Revenue Service Form 5310-A states that the IRS considers the asset transfer itself to be a plan merger (and some might consider there to be a transfer of a "taint" due to the merger because the assets themselves might have been the subject of the taint by virtue of being impermissible in some way).
 - 12 See I.R.C. §§ 410(b)(C) and 412(c)(2); 26 C.F.R. §§ 1.401(k)-3(g) and 1.401(m)-3(f)(4).
 - 13 A summary of material modifications must be issued by the plan administrator within 210 days of the close of the plan year in which the termination is adopted. A final Form 5500 filing must be submitted within seven months following the date of the distribution of all assets. Similarly, if the Target intends to file for a determination letter upon plan termination, a notice must be provided to interested parties—employees with accrued benefits, former employees with vested benefits, and certain beneficiaries—within the ten to 24-day period before filing. (This last sort of filing is, however, nowadays unusual.)
 - 14 Even here, caveats apply for the Buyer when the closing happens on the same day as the plan termination. An alternative plan means a plan that exists at any time between the date of a plan termination and 12 months after distribution of all assets from the terminated plan, under 1.401(k)-1(d)(4). For purposes this rule, the definition of the term "employer" contained in §1.401(k)-6 "is applied as of the date of plan termination." That is a factor when the closing happens on the same day as the plan termination, which encourages having a gap in time between the closing and the termination date. However, such a gap can be undesirable for employee relations and payroll feasibility purposes. A plan is not an alternative plan if at all times 12 months before and 12 months after the plan termination date, fewer than two percent of those eligible under the terminated plan are eligible under the other plan. That won't typically be the case under our assumptions.
 - 15 See Part III below.
 - 16 If someone is concerned that a compliance failure may not be caught by the end of the second full post-Closing plan year, the answer is simply: do not merge the Target plan with a Buyer plan – before that deadline or after it. None of this is relevant to *terminating* the Target plan, *pre*-Closing.
 - 17 Time and resource constraints of our own prevent the authors from extending the present analysis to asset sales and other fact-variations. We suspect, however, that if in other contexts the "closing-is-not-an-inflection-point" argument cannot be as flatly sustained, nonetheless it would be the rare situation where the increase in probable acquiror liability justifies (relative to other transaction risks) something as extraordinary and otherwise counterproductive as requiring pre-closing plan termination.

The Uncapping Conundrum

By Seth O'Loughlin



In addition to the normal buying and selling of property, real property is routinely transferred for estate planning, tax planning, financing, divorce, and more. What may be viewed from the owner's perspective as a simple transfer from an individual to an LLC wholly owned by that individual to create a liability shield can, however, have substantial property tax implications that must be taken into account. Property taxes matter because they are often the largest fixed expense for a property owner. Whether for a residential property or a commercial one, Michigan has the 14th highest property tax burden in the country.¹ As such, it is important that whenever a transfer of a property is contemplated that any attorney advising the transaction consider the property tax implications when determining the most effective strategy to employ.

While relevant to all property owners, the longer a property has been owned before the transfer the more substantial the property tax implications are. Property taxes are levied by multiplying the taxable value of the parcel by the local millage rate and dividing by 1,000. Proposal A to Article IX § 3 of Michigan's Constitution provides a built-in cap to the increase of taxable value: unless the property transfers as defined by MCL 211.27a the taxable value can only increase by the lesser of 5% or the Consumer Price Index for the year. This provides a benefit to individuals or entities that buy and hold properties. As an example, the 2025 CPI was 3.1% but residential home prices were up 9% from 2024.² Over time, the Proposal A cap can create a taxable value, and thus tax burden, that is substantially lower than the usual selling price of the property.

If, however, there is a transfer of ownership that requires the taxable value be uncapped, the value will be set at 50% of the true cash value of the property in the year following the transfer. This can lead to massive year-over-year increases in property taxes. MCL 211.27a determines what transfers are, and are not, an uncapping event. With 11 subsections that define an uncapping transfer and 24 subsections defining what transfers are not uncapping events, the law presents many pitfalls for parties or their counsel who do not consider the exact details of the transaction. With the Legislature modifying the statute eight times since 2012, or more than once every two years, constant review is necessary to ensure no issues arise.

