SECURITIES LAWS CONSIDERATIONS FOR THE ESTATE PLANNER

44TH ANNUAL ESTATE PLANNING
&
PROBATE COURSE
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I. Introduction & Overview

A. As wealth planning professionals, our primary goal is to help our clients achieve the goals they may have for their wealth, whether those goals are focused on wealth transfer to succeeding generations of their family, to support philanthropic missions, or, most commonly, a combination of the two. While tax considerations often are a dominant consideration, to help our clients be most effective with their planning, many other considerations are relevant, as well. Those considerations may range from personal and family dynamics – the influence of wealth on their descendants – to business objectives if the wealth consists of a family owned business. It also is important to understand the source and nature of the clients' wealth and the investment objectives that the client may have currently or likely to have at some point in the future.

If the source of the client's wealth is derived from being a public company executive or the wealth otherwise consists of publicly traded securities, the relevant considerations must also encompass the various constraints that exist and may apply to publicly traded, restricted securities. Similarly, we must be aware of the securities law constraints that may apply to the client as a result of the client being an "insider" under the U.S. securities laws.

Further, despite their seemingly falling in and out of favor, there are compelling reasons to include alternative investments – hedge funds, private equity investments – in a fully diversified investment portfolio. Additionally, if the planning will include the creation of trusts, the Uniform Prudent Investor Act, which encompasses the modern portfolio theory of investments, judges the investment performance on a total return basis. That is, the trustee's investment performance is based, not on the return of individual investments within the portfolio, but instead on the investment performance of the portfolio as a whole. Therefore, it is important for a fiduciary to implement a proper asset allocation and diversification strategy for the trust's portfolio, possibly including hedge funds and private equity investments.

Therefore, it is important, as estate planners, that we are aware of the potential complications associated with planning for publicly traded, restricted securities, planning for insiders, and planning for alternative assets.

B. Scope of this Paper

This paper is not intended to be a thorough and comprehensive analysis of the U.S. securities laws. Instead, it is intended to provide a broad understanding of the relevant statutory regimes and associated requirements and restrictions that we, as estate planners, may encounter in the context of advising high net worth clients.

Further, this paper focuses on the U.S. federal securities laws, but there are also applicable state blue sky laws. This paper does not address state blue sky law considerations, but very generally speaking, if the plan addresses the federal law considerations, it is unlikely that blue sky laws will present any additional considerations.

Finally, in various of the situations discussed below, there may be applicable company imposed or other contractual restrictions. Those, too, are outside the scope of this paper.

II. The U.S. Securities Statutory Regime

A. Securities Act of 1933 (15 USC §§77a – 77aa) ("the Securities Act")

The Securities Act is often referred to as the "truth in securities" law.

Enacted on the heels of the stock market crash, beginning on Black Thursday, October 24, 1929, and the related Great Depression, the Securities Act has two main objectives:

(1) ensure that the investing public receives financial and other significant information concerning securities being offered for public sale; and

(2) "prohibit deceit, misrepresentations, and other fraud in the sale of securities."

See https://www.sec.gov/answers/about-lawsshtml.html.

To protect the investing public, the Securities Act doesn't so much regulate the securities themselves, but instead is intended to regulate the disclosure of information about the securities. The goal of Securities Act is to protect the investing public by arming them with enough information to make educated investment decisions.

The disclosure of the information is initiated through the registration of securities offered for public sale. The registration process requires that securities sold in the U.S. must be registered before being offered for sale to the general investing public.

There are certain exceptions to the registration requirement, including, most importantly for estate planning purposes, private offerings to a limited number of persons or institutions.

B. Securities Exchange Act of 1934 (15 USC §§78a – 78mm) (“the Securities Exchange Act”)

The Securities Exchange Act created the Securities and Exchange Commission, and provided that agency broad powers and authority over the securities industry, including authority over self-regulated clearing exchanges, such as The New York Stock Exchange and the NASDAQ Stock Market.

The Securities Exchange Act requires listed companies to disclose certain information in connection with proxy solicitations or tender offers. Additionally, it requires certain “insiders” to disclose information in connection with their activities with respect to the stock.

