

Reviewing Shareholders' Agreements

By Ted Polci, CLU, TEP

In a recent article published in FORUM magazine (for Advocis), Gary Clark, CLU, TEP of Edmonton examined several areas of concern when advisors are reviewing a shareholders' agreement (SHA) funded by life insurance. With thanks and due credit to Gary, we have selected and edited his comments to fit our needs in communicating matters of interest in non-technical terms to professional advisors.

If you would like to see the entire article or if you have comments or questions, please e-mail or call me.

Here is the checklist **"areas of concern"**:

- 1) Pay close attention to the "stop loss" rules to see if the SHA maximizes available tax savings and deferral.**
 - Are the shares grandfathered by the agreement (restricted basis) or by the insurance (less restricted basis) ?
 - Have the wills been "synched" with the SHA ?
 - Are shares left to a surviving spouse which will permit a put/call strategy ?
- 2) How are the shares held ?**
 - Have there been changes since the agreement ?
 - Are there restrictions on the shares of the Opco but not the Holdco ?
 - Will the principals of the Holdco be obligated by the SHA ?
- 3) Is the agreement fully funded ?**
 - If not, will it create tax or liquidity issues, or unacceptable risk (unsecured debt) for the deceased's estate ?
- 4) Does the agreement take into account the enhanced capital gains exemption ?**
 - Does it consider the spouse's exemption as well ?
- 5) Who holds the insurance contracts ?**
 - We prefer to see the contracts in Holdcos to provide the flexibility to deal with insurance contracts in the future should there be a sale or other changes with respect to the Opco. For example, if one owner withdraws he/she has the ability to control insurance on his/her life without tax or other complexity.
- 6) Are the policies restricted from being assigned with appropriate penalties for assignment or unauthorized change in beneficiary ?**
- 7) Does the agreement exclude the life insurance from the fair market valuation of the company ?**
- 8) Is there clear language regarding from which pool (eligible or ineligible) a dividend is being paid ?**

Certainly, there are many other issues as well, but these are more relevant to insurance funding the obligations created by the agreement.