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Alternative Investments Using Self-Directed Retirement Funds

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I. Introduction

Traditionally, entrepreneurs seeking capital for their new venture – be it an operating enterprise or a more passive endeavor such as real estate investment – have had the option of choosing debt or equity financing. In today's economic times, and in the wake of the financial troubles of the late 2000s, capital has been scarce due to tightened lending standards amongst banks and the decline of personal wealth amongst those in a position to invest. At the same time, many individuals have sought to capitalize on depressed real estate prices by building a portfolio of investment real estate, while others seek types of investments other than stocks and mutual funds.

How do these new entrepreneurs and investors successfully fund their investment activities? Increasingly, and particularly in regards to real estate investment activities, a common source of capital for new entrepreneurs has been the monies which comprise their retirement accounts through the establishment of "self-directed IRAs". Self-directed IRAs, while governed by the same laws as "traditional" IRAs, carry with them certain risks which can lead to significant and adverse tax consequences for the IRA owner if not properly understood and avoided. Additionally, there are arrangements related to self-directed IRAs that have attracted IRS' scrutiny and are not advisable.

Given the increased use of self-directed IRAs as financing sources for private placements and real estate investment activities, practitioners need to have a basic understanding of how self-directed IRAs work, what can and cannot be invested in using self-directed IRAs and, most importantly, what types of transactions are deemed "prohibited" by the IRA regulations. In addition, it is important to understand how to properly form a "checkbook control" LLC to facilitate these types of investments.

II. Background on IRAs

Saving for retirement on an individual basis came into the mainstream in 1974 when Congress passed a tax act known as the Employment Retirement Income Security Act (ERISA)[1]. While ERISA's primary purpose was to regulate employer-sponsored retirement plans, Congress – recognizing that some employers would not sponsor pension plans – created IRAs to encourage individual savings[2].

III. What is a "Self-Directed IRA"?

A self-directed IRA is legally no different from any other IRA[3]. The term "self-directed" simply indicates that you choose your IRA's investments[4].

To understand the differences between a self-directed IRA and other IRAs, it is necessary to understand what types of investments are permitted through an IRA. Traditionally, IRA funds are invested in stocks and mutual funds. However, there are only a limited number of prohibited investments – life insurance contracts, collectibles (artwork, rugs, precious metals (with the exception of certain gold, silver, palladium and platinum bullion), gems, stamps, coins (with the exception of certain gold and silver coins minted by the U.S. Treasury Department), alcoholic beverages, and personal property. In addition, IRAs may not own shares of S corporation stock since such shares must be held by individuals, not entities. IRA owners may legally invest in anything else, including real estate of all types and private placements.

Despite the fact that IRAs may hold many types of investments, most brokers and advisors who routinely administer IRAs limit investments to stocks and mutual funds. The reasons for this are relatively straightforward.

There are several companies throughout the U.S. that serve as custodians for self-directed retirement plans. These companies do not give investment advice; to do otherwise would make them fiduciaries. Instead, they recommend to their clients qualified advisors that understand self-directed investments – attorneys, CPAs and financial advisors – and who can provide the necessary advice.

IV. Control Using LLCs

Self-directed real estate investing works best when it is done through a limited liability company ("LLC") funded by IRA funds. A qualified attorney sets up the LLC, the custodian signs the contribution agreement on behalf of the IRA which is the owner of the LLC. Use of a LLC allows a separate bank account to be created and IRA funds to be deposited into the account. The LLC manager then can write checks for expenses related to the properties and deposit rent checks and the like. Ask most custodians and they will tell you that they prefer the use of the LLC as it eases the time and burden placed upon them for their clients' investment activities. This structure is commonly known as "checkbook control" as use of the LLC form provides the IRA owner with direct control over the IRA funds via the LLC bank account.

