TWENTY-FOURTH
ANNUAL TAX SYMPOSIUM

November 14, 2015
SHERATON DETROIT NOVI
NOVI, MICHIGAN

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

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November 14, 2015

Dear Tax Symposium Participant:

Welcome to our Twenty-Fourth Annual Tax Symposium. We are pleased that you have joined us this morning.

This year's program emphasizes the breadth of tax issues that may be encountered by tax practitioners. Such diverse topics as the Affordable Care Act, like-kind exchanges, taxation of trusts, tax considerations in a pre-nuptial agreement and divorce, state property taxes and qualified retirement plan failures are dealt with by Maddin Hauser every day. We will be delighted to assist you and your client with any of these and other tax related matters.

We also would like to inform you that we will be continuing our Breakfast Bites for Tax Practitioners program. Workshops will be offered at our office during the upcoming year which will provide you with opportunities to consider in depth some of the topics which are being covered during the Symposium. These programs will also qualify for continuing education credits for Certified Public Accountants. Details for Breakfast Bites will be provided at the Symposium.

While our annual Tax Symposium features many of our tax and corporate members of our 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 the program and welcome your comments and suggestions.

Very truly yours,

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TWENTY-FOURTH ANNUAL TAX SYMPOSIUM PROGRAM

**** Seminar Qualifies for Four CPE Credits ****

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YOU'RE THE TRUSTEE – NOW WHAT?

By: Robert D. Kaplow, Esq.

I. TRUSTEE DUTIES – FIDUCIARY OBLIGATION

A. Based on trust terms, Michigan statutes and common law

B. Michigan Trust Code – effective April 1, 2010

MCL 700.7801

The trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with [the Michigan Trust Code].

C. Duty to administer the trust

D. Duty of care and performance

E. Duty of loyalty

1. Administer the trust in the best interests of the beneficiaries and in an impartial manner.

F. Duty to keep records and furnish accounts

1. Generally, beneficiaries are entitled to receive an annual accounting of trust activity.

G. Duty to take control of trust property

1. Take reasonable steps to protect and preserve trust property.

H. Duty to enforce claims on behalf of the trust and defend claims against the trust

I. Duty to pay expenses and taxes of the trust

J. Duty to keep trust property separate from trustee's property

K. Duty to make trust property productive

1. Unless trust specifically provides otherwise

2. Prudent investor rule

L. Duty to follow trust terms regarding distributions to beneficiaries

1. Required distributions

2. Permissive distributions

3. Health, education, maintenance and support (HEMS)

M. Duty to furnish information

Under Michigan law, a beneficiary has the right to a copy of the terms of the trust that describe or affect the beneficiary's interest and to relevant information about the trust property. The beneficiaries need to be notified of this right.

N. Duty to exercise reasonable care and skill as the trustee

1. Exercise care and skill that a person of ordinary prudence would use in dealing with his own property – prudent investor rule.

2. As an accountant, you will be required to use your professional skills when serving as trustee.

II. APPLICATION TO REAL LIFE SITUATION

A. Family – Bob Brady – Husband/Father – successful architect, real estate developer and member of numerous partnerships and limited liability companies, age 70.

B. Tammy Brady – second wife – mother of son with Bob (Harvey). Harvey age 22.

C. Michelle Brady – daughter of Bob, age 45, spendthrift, divorced twice, three children

D. Mickey Brady – son of Bob, age 40. Also an architect and real estate developer. Works with Bob in the businesses. Two children, married.

Bob dies suddenly in 2014, but had created numerous trusts and had made gifts of interests in the partnerships and LLCs to his children and grandchildren. Leaves $5,000,000 to wife in QTIP trust. Will and trusts named Mickey as the Personal Representative and Successor Trustee.

Overall estate - $15,000,000.

Trusts provide for distributions over 5 years to Harvey and Mickey – Michelle's share is held in trust for her lifetime.

Personal property is divided equally among the three children, in the discretion of the Trustee.

Michelle feels Bob slighted her by naming Mickey as PR and Trustee when she is the oldest child. Also upset that her distribution provisions are different.

III. INITIAL STEPS

A. Gather assets and protect assets.

B. File will with probate court.

C. Obtain Employee Identification Number.

D. Open bank account for estate/trust.

E. Notify beneficiaries of trust terms.

F. Publish Notice to Creditors and notify known creditors.

G. Arrange for appraisals of assets.

H. Hire attorney at Maddin Hauser to represent the Trustee.

I. Determine if probating of assets is required in Michigan or any other state.

J. Get copies of all gift tax returns and last three years of income tax returns.

K. Prepare inventory of trust assets.

L. Notify banks, stock brokers, etc. that you are the Successor Trustee and provide your contact information and the new EIN.

M. File claims for life insurance proceeds, other benefits such as retirement plans, IRAs.

IV. ONGOING ADMINISTRATION

A. Determine what assets need to be sold and which assets are to be retained – Determine how to invest the assets.

B. Determine how federal estate tax will be paid.

1. Will IRC § 6166 be applicable to defer portion of estate tax over 14 years?

2. Deferral may be available if closely held interests are more than 35% of adjusted gross estate.

3. Must be active businesses, not passive assets.

4. Must pay any undistributed net income to IRS.

C. Allocate personal property among three beneficiaries – lottery, Trustee decision, individual choices? Conflict of interest with Mickey choosing distributions.

D. Prepare for litigation from Michelle. Was Bob of sound mind? Was there undue influence by Mickey? Are there incontestability provisions in the documents?

E. Notify beneficiaries of ability to disclaim.

F. Elect to combine estate and trust under IRC § 645 to adopt fiscal year for the trust, until estate is closed.

G. Make any required distributions to the trust beneficiaries. What are the trust provisions regarding distributions?

H. Have regular and open communication with the beneficiaries – be transparent.

I. Prepare and file estate tax return.

J. Pay reasonable compensation to yourself as Trustee.

V. INVESTING ASSETS

A. Investing for both income beneficiaries and remaindermen.

B. April 1, 2000 – Estates and Protected Individuals Code (EPIC) replaced the "prudent man rule" with the "prudent investor rule".

C. EPIC adopts modern portfolio theory. Look at the portfolio as a whole rather than each individual investment.

D. Trustee must exercise reasonable care, skill and caution. MCL 700.1502.

E. The prudent investor rule requires consideration of the following circumstances. MCL 700.1503(2)

1. General economic conditions.

2. The possible effect of inflation or deflation.

3. The expected tax consequences of an investment decision or strategy.

4. The role that each investment or course of action plays within the overall portfolio, which may include financial assets, interests in closely-held enterprises, tangible and intangible personal property, and real property.

5. The expected total return from income and the appreciation of capital.

6. Other resources of the beneficiaries.

7. The need for liquidity, regularity of income, and preservation or appreciation of capital.

8. An asset's special relationship or special value, if any, to the purposes of the fiduciary estate or to one or more of the beneficiaries.

F. The prudent investor rule is a rule which can be modified by the provisions of the trust.

G. Uniform Principal and Income Act (UPIA) (MCL 555.501, *et. seq.*) determines how receipts and expenditures of the trust are credited and charged between income and principal.

H. UPIA also allows the trustee to adjust between income and principal and use a total return approach to balance the needs of the income beneficiaries and the remainder beneficiaries.

I. Prepare an overall investment policy and share it with the beneficiaries.

J. Hire investment professionals.

VI. DISTRIBUTIONS TO BENEFICIARIES

A. One of the fundamental duties of the Trustee is to make distributions of trust assets to creditors of the trust and to the beneficiaries of the trust.

B. Trustee has to follow the terms of the trust.

C. Mandatory Distributions – "The Trustee shall pay the net income of the Trust to the beneficiary at least quarterly."

D. Discretionary Distributions

1. Support trust – "The Trustee shall pay to the beneficiary such amount as the Trustee determines is necessary for the beneficiary's support."

2. Many support trusts adopt an ascertainable standard of paying for the health, education, maintenance and support of the beneficiary.

3. Pure discretionary trust – "The Trustee may pay to the beneficiary such amount as the Trustee deems appropriate."

4. In a pure discretionary trust, the Trustee has complete authority, as long as the Trustee acts in good faith and with reasonable judgment.

5. Even where distributions are required, such as at a particular age, some trusts give the Trustee the power to withhold the distribution where it is in the best interests of the beneficiary. Examples include withholding where the beneficiary is having medical or drug problems.

6. The Trustee can generally take into account the beneficiary's other assets in deciding whether to make a distribution.

VII. INFORMATION TO BENEFICIARIES

A. Beneficiaries entitled to documents:

1. Within 63 days of trust becoming irrevocable, must provide the following to qualified trust beneficiaries:

a. Notification of existence of the trust.

b. Identity of the grantor.

c. The court in which the trust is registered, if any.

d. Notification of beneficiary's right to receive a copy of the trust's terms that describe or affect the beneficiary's interest. MCL 700.7814(2)(c).

B. Annual accountings.

1. Unless the trust provides otherwise, the Trustee must provide the following accounting requirements – MCL 700.7814(3):

a. Report of the trust property, liabilities, receipts and disbursements, including the source and amount of the Trustee's compensation, a listing of the trust property, and if feasible, their respective fair market values.

b. The Trustee shall keep the qualified trust beneficiaries reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests.

c. Unless unreasonable under the circumstances, a Trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust. MCL 700.7814(1).

d. The above provisions regarding annual reports can be modified by the terms of the trust.

C. Qualified trust beneficiary – MCL 700.7103(g):

1. Distributee or permissible distribute of trust income or principal.

2. Beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees listed above terminated without causing the trust to terminate.

3. Beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated.

D. Protection for Trustee.

1. Generally, the beneficiary is barred from bringing an action against the Trustee later than one year after receiving an annual report IF the report adequately discloses the existence of a potential claim for breach of trust AND the Trustee has informed the beneficiary of the time allowed for bringing an action. MCL 700.7905(1)(a).

2. Report adequately discloses the existence of a potential claim if it provides sufficient information so that the beneficiary knows of the potential claim or should have inquired into the potential claim's existence. MCL 700.7905(2).

3. One commentator has suggested that following the Uniform Fiduciary Accounting Principles of Accounting Study #19: National Fiduciary Accounting Standards (May 1984) should be adequate to provide protection to the Trustee.

4. If the Trustee does not provide adequate reports, a beneficiary can bring an action against the trustee up to five years following the first to occur:

   a. Removal, resignation or death of the Trustee,

   b. Termination of the beneficiary's interest in the trust, or

   c. Termination of the trust. MCL 700.7905(3).

E. Annual accountings should allocate income, expenses, disbursements, etc. between income and principal.

VIII. WINDING UP THE TRUST

A. Most trusts (other than dynasty trusts which continue for many generations) come to an end at some point.

B. Termination of the trust may be caused by:

1. Explicit terms of the trust specifying an end date.

2. All beneficiaries having received their full distribution of trust assets under the terms of the trust.

3. Trust terminating because all beneficiaries have died and no further beneficiaries are named.

4. Trust has terminated because it exceeded the time limit of a trust under the rule against perpetuities.

5. Trust has merged with another trust.

6. Trust assets have fallen below $74,000. This amount is adjusted each year for inflation. MCL 700.7414.

C. Steps to be taken upon termination.

1. File final tax returns.

2. Determine final beneficiaries and their share of assets after deducting final expenses and taxes.

3. Prepare distribution plan and forward to beneficiaries. A trust beneficiary has only 28 days after the proposed distribution plan was sent in order to object to the proposed plan. See the requirements of MCL 700.7821(1).

