

### Legal and Regulatory Considerations

As is the case with any investment vehicle, a family office may be subject to a wide range of regulatory regimes depending on the nature of the investment it makes and the industries and jurisdictions in which it invests. As to the family office itself, in the United States there are typically only a limited number of legal or regulatory issues to be considered. The principal regulatory concern is the availability of the exemption from registration under the Investment Advisers Act of 1940, as amended (the Advisers Act). For a single-family office, no matter the manner in which it is structured from a legal entity standpoint, the concern, in a nutshell, is to make certain that the family office does not provide investment advice, as defined under the Advisers Act, to specified categories of entities or individuals such that the family office would be required to undergo the burdensome (and public) process of registration with the Securities and Exchange Commission as an “investment adviser” and ongoing compliance under the Advisers Act. This analysis becomes more complex – and more critical – as the scope of the family office’s activities expand and the number of family members increases, and is of key legal importance for multi-family offices.

Apart from the regulatory issue posed by the Advisers Act, much as would be the case for the persons responsible for the legal function in any group of companies, the family office needs to ensure that the “corporate formalities” are observed and maintained for all of the legal entities established by the family group. The general term “corporate formalities” refers broadly to the formal legal steps to be taken by legal entities to substantiate their existence as separate legal entities: this suite of “corporate housekeeping” matters typically includes such things as maintaining the legal good standing of each entity through the making of all required state franchise tax or similar filings, the maintenance of separate books and records for each entity, the regular election of directors and officers for each entity, the keeping of separate records of board minutes and resolutions adopted and actions taken by each entity, the documentation of any movements of capital among intra-family entities, and the maintenance of separate bank accounts and financial records for each entity. In the corporate context, these steps are important to ensure that the legal “separateness” of each entity will be respected for purposes of liability limitation and financial responsibility. Those considerations are, of course, equally relevant for family entities – in addition, the maintenance of proper corporate formalities can help provide legal substance for intra-family transactions and help to mitigate the risk of inadvertent gift tax exposure.

This same concern applies equally to all intra-family transactions – whether they are investments or loans between entities owned by different members of the family, employment arrangements between family-owned entities and family members, or loans directly from family entities to individual family members. Part of the legal function of the family office should be to ensure that each such intra-family transaction is properly documented and, unless the transaction is intended to be a gift, reflects reasonable arm’s-length market terms, to mitigate the risk of a transaction being re-characterized, in whole or in part, as a gift for tax purposes.

### Ethics and Conflicts

As to the lawyers themselves, whether in-house counsel or external, the family office, with its constellation of entities and individual family members all requiring legal advice, can present a special challenge – the ethical issue of conflicts of interest and the recurring question of “Who is the client?” Providing legal advice to multiple generations of family members can present unique challenges to the “family lawyer,” and the family decision makers – whether senior family members or family office professionals – and the lawyers themselves need to be alert to potential conflicts of interest under the lawyers’ applicable rules of professional conduct. External counsel for a family office should carefully consider the terms of their engagement letter, and consider addressing issues such as whether (or the extent to which) they may represent individual members of the family, as well as the family’s entity or entities and, if so, for what purposes. For internal family office counsel, these can be even more difficult waters to navigate, and a written policy as to the scope of the professional services the in-house lawyer will perform on behalf of the various family office stakeholders can be a useful tool for establishing ethical guideposts. Although those agreements and policies, and written conflict waivers, joint representation agreements and other structural approaches can be valuable tools for mitigating the potential for ethical conflicts of interest and for avoiding intra-family disputes, it is almost inevitable that circumstances will arise in which the differing interests of family members will make it advisable to retain separate counsel, and identifying those circumstances and managing that process, when it arises, poses a unique challenge to the “family lawyer.”

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