The genesis for the idea is largely attributable to the case of Swanson v. Commissioner[5], a Tax Court case that was decided in 1996. In that case, Mr. Swanson set up a self-directed IRA at a bank and formed a corporation of which he was appointed the director and president[6]. He then directed the bank to subscribe to the original issue shares of the corporation so that his IRA became the sole shareholder[7]. Subsequently Mr. Swanson transacted business between his IRA owned corporation and his privately owned corporation[8]. These transactions were prohibited transactions, but the IRS' litigation position was limited to arguing that the purchase by the IRA of the original issue shares and the payment of dividends from the IRA owned corporation back to the IRA were prohibited[9]. The IRS eventually conceded the case as it related to the alleged prohibited transactions[10].

Practitioners advising clients seeking to establish a checkbook control IRA arrangement should pay attention to the limited nature of the Tax Court's ruling in the Swanson case. Far from approving the entire concept of a "checkbook control" IRA owned entity, as some people allege, Swanson v. Commissioner can only be relied on for two concepts: first, that the purchase of the original issue stock of the corporation was not a prohibited transaction because prior to the IRA purchasing the stock there were, by definition, no owners, which meant that there could not have been a transaction between the IRA and a disqualified person (the court ruled that the corporation did not become a disqualified person until it was funded, which raises other interesting issues); and second, that the payment of dividends from the IRA owned corporation back to the IRA was not a prohibited transaction as a direct or indirect benefit to Mr. Swanson, since the only benefit of the dividend payments accrued to his IRA and not to Mr. Swanson personally[11]. In other words, Swanson does not permit the use of IRA funds to infuse capital into an existing entity in which the IRA owner and/or any other disqualified person(s)[12] owned an interest.

The process for establishing a checkbook control IRA LLC is very similar to the process for establishing any LLC. Articles of Organization are prepared and filed with the Secretary of State; a form of Bylaws/Operating Agreement is adopted; an Employer Identification Number (EIN) is obtained through the IRS; and written resolutions as to approval of organizational documents and establishment of an LLC bank account are executed. A contribution agreement is also utilized, and there are some slight differences in this aspect of the LLC formation. Given that the IRA is the "member" of the LLC, the third-party administrator signs the contribution agreement as member; also, the specific dollar amount of the contribution the IRA is making to the LLC must appear within the agreement.

In the event that IRA funds are used to acquire only a partial membership interest, it is essential that the respective membership interests issued be directly proportionate to the amount of each member's capital contribution, both in financial rights and governance rights; any agreement to allocate such rights on something other than a proportionate basis (as is permitted by most, if not all, state LLC statutes) is not permissible where IRA funds are used to acquire a membership interest. For example, if $100,000.00 is contributed through a self-directed IRA and another member contributes $50,000.00 of their personal cash, the IRA should be issued a 66 ⅔% membership interest and the other member will be issued the remaining 33 ⅓%.

V. UBIT Issues

Next to the prohibited transaction/self-dealing issues discussed in Section VI, issues of unrelated business income tax (UBIT) are perhaps the biggest pitfall for self-directed IRA investors. Sections 512-513 of the Internal Revenue Code[13] were enacted to require exempt entities, including self-directed IRAs, to pay tax on the earnings received from any unrelated active businesses[14].

Any active trade or business is, by definition, unrelated to the function of a retirement account so all retirement accounts would normally pay this tax when they invest in any trade or business[15]. However, there are a few exceptions to UBIT for self-directed IRAs; UBIT can be avoided if the IRA's investment income comes from these passive sources:

- Dividends (from C corporation shares);
- Royalties (but special rules apply to royalties from mineral rights);
- Interest from passive loans;
- Rents from real estate and any related rent from a small amount of Personal property (defined as 10% or less of the total rental income);
- Capital gains/losses on the sale or exchange of unleveraged equity interests in a business (whether a passive investment in stock or an active investment in a pass-through entity);
- Gains/losses from the lapse or termination of options to buy/sell securities or real estate; and
- Gains/losses from the forfeiture of good-faith deposits for the purchase, sale or lease of real estate in connection with the entity's investment activities[16].