4. Liquidate remaining assets.

5. Distribute the assets in kind or the proceeds from the sale of the assets.

6. Prepare final trustee accounting and distribute to beneficiaries.

7. Obtain court approval for final accounting (when appropriate).

PRENUPTIAL AGREEMENTS
TAX AND NON-TAX CONSIDERATIONS

By: Stuart M. Bordman

I. NON TAX ISSUES IN THE EVENT OF DIVORCE

A. Payment to former spouse.

1. Amount.

2. Lump sum.

3. Payment over time.

a. Security for payment.

i. Life insurance.

ii. Mortgage on real estate.

iii. Security interest in assets.

iv. Pledge of stock or membership interest.

B. Continuation of Health Care Coverage.

C. The terms may be a function of the length of the marriage. The longer the marriage, the larger the payment. Consideration of a sunset provision after a specified number of years.

II. FINANCIAL STATEMENT OF EACH SPOUSE

A. Each spouse must fully disclose his/her assets and liabilities to the other. Each spouse must attach a personal financial statement to the pre-nuptial agreement. Tax returns should be shared.

B. Supported by objective evidence (brokerage statements, appraisals, etc.).

C. Difficult assets to value.

III. DEDUCTION OF SPOUSAL SUPPORT FOR INCOME TAX PURPOSES:

A. A payment is spousal support, deductible to the payor and includible in the payee spouse's gross income, when:

1. The payment is made in cash.

2. The payment is received by a spouse under a divorce decree or written separation instrument.

3. If the spouses are divorced or legally separated, they reside in separate households when payment is made.

4. The payments to a third party on behalf of the payee spouse are evidenced by a timely executed writing.

5. The payor spouse's liability to make the payment does not continue for any period after the payee spouse's death.

6. The payor and payee (if married) do not file a joint return; and

7. The divorce or separation instrument does not designate non-spousal support treatment.

IV. IRC SECTION 1041--TRANSFERS OF PROPERTY BETWEEN SPOUSES OR INCIDENT TO DIVORCE

A. Section 1041 provides that no gain or loss is recognized on a transfer of property from an individual to a spouse or former spouse if the transfer is incident to a divorce.

B. Subject to certain exceptions, a transfer pursuant to Section 1041 is treated as a gift for income tax purposes and the transferee's basis in the transferred asset is the transferor's adjusted basis before the transfer.

C. The transferee's holding period includes the holding period of the transferor.

V. NON TAX ISSUES IN THE EVENT OF DEATH

A. Cash.

B. Power to continue living in principal residence or vacation home.

1. For how long?

2. Who pays taxes, maintenance and insurance?

C. Continuation of Health Insurance.

VI. TAX ISSUES UPON DEATH OF THE OBLIGOR SPOUSE

A. While married: all assets are included in the decedent's estate but assets transferred to the spouse qualify for the unlimited marital deduction.

B. After dissolution of marriage: The amount due the former spouse is a "claim" and will be deducted from the gross estate.

VII. DEDUCTION OF HOUSING COSTS

A. Property taxes – deductible by the owner of the marital home.

B. If one spouse pays property taxes on behalf of the other spouse or a former spouse, the payments may be deductible as spousal support.

VIII. QUALIFIED RESIDENCE INTEREST

Deductibility is unclear in the situation where spouse A owns the home and is making the mortgage payments while spouse B resides in the home under the decree or settlement.

IX. TIMING AND PREPARATION OF THE PRENUPTIAL AGREEMENT - - WELL IN ADVANCE OF THE MARRAIGE

WHAT YOU NEED TO KNOW ABOUT LIKE-KIND EXCHANGES

By: Alexander G. Domenicucci

I. BASIC REQUIREMENTS

A. Section 1031. Section 1031 of the Internal Revenue Code (the "Code") is an exception to the general rule that a taxpayer recognizes gain (or loss) on the sale, exchange or other disposition of property. Code Section 1031 provides that no gain (or loss) is recognized on the exchange of property held for productive use in a trade or business or for investment, for property of like kind that is also held for either purpose.

B. Qualified property. The property being exchanged (the "relinquished property") and the property being received (the "replacement property") must be held either for productive use in a trade or business or for investment.

1. Property held for productive use in a trade or business can be exchanged for property held for investment and vice-versa.

2. The use of the relinquished property by the buyer is irrelevant.

3. The following types of property are specifically excluded by the statute from being qualified property:

   a. Stock in trade or other property held primarily for sale (i.e., dealer property);

   b. Stock, bonds, and notes;

   c. Securities and other evidence of indebtedness;

d. Interests in a partnership (unless the partnership elects out of partnership classification under Code Section 761(a));

e. Certificates of trust or beneficial interests, and

f. Choses in action (for example, a lawsuit).

C. Like kind. The relinquished property and the replacement property must be of like kind to one another.

1. "Like kind" refers to the nature or character of the property and not to its grade or quality.

2. The fact that any real estate in question is improved or unimproved is not material as that relates to the grade or quality of the property and not to its kind or class.

3. The question of whether property is treated as real property is generally controlled by state law.

4. A lease of 30 years or more is of like kind to a fee interest in real estate. Renewal options under a lease are taken into account in determining whether a lease is of a term of 30 years or more.

5. Real estate subject to a long-term lease is treated as real property and can be exchanged for other real estate in a tax-free exchange.

6. A lease interest that is carved out from a fee interest in real estate will not be treated as property that is of like kind to real estate. For example, if the owner of a fee interest in real estate exchanges a 30-year lease in the property for a fee interest in other real estate, the exchange will be fully taxable with the

exchanging taxpayer (the "Exchanger") being treated as receiving prepaid rent with respect to the lease.

7. A tenant-in-common ("TIC") interest in real estate is of like kind to a fee interest in other real estate so long as the TIC interest is not considered to be a partnership interest for tax purposes. The IRS has issued guidance as to when a TIC interest will be respected as such for purposes of a like-kind exchange. See Revenue Procedure 2002-22.

8. Depreciable tangible personal business property can be exchanged for like-kind property. Property is deemed to be of like kind if it is in the same product class or general asset class.

D. Exchange. There must be an exchange of qualified property for other qualified property.

1. A sale immediately followed by a separate purchase will not qualify as a tax-free exchange.

2. The same taxpayer that initiates the exchange must complete the exchange. No change in the identity of the Exchanger can occur during the exchange.

a. A partnership selling relinquished property with its partners purchasing separate replacement properties will not qualify as a tax-free exchange.

b. If, during an exchange, a corporation or partnership merges into another entity in a taxable transaction, the acquiring entity will not be able to complete the exchange.

c. If an individual dies after selling relinquished property, his estate can complete the exchange by purchasing the replacement property.

d. The conversion of a general partnership into a limited partnership or vice-versa, or the conversion of a general or limited partnership into an LLC or vice-versa, during an exchange, will not disqualify the exchange if the post-conversion entity is regarded as a continuation of the pre-conversion entity for tax purposes.

e. The replacement property can be acquired by a revocable living trust. A revocable living trust is a grantor trust that is disregarded for federal income tax purposes.

f. The replacement property can be acquired by an LLC of which the Exchanger is the sole member. An LLC with only a single member is disregarded and not considered to be a separate entity for tax purposes (unless an election has been made to classify the LLC as a C or S corporation).

E. Boot. Boot is the receipt of property which is either property (i) that is not qualified or (ii) not of like kind.

1. The receipt of boot by the Exchanger will not disqualify an exchange for tax-free treatment.

a. Boot will, however, be taxed to the Exchanger to the extent of the gain realized on the relinquished property.

b. Gain realized with respect to a relinquished property is the fair market value of the property less its adjusted basis.

2. Boot includes:

a. Cash;

b. Nonqualified property such as stocks or partnership/LLC interests;

c. Relief from indebtedness;

d. Property not of like kind to the relinquished property such as the receipt of personal property in exchange for real estate; and

e. Property acquired by the Exchanger other than for use in his trade or business or for investment.

II. TYPES OF LIKE-KIND EXCHANGES

A. Simultaneous exchange. A simultaneous exchange is a like-kind exchange in which two parties simultaneously exchange properties of like kind with one another.

1. Simultaneous exchanges are uncommon because it is extremely rare that two parties have property of equal value that the other party is interested in acquiring.

2. If the properties in a simultaneous exchange are of unequal value, there will be boot recognized by one of the parties to the extent such party receives money from the other party to equalize the value given in the exchange.

B. Deferred (forward) exchange. A deferred exchange is a like-kind exchange where the Exchanger transfers the relinquished property to a qualified intermediary ("QI") and, within 180 days, receives the replacement property.

1. Identification period. In a deferred exchange, the replacement property must be properly identified within a 45-day identification period.

a. The identification period begins on the day the Exchanger transfers the relinquished property and ends on the 45th day thereafter.

b. If the Exchanger transfer more than one relinquished property in a single exchange transaction, the 45-day identification period begins on the date the first property is transferred.

c. If the replacement property is not properly identified within the 45-day identification period, the entire exchange will be taxable.

d. The replacement property must be identified in a written document signed by the Exchanger. The document must be delivered to another party involved in the exchange (either the QI, seller, escrow agent or title company) before the end of the identification period.

e. The Exchanger must unambiguously describe the replacement property. For example, by its legal description, a street address, or the name of a particular building.

f. The identification of the replacement property must satisfy one of the following requirements:

i. The Exchanger may identify three properties without regard to the fair market values of the properties.

ii. The Exchanger may identify any number of properties if the aggregate fair market value of the properties does not exceed 200% of the fair market value of the relinquished property.

iii. The Exchanger may identify any number of properties if, during the exchange period, the Exchanger actually receives identified replacement property with a fair market value equal to at least 95% of the aggregate fair market value of all identified replacement property.

g. The exchange will be disqualified if the replacement property received by the Exchanger is different from the property identified by the Exchanger.

2. Exchange period. The replacement property must be acquired by the Exchanger within a period of time not to exceed 180 days.

a. The exchange period begins the date on which the Exchanger transfers the relinquished property and ends on the earlier of the 180th day thereafter or the due date (including extensions) of the Exchanger's tax return.

b. The exchange period commences on the date title to the relinquished property is transferred, not the date on which the property was placed under contract for sale.

C. Reverse exchange. A reverse exchange is a like-kind exchange in which the replacement property is acquired before the relinquished property is sold by the Exchanger.

1. In a reverse exchange, either the relinquished property or the replacement property will be parked with an intermediary until the relinquished property can be sold.

