SIXTEENTH
ANNUAL TAX SYMPOSIUM

October 6, 2007
SHERATON DETROIT NOVI
NOVI, MICHIGAN

PRESENTED BY THE LAW OFFICES OF
MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

October 6, 2007

Dear Tax Symposium Participants:

Welcome to our Sixteenth Annual Tax Symposium. We are pleased that you have joined us this morning. This year's Tax Symposium will continue a format which begins with a general session and, after a brief refreshment break, concludes with two concurrent breakout sessions. You, of course, may select a breakout session which interests you or is most relevant to your practice.

As we have done historically, our Program will principally address tax issues and topics which we believe will help you better represent your clients. You will note, however, that we have also included in our Program two topics which should be beneficial in operating your own tax practice. The first of these is a presentation on applying for professional liability insurance. The second is a presentation on the sale of a professional practice. Since these are matters that you may encounter at any time, we encourage you to call upon us and allow us to assist you with these or other matters that affect you personally.

While our Annual Tax Symposium features many of the tax and corporate members of the Firm, you should be aware that we are a "full service law firm." Please visit our website at www.maddinhauser.com to find out more about Maddin Hauser. As always, we appreciate your attendance at this Program and welcome your comments and suggestions.

Very truly yours,

MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

SIXTEENTH ANNUAL TAX SYMPOSIUM PROGRAM

GENERAL SESSION

BREAKOUT SESSION A

BREAKOUT SESSION B

GENERAL INFORMATION

SALE OF A PROFESSIONAL PRACTICE

By: Stuart M. Bordman

I. WHY IS A PROFESSIONAL PRACTICE DIFFERENT FROM OTHER BUSINESSES?

A. Location.

1. MEDICAL/DENTAL – Location may be of importance. For specialists, patients will travel.

2. LEGAL/ACCOUNTING – Not significant.

B. The tangible assets of the business are not significant.

1. FF&E may be old and obsolete.

2. FF&E can be easily replaced.

C. There are no patents, trademarks, or service marks which are of value.

D. There are generally no contracts which assure continuing business. Some medical practices have contracts with the State of Michigan health maintenance organizations or other third party payers where the practice will receive a fixed payment per patient, per month ("capitated payment") to provide medical care, when necessary. If the contract is transferable, the practice has enhanced value.

II. WHAT IS THE PURCHASER BUYING?

A. Patient/client relationships.

B. Staff.

1. Asset – Patients/clients may know the staff and the staff may assist in transition from seller to purchaser.

2. Liability – The staff may take the patients/clients and go into practice on their own or move the patients/clients elsewhere.

C. FF&E.

D. Accounts Receivable – Collected by purchaser and remitted to seller. Loan to assist purchaser with cash flow.

III. HOW DO YOU PROTECT THE STAFF FROM TAKING THE PATIENTS/CLIENTS?

A. Agreement Not to Compete.

1. Michigan Antitrust Reform Act

445.774a. Agreements not to compete application:

> Section 4a. (1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.
>
> (2) This section shall apply to covenants and agreements which are entered into after March 29, 1985.

2. Enforcement of Michigan Anti Trust Reform Act.

A. Injunction.

B. Damages.

- Liquidated damages set forth in Agreement.
- Proof problems.

B. Non-solicitation Agreement.

Allows employee to compete but prohibits the employee for specified period of time from treating or servicing, as the case may be, patients/clients of his/her former employer.

IV. HOW MUCH IS IT WORTH?

A. Accounting Firm Rule of Thumb – 20% of gross receipts each year for five years.

B. Other Practices – Variables:

1. Is the seller available for transition or is he deceased, disabled, or otherwise unable to assist in transition?

2. Is there support staff to assist in transition?

3. How much is the seller's revenue?

4. What is the seller's profit before compensation and fringe benefits to the practitioner?

5. Are there agreements not to compete or non-solicitation agreements in place which can be assigned to the purchaser?

6. Will this practice continue to be a stand alone practice or is it being folded into an existing practice of the purchaser (e.g., neighboring practitioner retiring).

7. Are there a large number of small clients or a few large clients?

8. How good are the clients?

   a. Longtime clients.

   b. Billed at standard rates if billed hourly.

   c. Paying bills currently.

   d. Plans to sell or discontinue business.

   e. Plans to bring more work in-house.

   f. Clients in an industry where there is consolidation or contraction.

9. Are there contracts with third party payers that will be transferred as a condition to closing?

10. Is this a walk-in clinic where the patients are attached to the location, or is it a referral specialty practice dependent upon referrals from other practitioners to the seller?

11. How old is the patient/client population?

V. <u>ALLOCATION OF THE PURCHASE PRICE</u>

A. FF&E.

   1. Allocated to selling P.C.

   2. Subject to depreciation recapture.

B. Shareholder's personal goodwill.

   1. Capital gain to shareholder.

   2. Bypasses P.C.

3. Section 197 asset to the purchaser – amortized over 15 years.

C. Supporting Cases.

1. *Norwalk v Commissioner* (T.C. Memo 1998-279). Neither an incorporated accounting firm nor its shareholders recognized income from the distribution of goodwill on the corporation's liquidation. Commissioner argued that goodwill was a corporate asset and should be taxed to the corporation and the shareholders upon liquidation.

2. *Martin Ice Cream Co.*, 110 T.C. 189 (1998). No saleable goodwill in a corporation where the business depends on its key employees. If a covenant not to compete is in force the personal relationship with the clients will be property of the corporation.

D. Agreement not to compete must be eliminated before sale or liquidation.

E. Agreement not to compete signed by Shareholder -- Ordinary income to the shareholder.

HEALTH AND WELFARE PLAN COMPLIANCE REVIEW

By: Marc S. Wise

I. INCREASED SCRUTINY BY THE GOVERNMENT AND PLAINTIFF'S ATTORNEYS ON HEALTH AND WELFARE PLAN ISSUES:

A. The U.S. Department of Labor has increased its review of health and welfare plans relating to compliance and disclosure rules.

B. New IRS Section 125 proposed regulations have been issued after almost 30 years under the prior proposed regulations.

C. Many employers are still not complying with the health care continuation requirements of COBRA.

D. Multiple employer plans and Form M-1 filing.

1. Explanation – Administrators of multiple employer welfare arrangements (MEWAs) and certain other entities that offer or provide coverage for medical care to employees of two or more employers are generally required to file the Form M-1 (Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)). The Form M-1 is filed with EBSA. The Form M-1 is due no later than March 1 following any calendar year for which a filing is required.

2. DOL penalty provisions – The U.S. Department of Labor can impose penalties of up to $1,100 per day for failing to comply with the M-1 filing requirements.

E. Health Insurance Portability and Accountability Act ("HIPAA").

1. Discrimination based on health factors – IRS statement of September 6, 2007.

2. HIPAA is regulated by the IRS, DOL and CMS.

3. Penalties for failure to comply.

F. Employee Retirement Income Security Act of 1974 ("ERISA") disclosure requirements are being enforced by employees. Court awards a penalty of $179,960 for failure to provide documents to a plan participant.

II. PLAN DOCUMENTATION AND DISCLOSURE REQUIREMENTS

A. ERISA Plan Requirements.

1. ERISA Section 402 – Establishment of Plan.

a. Named fiduciaries

Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

b. Requisite features of a plan.

Every employee benefit plan shall (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter, (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan, (3) provide a procedure for amending such plan, and for identifying the persons who have authority

to amend the plan, and (4) specify the basis on which payments are made to and from the plan.

B. What is an Employee Benefit Plan?

ERISA Section 3 provides that the terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which is established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act of 1947 (Taft Hartley), other than pensions on retirement or death, and insurance to provide such pensions.

C. Written Plan Requirements.

1. The written plan requirement is intended to enable the employees to determine their rights and responsibilities under the plan and to discover who is responsible for operating the plan.

a. More than one document – A health and welfare plan can consist of more than one document.

i. Insurance company brochure to employees combined with the insurance policy and other documents can constitute the plan for purposes of ERISA.

ii. Wrap Plan Documents.

A wrap plan typically "wraps" together the various welfare benefit plans of the employer into a single plan document. While the wrap plan document generally does not define plan terms or lay out plan benefits, it does provide the important documentation required under ERISA. Elements of the wrap plan usually include detailing who the participating employers are, who pays the cost of plan benefits, which employees are eligible, a claims procedure, language giving the plan sponsor and its delegates the power to amend or terminate the plan and to interpret the plan's terms, plan administration rules, and other ERISA requirements.

Some employers choose to insure certain welfare plans and self-fund others, often through a voluntary employees beneficiary association ("VEBA"). Such an employer might choose to sponsor two separate wrap plans – one for the insured component plans, and another for the self-funded component plans funded through the VEBA. The reason for having two wrap plans is that only self-funded welfare plans funded through VEBAs or other funding arrangements are subject to the U.S. Department of Labor's audit requirement. By having two wrap plans, the time and expense of the audit will only apply to the VEBA.

iii. Summary Plan Description ("SPD") as plan document.

Some employers take the approach that the summary plan description, intended in ERISA to be a shorter, easier-to-understand version of the formal written document, is in fact also the plan document. Although this approach eliminates the need to maintain a separate plan document, it raises issues in its own right, such as whether there needs to be a formal process in place for adopting and amending the SPD, and whether the plan document provisions can be written in plain, understandable language that satisfies the SPD requirements.

D. Fringe benefits and “payroll practices”:

While most of the welfare benefit programs are covered by ERISA, some fringe benefits, such as short-term disability, sick leave plans, and severance programs, fall in a gray area. It is often unclear whether they are just “payroll practices,” which are not subject to ERISA, or whether they are ERISA-covered welfare plans.

The answer may depend in part on how the employer treats the benefits. We would suggest that the benefits be included in a plan covered by ERISA. Typically, it will be to the employer's advantage to have the plan covered by ERISA since the rules that have developed under ERISA are generally more favorable to plan sponsors than the rules that exist under state law. Therefore, employers should take steps to increase the likelihood of ERISA treatment – including asserting ERISA coverage of the plan in the plan document and SPD, complying with the form and filing requirements of ERISA (Form 5500,

SPD requirements, claims procedures, etc.), and associating the plan with an insured plan (for example, combining short-term disability with your long-term disability plan) to the extent possible.

Payroll practices. For purposes of ERISA, the terms ``employee welfare benefit plan'' and ``welfare plan'' do not include —

1. Payment by an employer of compensation on account of work performed by an employee, including overtime pay, shift premiums, holiday premiums, and weekend premiums;

2. Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination, or psychiatric treatment); and

3. Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination, or psychiatric treatment) performs no dutie; for reasons such as vacation or holidays, to an employee who is absent while on active military duty, while an employee is absent for the purpose of serving as a juror or testifying in official proceedings, while engaged in training (whether or not subsidized in whole or in part by federal, state or local government funds), and to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

4. On-premises facilities are excluded from ERISA welfare plan coverage. Such facilities would include recreation, dining, or other facilities (other than day care centers) for use by employees or members, the maintenance on the premises of an employer of facilities for the treatment of minor injuries or illness or rendering first aid in case of accidents occurring during working hours, and holiday gifts.

5. Voluntary group or group-type insurance programs. For purposes of ERISA, the terms "employee welfare benefit plan" and "welfare plan" do not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

   a. No contributions are made by an employer or employee organization;

   b. Participation in the program is completely voluntary for employees or members;

   c. The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues check-offs and to remit them to the insurer; and

   d. The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

III. LACK OF A WRITTEN PLAN

A. Although lack of written plan terms may seem to allow employers greater discretion in paying benefits, the absence of a written plan may actually restrict the employer's ability to amend or terminate a welfare benefit plan.

Numerous cases have found that where an employer handles its welfare benefits on an informal basis, the employer's past practices provide the basis on which employees may make a claim for the same benefits.

This type of claim rests on the premise that the employer's past practices have established an ERISA plan, and that the benefit levels previously paid by the employer must be paid to the terminated employees now claiming benefits because the employer has not reserved the express right to reduce them.

In addition, a written plan allows the employer to determine what benefits, if any, would be payable upon a specified event, such as a corporate sale, divestiture of a unit, restructuring, or a layoff. Having a plan document also allows an employer to grant the plan administrator or other plan fiduciaries the discretion to make all eligibility and benefit determinations, enabling the employer to have the benefit of deferential review of those determinations in the event of a lawsuit. If the discretion to grant or deny the benefit is not expressly stated in a written plan, then the employer may be left with a court determining the benefits.

B. Information Required to be included in the Summary Plan Description.

Pursuant to U.S. Department of Labor Regulations under 29 CFR 2520.102-3 and the requirements under HIPAA, a health and welfare

plan SPD must contain directly or in combination with other documents the following information:

1. Official name of the plan;

2. Name, address, and phone number of the plan sponsor;

3. Name, address, and phone number of the plan administrator;

4. Employer Identification Number;

5. Plan number (e.g. 501);

6. Type of welfare plan (hospitalization, disability, etc.);

7. Type of administration of the plan, (e.g., contract administration, etc.);

8. Name and address of the insurer(s), health service organization(s), or third party organization(s) responsible for the financing or administration of the plan;

9. Name of person designated as agent for service of legal process, address at which process may be served, and a statement that service of legal process may also be made upon a plan trustee (as applicable) or the plan administrator;

10. The plan's requirements respecting eligibility for participation and for benefits. The SPD shall also include a description or summary of the benefits;

11. The SPD must include directly or in combination with other documents, a description of:

a. any cost-sharing provisions, including premiums, deductibles, coinsurance, and co-payment amounts for which the participant or beneficiary will be responsible;

b. any annual or lifetime caps or other limits on benefits under the plan;

c. the extent to which preventive services are covered under the plan;

d. whether, and under what circumstances, existing and new drugs are covered under the plan;

e. whether, and under what circumstances, coverage is provided for medical tests, devices, and procedures;

f. provisions governing the use of network providers, the composition of the provider network, and whether, and under what circumstances, coverage is provided for out-of-network services;

g. any conditions or limits on the selection of primary care providers or providers of specialty medical care; and

h. any conditions or limits applicable to obtaining emergency medical care; and any provisions requiring pre-authorizations or utilization review as a condition to obtaining a benefit or service under the plan.

12. In the case of plans with provider networks, the listing of providers may be furnished as a separate document that accompanies the plan's SPD, provided that the SPD contains a general description of the provider network and provided further that the SPD contains a statement that provider lists are

furnished automatically, without charge, as a separate document.

13. Description of relevant provisions of any collective bargaining agreement (as applicable);

14. A statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits;

15. A summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan, or amend or eliminate benefits under the plan, and the circumstances, if any, under which the plan may be terminated or benefits may be amended or eliminated;

16. A summary of any plan provisions governing the benefits, rights, and obligations of participants and beneficiaries under the plan on termination of the plan or amendment or elimination of benefits under the plan, and a summary of any plan provisions governing the allocation and disposition of assets of the plan upon termination;

17. In the case of a group health plan subject to COBRA, a description of the rights and obligations of participants and beneficiaries with respect to continuation coverage, including, among other things, information concerning qualifying events and qualified beneficiaries, premiums, notice and election requirements and procedures, and duration of coverage;

18. Source of contributions to the plan (employer and employee contributions);

19. Source of plan financing (insured, self-insured with no stop loss, etc.);

20. Date of the end of the plan year and whether plan records are kept on calendar, policy, or fiscal year basis;

21. Qualified medical child support order procedure (or a statement indicating where a participant can obtain a copy of a procedure at no charge);

22. Statement of ERISA rights;

23. Notice of Rights under the Newborn's and Mother's Health Protection Act;

24. Women's Health and Cancer Rights Act Notice;

25. Uniformed Services Employment and Reemployment Rights Act (USERRA) Notice;

26. Family Medical Leave Act (FMLA) Notice;

27. ERISA Claims and Appeals Procedure;

28. HIPAA Pre-Existing Condition Disclosure; and

29. HIPAA Special Enrollment Rights Notice.

C. We pay our health insurance company hundreds of thousands of dollars each year. Doesn't the health insurer make sure we are in compliance with ERISA?

1. The obligation to comply with the ERISA disclosure requirements and the corresponding liability belongs to the

employer. Third parties, including insurance companies, health maintenance organizations, and insurance consultants are not eager to share in this liability.

a. Section 9 of the Blue Cross Blue Shield of Michigan Group Enrollment and Coverage Agreement imposes on the group (the employer) the responsibilities for complying with ERISA, preparing and distributing the SPD, and advising all eligible employees of the benefits available and of any changes in benefits, termination of coverage, and COBRA rights of the employees.

   i. Blue Cross Blue Shield "Your Benefits Guide" does not meet the SPD requirements set out above.

   ii. Some insurance consultants are assisting employers with SPDs for clients. These documents should be read carefully before distributing them to the employees.

   Example: The Plan Administrator administers this Plan. The Plan Administrator has full discretion and authority to: administer the Plan, interpret the Plan; determine eligibility for and the amount of benefits; determine the status and rights of participants, beneficiaries and other persons; to make rulings; make regulations and prescribe procedures; gather needed information; to prescribe forms; exercise all of the power and authority contemplated by ERISA and the Internal Revenue Code with respect to the Plan; employ or appoint persons to help or advise in any

administrative functions; appoint investment managers and trustees; and generally do anything needed to operate, manage, and administer the Plan.

Example: Plan benefits will be provided from the general assets of the Employer or under insurance policies with an insurer, as determined by the employer.

IV. PARTICIPANT DISCLOSURES

Section 102 of ERISA provides that an SPD of any employee pension plan and welfare plan must be furnished to participants and beneficiaries.

A. The SPD must include certain required information, be written in a manner calculated to be understood by the average plan participant, and be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.

Time of Distribution of SPD. New plan participants must receive a SPD within 90 days of first becoming eligible to participate, or if earlier, when first receiving benefits. If no changes are made to a plan, a new SPD must be provided every 10 years. If changes are made to the plan, a new document must be provided once every 5 years. Since employers change their welfare plans on a frequent basis, especially their health care plans, most employers will need to reissue the SPD every 5 years.

B. A summary of any material modification in the terms of the plan (SMM") and any change in the information required to be included in the SPD must be written in a manner calculated to be understood by the average plan participant.

1. Time of Distribution of SMM. A SMM must be provided with 210 days after close of the plan year in which a change is effective.

   a. Special Rule for Health Care Plans. If the material modification is to the health plan and the change is a reduction in covered benefits, the SMM must be distributed within 60 days of the adoption of the change. ERISA 104(b)(1).

V. DISCLOSURE THROUGH ELECTRONIC MEDIA

The DOL regulations provide that the administrator of an employee benefit plan furnishing documents through electronic media is deemed to satisfy its disclosure requirements if the following apply:

A. The administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents:

   1. Results in actual receipt of transmitted information (by using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information);

   2. Protects the confidentiality of personal information relating to the individual's accounts and benefits (incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended);

   3. Notice is provided to each participant, beneficiary, or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that informs the individual

of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g., the attached document describes changes in the benefits provided by your plan) and the right to request and obtain a paper version of such documents; and

4. Upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.

B. Participants Who May Receive Electronic Disclosure.

1. Employees with work-related computer access. ERISA disclosures may be delivered electronically to employees that have the ability to effectively access documents furnished in electronic form at any location where the employee is reasonably expected to perform his or her duties, and such employees who have such access to the plan sponsor's electronic information system is an intricate part of such duties.

It should be noted that merely providing employees access to a computer in a common area is not a permissible means by which to deliver documents required to be furnished to plan participant.

2. For beneficiaries and other plan participants who do not have work-related computer access, electronic distribution may not be provided without the consent of such participant. The consent may be provided in either electronic or paper form. The consent must include a clear and conspicuous statement that explains:

a. The types of documents to which the consent will apply;

b. That the consent can be withdrawn at any time without charge;

c. The procedures for withdrawing consent and for updating the participant's beneficiaries or other individuals' address for receipt of electronically furnished documents or other information; and

d. The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge.

VII. MAJOR HEALTH CARE LAWS IMPACTING YOUR CLIENTS

There are a number of laws that have an impact on health care plans. While much of the disclosure requirements are mandated by ERISA, there are other federal laws that also apply. Those individuals who have involvement with health care plans should have some basic knowledge of the following federal laws and requirements:

A. Qualified Medical Child Support Orders. A 1993 amendment to ERISA requires employer-sponsored group health plans to extend health care coverage to the children of a parent/employee who is divorced, separated, or never married when ordered to do so by state authorities.

A "QMCSO" is a medical child support order that:

Creates or recognizes the right of an "alternate recipient" to receive benefits for which a participant or beneficiary is eligible under a group health plan or assigns to an alternate recipient the right of a participant or beneficiary to receive benefits under a group health plan. and is recognized by the group health plan as "qualified" because it includes

information and meets other requirements of the QMCSO provisions of ERISA.

B. HIPAA General Notice of Preexisting Condition:

A group health plan (or issuer) may not impose a preexisting condition exclusion with respect to an individual before notifying the participant, in writing, of the following:

1. The existence and terms of any preexisting condition exclusion under the plan. This includes:

    a. The length of the plan's look-back period;

    b. The maximum preexisting condition exclusion under the plan;

    c. How the plan will reduce the maximum preexisting condition exclusion by creditable coverage; and

    d. A description of the rights of individuals to demonstrate creditable coverage, and any applicable waiting periods, through a certificate of creditable coverage or other means. This includes:

        i. A description of the right of the individual to request a certificate from a prior plan or issuer, if necessary;

        ii. A statement that the current plan or issuer will assist in obtaining a certificate from a prior plan or issuer, if necessary; and

        iii. A person to contact (including an address or telephone number) for obtaining additional

information or assistance regarding the preexisting condition exclusion.

VIII. HIPAA INDIVIDUAL NOTICE OF PREEXISTING CONDITIONS

A group health plan (or issuer) seeking to impose a preexisting condition exclusion is required to disclose to the individual, in writing:

A. Its determination of the period of creditable coverage, including the source and substance of any information on which the plan or issuer relied (note: the plan must allow a reasonable opportunity to submit additional evidence of creditable coverage);

B. The remaining preexisting condition exclusion period that will apply to the individual; and

C. Any appeal procedures established by the plan or issuer.

IX. NEWBORNS' AND MOTHERS' HEALTH PROTECTION ACT OF 1996 (the "Newborn's Act")

The Newborns Act requires plans that offer maternity coverage to pay for at least a 48-hour hospital stay following childbirth (96-hour stay in the case of a cesarean section).

The Newborns' Act, and its regulations, prohibit incentives (either positive or negative) that could encourage less than the minimum protections under the Act as described above.

X. WOMEN'S HEALTH AND CANCER RIGHTS ACT ("WHCRA")

WHCRA includes important protections for individuals who elect breast reconstruction in connection with a mastectomy. WHCRA amended the ERISA and the Public Health Service Act (PHS Act).

There are two separate notices required under WHCRA. The first notice is a one-time requirement under which group health plans, and their insurance companies or HMOs, must furnish a written description of the benefits that WHCRA requires. The second notice must be furnished annually and reminds the participants of the benefits required under WHCRA.

XI. CONSOLITATED OMNIBUS BUDGET RECONCILLIATION ACT (COBRA)

COBRA provides certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at group rates. This coverage, however, is only available when coverage is lost due to certain specific events.

Note: Plan Coverage - Group health plans for employers with 20 or more employees on more than 50 percent of its typical business days in the previous calendar year are subject to COBRA. Both full and part-time employees are counted to determine whether a plan is subject to COBRA. Each part-time employee counts as a fraction of an employee, with the fraction equal to the number of hours that the part-time employee worked divided by the hours an employee must work to be considered full time.

Note: Special rules for open enrollment periods. If an employer or employee organization makes an open enrollment period available to similarly situated active employees with respect to whom a qualifying event has not occurred, the same open enrollment period rights must be made available to each qualified beneficiary receiving COBRA continuation coverage. Treas. Reg. 54.4980B-5, Q&A 4(c).

Recent Case: COBRA can apply to employers having less than 20 employees. This case stands for the proposition that, even though an employer may have less that 20 employees, it may be subject to COBRA requirements if the employer has used "conduct or language amounting to a representation" that an employee is entitled to COBRA benefits. If the

employer's insurance contract does not provide COBRA benefits, the employer could be stuck with huge medical bills with no insurance carrier to turn to for reimbursement. Thomas v. Miller, 2007 WL 1827293 (C.A.6 (Mich.) (June 27, 2007).

XII. AMERICANS WITH DISABILITIES ACT

Health and welfare plans may not discriminate against individuals with disabilities. Violations of the Act may be enforced by the Equal Employment Opportunity Commission ("EEOC") as well as by the individual employees. This is a broad statute that also applies to many aspects of employment.