Notwithstanding the above exceptions, certain rental income is still subject to UBIT, including (1) if rent is tied to the income of the tenant (such as with some shopping centers that charge a flat rate plus a percentage of sales); (2) hotel rooms; (3) boarding houses; (4) tourist camps; (5) storage or warehouse space; and (6) certain parking lot income.

VI. Prohibited Transactions

The use of self-directed IRA funds, however, is not without pitfalls. Owners must be aware of the Internal Revenue Service's regulations on IRAs, particularly the self-dealing provisions, as Section 4975 of the Internal Revenue Code[17] imposes a tax on each prohibited transaction. The rate of tax is equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period[18]. The tax imposed shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such). In addition, in any case in which the initial fifteen percent tax is imposed on a prohibited transaction and the transaction is not corrected within the taxable period, an additional tax equal to 100 percent of the amount involved is imposed[19]. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

Definition of "Prohibited Transaction"

The term "prohibited transaction" means any direct or indirect (A) sale or exchange, or leasing, of any property between a plan and a disqualified person (defined below); (B) lending of money or other extension of credit between a plan and a disqualified person; (C) furnishing of goods, services, or facilities between a plan and a disqualified person; (D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan; (E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or (F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan[20].

Definition of "Disqualified Person"

The term "disqualified person" means a person who is (A) a fiduciary[21]; (B) a person providing services to the plan; (C) an employer any of whose employees are covered by the plan; (D) an employee organization any of whose members are covered by the plan; (E) an owner, direct or indirect, of 50 percent or more of (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation, (ii) the capital interest or the profits interest of a partnership, or (iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in Section 4975(e)(2), subparagraph (C) or (D); (F) a member of the family (which includes an individual's spouse, ancestor, lineal descendant and any spouse of a lineal descendant) of any individual described in Section 4975(e)(2), subparagraph (A), (B), (C), or (E); (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation, (ii) the capital interest or profits interest of such partnership, or (iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in 4975(e)(2), subparagraph (A), (B), (C), (D), or (E); (H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in 4975(e)(2), subparagraph (C), (D), (E), or (G); or (I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in 4975(e)(2), subparagraph (C), (D), (E), or (G)[22].

With respect to the definition of "family", note that the definition does not include non-lineal descendants such as siblings, uncles/aunts, cousins and their spouses and/or children.

Examples of Prohibited Transactions

Identifying a prohibited transaction is a key aspect involved with advising clients using self-directed IRAs, particularly in the area of real estate investments. While there are many possible scenarios that could be deemed a "prohibited transactions", the following are some of the most common mistakes which self-directed IRA investors make involving "prohibited transactions"[23]:

1. The IRA Holder personally enters into an agreement on property they want to buy with their IRA. Many investors wait until they find a property in order to engage the services of an IRA custodian or administrator. Unfortunately, in doing so, they are not allowed under the prohibited transaction code to use personal funds for the benefit of the IRA. Let's say you find a great piece of rental real estate you'd like to buy as an IRA investment. If you have not already established a self-directed IRA account you may lose out on the deal because you don't have immediate access to your IRA funds and you cannot personally deposit your own earnest money to enter into a purchase agreement. Remember, the IRA needs to buy and fund the property, not you.

2. Self-directed IRA clients use personally owned assets for the benefit of the IRA. The use of a personally owned remodeling company or construction equipment to develop or improve IRA owned property would constitute a prohibited transaction. You the IRA holder cannot personally benefit from nor use personal assets to benefit the IRA investment. "Sweat Equity" constitutes a non-cash IRA contribution, which is not allowed.

3. The attempt by the self-directed IRA holder to take a real estate commission on property purchased or sold by the IRA. If the IRA holder is a licensed real estate agent, they cannot receive a commission on the buying or selling of the IRA property, which would be considered personal compensation from the IRA investment. The commission can be used to reduce the sales price, which is a benefit to the IRA investment.