2. A safe harbor for structuring a reverse exchange is set forth in Revenue Procedure 2000-37. If the six requirements of the safe harbor are satisfied, the IRS will not challenge the characterization of property as relinquished property or replacement property in a tax-free exchange.

a. The property must be owned by an "exchange accommodation titleholder" ("EAT") who is not the Exchanger or a disqualified person (which is generally a person related to the Exchanger). The EAT must hold a deed to the parked property or be a purchaser under a real estate contract. The EAT must be a taxpaying entity or, if the EAT is a partnership or S corporation, having 90% or more of its equity interests owned by one or more taxpaying entities.

b. The Exchanger must have a bona fide intent that the property held by the EAT will be used either as relinquished property or replacement property in a tax-free exchange.

c. The EAT and the Exchanger must enter into a written agreement (no later than 5 business days after the parked property is transferred to the EAT) providing that the EAT is holding the property for the benefit of the Exchanger in order to facilitate an exchange under Code Section 1031 and Revenue Procedure 2000-37. The agreement must provide that the EAT will be treated as the owner of the parked property for federal income tax purposes and that the parties will report the transaction in a manner consistent with the agreement.

d. Within 45 days after the EAT acquires title to the parked replacement property, the relinquished property must be identified.

e. Within 180 days after the EAT acquires title to the parked property, the property must be transferred to the Exchanger as replacement property or to a buyer as relinquished property in a tax-free exchange.

f. The combined period that the EAT holds any parked property (either relinquished property or replacement property) cannot exceed 180 days.

3. The safe harbor also permits the use of various arrangements, such as loans, guarantees, leases, puts and calls, to structure the reverse exchange, regardless of whether such arrangements include arms'-length terms.

D. Improvement (build-to-suit) exchange. An improvement exchange is a like-kind exchange in which the QI improves the replacement property before it is transferred to the Exchanger.

1. The QI acquires the replacement property and constructs improvements on the property during the exchange period.

2. An improvement exchange allows the Exchanger to use proceeds from the sale of the relinquished property to build or repair the replacement property.

3. The improvements or repairs must be completed within the exchange period. Improvements or repairs made after the exchange period will not be counted towards the exchange.

III. COMMON PITFALLS

A. Related-party exchanges. An exchange between related parties will be taxable if within 2 years following the exchange either (i) the related party disposes of the relinquished property or (ii) the Exchanger disposes of the replacement property.

1. Exceptions to the related-party rules are:

a. A disposition within the 2-year period following the death of the Exchanger or the related party.

b. A disposition within the 2-year period resulting from a condemnation or threat of condemnation.

c. A disposition that did not have as one of its principal purposes the avoidance of federal income taxes.

2. A related party is a person having a relationship to the Exchanger described in Code Section 267(b) or Code Section 707(b). Related parties include:

   a. Siblings, spouses, ancestors, and lineal descendants;

   b. Two partnerships in which the same persons own more than 50% of the capital or profits interests;

   c. A partnership and a person owning more than 50% of the capital or profits interests in such partnership; and

   d. A corporation and a partnership if the same persons own more than 50% in value of the outstanding stock of the corporation and more than 50% of the capital or profits interests in the partnership.

3. An exchange in which the seller of the replacement property is a related party is likely to be disqualified, unless the related-party seller also conducts its own exchange. The IRS generally views this type of exchange as a simultaneous exchange between the Exchanger and the related-party seller, with the related-party seller immediately disposing of the acquired property in violation of the 2-year holding period requirement.

B. Liabilities encumbering relinquished property. An Exchanger is treated as receiving boot to the extent liabilities on the relinquished property are more than the liabilities on the replacement property.

1. Exchangers often make the mistake of believing that there will be no boot as long as they use the entire net proceeds from the relinquished property (after satisfaction of any mortgage) towards the replacement property.

2. While there must be as much equity in the replacement property as in the relinquished property, there must be at least the same amount of debt on the replacement property.

C. Held-for requirement. As indicated above, the relinquished property and replacement property must be held either for productive use in a trade or business or for investment.

1. If the relinquished property was held for only a short period of time before an exchange, the Exchanger may be viewed as not having held the property for the requisite purpose.

2. If the replacement property is held for only a short period of time by the Exchanger before a subsequent disposition of the replacement property, the Exchanger may be viewed as not having held the replacement property for the requisite purpose.

D. Dealer property. If the replacement property is vacant land and, shortly after the exchange, the Exchanger subdivides the land for sale of individual lots, the replacement property will likely not be considered to have been held for the requisite purpose.

E. Actual or constructive receipt of sale proceeds. The Exchanger is prohibited from being in actual or constructive receipt of the proceeds from the sale of the relinquished property, or having the ability to pledge, borrow or otherwise obtain the benefits of the sale proceeds during the exchange period.

1. The Exchanger may receive a portion of the sale proceeds directly from the buyer of the relinquished property without disqualifying the exchange. The receipt of cash from the buyer is treated as taxable boot.

2. If the Exchanger actually or constructively receives any portion of the sale proceeds deposited with the QI, the exchange may be disqualified with the entire transaction becoming taxable.

ROUNDUP OF RECENT TAX DEVELOPMENTS

By: William E. Sigler

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I. FEDERAL

A. Inflation Adjustments. For tax year 2015, Revenue Procedure 2014-61 provides details about annual inflation adjustments for more than 40 tax provisions, including the tax rate schedules, and other tax changes. Among them are the following:

1. Rate Bracket Amounts. For 2015, bracket adjustments are made for all brackets: 10%, 15%, 25%, 28%, 33%, 35% and 39.6%. The top 39.6% tax bracket, for example, will start at $464,850 for married joint filers (up from $457,600); $439,000 for heads of household (up from $432,200); $413,200 for unmarried filers (up from $406,750); and $232,425 for married separate filers (up from $228,800).

2. Personal Exemptions. Personal and dependency exemptions will increase from $3,950 in 2014 to $4,000 for 2015.

3. Standard Deductions. Standard deductions will increase for 2015 to $12,600 for married joint filers (up from $12,400 for 2014) and $6,300 for single filers and married separate filers (up from $6,200 for 2014). For heads of household, the standard deduction will be $9,250 (up from $9,100 for 2014).

4. Limitation on Itemized Deductions. For 2015, the amount of itemized deductions that can be claimed will begin to phase out for certain taxpayers whose income exceeds $309,900 (married joint filers); $284,050 (heads of household); $258,250 (single filers); or $154,950 (married separate filers).

5. Kiddie Tax. For purposes of determining whether a child's unearned income is taxed at the parent's tax rate, the amount by which the child's net unearned income escapes the kiddie tax increases tax for 2015 to $1,050. The child's income can be reported on the parent's return if the child's gross income is more than $1,050, and less than $10,500. The exemption amount for purposes of the alternative minimum tax cannot exceed the sum of the child's earned income for the tax year, plus $7,400.

6. Estate And Gift Tax. The gift tax annual exemption will remain the same for 2015, at $14,000. However, the estate and gift tax applicable exclusion will increase from $5,340,000 for 2014 to $5,430,000. For 2015, recipients of gifts from certain foreign persons must report these gifts if the aggregate value of gifts received during the tax year exceeds $15,601.

7. AMT Exemption Amounts. For 2015, the alternative minimum tax (AMT) exemption for married joint filers and surviving spouses will be $83,400 (up from $82,100 for 2014). For heads of household and unmarried single filers, the exemption will be $53,600 (up from $52,800 for 2014). For married separate filers, the amount will be $41,700 (up from $41,050 for 2014).

8. Qualified Transportation Fringe Benefits. Absent action from Congress to extend parity between transit and parking benefits, the 2015 monthly cap on the exclusion for transit passes and for commuter highway vehicles will be $130. The monthly cap on qualified parking benefits will be $250.

B. Extenders. The "Tax Increase Prevention Act of 2014," has once again extended a package of expired or expiring individual, business, and energy provisions known as "extenders." The extenders are a varied assortment of more than 50 individual and business tax deductions, tax credits, and other tax-saving laws which have been on the books for years but which technically are temporary because they have a specific end date. Congress has repeatedly temporarily extended the tax breaks for short periods of time (e.g., one or two years), which is why they are referred to as "extenders." The new legislation generally extends the tax breaks retroactively, most of which expired at the end of 2013, for one year through 2014.

1. Individual Extenders.

a. The $250 above-the-line deduction for teachers and other school professionals for expenses paid or incurred for books, certain supplies, equipment, and supplementary material used by the educator in the classroom;

b. The exclusion of up to $2 million ($1 million if married filing separately) of discharged principal residence indebtedness from gross income;

c. Parity for the exclusions for employer-provided mass transit and parking benefits;

d. The deduction for mortgage insurance premiums deductible as qualified residence interest;

e. The option to take an itemized deduction for State and local general sales taxes instead of the itemized deduction permitted for State and local income taxes;

f. The increased contribution limits and carryforward period for contributions of appreciated real property (including partial interests in real property) for conservation purposes;

g. The above-the-line deduction for qualified tuition and related expenses; and

h. The provision that permits tax-free distributions to charity from an individual retirement account (IRA) of up to $100,000 per taxpayer per tax year, by taxpayers age 70 and ½ or older.

2. Business Extenders.

a. The research credit;

b. The temporary minimum low-income housing tax credit rate for non-federally subsidized new buildings;

c. The military housing allowance exclusion for determining whether a tenant in certain counties is low-income;

d. The Indian employment tax credit;

e. The new markets tax credit;

f. The railroad track maintenance credit;

g. The mine rescue team training credit;

h. The employer wage credit for activated military reservists;

i. The work opportunity tax credit;

j. Qualified zone academy bond program;

k. Three-year depreciation for racehorses;

l. 15-year straight line cost recovery for qualified leasehold improvements, qualified restaurant buildings and improvements, and qualified retail improvements;

m. 7-year recovery period for motorsports entertainment complexes;

n. Accelerated depreciation for business property on an Indian reservation;

o. 50% bonus depreciation (extended before Jan. 1, 2016 for certain longer-lived and transportation assets);

p. The election to accelerate alternative minimum tax (AMT) credits in lieu of additional first-year depreciation;

q. The enhanced charitable deduction for contributions of food inventory;

r. The increase in expensing (up to $500,000 write-off of capital expenditures subject to a gradual reduction once capital expenditures exceed $2,000,000) and an expanded definition of property eligible for expensing;

s. The election to expense mine safety equipment;

t. Special expensing rules for certain film and television productions;

u. The deduction allowable with respect to income attributable to domestic production activities in Puerto Rico;

v. The exclusion from a tax-exempt organization's unrelated business taxable income (UBTI) of interest, rent, royalties, and annuities paid to it from a controlled entity;

w. The special treatment of certain dividends of regulated investment companies (RICs);

x. The definition of RICs as qualified investment entities under the Foreign Investment in Real Property Tax Act;

y. Exceptions under subpart F for active financing income;

z. Look-through treatment for payments between related controlled foreign corporations (CFCs) under the foreign personal holding company rules;

aa. The exclusion of 100% of gain on certain small business stock;

bb. The basis adjustment to stock of S corporations making charitable contributions of property;

cc. The reduction in S corporation recognition period for built-in gains tax;

dd. The empowerment zone tax incentives;

ee. The American Samoa economic development credit; and

ff. Two provisions dealing with multiemployer defined benefit pension plans (dealing with an automatic extension of amortization periods and shortfall funding method and endangered and critical rules), are extended through 2015.