XIII. AGE DISCRIMINATION IN EMPLOYMENT ACT

Health and welfare plans may not discriminate against individuals who are age 40 or over on the basis of age. This is a broad statute that also applies to many aspects of employment.

Recent Example: Group life insurance plan provides that a life insurance benefit of 1 times salary, up to $50,000, will be provided to each employee. The amount of life insurance an employee may receive shall decrease by 7% per year from age 65 until age 70 when no further coverage will be provided.

Unless employees who are 70 and older receive additional employee benefits that offset the savings to the employer in not providing group-term life insurance, this example would violate the Act.

XIV. FORM 5500 REQUIREMENTS

Welfare benefit plans covering 100 or more participants as of the beginning of the plan year must file a Form 5500 if it is unfunded, fully insured, or a combination of insured and unfunded.

XV. SECTION 125 CAFETERIA PLAN

Section 125 of the Internal Revenue Code is the sole method for employees to pay all or a portion of any medical insurance premiums and other health expenses on a pre-tax basis via salary deferral elections.

We have attached a Checklist for your use in reviewing Health Care Plan Compliance with the above listed requirements.

FORM 5500 FILING AND CORRECTION ISSUES FOR HEALTH AND WELFARE PLANS

1. General Information.

Similar to the reporting requirement under the Internal Revenue Code, the Employee Retirement Income Security Act of 1974 ("ERISA") imposes an information reporting requirement, under which the administrator of an employee welfare benefit plan must file an annual report on the plan's operations, with particular focus on reporting, disclosure, fiduciary duty, and plan operations.

2. IRS Fringe Benefit Rules.

Employers maintaining specified fringe benefit plans under sections 125, 127 or 137 are relieved from the requirement to file the annual Form 5500 and Schedule F pursuant to section 6039D. IRS Notice 2002-24.

No relief from the filing obligation is intended to apply for either ERISA requirements or Form 5500 schedules other than Schedule F.

Some employers interpreted this Notice as indicating that no Form 5500 is required for any health and welfare benefit plan.

Example 1 - Employer previously filed Form 5500 for its Section 125 plan. If the Section 125 plan only permits employees to pay their share of the health insurance premiums on a pre-tax basis, this type of plan would be treated as a specified fringe benefit plan and would not be subject to ERISA. Thus, no Form 5500 would be required under the Internal Revenue Code not ERISA, even if the plan had over 100 participants.

Example 2 – If the Section 125 plan also had a flexible spending account option, the plan would still be exempt from the Form 5500 filing requirements under the Internal Revenue Code. However, the addition of the flexible spending account brings the plan under ERISA and its separate filing requirements. Thus, if this Section 125 plan had over 100 participants, a Form 5500 filing would be required.

3. Filing Requirements for Health and Welfare Benefit Plans.

A. General Information. U.S. Department of Labor ("DOL") regulations require an employer that sponsors certain health and welfare benefit plans covering 100 or more employees to file a Form 5500 for each plan.

Note: The failure to timely file the Form 5500 can cause the imposition of penalties of up to $1,100 for each day the filing is late.

B. Welfare Benefit Plans. A welfare benefit plan is defined by the DOL as:

Any plan providing medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. 29 CFR §2510.3-1(a)(2).

Basically, the employee benefits that most businesses have that are welfare benefits plans are:

1. Health insurance benefits;

2. Dental insurance benefits;

3. Vision benefits;

4. Short-term disability benefits;

5. Long-term disability benefits;

6. Life insurance; and

7. Accidental death & dismemberment.

C. Annual Reporting Requirements.

1. General Requirements. Plan administrators are generally required to file an annual report for each plan subject to Title I of the ERISA. Plan administrators satisfy this filing requirement by filing the appropriate Form 5500 with the DOL's Employee Benefits Security Administration. There are exceptions to this general rule for certain welfare benefit plans that are unfunded or funded solely with insurance and have fewer than 100 participants at the beginning of the plan year.

2. Timing. A plan's annual report must be filed for each plan year by the last day of the seventh month after the close of the plan's plan year. An extension of up to two and one-half months may be obtained by filing a request (Form 5558) with the DOL before the expiration of the seven-month period.

3. Exception for Small Welfare Plans.

Annual reports for unfunded welfare plans with fewer than 100 participants (determined as of the beginning of the plan year) are not required, provided that one of the following conditions is met:

a. Benefits under the plans are paid only from the general assets of the employer;

b. Benefits are provided exclusively through insurance policies the premiums for which are paid directly by the employer or employee organization from its general assets or from its general assets together with contributions from employees; or

c. Benefits are provided through a combination of insurance and the general assets of the employer or employee organization.

4. Sanctions for Failure to File.

The DOL may assess a civil penalty of up to $1,100 per day for failure to file an annual report. In practice, the DOL assesses penalties against non-filers of up to $300 per day until a complete annual return is filed. In addition, the DOL takes the position that it is not subject to a statute of limitations with respect to an unfiled annual report. To mitigate the penalties described in this section, a plan administrator that has not timely filed a Form 5500 may file such report under the DOL's Delinquent Filer Voluntary Compliance ("DFVC") program, which is further described below.

5. Use of a Wrap Plan to Minimize the Number of Forms 5500.

As opposed to filing a separate Form 5500 for each welfare plan that is subject to the reporting requirements, the plan sponsor can establish a "wrap" welfare plan. To create a single plan, the company would establish a plan that incorporates the various benefits or insurance policies into one comprehensive plan document. This would allow the filing of a single Form 5500 going forward.

D. DFVC Program.

The DFVC Program is designed to encourage voluntary compliance with the annual reporting requirements under the ERISA. The DFVC Program gives delinquent plan administrators a way to avoid

potentially higher civil penalty assessments by satisfying the program's requirements and voluntarily paying a reduced penalty amount.

1. Program Eligibility.

Eligibility for the DFVC Program is limited to plan administrators with filing obligations under Title I of ERISA who comply with the provisions of the program and who have not been notified in writing by the DOL of a failure to file a timely annual report under Title I of ERISA. For example, Form 5500-EZ filers are not eligible to participate in the DFVC Program because such plans are not subject to Title I of ERISA.

2 Program Criteria.

Participation in the DFVC Program is a two-part process. First, file with the Employee Benefit Security Administration ("EBSA") a complete Form 5500 Series Annual Return/Report, including all schedules and attachments, for each year relief is requested. To ensure proper processing, box "D" on the 5500 must be marked and a statement labeled "DFVC Program" must be attached. Special simplified rules apply to "top hat" plans and apprenticeship and training plans. Second, submit to the DFVC Program a copy of the 5500, without the schedules and attachments, and the applicable penalty amount. The plan administrator is personally liable for the applicable penalty amount, and therefore, amounts paid under the DFVC Program cannot not be paid from the assets of an employee benefit plan.

3. Penalty Structure.

Per day penalty. The basic penalty under the program is $10 per day for delinquent filings.

"Per filing" cap. The maximum penalty for a single late annual report has been reduced from $2,000 to $750 for a small plan (generally a plan with fewer than 100 participants at the beginning of the plan year) and from $5,000 to $2,000 for a large plan.

"Per plan" cap. The DFVC Program also includes a "per plan" cap. This cap is designed to encourage reporting compliance by plan administrators who have failed to file an annual report for a plan for multiple years. The "per plan" cap limits the penalty to $1,500 for a small plan and $4,000 for a large plan regardless of the number of late annual reports filed for the plan at the same time. There is no "per administrator" or "per

sponsor" cap. If the same person is the administrator or sponsor of several plans required to file annual reports under Title I of ERISA, the maximum applicable penalty amounts would apply for each plan.

Small plans sponsored by certain tax-exempt organizations. A special "per plan" cap of $750 applies to a small plan sponsored by an organization that is tax-exempt under Internal Revenue Code §501(c)(3). The $750 limitation applies regardless of the number of late annual reports filed for the plan at the same time. It is not available, however, if as of the date the plan files under the DFVC Program, there is a delinquent annual report for a plan year during which the plan was a large plan.

"Top hat" plans and apprenticeship and training plans. The penalty amount for "top hat" plans and apprenticeship and training plans is $750.

4. Program Participation Procedures.

The procedures governing participation in the program are intended to make the program easy to use:

Plan administrators may use the Form 5500 for the year relief is sought or the most current form available at the time of participation. This option allows administrators to choose the form that is most efficient and least burdensome for their circumstances;

5. IRS and PBGC Participation.

Although the DFVC Program does not cover late filing penalties under the Internal Revenue Code or Title IV of ERISA, the Internal Revenue Service and Pension Benefit Guaranty Corporation have agreed to provide certain penalty relief for delinquent Form 5500s filed for Title I plans where the conditions of the DFVC Program have been satisfied.

6. Notification by the DOL Prior to Filing the Form 5500.

If the DOL determines that a Form 5500 filing has not been made or that the filing is incomplete, a Notice of Rejection will be sent to the plan administrator. The following is what transpired in a recent case which we settled with the DOL.

a. Notice of Rejection. A Notice of Rejection notifies the plan administrator of a problem with the Form 5500

filing. A revised filing must be made within 45 days of the Notice in order to avoid an assessment of penalties.

b. Notice of Intent to Assess a Penalty. If the problem with the Form 5500 is not corrected with the 45 days period or if the DOL rejects the correction, a Notice of Intent to Assess a Penalty is issued. A Statement of Reasonable cause must be filed 35 days from the date of the Notice.

c. Notice of Determination on Statement of Reasonable Cause. This Notice informs the plan administrator as to whether the DOL finds a basis to excuse or modify the penalty based on the information provided in the Statement of Reasonable Cause. An unfavorable response by the DOL will require the plan administrator to either accept the imposition of the penalty or request a hearing and file an Answer within 35 days from the date of the Notice of Determination.

d. Notice of Docketing. This Notice advises the parties of the docketing of the case with the Office of Administrative Law Judges and notifies the parties of the required filing within 30 days of the date of the Notice of:

   i. a short statement of the issues believed to be in dispute;

   ii. a proposed witness list;

   iii. a suggestion as to a suitable location for the trial; and

   iv. state the approximate number of days for the trial.

e. Stipulation For Dismissal and Order. In this case, we were able to negotiate with the attorney for the DOL a reduction of the proposed assessment of almost $90,000 down to $13,000.

f. Order Approving Stipulation for Dismissal and Order. This Order approves the negotiated settlement and concludes the case.

HOW TO APPLY FOR PROFESSIONAL LIABILITY COVERAGE

By: Harvey R. Heller

I. INTRODUCTION

A. This guide is designed to provide information essential to your purchase of professional liability insurance. An insurance broker who is knowledgeable, especially one who specializes in this kind of coverage, can be a valuable source of information about purchasing coverage. Ultimately, the responsibility for the choice will be yours. This guide is designed to help you make the correct decisions.

B. Each insurer has a preprinted policy form which contains its standardized coverage. Because this market is somewhat competitive, basic coverage is very similar. Yet coverage differences exist which can range from vitally important to merely desirable. The importance of these coverage differences will vary depending upon the nature of your practice, the composition of your firm, and other factors which may be unique to your accounting practice.

C. Depending upon your firm's particular needs, these coverage differences can determine which policy you will buy. Price considerations, however, may outweigh the importance of coverage provisions. Regardless of the wording of the policy forms, you will have to decide the amount of policy limits and deductibles and the need for other coverages, some of which can be obtained through endorsements, other of which require purchasing different types of policies.

II. THE POLICY

An insurance policy can be divided into four parts: the declarations page, the insuring agreement, the conditions, and the exclusions. The application you

sign and submit is integrated into the policy by physical attachment, explicit policy language, or both. Understanding all the components of a policy is essential to enable you to select the best coverage for your needs. You can also tailor the policy to suit your needs by changing the scope of the standard coverage provisions through endorsements. Endorsement are not a unique aspect of coverage, but rather modify one of the four parts.

A. The declarations page. The declarations page or face sheet identifies the named insureds, the policy limits, and the policy term. This page also identifies any additions or deletions to the insurers standard form policy, typically, by endorsement.

1. Policy limits. The size of the policy limits required by your firm depends on numerous circumstances including the risk and the financial exposure of the matters you handle, the form of practice, the assets of your firm, your personal assets and those of others who need protection.

a. "Per claim" and "aggregate limits." The amount of coverage you can obtain is usually subject to two policy limits: (1) a per claim or occurrence limit, and (2) an annual aggregate limit for all claims. For example, the policy may specify the limits to be $500,000 per claim and $1 million aggregate for all claims.

b. "Per claim limit." The per claim limit is often expressed as an occurrence limit, usually meaning that the company will pay no more than that sum as the total amount for all claims arising out of the same act or omission, regardless of the number of claimants.

c. "Aggregate limits". The second limit, the aggregate limit, is usually identified as the total limit of a company's liability for all claims made within the policy year.

d. Policy limits. You should determine both the amount of the limits for an individual claim and the extent of the risk of multiple claims within a given year.

2. Deductibles. Virtually all policies contain deductibles. This is the sum of money you will pay as the first dollars incurred for a claim. The deductibles can apply only to settlements or judgments, or alternatively to defense costs. In the latter case, the deductible will be paid very early in the litigation and more than likely to the attorney for his initial work on the file. The higher the deductible, the lower the cost. Deductibles usually apply to each claim as that term is defined in the policy.

B. The Insuring Agreement. The insuring agreement contains those provisions that create coverage. It contains the verbiage which provides the broadest statements of the risk against which the insured will be protected. Unless the risk which occurs falls within the language of these provisions, there is no coverage, and usually no duty to defend.

C. Conditions of Coverage

1. The basic condition of coverage is that the accountant be rendering (or failing to render) professional accounting services for others. The difficulty here can arise because accountants engage in a wide spectrum of activities which include many commonly performed by non-accountants.

2. Under the current claims made form, the main disadvantage is that it does not afford coverage after the policy expiration.

Therefore, an accountant must renew or obtain coverage each year to avoid a gap in coverage. This can be troublesome for you if you retire, become inactive, or otherwise discontinue your practice. Most insurers, for a price, will provide an endorsement extending coverage for such circumstances.

D. Exclusions. All policies contain clauses which delete or limit coverage under certain circumstances. These clauses appear in the portion of the policy entitled "Exclusions." An "exclusion" itself may be modified by language which returns that which was taken away under other such circumstances! Such a provision is an "exception," although not expressly so entitled. The most common basis upon which an insurer reserves rights on coverage or refuses to defend an insured, is based on fraud and often the focus is on application fraud. Whether intentional or not, the issue between an insurer and an insured, is whether the misrepresentation was material to the risk assumed by the carrier. The remainder of this article will discuss how to apply for coverage.

III. THE APPLICATION PROCESS

A. The application process is the insurer's opportunity to assess the risk presented by a particular accountant, and to decide whether to extend coverage and at what price. Underwriters review the information provided by an applicant to assess the likelihood of his becoming the target of a professional malpractice claim.

1. Answer all questions. First, answer all of the questions on the application form fully and completely. The questions on the form are designed to elicit information that the underwriter regards as necessary in evaluating the risk presented by the applicant. Thus, if a question is inapplicable, state that fact

rather than leaving the question blank. If you require additional space, attach clearly marked supplements.

2. Answer the questions candidly, fully disclosing information that an underwriter might regard as negative. Good faith disclosure within the knowledge of the applicant which are material to the insurance contract is an essential prerequisite. Information called for on an insurance application can be presumed to be "material" to an insurer's decision to extend coverage. In fact, most policies now provide that the application becomes part of the policy so that the material misrepresentations can render the policy voidable.

B. Prior acts question. Virtually every application for accountants' errors and omissions insurance contains a question regarding whether the applicant has, within a designated time period, learned of any act or omission which may result in a claim. At first blush, the question may appear to be rather straightforward. However, it is imperative that, when answering this question, the applicant thoroughly considers and fully and truthfully responds to the question. Otherwise, coverage could be denied. Set forth below are several "pointers" to help the applicant do just that.

1. Pay attention to the time period at issue. The applicant must pay attention to the time period at issue. If the application asks whether the applicant has learned of any such acts/omissions in the past *(5)* years, be sure to go back the full (*5)* years.

2. Inquire of all persons designated. The application usually asks if after inquiry of certain designated persons (usually owners, partners, officers, and employees), any past or present personnel has learned of such an act. Do not assume that the person signing the application would know if such an act had

occurred. Rather, the applicant should follow the directive of the question literally and actually ask the designated people if they are aware of any such acts/omissions. Even if the act was committed by a *former* employee, it must be reported if the insured learned of the act within the designated time period.

3. Acts which may give rise to a claim. Typically, the application inquires about acts/omissions that may give rise to a claim or could be expected to give rise to a claim. Even though you may not believe the claim would be a legitimate one or successful one, you *must* identify it.

4. Persons/entities against whom/which the claim may be made. Usually, the application will inquire whether the applicant is aware of acts/omissions that may give rise to a claim against the firm, the firm's affiliates, its personnel, or the firm's predecessors in business. Pay close attention to the terms used. For example, if the applicant entity recently merged with another firm and the merged entity therefore constitutes a "predecessor in business," to accurately answer this question you must ascertain whether any acts/omissions could potentially give rise to a claim against this merged entity even if these acts/omissions would not give rise to a claim against the entity actually applying for coverage.

C. Merit of claims. It is rarely productive to argue the lack of merit of prior claims or unreasonableness of the claimants. Such arguments are given little weight and may even enhance the underwriters impression that the applicant is irresponsible and high risk. On the other hand, if a settlement was made for “economic” or other reasons, that fact should be mentioned.

D. Whether to report a claim that will not exceed the deductible. A recurring question is whether or not to report a claim that will not exceed the accountant's deductible or self-insured retention. Such claims fall within most policy definitions of a "claim."

E. High-risk areas of practice. Insurance carriers associate varying degrees of risk to different practice areas. For example, many insurers have identified the area of financial planning and investment services, elder care services, elder care consulting, and other areas as presenting a high risk of claims. Since the underwriter's goal is to minimize risk, an applicant may appeal to a carrier simply by virtue of his particular specialty or lack thereof. The departure of employees who have practiced in high-risk specialty areas should also be emphasized. If there are high-risk areas that your firm practices in, you should emphasize the firm's expertise in your application.

F. Intended use of malpractice insurance. The context in which an accountant intends to use his malpractice insurance is also relevant. For example, application forms generally include questions as to whether the accountant-applicant serves as a director or officer of any business enterprise other than his accounting firm. Insurers have found that the more costly claims often involve professionals who were "wearing two hats." Thus, an applicant who was functioning as a director or officer of an unrelated corporation, should emphasize in his application the existence of directors and officers liability insurance to cover his activities in that capacity.

G. The goal in completing a professional liability application. In short, the accountant's goal in completing a professional liability application is to present the information in a concise, honest manner that minimizes facts and omits lengthy details about nonissues. By making the underwriter's job easier, the applicant increases the probability that

the individual accountant will obtain professional liability coverage on desirable terms.

CHECKLIST FOR PURCHASING ACCOUNTANTS' PROFESSIONAL LIABILITY INSURANCE

POLICY LIMITS

- Are the proposed per claim limits of liability sufficient to cover your maximum likely financial exposure for a single claim?
- Are you likely to be the target of more than one claim in the coming year? If so, are the proposed aggregate limits of liability sufficient to cover your maximum claims?
- Are the proposed per claim and aggregate limits of liability sufficient to protect your and your partners' collective assets?
- If the limits of liability include defense costs, are the proposed limits adequate to cover both your potential liability and your costs of defense?

DEDUCTIBLES

- Are you financially willing and able to risk the amount of the proposed deductible in exchange for a reduction in your premium?
- Are the limits of liability in excess of or inclusive of the deductible?

THE INSURING AGREEMENT ITSELF

- Does the policy provide coverage for your employees (accountants, consultants, affiliates, and secretaries)
- Does the policy provide coverage on a claims-made or claims-made and reported basis? Does it also require that the act, error, or omission occur during the policy period?
- Does the policy provide coverage for your vicarious liability for non-employees (agents, subcontractors)?

- Does the policy provide coverage for accountants who become employees during the policy period? Are there any conditions, limitations, or additional premiums for new accountants?

POLICY TERRITORY

- Are you likely to be the subject of a claim or suit in a jurisdiction which is outside the geographic territory of the policy?
- Will the insurer agree to such coverage?

POLICY EXCLUSIONS

- Does the fraud exclusion eliminate coverage for insureds who are derivatively liable for the wrongful acts of another insured?
- Does the policy exclude coverage for claims likely to arise out of any of your practice areas?
- Is there an investment or financial advice exclusion?
- Is there a public official or governmental employee exclusion?
- Is there a banking or savings and loan exclusion?
- Are there coverage exclusions that otherwise affect the operation of your existing practice?
- Does the policy provide coverage for claims which are unrelated to your practice area?
- If so, can you narrow coverage by way of endorsement, and thereby reduce your premium?

SETTLEMENT, DEFENSE AND LOSS PREVENTION PROVISIONS

- Does the insurer permit you to participate in the selection of counsel?

- Will the insurer accept your recommendations?
- Will the insurer allow you to select only among panel counsel?
- Is your consent required before the company can settle a claim against you?
- Does the insurer offer loss prevention services?

EXTENDED REPORTING OPTIONS

- Is the optional extended reporting ("tail") coverage long enough to meet your needs? (You may have to call the insurer.)
- Is this option available if you do not renew?

RELIABILITY OF THE INSURER

- How long has the insurer been writing in the United States? In your state?
- Is the insurer admitted in your state?
- Is the insurer financially sound? (Ask your broker about the insurer's capitalization, current financial position, operating history, reinsurance ratings, and Best's and/or Standard & Poor's Insurance Rating.)
- What is the insurer's reputation for claims handling?
- What is the insurer's reputation for underwriting flexibility?

THE APPLICATION

- Have you provided complete and accurate responses to each question on your insurance application?
- Have you accurately described all services performed?

- Have you included and accurately described the claims against you and your firm during the specified period?

- Have you disclosed those circumstances which may give rise to a claim?

- **Very important**: If changing insurers, have you notified your existing insurer of the circumstances of potential claims against you?

OTHER INSURANCE

- Do you require fiduciary coverage for professional services as a trustee, executor, etc.? Does the policy provide such coverage?

- Do you require Directors and Officers insurance coverage?

- Do you require coverage for activities as a notary? Does the policy provide such coverage?

- Do you have adequate general liability coverage?

NEGOTIATING WHEN IT MATTERS: ASSISTING YOUR BORROWER CLIENT IN OBTAINING A COMMERCIAL LOAN COMMITMENT LETTER

By: Danielle M. Spehar

I. THE INTERRELATED ROLES OF ACCOUNTING AND LEGAL PROFESSIONALS

A. Commitment letter is a binding legal contract.

1. Contractual commitment by lender to loan money on terms stated.

2. Borrower pays commitment fee as consideration for the contract.

3. Borrower should involve accounting and legal professionals now.

a. Both business and legal terms must be negotiated.

b. Added importance when dealing with national lender and/or conduit/securitized loans.

B. A detailed precise loan commitment leads to a more efficient loan documentation process.

1. Greater detail in commitment allows drafter of loan documents to specifically comply with agreed upon business terms.

2. Greater precision leads to less negotiation and less expense in loan documentation process.

a. Use previously negotiated loan documents.

b. Be aware some lenders charge "per comment."

C. Accounting professional has detailed knowledge of Borrower's business operations and financial performance.

D. Legal professional aids Borrower in avoiding pitfalls and liability.

II. NEGOTIATING ACHIEVABLE FINANCIAL COVENANTS

A. Covenants formalize expectations.

1. Financial performance.

2. Specific financial reporting requirements.

3. Create warning system to advise lender of change in Borrower's circumstances.

B. Goals of effective covenants.

1. Flexible.

2. Customized to particular Borrower.

3. Not too restrictive.

C. Understanding lender's motivation.

1. Traditional commercial mortgage loans.

a. Maintain loan quality.

b. Keep adequate cash flow.

c. Preserve equity.

d. Maintain understanding of Borrower's financial performance and condition.

2. Securitized lenders (Commercial backed securities market).

a. Avoidance of variations in anticipated cash flow.

b. Protection of income stream.

c. Stress debt service coverage ratio over proper types loan-to-value ratio.

III. IDENTIFYING APPROPRIATE FINANCIAL REPORTING REQUIREMENTS

A. Frequency.

1. Annual.

2. Quarterly.

3. Monthly.

B. Audited versus certified.

C. In accordance with GAAP.

D. Reporting deadlines.

1. Consider extensions.

2. Notice required prior to constituting event of default.

IV. NEGOTIATING KEY LOAN TERMS

A. Typical terms addressed in loan commitment letter.

1. Recourse or lender's remedy limited to collateral.

a. Require detailed carve-outs to be included in commitment.

b. Be cognizant of springing recourse provisions.