C. The Investment Company Act of 1940 (“the Investment Company Act”)

The Investment Company Act regulates the organization and activities of companies that engage primarily in investing in securities and whose own securities are offered to the general public

D. Hart-Scott Rodino Antitrust Improvements Act (1976) (“HSR”)

HSR was enacted to give the Federal government, through the Federal Trade Commission and the Department of Justice, an opportunity to review corporate transactions to protect competition in the marketplace. To accomplish that objective, HSR requires parties to a merger, acquisition, or other consolidation transaction to file with the Premerger Notification Office of the Federal Trade Commission a “Notification and Report Form for Certain Mergers and Acquisitions,” prior to completion of certain mergers or acquisition transactions. That premerger notification requires the disclosure of information about each party to the transaction, as well as information about the transaction itself. The parties may not close the transaction until the waiting period has passed or the government has granted early termination of the waiting period.

Generally, the premerger notification report must be filed thirty days in advance of the intended merger or acquisition transaction. A significant filing fee based upon the “Size of Transaction,” is required. Size-of-Transaction is equal to the aggregate total amount of voting securities, assets, or non-corporate interests being acquired.

As of April 3, 2019, the filing fees ranged from $45,000 for transactions greater than $90 million, but less than $180 million; to $125,000 for transactions greater than $180 million, but less than $899.8 million; to $280,000 for transactions greater than $899.8 million.

III. The Securities Act and Rule 144

A. Brief Overview of Rule 144

As noted above, the Securities Act requires shares to be registered before being offered for sale to the general public. That registration requirement ensures adequate disclosure of information about the issuer so that any potential purchaser has the information necessary to make an informed investment decision. The Securities Act further provides that a shareholder cannot sell unregistered securities unless the sale is eligible for an exemption or safe harbor from registration.

Rule 144 imposes certain conditions on the sale of unregistered stock (i.e., stock not purchased through a stock exchange on the open market), regardless of whether the seller is an "affiliate." Further, it imposes conditions on the sale of any stock, whether registered or unregistered by an "affiliate."

1. For purposes of Rule 144, an "affiliate" is defined as any person or entity that directly or indirectly controls the management of the issuer. That definition generally includes a company's senior management, directors and certain large shareholder (*i.e.*, shareholders of greater than 10% of the outstanding stock). The company's general counsel usually determines who is an affiliate (*i.e.*, does the individual hold a "control" position within the company).

2. Stock subject to Rule 144 is often called "restricted stock" or "Rule 144 stock." It sometimes is colloquially referred to a "legend stock," because a legend is stamped on the physical certificate representing such shares.

3. "Control stock" refers to stock purchased in a registered transaction (*e.g.*, an open market transaction or exercise of an employee stock option).

B. Selling Shares Under Rule 144

If the selling shareholder is an affiliate, the shareholder can sell under Rule 144 subject to certain conditions:

1. Holding Period: Restricted or Rule 144 stock must be held for six months prior to the sale. This generally is not an issue for shares acquired pre-IPO, since a post-IPO lock-up is generally six months, preventing any sale prior to the expiration of six months.

2. Volume Limitations: During any three-month period, the selling shareholder may sell up to the greater of 1% of the outstanding shares or the weekly average trading volume of the four preceding calendar weeks.

3. Notice Requirement: A Form 144 must be filed with the SEC and principal exchange on or before the date of the sale, indicating the number

of shares to be sold and the current market value. Form 144 is only required if an affiliate intends to sell greater than 5,000 shares or greater than $50,000 worth of stock during any three-month period.

4. Public Information and Manner of Sale Requirements: Public information and manner of sale requirements also apply to sales by affiliates, but these are typically met and don't require much analysis. Having said that, manner of sale requirements can be tricky with thinly traded stocks and principal/block trades.

5. If the selling shareholder is not an affiliate and hasn't been for at least three months, the shareholder can freely sell shares subject only to the six-month holding period.