3. Energy Extenders.

a. The credit for nonbusiness energy property;

b. The second generation biofuel producer credit (formerly cellulosic biofuels producer tax credit);

c. The incentives for biodiesel and renewable diesel;

d. The Indian country coal production tax credit;

e. The renewable electricity production credit, and the election to claim the energy credit in lieu of the renewable electricity production credit;

f. The credit for construction of energy efficient new homes;

g. Second generation biofuels bonus depreciation;

h. The energy efficient commercial buildings deduction;

i. The special rule for sale or disposition to implement federal energy regulatory commission (FERC) or State electric restructuring policy for qualified electric utilities;

j. The incentives for alternative fuel and alternative fuel mixtures; and

k. The alternative fuel vehicle refueling property credit.

C. New IRS Certification for PEOs. The Tax Increase Prevention Act of 2014 gives the IRS six months to establish a voluntary certification program for professional employer organizations (PEOs), allowing them to collect and remit employment taxes for their clients. It is intended to provide certified PEOs with successor employer status for federal payroll taxes which eliminates the potential for double taxation of FICA and FUTA when a business contracts with a PEO during the year. The objective is to avoid double taxation and eliminate a sales hurdle that many PEOs claim to have historically faced with many prospects. To be certified by the IRS, a PEO will have to pay an annual fee of up to $1,000 and satisfy quarterly and annual reporting requirements. The PEO must post a bond ($50,000 or 5 percent of the organization's tax liability up to $1 million) and secure CPA-approved financial statements, among other standards to be determined in future IRS regulations. Certified PEOs will be granted sole liability for collecting and remitting federal employment taxes for worksite employees.

D. ABLE Accounts. For tax years beginning after Dec. 31, 2014, the Achieving a Better Life Experience (ABLE) Act of 2014 allow states to establish tax-exempt ABLE accounts to help people with disabilities build an account to pay for qualified disability expenses. Similar to a Qualified Tuition Program or Section 529 plan, a tax exemption would be allowed for an ABLE program. The amounts in an ABLE account would accumulate on a tax-exempt (or, in some cases, tax-deferred) basis.

1. Background.

a. Individuals with disabilities can lose access to means-tested benefits, such as Medicaid or supplemental security income (SSI), if they exceed a minimum level of savings and income. A specially designed trust, sometimes called a special needs trust or supplemental needs trust, may be used to provide financial assistance to a disabled person (the trust beneficiary) without disqualifying the beneficiary for Medicaid, SSI, and other government benefits.

b. A qualified disability trust is allowed a personal exemption equal to that of an unmarried individual ($4,000 for 2015, subject to phaseout if adjusted gross income exceeds $258,250). A "qualified disability trust" is a disability trust described in Sec. 1917(c)(2)(B)(iv) of the Social Security Act, all the beneficiaries of which are determined to be disabled (within the meaning of Sec. 1614(a)(3) of the Social Security Act).

c. Amounts distributed to a child who's a beneficiary of a qualified disability trust are treated as earned income for purposes of the "kiddie" tax and are therefore not taxed at the parents' tax rates.

d. A person can make nondeductible cash contributions on behalf of a designated beneficiary to a qualified tuition program (QTP, or 529 plan) established by a state. The earnings on the contributions build up tax-free and distributions from the QTP are excludable to the extent used to pay qualified higher education expenses. An additional 10% tax is imposed on distributions that are includible in gross income. The contributor can change the beneficiary, or roll over

amounts from one QTP to another for the same or a different beneficiary who's a member of the former beneficiary's family, without tax consequences.

2. Qualified ABLE Program. The new law creates "qualified ABLE programs" which are programs established and maintained by a state or an agency or instrumentality of a state that meets the following conditions:

a. Under the program, a person may make contributions for a tax year to an ABLE account established for the purpose of meeting the "qualified disability expenses" of the designated beneficiary of the account.

b. The program must limit a designated beneficiary to one ABLE account. If an ABLE account is established for a designated beneficiary, then no account established later for that beneficiary is treated as an ABLE account.

c. The program must allow an ABLE account to be established only for a beneficiary who is a resident of either the state that maintains the program (a "program state") or of a contracting state that hasn't established an ABLE program but has entered into a contract with a program state to provide the contracting state's residents with access to the program state's ABLE program.

d. The program must meet the other requirements of Code Sec. 529A.

3. ABLE account. An account maintained under a qualified ABLE program and established and owned by an eligible individual (defined below) is called an ABLE account.

a. An ABLE account's principal tax advantage is that funds used to pay disability expenses build up tax-free. Although contributions to an ABLE account aren't deductible, once the money's in the account, all income on it is earned tax-free, and there's no tax on those earnings unless distributions exceed qualified disability expenses.

b. An ABLE account also has an important non-tax advantage in that the account balance and distributions used to pay qualified disability expenses are disregarded for most federal means-tested programs (although an account balance over $100,000 and distributions to pay for housing are taken into account under SSI). This allows contributions to be made to an ABLE account for a beneficiary without disqualifying the beneficiary for those means-tested benefits.

4. Eligible individual. An individual is an "eligible individual" for a tax year if during that tax year:

a. The individual is entitled to benefits based on blindness or disability under the social security disability insurance (SSDI) program (title II of the Social Security Act) or the SSI program (title XVI of the Social Security Act), and that blindness or disability occurred before the date on which the individual reached age 26 (Code Sec. 529A(e)(1)(A)); or

b. A disability certification for the individual has been filed with IRS for the tax year.

5. Disability Certification. A "disability certification" is a certification made by the eligible individual or the eligible individual's parent or guardian to IRS's satisfaction. It must certify that:

a. The individual (i) has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months, or (ii) is blind, within the meaning of Section 1614(a)(2) of the Social Security Act.

b. The disability or blindness occurred before the date on which the individual reached age 26.

c. The certification must include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a licensed physician who meets the criteria of Section 1861(r)(1) of the Social Security Act.

6. Qualified Disability Expenses. The term "qualified disability expenses" means any expenses related to the eligible individual's blindness or disability that are made for the benefit of an eligible individual who's the designated beneficiary.

7. Contributions to ABLE Account. A qualified ABLE program must provide that only cash contributions will be accepted. Except for a rollover contribution from another account, a qualified ABLE program must limit the aggregate contributions from all contributors to an ABLE account for a tax year to the amount of the annual gift tax exclusion for that tax year. A 6% excise tax is imposed on excess contributions to an ABLE account. The excess contributions tax doesn't apply if the ABLE account's trustee makes a corrective distribution of the excess amount within the tax year. Each state sets its own aggregate contribution limit. An account that has reached the limit may continue to grow due to investment earnings. But no further contributions are allowed unless the account balance drops below the limit.

8. Gift Tax Treatment.

a. For gift tax and generation skipping transfer ("GST") tax purposes, a contribution to a qualified ABLE program on a designated beneficiary's behalf is treated as a completed gift to the beneficiary of a present interest in property.

b. Contributions to an ABLE account qualify for the per-donee annual gift tax exclusion ($14,000 for 2015, adjusted annually for inflation) and are exempt from GST tax to the extent of the exclusion.

c. A contribution to an ABLE account does not qualify for the Code Section 2503(e) gift tax exclusion for qualified medical and tuition payments made on behalf of another person.

d. A distribution from an ABLE account to the account's designated beneficiary is not a taxable gift.

9. Distributions and Rollovers.

a. If distributions from an ABLE account do not exceed the designated beneficiary's qualified disability expenses, then no amount is includible in gross income.

b. Distributions from a qualified ABLE program are includible in the distributee's gross income under the Code Section 72 annuity rules to the extent not excluded from gross income under any other income tax provision. The application of the Code Section 72 annuity rules means distributions are treated as representing a pro-rata share of the principal (i.e., contributions) and accumulated earnings in the account.

c. A taxpayer who receives a distribution from a qualified ABLE program that's includible in gross income is subject to an additional 10% tax on the includible part.

d. A payment or distribution from an ABLE account isn't taxable to the extent that the amount received is paid, no later than the 60th day after the date of the payment or distribution, into another ABLE account for the benefit of the designated beneficiary or an eligible individual who's a family member of the designated beneficiary. A "member of the family" of a designated beneficiary means a brother, sister, stepbrother or stepsister of the beneficiary. The tax-free rollover rule does not apply to any transfer that occurs within 12 months from the date of a previous transfer to any qualified ABLE program for the designated beneficiary's benefit.

e. A change in the designated beneficiary of an interest in a qualified ABLE program during a tax year isn't treated as a taxable distribution if the new beneficiary is both an eligible individual for the tax year and a member of the family of the former beneficiary.

10. Death of Beneficiary.

a. Any outstanding payments due for qualified disability expenses incurred by a designated beneficiary will be paid if the designated beneficiary dies.

b. All amounts remaining in the ABLE account, up to the total medical assistance paid for the designated beneficiary under a state Medicaid plan after the account was established, will be distributed to the state as a creditor (and not a beneficiary) of the ABLE account. The state must file a claim for the payment. The repaid amounts will be net of any premiums paid from the account or by or on behalf of the designated beneficiary to a Medicaid Buy-In program.

c. The additional 10% tax doesn't apply to distributions to the state or to payments or distributions made to a beneficiary or to the designated beneficiary's estate on or after the designated beneficiary's death.

E. Proposed Regulations on State-Sponsored ABLE Accounts for People with Disabilities. The Internal Revenue Service has released proposed regulations (IR-2015-91, June 19, 2015) implementing a new federal law authorizing states to offer specially-designed tax-favored ABLE accounts to people with disabilities who became disabled before age 26. The Achieving a Better Life Experience (ABLE) account provision was signed into law in December 2014. ABLE accounts are designed to enable people with disabilities and their families to save for and pay for disability-related expenses. The new law authorizes any state to offer its residents the option of setting up an ABLE account. Alternatively, a state may contract with another state that offers such accounts. The account owner and designated beneficiary of the account is the disabled individual. In general, a designated beneficiary can have only one ABLE account at a time, and must have been disabled before his or her 26th birthday. The law defines what it means to be disabled for this purpose. Contributions in a total amount up to the annual gift tax exclusion amount, currently $14,000, can be made to an ABLE account on an annual basis, and distributions are tax-free if used to pay qualified disability expenses. These are expenses that relate to the designated beneficiary's blindness or disability and help that person maintain or improve health, independence and quality of life. For example, they can include housing, education, transportation, health, prevention and wellness, employment training and support, assistive technology and personal support services and other expenses. In general, an ABLE account is not to be counted in determining the designated beneficiary's eligibility for many federal means-tested programs, or in determining the amount of any benefit or assistance provided under those programs, although special rules and limits apply for Supplemental Security Income (SSI) purposes.

