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PLANNING POTPOURRI

■ **Agent Confusion:** You may have disparate appointments, and they may not be planned or consistent. Determine all such appointments and coordinate them with the fiduciaries named under legal documents so that they do not undermine the safeguards you created. You may not even realize who is named in some old appointments and they may be people you can no longer rely on. Some of the many appointments might include: ■ Authorized signer on safe deposit box. ■ Trusted contacts, such as your brokers listed under FINRA Rule 4512, Customer Account Info. ■ Social Security's Admin (SSA) Representative Payment Program naming someone to receive your payments. ■ Long term care insurance "lapse designee" to get notice of a lapse of your policy. ■ Successor Account Holders on 529 plans. ■ Bank accounts POD, TOD, joint, etc. These may have been created long ago and never updated to reflect your current estate plan. ■ Funeral agent. ■ Physician Order for

Life sustaining Treatment (POLST) signed with your physician. Financial positions might be coordinated with a financial power of attorney. Personal positions might be coordinated with a health care proxy.

■ **Community Property Considerations:** Before implementing estate or asset protection planning, evaluate whether any of your assets may be community property. The fact that you have lived in a non-community property state for decades won't alone change the character of property you acquired while living married in a community property state (e.g., TX, AZ, etc.). Say you and your spouse own entity interests as community property and you want to contribute 1/2 those interests to a trust for your spouse (a SLAT). You have to have counsel in the state where the community interest was created transmute or terminate the community interest. That might result in 1/2 of the value of the investment being owned by each of you. (But if, for example, Wife wants

to transfer all those interests to a trust for Husband and decedents, Husband first must make a gift to Wife of his 1/2 post-transmuted interests.) Time should pass before Wife gifts those interests to a trust for Husband, and other steps taken to deflect a step-transaction issue. Some might view the quick transfer of transmuted community property as the transfer of an asset by the donee spouse they had a community interest in. Also, Wife should consider the economic impact on her if there is a future divorce. Wife had 1/2 interest in the community property, now it may reside 1/2 in Husband (if no gift) and the rest in a trust for the Husband, and nothing for her. PP



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CORPORATE TRANSPARENCY ACT COMING FOR YOU!

Summary: The Corporate Transparency Act (CTA) will require privately held entities to report detailed private information to the Treasury. The rules are complex, very different than anything that has previously been required, and provide for stringent penalties for non-compliance.

■ **Big Brother Will Be Watching Not Just Oceania, But You!** The CTA will have a significant and disturbing impact by mandating new and invasive reporting about entities and their beneficial owners to the government. It is all encompassing and it will affect many people who have undertaken estate planning, asset protection planning, own real estate, and more. Complying with the new CTA rules will be costly, nettlesome, concerning in terms of penalties, and will make you very uncomfortable disclosing information that you probably never did before.

■ **What the CTA Does:** The CTAs goal is to create a comprehensive, searchable, national database of entities. The objective is to pierce entity solution and identify those behind each entity. You may have to disclose your name and home address, not office address or P.O. Box, to comply. This is worrisome. For those who are concerned about personal security, kidnapping and other activities, this is another step obviating privacy and confidentiality. More details on the disclosures appear below. This is part of a growing worldwide effort to combat criminal activities including tax evasion, money-laundering, and other financial crimes. This reporting has grown common in other developed countries, but is new to the U.S. and represents an effort to get the U.S. on par with reporting standards in other countries. CTA reporting has requirements that are very different from tax returns and your CPA may not be able to, or perhaps may not be willing to, handle the CTA filings for you (you might need to engage your attorney).

■ **You Likely Will be Affected:** CTA reporting will affect the owners or principles involved in almost all business entities. This includes limited liability companies (LLCs), corporations, limited partnerships (LPs and FLPs), and other closely held entities. When you engage in estate or asset protection planning, or structure business or real estate investments, you routinely have and will create entities that will be subject to CTA reporting. Investment planning might include forming a holding company LLC to aggregate securities or other investments. Businesses and rental real estate properties are typically segregated into separate entities to avoid a domino effect if there is a lawsuit emanating from the underlying assets. That means more CTA reporting entities. Your estate plan might include the creation of one or more LLCs designed to hold other assets or even other entities to facilitate

trust funding or trust administration. For example, it might be easier and less costly to transfer a basket of assets into an LLC, then transfer slices of that LLC's ownership interests to various family trusts than to transfer the underlying assets. That's another CTA reporting entity. LLCs are often formed to hold vacation homes or tangible property (e.g., art) that is physically located in a state other than your primary state (domicile) to avoid probate in those other states. More CTA reporting entities. A family limited partnership might have been created for management and estate tax valuation discount purposes, and other rea-

sons. Another CTA reporting entity. If you are engaged in planning to reduce the risk of a malpractice claimant or other claimant or predator reaching your wealth (asset protection planning) multiple entities might be created to insulate each underlying assets from claims of creditors. For example, you might transfer assets into a multi-member (more than one owner) LLC in order to take advantage of charging order protection which could limit a claimants ability to reach the underlying assets. More CTA reporting!