While an analysis of each subsection would require its own article, the general principal as set forth in the statute is that any transfer that results in the conveyance of title or beneficial use of a property will result in an uncapping. So, the normal buying and selling of property will trigger an uncapping. The conveyance of a deed, land contract, or lease to lease to purchase will result in an uncapping. In the corporate ownership context, any conveyance of more than 50 of an interest in the property owning entity is also a transfer. It is functionally impossible to avoid an uncapping in the normal buying and selling of real property.

The dangers, however, are not in the normal buying and selling of property, but from the dangers when property is transferred in other contexts. For example, the transfer of non-residential property into a trust, from a trust, and the changing of the beneficiaries of a trust also triggers an uncapping. There is an exception for residential property but even that only applies if the beneficiaries are a family member as defined by statute. Notably, this excludes adopted grandchildren and siblings, but includes adopted children making careful review of the statute. Something as simple as modifying one of ten beneficiaries to a trust holding commercial property, unless the change is to add or substitute a spouse, can result in an uncapping event for every commercial property held by that trust.

If a deed is filed, MCL 211.27a(10) requires that the register of deeds update assessors of all recorded transactions on a monthly basis. The assessor is automatically aware of what occurred. The danger of hidden uncapping events is heightened in situations where a deed is not filed as part of the transaction such as the beneficiary situation detailed above. While MCL 211.27a(10) requires that a property transfer affidavit be filed whenever a transfer of ownership as defined in that statute occurs, that requires that the parties or their counsel know that one needs to be filed. That often does not happen. If a transfer of ownership does occur and documentation is either not filed or the local unit of government does not uncap the property, the local unit of government can retroactively uncap the

property and require the immediate payment of all back taxes with interest, regardless of how long ago the transfer occurred.³ This can result in massive tax bills with very short notice. MCL 211.27b provides only a 35 day period to challenge the delayed uncapping and a failure to timely raise a challenge is dispositive.

With the extensive list of what does qualify as an uncapping is a similarly long list of what does not. In general, transfers between spouses are not uncapping events. There are special provisions for foreclosure and redemption situations or where the transfer involves agricultural property, qualified forests, or subject to a conservation easement. There is an exception for residential property transferred between immediate family members. There are also several carveouts for transfers between corporate entities where they are commonly controlled or members of an affiliated group such that the beneficial interest did not transfer.

The more complicated the ownership and the more transactions that occur, the more vexing the issues can be. In *FCB Associates LLC v City of Ann Arbor*, a 2024 case, commercial property was owned by an LLC that was in turn owned by the revocable trust of Dr. Hina Papo.⁴ FCB Associates acquired the property in 2020 from a partnership that was owned by Dr. Papo and his deceased wife. The wife passed away, the doctor became the sole owner of the partnership, and the property was transferred to the new LLC for estate planning purposes. The transfer from the partnership to the LLC was accomplished via warranty deed. The filing of the deed, however, exposed the uncapping event. The partnership had been owned 51% by the deceased wife and 49% by Dr. Papo. The doctor became the controlling owner of the partnership when his wife died. This change, not the transfer to the LLC, was found to be an uncapping event under MCL 211.27a(6)(h) because Dr. Papo received the majority share in the partnership, and thus ownership, through the dissolution of the partnership entity. That statute, being directly on point to the facts of the case, rendered arguments as to uncapping exceptions for a direct spousal transfer or through a will moot.

Any party, or their counsel, reviewing the transfer between the partnership to the entity would be correct in noting that would not be an uncapping event under MCL 211.27A(7)(m). The failure to review the partnership activity, however, caused substantial problems. While the factual scenario in *FCB Associates LLC* is unlikely to be repeated now that the case has been adjudicated, the scenario is indicative of the multitude of pitfalls that routine property transfers can produce under the maze of MCL 211.27a.

While the obvious solution is for the Legislature to simplify the statute from its host of subsections to a more workable provision, in the meantime practitioners should always contemplate the potential uncapping events from not only the transfer at issue, but also those preceding and subsequent if the property is not going to be sold to a third party. A deep review of MCL 211.27a and the many published and unpublished Court of Appeals and Supreme Court cases provide answers to almost every scenario.