F. Accounting Method Changes.

1. Rev. Proc. 2015-13. Rev. Proc. 2015-13 updates and revises the general procedures under Code Section 446(e) and Treas. Reg. § 1.446-1(e) that taxpayers should use to obtain the IRS's consent to change an accounting method for federal income tax purposes. Accounting method changes have become more necessary as of late under the tangible property regulations. Under Code Section 446(e), taxpayers must obtain IRS's consent before changing a method of accounting for federal income tax purposes. There are two processes, automatic and nonautomatic consent. Some common "automatic consent" changes are those involving impermissible to permissible accounting method for depreciation and changes under the Code Section 162 and Code Section 263 capitalization regulations. There are generally no user fees for automatic-consent accounting method change requests. In general, automatic consent to change an accounting method is achieved by (i) filling out Form 3115 (Application for Change in Accounting Method) and attaching it to the timely filed (including extensions) original income tax return for the requested year of change; and (ii) sending a copy of the completed form to IRS's National Office no later than the date that the original Form 3115 is filed with the return for the change year. Unless IRS provides otherwise, a taxpayer not under audit who follows the automatic consent procedures generally gets both audit and ruling protection. This means that the IRS will not require the taxpayer to change its method of accounting for the same item for a tax year before the change year (audit protection). It also won't require the taxpayer to change or modify the new method of accounting except in certain limited circumstances, and, if IRS makes the taxpayer change or modify the new method of accounting, the

required change or modification generally won't apply retroactively (ruling protection). In other words, the taxpayer generally receives protection for the use of the new method of accounting in future years.

2. Rev. Proc. 2015-14. Rev. Proc. 2015-14 provides the List of Automatic Changes to which the automatic change procedures in Rev. Proc. 2015-13 . apply.

3. Revised Rev. Proc. 2015-13. IRS has issued a revised version of Rev. Proc. 2015-13, which provides the general procedures under which taxpayers obtain IRS consent to change a method of accounting. The revision modifies section 15.02(1) to permit taxpayers to choose whether to use Rev. Proc. 2015-13 or Rev. Proc. 2011-14 for automatic accounting method changes for their 2014 tax returns. The revision recognizes that some taxpayers may already have prepared a Form 3115, Application for Change in Accounting Method, for their 2014 tax year with the expectation of using the procedures in Rev. Proc. 2011-14. Under the revised Revenue Procedure, those taxpayers may file these Forms 3115 under the procedures in Rev. Proc. 2011-14, rather than under the procedures in Rev. Proc. 2015-13.

4. Rev. Proc. 2015-20. Rev. Proc. 2015-20 provides that for the first tax year beginning on or after January 1, 2014, small business taxpayers are permitted to make certain tangible property and dispositions changes without filing a Form 3115 if they choose to make the changes by calculating a Section 481(a) adjustment that takes into account only amounts in tax years beginning on or after January 1, 2014. Taxpayers filing under this procedure do not receive audit protection for tax years beginning prior to January 1, 2014. The accounting method changes that may be made under the provisions of Rev. Proc. 2015-20 are changes under the final tangible property regulations (Section 10.11(3)(a) of Rev. Proc. 2015-14); certain permissible to permissible methods of accounting for depreciation of MACRS property in mass asset accounts (Sections 6.37(3)(a)(iv), (v), (vii), and (viii) of Rev. Proc. 2015-14); disposition of a building or structural component (Section 6.38 of Rev. Proc. 2015-14); and dispositions of tangible depreciable assets (Section 6.39 of Rev. Proc. 2015-14). A taxpayer that chooses to use the procedures of Rev. Proc. 2015-20 for tangible property method changes must also use this procedure for its dispositions changes, and vice versa, and is not permitted to make a late partial disposition election. A "small business taxpayer" means a business with total assets of less than $10 million or average annual gross receipts of $10 million or less for the prior three tax years.

G. Abandoned Securities Loss is Ordinary. The Fifth Circuit Court of Appeals has issued a taxpayer-favorable opinion in *Pilgrim's Pride Corp. v. Commissioner*, No. 14-60295, concluding that a taxpayer may realize ordinary losses in a pre-2008 abandonment of stock, which was worth $20 million at the time of the abandonment. Pilgrim's Pride Corp. held securities issued by Southern States Cooperative Inc. Pilgrim's Pride had a basis of $98.6 million in the securities when Southern States made an offer to redeem them for $20 million. Pilgrim's Pride rejected the offer and surrendered the securities for no consideration, reasoning that the tax savings it would realize by claiming an ordinary loss on abandonment was greater than the $20 million. The Tax Court held that the corporation's $98.6 million loss from the

abandonment of the securities was subject to capital loss treatment as a deemed sale or exchange of capital assets under Section 1234A. The Fifth Circuit reversed the Tax Court saying that Section 1234A does not apply to abandoned capital assets, but only to the termination of contractual or derivative rights. The court based this conclusion on the plain language of Section 1234A(1). The court also rejected the IRS's claim that Section 165(g) requires the loss to be treated as a capital loss.

H. Final Regulations on Agents for Affiliated Groups. The IRS has issued final regulations (T.D. 9715) that revise the rules on the identity and authority of an agent that files a consolidated return for an affiliated group. Effective April 1, 2015, the final regulations adopt, with some changes, proposed regulations (REG-142561-07) issued in May 2012. Simultaneously released guidance (Rev. Proc. 2015-26) provides instructions for all communications regarding the identification of an agent for a consolidated group. The final regulations organize the provisions that allow the IRS to designate an agent into two categories: (i) those provisions allowing the IRS to replace an agent, with or without a written request from a member, and (ii) a provision described in the preamble to the final regulations allowing the IRS to replace an agent at a member's written request. The final regulations expand the circumstances under which an agent may be replaced by the IRS. The regulations adopt the following three circumstances from the proposed regulations: (i) a terminating agent has no default successor and fails to designate an agent, (ii) the IRS believes that the agent or its default successor exists but that entity fails to timely respond to notices, or (iii) the agent is or becomes a foreign entity. The final regulations expand the second circumstance to allow the IRS to also replace an agent that fails to perform its obligations. The final regulations add a fourth circumstance to allow the IRS to designate a new agent for a current year if a previously designated agent ceases to be a member of the group. The final regulations clarify that an agent other than the common parent generally serves as agent under the same terms and with the same rights as the common parent. An exception to that general rule applies when an agent is designated by the IRS, in that the agent may not designate an agent upon its termination unless the IRS designated the agent solely because a prior agent terminated without a default successor and without designating an agent (other than in the case of a group structure change). The final regulations clarify that a terminating agent without a default successor may designate an agent only for completed years. To prevent groups from nullifying a designation made by the IRS, the final regulations provide that designating agents must submit a request to the IRS to designate any entity previously replaced by the IRS as an agent. The final regulations allow an agent to resign for completed years if four conditions are met. The final regulations also contain clarifying and non-substantive changes to the text of the proposed regulations and re-designate the current rules as reg. section 1.1502-77B. (Reg. section 1.1502-77A continues to apply for consolidated return years beginning before June 28, 2002.) The final regulations apply to consolidated return years beginning after March 31, 2015. The re-designated rules and prior guidance (Rev. Proc. 2002-43) continue to apply to consolidated tax years beginning between June 27, 2002, and April 1, 2015. However, the new rules allowing the resignation of agents may be relied on for completed years otherwise governed by the current rules.

I. Two-Step Analysis for Transferee Liability Rejected. Although it rejected a two-step analysis frequently asserted by the IRS to determine transferee

liability, the Tax Court in *William Scott Stuart et al. v. Commissioner*, 144 T.C. No.12; Nos. 1685-11, 1686-11, 1687-11, 1688-11, nevertheless held that former shareholders of a Nebraska company are liable as transferees for their shares of the company's unpaid tax liability. After shareholders in Little Salt Development Co. sold their shares, the IRS assessed a tax deficiency in Little Salt's income tax and an accuracy-related penalty, neither of which Little Salt paid. The IRS determined that the former shareholders, as transferees of Little Salt's property, were liable for their shares of Little Salt's unpaid tax. In its notices of transferee liability, the IRS said it would recast the transaction by which the shareholders disposed of their shares in Little Salt as the IRS saw the substance of the transaction, i.e., not as the shareholders' sale of those shares to a third party but, rather, as a liquidating distribution of all Little Salt's cash to its shareholders in redemption of its outstanding shares, followed by the shareholders' payment of a portion of that cash to the third party as an accommodation fee for its participation in the assumed sale. Instead of following the IRS' analysis, Judge Halpern looked to the Tax Court's prior opinion in *Swords Trust v. Commissioner*, 142 TC 317 (2014), circuit court opinions, and other decisions to conclude that the Little Salt shareholders were liable as transferees under Section 6901. Following *Swords*, Judge Halpern rejected the IRS's proposed two-step analysis for determining transferee liability, noting that the Fourth Circuit held that the question as to whether a person or an entity is a "transferee" for purposes of Section 6901 is separate from the question as to whether a transfer is fraudulent for state law purposes. The Fourth Circuit concluded that a 1958 Supreme Court decision "forecloses the Commissioner's efforts to recast transactions under federal law before applying state law to a particular set of transactions." Judge Halpern said that the determining factor is liability to a creditor -- in this case, the IRS commissioner -- for the debt of another under a state fraudulent conveyance, transfer, or similar law. "We have found that, pursuant to [Nebraska law], the shareholders are collectively liable" to the IRS as "person[s] for whose benefit" Little Salt transferred funds to a third party, Judge Halpern wrote. "They are, on that basis, transferees within the meaning of section 6901."

J. Father Denied Dependency Exemptions, Credits, Head of Household Status. In *Ronald Lorenzo Rolle v. Commissioner*, T.C. Memo. 2015-93, No. 16765-13, the Tax Court held that an individual wasn't entitled to dependency exemption deductions for his children who resided with their mother for a longer time during the tax year and, because he had no qualifying children, he wasn't entitled to an earned income credit, child tax credit, child care credits, or head of household filing status.

K. Taxpayer Transcripts Stolen in Data Theft. Criminals using personal identifying information from outside sources raided the IRS's online Get Transcript application 200,000 times between mid-February and mid-May, gaining unauthorized access to about 104,000 taxpayers' accounts, Commissioner John Koskinen announced during a call with reporters May 26, 2015. The criminals apparently had access not only to basic identity information such as names, addresses, and Social Security numbers but also to individuals' answers to "out-of-wallet" questions the IRS uses to authenticate online requests for Get Transcript accounts, Koskinen said. He speculated that much of the out-of-wallet information may have come from taxpayers' social media accounts. The commissioner emphasized that the raid did not compromise the IRS's database of more than 150 million taxpayers' tax accounts. But the 104,000 taxpayers whose transcripts were stolen may now be at an increased risk of stolen identity refund fraud

and may have other identity theft risks as a result of their compromised transcripts, he said. The IRS will provide credit monitoring and protection to the 104,000 victims at the agency's expense, Koskinen said. Victims will also be given the IRS's identity protection personal identification numbers so they are not targeted again, he said. All 200,000 of the taxpayers affected by the raid will be sent notification letters from the IRS and will have their accounts flagged on the agency's core processing systems, he added. Koskinen estimated that fewer than 15,000 fraudulent refunds made it through IRS identity theft filters, resulting in less than $50 million in refunds issued, as a result of the raid.