2. Length of loan.

3. Interest rate.

    a. If not locked, how and when is rate locked?

    b. Charge for locking rate?

    c. Calculated on actual days versus 30-day months.

4. Amortization of payments.

    a. Fully amortized.

    b. Balloon payment.

5. Guarantor(s).

    a. Full.

    b. Partial.

    c. Carve-out.

    d. Liability for environmental indemnities.

    e. Default upon guarantor's death or bankruptcy.

    f. Restrictions on transfer of guarantor's assets.

6. Prepayment.

    a. Permitted?

    b. Full or partial.

    c. Premiums or penalties.

7. Fees and deposits.

    a. Any unused portion should be returned to Borrower.

    b. Cap due diligence and closing costs.

        i. Utilize/update existing due diligence reports.

        ii. Utilize Borrower's title company.

    c. Cap lender's legal fees.

    d. Limit charges assessed for post closing items (*i.e.*, administration of escrow accounts).

8. Escrows.

    a. Taxes and insurance.

        i. Abated until default?

        ii. Interest bearing?

    b. Replacement reserve, leasing, etc.

9. Insurance requirements.

    a. Earthquake, terrorism, flood or other unique or expensive coverages required.

    b. Coverage amounts.

    c. Carrier rating requirements.

    d. Self-insurance is blanket policy.

10. Assignment and/or assumption.

    a. Limitations on number of transfers.

b. Fees and costs.

c. Modification of loan terms.

d. Criteria for transferee.

11. Tenant Estoppels and Subordination, Non-Disturbance and Attornment Agreements.

a. Unusual termination rights.

b. Limitations on number and/or types of tenants required to provide.

c. Pre-negotiated approved forms incorporated into leases.

B. Controlling Costs.

409A: FEAR, PROCRASTINATION, OR JUST NOT ABLE TO COME TO A DECISION

By: William E. Sigler

I. WHY BE CONCERNED ABOUT SECTION 409A?

A. Noncompliance will result in all current and prior deferred compensation being included in income.

B. A 20 percent additional tax applies to amounts includable as a result of a violation of Section 409A.

C. An additional 1 percent penalty is added to the underpayment rate. The underpayment rate is applied to the amounts deferred as of the date of deferral or the date there is no substantial risk of forfeiture, whichever is later.

II. WHAT IS SECTION 409A?

A. Section 409A was added to the Internal Revenue Code by the American Jobs Creation Act of 2004.

B. Section 409A applies to all arrangements in which there is a deferral of compensation. Section 409A generally states that if certain requirements regarding the timing of deferred compensation are not met, then all deferred amounts are immediately included in income unless subject to a substantial risk of forfeiture. In addition to regular income tax, Section 409A imposes an additional 20 percent tax, plus interest on the deferred compensation.

C. Final regulations were issued by the Treasury on April 10, 2007.

III. WHEN IS SECTION 409A EFFECTIVE?

A. Section 409A is effective for amounts deferred in taxable years beginning after December 31, 2004.

B. Deferred amounts that were "earned and vested" as of December 31, 2004, and the earnings on those amounts, are not subject to Section 409A and are considered "grandfathered amounts." Amounts are earned and vested if they are not subject to a substantial risk of forfeiture under Section 83 or a requirement to perform further services.

C. Grandfathered amounts become subject to Section 409A if the plan under which the deferral is made is materially modified after October 3, 2004.

D. A modification is material if a benefit or right existing as of October 3, 2004 is materially enhanced or a new material benefit or right is added, and the material enhancement or addition affects amounts earned and vested before January 1, 2005.

1. Amending a plan to comply with Section 409A is not a material modification.

2. Changing investment vehicles under an account balance plan is not a material modification.

E. The final regulations are generally effective for taxable years beginning on or after January 1, 2008.

IV. WHAT IS REQUIRED TO BE DONE BY DECEMBER 31, 2007?

A. Under Notice 2007-78, plans must be amended on or before December 31, 2008 to comply with Section 409A. However, plans

must be operated in compliance with the final regulations for taxable years beginning on or after January 1, 2008.

B. For taxable years beginning prior to January 1, 2008, plans must be operated in good faith compliance with Section 409A. Complying with any applicable IRS Notice, the proposed regulations, or the final regulations is deemed to be good faith compliance.

C. Transitional Rules:

1. Payment elections under existing plans may be changed on or before December 31, 2007, without violating the subsequent election or anti-acceleration rules, except that an election made in 2007 cannot defer a payment that would otherwise have been made in 2007 to a later year or accelerate a payment into 2007 that would have otherwise been made in a later year.

2. Elections as to the time and form of payments under a nonqualified deferred compensation arrangement that is linked to payments under a qualified plan are permitted to remain in effect until December 31, 2007, if the determination of the time and form of payment is made pursuant to the terms of the arrangement that governs payment elections, as in effect on October 3, 2004.

3. A discounted stock right may be amended on or before December 31, 2007, to provide for fixed payment terms. A stock right will not be treated as payable in a year solely because the stock right is exercisable during that year if the stock right is reasonably expected to be exercised in a later year.

4. A discounted stock right may be amended to increase the exercise price to the original fair market value until

December 31, 2007. However, this transition rule does not apply to Section 16 individuals in public companies with stock option backdating problems.

V. WHAT KINDS OF PLANS OR ARRANGEMENTS ARE NOT SUBJECT TO SECTION 409A?

A. Any "qualified employer plan" is not subject to Section 409A, including a qualified retirement plan under Section 401(a), an annuity arrangement under Sections 403(a) or (b), a SEP under Section 408(k), a SIMPLE plan under Section 408(p), a trust under Section 501(c)(18), a Section 415(m) plan, or any Section 457(b) plan.

B. Vacation or sick leave plans, compensatory time arrangements, disability pay plans, death benefit plans, Archer MSAs, HSAs, or any other medical reimbursement arrangement, including arrangements satisfying Sections 105 and 106 so long as benefits or reimbursements are not includable in income, are not subject to Section 409A.

C. Certain foreign plans are not subject to Section 409A (e.g., plans subject to a treaty, mandated social security systems, tax equalization plans, etc.).

VI. WHAT KINDS OF PLANS OR ARRANGEMENTS ARE SUBJECT TO SECTION 409A?

A. Section 409A applies to any plan or arrangement providing for the deferral of compensation.

B. The definition of deferred compensation is interpreted very broadly and includes arrangements that are not traditionally thought of as deferred compensation.

C. Examples:

1. Nonqualified deferred compensation plans, such as excess plans and 401(k) mirror plans.

2. Nonqualified defined benefit deferral compensation plans, such as SERPs.

3. Section 457(f) plans.

4. Equity compensation awards with provisions for additional deferrals of compensation.

5. Severance agreements.

6. Post-retirement compensation reimbursement arrangements.

7. Certain split dollar plans that include a deferral of compensation.

8. Discounted stock options.

9. Stock appreciation rights.

VII. WHAT IS "DEFERRED COMPENSATION"?

A. Deferred compensation is defined as any "legally binding right" to compensation that has not been actually or constructively received and that is payable in a later year.

1. This definition is applied without regard to whether the amounts are determinable or whether they are subject to a contingency or a substantial risk of forfeiture.

2. An employee does not have a legally binding right to compensation if it can be unilaterally reduced or eliminated after the services have been performed. However, an

employer's right to unilaterally reduce or eliminate a right to compensation after the services have been performed will not be respected if the employee has control over, or is related to, the employer.

B. Short-term deferrals of compensation are excepted from Section 409A.

1. The payment is exempt from Section 409A if the plan does not provide for a deferred payment and the employee receives the payment before the last day of the "short-term deferral period."

2. The "short-term deferral period" ends two and one-half (2 1/2) months following the later of the calendar year or the employer's fiscal year in which the employee's right to receive the payment is no longer subject to a substantial risk of forfeiture. For example, if an employee acquires a vested right to receive compensation in calendar year 2007, and the employer's fiscal year is the calendar year, then the short-term deferral period ends March 15, 2008.

3. The definition of a "substantial risk of forfeiture" under Section 409A is not the same as under Section 83. Under Section 409A, a "substantial risk of forfeiture" exists if entitlement to the amount is conditioned on (i) the performance of substantial future services by any person, or (ii) the occurrence of a condition related to a purpose of the compensation, and the possibility of forfeiture is substantial.

a. A condition related to the purpose of the compensation must relate to the employee's performance for the employer or the employer's business activities or

organizational goals (e.g., attainment of earnings or equity value or the completion of an IPO).

b. Refraining from providing services (e.g., a covenant not to compete) is not a substantial risk of forfeiture.

c. The requirement that the employee sign a release in order to receive a benefit is not a substantial risk of forfeiture.

4. Whether the possibility of forfeiture is substantial depends on the surrounding circumstances. In the case of rights to compensation granted by an employer to a significant stockholder, the determination is based partly on the probability as to whether the employer will enforce the forfeiture restriction.

5. An amount will not be considered to be subject to a substantial risk of forfeiture after the date or time that the employee could otherwise have elected to receive the compensation, unless the present value of the amount subject to the forfeiture condition is materially greater than the present value of the amount that the employee could have elected to receive.

6. A plan will not qualify for the short-term deferral exception if any payment under the plan will be made or completed on or after any date, or upon the occurrence of any event, that will or may occur later than the last day of the short-term deferral period, such as a separation from service, death, disability, change in control event, specified time or schedule of payments, or unforeseeable emergency, regardless of whether an amount under the plan is actually paid during the short-term deferral period.

7. A delay in payment beyond the short-term deferral period is permitted if:

   a. It is administratively impractical to make the payment within the short-term deferral period, provided that the impracticality was unforeseeable;

   b. Making the payment would jeopardize the employer's ability to continue as a going concern; or

   c. The employer reasonably anticipates that it will not be permitted to deduct the payment because of the $1 million limitation on compensation under Section 162(m), provided that the employer can show that a reasonable person would not have anticipated that Section 162(m) would have applied at the time the legally binding right to the payment arose.

B. Section 409A does not apply to certain separation pay arrangements.

1. Section 409A does not apply to collectively bargained separation pay arrangements paid on involuntary separation or pursuant to a window program.

2. Non-collectively bargained involuntary or window separation pay arrangements are not subject to Section 409A if:

   a. The total payments to the employee do not exceed the lesser of two times the annual compensation for the year prior to the termination, or two times the Section 401(a)(17) limit ($440,000 for 2007); and

   b. All payments will be made by December 31 of the second year following the year in which the employee terminates employment.

3. Even if separation payments exceed these limits, the amounts up to the limit can be treated as subject to the separation pay exception.

4. Whether a separation is "involuntary" is based on the facts. The characterization made by the parties will be presumed to be correct, but it can be rebutted in certain cases.

5. The regulations permit certain voluntary terminations for "good reason" to be treated as an involuntary separation if there is a material negative change in the employment relationship and the employer has an opportunity to remedy the condition.

6. The regulations also provide a safe harbor definition of "good reason" if the following conditions are met:

    a. The employee separates from service within two years of the initial event giving rise to the separation;

    b. The amount, time and form of payment is identical to a non-good reason termination; and

    c. One or more of the following apply:

        i. There is a material diminution in the employee's base salary:

        ii. There is a material diminution in the employee's authority, duties or responsibilities;

        iii. There is a material diminution in the authority, duties or responsibilities of the person to whom the employee reports;

iv. There is a material diminution in the budget over which the employee has authority; or

v. There is a material change in the geographical location at which the employee must perform services.

C. Certain reimbursement arrangements are not subject to Section 409A.

1. Post-termination reimbursement arrangements are not subject to Section 409A if they are not includable in gross income, are deductible by the employer under Sections 162 or 167, or are reasonable out-placement or moving expenses. The reimbursements must be incurred no later than December 31 of the second calendar year following the calendar year in which the separation occurs and must be paid no later than the third calendar year.

2. Medical reimbursements that are permitted during the COBRA period are not subject to Section 409A.

D. Employer indemnification plans, bona fide legal settlements, and educational benefits are not subject to Section 409A.

E. Restricted stock awards are not subject to Section 409A.

F. Qualified stock options under Sections 422 and 423 are not subject to Section 409A.

G. An option to purchase "service recipient stock" ("SRS"), i.e., a non-qualified stock option, or a stock appreciation right ("SAR") granted at "fair market value" is not subject to Section 409A.

1. An SRS can be only the common stock of a company (under Section 305), but the stock may not have:

a. Any distribution preferences other than distributions of SRS and liquidation preferences; or

b. Any mandatory repurchase obligation (other than a right of first refusal) or a put-call right that is not a lapse restriction under Section 83, unless the right or obligation is at fair market value.

2. SRS includes the stock of the employer and any corporation that commonly controls the employer. In other words, SRS includes the common stock of any organization "up the employer's chain" but not "down the employer's chain." Common control is 50 percent, but it may be 20 percent if there are legitimate business criteria.

3. For a publicly traded corporation, fair market value is any reasonable and consistently applied trading price method.

4. For a privately-held company, fair market value is determined by the "reasonable application of a reasonable valuation method." Whether a valuation method is reasonable is based on the facts and circumstances and all available information.

5. Factors to be considered under a reasonable valuation method include:

a. Value of tangible and intangible assets;

b. Present value of anticipated future cash-flows;

c. Market value of stock or equity interests in similar corporations and other entities engaged in similar trades or businesses;

d. Recent arms length transaction; and

e. Other relevant factors such as control premiums or marketability discounts and whether the valuation is used for other purposes.

6. The following valuation methods will be presumed to be reasonable:

a. An independent appraisal that meets the requirements for valuing stock held by employee stock ownership plans and was issued no more than twelve months before the date of the grant of the stock right;

b. A formula-based valuation that would constitute a nonlapse restriction for purposes of Section 83 and will by its terms be used so long as the stock is not publicly traded, provided that it is used both for compensatory transactions and in connection with transfers to the issuer or a 10 percent shareholder, though its use need not be required in a sale of all or substantially all of the outstanding stock; or

c. For illiquid stock of start-up companies (generally, those that have been in business for less than 10 years, have no publicly traded class of securities, and do not reasonably anticipate a change in control within 90 days or a public offering within the next 180), a reasonable, good-faith valuation evidenced by a written report issued by someone who is qualified, but not necessarily independent.

7. Any "modification" of a stock option is treated as the grant of a new option. Consequently, if a modification occurs and the

exercised price is not adjusted to the then fair market value (if higher), the option will be subject to Section 409A.

a. A modification is any change that reduces the exercise price, adds a deferral feature, or extends or renews the option.

b. Any change to the option that increases its value is considered to be a modification.

c. An extension of the option is considered to be a modification, unless the right to exercise the option is not extended beyond the earlier of the original expiration date or ten years from the grant date.

d. A modification does not include any of the following:

i. Acceleration of vesting;

ii. Adding a stock exercise or withholding feature;

iii. Making adjustments to reflect certain changes in the capitalization of the corporation; or

iv. The grantor's exercise of discretion to permit the transfer of a stock option.

H. The grant of a partnership interest is treated under the same principles that govern the grant of stock. The grant of a profits interest in a partnership that is not includable in income does not appear to be subject to Section 409A.

I. Arrangements between accrual basis taxpayers are not subject to Section 409A.

J. Arrangements with service providers, other than an employer director, who are actively engaged in the trade or business of providing substantial services to two or more unrelated service recipients are not subject to Section 409A.

VIII. WHAT ARE THE REQUIREMENTS FOR ELECTIONS UNDER SECTION 409A?

A. Initial elections.

1. Elections as to the amount, time of distribution and form of payment must be made before the beginning of the calendar year in which the services are performed. An election must be irrevocable. An "evergreen" election may remain in effect for future years until timely changed or revoked, provided that the election becomes irrevocable with respect to salary earned during any future calendar year by December 31 of the preceding calendar year.

2. A plan under which the employee does not elect the time or form of payment must provide for the time and form of payment generally no later than the date that the employee first has a legally binding right to payment.

3. In the first year in which an individual becomes eligible to participate in a plan, the election must be made within thirty days after becoming eligible. Only compensation not yet earned may be deferred, and only a pro rata portion of any bonus type compensation earned over a performance period may be deferred.

4. For performance-based compensation, the election must be made no later than six months before the end of the period over which performance is measured.

a. Performance-based compensation is an amount that is contingent on satisfying pre-established company or individual goals over a performance period of not less than twelve months that are not substantially certain to be met at the time of the election.

b. The criteria must be established within ninety days after the performance period begins. If the criteria are based on increases in the value of the employer's stock, then only increases after the award date may be taken into account.

5. Under an involuntary separation pay plan, the employee can make an election regarding the form and timing of the payment up to the date the employee has a legally binding right to the payment. For a window separation pay plan, the employee can make this election up to the time the election to participate in the window program becomes irrevocable.

6. Certain elections to receive bonuses based on the employer's fiscal year must be made before the beginning of the relevant fiscal year.

B. Subsequent elections.

1. A participant may make a subsequent election only if permitted under the plan and the election meets the following conditions:

a. Any change in the timing or form of distribution must not take effect until at least twelve months after the election is made.

b. Except for payments on account of death, disability or unforeseeable emergency, the distribution must be

deferred for at least five years from the original payment date, or five years from the first payment date in the case of a life annuity or installment payments treated as a single payment.

c. An election to defer a series of fixed installment payments must be made at least twelve months before the first scheduled payment.

2. Multiple payments, such as installment or annuity payments, that are separately identified may be treated as separate payments and are eligible for separate subsequent elections.

a. Installment payments are treated as one payment, unless the plan treats each payment separately. If the installment payments are treated as one payment, a change from installment payments to a lump-sum payment would require the employee to delay the payment for five years from the original start date of the first installment payment. If the installment payments are separate payments, any change from installment payments to a lump sum payment would require the payment to be made five years after the last installment payment was scheduled to be made.

b. Life annuities are treated as one payment, but a participant may select among actuarial equivalent annuities if the election is made before the annuity payments begin.

c. There is a transitional rule permitting elections to be made on or before December 31, 2007. Generally, a plan that was adopted and effective before

December 31, 2007, whether written or unwritten, that fails to make a designation as to whether the entitlement to a series of payments is to be treated as an entitlement to a series of separate payments, may make such designation on or before December 31, 2007, provided such designation is set forth in writing on or before December 31, 2007.

IX. WHAT ARE THE REQUIREMENTS FOR DISTRIBUTIONS UNDER SECTION 409A?

A. A plan must provide that amounts subject to Section 409A may not be distributed earlier than one or more of the following events:

1. Separation from service.

a. There is no separation from service if the participant is on military leave, sick leave, or another bona fide leave of absence if the period does not exceed six months or, if longer, the participant's right to reemployment is provided by contract or statute.

b. Payments to "specified employees" of publicly traded companies must be delayed for at least six months following separation from service.

2. Death.

3. Disability.

a. The determination of disability must meet either of the two following definitions:

i. The participant is unable to engage in any substantial gainful activity by reason of any

medically determinable physical or mental impairment that can be expected to last for at least twelve months; or

ii. The participant is, by reason of any medically determinable physical or mental impairment that can be expected to result in death or can be expected to last for at least twelve months, receiving income replacement benefits for a period of at least three months under an employer sponsored disability plan.

b. A participant may also be deemed to be disabled if determined to be totally disabled by the Social Security Administration.

4. A time or a fixed schedule specified under the plan.

5. Unforeseeable emergency.

a. Unforeseeable emergency is limited to a severe financial hardship resulting from an illness or accident of the participant, spouse or dependent, loss of the participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising from events beyond the participant's control.

b. Examples include imminent foreclosure of the participant's primary residence, medical expenses, or funeral expenses.

c. The amount payable is limited to the amount reasonably necessary to satisfy the emergency, including any taxes.

6. Change in control.

a. The change in control of the corporation must be objectively determinable and must involve no discretionary authority.

b. Each change in control distribution event under the plan must qualify as a change in control event.

c. A change in control means:

i. A change in the ownership of the corporation where any one person (or more than one person acting as a group) acquires more than 50 percent of the value or voting power of the stock of a corporation.

ii. A change in the effective control of the corporation, which means either:

(A) Any one person (or more than one person acting as a group) acquires (during a twelve month period) 30 percent or more of the voting power of the stock of a corporation, or

(B) A majority of the board members are replaced during any twelve month period by directors whose appointment or election was not endorsed by a majority of the board prior to the date of appointment or election.

iii. A change in ownership of a substantial portion of the assets of a corporation where any one person

(or more than one person acting as a group) acquires (during a twelve month period) more than 40 percent of the total gross market value of all of the assets of the corporation.

X. WHAT ARE THE RESTRICTIONS ON ACCELERATING PAYMENTS UNDER SECTION 409A?

A. The payment of deferred compensation subject to Section 409A may not be accelerated, except as follows:

1. Payments necessary to comply with a domestic relations order;

2. Payments necessary to comply with certain conflict of interest rules;

3. Payments intended to pay employment taxes;

4. Certain cash-outs of small amounts related to the termination of a participant's interest in the plan (where the amount does not exceed the Tax Code Section 402(g)(1)(B) limit, which is $15,500 for 2007);

5. Payments intended to pay taxes on account of the failure to meet the requirements of Section 409A;

6. Cancellation of deferrals following an unforeseeable emergency or 401(k) plan hardship distribution;

7. In the case of a 457(f) plan, payments intended to pay taxes upon a vesting event;

8. Plan terminations and liquidations (as more fully discussed below);

9. Certain distributions to avoid a nonallocation year for ESOPs under Section 409(p);

10. Distributions to pay state, local, or foreign tax obligations arising from participation in the plan;

11. Cancellation of deferral elections due to disability (with the cancellation occurring by the later of the end of the calendar year in which the disability is incurred, or the 15th day of the third month following the date the disability is incurred, and where "disability" refers to a medically determinable physical or mental impairment resulting in the employee's inability to perform the duties of his or her position or any substantially similar position, where that disability can be expected to result in death or can be expected to last for a continuous period of not less than six months);

12. Offsets to satisfy debts of an employee to an employer, where the amount of the reduction in any calendar year does not exceed $5,000; and

13. Payments as part of a settlement between the employee and employer of an arms length bona fide dispute as to the employee's right to the deferred amount.

B. An employee is not permitted to receive a distribution of assets upon the termination of a non-qualified deferred compensation plan, except in the following circumstances:

1. A plan may be terminated during thirty days before or twelve months after a change in control.

2. A plan may be terminated upon a corporate dissolution or with the approval of a bankruptcy court if certain conditions are met.

3. A plan may be terminated if:

a. The employer terminates all similar plans,

b. Distributions are made no sooner than twelve months and no later than twenty-four months after termination, and

c. The employer does not adopt any new plan of the same type for three years.

C. The aggregation of all account and non-account balance plans does not apply in this context.

D. There is no acceleration permitted for ceasing to be a member of the top-hat group.

XI. WHAT ARE THE RESTRICTIONS ON FUNDING UNDER SECTION 409A?

A. The final regulations do not provide any guidance concerning the funding restrictions set forth in Section 409A. Therefore, the restrictions provided under Notice 2005-1 and Notice 2006-33 continue to apply.

B. Any assets set aside in a trust under a deferred compensation arrangement will be includable in the individual's income if the assets are located or transferred outside of the U.S. This provision does not apply to assets located in a foreign jurisdiction if substantially all of the services to which the deferred compensation relates are performed in that jurisdiction.

C. Any amounts subject to a deferred compensation plan that become restricted in connection with a change in the employer's financial health will be includable in the participant's income whether or not the assets are available to satisfy the claims of the employer's general

creditors. This effectively eliminates immediate funding in either a secular or rabbi trust if the employer's financial condition deteriorates.

XII. WHAT IS THE SIGNIFICANCE OF "PLAN AGGREGATION" UNDER SECTION 409A?

A. The proposed regulations introduced a "plan aggregation" concept and divided plans into four separate categories:

1. Account balance.

2. Non-account balance.

3. Certain separation pay arrangements.

4. Other plans.

B. All plans of the same type in which an employee participates are treated as one plan. If any one of those plans violates Section 409A, adverse tax consequences apply to all amounts deferred under all plans of the same type.

C. The final regulations add three new categories of plans for this purpose:

1. Split-dollar life insurance arrangements.

2. Reimbursement plans.

3. Stock rights.

XIII. WHAT IS THE NEW WRITTEN PLAN REQUIREMENT?

A. The regulations establish a requirement that the material terms of a deferred compensation arrangement that is subject to Section 409A be set forth in writing. The written plan requirement may be satisfied in one or more documents.

