**2000 Fountainview Drive**

**Monsey, New York**

**Estate Planning Day**

**Rockland County Estate Planning Council**

**May 15, 2015 – 8a to Noon**

**Discussion Agenda**

**Timothy Speiss, MST CPA PFS IAR**

**Partner and Practice Leader**

**National Personal Wealth Advisors Practice**

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[http://www.eisneramper.com/includes/images/logo.png](http://www.eisneramper.com/)

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**Certifications and Registrations**

* Certified Public Accountant (CPA)
* Personal Financial Specialist (PFS)
* Investment Advisor Representative (IAR)

**Specialties**

* Individual Taxation & Planning
* Estate & Trust Taxation & Planning
* Philanthropy & Charitable Giving
* Investment Advisory Services
* Advising Closely Held Businesses & Shareholders
* Advising Public Company Board Members & Executives
* Family Office Services
* International Wealth Advisory Services
* Athletes & Entertainers

**Activities**

* Widener University School of Business Advisory Board Chair
* U.S. Foreign Policy Association
* United Nations Fund to Support Global Business Principles

**Office Locations**

* New York
* New Jersey
* California
* Illinois
* Pennsylvania
* Mumbai
* Cayman Islands

**About Timothy P. Speiss**

Timothy Speiss is the Partner-in-Charge of the firm’s national [Personal Wealth Advisors](http://www.eisneramper.com/services/personal_wealth_advisors/) Practice and Vice President of EisnerAmper Wealth Planning LLC. He is a member of the firm’s Executive Committee and Tax Policy Committee, and co-chairman of the New York Tax Practice. Tim is also a member of the firm’s Technology Committee and Legislation Monitoring Group, and community service group EisnerAmperCares.

He has nearly 32 years of experience in providing comprehensive tax planning and related investment, compensation, and financial planning services to senior executives and board members of Fortune 100 publicly held companies, Forbes 100 families, and privately held businesses and owners including celebrities and owners of professional sports teams.  Prior to joining EisnerAmper, he was a partner with a Big Four firm and served as Partner-in Charge of their New York Metro and Northeast Area Private Client Advisory Practice.

Tim is a frequent speaker and author on topics of tax and financial planning, executive compensation, charitable giving, and related matters. He has lectured in various university graduate programs and regularly provides commentary on tax and investment and legislative matters to television, radio, and print media. Tim is also the editor of EisnerAmper LLP Personal Wealth Advisors Knowledge of Wealth.

He was a staff assistant to a former U.S. Congressman and has attended U.S. Treasury hearings on various matters of federal taxation.  He is a member of the United States Foreign Policy Association (U.S. FPA), has been cited as an Outstanding New York Businessperson by a U.S. Senate Subcommittee, and is the founder of the Timothy Speiss Endowed Fund For the Promotion of United Nations Responsible Global Business Principles at Widener University.  Tim serves on the boards of, and regularly advises, numerous charitable and educational organizations and capital campaign initiatives.   His involvement includes the Trustee, Finance and Development Committees of the Harlem Academy; Board Chair (Manhattan) of the Abingdon Theatre Company Corporate Development Committee of the Alliance for Lupus Research; and Chair of the Bishop McDevitt High School President’s Advisory Board.  Tim graduated from Widener University with a B.S. in Business and M.S. in Taxation.

**About EisnerAmper LLP**

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Recognized internationally as one of the premier firms providing advisory, [audit](http://www.eisneramper.com/services/audit_and_assurance/), and [tax services](http://www.eisneramper.com/services/tax_services/) to [financial services](http://www.eisneramper.com/industries/financial_services/) entities and portfolio companies, EisnerAmper serves more than 1,200 [hedge funds](http://www.eisneramper.com/industries/financial_services/hedge_funds/), 175 [private equity](http://www.eisneramper.com/industries/financial_services/private_equity/) funds and other fund entities. The firm works with more than 75 broker-dealers serving investment banks and retail brokerages. EisnerAmper was recognized by Institutional Investor as the leading accounting services provider to hedge fund managers and also provides services to more than 150 [insurance entities](http://www.eisneramper.com/Industries/Financial_Services/Capital_Markets/Insurance_Industry/).

EisnerAmper‘s knowledge of the capital markets helps clients seeking advice on issues such as mergers and acquisitions, debt financing, IPOs, international expansion, valuation, due diligence and restructuring. In addition, the firm provides full audit services to clients with off-shore needs through PKF Cayman.