L. Nonqualified Deferred Compensation Audit Techniques Guide. In June 2015, the IRS released an audit techniques guide for examining cases involving nonqualified deferred compensation plans. The guide focuses on the tax treatment of deferred amounts, constructive receipt and economic benefit, deferrals and employment taxes, and timing rules for income tax and for FICA/FUTA taxes.

M. Abatement of Interest and Penalties that have Already Been Paid. A taxpayer filed a late tax return, and paid with it interest and penalties based on the tax due. The taxpayer then filed a time-barred refund claim, providing that the tax amount due was overstated on the original return. It was too late for the taxpayer to receive a refund of the overpaid taxes. However, the statute of limitations for refund of the interest and penalties paid had not yet expired. Code Sec. 6404(a) provides: "IRS is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which—(1) is excessive in amount, or (2) is assessed after the expiration of the period of limitation properly applicable thereto, or (3) is erroneously or illegally assessed (emphasis added)." Accordingly, the IRS, in Chief Counsel Advice 201520010, indicated that the Code Sec. 6404 abatement "is permissive and that the IRS is not prohibited from abating the paid portion of assessments." Thus, although Section 6404(a) authorizes the IRS to abate the *unpaid* portion of an excessive assessment, the IRS believes that the statute is permissive, and therefore, it may also abate the *paid* portion of assessments.

N. Corporate Partners with Appreciated Partnership Interest. The IRS has issued two sets of regulations to address the potential avoidance of gain by corporate partners. First, new § 337(d) temporary regulations, often referred to as the "May Company" regulations, define when and how a corporate partner is deemed to recognize taxable gain in its partnership interest if the partnership acquires stock in such corporate partner. Second, new § 732(f) proposed regulations clarify when a corporate partner recognizes gain when a partnership distributes stock of a different corporation to such partner.

1. Section 337(d) May Company Regulations. The Section 337(d) temporary regulations replace 1992 proposed regulations on when a corporate partner recognizes gain when the partnership acquires stock in the partner. The regulations address the gain avoidance that occurred when May Company contributed appreciated property to a partnership and effectively sold that property by having the partnership use cash to purchase May Company stock. When the partnership later distributed the acquired stock back to May Company, the gain effectively disappeared. The original proposed regulations imposed arguably overlapping gain recognition rules both when the corporate partner obtained an indirect interest in the stock through its partnership

interest (the deemed redemption rule) and when the partnership distributed the stock to the corporate partner. The new regulations streamlined the rules by eliminating the distribution rule and incorporating certain concepts into a single deemed redemption rule that imposes taxable gain on the corporate partner when there is an expansion of the partner's share of its stock held by the partnership. The regulations make a number of additional mechanical changes to clarify administration of the rule and require that consistent concepts be applied in the tiered partnership context.

2. Section 732(f) Partnership Distributions of Stock to Corporate Partners. The second set of regulations would update rules under Section 732(f), enacted in 1999, which prevent corporate partners from avoiding tax on their share of partnership appreciation by having the partnership redeem them with a controlling interest in stock of a new corporation ("Newco"), where Newco holds high-basis assets. The avoidance occurs because, although the corporate partner receives a low-basis in the distributed Newco stock, the corporate partner simply liquidats Newco, and the high-basis assets inside Newco carry over to the corporate partner. In that context, Section 732(f) generally requires that both the Newco stock and the Newco assets be stepped down. The new regulations further clarify the mechanics of these rules, including addressing tiered partnerships and adding a special rule to aggregate basis computations if the partnership distributes stock to multiple members of the same consolidated group.

O. New Law Doubled Reporting Penalties. On June 29, 2015, President Obama signed into law the Trade Preferences Extension Act of 2015, which includes little-noticed increases in penalties for failure to file correct information returns and provide payee statements. The new law increases the taxpayer penalty cap for failure to file correct information returns under Section 6721 and failure to furnish correct payee statements under Section 6722 from $1.5 million to $3 million for both penalty sections. The amount for each individual failure has increased from $100 to $250. Lower penalty caps for when the penalty is corrected within 30 days or before August 1 have also doubled and trebled to $500,000 and $1.5 million, respectively. Lower limitations for persons with gross receipts of $5 million or less have also been raised. The penalty amounts are indexed for inflation. For example, the higher penalties will apply to information returns such as a W-2, 1099, 1098 mortgage statement, as well as 1042-S's for payments subject to FATCA reporting. Especially significant is that it applies to new forms required to be filed under the Affordable Care Act. Treas. Reg. §301.6721-1 states that inconsequential errors or omissions are not considered a failure to include correct information. But errors in taxpayer identification numbers, the surname of a payee, and any monetary amounts are never inconsequential, according to the regulations. Treas. Reg. §301.6722-1 states that dollar amounts, significant items in the address of a payee, the appropriate form for the information provided, and the manner of furnishing a statement required under Sections 6042(c), 6044(e), 6049(e), and 6050N(b) are never inconsequential.

P. Tax-Filing Deadlines For Partnerships, S Corporations, And C Corporations.

1. Background. A C corporation or an S corporation is required to file its tax return by March 15 (or within two and a half months after the close of its tax year). Corporations can obtain an automatic three-month extension of the filing due date

and can apply for an additional three-month extension—for a total of six months. A partnership is required to file its return by April 15 (or within three and a half months after the close of its tax year), the same date that applies to individuals.

2. New Deadlines. On July 31, 2015, the President signed into law H.R. 3236, the "Surface Transportation and Veterans Health Care Choice Improvement Act of 2015" (the Act) which provides that a partnership and an S corporation are required to file by March 15 following the close of the calendar year (or for a fiscal year taxpayer, on or before the 15th day of the third month following the close of its fiscal year), and a C corporation is required to file by April 15 (or three and a half months after the close of its tax year). (Code Sec. 6072, as amended by Act Sec. 2006(a), effective for returns for tax years beginning after Dec. 31, 2015) For C corporations with a tax year ending on June 30, the above changes are effective for tax years beginning after Dec. 31, 2025. (Act Sec. 2006(a)(3)) The Act also provides C corporations with an automatic six-month extension of the applicable filing date. In the case of calendar year C corporations, the automatic extension is up to five months (September 15) until tax years beginning after Dec. 31, 2025, at which time the extension would be up to six months (October 15). For C corporations with tax years ending on June 30, the current law filing date (September 15) remains in effect until tax years beginning after Dec. 31, 2025, and will be extended to October 15 thereafter. (Act Sec. 2006(c))

Q. Ninth Circuit Holds Mortgage Interest Applies Per Taxpayer. In *Voss v. Commissioner*, No. 12-73257, 12-73261 (9th Cir. 2015), a case of first impression, The Ninth Circuit reversed a Tax Court opinion and held that the Section 163 home mortgage interest deduction applies on a per-taxpayer basis to unmarried co-owners of a qualified residence, rather than on a per-residence basis as the Tax Court and IRS concluded.

R. IRS Eliminates W-2 Automatic Extensions to Combat Fraud. To combat stolen identity refund fraud, the IRS issued new rules on August 12, 2015, that would eliminate automatic extensions to file forms in the W-2 series and grant non-automatic extensions only in limited circumstances.

S. New Identity Protection PIN Rules for 2016. The IRS has announced that beginning January 1, 2016, it will require the use of identity protection personal identification numbers (IP PINs) for all Social Security numbers with an IP PIN requirement, regardless of whether the SSN is entered for a primary, spouse, or dependent. Failure to include the IP PIN in a required field will result in the return being rejected. The IRS also issued a list of frequently asked questions about IP PINs.

II. MICHIGAN

A. Offer in Compromise Program Starts January 1, 2015. The Michigan Department of Treasury has announced that is providing an "offer-in-compromise" program beginning January 1, 2015. This program will allow taxpayers to submit an offer to compromise a tax debt for less than the full amount due. An assessed tax liability includes tax and any related interest and penalty. The Department's Offer in Compromise program is established pursuant to L. 2014, P.A. 240 (see, Offers in Compromise, Mich. Dept. Treasury, 12/16/2014; Guidelines for Offer in Compromise Program, Mich. Dept. Treasury, 12/16/2014.)

1. Grounds For Submitting Offer In Compromise. A taxpayer may submit an offer in compromise if one or more of the following grounds exist:

a. The taxpayer has received an Offer in Compromise from the IRS for the same tax periods for which the taxpayer is requesting state relief. Only tax debt for individual income tax or for corporate income tax is eligible for compromise under this ground.

b. A doubt as to the collectability of the tax debt exists. The taxpayer must show both: (i) the amount offered is the most that can be expected to be paid or collected from the taxpayer's present assets and income; and (ii) the taxpayer does not have reasonable prospects for acquiring increased income or assets that would enable the taxpayer to pay a greater amount of the tax debt than the amount offered, within a reasonable period of time.

c. A doubt as to the liability for the tax debt exists. Based on a review of evidence provided by the taxpayer, Treasury must determine that the taxpayer would have prevailed in a contested case if the taxpayer had appealed the assessment.

2. Submitting Offer In Compromise.

a. A taxpayer must submit an offer in compromise on Form 5181 (Michigan Offer in Compromise). The taxpayer must state on the form the amount the taxpayer offers to pay on the tax debt as a compromise, and the taxpayer must submit all documents and information requested on Form 5181. A taxpayer must also submit with Form 5181 a non-refundable initial payment on the offer of $100 or 20% of the taxpayer's offer, whichever is greater. The Department will apply the payment toward the outstanding tax debt. The Department may reject an offer in compromise that fails to provide all required items.

b. At the time a taxpayer submits an offer in compromise to the Department, all of the following must be true:

i. The taxpayer must have been assessed for the tax liabilities specified in the offer in compromise.

ii. The taxpayer's opportunities to contest the tax debt in the Department's informal conference process and to appeal the assessed tax liability to the Michigan Tax Tribunal or a court must have expired.

iii. The taxpayer must have filed returns for all taxes for all outstanding tax periods.

iv. The taxpayer must have no open bankruptcy proceedings.

v. The taxpayer must agree to all of the conditions of the offer in compromise contained in Form 5181. By signing the form under penalty of perjury, the taxpayer acknowledges that the offer, including accompanying schedules and documents, is true, correct and complete to the best of the signer's knowledge and belief. If not signed, the offer in compromise may be rejected.

vi. Each taxpayer who is a party to the offer in compromise must personally sign Form 5181. A Form 5181 submitted by a business entity must be signed by a representative who has authority to act on the business entity's behalf. A Form 5181 submitted by the estate of a deceased taxpayer must be signed by the administrator, executor or other authorized fiduciary for the estate. A representative signing on behalf of an incapacitated taxpayer or a deceased taxpayer must submit proof that the representative is authorized to sign the offer in compromise. Proof includes a durable power of attorney or letter of authority from a probate court or other legally recognized document of authority.

vii A legally competent taxpayer must personally sign an offer in compromise even if a third party designated representative has been authorized to discuss the offer in compromise or receive information in connection with the offer in compromise.

c. An offer in compromise may propose the following types of payment: (i) payment of a lump-sum amount; (ii) payment in five or fewer equal or unequal monthly installments after acceptance of the offer in compromise; or (iii) payment in equal monthly installments made over a period of six months or more after acceptance of the offer in compromise.

d. A taxpayer is expected to pay the entire amount of the accepted offer in compromise in as short a time as reasonably possible, and generally not more than 24 months past the date that an offer in compromise is accepted. The Department may allow a payment period of greater than 24 months if circumstances warrant it. Acceptable payment terms are determined by the Department and will not be limited to those proposed by the taxpayer. Payment term options are provided on Form 5181.

e. Submission of an offer in compromise does not suspend interest or penalties from accruing on the outstanding tax liability.