C. Practical Mechanics of Selling Rule 144 Restricted Stock

1. The selling broker typically contacts the company counsel to initiate discussion about "cleaning" the shares and the intent to sell them. Company counsel then issues an opinion letter to the transfer agent stating that the conditions of Rule 144 have been met for purposes of resale of the securities without registration. That opinion also advises that the transfer agent should remove the restrictive legend on the shares. The opinion will cite whether the seller is an affiliate or not. Further, the seller may be required to complete a "144 Seller's Rep Letter," verifying that the seller is not an affiliate.

D. Issues Arising When Public Company Acquires Private Company

1. When two public companies merge, the consideration for the deal is typically stock of the acquiring company issued to the shareholders of the acquired company. In that structure, the deal is registered with the SEC on a Form S-4. As a result, the shareholders of eh acquired company get clean, registered stock. Thus, Rule 144 is not applicable unless a selling shareholder becomes an affiliate of the acquiring company.

2. When a public company acquires a private company, however, the deal may be stock for stock (or part stock, part cash). The deal is typically structured as a private placement, meaning the shares of the acquiring company issued to the shareholders of the acquired company have not been registered with the SEC.

   a. One exception to the structure described above is a "shelf registration," where the acquiring company gives registration rights to the shareholders of the acquired company. The shelf registration is reflected on a Form S-3 filed with the SEC. As a result, the acquiring company must register the shares with the SEC if requested to do so by a shareholder of the acquired company who wants to sell his or her shares.

b. In an un-registered deal (e.g., a public company acquires a private company without shelf registration rights, and no other exemptions apply, Rule 144 requires a six-month holding period before a shareholder of the acquired company can sell the shares received in the transaction. For this requirement, the selling shareholder cannot tack his or her holding period of the stock of the acquired company to the holding period for the stock of the acquiring company.

E. Transferring Rule 144 Stock to an Irrevocable Trust

If the holder of Rule 144 stock transfers those shares to an irrevocable trust, the holding period does tack; that is, the trust's holding period for Rule 144 purposes is not restarted but tacks with the grantor's holding period. The same result may not be true with a sale to a grantor trust transfer. Any sale, as distinguished from a gift, results in the buyer starting a new six-month holding period.

An additional consideration is whether the irrevocable trust is itself treated as an affiliate for purposes of Rule 144, which would trigger the volume limitations and the Form 144 reporting requirements. The trust could be affiliate on its own by being a greater than 10% shareholder.

Additionally, the trust could be aggregated with the grantor under the aggregation rules of Rule 144(a)(2). The language of Rule 144(a)(2) is somewhat confusing; therefore, it is always a good practice to have company counsel determine whether the aggregation rules apply. Whether or not the trust is a grantor trust for income tax purposes is irrelevant for purposes of determining whether the trust is aggregated with the grantor for volume limitation purposes. The trust could be aggregated with the affiliate grantor if the trustee is an affiliate (*e.g.*, the grantor is serving as trustee or investment advisor to the trust) or the trust beneficiaries include the spouse or any relative of the affiliate grantor who shares the same household as the affiliate grantor.

For example, if an affiliate grantor funds a GRAT with Rule 144 stock, which then distributes to a remainder irrevocable trust for the benefit of grantor's minor children living at home with the grantor, the irrevocable trust will be aggregated with the grantor for volume limitation purposes, even if the trust has an independent trustee.

F. Charitable Gifts of Restricted Stock

1. There are no Rule 144 issues upon the transfer to the charity, because no sale is involved.

2. The donee charity, including both a donor advised fund or a private foundation, can freely sell the shares under Rule 144 assuming the charity is not an affiliate on its own (*e.g.*, by being a greater than 10% shareholder), which is unlikely.

a. The charity can tack the donor's holding period.

b. In a registered merger transaction, the shares of the acquiring company are "clean" shares. As a result, the shares can be freely donated to charity, unless prohibited by a contractual lock-up or company trading policy.