4. The IRA holder believes that the transactions with a non-disqualified person cannot be a prohibited transaction. This is a common belief that simply is not true. You, the IRA holder, have a fiduciary responsibility to do what is in the exclusive interest of the IRA. This holds true also when investing with non-disqualified persons such as siblings. As an example, an IRA holder that lends money should not lend before the fair market rate because it is not in the best interest of the IRA.

5. The IRA holder assumes that no UBIT applies to passive investments into an operating business. Unrelated Business Taxable Income (UBIT) is generated when an IRA engages in "business activity". Often times an IRA owner wants to passively invest in a business entity, but the business activity itself is not passive. Should the investment be made in a pass-through entity, such as an LLC, an IRA could generate UBIT on any profit derived by the business entity. If generated, the IRA is responsible to pay the UBIT.

6. The IRA owner attempts to make a contribution to the IRA by depositing the funds directly in the IRA-owned LLC checking account. If you make an annual IRA contribution directly into the LLC rather than through the IRA custodian, you are personally transacting with your IRA LLC. That is considered a prohibited transaction.

7. The IRA holder makes personal guarantees. You, as the individual holding the IRA account are considered a "disqualified person" and cannot provide a personal guarantee of the IRA debt for an IRA investment or for an entity like an LLC that is owned by the IRA. Loans to an IRA-owned LLC or credit cards issued by the banks where the IRA LLC sets up an account for checkbook control of the IRA assets are based on your personal credit and are not allowed. The execution of that personal guarantee constitutes an "extension of credit" and hence is an automatic prohibited transaction even if the guarantee is never exercised.

Note, however, that acquisition and/or construction financing in regards to a property owned within an IRA or an IRA-owned LLC is not prohibited entirely; non-recourse loans are permissible, and there does exist a network of asset-based lenders willing to make such loans.

8. The self-directed IRA enters into a partnership in which it loans money to an investor, and instead of making the loan secured with interest and payments; it takes a share of the profits. Although this is allowable, the way that this investment is structured, it will generate UBIT. This wouldn't be an issue if the IRA lent the money at fair market rate and created a payment schedule. But, in a profit-sharing investment, structured to look like a loan with generated equity returns not paying potential UBIT will be an issue.

9. Two self-directed non-disqualified IRA holders enter into a quid pro quo, partnership to utilize their own retirement funds. For example, each person has a $100,000 self-directed IRA. They each make a loan out of their respective IRA's for $100,000 to invest in personal investments. These loans are "disguised" personal loans that are dependent on the other individual lending the money and could be construed as using one's own retirement funds for personal benefit.

10. Self-directed IRA holder attempts to "disguise" active investments that can potentially generate UBIT. Pretending to actively rent the IRA real estate investment by placing periodic ads in the paper to try to prove that you are renting this investment as a passive investment with the intent to avoid paying UBIT while you are actually trying to quick turn the real estate investment will not change the tax outcome. Although the intent was to rent the property long term rather than a short-term investment, the case law says that the most dominant factor is the purpose at the time of the sale, not at the time of the initial purchase. So, you could have setup a perfectly passive non-business IRA investment, but because of circumstances that change the purpose or intent, such that at time of sale it was a business type of transaction, you will now potentially have to pay UBIT, which is not all that bad in and of itself. It just has to be factored into the investment equation.

VII. Private Placements: Use of Self-Directed Funds and "Non-Accredited Investors"

Many startup ventures, affected by a lack of access to bank financing or simply needing additional equity infusion in order to qualify for such financing, conduct private placements of their stock or other ownership interests. With so many ventures in the marketplace at this time, higher net worth investors are more selective as to what they invest in and the returns on investment and exit strategies can make or break some offerings. For some new ventures – such

as a neighborhood microbrewery – there may be significant interest from individuals who do not meet the definition of "accredited investor" as set out in Federal securities laws and whose only source of capital is their IRA. While it is perfectly acceptable for these investors to establish a self-directed IRA and make an investment into a new venture, the issuing entity must be sure to comply with the myriad of disclosure requirements sufficient to justify an exemption for the issuance of securities to a non-accredited investor.