The firm provides a comprehensive set of private business services to closely held companies, high net worth individuals and families including tax planning and compliance, investment planning, [international wealth advisory](http://www.eisneramper.com/services/international_services/) services, risk management, trusts and [estate planning](http://www.eisneramper.com/services/tax_services/estates_trusts_and_private_foundations/), cash flow and asset protection planning.

EisnerAmper professionals have significant breadth and depth of knowledge in key service areas including [consulting services](http://www.eisneramper.com/services/Risk_Advisory_Services.aspx) comprised of [internal audit](http://www.eisneramper.com/services/internal_audit_and_risk_management/internal_audit/), risk management, information technology and compliance. Other primary service lines include asset and business valuation, [international tax](http://www.eisneramper.com/services/tax_services/international_tax_services/), [human capital advisory](http://www.eisneramper.com/services/Human_Capital_Advisory_Services.aspx), [employee benefit plan audits](http://www.eisneramper.com/services/employee_benefit_plan_audits/audit/), [fund services](http://www.eisnerfundservices.com/), [litigation support and forensic accounting](http://www.eisneramper.com/services/litigation_consulting_and_forensic_accounting/), bankruptcy and insolvency and [royalty audit](http://www.eisneramper.com/services/litigation_consulting_and_forensic_accounting/commercial_litigation/royalty_audits/).

EisnerAmper has deep expertise providing audit, tax and advisory services to clients in major industry groups including [life sciences](http://www.eisneramper.com/industries/life_sciences/) and bio-tech, health care, [clean tech](http://www.eisneramper.com/industries/technology_companies/clean_tech/), technology, digital media, entertainment, sports, real estate, construction, [not-for-profit](http://www.eisneramper.com/industries/nonprofit_organizations/), manufacturing, automotive, distribution and retail.

EisnerAmper works with companies from their inception providing [accounting](http://www.eisneramper.com/services/accounting_services/), advisory and tax services. The firm serves incubators and start-ups with accounting services and advice. As companies grow, EisnerAmper assists them every step of the way with a full complement of services to help them reach their goals.

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**The Use of Annuities in Trust and Estate Planning**

**Income Tax Considerations**

**A Client’s Potential Principal Goals**

* + **Definition of an annuity under IRC Sec. 72**
    - Private annuities ((1969-1, C.B. 43; GCM 39503 (5/7/86)
      * Useful for lifetime transfers of property among family members, generations
      * Transfer of property from the transferor, in exchange for a transferee’s unsecured promise to pay a stream of fixed payments
      * Fixed period or lifetime
      * Life expectancy tables prescribed by the IRS (see also Rev. Rul. 69-74)
      * Where a transferor’s death occurs prior to all payments (life term) being received, unpaid annuity payments not included in the estate
      * Transferees basis on property acquired
      * How does transferee fund annuity payments ?
      * Over ten factors distinguish a private annuity from a commercial annuity (see also Reg. Sec. 141901-05, 71 Fed. Reg. 61441 (10/18/06; other)
  + **Commercial annuities**
    - * All gain (or excess contract value over adjusted basis) is taxed as ordinary income, either to the living contract holder or beneficiary
        + In contrast, the death benefit of a life insurance policy is generally received income tax free by a beneficiary
      * Distributions from an annuity (issued post August 13, 1982) are taxed on a “last in, first out” basis (or as gain) until all gain has been distributed. This treatment also applies to life insurance policies that are modified endowment contracts (MECs)
        + Distributions to the living owner of a life insurance policy (not a MEC) are taxed on a “first in, first out basis” All distributions are considered as a return of principal until all contract basis has been distributed
  + **Income to estate owner’s heirs: annuity payments, and income and estate tax rates**
    - Return of basis (payments as a return of purchase price; nontaxable)
      * Basis step up to fair value at date of death – Note: unavailable step up in basis when annuity is acquired by a decedent
    - Return (payment) in excess of basis – capital gain/qualified dividends (20% plus 3.8% (federal))
    - Interest income payment – ordinary income (up to 39,6% (federal))
    - Federal estate tax exemption $5.43 million ($10.86 million joint), top tax rate of 40%.
    - New York income tax rate – 8.82% (top rate)
    - New York estate BEA and tax rate - $3.125 million (to 3/31/16); 16% top rate
  + **Tools to attain goals: Immediate and deferred annuities**
    - Immediate annuities (SPIAs) can provide for annual increases. Purchased with a single premium, where payments begin not later than one year from the date of purchase (Sec 72(u)(4); PLR 9237030). Annuity contract return can create deferred income where investment returns exceed contract rate, with tax deferral opportunities - Advantage
    - Most immediate annuities, once begun, do not permit modification of the payment amount or commutation – Disadvantage
    - Deferred annuities can also be acquired via a lump sum payment, or via periodic payments; payments (to annuitant) grow on a tax-deferred basis until the distribution process begins
    - *Types of annuities include*
      * Single lifetime (no survivorship, survivorship; straight –life: “win lose” where annuitant lives longer than life expectancy or shorter than life expectancy)
        + Risk – Do clients/annuitants consider and understand the financial risk (to family members/potential beneficiaries) when selecting single life payments ? Consider a “Refund Feature”