B. Those material terms include such things as the following:

1. The amount (or the method or formula for determining the amount) of deferred compensation to be provided under the plan.

2. The time and form of payment.

3. If employees are permitted to make initial deferral elections, then the plan must set forth in writing, on or before the date the employee's election is required to be irrevocable, the conditions under which the election may be made.

4. If a plan permits subsequent deferral elections, then the plan must set forth in writing, on or before the date such an election is required to be irrevocable, the conditions under which those elections may be made.

5. A plan is generally not required to set forth in writing the conditions under which payment may be accelerated.

6. A "savings clause" is not adequate to comply with Section 409A.

C. Although generally a plan will not be considered to be established until its material terms are set forth in writing, a plan will be deemed to be established as of the date a participant has a legally binding right to a deferral of compensation, so long as the plan is actually established

by (i) the end of the year in which the legally binding right arises, or (ii) with respect to an amount not payable in the year immediately following the year in which the legally binding right arises (i.e., the subsequent year), the 15th day of the third month of the subsequent year. In the case of an amendment that increases the amount deferred under a plan, the plan is not considered to be established with respect to the additional amount until the plan is appropriately amended.

D. Although the final regulations are applicable for taxable years beginning on or after January 1, 2008, Notice 2007-78 provides limited transition relief, until December 31, 2008, with respect to the plan document requirements.

1. The Notice does not extend the good-faith standard that has applied under prior guidance from 2005 through the end of 2007, nor does it change the requirement that plans must comply in operation with Section 409A in 2006.

2. After December 31, 2007, taxpayers may not generally change the time and form of payment, and no change in the time and form of payment after December 31, 2007 may result in an amount that was deferred as of December 31, 2007 qualifying for an exclusion from the definition of deferred compensation under the final regulations.

3. To qualify for the extension, taxpayers must designate in writing before January 1, 2008, a compliant time and form of payment for any deferrals under the plan as of January 1, 2008. The Notice provides some flexibility on how this written designation may be made, but it must provide for payment on an event that is permissible under the final regulations. Similarly, the designation of a specified date or fixed schedule of payments

must comply with the final regulations. If a permissible payment event is not specified in writing by January 1, 2008, then the later addition of that payment event is subject to the anti-acceleration and subsequent deferral election provisions of Section 409A. Similarly, if a payment event is specified in writing on January 1, 2008, the removal of that payment event is subject to the anti-acceleration and subsequent deferral election provisions of Section 409A. To the extent that existing definitions of permissible payment events within a plan document do not fully conform to definitions under Section 409A, the writing required by the end of 2007 does not have to amend those definitions. As long as the plan is operated in compliance with Section 409A, the retroactive plan amendment may supply the definition used by the plan in operation. For example, a plan may have a definition of disability that is different from the one in the final regulations. As long as the plan is operated in accordance with the final regulations so that a payment due upon disability is only made if the disability meets the definition in the regulations, the plan can be amended as late as December 31, 2008, to reflect the application of the correct definition.

4. A plan does not have to be amended to include the six month delay rule for specified employees until December 31, 2008, but the amendment must be made retroactive to January 1, 2008, and must reflect the operation of the plan through the date of the amendment. "Specified employees" are generally employees of publicly traded companies who satisfy the definition of a Key employee under Section 416(i) and are prohibited under Section 409A from receiving a distribution on account of separation from service until at least six months after the separation date.

5. The Notice also provides limited relief in the following situations:

   a. Instances in which the employer wishes to conform an existing good reason termination definition to the provisions in the final regulations.

   b. Commentators have asked about the conditions under which rights to deferred compensation under an extension of an employment agreement, or a negotiation of a new employment agreement, will constitute a new legally binding right to compensation rather than a substitution for rights to deferred compensation contained under a previous agreement. Until further guidance, if a right to deferred compensation payable only upon an involuntary separation from service (as defined under § 1.409A-1(n)) at all times under an employment agreement would automatically be forfeited at the end of the term of the employment agreement, then the grant of a right to deferred compensation in an extended, renewed or renegotiated employment agreement will not be treated as a substitute for the right that was forfeited at the termination of the prior employment agreement.

   c. The application of the automatic cash-out provisions to annuities and installment payments. Until further guidance, a taxpayer may treat such a provision as part of an objectively determinable and nondiscretionary payment schedule if the payment schedule would otherwise meet the requirements of the regulations, including that the cash-out threshold be fixed at the time

the permissible payment event is designated, and if the taxpayer can demonstrate that the provision operated in an objective, nondiscretionary manner and did not operate so as to provide either the service provider or the service recipient with rights having substantially the effect of a right to a late election as to the time and form of payment. Any subsequent change in a cash-out threshold applicable to a deferred amount is subject to the rules governing subsequent deferral elections and the acceleration of payments.

E. The Notice indicates that a limited correction program will be created that will apply to certain unintentional operational failures to comply with Section 409A. The Notice suggests that the program will provide methods by which certain operational failures may be corrected in the same taxable year that the failure occurred, and other methods by which certain unintended operational failures may result "in only limited amounts" becoming includable in income and subject to additional taxes.

KEEPING THOSE QUALIFIED RETIREMENT PLANS COMPLIANT

By: Charles M. Lax

I. PENSION PROTECTION ACT OF 2006 ("PPA") RULES AND REQUIREMENTS

A. Accelerated Vesting in Defined Contribution Plans.

1. Under the rules prior to PPA, non-top heavy plans could meet either of two minimum vesting schedules. They were:

   a. A five year cliff vesting schedule (no vesting for five years and full vesting after five years).

   b. A graded vesting schedule requiring 20% vesting after three years and 20% increases thereafter; providing full vesting after seven years).

2. Top heavy plans were required to either vest under a three year cliff vesting schedule or a graded vesting schedule of 20% per year commencing after two years (thereby requiring full vesting after six years).

3. Commencing with years beginning after December 31, 2006, all defined contribution plans must meet the minimum vesting requirements for top heavy plans specified in Section A2 above.

4. Note that the faster vesting schedules are required even though they need not be memorialized in a plan amendment until 2009 or later.

B. New Combined Defined Contribution and Defined Benefit Plan Deduction Limits.

1. Prior to PPA, if an employer maintained both a defined benefit and defined contribution plan, the deduction was limited to 25% of participant's compensation. This, of course, precluded the use of a defined contribution plan where a defined benefit plan contribution exceeding 25% was required.

2. Under PPA, beginning with calendar year 2006, employers maintaining both defined contribution and defined benefit plans could contribute and deduct the amount necessary to fund the defined benefit plan and an amount not more than 6% of compensation under the defined contribution plan.

3. Note that amounts deferred by participants in a 401(k) plan do not count towards the deduction limit.

4. Beginning with calendar year 2008, employers who are subject to PBGC jurisdiction can contribute and deduct up to 25% of compensation for a defined contribution plan plus the amount necessary to meet minimum funding requirements for their defined benefit plans.

5. The affect of these new combined deduction rules is to provide even greater contribution/shelter opportunities for smaller employers desiring to provide large contributions/tax deductions.

C. Qualified Automatic Enrollment Arrangements for 401(k) Plans.

1. While automatic enrollment arrangements features were available prior to PPA, the Act increased their attractiveness for

many employers by introducing the qualified automatic enrollment arrangement ("QAEA").

2. Beginning with years commencing after December 31, 2007, a QAEA feature in a 401(k) plan will require:

   a. Automatic participant deferrals, unless the participant elects not to participate or participate at a different level, requiring minimum deferrals of at least the following:

      i. First year: 3%.

      ii. Second year: 4%.

      iii. Third year: 5%.

      iv. After the third year: 6%.

   b. The employer must contribute to this plan under one of the two following options:

      i. A 3% non-elective contribution for all participants.

      ii. A matching contribution of 100% of the first 1% of compensation plus 50% of the next 5% of compensated deferred by the participant.

   c. The plan must permit participants who inadvertently allowed an automatic deferral to be made on their behalf to have the deferral returned within 90 days of the first deferral and cause the forfeiture of any matching employer contribution.

3. What are the advantages to an employer which includes these provisions in its plan?

   a. No ADP/ACP testing is required.

   b. No top heavy minimums contributions are required (if the plan is top heavy).

   c. A smaller maximum employer match than under a conventional safe harbor 401(k) plan (3.5% vs 4%).

   d. Utilization of a two year cliff vesting schedule on the employer, non-elective or matching contributions (in traditional safe harbor 401(k) plans, non-elective or matching contributions must be immediately fully vested):

D. Non Spousal Beneficiary Rollovers.

1. Effective January 1, 2007, rollovers from qualified retirement plans are now permitted for non-spouse beneficiaries to "inherited IRAs."

2. Inherited IRAs are not as flexible as regular IRAs. Beneficiaries will, however, be able to spread distributions from an inherited IRA over their life expectancy.

3. This now allows non-spouse beneficiaries of retirement plan benefits to obtain the same tax treatment that non-spouse beneficiaries of IRAs receive.

E. Roth IRA Rollovers.

1. Effective January 1, 2008, participants in qualified retirement plans and owners of regular IRAs may rollover "eligible rollover

distributions" into a Roth IRA if their adjusted gross income is $100,000 or less.

2. Elective January 1, 2010, the $100,000 limit is repealed and anyone may roll any amount from a qualified retirement plan or a regular IRA into a Roth IRA (of course, subjecting that amount to taxation).

F. IRS Form 5500 Issues.

1. Commencing with plan years beginning after December 31, 2007, all 5500s must be electronically filed with the Department of Labor ("DOL"). Note, however, the DOL has informally indicated that this requirement will likely be delayed until years beginning after December 31, 2008.

2. The DOL must display filed 5500s on its web site, within 90 days of their receipt.

3. For plan years beginning after December 31, 2007, employers that maintain an intranet must post on the intranet 5500 forms, within 90 days of their filing with the DOL.

4. For plan years beginning after December 31, 2007, if a plan has only one participant (and his or her spouse) and has less than $250,000, no 5500 form is required. Prior to PPA, the limit for filing was $100,000.

5. Congress has directed the DOL to implement a simplified reporting requirement for plans with less than 25 participants.

G. New Benefit Statement Requirements.

1. For plan years beginning after December 31, 2006, if the plan provides directed investment options for participants, benefit

statements must be distributed at least once each calendar quarter. Prior to PPA, benefit statements were required only once a year.

2. Benefit statements for plans that offer directed investments for plan participants must include the following:

a. The amount of the total account balance.

b. The vested portion.

c. The value of each individual investment in the account.

d. An explanation of any limitation or restriction on the right to invest the account balance.

e. A statement emphasizing the importance of a balanced and diversified portfolio.

f. A notice directed to participants advising them of the DOL web site, which provides participant information on balancing and diversifying portfolios.

H. New Fiduciary Protection Rules.

1. Qualified Default Investment Alternatives ("QDIA").

a. Fiduciary protection is provided where a plan provides participants with a QDIA. The QDIA could be available in either:

i. An automatic enrollment 401(k) plan; or

ii. In a regular defined contribution plan offering directed investments.

b. In order to qualify as a QDIA the plan must provide certain types of specified investments, such as:

i Life cycle funds.

ii. Balanced funds.

iii. Professionally managed accounts.

c. The plan must also provide participants with notice of the default investment mechanism within a reasonable period of time prior to the beginning of the plan year.

d. These rules are effective for plan years beginning after December 31, 2007.

2. Personalized Investment Advice for Plan Participants.

a. Investment advisors will now be able to recommend their own funds to participants without fiduciary liability if:

i. Fees and commissions don't vary depending upon which options are selected.

ii. The advisor uses a certified, unbiased computer model to make recommendations.

b. Employers are protected from fiduciary liability without reviewing the investment advice, as long as they acted prudently in selecting the investment advisor.

c. These rules are effective for plan years beginning after 2007.

II. CORRECTING PLAN FAILURES

A. Introduction.

Employee Plans Compliance Resolution System ("EPCRS") is a collection of programs, which allows "plan sponsors to correct qualification failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis." The program includes:

1. Self Correction Program ("SCP"): Employer discovers failures and fixes problems without involving the IRS.

2. Voluntary Correction Program ("VCP"): Employer discovers failures and fixes them with IRS approval.

3. Audit Closing Agreement Program ("Audit CAP"): Resolves qualification failures that are identified during the course of an IRS audit or during the course of the determination letter process.

B. Categories of Plan Failures.

1. Plan Document Failure: A plan provision (or the absence of a plan provision) that on its face violates the requirements of IRC § 401(a).

2. Operational Failure: Plan document provisions comply with IRC § 401(a); however, the failure is caused by the failure to operate the plan in accordance with its provisions; i.e., the provisions of the plan document were not followed.

3. Demographic Failure: Plan document terms were followed, but the plan still failed to satisfy any of the following requirements:

a. Minimum participation requirements of IRC § 401(a)(26).

b. Coverage requirements of IRC § 410(b).

c. Non-discrimination requirements of IRC § 401(a)(4).

C. Correction Principles.

1. Correction must include all taxable years, whether or not the taxable year is closed.

2. The correction method should restore the plan and its participants to the position they would have been in had the failure not occurred.

3. The correction should be reasonable and appropriate for the failure.

a. Certain methods specified in the Revenue Procedures are "deemed to be reasonable."

b. Other methods used are evaluated for reasonableness based on the following criteria:

i. To the extent possible, the correction method should resemble a method already provided for in the IRC.

ii. Correction method for failures relating to non-discrimination should provide benefits for non-highly compensated employees.

iii. Correction method should keep assets in the plan unless IRS guidance requires that correction be made by distribution to participants or that money be returned to the plan sponsor.

iv. Correction method should not violate another applicable specific requirement of IRC.

4. Exceptions to full correction.

i. Reasonable estimates, instead of precise calculations may be used when appropriate.

ii. Delivery of small benefits ($50 or less).

iii. Recovery of small overpayments ($100 or less).

iv. Participants cannot be located and reasonable efforts have been made including mailings to the last known address and use of a locator service; e.g., the IRS letter forwarding program.

D. SCP Program

1. SCP-Insignificant Operational Failures

a. Insignificant operational failures can be corrected at any time. The program is available even if the operational failure is discovered by an agent on examination.

b. Significant vs. Insignificant Failures. Factors considered when making that determination.

i. Whether other failures occurred during the period being examined. For this purpose, a failure will not be considered to have occurred more than once merely because more than one participant is affected by the failure.

ii. The percentage of plan assets and contributions involved in the failure.

iii. The number of years the failure occurred.

iv. The number of participants affected relative to the total number of participants in the plan.

v. The number of participants affected as a result of the failure relative to the number of participants who could have been affected by the failure.

vi. Whether correction was made within a reasonable time after discovery of the failure.

vii. The reason for the failure; e.g., data errors such as errors in the transcription of data, the transposition of numbers, or minor arithmetic errors.

2. SCP – Significant Operational Failures.

a. Not available if the failure is not corrected by the time the plan is under examination.

b. Generally the correction must be completed by the last day of the second plan year following the plan year in which the failure occurred.

c. Correction by retroactive plan amendment can only be used for the following situations and correction methods:

i. Contrary to the terms of the plan document, the plan provides for hardship distributions. The plan may be amended retroactively to provide for the hardship distributions that were made available.

ii. Contrary to the terms of the plan document, the plan provides for participant loans. The plan may be amended retroactively to provide for the loans that were made available.

iii. The plan is amended retroactively to change the eligibility provisions to provide for the inclusion of the ineligible employee to reflect the plan's actual operation. Ineligible employees include employees who either have not completed the plan's minimum age or service requirements, or have completed the plan's minimum age or service requirements but became participants earlier than the applicable entry date.

E. VCP.

1. If the plan or plan sponsor is under examination, VCP is not available.

2. Key elements:

a. Employer identifies qualification failures to the IRS.

b. Employer outlines methods used to correct the qualification failures to the IRS.

c. Employer outlines changes in administrative procedures to the IRS to ensure that failures do not reoccur.

d. Employer and IRS agree to the methods of correction and the proposed revision of administrative procedures.

e. Employer pays a compliance fee.

f. All corrective actions and changes to the administrative procedures are completed within 150 days of the execution of the "compliance statement."

3. Program can be used to correct all qualification failures: operational, plan document, and demographic.

4. Anonymous submissions may be made and withdrawn if there is no satisfactory resolution.

5. VCP Compliance Fees.

a. Generally, the fee is based on the following table:

Number of Participants/Employees	Fee
20 or fewer	$ 750.00
21 to 50	$ 1,000.00
51 to 100	$ 2,500.00
101 to 500	$ 5,000.00
510 to 1,000	$ 8,000.00
1,001 to 5,000	$15,000.00
5,001 to 10,000	$20,000.00
Over 10,000	$25,000.00

b. The compliance fee for plans that have not been timely amended for tax legislation changes is determined in accordance with the chart above. The applicable fee is reduced by 50% for nonamenders that submit under VCP within a one year period following the due date of the amendment.

c. If the sole failure being addressed by the VCP submission involves the failure to amend the plan timely with respect to certain "interim amendments," a

streamlined VCP procedure may be used and the fee is only $375.

d. Compare the following fee structure to Sections 5b and 5c above. The following represents the fees if a missing amendment is discovered during the determination letter process.

Number of Participants/Employees	EGTRRA Subsequent Legislation	GUST 401(a)(9) Regs.
20 or fewer	$ 2,500	$ 3,000
21 to 50	$ 5,000	$ 6,000
51 to 100	$ 7,500	$ 9,000
101 to 500	$12.500	$15,000
510 to 1,000	$17,500	$21,000
1,001 to 5,000	$25,000	$30,000
5,001 to 10,000	$32,500	$39,000
Over 10,000	$40,000	$48,000

6. New special correction method for the failure to include an eligible employee in a 401(k) plan.

a. The IRS requires that the employer contribute to the plan on behalf of the excluded employee an amount that makes up for the value of the lost opportunity to the employee.

b. The value of the "lost opportunity" to the employee is equal to 50% of the pre-tax deferrals that would have been made if the employee had been timely included in the 401(k) plan. Generally, the deferral is determined by using the ADP for non-highly compensated employees.

III. PLAN AMENDMENT REQUIREMENTS

A. Staggered Amendment System.

1. Individually Designed Plans ("IDPs").

a. Plan sponsors must apply for a new determination letter ("DL") once every five years for IDPs to have reliance on their DLs.

b. Interim amendments will generally be required during the five year period and a complete restatement at the time of the DL request.

c. The due date of the DL request is based upon the plan's "cycle." The plan's cycle is generally based upon the last digit of the plan sponsor's EIN.

Last Digit of EIN	Plan Cycle	Due Date of DL Request
1 and 6	A	January 31, 2007
2 and 7	B	January 31, 2008
3 and 8	C	January 31, 2009
4 and 9	D	January 31, 2010
5 and 0	E	January 31, 2011

d. Special cycles are available for multiple employer plans, multi-employer plans, government plans, etc.

e. Presumably, the cycles will start over again in 2012.

2. Pre-Approved Plans ("PAPs").

a. PAPs will utilize six year cycles.

b. Every six years, M&P and Volume Submitter ("VS") plan sponsors will be required to submit their plans to the IRS for review and the issuance of a new opinion letter.

c. Following the issuance of new opinion letters, employers of M&P or VS plans must execute restated plan documents.

d. Interim amendments will generally be required during the six year cycle.

e. Pre-approved defined contribution plans are presently in the middle of their first six year cycle:

Time Period	Action Required
February 1, 2005 - January 31, 2006	Plan sponsors updated their plan documents and submitted them to IRS for review.
February 1, 2006 - March 31, 2008 (tentatively)	IRS will review all PAPs and issue opinion letters.
April 1, 2008 - March 31, 2010 (tentatively)	All adopting employers must execute new plan documents and submit DL requests, if appropriate.
April 1, 2010 - January 31, 2011 (tentatively)	Additional time if needed to complete cycle.

f. It appears every pre-approved defined contribution plan will be restated in its entirety during the period April 1, 2008 – March 31, 2010.

g. Pre-approved defined benefit plans are at the outset of their first six year cycle (February 1, 2007 – January 31, 2013).

B. Interim Amendments.

Interim amendments (during the five year IDP cycle and the six year PAP cycle) are required in certain instances.

1. For discretionary amendments, the interim amendment must generally be adopted by the last day of the year for which such amendment is effective.

   a. An example of a discretionary type amendment is to add Roth 401(k) provisions to a traditional 401(k) plan.

   b. Note that discretionary amendments can never violate IRS § 411(d)(6) by reducing or cutting back benefits. As such, an amendment which reduces benefits or allocations for participants must be adopted before the higher benefit or contribution accrues.

2. For disqualifying amendments, the interim amendment must generally be adopted by the due date of the adopting employer's return for the year the disqualifying provision is effective.

   a. A disqualifying provision is generally a plan provision which must be modified due to a change in applicable law or regulatory guidance.

   b. For example, most 401(k) plans required an amendment for 2006 due to the implementing of final IRS 401(k) regulations.

   c. Note that the final 401(k) regulations contained both disqualifying and discretionary amendment provisions, and as such, most 401(k) plans were amended prior to December 31, 2006 to cover both.

d. The IRS has agreed to announce each year a list of interim amendments that are either disqualifying or discretionary.

C. PPA Amendments.

1. Congress clearly provided that no amendments would be necessary prior to the last day of the 2009 plan year to comply with PPA.

2. This will be true whether the provision is discretionary or disqualifying.

3. The IRS will likely require interim amendments in 2009 for PPA or extend the remedial amendment for plans to coincide with the next cycle of amendments under the staggered amendment system.

STRETCH IRAs/NON-SPOUSAL ROLLOVERS

By: Gary M. Remer

I. OVERVIEW OF THE RULES

A. Under Section 401(a)(9)(A) of the Internal Revenue Code (the "Code"), benefits must be distributed in a lump sum or installments (beginning not later than the required beginning date) over one of the following periods:

1. The life of the participant;

2. The lives of the participant and the participant's designated beneficiary;

3. A period not extending beyond the life expectancy of the participant; or

4. A period not extending beyond the joint life expectancy of the participant and the participant's designated beneficiary.

B. From a practical standpoint, the basic formula for the amount that must be distributed under the required minimum distribution rules is the participant's account balance divided by the applicable time period. These required minimum distributions must then begin as of the "required beginning date."

II. REQUIRED BEGINNING DATE

A. A participant's entire interest must either be distributed:

1. No later than the required beginning date, or

2. In installments, beginning no later than the required beginning date. Treas. Reg. 1.401(a)(9)-2 Q&A-1(a).

B. Required beginning date for IRA owners and 5% owners participating in a qualified plan. Treas. Reg. 1.401(a)(9)-2 Q&A-2(a).

April 1 of the calendar year following the calendar year in which the IRA owner or 5% owner participating in the qualified plan attains the age of 70 1/2 years.

C. Required beginning date for non-5 percent owners participating in a qualified plan. Treas. Reg. 1.401(a)(9)-2 Q&A-2(b).

1. April 1 of the calendar year following the later of:

   a. The calendar year in which the participant attains the age of 70 1/2 years, or

   b. Retires.

2. A plan does not have to use this rule. It can provide that the required beginning date for all employees is April 1 of the calendar year following the calendar year in which the participant attains the age of 70 1/2 years. Treas. Reg. 1.401(a)(9)-2 Q&A-2(e).

D. Five percent owner.

1. Corporation – 5% of the total combined voting power.

2. Non-Corporation – 5% or more of the capital or profits interest.

3. Attribution – Participant is treated as owning stock owned, directly or indirectly, by or for the participant's spouse and children, grandchildren, and parents.

4. The determination is made for the plan year ending in the calendar year in which the participant attains age 70 1/2 years. Treas. Reg. 1.401(a)(9)-2 Q&A-2(c).

E. Age 70 1/2 years.

1. A participant is considered to attain age 70 1/2 years as of the date six calendar months after the 70th anniversary of the participant's birth. Treas. Reg. 1.401(a)(9)-2 Q&A-3.

2. For example, if an IRA participant's date of birth is June 30, 1933, then age 70 1/2 years is attained as of December 30, 2003, and the required beginning date is April 1, 2004. However, if the IRA participant's date of birth is July 1, 1933, then age 70 1/2 is attained as of January 1, 2004, and the required beginning date is April 1, 2005.

F. Special rule for defined contribution plans and IRAs. Treas. Reg. 1.401(a)(9)-5 Q&A-1(b)&(c).

1. Applicable when the participant waits until the required beginning date to take the first required minimum distribution.

2. Must pay two required distributions in the same year.

a. One for the year in which the participant attains the age of 70 1/2 years, which is due by the following April 1.

b. One for the year in which the participant's required beginning date occurs, which is due by December 31.

