

Ways to approach buy-sell agreements when an associate is uninsurable or heavily rated

Many times in the course of designing a business continuation plan, it develops that one of the partners or stockholders is either uninsurable or heavily rated.

This should not stand in the way of completing the development of the buy-sell plan. In fact, if one of the owners has impaired health, implementation of a business purchase plan becomes even more important.

In the case of the owner who is rated but still insurable, issuance of the policy and payment of the rated premium is usually the wise course since the amount of rating attached to the premium represents a fair assessment of the owners shorter life expectancy. However, if the rated premium is more than can be afforded or if he/she is completely uninsurable, then other solutions will have to be found.

There are a number of possible ways to approach the problem of the uninsurable associate. Most of these approaches are based on the idea that some sort of sinking fund is desirable to provide the funds that will be needed to purchase the business interest of the uninsured owner at his/her death. If the solution involves an insurance company product, there are certain advantages not found in other methods.

Two methods that do not use a sinking fund approach anticipate settling the obligation created by the death of an owner with cash taken from the then-existing assets of the businesses or with an installment payment of the purchase price. Both of these methods suffer from uncertainty. The owner's death may create other demands on the business' cash flow that will make it impossible to buy out the owner's business interest. Installment sale agreements may not be completed because successor management may be unable to generate sufficient earnings to pay the obligation.



Other methods may prove more attractive. Such methods include:

Using existing insurance: If the uninsurable has surplus personal insurance, this can be used to fund the buy-sell agreement. When a policy is transferred to a partner, a partnership, or a corporation, the problem of the “transfer-for-value” rule under Internal Revenue Code § (IRC) 101(a)(2) is avoided since these transfers are exceptions to this rule. However, the transfer of existing insurance owned by a stockholder to a co-stockholder to fund a stockholder’s cross purchase agreement would “taint” the policy under the transfer-for-value rule.

Borrowing another life: It may be possible to own insurance on the life of someone else as the funding vehicle. For example, a key employee who is about the same age as the uninsured owner, or the spouse of the uninsured if he/she is an employee, could be insured:

- Under the entity approach, the partnership or the corporation applies for the policy as owner and beneficiary. If the insured dies first, the proceeds are paid to the business, income tax-free, and will be on hand when needed to purchase the interest of the uninsured at his or her subsequent death. If the uninsured dies first, there is an accumulation in the loan value of the policy available to make at least a partial payment on the purchase of his/her interest.
- Under the cross purchase approach, the insured could be the spouse of the uninsured. A typical crisscross policy ownership arrangement would be used. The uninsured would insure the lives of the insurable associates. They, in turn, would insure each other and also the spouse of the uninsured. If one of the insured associates dies first, the policy proceeds become available for the purchase of his/her business interest.

If the uninsured dies first, the loan values of the policy on the spouse’s life are available as partial payment toward the purchase of the interest. If the spouse of the uninsured dies first, the policy proceeds can be held by the insured associates for the purchase of the uninsured’s business interest at his/her subsequent death.

Increasing insurance on insureds:

- Under the entity approach, the business would increase the amount of coverage on the insured associates. The business pays the entire premium and is beneficiary of the proceeds. The increased insurance negates any need to create a separate fund for the purchase of the uninsured’s interest. If one of the insureds dies first, the business will receive enough proceeds to purchase the deceased’s interest. In addition, this will immediately create a fund to buy out the uninsured’s interest at his/her subsequent death. If he/she dies first, the business will own policies with substantial cash values available for the acquisition of the decedent’s interest.
- Under the cross purchase approach, two policies are purchased on each insurable associate’s life. The uninsured buys and pays for one policy. The other policy is owned and paid for by the other insurable associate. If an insured dies first, the proceeds of the policy owned by the uninsured are available to purchase the deceased’s interest. In that case, the “additional” coverage owned by the insured associate can be used for estate liquidity or family income purposes. If the uninsured dies first, the insured associates will have the cash values in the policy to make partial payment for the purchase of the deceased’s interest.

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