c. In an unregistered transaction, as noted above, the holding period for the shares of the acquiring company starts upon delivery of the shares at the time the deal closes. Therefore, if the donation is made before the six-month holding period has expired, the charity won't be able to sell the shares, which could impact the charitable deduction for gifts to public charities or disqualify the deduction for a gift to a private foundation. Further, if the unregistered transaction also included shelf registration rights, careful consideration should be given to any donation to a private foundation, to ensure that the charitable deduction under IRC §170(e)(5) is available.

d. Under *Turner* SEC No-Action Letter (1993 SEC No-Act. LEXIS 489), a private foundation is not aggregated with the donor for volume limitation purposes, even if the donor controls the foundation as an officer or board member. The reasoning of the SEC is that the donor has no economic interest in the foundation assets. Similarly, there should be no aggregation for a donor advised fund or a public charity even if the affiliate donor serves as advisor to the fund or on the board of the public charity.

IV. The Securities Exchange Act and Section 16

A. Brief Overview of Section 16

Section 16 of the Securities Exchange Act, often referred to as the "short-swing profits rule," imposes a reporting requirement when there is a "change in beneficial ownership" of an insider's stock ownership. A change in beneficial ownership includes purchases, sales and other transfers. The change is reported on a Form 4 or Form 5 prepared and filed by the company.

For purposes of Section 16, insiders include a company's senior management, directors, and greater than 10% shareholders. For this purpose, certain attribution rules are used to determine if an individual is a Section 16 insider under the greater than 10% shareholder test. (Interestingly, a different set of attribution rules is used to determine if sales by the transferee of a Section 16 insider must be reported and matched with the Section 16 insider's transactions. Similarly to the Rule 144 discussion above, company counsel usually provides the final determination on insider status as applicable to Section 16.

Short swing profit forfeiture is imposed under Section 16(b) if an insider purchases and sells, or sells then purchases, company stock within a six-month period. What constitutes a purchase or a sale can be somewhat tricky and requires further consideration. For example, acquisition of stock through the exercise of a stock option is not considered a purchase for purposes of Section 16(b).

B. Section 16 and GRATs

If a GRAT is to be funded with public company stock and the grantor is an insider, the first consideration is whether the transfer to the GRAT must occur in an "open window." Many times the answer will be "yes," but not all companies take the same position. Some companies take the position that, since the transfer to the GRAT is not a "sale," the transfer is not subject to an open window requirement. Similarly, there are no Rule 144 considerations (see discussion above) since the GRAT funding is not a sale.

There are four relevant points or transactions to consider: (i) funding the GRAT, (ii) making the required annuity payments, (iii) potential sales of shares while held in the GRAT, and (iv) distribution of the shares after termination of the annuity period.

1. Funding the GRAT with Insider Stock

The funding of the GRAT should not be a reportable transaction is the grantor is the trustee of the GRAT for two reasons. First, although Section 16(a) requires reporting when there is a change in beneficial ownership (*e.g.*, a sale or purchase) of an insider's stock, if the insider grantor is also the trustee, the insider still owns the stock, albeit indirectly. This transfer should be reported as a change in the form of ownership from direct to indirect on a Form 4.

2. Satisfying the Annuity Payments

Because the GRAT is likely to be funded only with insider stock, it is likely that the required annuity payments will have to be satisfied in kind by distributing the shares back to the insider grantor. Satisfying the required annuity payments by distributing the shares back to the grantor should not be treated as a purchase by the grantor for Section 16 purposes. The transfer back to the insider/grantor should be reported on a Form 5 as an "other acquisition or disposition."

Most practitioners cite the *Kight* SEC No-Action Letter (Oct. 16, 1997) in support of this conclusion. There is some uncertainty, however, whether the conclusion reached in *Kight* would extend to a substitution or swap of the shares inside the GRAT in exchange for other assets. If *Kight* does not extend to a substitution or swap, the substitution or swap might eb subject to Section 16(a), and the grantor should not have any matching transactions either six months before or six months after the substitution.

3. Sales of Shares Held in the GRAT

If the grantor/trustee is an insider for Section 16 purposes, any sales by the GRAT will be aggregated with personal sales by the grantor/insider for Section 16 purposes. The sale should be reported on a Form 4 as a sale.