■ **Few Exceptions from CTA**

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CHECKLIST: INSUR TRUST

Summary: Irrevocable Life Insurance Trusts (ILITs) are one of the most common estate planning tools, but too often folks just don't give them the care and attention they require. No trust, estate plan or asset protection technique will work if you don't administer it properly and regularly with a collaborative team. There can be a significant number of documents, steps, and nuances (lots of variation between ILITs). These are not "standard" and be careful making assumptions. Consider the following.

✓ **ILIT File:** You (the settlor who created the trust), the trustee, and your advisers should all have a complete and

current compilation of all information and documents so each can fulfil their role and the ILIT can be properly administered. That may include: Memorandum explaining the plan as initially formulated and any follow up adviser communications. Insurance projections when the policy was issued and every few years when the policy is reviewed and evaluated. The initial insurance application should list the trust as owner (or if the policy was later transferred to the trust, that documentation). A PDF of the insurance policies and an indication where the originals are. Fully PDF signed trust document and an indication

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Filing Requirements: Large active enterprises with 20+ employees and more than \$5 million in revenues, or entities such as banks that are already subject to significant federal reporting requirements may be exempt. So, unless your advisers confirm otherwise, you should assume that every entity involved in your planning must report.

■ **Reporting Entities Will Have to Report:** Reports will require the legal name and any trade names of the entity, a street address for company's principal place of business, state of formation, and the Tax ID number.

■ **Every Beneficial Owner has to Report:** These are the people behind or controlling each reporting entity. You'll have to disclose your full legal name, date of birth, home address (a P.O. Box won't suffice) and you'll have to provide a PDF of your passport or driver's license. This is sensitive, confidential and personal information that goes well beyond anything you had to report on an income tax return in the past.

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■ **Changes in Reported Information:** Reporting entities must also report changes to any filing within 30 days. Example: One of the managers of an LLC you are involved with moves to a new home. That change of address will have to be reported within 30 days! That won't be easy and how will you know? If someone with an ownership interest in, or who has "control" over an entity changes their name, that will have to be reported in 30 days. You may have to assure that all of those people know to inform you of such changes so that you can assure that the required filings are made. Corporate counsel might have you amend governing documents (e.g., operating agreements for LLCs) to mandate that every signer complies with their reporting obligations and inform a designated person on behalf of the entity to report.

■ **The Financial Crimes Enforcement Network:** FinCEN will be in charge of creating and maintaining the database of all info the government collects. It will be accessible to a variety of governmental agencies.

■ **Who Specifically May be Affected:** The CTA will tag most small family businesses, including LLCs and other entities designed only to hold a vacation or rental homes. Even if an entity has only one owner and is ignored for federal income tax purposes (like a single-member disregarded LLC), it may still have to file reports with FinCEN. If you have any ownership interests in any closely held entity, such as an LLC, corporation, or limited partnership (any entity that required a filing with a state agency such as the Secretary of State or any similar office), then you may be subject to these requirements. This may even include foreign entities authorized to do business in the U.S. The rules are broad and nuanced. "Ownership" is not limited to obvious ownership (e.g., you own membership interests in an LLC). It is broadly defined to include any type of equity interests (e.g., a profits interests, convertible instruments, warrants, options, puts, calls, and other entity interests). Ownership can be interests owned or controlled through joint ownership, through a

trust agreement, or other indirect arrangements. All of these disparate rights may be subject to CTA reporting rules.

■ **If You Control an Entity You Do Not Own You Too May Have to File:** If you are not an "owner" of an entity, but you exercise the authority which a senior officer of the entity

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might hold, you also have to report. If you are not an owner or officer, but if you have direct or indirect substantial control over the entity you may have to report. This might include a chief financial officer, general counsel, trust protector, trustee, etc. The goal of the CTA is to reach those controlling the entity.

■ **Effective Date:** The CTA rules apply on January 1, 2024. For entities that already exist by that date, their initial reports are due by January 1, 2025. For entities created 1/1/24 or later a report is due within 30 days from the date of the creation. As of now, there are no extensions of time.

■ **Act Now:** You and your advisers should begin the process now of identifying reporting entities and beneficial owners, and gathering information to prepare for the eventual reporting requirements. Try to avoid the likely pressure as the deadline approaches and every attorney and CPA will be scrambling to help those who have not prepared. Compile a list of every entity you are an owner of, or involved with, and have your attorney review the reporting implications for that list of entities. You should not assume that any of your advisers, including the attorney that may have helped form an entity, has the information. They won't. Maintain records of every entity you determine if you have to report for, and why, for future use. **PP**

...CHECKLIST: LIFE INSURANCE TRUST

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where the original is. Over the years there may be trustee changes, actions by various persons holding powers under the trust (e.g., a trust protector), etc. PDF copies of all those documents should be held in chronological order so that the current status of the trust can be proven.