In defined benefit pension plans as well

* + - * Joint and survivor (smaller payments compared to a single life)
      * Term certain – can reduce the financial detriment of a premature death; potentially a smaller monetary loss upon death prior to full term
      * Specified amount until exhausted
      * Other types/forms
        + Certain contracts can contain a death benefit or a survivor benefit
        + Acquiring multiple annuities
        + The importance of understanding the client(s)’ lifetime after-tax cash flow needs (medical and long-term care, support, other), current and forecasted balance sheet position and liquidity over a lifetime(s) time horizon (extended life expectancy), total investment allocations and after-tax income/appreciation forecasts, inflation on expenses, life insurance in force, estate plan objectives, post tax estate value, other factors
        + Evaluating contracts – considerations ?
  + **Use of credit shelter trusts to acquire a SPIA**
    - Dilemmas for trustees and estate planners
      * Income to surviving spouse
      * Growth of principal for remainder beneficiaries
        + Tension between attaining simultaneous income and appreciation
    - Purchase an annuity for the income beneficiary, invest remaining trust assets for growth
      * Growth investments do not benefit the income beneficiary
      * Premium payment more costly for two beneficiaries
      * Include a refund feature where an income beneficiary may die sooner
      * An income beneficiary live longer than life expectancy ?

**Estate Tax Considerations**

* **Considerations include**
  + Testators
  + Beneficiaries
  + Designations
  + Asset protection
  + Cash flow/distributions control
  + Other
* **Estate, income tax, financial and retirement planning, and investments involving annuities – What to consider ?**
  + First, IRC Sec 20139(a): Includable interests - annuities
    - Payable to the decedent, or
    - Received the right to receive
  + Second, general overview
    - Variable and fixed, immediate and deferred annuities, and guarantees
    - SPIAs and other annuity vehicles
    - GRATs and GRUTs
    - credit shelter trusts
    - lifetime gifts to heirs
    - benefits for employees
    - Family financial planning considerations