VIII. Rollovers for Business Start-Ups (ROBS)

A topic related to self-directed IRAs, which bears some discussion here, involves the transfer of qualified retirement plan funds into another retirement plan to fund new business start-up costs. While technically permissible, this type of arrangement commonly referred to as "Rollover for Business Start-up", has attracted much IRS scrutiny, and is far more complicated to operate without penalty and should be avoided if at all possible.

ROBS involve an individual establishing a shell C corporation which sponsors a defined contribution qualified retirement plan[24]. The qualified retirement plan document allows a participant to invest his or her account balance in employer stock, and the individual is the only employee of the corporation and the only participant in the plan[25]. The individual executes either a rollover or a direct trustee-to-trustee transfer of the assets of an existing qualified plan (such as a plan from a former employer) or a personal IRA to the newly created qualified plan[26]. The individual then directs the shell corporation to issue all of its stock to the new qualified plan in exchange for the retirement funds held in the plan[27]. The effect of the transfer is that the new plan is the sole shareholder of the C corporation[28]. The stock of the corporation is valued to reflect the amount of the plan assets that are transferred in exchange for the stock[29]. The former qualified plan assets have been distributed tax-free from the plan and are now held by the new corporation, and the corporation typically uses the funds to acquire a franchise or to begin some other business enterprise[30].

After the new business is established, the corporation's qualified plan is then amended to prohibit further investments in employer stock[31]. Thus, the individual that originally formed the corporation is the only participant in the plan that owns the C corporation stock, and as the business grows, future employees and plan participants are precluded from investing in employer stock[32].

On October 1, 2008, the IRS issued a 15-page memorandum (the "Memorandum")[33] identifying a number of issues that IRS examiners should develop in connection with their review of ROBS transactions [34]. The Memorandum identified two primary issues: (1) benefit discrimination rules associated with qualified plans under the Section 401 regulations may be violated (because the ROBS arrangement only allows one participant – the taxpayer who formed the corporation – to be the beneficiary of the plan that acquired the corporation's stock; also, that benefit is not available to future employees who may subsequently become involved with the corporation and become eligible to participate in the plan); (2) there is a potential prohibited transaction valuation issue because the value of the corporation's stock is typically deemed to be equal to the value of the available retirement plan assets rather than the corporation's business; thus there is a question of the proper valuation of the corporate stock [35].

Conclusion

Whether self-directed IRAs continue to increase in popularity remains to be seen. If access to credit loosens amongst traditional lenders, and if the availability of venture capital and angel funds increases, the use of one's retirement funds for passive investment activities such as real estate investment and private placements may level off. However, at the present time, the prevalence of self-directed IRA transactions requires that attorneys working in the areas of entity formation and real estate transactions have a basic understanding of what is entailed in self-directed investing, including the nuances involved with "checkbook control" LLCs. More importantly, practitioners need to know the rules as to prohibited transactions and disqualified persons so that they can properly analyze a client's proposed course of action with an eye towards whether heavy tax and penalties are ahead if the transaction proceeds.