✓ **Insurance:** Insurance policies are the heart of ILITs, but too often people make the dangerous assumption that if the policy made sense when the trust first purchased it, that it makes sense decades later. Insurance is not a "buy it and forget it" decision. Have your policy and your circumstances reviewed every few years to see if the policy is working as desired and to be sure it meets current needs. Sometimes policies are great, sometimes they need to be added on to (i.e., more coverage). Sometimes they can be converted, sold or cancelled. Don't assume insurance is "one and done." It needs to be monitored like any other investment asset.

✓ **TIN:** ILITs probably should have their own Tax Identification Number although some advisers suggest using the settlor's Social Security Number since ILITs are almost always, if not always, grantor trusts.

✓ **Investments:** Most ILITs never need an investment plan or tax return because they have nominal bank balances and an insurance policy. But many ILITs have investment assets as a result of a plan to prefund the trust, etc. So be sure that if you have investments apart from the policy in the trust, those are being properly managed and all steps related to that investment asset addressed.

✓ **Bank:** ILITs should have their own bank account. Personal and trust funds should never be commingled.

✓ **Gifts:** When you make a gift to the trust, most trusts require that the trustee give written notice to the beneficiaries to qualify the gifts for the annual gift tax exclusion. These are called Crummey notices. Review exactly what your trust says about these as there are lots of different nuances. Some advisers suggest beneficiaries waive the requirement of notice. Too many people just ignore the requirements. But keep in mind

the trustee should adhere to the terms of the trust even apart from gift tax considerations. If there is a lawsuit, creditors might not be required to respect the trust if you didn't. Save PDF copies of every year's notices. If the premiums are significant, there may be documentation on a split-dollar loan or other financial arrangement to fund the trust (e.g., a tier of GRATs the back end of which may pass to the ILIT).

✓ **Gift Tax Returns:** If you made taxable gifts to fund the ILIT, a gift tax return might be required. If you made only annual gifts with Crummey powers you might (discuss with your tax adviser) report those on a gift tax return to run the statute of limitations on audit. Similarly, if gifts were made between spouses before funding the trust (e.g., from one spouse to the other if the couple

only has a joint checking account) some tax advisers recommend those be disclosed on the return.

✓ **Plan Review:** Every few years review your ILIT plan. Might it be beneficial to change insurance coverage, remove and replace a trustee, move the trust to a better state, decant or merge the trust into a newer trust, etc.? Over years, and certainly over decades, much can change and your ILIT plan should, to the extent feasible, evolve with those changes. Most insurance trusts are irrevocable but that doesn't mean that they might not be changed. Old trusts often have inefficient or inadvisable administrative provisions. Those might be modified by decanting or merging the old ILIT into a new trust. Common issue: old trust pays out to beneficiaries at some age, e.g. 30, and that is rarely ideal. **PP**

RECENT DEVELOPMENTS

■ **Revenue Ruling 2023-02:** States the IRS's position that the basis adjustment under Code Sec. 1014 does not apply to the assets in an irrevocable grantor trust that is not included in the deceased grantor's gross estate for Federal estate tax purposes. The basis of those assets is not stepped up to fair value on death even though the grantor trust's owner is liable for Federal income tax on the trust's income, the assets of the grantor trust are not considered as acquired or passed from a decedent by bequest, devise, inheritance, or otherwise within the meaning of Code Sec. 1014(b), and therefore 1014(a) does not apply. IRB: 2023-16, dated April 17, 2023.

■ **Kalikow Case:** A recent Tax Court ruling reaffirms estate inclusion rules governing qualified terminable interest property (QTIP) trusts and the requirements for valuation of QTIP assets and determination of expenses. It also presents another lesson in how estate plans and family challenges can pose difficulties for all. Estate of Kalikow v. Commissioner, T.C. Memo. 2023-21. The court considered the issue of deducting administrative fees from an estate to reduce estate tax due, and discussed Code Sec. 2053. Husband's will created a QTIP for wife that included a requirement to pay the surviving wife all income during her life. On Wife's death, the assets remaining in the QTIP were to be divided and paid to trusts for each of the two children. Most of the assets in the trusts were interests in an FLP that owned rental real estate. It was asserted that wife had not been paid income of almost \$17 million. Litigation followed, and a settlement was reached in which the QTIP agreed to pay the wife's estate about \$6.5 million of undistributed income and about \$2.7 million in fees. The estate was held not entitled to deduct any part of the agreed-on settlement payment as administration expenses pursuant to Section 2053. The family, estate and trust endured 10-years of litigation. The tax issues the family lost on might pale in comparison to the legal costs incurred and the personal damage to the family.

■ **Biden Greenbook:** The Biden administration issued its budget proposal, the so-called Greenbook. For a detailed analysis and planning implications see the paper posted to the blog post on www.shenkmanlaw.com.