4. Distribution of Shares at Termination of the GRAT

If, after satisfaction of the required annuity payments, there remains insider shares in the GRAT to be distributed to the remainder beneficiaries, for Section 16 purposes, the grantor/insider no longer will have any beneficial interest in or voting control of the shares, therefore, at termination of the GRAT, the grantor./insider will be treated as having disposed of the shares by gift. This change should be reported on a Form 5 as a gift.

C. Section 16 and an Irrevocable Trust

It is important to determine if the trust will be subject to Section 16 and, therefore, whether any purchases or sales by the trust need to be reported on a Form 4 under Section 16(a). More importantly, it is important to determine if purchases or sales by the trust could be matched with purchases or sales by the grantor for the short swing profits rule.

First, the trust could be an insider on its own right if it is a greater than 10% shareholder.

Secondly, the trust could be attributed insider status if a Section 16 insider has investment control over the shares held in the trust and the insider has a pecuniary interest in the trust.

Investment control would exist if an insider were serving as trustee of investment advisor in a directed trust situation.

Pecuniary interest for Section 16 purposes doesn’t need to be a direct interest. Instead, it can exist if the trust beneficiaries are members of the grantor’s immediate family, which includes children who share the same household.

If the trust is not attributed the Section 16 insider status of the grantor, and the grantor exercises his or her substitution power over the trust, taking out the insider shares, that exercise could be treated as a purchase by the grantor for Section 16(b) purposes.

D. Charitable Gift of Insider Shares

The gift to the charity will require a Section 16 reporting for the insider donor.

Sales by the charitable donee will not require a Section 16 reporting unless the donee is an insider on its own right (*e.g.*, a greater than 10% shareholder).

There would be no "matching" concerns for purchases and sales by the charitable donee since the charitable donee won't be attributed Section 16 insider status via the insider donor. It doesn't matter if the insider donor controls the foundation or public charity. This is because the insider donor is not deemed to have any pecuniary interest in the charitable assets.

V. Accredited Investor and Qualified Purchaser Rules

As noted above, the Securities Act provides protection to investors in connection with the offering of securities for sale to the public. That protection is carried out through the registration requirements under that act; Regulation D of the Securities Act, however, provides several exemptions from registration.

Rule 505 of the Securities Act provides an exemption if the number of purchasers of the securities is capped at 35. Rule 506 permits an unlimited offering, not limited to the cap of 35, to certain sophisticated investors, defined under the Securities Act as "Accredited Investors."

Similarly, the Investment Company Act provides protection to investors by requiring companies subject to the act to register with the SEC and to disclose certain information regarding their financial condition and the policies governing their investments.

Similarly to the Securities Act exemption for sophisticated investors, the Investment Company Act contains a similar exemption. Section 3(c)(7)(A) of the Investment Company Act provides an exemption for any investment company whose securities are owned exclusively by sophisticated investors, defined under that act as "Qualified Purchasers."

Because it is likely that a trust may potentially be an investor in hedge funds or private equity, generally accessible through unregistered investment vehicles exempt under both the Securities Act and the Investment Company Act, it is important to understand the requirements for a trust to be an Accredited Investor and Qualified Purchaser.

A. Accredited Investor Rules

The term "Accredited Investor" is defined in Rule 501 of Regulation D and includes eight categories:

1. Certain banks, any saving and loan association, and similar institutions;

2. Any private business development company;

3. Any 501(c)(3) organization, corporation, partnership, or business trust not formed for the purpose of acquiring the securities offered and which has total assets in excess of $5 million;

4. Any director, executive officer, or general partner of the issuer of the securities being offered;

5. Any natural person who has a net worth, or joint net worth with that person's spouse, at the time of the purchase of the securities exceeds $1 million;

6. Any natural person who has income in excess of $200,000 (or joint income in excess of $300,00) in each of the last two years and reasonably expects to achieve that same income level in the year of the purchase;