While the property tax implications may be outweighed by federal tax provisions or other, and indeed more practical, management issues, consideration of the property tax aspect will ensure that regardless of what strategy is chosen there is not a surprise tax bill at some point in the future that is presented by an unhappy client.

ENDNOTES

- 1 <https://www.freep.com/story/news/local/michigan/2025/01/07/high-property-taxes-michigan-lansing-detroit-ann-arbor/77427916007/>
- 2 <https://www.redfin.com/state/Michigan/housing-market>
- 3 MCL 211.27b.
- 4 Unpublished per curiam opinion of the Michigan Court of Appeals, issued August 23, 2023 (Docket No. 366685).

How to add two paragraphs to your General Powers of Attorney so you can cure defects in your Form 2848 and represent your clients before the Internal Revenue Service.

By Neal Nusholtz



Tax return information has been private at least as far back as April 5, 1870, when IRS Commissioner Columbus Delano ordered tax assessors not to publish taxpayer information. A few months later, in July, Congress passed a revenue act that prevented publishing income tax return information except for general statistical purposes.¹

Under IRC §6103(a), no federal or state employee who acquires federal tax return information “shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.” “For purposes of this subsection, the term “officer or employee” includes a former officer or employee”. Disclosures may be made to a designee of the taxpayer² or to an attorney in fact authorized in writing.³ 26 CFR § 601.502 defines a “recognized representative as someone who can receive copies of notices sent to the taxpayer and the delivery of a check drawn on the United States Treasury. Failure to send a notice to the recognized representative will not affect the validity of the notice.⁴

An IRS Form 2848 authorizes an individual to represent a taxpayer.

According to the IRS instructions for Form 2848, Form 2848 is used to authorize a representative to perform all acts that a taxpayer can perform with respect to matters described in the power of attorney (that is, to sign agreements, consents, waivers, or to sign other documents). Treas. Reg. 601.503 specifies the requirements of a Form 2848, such as requiring: the taxpayer’s name, address, social security number, the federal tax form number at issue and the specific years involved.

ADDING TWO PARAGRAPHS TO YOUR GENERAL POWER OF ATTORNEY

If a power of attorney lacks the required information, according to a “special provision” of 26 CFR 601.503, the deficiency can be cured by an attorney in fact with a general power of attorney that contains two paragraphs ((i) and (ii) as follows:

- (3) **Special provision.** The Internal Revenue Service will not accept a power of attorney which fails to include the information required by §§ 601.503(a)(1) through (5). If a power of attorney fails to include some or all of the information required by such section, the attorney-in-fact can cure this defect by executing a Form 2848 (on behalf of the taxpayer) which includes the missing information. Attaching a Form 2848 to a copy of the original power of attorney will validate the original power of attorney (and will be treated in all circumstances as one signed and filed by the taxpayer) provided the following conditions are satisfied—
 - (i) The original power of attorney contemplates authorization to handle, among other things, Federal tax matters, (e.g., the power of attorney includes language to the effect that the attorney-in-fact has the authority to perform any and all acts).
 - (ii) The attorney-in-fact attaches a statement (signed under penalty of perjury) to the Form 2848 which states that the original power of attorney is valid under the laws of the governing jurisdiction.

Being able to access taxpayer information for a decedent is invaluable when a practitioner is handling an estate. Current IRS wage and income transcripts can provide leads to assets. Tax return transcripts can indicate whether unfiled returns need to be prepared based on the income shown on wage and income transcripts.

MAKING A “STARTER” FORM 2848

Because the Treasury regulation allows an attorney in fact to cure an existing Form 2848, at the outset of a case, it would be recommended for an estate attorney to obtain both a “starter” Form 2848 (e.g. covering Form 1040 for the current year and one year prior) and to obtain a general power of attorney with the required paragraphs authorizing the attorney for the estate to handle tax matters. Any deficiencies in the starter Form 2848 can then be corrected by the attorney for the estate by following the procedures outlined in 26 CFR §601.503 to avoid a situation where a government agent advises the estate attorney “Sorry, You cannot represent your client, Bye”!

ENDNOTES

- 1 IRS history Timeline, p. 10 <https://www.irs.gov/irs-history-timeline>
- 2 IRC §6103 (c)
- 3 IRC.6103(e)6)
- 4 26 CFR § 601.506(a)(3)