3. Offer In Compromise Pending.

a. An offer in compromise becomes pending when the Form 5181, along with required schedules and documentation, and the required initial payment is received by the Department. The Department will not levy against property or assets to collect on the tax debt specified in the offer in compromise while the offer in compromise is pending review and decision by the Department, except where the Department determines that the offer in compromise was submitted solely for purposes of delaying collection of the tax debt or where the Department determines the need to issue a jeopardy assessment. The Department will notify a taxpayer in writing when an offer in compromise submission is received by the Department.

b. If the Department determines that the offer in compromise submission is incomplete or fails to provide the documentation and information sufficient for the Department to evaluate the offer in compromise, the Department will within a reasonable period of time notify the taxpayer and any third party designated representative in writing: (i) that the offer in compromise is being rejected; or (ii) what

additional information must be provided in order for the submission of the offer in compromise to be considered complete or sufficient for the Department to evaluate.

4. Withdrawal of Offer In Compromise. A taxpayer may withdraw an offer in compromise at any time prior to the Department's acceptance or rejection. An offer in compromise will be considered withdrawn when the Department receives a letter from the taxpayer withdrawing the offer. The required initial payment will be applied to the taxpayer's outstanding tax debt and will not be returned or refunded to the taxpayer if the offer in compromise is withdrawn. Once an offer in compromise is withdrawn, the Department may begin collection of the full tax debt.

5. Acceptance of Offer In Compromise.

a. The State Treasurer has given certain divisions within Treasury authority to accept or reject an offer in compromise. The Department may accept an offer in compromise with conditions. For instance, a compromise may require a taxpayer to make timely payments under a payment plan and may require timely filing of future tax returns. If a taxpayer does not comply with the conditions, the compromise may be revoked and the entire tax debt may be reinstated. The Department may then take actions to collect the full reinstated tax debt. Under the Offer in Compromise program, The Department may compromise all or part of any outstanding tax debt that is subject to administration under the state Revenue Act.

b. An offer in compromise is accepted when the Department sends the taxpayer and any third party designated representative a letter accepting the offer in compromise. If a taxpayer complies with the conditions of an accepted offer in compromise and pays the compromised amount in full, the offer in compromise will conclusively settle the tax debt for the tax periods specified in the accepted offer in compromise. A compromise with one taxpayer will not extinguish the liability of any person or entity not named in the offer in compromise that may also be liable for the tax, such as a joint filer or a responsible person under Mich. Comp. Laws Ann. § 205.27a. The Department may still pursue collection from other liable parties up to any remaining amount of the uncompromised tax debt owed. Acceptance of an offer in compromise does not compromise or otherwise affect any other tax liability not specified in the offer in compromise.

6. Rejection of Offer In Compromise. If the Department determines that an offer in compromise does not contain the documentation and information required by Form 5181 or the applicable schedules (Form 5182, 5183, 5184, or 5185), it may reject the offer in compromise. An offer in compromise may also be rejected if one or more of the following exists:

a. The taxpayer is in bankruptcy.

b. The taxpayer did not pay the required initial payment of $100 or 20% of the offer, whichever is greater. A payment that has insufficient funds will be considered nonpayment.

c. The taxpayer's opportunity to contest the tax debt in the Department's informal conference process and to appeal the tax debt to the Michigan Tax Tribunal or a court has not expired.

d. The tax liability included in the offer in compromise has not been assessed by the Department.

e. The taxpayer failed to submit required returns for outstanding tax periods.

The required initial payment will be applied to the taxpayer's outstanding tax debt and will not be returned or refunded to the taxpayer if the offer in compromise is rejected.

7. Revocation of Accepted Offer In Compromise. Any compromise made under the Offer in Compromise program is subject to continuing review and monitoring by the Department. The Department may revoke an accepted compromise if any of the following occurs:

a. The Department determines that the person receiving a compromise concealed from the Department any property or sources of income belonging to the taxpayer, the estate of the taxpayer, or any other person liable for the tax;

b. The Department determines that the person receiving a compromise intentionally misled the Department by withholding, destroying, mutilating or falsifying any book, document or record or made any false statement, relating to the estate or financial condition of the taxpayer or other person liable for the tax to induce the compromise; or

c. The taxpayer fails to comply with any of the conditions that were part of an accepted offer in compromise or fails to file required returns or pay tax liabilities after an accepted compromise within 20 days after the Department issues a notice and demand to the person stating that the failure to comply with the conditions of the accepted offer in compromise or the continued failure to file the required returns or pay the tax may result in the revocation of the compromise.

8. Independent Administrative Review.

a. Independent administrative review of a rejection of an offer in compromise is available upon request by a taxpayer. An independent administrative review will set aside a rejection of an offer in compromise only upon clear and convincing evidence presented by the taxpayer that the rejection was the result of fraud, adoption of a wrong principle or error of law by the Department.

b. A taxpayer may request an independent administrative review of a rejected offer in compromise by filing Form 5186 (Request for Independent Administrative Review of Rejected Offer in Compromise) with the Department's Office of Legal Affairs no later than 30 calendar days after the date of the Department's rejection letter. A request for independent administrative review will be deemed timely filed if it bears a postmark date before the 30 calendar-day deadline. The taxpayer requesting an

independent administrative review must state with particularity the grounds for the taxpayer's objections and must specify whether they relate to doubt as to liability, doubt as to collectability, or grant of a federal Offer in Compromise by the IRS for the same tax periods.

c. An independent administrative review will be based upon the record established by the Department in the course of considering and rejecting an offer in compromise. The record will include any information submitted by the taxpayer in connection with the offer in compromise as well as information otherwise available to and used by the Department in its consideration. An independent administrative review will not consider any issue, information, or documentation that was not raised or submitted by the taxpayer or the Department during the determination process. An independent administrative review will treat as conclusive the disposition of any question of fact based upon the record established by Treasury in the course of rejecting an offer in compromise, so long as the disposition is supported by competent, material, and substantial evidence on the record. Questions of law will be reviewed de novo.

d. If an independent administrative review determines that the Department erred in rejecting an offer in compromise, the independent administrative reviewer will overturn that decision and notify the taxpayer and any third party designated representative. The independent administrative reviewer will direct the Department division that evaluated the offer in compromise to accept the offer in compromise and to issue to the taxpayer and any third party designated representative a letter accepting the offer in compromise.

e. If an independent administrative review upholds the Department's rejection of an offer in compromise, the independent administrative reviewer will send a letter to the taxpayer and any third party designated representative stating the decision to uphold the Department's rejection. The Office of Legal Affairs will notify the Office of Collections of the independent administrative review decision, and the Department will reinstitute collection of the tax debt beginning with the date of the letter upholding the rejection. A decision of the independent administrative review is final and may not be appealed to the Michigan Tax Tribunal or to any court.

B. Roads and Schools.

1. Gas Tax. L. 2015 H5477 (P.A. 468), effective 10/01/2015 if voters approve at the 05/05/2015 general election a constitutional amendment increasing the sales-use tax rate, would, among other changes, amend the Motor Fuel Tax Act to change from the current fixed taxes of 19¢ per gallon for gasoline and 15¢ per gallon for diesel fuel to a tax calculated based on 14.9% of the average wholesale prices of gasoline and diesel fuel. Although the wholesale rate would remain fixed at 14.9%, the actual cents-per gallon levy for gasoline and diesel fuel would vary annually in conjunction with the average wholesale prices, subject to certain limitations. The bill defines the initial average wholesale prices as the 12-month rolling averages for gasoline and diesel fuel from July 1, 2013 through June 2014. For future years, the bill would provide that the 12-month rolling average period end on the last day of the month that is three months prior to the month the new rates would take effect. The bill contains an inflation adjustment mechanism that would limit large swings in the cents-per-gallon

levy that may result from volatile gas prices so that the levy would not increase by more than 5¢ per gallon above the rate of inflation. Additionally, the levy would not fall below the initial rate, adjusted for inflation or 5% per year, whichever is less.

2. Sales Tax. L. 2014, HJR UU, effective 10/01/2015 if approved by voters at the 05/05/2015 general election, would amend the Michigan Constitution to exempt sales of gasoline and diesel motor fuel from the state general sales tax and increase the maximum sales and use tax by 1% (to 7% from 6%). The resolution would also dedicate a portion of the revenue from the sales and use taxes to the School Aid Fund; require that the Fund be used for specified purposes; and dedicate a portion of the revenue of the sales and use taxes to revenue sharing with local governments.

3. Defeated. Both proposals were defeated by the voters at the May 5, 2015 special general election.

C. Bonus Interest on Delayed Michigan Business Tax Refunds. L. 2014, H4760 (P.A. 424), effective 12/30/2014, provides that starting January 1, 2015, in addition to and separate from the regular interest added to a refund, for refunds for Michigan Business taxes, additional interest will be added to refunds that are not paid within 90 days after the claim is approved or 90 days after the date established by law for filing the return, whichever is later. This additional interest will be paid at a rate of 3% per annum for each day the refund is not issued within the time frame required if all of the following conditions are met: (i) the refund is claimed on an original return which was timely filed under Mich. Comp. Laws Ann. § 208.1505; (ii) the refund is not adjusted by the Department of Treasury; (iii) the refund is not claimed by a taxpayer filing as a unitary business group; (iv) the return is not subject to Mich. Comp. Laws Ann. § 205.27a(3) or Mich. Comp. Laws Ann. § 205.27a(4) (relating to the suspension of the statute of limitations for refund claims) except for audit by the Department; (v) the return is complete for processing purposes with no calculation errors and contains all required information as prescribed by the Department under Mich. Comp. Laws Ann. § 208.1507 and Mich. Comp. Laws Ann. § 208.1509, including any state and federal returns, forms, or schedules necessary to process the return.; (vi) the taxpayer who has filed a complete return under (v) herein has complied with the Department's request, if any, for additional documentation or information within 30 days of that request; (vii) no portion of the refund is subject to interception under Mich. Comp. Laws Ann. § 205.30a; and (viii) the amount to be refunded is more than $10.

D. Publication of Audit and Training Manuals, and Other Documents. L. 2015, H4290 (P.A. 565), effective 01/15/2015, requires the Department of Treasury, starting not later than six months after the date of enactment of this bill, to publish and make available to the public in printed and electronic formats the Department's internal policy directives, audit standards, sampling manual, cash basis sales tax audit overview, industrial processing sales and use tax manual, contractors sales and use tax manual, and other deductions sales and use tax manual. The Department may charge a reasonable fee for subscriptions to this service not to exceed the cost of printing.