7. Any trust with total assets in excess of $5 million, not formed for the purpose of acquiring the securities offered and whose purchase is directed a sophisticated person; and

8. Any entity in which all of the equity owners are Accredited Investors.

Under these definitions, trusts may qualify as an Accredited Investor. A trust may qualify under one of three categories:

1. A trust of any size may be an Accredited Investor if the trust has an institutional trustee – a bank, savings and loan, or a similar financial institution – and that trustee has investment authority over the trust assets.

   a. Rule 501 defines a bank under Section 3(a)(2) of the Securities Act, which does not include a trust company. It is unlikely, however, that a trust company would not meet the requirements of Rule 501. The rationale is that a bank, savings and loan, and other similar financial institution would have the financial sophistication necessary to make informed investment decisions. In *Nemo Capital Partners, L.P.*, SEC No-Action Letter (April 11, 1987), the SEC did not challenge the Accredited Investor status of a trust with a trust company as a co-trustee, when the other trustee was not an Accredited Investor.

2. A trust with assets in excess of $5 million also would qualify as an Accredited Investor, provided the trust was not formed for the purpose of acquiring the securities being offered and the investment decisions for which are directed by a sophisticated person.

3. In certain circumstances, a trust whose grantor is (or grantors are) an Accredited Investor may also qualify as an Accredited Investor. For a revocable trust, the grantors are considered to be the "equity owners" of the trust. If each grantor to the trust is an Accredited Investor, the trust also will be an Accredited Investor.

A family entity – a corporation, partnership or limited liability company with total assets in excess of $5 million will qualify as an Accredited Investor so long as the entity was not formed for the purpose of acquiring the offered securities. And, similarly to a trust, as discussed above, a family entity will qualify as an Accredited Investor is all equity owners are Accredited Investors.

B. Qualified Purchaser Rules

"Qualified Purchaser" is defined in the Investment Company Act, and includes four categories:

1. Any natural person, including that person's spouse if they invest jointly, owning $5 million or more in investments;

2. Certain family owned companies that own $5 million or more in investments and that is owned, directly or indirectly, by two or more natural persons who are related as sibling or spouse (including former spouses), or direct lineal descendants by birth, adoption, spouses of such persons, estates of such persons, and charitable organizations and trusts established by or for the benefit of such persons;

3. Any trust that doesn't fall within the family owned company category above that was not formed for the purpose of acquiring the securities offered, that was formed by one or more qualified purchasers, and for which investment decisions are made by qualified purchasers; and

4. Any person acting on his or her own behalf or for the accounts of others qualified purchasers, who in the aggregate owns and invests on a discretionary basis, $25 million or more in investments.

A trust will be a Qualified Purchaser if it meets one of four requirements:

Under the Investment Company Act, "family owned company" is defined to include a trust. Therefore, a trust that owns at least $5 million in investments and which was established for the benefit of two or more persons who are related as siblings, or as a spouse or former spouse, or as a direct lineal descendant by birth or adoption, spouses of such persons, estates of such person, and charitable organizations and trusts established by or for the benefit of such persons.

Further, trusts with a Qualified Purchaser grantor and trustee will also be a Qualified Purchaser, so long as the trust was not formed for the purposes of acquiring the offered securities.

Finally, a trust acting on its own behalf or for the account of others, which has investment assets of $25 million or more, and which was not formed for the purpose of acquiring the offered securities qualifies as a Qualified Purchaser.

VI. HSR and Trusts

While is hard to comprehend how the creation and funding of a trust for the benefit family members can come under statutory provisions intended to protect competition in the marketplace (*i.e.*, antitrust statutes), it is possible to do so. Therefore, having at least a pedestrian understanding of the provisions of HSR is critical for estate planners who work frequently with high net worth clients.

As noted above, parties in certain merger, acquisition and other consolidation transactions may be subject to the premerger notification report requirements of HSR. The determination of what transactions are subject to those reporting requirements is based upon one of two tests:

1. The Size-of-Transaction Test

   If a merger, acquisition, or other consolidation transaction results in the acquiring person owning voting securities of the acquired person valued in excess of $376 million (all dollar levels cited herein are based upon 2020 adjustment), the acquiring person and the acquired person are both required to file the premerger notification report.