III. DETERMINING THE ACCOUNT BALANCE

A. The account balance is determined as of the last valuation date in the calendar year immediately preceding the distribution calendar year, increased by the amount of any subsequent contributions or forfeitures and decreased by the amount of any subsequent distributions occurring in the calendar year containing the valuation date. Treas. Reg. 1.401(a)(9)-5 Q&A-3.

B. If, for example, the required minimum distribution for the year the participant attains the age of 70 1/2 years is delayed until the following April 1, then the required minimum distribution for the second year will be greater because the final regulations deleted Prop. Reg. 1.401(a)(9)-5 Q&A-3(c)(2) which contained an adjustment allowing the participant to subtract the first year required minimum distribution from the year end account balance.

C. The account balance is determined without regard to whether or not all of the participant's benefit is vested. The vested portion is simply treated as being paid first. If the total amount of the participant's vested benefit is less than the amount of the required minimum distribution, only the vested portion is required to be distributed. Treas. Reg. 1.401(a)(9)-5 Q&A-8.

IV. LIFETIME REQUIRED MINIMUM DISTRIBUTIONS

A. The required minimum distribution is determined by dividing the account balance by the distribution period. Treas. Reg. 1.401(a)(9)-5 Q&A-1(a).

B. Generally, for lifetime required minimum distributions the distribution period is determined by using the Uniform Lifetime Table found in Treas. Reg. 1.401(a)(9)-9 Q&A-2. The table is based on the joint life expectancies of an individual and a survivor ten years younger at each age beginning at age 70, similar to the old MDIB Table. Treas. Reg. 1.401(a)(9)-5 Q&A-4(a).

C. An exception applies if the participant's sole beneficiary during the year is the participant's spouse and the spouse is more than ten years younger than the participant. In that case, the participant may use the longer distribution period measured by the joint and last survivor life expectancy of the participant and his or her spouse using the

participant's and spouse's attained ages as of their birthdays in the distribution calendar year. Treas. Reg. 1.401(a)(9)-5 Q&A-4(b).

D. A spouse is considered to be a "spouse" for the entire year if the participant and spouse were married to each other on January 1. A spouse is considered to be the "sole beneficiary" if the spouse is the sole beneficiary on January 1 and the participant does not change the beneficiary prior to the end of the year (or the death of the spouse, if earlier). Thus, death or divorce per se does not affect required minimum distributions until the year following the death or divorce, but changing the beneficiary prior to the death of the spouse, even if the participant and spouse are divorced, will result in the loss of the ability to use their joint life expectancies for purposes of calculating the required minimum distributions. Treas. Reg. 1.401(a)(9)-5 Q&A-4(b)(2).

E. The Uniform Lifetime Table (Table III), the Single Life Expectancy Table for beneficiaries (Table I) and the Joint and Last Survivor Table for participants whose spouses are more than 10 years younger (Table II) first appeared in the June 2002 supplement to IRS Publication 590. The tables have since been incorporated into IRS Publication 590.

F. Under the Pension Protection Act of 2006, an individual who has attained age 70 1/2 may make tax-free IRA distributions directly from his or her IRA to a charitable organization. The rule limits the tax-free distributions to $100,000 per year, and only applies to distributions made through December 31, 2007. These distributions count toward the satisfaction of an individual's required minimum distribution for the year of the distribution.

V. REQUIRED MINIMUM DISTRIBUTION FOR THE YEAR OF THE PARTICIPANT'S DEATH

A. The required minimum distribution for the year of the participant's death is based upon the Uniform Lifetime Table found in Treas. Reg. 1.401(a)(9)-9 Q&A-2.

B. Treas. Reg. 1.401(a)(9)-5 Q&A-4(a). If the spouse is designated as the beneficiary and the spouse is more than ten years younger than the participant, then the table in Treas. Reg. 1.401(a)(9)-9 Q&A-3 applies. Treas. Reg. 1.401(a)(9)-5 Q&A-4(b).

C. The required minimum distribution for the year of the participant's death should be paid to the participant's beneficiary and not the participant's estate.

VI. REQUIRED MINIMUM DISTRIBUTIONS AFTER THE PARTICIPANT'S DEATH

A. Participant dies before the required beginning date. Treas. Reg. 1.401(a)(9)-3.

1. Spouse is designated beneficiary.

a. The spouse must take required distributions either under the five year rule or over the spouse's life expectancy, beginning no later than the later of:

i. The end of the calendar year immediately following the calendar year in which the participant died, or

ii. The end of the calendar year in which the participant would have attained age 70 1/2.

b. Under the five year rule, all benefits must be distributed by December 31 of the calendar which contains the fifth anniversary of the date of the participant's death. Treas. Reg. 1.401(a)(9)-3 Q&A-2.

c. Under the life expectancy rule, the surviving spouse's life expectancy is recalculated annually. After the surviving spouse dies, any benefits remaining are paid out over the remaining fixed life expectancy of the surviving spouse using the spouse's age on the spouse's birthday in the year in which the spouse dies. In other words, life expectancy is recalculated during the spouse's lifetime and fixed afterward. Treas. Reg. 1.401(a)(9)-5 Q&A-5(c)(2).

2. Spouse is not designated beneficiary.

a. The beneficiary must take required distributions either under the five year rule or over the beneficiary's life expectancy beginning no later than December 31 of the calendar year following the year in which the participant dies.

b. The beneficiary's life expectancy is based on the beneficiary's age on the beneficiary's birthday in the calendar year following the year in which the participant dies.

3. Default rule.

a. A plan may specify whether the life expectancy or five year rule applies to distributions or it may allow the participant to elect. Treas. Reg. 1.401(a)(9)-3 Q&A-4(b)&(c).

b. If the plan fails to specify, then:

i. The life expectancy rule will apply if the participant has a designated beneficiary.

ii. The five year rule will apply if the participant has no designated beneficiary. Treas. Reg. 1.401-(a)(9)-3 Q&A-4(a).

4. Switch from five year to life expectancy method.

a. A beneficiary receiving payments under the five year rule had a limited opportunity to switch to the life expectancy rule. Treas. Reg. 1.401(a)(9)-1 Q&A-2(b)(2).

b. All amounts that would have been required to be distributed under the life expectancy rule for all calendar years before 2004 had to be distributed by the earlier of December 31, 2003 or the end of the five year period.

c. The switch could be made by affirmative election or by default, but the plan had to allow for it.

B. Participant dies on or after the required beginning date.

1. Spouse is designated beneficiary.

a. During the spouse's lifetime, required distributions are taken over the spouse's life expectancy, recalculated annually, beginning in the year after the year in which the participant dies. Treas. Reg. 1.401(a)(9)-5 Q&A-5(c)(2).

b. Any benefits remaining after the spouse dies must be paid out over the remaining fixed life expectancy of the

spouse, computed as of the spouse's age on the birthday occurring in the year of the spouse's death. Treas. Reg. 1.401(a)(9)-5 Q&A-5(c)(2).

2. Spouse is not designated beneficiary.

a. The beneficiary must take required distributions over his or her life expectancy beginning in the year after the year in which the participant dies. Treas. Reg. 1.401-(a)(9)-5 Q&A-5(a)(1)(i).

b. However, if the beneficiary's life expectancy is shorter than the participant's, then the participant's life expectancy may be used. Treas. Reg. 1.401(a)(9)-5 Q&A-5(a)(1)(ii).

c. The beneficiary's life expectancy is determined using the beneficiary's age on his or her birthday which occurs in the year after the year in which the participant dies. Treas. Reg. 1.401(a)(9)-5 Q&A-5(c)(1).

d. The participant's life expectancy is determined using the participant's age on his or her birthday which occurs in the year in which the participant dies. Treas. Reg. 1.401(a)(9)-5 Q&A-5(a)(1)(ii) and Q&A-5(c)(3).

C. No designated beneficiary.

1. Participant dies before the required beginning date.

If the participant dies before the required beginning date and does not have a designated beneficiary, then the five year rule applies and the account must be completely distributed by December 31 of the fifth year following the year of the participant's death. Treas. Reg. 1.401(a)(9)-3 Q&A-1 & 2.

2. Participant dies on or after the required beginning date.

a. If the participant dies on or after the required beginning date and does not have a designated beneficiary, then benefits must be distributed over the remainder of the participant's life expectancy. Treas. Reg. 1.401(a)(9)-5 Q&A-5(a)(2) and 5(c)(3).

b. The participant's life expectancy is determined using the participant's age on his or her birthday which occurs in the year in which the participant dies, reduced by one for each subsequent year. Treas. Reg. 1.401(a)(9)-5(c)(3).

VII. SPECIAL ELECTIONS AVAILABLE TO A SURVIVING SPOUSE

A. Recharacterization of IRA by surviving spouse.

1. A surviving spouse of a participant may elect to treat the spouse's entire interest as a beneficiary of the participant's IRA as the spouse's own IRA. Treas. Reg. 1.408-8 Q&A-5(a).

2. The election is permitted to be made at any time after the distribution of the required minimum amount from the account for the calendar year containing the individual's date of death. Treas. Reg. 1.408-8 Q&A-5(a).

3. The spouse must be the sole beneficiary of the IRA, and have an unlimited right to withdraw amounts from the IRA. This requirement is not satisfied if a trust is named as beneficiary of the IRA, even if the spouse is the sole beneficiary of the trust. Treas. Reg. 1.408-8 Q&A-5(a).

4. The required minimum distribution for the year of the election and each subsequent year is determined as if the IRA belonged to the spouse. Treas. Reg. 1.408-8 Q&A-5(c).

a. Allows the spouse to "start over" (except that there are no new spousal rights for anyone the spouse marries).

b. Permits the spouse to defer receiving benefits until the spouse attains the age of 70 1/2.

c. The spouse may name a new beneficiary.

d. The 10 percent premature distribution penalty applies to distributions from the spouse's IRA. However, it may be possible to avoid the penalty if the requirements under Section 72(t)(2)(A)(iv) can be met. This exception applies to distributions that are part of a series of substantially equal periodic payments made at least annually over the life or life expectancy of the IRA owner or the joint lives or life expectancies of the IRA owner and his or her designated beneficiary.

5. If the surviving spouse is age 70 1/2 or older, the required minimum distribution must be made for the year and, because of this required minimum distribution, that amount may not be rolled over by the spouse. Treas. Reg. 1.408-8 Q&A-5(a).

6. The election by the surviving spouse may be accomplished by designating the IRA with the name of the surviving spouse as owner rather than beneficiary. The election is deemed to have been made if the spouse adds money to the IRA or fails to withdraw a required minimum distribution from the IRA. Treas. Reg. 1.408-8 Q&A-5(b).

B. Spousal rollover.

1. A surviving spouse may rollover the deceased participant's interest in a qualified plan or IRA to another IRA and treat the IRA as the spouse's own IRA. Treas. Reg. 1.408-8 Q&A-7.

2. In PLR 200129036, the IRS allowed a surviving spouse to rollover her deceased spouse's IRA, even though the deceased spouse did not name a beneficiary and died without a will, because state law treated the estate as the default beneficiary and the surviving spouse as being entitled to the entire estate.

3. In PLR 200236052, the IRA owner left his IRA to his estate and named his surviving spouse both as the sole beneficiary of the estate and as the sole executrix of the estate. The IRS treated the surviving spouse as receiving the IRA benefits directly from the IRA, rather than through the estate, with the result that the surviving spouse could rollover those benefits into an IRA in her own name. A rollover would not have been permitted had the surviving spouse not been named both as the sole beneficiary and as the sole executrix. PLR 200344024 reaches the same conclusion under similar facts, except that a qualified plan is involved.

4. In PLR 200245055, the IRS said that if the proceeds of a decedent's IRA are payable to a trust, are paid to the trustee of the trust, and are then transferred at the direction of the surviving spouse to an IRA set up and maintained in the name of the surviving spouse, the surviving spouse will be treated as having received the IRA proceeds from the trust and not from the decedent. Accordingly, the surviving spouse may not roll over the distributed IRA proceeds into his or her own IRA. On the other hand, where a trust is the beneficiary of a decedent's

IRA and the surviving spouse is the sole trustee of the trust, as well as the income beneficiary of the trust with the power to demand payment of a portion or all of the trust principal, and if the surviving spouse, as trustee, requests and receives payment of the remaining IRA assets, and, as income/principal beneficiary then rolls all or a portion of the assets of the deceased spouse's IRA into an IRA set up and maintained in his or her own name, the surviving spouse will be treated as having received the IRA proceeds from the decedent's IRA and not from the trust. Note that the rollover of the distribution must occur no later than the 60th day from the date the distribution is received by the surviving spouse, as trustee of the trust.

5. In PLR 200415012, the husband withdrew funds from an IRA prior to his death. After the expiration of the 60 day rollover period, the surviving spouse withdrew the distributed amount from the account that it had been deposited in and opened her own rollover IRA. She requested and was granted a waiver on the grounds that she was in mourning, handling funeral arrangements, etc. An opposite result was reached in PLR 200415011 where the executor, the decedent's son (there was no surviving spouse), attempted to return a portion of the pre-death distribution to the IRA.

C. Non-Spouse rollover.

1. Before 2007, many non-spouse beneficiaries had no tax saving option when they inherited all or part of a deceased persons qualified retirement plan account. This came about as a result of the Pension Protection Act of 2006 ("PPA").

2. Prior to PPA, a non-spouse beneficiary that inherited employer plan assets was subject to plan rules, which could mean an

immediate distribution or distribution within a shorter period than allowed by law or regulation. The disadvantage was that a non-spouse beneficiary not only lost that ability to accumulate tax deferred earnings on the account, but had to pay taxes on the amount distributed.

3. The new rule may allow a non-spouse beneficiary to directly roll the inherited plan assets to a traditional "Beneficiary IRA."

4. IRS Notice 2007-7 provides the following rules and restrictions:

   a. An employer plan is not required to offer this option to a non-spouse beneficiary unless the plan is terminated;

   b. If allowed by the employer plan, the plan must use the direct rollover method to move the assets to a Beneficiary IRA; a distribution made directly to a non-spouse beneficiary is not eligible to rollover to a Beneficiary IRA;

   c. The Beneficiary IRA must be properly identified as such (e.g., Tom Smith, Beneficiary of John Smith); and

   d. Participant and beneficiary required minimum distributions are not eligible for direct rollover to a Beneficiary IRA.

5. When an individual establishes a Beneficiary IRA, it is not his/her IRA. Although he/she has control of the assets, he/she cannot make regular contributions to the IRA and cannot combine the Beneficiary IRA assets with his/her own IRA assets.

6. Once the assets from the qualified retirement plan are rolled over to the Beneficiary IRA, the receiving IRA falls under the

required minimum withdrawal rules for inherited IRAs. Basically, what this means is that you can gradually drawn down the balance of the receiving IRA over the beneficiaries' life expectancy and potentially reap many years of tax deferral benefits.

VIII. DESIGNATED BENEFICIARY

A. Possible choices. Treas. Reg. 1.401(a)(9)-4.

1. Plan may specify or allow participant to select.

2. A beneficiary may either be a "designated beneficiary" or a beneficiary that is not a "designated beneficiary."

3. Required minimum distributions may be made over the life or life expectancy of the participant and the designated beneficiary.

4. They may not be made over the life or life expectancy of the participant and another beneficiary who is not a designated beneficiary.

5. May be any of the following:

   a. Participant's spouse.

   b. An individual.

      i. Need not be specified by name.

      ii. Merely must be identifiable under the plan.

   c. Trusts:

      i. A trust cannot be a designated beneficiary. However, if certain requirements are met, then

the trust can be disregarded and the beneficiaries of the trust will be treated as the designated beneficiaries. Treas. Reg. 1.401(a)(9)-4 Q&A-5(a). A testamentary trust can also qualify for look-through treatment for its beneficiaries.

ii. Requirements (Treas. Reg. 1.401(a)(9)-4 Q&A-5):

- The beneficiaries of the trust must be identifiable from the trust agreement.
- The trust must be a valid trust under state law, or would be but for the fact that there is no corpus.
- The trust is irrevocable or must become irrevocable upon the participant's death.
- The trustee must provide a copy of the trust to the plan administrator by October 31 of the calendar year following the calendar year of the participant's death. Alternatively, a certification can be provided to the plan administrator listing the beneficiaries as of September 30 of the calendar year following the calendar year of the participant's death, describing the conditions of their entitlement to benefits, and agreeing to provide a copy of the trust agreement upon demand. The trustee must also certify that the trust is valid, that the trust was irrevocable or became irrevocable upon the participant's

death, and that the beneficiaries are identifiable. Treas. Reg. 1.401(a)(9)-4 Q&A-6(b).

iii. If the certification is inconsistent with the terms of the trust, the requirements of Section 401(a)(9) will not be failed if the plan administrator reasonably relied on the certification, and required minimum distributions for calendar years after the calendar year in which the discrepancy is discovered are determined based on the actual terms of the trust. Treas. Reg. 1.401(a)(9)-4 Q&A-6(c).

iv. The documentation requirement must also be satisfied by the participant's required beginning date if the lifetime distribution period for the participant is measured by the joint life expectancy of the participant and the participant's spouse. This will occur only in the situation where the participant's spouse is more than ten years younger than the participant, and the participant has designated a trust with respect to which the spouse is the sole beneficiary rather than the spouse directly. In that case, copies of any subsequent trust amendments must also be provided to the plan administrator or, if the certification was provided, it must be updated to reflect the amendments. Treas. Reg. 1.401-(a)(9)-4 Q&A-6(a).

v. If a trust fails to meet the requirements allowing the beneficiaries of the trust, and not the trust itself, to be treated as the participant's designated beneficiaries solely because the required documentation was not provided to the plan administrator by October 31 of the calendar year following the calendar year of the participant's death, the trust will nevertheless qualify if the documentation is provided by October 31, 2003. Treas. Reg. 1.401(a)(9)-1 Q&A-2(c).

vi. A trust that otherwise meets all of the applicable requirements may nevertheless fail to qualify for look-through treatment for its beneficiaries if trust assets can be used to pay debts, taxes or expenses arising at the participant's death. PLR 9820021. Also see PLR 200228025. On the other hand, the trust will not fail to qualify if the taxes, debts and expenses are paid prior to September 30th of the calendar year following the year of death. PLRs 200432027, 200432028 and 200432029. Finally, see PLR 200537044 for a situation where the trust contained a prohibition on using the IRA benefits to pay taxes, debts or expenses.

B. Ineligible beneficiaries.

1. A beneficiary that is not an individual, such as an estate or charitable organization. Treas. Reg. 1.401(a)(9)-4 Q&A-3.

2. A person to whom benefits are paid solely by reason of state law (e.g., the participant's estate). Treas. Reg. 1.401(a)(9)-4 Q&A-1.

C. Date of determination.

1. Generally, the designated beneficiary is determined as of September 30 of the calendar year following the year of the participant's death. Treas. Reg. 1.401(a)(9)-4 Q&A-4(a).

2. If the participant's spouse is the sole designated beneficiary and the spouse dies after the participant and before the date on which distributions have begun to be made to the spouse, then the designated beneficiary for determining the distribution period is the designated beneficiary of the surviving spouse. Treas. Reg. 1.401(a)(9)-3 Q&A-5. This designated beneficiary is determined as of September 30 of the calendar year following the calendar year of the spouse's death. If there is no designated beneficiary as of that date, then distribution must be made in accordance with the five year rule discussed below. Treas. Reg. 1.401(a)(9)-4 Q&A-4(b).

D. Death of the designated beneficiary.

1. An individual whose life expectancy is being used to calculate the distribution period and who dies after September 30 of the calendar year following the calendar year of the participant's death will nevertheless continue to have his or her life expectancy used for purposes of determining the distribution period, without regard to the life expectancy of the subsequent beneficiary. Treas. Reg. 1.401(a)(9)-5 Q&A-7(c)(2).

2. An individual who is a beneficiary as of the date of the participant's death, and who dies prior to the September 30 of

the calendar year following the calendar year of the participant's death without disclaiming, continues to be treated as the beneficiary for purposes of determining the distribution period for required minimum distributions, regardless of the identity of the successor beneficiary who is entitled to distributions as the beneficiary of the deceased beneficiary. Treas. Reg. 1.401(a)(9)-4 Q&A-4(c).

IX. EXCEPTIONS AND SPECIAL RULES

A. TEFRA 242(b)(2) election.

1. Required minimum distribution rules do not apply if this election was made. Treas. Reg. 1.401(a)(9)-8 Q&A-13.

2. Participant had to make a valid election before January 1, 1984.

3. Benefits of having made the election may be lost if the form or timing of the payment of benefits is changed.

4. The election may be revoked after the date by which distributions are required to commence under Section 401(a)(9) in which event the total amount required to have been distributed under Section 401(a)(9) must be distributed by the end of the calendar year following the calendar year in which the revocation occurs. Treas. Reg. 1.401(a)(9)-8 Q&A-16.

B. Roth IRAs.

Roth IRAs are exempt from the minimum distribution rules until the year following the participant's death under Section 408A(c)(5) and Treas. Reg. 1.408A-6 Q&A-14.

C. Annuities.

Distributions in the form of an annuity will satisfy the required minimum distribution rules if the annuity satisfies certain requirements. Treas. Reg. 1.401(a)(9)-5 Q&A-1(e).

D. Pre-age 59-1/2 Distributions.

1. Distributions from qualified plans and IRAs before age 59-1/2 are generally subject to a 10 percent premature distribution penalty under Section 72(t)(1).

2. There are several exceptions, including one for distributions that are part of a series of substantially equal periodic payments made at least annually over the life or life expectancy of the employee or IRA owner or the joint lives or life expectancies of the employee or IRA owner and his or her designated beneficiary.

3. Notice 89-25 Q&A-12 provides three methods for determining the payments, an annuitization method, an amortization method, and a required minimum distribution method. The first two methods result in fixed payments. Those fixed payments later caused accounts for many taxpayers to be prematurely depleted when the stock market declined.

4. The IRS provided relief in Rev. Rul. 2002-62, which provides new guidance on the three methods and permits taxpayers who selected the annuitization or amortization method to switch to the required minimum distribution method.

IX. STRETCH IRA

A. The current rules have significantly expanded the period of time over which the IRA owner, the spouse, and even non-spouse beneficiaries

may stretch out the required minimum distributions over their respective lifetimes.

B. An example will help demonstrate this, let's assume Mom is age 65 and has a total of $250,000 in her IRA. Let's also assume that, over time, she earns 8% annual growth of the account. At age 70 ½, the account will be worth $396,000. If she begins taking minimum distributions at age 70 ½, the IRA will continue to grow because the required minimum distribution is only about 4% of the account balance. When she passes away at age 80, the IRA inherited by her son is worth about $541,000, even with the required minimum distributions. If the son is age 45 and annually takes out only the required minimum distribution, by the time he is 80, he will have taken required minimum distributions totaling about $2.9 million dollars but will still have over $700,000 remaining in the IRA to potentially pass down to the next generation. In other words, Mom's original $250,000 may be worth over $3.5 million dollars to her family over time.

THE ADVISOR'S ROLE IN SPECIAL NEEDS PLANNING

By: George V. Cassar, Jr.

As advisor's to our clients, young and old, rich or poor, educated and not - at some point in our careers we come across a client who either has special needs, is in a special needs type circumstance or is caring for a special needs individual. Sometimes that individual will be a spouse, a child, a sibling, parents or simply a friend. How will you recognize the situation when it presents itself? How will you handle it once you do? Will you ignore it, "wing" it, know it or refer it?

In today's society, the term special needs has become more encompassing than ever before. Often reserved for those "developmentally disabled" individuals identified under the law as such, the term special needs today is more generic, like Xerox and Kleenex, or for that matter, like Lawyer and Accountant.

Today, special needs can refer to that same developmentally disabled child, but also to that elderly grandparent who is simply succumbing to old age. It can refer to the mere situation more than the individual such as needing to apply for Medicaid or having to plan to deal with the vast unknown. However, no matter how you define it or where you apply it, one common thread continues to run through it: a special needs situation demands your utmost attention, respect and ability to know exactly what you are advising or exactly who to refer to that does, because unlike any other situation, the consequences of "winging it" can be detrimentally life altering for the client, their loved ones and ultimately – their advisors.

No one outline, presentation or course can give you all the resources that you need as an advisor to your special needs clients and situations. What follows, however, is a summary of some of the highlights that you need to be consciously aware of in every special needs situation you encounter - from identifying the situation to knowing the options to getting it done - so that at a minimum, you can remain that trusted confidant that your clients have come to respect you for and give you the ability to best represent their interests and yours.

