QSBS PLANNING | A CO-AUTHORED COMMENTARY

Why Stacking Is Safe

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The Treasury has been making noise about overly aggressive QSBS stacking. Tax conferences are buzzing. Some advisors are telling clients to unwind their trusts.

We agree with the Treasury on the basic point. The IRS should crack down on people who exploit stacking — founders setting up a bunch of trusts for distant cousins, friends, nannies, and anyone else with a pulse. That is not estate planning. That is a tax shelter dressed up in a family tree.

But proper estate planning for a founder's immediate family — children, future children, spouse, parents — is exactly what the law was written for.

QSBS is intended to benefit founders and investors who take risks by investing in startups. If a founder is going to max out her $10 million or $15 million exclusion, Section 1202 is clear: those founders and other early shareholders can gift their QSBS and those shares will keep their QSBS status in the recipient's hands. That is not a loophole. That is the rule.

What stacking is. Section 1202 lets a seller of QSBS exclude a large slice of the gain from tax. Under the One Big Beautiful Bill Act, the cap was raised from $10 million to $15 million (or ten times basis, if greater, as before). The cap is per taxpayer. A nongrantor trust is its own taxpayer. So if a founder gifts shares to a trust for her son before the sale, that trust has its own cap. A second trust for her daughter has another. Five children, five trusts, five caps.

Section 1202(h) is the key. When QSBS is transferred by gift, the recipient steps into the donor's shoes and inherits the holding period and tax-favored status. The recipient gets her own full exclusion when she eventually sells the QSBS. Congress wrote this on purpose.

What the IRS Is Actually Targeting

The IRS is not coming for a founder who placed shares into separate trusts for her children two years before a sale. The IRS is coming for the people who overreached:

- Identical trusts with the same beneficiary, signed on the same day.
- Gifts made a day before closing.
- Trusts for distant acquaintances — friends, nannies, business contacts — with no real family bond or close personal tie.
- Shell structures where the donor keeps the economic benefit.

That is what Section 643(f) is for. It lets the IRS treat two or more trusts as one if they have substantially the same grantor, substantially the same primary beneficiary, and a principal purpose of

tax avoidance. Similarly, the judicial doctrine of assignment of income allows the IRS to disregard gifts that occur too close to a closing when there is no risk that the sale will not close. In other words, the IRS already has multiple tools to attack shareholders who are aggressively stacking QSBS. The proposed new regulations cannot (and should not) attack legitimate trust stacking for QSBS benefits.

The Four Corners

How to avoid potential attacks on QSBS stacking? Stay inside these four corners and a plan holds up.

- **Different beneficiaries in different trusts.** One trust per child. One trust per grandchild. Not five trusts for the same person. The IRS can collapse copycat trusts. It cannot collapse trusts that serve different people.
- **A real non-tax purpose.** Estate planning, asset protection, insulation from a future divorce or creditor claim, generation-skipping for grandchildren. Document the reason when the trust is created.
- **Move early.** Gift the shares well before a sale is on the horizon. Not after a binding agreement is signed. Not after the deal is essentially done. The assignment-of-income doctrine taxes the donor, not the donee, if the gain has effectively been earned before the transfer.
- **Genuine gifts to real beneficiaries.** Spouse, children, grandchildren, parents. The donor cannot retain the economics. A gift that quietly loops back to the donor is not a gift.

An Enforcement Story, Not a Legislative One

Treasury officials are pressing the IRS to enforce existing rules more aggressively against the worst actors. That is a posture shift, not a law change. Even practitioners who believe the rules need tightening concede that the statutory text supports stacking. Congress is not rewriting Section 1202. In thirty-three years, QSBS has only ever been expanded — never narrowed. The most recent legislation, in July 2025, raised the exclusion cap from $10 million to $15 million. That is not a Congress getting ready to take stacking off the table.

The risk is not that the rules will change. The risk is that founders with shaky structures will draw scrutiny they could have avoided.

Plan for the family. Document the reasons. Move early. Make the gift real. The statute does the rest.

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