2. The Size-of-Transaction Plus Size-of-Person Test

   If the result of an acquisition transaction is that the acquiring person would own voting securities in the acquired person valued in excess of $94 million but not in excess of $376 million and the Size-of-Person Test is met, again both the acquiring person and the acquired person are required to file the premerger notification report.

For this purpose, the Size-of-Person Test is satisfied if: (1) the acquired person has annual net sales or total assets of $188 million or more and the acquiring person has total assets or net annual sales of $18.8 million or more, or (2) if the acquired person has total assets or $18.8 million or more and the acquiring person has total assets or annual net sales of $188 million or more.

3. Exemptions

From an estate planning perspective, the most common exemption is provided by Rule 802.71. Under that rule, acquisitions resulting from "a gift, intestate succession, testamentary disposition, or transfer by a settlor to an irrevocable trust" are exempt.

Additionally, Rule 802.9 provides that any acquisition made by an acquiring person who holds less than 10% of the acquired person and which acquisition is made solely for the purpose of a passive investment is exempt.

Finally, transfer between parties that under the control of the same person are exempt.

A. Application of HSR to GRATs

Similar to the analysis above with respect to Section 16 and GRATs, it is important to analyze the possible application of HSR to GRATs by looking at each of the phases of a GRAT separately. Additionally, each of those phases should be analyzed both with respect to whether the transfer of shares is considered an acquisition or consolidation transaction and whether the shares held in the trust are attributed to the grantor for purposes of the Size-of-Transaction Test.

1. Funding the GRAT

Because a GRAT by definition is an irrevocable trust in which the grantor does not have a reversionary interest in the corpus of the trust, unless the grantor has the right to presently designate 50% or more of the trustees, an acquisition will have occurred, and the shares will be deemed to be held by the trust and not by the grantor. If the grantor does have such a presently exercisable power, there will not have been an acquisition, and the shares will be deemed to be owned by the grantor. As such, the transfer would be eligible for the transfer between same person exemption. It further would be subject to the transfer by gift exemption.

2. Satisfying the Annuity Payments

As noted above, if the grantor has a presently exercisable right to designate 50% or more of the trustees, any transfer between the GRAT

and the grantor will be deemed to be a transfer between the same person and exempted from the HSR filing requirements. If the grantor does not have such a presently exercisable right, it will be a transfer subject to the HSR filing requirements if either the Size-of-Transaction Test or the Size-of-Transaction Plus Size-of-Person Test is met.

3. Funding the Remainder Trust

If the GRAT has been successful, the GRAT will hold shares after full satisfaction of all required annuity payments; therefore, shares will be transferred to the remainder trust upon termination of the GRAT.

If the grantor has presently exercisable right to designate 50% or more of the trustees of the GRAT and the remainder trust, the transfer will be eligible for the transfer between the same person exemption. If, however, the grantor has such a power over one but not both of the trusts, that exemption will not apply. In that case, the transfer would be a transfer subject to the HSR filing requirement if either the Size-of-Transaction Test or the Size-of-Transaction Plus Size-of-Person Test is met.

Finally, if the grantor has a presently exercisable right to designate 50% or more of the trustees of the remainder trust, the shares held in the remainder trust will be deemed held by the grantor for purposes of the Size-of-Transaction Test and the Size-of-Transaction Plus Size-of-Person Test.

IMPORTANT INFORMATION
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Investing in alternative assets involves higher risks than traditional investments and is suitable only for sophisticated investors. Alternative investments involve greater risks than traditional investments and should not be deemed a complete investment program. They may not be tax efficient and an investor should consult with his/her tax advisor prior to investing. Alternative investments have higher fees than traditional investments and they may also be highly leveraged and engage in speculative investment techniques, which can magnify the potential for investment loss or gain. The value of the investment may fall as well as rise and investors may get back less than they invested.

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