Much of the content in this presentation focuses on the non-traditional accounting practices that an accountant/CPA would or could provide for their elderly and disabled (i.e. "special needs") clients. While these clients have the same need for tax planning and advice that our other clients have, they also are confronted with a number of unique problems such as dealing with Social Security, Medicare, Medicaid, long term care benefits and planning for incapacity. They may have concerns over what happens when they succumb to dementia or more detrimental incapacities. Those clients who have been clients for some time may look to you to be their fiduciary, to look after their assets, to keep their children in line and to ensure that no one else tries to take advantage of them. These are all special needs and concerns that our aging clients have – whether they ask it or not. The question for you and where you want your practice to grow is whether you will be the one that waits for those questions to come (some may never get around to asking until it is too late) or will you be proactive with your clients and help them help themselves?

Assuming you are among the latter group and you have a desire to grow your practice, especially among the elderly population (by the way, the fastest growing segment of the population for at least the next 20 – 25 years – see below), then don't tip toe into it. Jump right in. Become an expert in the area of concerns that your clients have. Put together your resources, your team of expert professional advisors and then go out and promote it!

Start with your own client base. Send out newsletters, emails, have discussions with them when they come to your office, schedule an extra 15 minutes on EVERY TAX RETURN SIGNING to force yourself to discuss these issues. Put them on a checklist. Ask the question.

After you've exhausted your own client base, go to the outside world. Go to local service clubs, organizations, hospital outreach programs and support groups. Offer to speak at these events, sponsor a meeting and get involved. Engage the younger associates in your office to write articles, speak at forum events and get the

word out that you are the geriatric accountant. Develop your own style and go out and get the clients that need an accountant that knows their pain, that understands their issues and that can get the job done.

I. DECIPHERING THE DEFICIT REDUCTION ACT of 2005

So in developing the expertise, start by knowing that when talking about any kind of special needs situation today, whether it be assisting that special needs child, looking at Medicaid eligibility for the financially needy, helping a family muddle through the nursing home and assisted living care facilities, or simply trying to do some long term planning, every conversation is now rooted in the Deficit Reduction Act of 2005.

A. Following extremely close votes in the U.S. House and Senate, the Deficit Reduction Act of 2005 (the "DRA") became law February 8, 2006. The DRA made significant changes to many of the rules that apply when people seek Medicaid and other special needs related assistance. In fact, this law was designed to restrict many aspects of Medicaid planning in general.

B. While a Federal Act, the DRA reaches out to every state, some provisions being mandated while others open for each state to put their own mark on the application of the same. Michigan's Department of Health and Human Services adopted some portions of the DRA in July 2007. Other changes mandated by the DRA are expected to be implemented by additional changes before the end of 2007. Some of the more notable changes mandated by the DRA and implemented by the State of Michigan in July 2007 include:

1. A cap on the value of an exempt homestead at $500,000;

2. Divestment look-back period extended to five years;

3. Divestment penalty period delayed; and

4. Daily divestment penalty periods.

C. Still anticipated in the coming changes this year will be those related to commercial annuities and, in particular, the DRA requirement that the state be named remainder beneficiary on commercial annuities used in Medicaid planning situations.

D. And while not specifically an issue stemming from the DRA, Estate Recovery remains a hot issue in Michigan which most professionals believe will be a major part of the state's 2007-2008 Fiscal Budget. Estate Recovery allows the state the ability to make a claim against a decedent's estate, specifically against assets such as their personal residence that may have been an exempt and otherwise "protected" asset during their lifetime, in an effort to allow the State to recover all or a portion of the proceeds it provided to the decedent while receiving Medicaid benefits. Such a change could have a significant impact on traditional Medicaid planning techniques such as converting cash and other countable assets into non-countable assets for Medicaid purposes by paying off a mortgage or making major improvements to one's residence.

II. PLANNING FOR FAMILIES WITH SPECIAL NEEDS CHILDREN

In an effort to adequately allocate the appropriate attention to the more traditional special needs situations, this section of the presentation will focus on the "traditional" special needs child. In addition to the usual hurdles that parents face when preparing an estate plan (i.e., who should be the guardian, trustee, personal representative, etc.) the parents of a special need child are faced with a unique estate planning challenge – how to provide for all of their loved ones without jeopardizing the special needs child's current and potentially future eligibility for need based government benefits such as SSI and Medicaid.

A. Every family has basic estate planning needs. Everyone is going to die eventually. It is 100% certain and 100% unavoidable. Therefore, every adult person – aged 18 or 80 or 108 – needs to plan for his or her eventual demise (and perhaps more importantly, their potential disability due to illnesses, accidents, etc.). This can be best accomplished through proper planning with an estate planning attorney that specializes in estate planning. Period.

B. It is always easier and cheaper (or shall we say less expensive) to take proactive preventive steps than to take remedial, sometimes damaging steps. As we all know, lawyers, accountants, doctors, mechanics, etc. charge more to fix a problem than to solve an issue before it becomes a problem. It's the old "pay me now" (to avoid the potential problem), or "pay me much more later" (to fix the problem). In the traditional family estate planning, these problems typically arise through issues like failure to avoid probate, loss of estate tax exclusions, and income in respect of a decedent. Regardless, a special needs child deserves a parent's continued support and guidance, even though the parent may be incapacitated or deceased. As such, the parents of a special needs child need to protect not only themselves, but that special needs child. In doing so, every such parent should typically have the following estate planning documents prepared:

1. Last Will & Testament;

2. General Durable Power of Attorney;

3. Medical Durable Power of Attorney;

4. Revocable Living Trust; and

5. A Special Needs Trust.

C. Aside from the obvious financial support that a parent may offer into the future, the most important role of the parent's estate plan may be in the nomination of a guardian to continue to care for the special needs child upon the parent's incapacity or demise.

1. If the special needs child is a minor, the standard provisions for nominating a guardian and conservator for a minor child common in most Last Wills & Testaments for individuals with minor children should be sufficient.

2. If the special needs child is an adult, the parent's Will should still nominate a guardian of the person and a guardian of the estate for the special needs child (i.e., a guardian and a conservator) but knowing that such a nomination over an adult individual may not eliminate the need for the Probate Court to independently determine the fitness of a guardian under the Mental Health Code, the parent's Will should outline the relationship between the child and the nominated guardian, the reasons why the nominated guardian is the best choice, and the overwhelming desire that the Court find the same way. Alternatives should also be provided in the Will and other estate planning documents in the event the Court finds differently.

D. Of the five typical estate planning options available to a parent to provide for their special needs child, it is generally preferred among professionals, the author included, to have the parents prepare some sort of a third party supplemental needs trust for the child's benefit. All in all, the five options (if you can really call them that) include:

1. Distributing assets outright to the special needs child (not recommended);

2. Disinheriting the special needs child altogether thereby all but mandating that the government provide for them (also not recommended);

3. Leaving property to another family member or friend with the "understanding" that they will care for and use the property for the benefit of the special needs child (still not recommended in most situations);

4. Establishing a third party discretionary support trust for the special needs child (better, but still not the most recommended); or

5. Establishing a third party supplemental needs trust for the special needs child (highly recommended).

The third party supplemental needs trust can be either revocable or irrevocable and can be designed to be a stand alone separate trust or created as a provision of the parent's traditional revocable living trust agreement. The trustee of a third party supplement needs trust is given complete discretion in making distributions to or for the benefit of the special needs child and because the trust is a discretionary non-support trust with spendthrift provisions, the trustee has maximum flexibility to meet the beneficiary's needs and maintain the beneficiary's eligibility for government benefits.

A trust protector can also be appointed to direct the trustee's actions as well as to remove and replace the trustee under defined conditions.

E. So aside from recognizing the need, advising the client to seek not only competent counsel but counsel that specializes in dealing with estate planning for families with special needs children, what is the role of the accountant in all of this? The accountant must understand and often times, explain to both the client and the attorney why tax

planning should not be ignored when preparing any estate plan, but especially an estate plan that involves a special needs child.

1. There is often a general (and clearly incorrect) assumption among planners that taxes are of little or no concern to families of special needs children and that all their focus is on providing for the child's care and maintaining eligibility for government benefits.

2. Income taxes, estate taxes, gift taxes, and generation skipping transfer taxes should all be considered and dealt with when preparing any estate plan. Equally important are the income and transfer tax consequences of a special needs trust.

3. Third party created and funded special needs trusts are typically "complex" trusts for income tax purposes and are separate and distinct taxpayers under the Internal Revenue Code. Consequently, any trust income not distributed to or for the benefit of the special needs child will be taxed at the trust's income tax rate, which can be very high. (In 2007, a trust reaches the highest 35% tax bracket with only $10,450 of income while the same 35% tax bracket for an individual starts at $349,700 of taxable income). A complex trust can minimize its taxable income consequences by having the trustee understand the importance of investing in tax-exempt bonds and capital (growth) assets that generate little or no dividend income beyond the anticipated needs of the child.

4. For those trusts designated as a "qualified disability trust" (see IRC section 642(b)(2)(C), which is a "sole benefit" special needs trust that is a non-grantor trust for income tax purposes (i.e., is a third party funded discretionary trust for the benefit of a disabled child), starting in tax year 2007, such a qualified

disability trust is entitled to a personal exemption of $3,400 instead of an exemption of $100 for a complex trust or $600 for a simple trust (subject to an income phase out at $156,400 of income). Also, income paid from a qualified disability trust to or for the benefit of a disabled child is not considered "unearned income" for kiddie tax purposes and the income is taxed at the child's rate.

5. Some special needs trusts are "grantor" trusts, which means that all the trust income (whether or not distributed by the trust) is taxable to the "grantor," who is typically in a lower income tax bracket than the special needs trust itself. This is often drafted as such by way of design to continue to reduce the grantor's taxable estate and to preserve the maximum assets remaining available for the child under the special needs trust itself. Sometimes a trust is a grantor trust by mistake (improper planning) and it isn't until the accountant does the tax return that the client and the attorney realize the consequences of not understanding proper planning procedures.

6. It is also important for all of the advisors to understand (and probably easier for the accountant to understand and explain) that not all income that is treated as such for income tax purposes is treated as income for SSI and Medicaid eligibility purposes. And items reported on a trust's Schedule K-1 such as the beneficiary's share of income, deductions, credits, etc. as income of the beneficiary may not be income for SSI purposes, or vice-versa. (For example, a Crummey withdrawal power is a nontaxable receipt for income tax purposes but nevertheless is income for SSI purposes because a trust contribution subject to the power can be withdrawn by the donee/beneficiary of the power and as such, used for his or her

support. Conversely, a trust expenditure, such as for travel expenses, that is not income under the SSI test (i.e., is not available to the beneficiary for use for his or her support) may nevertheless be income for income tax purposes and reportable on the beneficiary's Schedule K-1.

F. The accountant (and attorney) should also advise the client on the importance of reviewing not only their own estate plan, but those of other loved ones that may desire to provide for the benefit and wellbeing of the special needs child as well, such as a sibling, a grand parent or that long lost uncle. If one of the principal purposes of establishing the third party supplement needs trust is to provide an inheritance for the special needs child without risking the loss of important government benefits, it is vitally important to ensure that grandparents and other loved ones looking to provide for the child as well don't leave an inheritance outright to that child. A parent's third party supplemental needs trust can be structured to receive gifts from other relatives and love ones.

G. Finally, the accountant can play a vital role in undertaking a thorough review of their client's assets and ensuring that the child's inheritance is provided in the most tax efficient manner possible.

1. For example, the following assets and beneficiary designations should be reviewed to make sure they will not be paid (or given) directly to the special needs child:

a. IRA, 401(k) and other retirement benefits;

b. Life insurance (including employer provided life insurance) benefits;

c. Accidental death and travel insurance benefits provided through credit cards when a person purchases a plane ticket, etc. using that credit card;

d. Annuities;

e. Savings Bonds;

f. Any property not subject to the parent's Will or trust;

g. UGMA or UTMA accounts;

h. TOD, POD, ITF designations on accounts, savings bonds or securities;

i. Inheritances, gifts or bequests through another person's Will or trust not paid to a supplement needs trust;

j. Joint accounts;

k. Jointly owned property, including jointly owned real estate;

l. Final paychecks including sick pay and vacation pay;

m. Collectibles, antiques and family heirlooms of any consequential value; and

n. Personal injury or wrongful death proceeds payable to a parent's estate (in contrast to personal injury and wrongful death proceeds payable, by law, directly to the special needs child).

Clearly this is not an exhaustive list, but just a start.

2. Second, the accountant should take an active role with the client's financial planner to ensure that the proper assets are

being allocated to the child's trust. Life insurance (payable through a third party supplemental needs trust) may be one of the most cost effective (and least expensive) ways to ensure that the special needs child will receive an inheritance, especially when the parent's overall assets are limited. On the other hand, 401(k), IRA, and other types of retirement benefits, even if paid to a third party supplemental needs trust, may be an inefficient and (income) tax expensive method of providing an inheritance for the special needs child. A competent accountant working with the client and the client's financial advisor can be of great help and provide valuable assistance.

Never before has it been more important for a client to have a reliable team of advisors in place – accountant, attorney and financial planner - all coming together for the accomplishment of a common good.

H. Finally, when the special needs child becomes an adult, it is important to take recognition of two very significant issues:

1. Under the new federal HIPAA rules which went into effect in April 2003, medical personnel (such as doctors and hospitals) are not allowed to talk freely about a patient's medical condition and they can be fined or jailed (or lose their license) for dissemination of any private health information without the patient's consent. This applies to ALL patients over the age of eighteen (18) years, including patients with special needs.

    a. While the HIPAA privacy rules are well intentioned, this is a classic example of "good intentions, terrible results." The inability for a doctor or hospital to share important medical information with the special needs patient's parents or caregivers can have horrendous implications if he or she is unable to give informed consent and

knowingly participate in his or her own medical treatment.

b. If the adult special needs child lacks the ability to make informed medical or mental health decisions or to give consent to the release of confidential medical information, parents should consider these options:

i. If the special needs child is mentally competent, have an estate planning attorney prepare a durable medical power of attorney that includes HIPAA release information and names each parent as “personal representative” for purposes of legally being able to request and receive confidential medical information; or

ii. Obtain at least a partial guardianship over the special needs child for medical treatment purposes.

2. Secondly, if the adult special needs child is functioning in daily life and is mentally competent, he or she should also have an estate planning attorney prepare a General Durable Power of Attorney ("GDPOA") for financial purposes.

a. As with all children, once the special needs child attains the age of 18, the parent’s right to know, monitor, advocate and intercede in the special needs child’s affairs may be limited or prohibited absent the child’s consent, a court order (such as through a guardianship of the estate – conservatorship) or a GDPOA. A properly drafted GDPOA will permit the person named

as the attorney in fact to assist the special needs child in his or her financial affairs.

b. Additionally, a parent may become the "representative payee" of the special needs child's SSI, SSDI and Social Security benefits, thus avoiding a court appointed conservatorship. A representative payee is the Social Security Administration's equivalent of a financial power of attorney.

III. ASSISTING OUR ELDERLY AND DISABLED CLIENTS

Whether attorney, accountant or client, we are all on the aging continuum. It is not a matter of "us" and "them." To a certain extent, we are all at various stages of the aging process. Ever-increasing numbers of Americans are living longer. In 2000, 35 million Americans, 12.4% of the U.S. population (or one in every eight adults) were 65 or older. By 2030, that number will more than double to more than 71 million Americans being over age 65.

The fastest growing segments of the older population are among the very old. In 2000, 16.6 million Americans were 75 years of age or older. Although the grown in the older population slowed somewhat in the 1990s because relatively few babies were born in the Great Depression era, the most rapid increase is still expected between 2010 and 2030, when the post Great Depression era babies (i.e., the baby boom generation) begins to turn 65. In Michigan alone, in 1990 the population over the age of 60 numbered 1.5 million or 16.2% of the state's total population. In 2000, the U.S. census shows the population in Michigan over age 60 rising 5.7%. And the number of Michiganians age 85 or over in 2000 totals 142,000+, an increase of 33.33% over 1990 numbers.

And if that wasn't enough to grab your attention, at last count, General Motors had in excess of 150 retirees receiving pension benefits that were over the age of 100 years old.

A. What does all of this mean for us as attorneys and accountants (i.e., trusted advisors) to our clients? Aside from our traditional counsel on legal and tax planning matters to deal with the natural consequences of becoming old and possibly disabled, it means we need to rethink our own mortality, our ways of doing business, the succession plan we offer to our clients, the comfort we can offer our younger clients that we (or our companies) will still be there to take care of them when they get older, etc. Most importantly though may be the non-traditional services and advice we can offer our clients that really cement our roles as trusted advisor, confidant, and friend.

Taking a look at it another way:

1. It means that we must be vigil to all of the issues facing our aging clients (and their children). We know that the aging of Americans is already affecting health care needs and the changes will only be more pronounced as the baby boomers reach retirement age.

    a. Longer postretirement life expectancies mean that the U.S. will devote an increasing share of resources to these elders' needs, which include health care, long-term custodial care, and housing.

    b. In addition, the aging population is increasingly a predominantly female one. This adds even more complexities and planning opportunities as we advise our clients on planning for their golden years.

2. For our younger clients, we need to be cognizant of their needs in this "sandwiched generation" as they have been fondly termed. Middle aged professionals living life at a neck-breaking pace while raising young children, planning for college, and caring for 2 or 3 or 4 sets of elderly and/or disabled parents (think second and third marriages), face challenges that they haven't even thought about yet – challenges that can, however, be planned for in advance.

   a. We need to fully understand what resources and options are available to our clients, young and old, for medical needs, supplemental income, prescription coverage, long term care, in home care, nursing homes, etc.

      In addition to the traditional commercial resources such as long term care insurance policies, private pay and the like, there are public income and health programs available to elders and individuals with disabilities that are often overlooked or appear too confusing to deal with:

      i. Public income programs include:

         a. Social Security Retirement (Old Age Insurance Benefits);

         b. Supplemental Security Income (SSI); and

         c. Social Security Disability (SSDI).

      ii. Public health care programs include:

         a. Medicare; and

         b. Medicaid.

iii. Veteran's Benefits.

b. We need to identify those resources that we are going to call upon when the clients ask us the questions that we don't know the answers to:

gvc@maddinhauser.com

c. We need to help plant the seeds and find the tax advantages (when there are any) to helping clients plan for long term care costs, preserving assets for retirement, providing for continued health care coverage after retiring from the family business, or selling that lucrative practice.

i. What are the possibilities and limitations for carrying a retired/bought out parent from the family business as a "consultant" in order to continue providing health insurance benefits?

ii. When and under what circumstances can we continue those benefits for surviving spouses of the "consultant."

iii. What long term care or other premiums are deductible to the business and when does it make sense to do so?

iv. Are our clients being penny wise and pound foolish by chasing after coverage for minimal expenses while failing to plan for larger catastrophic events that could wipe out their entire portfolio and then some?

3. Then there is the whole practical side of having an aging clientele. When do we have to worry about competency (the client's, not our own)? Who, in fact, is the client? How do we coordinate with other professionals?

   a. Competency is defined by Black's Law Dictionary as "the mental ability to understand problems and make decisions." With the elderly, it is more acute and the decision may revolve around clients on medication, clients diagnosed with dementia, clients coping with closed-head injuries, or clients suffering from diseases like Parkinson's or Alzheimer's. By way of an issue spotting checklist of sorts, consider the following:

      i. Privately meet with the client.

      ii. Is the client oriented as to:

         a. Time, date and place;

         b. Current events (who is the President, etc.);

         c. Health status and care needs (what medications they are taking, current diagnoses, current care plan); and

         d. Decision making (emergencies, medical procedures, financial issues).

      iii. Look for indications of influence:

         a. Did the client come to your office alone?

         b. Is client favoring a caretaker or person in other close relationship over other family

members, or even excluding family members for a third party? Look for unusual dispositions of property.

iv. Family and Friends

a. Have the client identify these individuals, including approximate ages, city and state of residence.

b. Try to develop a family tree with the client.

v. Asset summary

a. Client should identify all assets, where located and approximate value.

b. Have client review and verify the asset summary.

b. Determining who actually your client is sounds quite rudimentary and typically it is. However, when dealing with an elderly client, especially a new client, the issue can be easily lost. For instance, it is often a son or daughter who may contact you about one or both of their parents, getting their tax situation in order, or more often than not, just bending your ear because they trust your judgment. Sometimes it may be a trusted friend or a distant relative. It may even be an existing client.

i. It is prudent for you to establish the client relationship as immediately as possible and to outline that fact in your retainer/engagement letter.

ii. Your client should understand that you expect to keep all of their information and conversations confidential, even from family and friends, unless and until you are specifically directed to share that information with others. It is best to get such instructions in writing or at least affirm the same in writing under these circumstances especially.

iii. If you are receiving payment for services (preparation of tax returns, meetings, advice, etc.) from someone other than the client, you should have a similar engagement letter to that individual outlining that they are taking on the financial responsibility of the services but that your confidentiality, loyalty and representation remains with the client, unless otherwise specifically directed to include that person in the loop.

iv. Conflicts should be avoided at all costs. When another client brings you the referral, especially when there is some relationship between them, and you sense trouble with other family members or individuals, you need to immediately ascertain what conflicts, if any, you may be faced with down the road and determine what ability you have to proceed.

c. Finally, coordinating with other professionals is or should be almost a daily occurrence if you plan on having a substantial clientele, elderly or otherwise. You need to coordinate with estate planning attorneys, financial planners, insurance agents, and more. Typically, it has

been this author's practice to see that the accountant is the one spearheading the team. There may be conflicts of interest with these other professionals, especially if they are frequent referral sources, but you must maintain the professionalism of always doing what is in the best interests of the client. Elderly and disabled clients especially, typically have a higher sense of trust in an advisor (again, typically their accountant), relying on them and the other professionals that they introduce to the equation. As such, you need to be certain that the professionals you choose to deal with and the decisions that they make, independent of you or otherwise, remain in the best interests of the client or you will be the one that the client, their family, and their estate ultimately blame.

COLI, CHOLI, EOLI, SOLI – HOLY MOLY, I NEED A STOLI!!

By: Robert D. Kaplow

I. LIFE INSURANCE – CURRENT PROBLEMS AND ISSUES

II. BASIC LIFE INSURANCE PRINCIPLES

A. Life Insurance Proceeds are received free of any income tax-§ 101 (a)(1).

B. Exception – transfer for value – If policy is sold, proceeds in excess of amount paid plus premiums paid is subject to income tax – ordinary income. § 101(a)(2).

C. Exception to the Exception – If transfer of policy is to one of the following, or a gift, then proceeds are income tax free – permitted transferees:

- A partner of the insured.
- A partnership in which the insured is a partner.
- A corporation in which the insured is a shareholder or officer.
- Note – exception does not apply to a transfer to a fellow shareholder!

D. Insurable Interest – Person owning the policy must have an insurable interest in the insured when the policy is issued.

1. Owner must have a reasonable expectation of benefit or advantage from the continued life of the insured – such as a child having an insurable interest in the life of a parent.

2. If insurer determines that no insurable interest existed, insurer not liable for the insurance proceeds – only the return of the premiums paid.

III. DEFINITIONS

BOLI – Bank owned life insurance.

CHOLI – Charity owned life insurance.

COLI – Corporate owned life insurance.

EOLI – Employer owned life insurance.

FLI – "Free" life insurance.

IOLI – Investor owned life insurance.

SOLI – Stranger owned life insurance.

IV. CHOLI – CHARITY OWNED LIFE INSURANCE

A. Traditional Structure.

1. Charity owns life insurance policy on a donor and is the beneficiary.

2. Donor contributes money to charity each year which can be used to pay life insurance premiums. Donor receives charitable deduction for gift.

3. Policy can be one owned by donor which is donated to charity – or new policy purchased by the charity.

4. Insurable interest – Michigan statute provides:

> "Notwithstanding any other section of this Act [the Insurance Code of 1956] an organization described in and qualified under §501(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C. 501, has an insurable interest in the life of an individual who gives written consent to the ownership or purchase of a policy on his or her life." MCLA §500.2212.

5. Charity can hold policy until death of insured, or cash in policy for cash surrender value (when appropriate).

6. Problem – what if donor refuses to make additional contributions to the charity?

B. Multiple Insureds.

1. Charities obtain life insurance policies on large pool of donors – "death pool."

2. Purpose – improve cash flow of the charity – as the donors die.

3. Insurable interest?

4. Obtain outside funding to pay the premiums?

5. Will IRS investigate this program?

C. Pension Protection Act.

1. The Pension Protection Act added Code Section 6050V which requires tax exempt organizations to file an information return when they acquire an interest in a life insurance policy that is funded and partly owned by private investors.