1. Matthew M. Allen, "Leverage Your IRA: Maximize Your Profits with Real Estate", p. 35. the Employment Retirement Income Security Act is codified at 29 U.S.C. § 1002 et .seq.
2. Allen, at 35.
3. Allen, at 36.
4. Id.
5. 106 T.C. 76 (1996); H. Quincy Long, Checkbook Control IRA-Owned Entities Under Attack, http://questira.com/checkbook-control-ira-owned-entities-under-attack/
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. See Section VI, infra.
13. 26 U.S.C. §§512-513.
14. http://www.accuplan.net/selfdirectedirablog/self-directed-ira/self-directed-ira-unrelated-business-income-tax-ubit/
15. Id.
16. Id.
17. 26 U.S.C. §4975(a).
18. Id.
19. 26 U.S.C. §4975(b).
20. 26 U.S.C. §4975(c)(1).
21. "Fiduciary" is defined under Section 4975(e)(3) as "any person who (A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (C) has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.
22. 26 U.S.C. §4975(e)(2).
23. This list was originally compiled by Todd Grill of Nexus Direct IRA, LLC, used with permission.
24. Andrew R. Biebl, CPA, and Robert J. Ranweiler, CPA, MBA, 2010 Tax Advisors Update, at 13-20.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id. at 13-21.
33. The Memorandum can be found on the IRS website at http://www.irs.gov/pub/irs-tege/rollover_guidelines.pdf
34. Id.
35. Id.

About Jeffrey O'Brien

Jeff practices in the areas of business formations, business transactions, real estate law, estate planning and probate law. His clients represent a diverse array of businesses and business owners including real estate agents, developers and investors, title companies, community banks, film producers, restaurant operators, manufacturing companies, and franchised businesses. He has significant experience with the formation of new businesses and he presently serves as President of the American Association of Microbusinesses (AAM).

Jeff has several niche practice areas, including his work with individuals financing a business venture and/or acquiring real estate through the use of self-directed retirement accounts. He also works with a number of microbreweries.

Jeff is a Minnesota State Bar Association Board Certified Real Property Specialist and appears as a featured guest on the WCCO Real Estate Radio Hour to present the "Legal Minute." He is admitted to practice in the states of Minnesota and Wisconsin as well as the United States District Court for the District of Minnesota.

A frequent lecturer and writer, Jeff has presented and written articles on a variety of topics such as asset protection planning, entity conversions, real estate lending and loan documentation and other general business and real estate matters. He is also the author of the blog "The Business Man's Lawyer." A self-described "social media addict," you can also connect with him on LinkedIn, Facebook and Twitter. His column, "The Social Media Lawyer," appears quarterly in the CIC Midwest News.

Jeff has been listed as a Rising Star by Minnesota Super Lawyers each year since 2008, a designation reserved for only 2.5 percent of all attorneys in Minnesota.

A resident of Albertville, Minnesota, Jeff is active in his local community and has been a member of the Wright County Economic Development Partnership, the Elk River Area Chamber of Commerce and presently serves on the Board of Directors of his homeowners association.

Bar Admissions: Minnesota, 2000 Wisconsin, 2006 U.S. District Court District of Minnesota, 2003

Published Works:

- "What is a Social Media Policy and Why Is It Important?" Social Media Lawyer, CIC Midwest News, Summer 2011
- "Creative Solutions from Practitioners in Dealing with Real Property Issues and the Increase in Drafting Language to Deal with the Possibility of Foreclosures in J&Ds," (co-authored with Lymari J. Santana), Family Law Forum, Winter 2011
- "Real Estate Sales in a Troubled Market: A Crash Course on Terminology," Hennepin Lawyer, March 2009
- "Estate Planning for Real Estate Owners With Family Limited Partnerships," North Central News, Spring 2007
- "The Basics of the Minnesota Professional Firms Act," Summer 2006

Classes or Lectures

- Understanding the World of Minority Rights and Fiduciary Obligations, Advanced LLC Issues, National Business Institute, May 2011
- How to Use Social Media to Market Your New Business Legally, MetroNorth Chamber of Commerce "Be Your Own Boss" Workshop, October 2010
- Estate and Succession Planning for Business Owners, Minnesota Onsite Wastewater Association (MOWA) Conference, February 2010
- Significant Drafting Issues Specific to Commercial Leases, Drafting and Enforcing Commercial Leases, Sterling Education Services, Inc., November 2007
- Lending to the Real Estate Industry (Web Seminar), Lorman Educational Services, September 2006
- Ethical Considerations in Asset Protection Planning, Asset Protection Planning, Lorman Educational Services, May 2005

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