**Twelve planning concepts to be aware of (evaluating annuity illustrations is a must)**

* + Trust acquires an immediate annuity naming the income beneficiary as the annuitant; invest all remaining assets with a growth objective
    - Document risk tolerance and income/capital needs of all beneficiaries; consider an investment policy statement involving all beneficiaries and the trustee(s); Modern Portfolio Theory design strategy; monitor results and fees; watch list and modify as necessary
    - Trust acquires SPIA for heirs outside of a trust
    - Protection from creditors, divorce
  + Immediate annuities for heirs outside of trusts
    - Specific and certain income for specified heirs
    - Disadvantage: overhead costs, surrender charges
  + Purchase of a deferred annuity for heirs
    - When certain income is needed for heirs at a future date
    - Tax deferral of capital gains can arise
    - If the annuity is acquired via trust, creditor protection
    - Disadvantages – costs, unavailability of basis step-up when owned by a decedent and ordinary income tax on distributions
  + Purchase of SPIA by estate owner and spouse – Opportunity to make lifetime gifts
    - Enhances ability and confidence to make lifetime gifts
    - A hedge against the concern of “running out of money”
    - A surviving spouse’s income is potentially enhanced
    - Increase possibility of greater asset transfers to family and charity
    - Both (either) deferred and immediate annuities can be effective, based on facts and assumptions
  + Using a variable deferred annuity to provide death benefit to an uninsurable estate owner
    - A deferred annuity is not life insurance. A contract qualifying as life insurance under IRC Sec. 7702 has a death benefit that is taxed differently (under IRC Sec. 101) than a contract qualifying as an annuity under IRC Sec. 72
    - A variable deferred annuity often provides a death benefit in excess of the contract’s cash value, compared to the death benefit of a fixed deferred annuity is limited to the cash value; an advantage is significant for an individual who cannot obtain insurance or for whom the premiums would be unacceptably high; the death benefit is taxable however there is no insurance underwriting process
    - Some advisors recommend variable annuities with strong enhanced death benefit guarantees; further a single annuity could be split into more than one annuity contract
  + Using the guarantees in a deferred annuity to provide portfolio insurance
    - A fixed deferred annuity provides three guarantees to its owner
      * A guarantee of principal
      * A guaranteed minimum rate of return
      * Guaranteed annuity factors
        + A variable deferred annuity does not offer the first two guarantees to the living policy owner
  + Using the guaranteed income of an immediate annuity to help reduce retirement portfolio failure (investing a portion of a retirement plan balance)
  + Using annuities beyond the grave: tax deferral planning
    - As discussed, the income tax on annual gains in an annuity is generally deferred until distributed
    - Further, if a deferred annuity is structured so to ensure that beneficiaries and receive proceeds in the form of an annuity the benefits of tax deferral could survive the annuity owner
      * A “Stretch Annuity” – amortization or annuity or life expectancy factor methods – See IRC Sec 72(b) – the life expectancy factor could offer the most tax deferral
      * See IRS Notice 89-25
    - Family funding: step children and others
    - To restrict/plan how beneficiaries will receive annuity funds, a trust as owner could be beneficial
      * The five year rule
  + Business owners: Using a SPIA to fund a long term compensation plan
    - * + For the business owner
        + For key employees
        + Deferred compensation arrangements
        + IRC Sec 754 basis step ups, taxable sales, and deferred gain recognition with IRC Sec 72 annuity payments
  + Charitable planning
    - SPIA payments to a (fund) bequest
    - Variable annuity to fund a CRUT
      * Charitable remainder beneficiary and non-charitable annual income beneficiary
        + Non-charitable beneficiary receives a unitrust payment each year (a percentage of trust value); lesser of trust net income or the cited percentage; shortfalls are credited to a make-up account (NIMCRUT)
        + Independent trustee elects to make payments, or not; thus impacting trust income and deductions (note the difference between trust accounting income and taxable income)
        + A NIMCRUT instrument can be drafted so as to define distributable income as any distribution from the annuity provided state law permits such language. And note -
        + State Principal and income Acts
  + Deferred annuities and QTIPs
    - Estate of Kite v. Commissioner, T.C.M. 2013-43
    - Separately, in some estate planning situations involving trusts, the use of an annuity may be problematic.
    - Annuities may not be appropriate investments for [**QTIP trusts**](http://www.lifehealthpro.com/2013/09/16/6-trusts-you-should-know-about?page=3) for a reason associated with state law definitions of income.
      * In most states, the undistributed gains inside of an annuity are not defined as income, and therefore may not have to be distributed to the income beneficiary. Income would only be recognized to the extent the trustee made withdrawals of gains from the annuity.
      * If the trustee made no withdrawals, then there may be significantly less trust income to distribute to the surviving spouse. The trustee could be placed in an unenviable position between the surviving spouse who may want to maximize income and the children who want to maximize principal for later distribution
      * Unless the trustee and all beneficiaries agree on specific parameters for any annuity withdrawals, an annuity may present problems
    - Some of the above can be mitigated by a clear drafting of the QTIP trust before the first death (i.e., to clearly state what constitutes income and whether/how income with respect to the annuity will be classified for income distribution purposes)
      * In some cases, the treatment of an annuity may be preferable to alternatives, if the specific goal is actually to minimize income distributions to the surviving spouse
      * On the other hand, if the spouse is not happy with such an arrangement, the spouse could potentially have the annuity liquidated, under the required right of a spouse under a QTIP trust, compelling the trustee to convert QTIP assets to income-producing property
      * If such a conversion occurs after many years, the trust could be compelled to recognize significant accrued taxable gains in a single year
      * Accordingly, it may ultimately be wise to avoid the use of deferred annuities inside of a QTIP trust, unless the spouse income beneficiary is clearly supportive of the arrangement, and unlikely to have his/her mind changed

**Examples and client stories on annuities**

* First, current IRS rates (May 2015)
  + Sec. 7872
    - AFR ST - .43%
    - AFT MT – 1.53% and 1.52%
    - AFT LT – 2.3% and 2.28 and 2.29%%
  + Sec 7520 - 1.8%
* US Treasuries (May 14, 2015)
  + 10 year – 2.27%
  + 5 year – 1.54%
  + 1 year - .24%
* Examples and client stories on annuities
  + Second to die life insurance policy as a deferred compensation plan (a defined benefit plan (a 403(b) proxy))
  + Sales of low basis property via a Sec 72 annuity to non-grantor trusts
  + Transfers to GRATS