2. Similar to stranger owned life insurance – questioning insurable interest issues.

3. Applies to policies acquired after August 17, 2006.

4. Does not apply to policies wholly owned by the charity.

V. COLI AND EOLI – CORPORATE OWNED AND EMPLOYER OWNED LIFE INSURANCE

A. Background.

1. Many large publicly traded companies bought policies on the lives of thousands of employees – "Janitor insurance."

2. Purpose was to obtain source of cash flow in the future.

3. Litigation by families of the insured who died.

4. Insurable interest?

5. Deduction of interest paid to finance the policies.

6. Also applies to BOLI contracts.

B. Cases.

1. Wal Mart.

2. Dow Chemical.

3. Camelot Music.

C. Large scale COLI policy programs held to be invalid.

D. COLI Best Practices Act.

1. Part of Pension Protection Act of 2006 - § 101(j) of the Code.

2. Regulates "employer owned life insurance contracts."

3. Defined as:

i. A life insurance contract that is owned by a person engaged in a trade or business and under which such

person (or a related person) is directly or indirectly a beneficiary, and

ii. Covers the life of an individual who is an employee with respect to the trade or business of the policyholder on the date the contract is issued.

4. Proceeds from an employer owned life insurance contract are TAXABLE, to the extent the proceeds exceed the premiums paid.

5. However, proceeds will be tax free IF BEFORE the contract is issued, the employee:

a. Is notified in writing that the employer intends to insure the employee's life, and the maximum amount of the insurance;

b. Is notified in writing that the employer will be the beneficiary of the death benefits; and

c. Consents in writing to being insured.

6. The employee must have been either employed by the employer within the year ending on the date of death or must have been a director of the employer, a 5% owner of the business, or a highly compensated employee at the time the contract was issued.

7. See sample notice attached as Exhibit A.

8. Employer must file a return with the IRS each year regarding COLI policies. IRS has not yet instituted this requirement.

9. IRS Filing must state:

   a. Number of employees at end of year.

   b. Number of employees insured under COLI contracts at end of year.

   c. Total amount of insurance in force under the COLI contracts at the end of the year.

   d. Employer's name, address and TIN.

   e. Employer's type of business.

   f. That the employer has a valid consent for each insured employee.

   g. Number of insured employees for whom such consent was not obtained.

10. Rules apply to contacts issued after the date of enactment, August 17, 2006.

11. The employer can be an individual, corporation, partnership, limited liability company, etc.

12. New rules therefore apply to key man insurance and buy sell agreements.

13. The above rules apply to the extent that the proceeds are paid to the employer. Proceeds paid to another beneficiary, such as the employee's family, are still income tax free.

VI. SOLI, IOLI AND "FREE" LIFE INSURANCE

A. Newest internet program.

B. Scenario – third party loans premiums to elderly insured (age 75 or above) for substantial amount of life insurance ($5,000,000 or more). Interest accrues at 12-15 percent. Lender takes collateral assignment of policy for security. At end of two years, insured can pay back loan and interest and keep policy, or default on the non-recourse loan and lender takes over policy.

C. So insured gets insurance coverage at no cost for 2 years! Sounds good!

D. Problems – there are numerous problems with this –

1. Individual losing some of his insurability in case he needs other insurance.

2. Can be treated as split dollar agreement, generating income tax to the insured.

3. Biggest problem – lack of insurable interest – insurers looking at this – asking questions on the insurance policy – lenders trying to structure this to avoid the insurable interest problem.

4. Lender to hire "hit man" to collect proceeds of insurance more quickly?

5. Many insurance companies are refusing to sell these policies.

VII. VIATICAL SETTLEMENTS AND LIFE SETTLEMENTS

A. Viatical.

1. Popular in the 1980's when individuals diagnosed with AIDS or cancer wanted to sell their life insurance policies and use the proceeds for their family or for their treatment.

2. Market was created to sell the policy to third parties for more than the cash surrender value.

3. Generally applied to people who had a life expectancy of 3 years or less.

4. Amount received by investor is subject to income tax on amounts above the investment in the policy.

5. Problem for investors – medical science has allowed the insureds to live longer than originally expected.

6. Some insurance companies developed their own programs to allow individuals to get money from the policies.

B. Life Settlement.

1. Procedure by which owners of policies sell them to third parties for more than the cash value.

2. Can be useful where family no longer needs the insurance or needs more cash than can be obtained by surrendering the policy.

3. Numerous companies available to bid for the policy.

4. Life settlement best under the following circumstances:

Insured over age 70.
Insured has some health impairment.
Policy has low cash surrender value.

VIII. PENSION SUBTRUSTS

A. Viability of pension subtrusts was questionable.

1. Idea was to be able to exclude life insurance owned by the retirement plan from being included in the employee's estate.

2. Similar to irrevocable life insurance trust.

3. In a Technical Advice Memorandum issued on September 19, 2006, the IRS ruled that the pension subtrust is not valid.

4. The subtrust caused the defined benefit plan itself to be disqualified under several different pension rules, and the creation of the subtrust constituted a currently taxable distribution to the participant.

IX. FASB

A. The Financial Accounting Standards Board (FASB) has recently been examining the proper financial reporting of various life insurance programs.

B. See, for example, the following:

1. Emerging Issues Task Force (EITF) Issue No. 06-4: Accounting for Deferred Compensation and Postretirement Benefit Aspects of Endorsement Split-Dollar Life Insurance Arrangements.

2. EITF Issue No. 06-5: Accounting for Purchases of Life Insurance – determining the amount that could be realized in accordance with FASB Technical Bulletin No. 85-4.

3. EITF Issue No. 06-10: Accounting for Deferred Compensation and Postretirement Aspects of Collateral Assignment Split-Dollar Life Insurance Arrangements.

C. FASB has also issued an Invitation to Comment, an FASB Agenda Proposal: Accounting for Insurance Contracts by Insurers and Policyholders, including the IASB discussion paper, Preliminary Views on Insurance Contracts. The Board is seeking written comments on the proposal by November 16, 2007.

EXHIBIT A

Employer Owned Life Insurance Contract

Insured's Acknowledgement of Notice and Consent

I, [___insert full name of proposed insured____] understand that [insert full name of proposed policy owner employer,_____], the "Employer," intends to insure my life for a maximum face amount of $_____, and that such coverage may continue after I terminate my employment with Employer. I also understand that the Employer will be a beneficiary of all or part of the policy proceeds. I give consent to authorize and allow Employer the authority to purchase such life insurance on my life.

Information Regarding the Proposed Insured:

Name _____ Date of Birth _____

Home address _____

City _____ State _____ Zip Code _____

Business Phone Number _____

Signature of Proposed Insured _____

Date Signed _____

IRREVOCABLE TRUSTS

By: Geoffrey N. Taylor

I. THE BASICS

A. Components Common to All Irrevocable Trusts.

1. Agreement between grantor and trustee.

a. Must there be a written agreement?

b. When is the agreement effective?

2. Dispositive provisions.

a. Grantor has almost limitless choices as to manner in which trust assets will be held and distributed.

b. Grantor may have a special purpose for creating the trust beyond the general support and maintenance of the beneficiaries:

i. Education.

ii. Provide incentives for beneficiaries to be self-sufficient, such as wage-matching.

iii. "Extras" in life such as travel, arts, etc.

3. Irrevocability.

a. Trust assets will be included in the grantor's taxable estate if the grantor retains the right to amend or revoke the trust agreement.

b. However, significant flexibility can be built into the trust agreement as to the dispositive provisions and the

identity of the trustee, particularly when the grantor is married.

B. Types of Irrevocable Trusts.

1. Trusts where grantor retains an interest.

a. GRAT, QPRT, and other trusts that qualify for the exception from the rules of Chapter 14 of the Internal Revenue Code.

b. Risk with these types of trusts is that if the grantor dies during the term of the trust, the trust assets are included in the grantor's taxable estate at their date of death value.

c. Even if the grantor survives the trust term, the grantor's continued use of the residence after the term of a QPRT without paying rent will still result in the residence being included in the grantor's taxable estate.

2. Life insurance trusts.

a. ILIT is the owner and beneficiary of the policy on the grantor's life.

b. Preference is to have the trustee of the ILIT, apply for and purchase the policy on the grantor's life because if the grantor transfers an existing policy to the ILIT the policy proceeds will be included in the grantor's taxable estate if the grantor dies within three years after the transfer.

c. Is it fatal if the grantor pays the premiums directly rather than making cash contributions to the ILIT and having the trustee pay the premiums?

d. Excellent tool to provide liquidity to an estate to pay estate taxes.

i. How can the policy proceeds be used to pay estate taxes without having the proceeds included in the grantor's taxable estate?

ii. What happens if the beneficiaries of the ILIT and the grantor's revocable trust are different?

3. Minors' trusts.

a. If the requirements are met, contributions to the trust qualify for annual exclusion even though beneficiary does not have a Crummey withdrawal right.

b. Very inflexible – remaining assets must be distributed to the beneficiary, or at least available for withdrawal by the beneficiary, when the beneficiary reaches age 21.

c. Is it possible to prevent a beneficiary of an existing minor's trust to receive substantial liquid assets upon the beneficiary reaching age 21?

II. GIFT, ESTATE, AND GENERATION SKIPPING TRANSFER TAXATION

A. Annual Gift Tax Exclusion.

1. $12,000 per year adjusted for inflation.

2. Married taxpayers can agree to "split" gifts and give up to $24,000 even if all of the gifted property comes solely from the property of one spouse.

B. Annual Exclusion for Present Interest Gifts.

1. Present interest means the donee/beneficiary must have the immediate right to enjoyment of the property gifted or the income therefrom.

2. Gifts to trusts that a beneficiary would not receive until some time in the future are not gifts of a present interest and do not qualify for the annual gift tax exclusion.

C. Crummey Notices.

1. Crummey notices and withdrawal rights are used to give beneficiaries the requisite present interest.

a. Each time a contribution to the trust is made, the beneficiary is given a right to withdraw a portion of the amount contributed.

b. The trust agreement should require the trustee to notify each beneficiary promptly in writing of (i) the date and amount of the contribution to the trust, (ii) the beneficiary's right to withdraw a portion of the amount transferred, and (iii) the consequences of the failure to exercise the withdrawal right.

c. The beneficiary is normally provided 30 days after receiving the written notice from the trustee to exercise the beneficiary's withdrawal right.

d. Because the beneficiary can take the money out, the beneficiary has the right to immediate enjoyment of the property and therefore the annual gift tax exclusion is available.

e. Obviously, the grantor intends that none of these withdrawal rights will be exercised.

2. Can a beneficiary waive the right to receive Crummey notices or receive a notice of "scheduled" contributions?

3. What if the trust contains only illiquid assets, such as a term life insurance policy?

4. Withdrawal right are typically subject to an annual maximum.

a. For example, a beneficiary can withdraw only up to the amount of the annual gift tax exclusion (which makes sense because the withdrawal right is provided only to enable the contributions to qualify for the annual gift tax exclusion, and therefore allowing the beneficiary to withdraw more than that amount would serve no purpose).

b. Are there potential income tax problems if the beneficiary fails to exercise the withdrawal right, such that the withdrawal right should be limited further and provide for a "hanging" power?

D. Inclusion of Retained Interests for Federal Estate Tax Purposes.

1. Transfers with a retained right of enjoyment or right to designate who will enjoy the transferred property.

a. Grantor retains enjoyment of the property - The grantor retains for his life or for any period which does not end before his death:

i. The right to use the property transferred; or

ii. The right to the income from the property transferred.

b. Grantor retains the right to designate who enjoys the property - The grantor retains for his life or for any period which does not end before his death, either alone or in conjunction with any other person, the right to designation those persons who will have:

i. The right to use the property transferred; or

ii. The right to the income from the property transferred.

c. This problem can arise even where it is not apparent that the grantor has retained these rights.

i. The trustee has sole discretion to determine the amount and recipients of distributions and the grantor has the right to replace the trustee with a related or subordinate party.

ii. The trust agreement is drafted properly but there is an "implied agreement" among the grantor, the trustee, and the beneficiaries that the grantor will be entitled to retain impermissible rights/control.

2. Transfers with a right of revocation.

3. These retentions are subject to the three-year rule under Section 2035 of the Internal Revenue Code, meaning the property will be included in the grantor's taxable estate if the grantor held one of these impermissible "strings" at any time within three years prior to the grantor's death.

E. Generation Skipping Transfer Tax.

1. Requirements for the annual exclusion from generation skipping transfer tax for transfers made to trusts are not the same as the requirements for the annual exclusion from gift tax for transfers made to trusts.

2. Lifetime generation skipping transfer tax should be allocated to trusts that are designed as "dynasty" type trusts.

III. INCOME TAXATION

A. Overview of Income Taxation of Irrevocable Trusts.

1. Distributable net income determines the extent of deductions available to the trust for distributions to the trust beneficiaries and the amount of income and the characterization of that income to the trust beneficiaries.

2. Highly compressed income tax brackets.

i. For 2007, highest marginal rate of 35% applies to income in excess of approximately $10,500.

B. Grantor Trusts.

1. If a trust is a "grantor" trust (sometimes referred to as a "defective" grantor trust), all items of income and deduction for

the trust are deemed to be owned by the grantor and are reported on the grantor's individual income tax return.

2. Grantor's retention of certain administrative powers causes the trust to be a grantor trust.

   a. Power to deal with trust assets for less than adequate and full consideration.

   b. Power to borrow trust assets without adequate interest or security.

   c. Power to borrow from the assets of the trust without repayment of all amounts due before the beginning of the next taxable year.

   d. Administrative powers exercisable in a non-fiduciary capacity without the approval or consent of the trustee:

      i. Power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control.

      ii. Power to control the investment of the trust assets either by directing or vetoing proposed investments to the extent that trust assets consist of stocks of corporations in which the holdings of the grantor and the trust are significant in terms of voting control.

      iii. Power to reacquire trust principal by substituting other property of an equivalent value.

e. Trust income may be used for the benefit of the grantor or the grantor's spouse:

i. Distribute trust income to the grantor or the grantor's spouse.

ii. Use trust income to pay premiums on policies of insurance on the life of the grantor or the grantor's spouse.

C. Is a Grantor Trust Desirable?

1. From a total tax liability perspective, a grantor trust is desirable if all income is required to be distributed and the trust beneficiaries are all in income tax brackets that are lower than the grantor's income tax bracket.

2. By paying the income taxes on the trust, the grantor effectively makes additional gifts to the trust beneficiaries without incurring gift tax.

3. Allows income-tax-free transactions between the trust and the grantor and the transfer of existing life insurance policies for consideration without violating the transfer for value rules.

4. Is it possible to allow the grantor to release a power that causes grantor trust status?

5. Is it possible to allow the trustee to make a distribution to the grantor to reimburse the grantor for the grantor's payment of the taxes on the trust's income (e.g., if the grantor falls on hard economic times)?

VI. TRUSTEE CONSIDERATIONS IN IRREVOCABLE TRUSTS

A. General Guidelines for Trust Distributions.

1. The more discretion is given, the more flexibility the trustee has to take changed circumstances into account but the more likely the grantor's intent could be frustrated.

2. Can distribution standards or conditions be invalidated as against public policy?

3. Should the trustee be required to take a beneficiary's other assets and sources of support into account prior to making a distribution?

B. Choosing a Trustee.

1. Clients often select family members as trustees, which can be good because the trustee is then more likely to have a personal relationship with the trust beneficiaries (and will therefore be more aware of the beneficiaries' needs, abilities, etc.), but which can be negative because the family member may not be able to analyze needs objectively as a result of that personal relationship.

2. The expected duration of the trust needs to be considered when selecting the identity and age of the trustee and successor trustees (especially for a "dynasty" type trust).

3. A professional trustee, such as a bank or trust company, provides stability (because, as the bank will tell you, it will "always be there") and has back office support to facilitate the investment of assets and the preparation of accountings, tax returns and statements, etc. However, trustee fees must also be considered.

4. Can the grantor of a trust ever be the trustee without causing inclusion of the trust assets in the grantor's estate?

5. Can a "trustee appointer" provide flexibility to the grantor and the beneficiaries?

VII. HOW "REVOCABLE" IS IRREVOCABLE

A. Judicial reformation.

1. Frustration of grantor's intent.

2. Trustee acting improperly.

3. Is there an estate inclusion issue if the grantor brings the reformation petition and/or otherwise participates in the process?

B. Trustee power to transfer assets to another trust.

C. Termination by consent of trustee and trust beneficiaries.

D. Special power of appointment in the hands of the grantor's spouse.

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

ATTORNEY BIOGRAPHIES

Michael W. Maddin is the President and one of the Managing Directors of the firm. Mr. Maddin has been practicing law for over 40 years, primarily in the areas of real estate, corporate and business law, estate planning and probate. He is a member of the Southfield, Oakland, Michigan and American Bar Associations and the American Judicature Society. He was also a member of the Real Property Law Section Council of the State Bar of Michigan and for many years served as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. Mr. Maddin has been a speaker at numerous ICSC, ICLE, National Business Institute and State Bar of Michigan Real Property Law Section Seminars, and has authored numerous real estate related articles in professional journals. He has been repeatedly selected by his peers for inclusion in "The Best Lawyers in America," "Chambers USA" and others, and has been President or Chairman of numerous civic, charitable or fraternal organizations and major groups.

Mark R. Hauser is a Managing Director of the firm who specializes in the areas of real estate, partnerships, finance, corporate and business law, taxation and estate planning. A 1964 graduate of the University of Michigan, he obtained his Juris Doctor *magna cum laude* from Wayne State University in 1967 where he served as an Editor of the Wayne Law Review. A member of the Real Estate, Business Law & Taxation Sections of the State Bar of Michigan, Mr. Hauser has lectured at numerous professional seminars for attorneys and accountants on real estate and tax-related issues. He has been continuously selected by his peers to be listed in the "Best Lawyers in America," is the immediate past President of the United Jewish Foundation of Metropolitan Detroit, and is Trustee of United Jewish Communities having recently completed his term as National Vice President and member of the Executive Committee.

Richard J. Maddin is a firm shareholder who has practiced law for over 36 years. He is a graduate of Michigan State University and University of Detroit-Mercy Law School. His areas of practice include general business, commercial and residential real estate construction, corporate, land use planning, zoning and probate law. Mr. Maddin is an active litigator, representing both plaintiffs and defendants in the above-described areas of practice, including also the areas of real estate construction, zoning, real property tax appeals alternative dispute resolution (ADR) practice, and is a certified mediator. He is a member of the real estate, litigation, and ADR sections of the State Bar of Michigan, the Southfield and Oakland Bar Associations, and the American Judicature Society.

Richard F. Roth is a shareholder in the firm. He attended the Wharton School at the University of Pennsylvania where he received a Bachelor of Science in Economics. He graduated from the University of Michigan Law School, *cum laude*, in 1972. Mr. Roth has a business practice, with a concentration on corporate law, real estate, estate planning, and taxation, and he currently heads the firm's Alternative Dispute Resolution Department. With regard to the real estate side of his practice, Mr. Roth has handled legal work for the development, construction, and management of numerous shopping centers, including construction loans and end mortgages, as well as all of the leasing work. He has also handled the acquisition and sale of apartment complexes, shopping centers, industrial buildings, office buildings and unimproved real estate. He has also handled workouts for distressed properties. On the corporate side, he has facilitated mergers, acquisitions and financing for his corporate clients. He has handled many corporate and individual tax matters and Michigan sales, use and single business tax issues. He co-authored the statute which exempts from Michigan sales tax the purchase of hi-tech computers used in computer integrated manufacturing and CAD-CAM. Mr. Roth has lectured at numerous professional seminars. He is currently a member of the Board of Trustees of The Jewish Fund, which manages and distributes over $60 million for charitable purposes. He is also a member of the Board of Trustees of the Karmanos Cancer Institute. Mr. Roth previously served as President of the Michigan Jewish Sports Foundation and the Sinai Health Care Foundation. He was previously a member of the Board of Trustees of Sinai Hospital, Huron Valley-Sinai Hospital, the Anti-Defamation League, Temple Beth Jacob, and Knollwood Country Club.

Harvey R. Heller is the shareholder in charge of our Insurance Coverage and Defense Practice Group. He is an honors graduate of Michigan State University, as well as a *cum laude* graduate of Detroit College of Law. In addition to being an active litigator, Mr. Heller is a member of the Michigan State Bar Foundation Fellows and the Michigan Defense Trial Council. On a national level, Mr. Heller is a member of the American Bar Association Standing Committee on Lawyers' Professional Liability, the Defense Research Institute, as well as the International Association of Defense Counsel. He has authored articles on the subject of professional liability and has been a featured speaker at professional liability seminars. Mr. Heller has continually been selected by his peers to be listed in the "Best Lawyers in America."

Michael S. Leib is a shareholder in the firm. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, creditor's rights law, including bankruptcy law and employment law. He is a graduate of Kalamazoo College, the University of Montana and Wayne State University Law School. He is a member of the State Bar of Michigan and is admitted to practice before several courts, including the United States District Court, Eastern District of Michigan and Western District of Michigan, 6th Circuit Court of Appeals and United States Supreme Court. Mr. Leib is also a member of the State Bar of Michigan Judicial Qualification Committee and past Chairperson of the State Bar of Michigan Character and Fitness Committee.

Robert D. Kaplow is a shareholder in the firm. His practice is concentrated in estate planning and personal and corporate income tax planning. He is a graduate of Cornell University, receiving his law degree from the University of Michigan. He received a Masters in Tax Law from Wayne State University. He is a member of the State Bar of Michigan (Taxation and Probate and Estate Planning Sections), Oakland County Bar Association (Taxation Committee) and American Bar Association (Taxation, Real Property, Probate and Trust Law Sections). Mr. Kaplow is a frequent lecturer before professional groups pertaining to tax and corporate matters. He is listed in Who's Who in American Law and Who's Who of Emerging Leaders in America. Mr. Kaplow is a member of the Financial and Estate Planning Council of Metropolitan Detroit, and is also active in various charitable and Bar related activities.

William E. Sigler is a shareholder in the firm whose practice involves business law, real estate, internet and computer law, taxation, pension and employee benefits, and probate and estate planning. He graduated from Michigan State University and the University of Detroit-Mercy School of Law where he was an editor of the Law Review. He has lectured frequently on the topics of estate planning and employee benefits and taught federal income taxation at Lawrence Technological University. He has authored several articles, including "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," Michigan Bar Journal, Volume 71, No. 10 (October 1992), "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!," Michigan Bar Journal, Volume 72, No. 10 (October 1993), "Qualifying for the Annual GST Tax Exclusion," LACHES, No. 387 (April 1998), and Innovative Retirement Plan Designs for the Small-Business Employer," LACHES, No. 450 (July 2003). Mr. Sigler is a member of the Financial and Estate Planning Council of Metropolitan Detroit and is active in charitable and Bar related activities. He has served as Chairperson of the Oakland County Bar Association Employee Benefits Committee, and is a member of the Board of the Association for Corporate Growth.

Stewart C. W. Weiner is a shareholder of the firm who has concentrated his practice for over 23 years in business, construction, real estate and securities matters with a particular focus on acquisitions, commercial transactions and resolution of business, construction, partnership and shareholder disputes. He frequently counsels clients on construction contracts, employment, securities and computer related matters. He serves as an arbitrator for the National Association of Securities Dealers, as a private arbitrator and is a member of the American Bar Association (Construction Forum, Business Law and Computer Law sections), State Bar of Michigan, Real Property Section, and Oakland County Bar Association.

Charles M. Lax is a shareholder of the firm who has practiced primarily in the areas of employee benefits, taxation, corporate law and mergers and acquisitions. He has authored numerous articles appearing in legal and public accounting journals. Mr. Lax has lectured extensively on qualified retirement plans and other tax topics before the Michigan Institute of Continuing Legal Education, Michigan Association of Certified Public Accountants and other professional groups. He presently serves

as a member of the IRS Great Lakes TE/GE Council, and as Co-Chair of the IRS-ASPA Great Lakes Benefits Conference for 2008. Mr. Lax has previously served as a member of the Advisory Committee on Tax Exempt and Government Entities Division of the IRS, the IRS Employee Plans, Ad Hoc Advisory Group for the Assistant Commissioner of Internal Revenue Service, EP, the IRS Regional Council Bar Advisory Group, Central Region, the Advisory Group to IRS Northeast Region's Chief of EP/EO Division and the Chairman of the State Bar of Michigan – Section of Taxation/Employee Benefits Committee. He is a Fellow of the American College of Employee Benefits Counsel and recognized by his peers by inclusion in the Best Lawyers in America. Mr. Lax has extensive experience in representing clients in tax controversy matters before the Internal Revenue Service and Tax Court of the United States.

Stuart M. Bordman is a shareholder of the firm who is an attorney and a certified public accountant. He has extensive experience in general corporate matters including business purchases and sales, franchise matters, health care law and representation before the Internal Revenue Service. He is a member of the Anti-Trust Franchising and Trade Regulation Section and the State Bar of Michigan. Mr. Bordman was the 1997-98 Chairman of the Oakland County Bar Association Tax Committee. Mr. Bordman is a frequent lecturer before the Michigan Association of Certified Public Accountants and a regular contributor to LACHES, the Oakland County Bar Association publication. He has written on use tax, corporate finance under the Michigan Business Corporation Act and single business tax. He is a graduate of the Northwestern University School of Law.

Steven D. Sallen is a shareholder and member of the firm's Executive Management Committee. Mr. Sallen received his undergraduate degree from the University of Michigan and his law degree, *cum laude,* from the University of Detroit-Mercy School of Law where he served as Case and Comment Editor of the University of Detroit Law Review. Mr. Sallen concentrates his practice in the areas of real estate law, environmental law and corporate law, and his clients include real estate developers, general contractors, commercial real estate brokers and environmental consulting firms. Mr. Sallen publishes Real e-State, a Quarterly Electronic Newsletter for Real Estate Professionals. He resides in Orchard Lake, Michigan with is wife and three children.

John E. Jacobs is a shareholder of the firm who specializes in commercial transactions, real estate, litigation, and consumer law, including residential mortgage lending. He also engages in lobbying activities in state government. He is a member of the Michigan Mortgage Lenders Association and Michigan Mortgage Brokers Association. Mr. Jacobs has lectured at professional seminars on real estate, consumer law and residential mortgage lending. He also taught Consumer Credit Regulation at Wayne State University Law School. He has been the President of three nonprofit organizations.

Michael B. Perlman is a shareholder of the firm, who specializes in commercial transactions in the areas of real estate, partnerships, finance, with a sub-specialty in affordable housing using various government programs, including low income housing tax credits, tax-exempt bonds and FHA housing finance programs. He is a member of the Michigan Housing Council and the ABA Section on affordable housing and community development. He obtained his Juris Doctor from Wayne State University in 1972 and was the chancellor of Moot Court. Mr. Perlman has been very active in the development and financing of several facilities for the elderly in the Jewish community, having acted as chairman of the building committees and attorney for the developments. He is a past President of Jewish Apartments & Services and was the initial Chairman of the Commission on Jewish Elder Care Services. Mr. Perlman was named again in the Thirteenth Edition of "The Best Lawyers in America – 2007".

Julie Chenot Mayer is a shareholder of the firm who received her undergraduate degree from the University of Michigan. She obtained her Juris Doctor, *cum laude*, from the Detroit College of Law in 1986 where she was a member of the Law Review. Ms. Mayer concentrates her practice in the area of litigation with an emphasis on insurance coverage and professional liability defense. Ms. Mayer is a member of the State Bar of Michigan and the American Bar Association.

Ronald A. Sollish is a shareholder in the firm who specializes in the areas of employment, real estate, partnership, finance, corporate and business law. Ron is a frequent speaker on legal topics and has spoken to such groups as the Michigan Chamber of Commerce, Michigan Association of Certified Public Accountants, and American Society for Industrial Security. He is licensed to practice law in both Michigan and Illinois. He graduated from the University of Detroit-Mercy School of Law where he was the managing editor of the Law Review. Ron received his undergraduate degree from the University of Michigan. Ron is a member of the State Bar of Michigan, Illinois Bar Association, American Bar Association and Oakland County Bar Association.

Lowell D. Salesin is a shareholder in the firm and a member of the firm's Executive Committee. He has been practicing with the firm since graduation from the George Washington University National Law Center in 1993, where he graduated with high honors and served as an Associate Editor of the George Washington Law Review. He received his undergraduate degree from Indiana University in 1990. Mr. Salesin is a member of the Real Property and Business Law Sections of the State Bar of Michigan and is a member of the American and Oakland County Bar Associations. He concentrates his practice in the areas of real estate development and finance, business planning, lending, commercial leasing, partnership and corporate law. Mr. Salesin's experience includes the acquisition, financing, construction, development, and leasing of all types of commercial real estate. He represents both owners and lenders in a wide variety of real estate transactions.

Mark H. Fink is a shareholder in the firm who graduated from Wayne State University, College of Business Administration and the Detroit College of Law with highest honors and is admitted to the practice of law in the states of Michigan and Arizona. Mr. Fink's practice areas include civil appeals and litigation, with concentration on commercial and real estate and insurance coverage matters. Mr. Fink is the author of several articles, which have appeared in publications such as the Michigan Bar Journal and the Detroit College of Law Review. He is a professional affiliate with the Oakland County Bar Association and Defense Research Institute, and a member of the Appellate Section of the State Bar of Michigan.

Steven M. Wolock is a shareholder in the firm who received his law degree from the University of Michigan Law School in 1985 and obtained a Bachelor's of Science in Economics from the University of California at Santa Cruz in 1977. Mr. Wolock specializes in general commercial litigation and professional liability litigation and has extensive experience in labor and employment law. Mr. Wolock is a member of the Labor and Employment and Negligence Sections of the State Bar of Michigan, American Bar Association and Oakland County Bar Association. He also serves as a panelist on the State Bar of Michigan Attorney Discipline Board. Mr. Wolock has been selected by his peer for inclusion in the "Best Lawyer in America" and in "Michigan Super Lawyers."

David E. Hart is a shareholder of the firm and a member of the firm's Executive Committee. He earned his Bachelor degree in Philosophy and Political Science from the University of Michigan in 1988 and received his Juris Doctor Degree, cum laude, from the Detroit College of Law in 1991. While at the Detroit College of Law, Mr. Hart was a senior member of the Detroit College of Law Review and he participated in several national Moot Court competitions. He concentrates his practice in the areas of title insurance, business disputes, real estate litigation, creditor's rights law, including bankruptcy, and general civil litigation. He lectures frequently on real estate and title insurance. Mr. Hart is licensed to practice in Michigan and Ohio. He is a member of the State Bar of Michigan, the Oakland County and Federal Bar Associations, and The Michigan Land Title Association.

George A. Contis is a shareholder of the firm. He earned his Bachelor of Arts degree in Economics from the University of Pittsburgh in 1982 and received his Juris Doctor degree from the University of Detroit School of Law in 1985. While at the University of Detroit, Mr. Contis participated in several local and national Moot Court competitions and was selected for membership to the Order of Barristers. He concentrates his practice in the areas of real estate development and finance, lending, transactional law, commercial leasing and business planning. His publications include: Tax Aspects of Divorce in Michigan, Michigan Tax Law Journal, 1984; Bring a Weapon to School, Get Expelled 370 LACHES 8, November 1996; and Year End Planning Considerations for 1031 Exchanges, Bar Briefs, December 2000.

Martin S. Frenkel is a shareholder of the firm. He graduated from the University of Michigan in 1991 and Wayne State University Law School in 1994. He is admitted to practice in Michigan and in the Federal District Courts for both the Eastern and Western Districts of Michigan. Mr. Frenkel was formerly employed by the Michigan Department of Attorney General and has been with Maddin Hauser since 1997 where he specializes in the areas of commercial and real estate litigation including construction, mortgage and title-related disputes. Mr. Frenkel is a member of the Real Property Section of the State Bar of Michigan and is also an affiliate member of the Associated General Contractors of America. Mr. Frenkel authored the article *"Navigating the Waters of Real Estate Arbitration"* published in Commercial, Inc. Magazine, discussing the dynamics of the real estate arbitration process. He is one of the firm's representatives to the National Mortgage Bankers Association and has authored the article "*Seven Common Mistakes in Selecting/Managing Outside Counsel in the Mortgage Industry"* which was published as a three part series in the MBA News Link.

Gary M. Remer is a shareholder of the firm. He received his law degree from the Detroit College of Law at Michigan State University where he graduated *summa cum laude* in May 1997 and obtained a Bachelor of Arts in Accounting from Michigan State University in 1990. Mr. Remer was a Revenue Agent with the Internal Revenue Service, Employee Plans Division, from 1992 through 1996. He concentrates his practice in the areas of employee benefits, corporate law, taxation and estate planning. Mr. Remer has lectured extensively on qualified retirement plans and other tax topics. He is an adjunct professor at Walsh College. Mr. Remer co-authored the The Insider's Guide to IRS Plan Audits. He is a Certified Public Accountant and Chair of the MACPA Employee Benefits Committee.

George V. Cassar, Jr. is a shareholder in the firm who concentrates his practice in the areas of estate and business succession planning, taxation and probate. Mr. Cassar graduated from the University of Michigan with honors and received his law degree with honors from Drake University Law School. He also received his Masters in Tax Law from Wayne State University Law School. He is a member of the State Bar of Michigan, the State Bar of Iowa, the American Bar Association and the Federal Bar Association. Mr. Cassar frequently speaks before professional organizations, as well as to their clients regarding estate planning, tax and probate matters. Mr. Cassar has also been accepted as a Life Member of the National Registry of *Who's Who in American Law* and is active in several charitable and other community organizations.

David M. Saperstein is a shareholder of the firm. He graduated from the University of Michigan Law School in 1993, and University of California, Berkeley with High Honors in 1989. He clerked for the late Michigan Court of Appeals Chief Judge Pro Tem Myron H. Wahls. Mr. Saperstein's publications include: "Why There are No Common-Law Exceptions to a Municipality's Governmental Immunity: A Municipal Perspective," Public Corporation Law Quarterly, Spring 2001, No. 9, p.1, and "The Abominable Snowman, the Easter Bunny, and The Intentional Tort Exception to Governmental Immunity: Why Sudul v Hamtramack was Wrongly Decided," 16

Michigan Defense Quarterly, No. 2, p. 7 (2000). Mr. Saperstein is admitted to practice law in Michigan, Ohio and California (inactive). He concentrates his practice in the areas of professional liability defense, primarily defending lawyers, accountants, stockbrokers, real estate agents, and insurance agents. Mr. Saperstein serves on the Board of Trustees for the Jewish Community Council and Congregation Shaary Zedek.

Richard M. Mitchell earned his Juris Doctor degree from Indiana University Law School, Bloomington, in 1991, where he served on the Indiana University Law Review. He earned his Bachelor of Arts degree from the University of Michigan in 1988. Mr. Mitchell focuses his practice on complex insurance coverage disputes and civil litigation. He has authored publications and spoken in these areas. He is also a member of the Society of Chartered Property Casualty Underwriters (CPCU), a designation granted by the American Institute for CPCU in Malvern, PA, upon the successful completion of a series of national examinations relating to insurance and business related topics. Mr. Mitchell is also on the Board of Directors of the Greater Detroit CPCU Chapter.

L. Jeffrey Zauberman is a shareholder in the firm. He has been a practicing attorney since 1984 in both the Province of Ontario and Michigan. He received his Bachelor of Laws from Osgoode Hall Law School in Toronto, Canada and his J.D. from the University of Detroit School of Law. Mr. Zauberman is a member of the Real Property Section of the State Bar of Michigan. He concentrates his practice in the areas of real estate development and finance, asset based secured financing and leasing of commercial real estate. Mr. Zauberman is also licensed in the Province of Ontario and able to advise upon matters of Ontario law.

John P. Gonway is a shareholder in the firm and specializes in secured financing, real estate, mergers and acquisitions and commercial transactions. He received his Juris Doctor, *cum laude*, from the Wayne State University School in 1996. Prior to attending law school, he received his undergraduate degree from James Madison College at Michigan State University. Mr. Gonway is a member of the Real Property, Business Law, and Taxation Sections of the State Bar of Michigan and is a member of the Oakland Bar Association. Mr. Gonway's expertise includes the acquisition, financing, construction, development and leasing of all types of commercial real estate, as well as the representation of clients in all aspects of corporate law, commercial law, mergers and acquisitions and commercial transactions.

Kathleen H. Klaus joined the firm's Defense Practice and Insurance Coverage Group in August 2004. Ms. Klaus graduated from the University of Michigan Law School in 1992 and received a Bachelor of Arts degree, with honors, from the University of Iowa in 1987. Prior to joining the firm, Ms. Klaus practiced commercial litigation and bankruptcy in Chicago, Illinois.

Kasturi Bagchi is a firm shareholder and received a Bachelor of Arts in Political Science with honors from UCLA in 1992 and subsequently was awarded her Juris Doctor degree with honors from Tulane University School of Law in 1995. While at law school, Ms. Bagchi was a managing editor of the Tulane University School of Law Environmental Journal where she published an article entitled "Application of the Rule of Lenity: The Specter of the Midnight Dumper Returns." 8 TUL.ENVTL. L.J. 265 (1995). Upon her graduation from Tulane, she clerked for the Honorable William Albrecht and the Honorable Harry K. Seybolt of the Superior Court of New Jersey, Warren County. She concentrates her practice in the firm's commercial lending and real estate groups. Ms. Bagchi is admitted to the Bars of New Jersey, Pennsylvania (inactive), California and Michigan.

Danielle M. Spehar attended Central Michigan University and earned a Bachelor of Science in Business Administration, *summa cum laude*. She also earned a Master's Degree in Business Administration from Wayne State University. She acquired her Juris Doctor, *magna cum laude*, from University of Detroit-Mercy School of Law in 1998. Ms. Spehar concentrates her practice in the areas of real estate transactions and corporate and business law. She is a member of the State Bar of Michigan and the American Bar Association.

Lori E. Talsky joined the firm as an associate after graduating *summa cum laude* from the Detroit College of Law at Michigan State University in January, 1996. Ms. Talsky has an extensive working knowledge of the Canadian legal system. She is a member of the State Bar of Michigan and the American Bar Association.

Sheryl K. Silberstein joined the firm in September, 2000. She is a 1986 graduate of the Detroit College of Law and earned her Bachelor of Arts Degree from the University of Michigan. Her concentration of law is in the area of real estate and related matters. Ms. Silberstein has over twenty years experience in the real estate industry in the corporate sector. She is a member of the State Bar of Michigan.

Geoffrey N. Taylor graduated *magna cum laude* from the University of Pittsburgh Law School in 1997. He obtained a Bachelor of Business Administration with distinction from the University of Michigan in 1992. Mr. Taylor concentrates his practice in the areas of estate planning, probate, and tax law.

Brian A. Nettleingham earned his Bachelor of Arts in Pre-Law from Cedarville University in 1993, where he also earned minors in Religion and Philosophy. Brian spent two years studying philosophy at Miami University's Graduate School, before earning his Juris Doctorate from the University of Notre Dame School of Law. While at Notre Dame, Brian was a member of the Appellate Moot Court Team and worked extensively with clients of the law school's Legal Aid and Immigration Law Clinics. He also won the law school's Annual Client Counseling Competition. After graduating from Notre Dame, Mr. Nettleingham clerked for the Honorable Joel P. Hoekstra of the Michigan Court of Appeals. He currently practices in the firm's Commercial Litigation Department and is admitted to the State Bar of Michigan and the Western and Eastern District Federal Courts for Michigan.

Jennifer M. Grieco is a member of the firm's Defense Practice and Insurance Coverage Group. Ms. Grieco received her Bachelor of the Arts degree from the University of Toledo in 1993 and her Juris Doctor cum laude from the University of Toledo College of Law in 1997. While in law school, Ms. Grieco was a Note and Comment Editor for the University of Toledo Law Review and a Member of The Order of the Coif. Ms. Grieco was elected in 2003 to the Board of Directors of the Oakland County Bar Association. She was recently re-elected to a three-year term on the OCBA Board in 2006. She is a Past President of the Women's Bar Association (Oakland Region of the Women's Lawyers Association of Oakland County), having previously served as the organization's Historian and President-Elect. Ms. Grieco has extensive trial experience in the areas of professional liability and commercial disputes. In 2004, Ms. Grieco was recognized by Michigan Lawyers Weekly when she was named one of Michigan's "Up and Coming Lawyers."

Michelle C. Harrell is a member of the firm's Litigation Practice Group. She received her Bachelor of Science degree in accounting, *summa cum laude*, from the University of Detroit in 1990 and her Juris Doctor, *cum laude*, from Wayne State University Law School in 1993. While at Wayne State, Ms. Harrell participated in moot court competitions and received three American Jurisprudence Awards. Michelle is a Barrister in the American Inn of Court, Oakland County Chapter, a Mentor in the Oakland County Bar Association Mentor Program and an Oakland County Circuit Court Case Evaluator (Complex Commercial Neutral). Ms. Harrell concentrates her practice in the areas of complex commercial, real estate and family law litigation.

Brandon Buck received his Bachelor of Science degree with honors from Wayne State University in 1998 and his Juris Doctor degree with honors from Wayne State University Law School in 2001. During law school Mr. Buck received a Board of Governors Scholarship for Academic Excellence and placed first in the law school's Moot Court brief writing competition. Mr. Buck is admitted to practice law in Michigan and California and concentrates his practice in the areas of business disputes, real estate, commercial and general litigation and creditor's rights law.

Rebecca M. Turner is an associate in the firm and concentrates her practice in the areas of corporate and business law and real estate transactions. Ms. Turner earned her Bachelor of Business Administration in Accounting from Western Michigan University Haworth College of Business in 1998 and earned her Juris Doctor, *cum laude*, from Syracuse University College of Law in 2001. While at Syracuse, Ms. Turner participated in a National Tax Moot Court Competition in which her team placed first in Oral Arguments and second with their Brief. Ms. Turner is a member of the American Bar Association, State Bar of Michigan and Oakland County Bar Association. Additionally, Ms. Turner is the Immediate Past President of the Women's Bar Association, Oakland Region of the Women Lawyers Association of Michigan, serving in the past as President, Vice President, Treasurer and Recording Secretary. Michigan Lawyers Weekly selected Ms. Turner as one of five 2006 Up and Coming Lawyers.

Alexander Stotland earned his Bachelor's degree from Hofstra University in 1994, with a dual major of international business and marketing. Mr. Stotland worked in the banking sector, before earning his Juris Doctor degree from Hofstra University School of Law in 1998. While in law school, Mr. Stotland participated in the prestigious Philip C. Jessup International Law Moot Court Competition. Mr. Stotland practiced law in New York City for approximately seven years, prior to joining the firm. Mr. Stotland is admitted to practice before the federal and state courts of Michigan and New York, is fluent in the Russian language and concentrates his practice in the areas of business disputes, employment law, commercial and civil litigation.

Michael K. Hauser is a CPA and a summa cum laude graduate of Wayne State Law School. He received his B.A. magna cum laude from Dartmouth College. His practice focuses on partnership and corporate tax, federal taxation of real estate transactions, gift and estate tax, and general business matters. He is an Adjunct Professor in the Cooley Law School LLM program, where he teaches Taxation of Real Estate. He is the author of "Avoiding Dealer Status to Obtain Capital Gains" and "Dealer Status and the Condominium Conversion," (both published in the Journal of Real Estate Taxation). He formerly worked in a mid-sized CPA firm in suburban Detroit servicing small to mid-sized businesses. In law school, he served as a Note & Comment Editor for the Wayne Law Review, for which he authored "The Tax Treatment of Intangibles in Acquisitions of Residential Rental Real Estate." He also served as an intern with the IRS Chief Counsel's Large and Mid-Sized Business Division, where he researched international tax and tax shelter issues.

Lavinia S. Biasell received her Bachelor of Arts degree with High Honors from Michigan State University in 2000, and received her Juris Doctor degree, *magna cum laude*, from Michigan State University-Detroit College of Law in 2003. While in law school, Ms. Biasell was a member of American Inns of Court and earned the Carolyn Stell Award for outstanding achievements and public service from the Women Lawyers Association of Mid-Michigan. Ms. Biasell was admitted to practice by the State Bar of Michigan in 2003. She is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan. Ms. Biasell concentrates her practice in the areas of commercial and real estate litigation. In addition, Ms. Biasell is the Women's Bar Association's representative to the Women Lawyer's Association of Michigan.

Stuart M. Dorf received his Bachelor of Arts in American History and Jewish Studies, graduating Magna Cum Laude, Phi Beta Kappa, as well as receiving the distinction of Tulane Senior Scholar and received the Ephraim Lizitsky Jewish Scholar Award from Tulane University in 1998. Mr. Dorf subsequently was awarded his Juris Doctor degree from the Chicago-Kent College of Law in 2001. While at law school, Mr. Dorf was selected to sit on the Dean's Advisory Panel for Electronic Voting Reformation and was a member of the corporate law society. He concentrates his practice in the firm's Lending and Finance Group. Mr. Dorf is admitted to the Bars of Illinois and Michigan.

Randall M. Blau is a member of the firm's litigation practice group. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, title insurance, employment law, and general civil litigation. Mr. Blau received his Bachelor of Arts from Kalamazoo College in 1993 and his Juris Doctor degree from University of Detroit Mercy in 1996. Mr. Blau has extensive litigation and trial experience in courts throughout Michigan and Ohio. He is the past Chairperson of the Oakland County Medical-Legal Committee and was recognized in Who's Who in the legal profession in 2004. Mr. Blau is also a member of the State Bar of Michigan, the American Bar Association, the Michigan Trial Lawyers Association and the Oakland County Bar Association.

James M. Reid, IV received a Bachelor of Arts in Political Science-Prelaw with honors from Michigan State University in 2002 and his Juris Doctor degree with honors from Wayne State University Law School in 2005. While at law school, Mr. Reid was an associate editor of the Wayne Law Review. Mr. Reid is admitted to practice before the federal and state courts of Michigan and concentrates his practice in the areas of corporate law and transactions, real estate, defense practice, and commercial and civil litigation.

Lindsey A. Jerbek received her Bachelor of Arts degree, magna cum laude, from Albion College in 2001. She earned her Juris Doctor degree, cum laude, from the University of Detroit Mercy School of Law in 2006. While attending law school, Ms. Jerabek interned for Justice Marilyn Kelly of the Michigan Supreme Court and for the Honorable Denise Page Hood of the United States District Court for the Eastern District of Michigan. Ms. Jerabek also served as Title Editor of the University of Detroit Mercy Law Review. In addition, Ms. Biasell is the Women's Bar Association's President-Elect, and has served in the past as Vice-President and Representative to the Women Lawyers Association of Michigan.

Diana E. McBroom is an associate in our Defense Practice and Insurance Coverage Group. She earned her Bachelor of Arts degree in Political Science from Wayne State University and was, in 2006, awarded her Juris Doctor degree from Wayne. While at law school, Diana participated in the Civil Rights Litigation Clinic where she co-authored a brief and argued before the Sixth Circuit Court of Appeals and participated in two federal trials. In 2005, she was honored by the U.S. District Court, Eastern District of Michigan, for her pro-bono work. Ms. McBroom was admitted to practice by the State Bar of Michigan in 2006. From 1993-2003, prior to attending law school, Ms. McBroom served as Michigan Chief of Staff and Campaign Finance Director for Congressman Sander Levin, 12th District. Ms. McBroom is a member of the Womens Bar Association of Oakland County, the Womens Lawyers Association of Michigan, Wayne County Chapter, the State Bar of Michigan and the American Bar Association.

Mark E. Plaza received his Bachelor of Arts degree with High Distinction from the University of Michigan in 1999, and received his Juris Doctor degree, Cum Laude, from Wayne State University Law School in 2003. While in law school, Mr. Plaza was a Senior Articles Editor for the Wayne Law Review and a member of Phi Alpha Delta Law Fraternity. Mr. Plaza was admitted to practice by the State Bar of Michigan in 2003. He is also admitted to the Federal District Court for the Eastern District of Michigan. Mr. Plaza concentrates his practice in the areas of commercial and real estate litigation.

Of Counsel

Marc S. Wise is of counsel to the firm. Mr. Wise concentrates his practice in the areas of employee benefits, business planning and taxation. Mr. Wise has extensive experience in the design, financing, implementation and correction of pension and welfare benefit plans for large multi-state employers as well as smaller local employers. As part of his practice, he represents clients in Internal Revenue Service, U.S. Department of Labor and Pension Benefit Guarantee Corporation audits and investigations. He earned his Bachelor of Science degree from Western Michigan University with dual majors in Accounting and Economics. He was awarded his Juris Doctorate degree from Ohio Northern University and a Master of Laws degree in taxation from Wayne State University. Mr. Wise is admitted to practice before the state and federal courts in Michigan, the United States Court of Appeals for the Sixth Circuit and the United States Tax Court.

NOTES

NOTES