E. Standards for Field Audits. The Michigan Department of Treasury announced that, effective May 13, 2015, it has adopted administrative rules (R 205.2001 through R 205.2010, effective 05/13/2015) establishing audit standards for field audits. The adopted rules cover: technical training by auditors and competence of

auditors for field audits; auditor's objectivity and independence; due professional care for field audits; reasonable assurance for field audits; planning and supervision of field audits; understanding of audited person by auditors, including internal controls, and assessment of risk; field audit evidence and documentation; field audit sampling and sampling projections; elements of audit report of findings; and confidentiality.

F. Nonprofit Corporations—Annual Report. L. 2015, S623 (P.A. 557), effective 01/15/2015, revises the Nonprofit Corporation Act. Among the changes, the bill provides that the annual report of each domestic and foreign nonprofit corporation must be signed by an authorized officer or agent of the corporation. The report must include the name and business or residence address of the corporation's president, secretary, treasurer, and directors (previously, the addresses of its officers and directors). If there are no changes from the last filed report, the nonprofit corporation may file a report on a form approved by the Administrator (previously, must certify) to the Administrator that no changes in the required information have occurred since the last filed report.

G. Redeemed Property. L. 2015, H5421 (P.A. 500), effective 01/14/2015, allows the county treasurer, in the case of redeemed property, to waive the additional interest amount under Mich. Comp. Laws Ann. § 211.78g(3)(b) if the property is withheld from the petition for foreclosure under a delinquent tax installment payment plan. The bill also provides that if the property is classified as residential real property, the property is a principal residence exempt from the local school operating tax, and a tax foreclosure avoidance agreement is in effect, while the agreement is effective, the property will be withheld from the petition for foreclosure and the additional interest under Mich. Comp. Laws Ann. § 211.78g(3)(b) will not apply and interest computed at a noncompounded rate of 0.5% per month on the taxes that were originally returned as delinquent, computed from the date that the taxes originally were returned as delinquent, will apply to the property. The bill also provides that before July 1, 2016, if the amount of unpaid delinquent taxes, interest, penalties, and fees for which a property was forfeited is greater than 50% of the state equalized valuation (SEV) of the property and the property is subject to and in compliance with a delinquent property tax installment payment plan or a tax foreclosure avoidance agreement, or both, the foreclosing governmental unit may reduce the amount of taxes, interest, penalties, and fees required to be paid to redeem the property to an amount equal to 50% of the SEV of the property.

H. Nonprofit Housing Property Exemption Applications. L. 2014, H5182 (P.A. 456), effective 01/02/2015 and operative as shown, provides that starting December 31, 2014, a charitable nonprofit housing organization that owns eligible nonprofit housing property must apply to the State Tax Commission (STC) for an exemption. If the application is granted by the STC, the exemption becomes effective starting December 31 in the year in which the STC approves the exemption (previously, the application had to be filed with and granted by the governing body of a local tax collecting unit by resolution).

I. Sales Tax Affiliate and Click-Through Nexus. L. 2015, S658 (P.A. 553), effective 10/01/2015, amends the Sales Tax Act to provide that a seller that sells tangible personal property to a purchaser in Michigan is presumed to be engaged in the business of making sales at retail in Michigan if the seller or a person (including an affiliated person) other than a common carrier acting as a common carrier, engages in

or performs any of the following activities in Michigan: (i) sells a similar line of products as the seller and does so under the same business name, or a similar business name, as the seller; (ii) uses its employees, agents, representatives, or independent contractors in Michigan to promote or facilitate sales by the seller to purchasers in Michigan; (iii) maintains, occupies, or uses an office or similar place of business in Michigan to facilitate the delivery or sale of tangible personal property sold by the seller to the seller's purchasers in Michigan; (iv) uses, with the seller's consent or knowledge, trademarks, service marks, or trade names in Michigan that are the same as or substantially similar to those used by the seller; (v) delivers, installs, assembles, or performs maintenance or repair services for the seller's purchasers in Michigan; (vi) facilitates the sale of tangible personal property to purchasers in Michigan by allowing the seller's purchasers to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or similar place of business maintained by that person in Michigan; (vii) shares management, business systems, business practices, or employees with the seller, or in the case of an affiliated person, engaged in intercompany transactions related to the activities occurring with the seller to establish or maintain the seller's market in Michigan; or (viii) conducts any other activities in Michigan that were significantly associated with the seller's ability to establish and maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan. The presumption can be rebutted by a demonstration that a seller's or person's activities in Michigan are not significantly associated with the seller's ability to establish or maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan. In addition to the presumption described previously, a seller of tangible personal property is presumed to be engaged in the business of making sales at retail of tangible personal property in Michigan if the seller enters into an agreement, directly or indirectly, with one or more Michigan residents under which the resident, for a commission or other consideration, directly or indirectly, referred potential purchasers, whether by a link on an Internet website, in-person oral presentation, or otherwise, to the seller, if both of the following conditions are satisfied: (i) the cumulative gross receipts from sales by the seller to purchasers in Michigan who are referred to the seller by all residents of Michigan with an agreement with the seller are greater than $10,000 during the immediately preceding 12 months; and (ii) the seller's total cumulative gross receipts from sales to purchasers in Michigan exceed $50,000 during the immediately preceding 12 months. This presumption can be rebutted by a demonstration that the Michigan residents with whom the seller has an agreement does not engage in any solicitation or any other activity within Michigan that was significantly associated with the seller's ability to establish or maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan. The presumption is considered rebutted by evidence of all of the following: (i) written agreements prohibiting all of the residents with an agreement with the seller from engaging in any solicitation activities in Michigan on the seller's behalf; and (ii) written statements from all of the residents with an agreement with the seller stating that the resident representatives did not engage in any solicitation or other activities in Michigan on behalf of the seller during the immediately preceding 12 months, if the statements are provided and obtained in good faith. The bill applies to transactions occurring on or after its effective date and without regard to the date the seller and the resident entered into an agreement. The 12 months before the bill's effective date is included as part of the immediately preceding 12 months for purposes of the presumption involving a business agreement.

J. No Personal Liability for Corporate Taxes where those Taxes were Assessed Prior to those Individuals Becoming Corporate Officers. In *Shotwell v. Department of Treasury*, Mich. S. Ct., Dkt. No. 150024, 03/25/2015, vacating in part Mich. Ct. App., Dkt. No. 314860, 05/27/2014, the Michigan Supreme Court vacated part of a Michigan Court of Appeals case that held that a person that acted as a de facto officer of a corporation was not a responsible officer liable for the corporation's unpaid 2006 and 2007 cigarette equity assessment because the person did not officially assume a corporate officer position until after the taxes were incurred. The Supreme Court held that the Court of Appeals erred in concluding that "a material question of fact remained regarding petitioner's status as a de facto officer," because the Michigan Tax Tribunal had concluded that the petitioner was not a de facto officer, and its findings are supported by competent, material, and substantial evidence on the whole record. The importance of the case goes beyond its facts, because the Court of Appeals held that several pro–taxpayer amendments, enacted into the law as part of 2014 PA 3, applied retroactively to all outstanding assessments and tax periods, including provisions (i) requiring the Department of Treasury to first assess successor purchasers of a business before pursuing responsible officers, (ii) requiring the Department to establish a prima facie case that the individual had actual responsibility for tax filing or payment and "willfully" failed to file or pay in order to be deemed "responsible," and (iii) limiting the period for which an individual could be held responsible.

K. Multistate Tax Compact Apportionment Formula in Michigan. On remand from the Michigan Court of Appeals, the Michigan Court of Claims in *Anheuser Busch Inc. v. Dept. of Treasury*, Mich. Ct. Claims, Dkt. No. 11-000085-MT, 04/07/2015, held that the legislature's retroactive repeal of the Multistate Tax Compact's provisions by L. 2014, P.A. 282, applied to the taxpayer's Michigan Business Tax refund claim, and negated the basis of the taxpayer's claim. The Court of Claims had previously held that the Compact was a binding contract that could not be repealed by a conflicting statute and so the taxpayer could elect to apportion its business income tax component of the Michigan Business Tax according to the 3-factor apportionment formula under Article IV of the Compact. The Michigan Court of Appeals had vacated and remanded the case back to the Court of Claims to consider what effect, if any, L. 2014 P.A. 282 had on the case. On remand, the Court of Claims held that, for reasons stated in *Yaskawa America, Inc. v. Department of Treasury*, Mich. Ct. Claims, Dkt. No. 11-000077-MT, 12/19/2014 and *Ingram Micro, Inc. & Subsidiaries v. Department of Treasury*, Mich. Ct. Claims, Dkt. No. 11-000035-MT, 12/19/2014, P.A. 282 applies to the instant action and negates the basis for the taxpayer's claim.

L. Prerequisite to Pay Disputed Tax, Penalties and Interest When Appealing to Michigan Court of Claims Eliminated. P.A. 79 of 2015, effective on the 91st day after adjournment of 2015 Legislature session, eliminates the requirement that, in an appeal to the Court of Claims, a taxpayer must first pay the disputed part of a tax, including penalties and interest, under protest and claim a refund as part of the appeal. It also extends the time to file an appeal to the tax tribunal to within 60 days (previously it was within 35 days) after the assessment, decision, or order of the Department of Treasury.

M. Use Tax and Online Services. In *GXS, Inc. v. Department of Treasury*, Mich. Ct. Claims, Dkt. No. 13-000181-MT, 03/23/2015, the court rejected the

Department of Treasury's argument that the Michigan customers' purported "access" to the taxpayer's software applications, equated to "delivery" of prewritten computer software. The Michigan use tax applies only to those transactions in which the person takes "delivery" of prewritten computer software. In this case, no underlying software or software code was installed or downloaded to Michigan customers' computers or servers in connection with the transactions, the underlying software used in these transactions was at all times housed on the taxpayer's servers located outside Michigan, and the transactions did not involve the mixed use of both services and sale of tangible personal property.

N. Uncapping Exception for Certain Conveyances by DNR. L. 2015, S19 (P.A. 19), effective April 29, 2015, excepts conveyances of property under Mich. Comp. Laws Ann. § 324.2120A(6) of the Natural Resources and Environmental Protection Act, which allows the Department of Natural Resources to convey certain properties to the current occupants and de facto color of title, from the definition of "transfer of ownership" for property tax cap purposes.

O. Change in Income Tax Filing Status for Married Same-Sex Couples. In response to the June 26, 2015, U.S. Supreme Court decision in *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, U.S. S. Ct., Dkt. No. 14-556, 06/26/2015 the Michigan Department of Treasury has announced that Michigan now recognizes the marriages of same-sex spouses, and that the Department has changed the state's policy with respect to the income tax filing status of married same-sex couples.

P. Additional Michigan Film Production Funding Ended. L. 2015, H4122 (P.A. 117), effective July 10, 2015, amends the film and digital media production assistance program to prohibit the Michigan Film Office and the Michigan Strategic Fund from approving funding under a new agreement, or increase funding through an amendment to an existing agreement, for direct production expenditures, Michigan personnel expenditures, crew personnel expenditures, or qualified personnel expenditures.

Q. Use of Multistate Tax Compact apportionment formula in Michigan. The Michigan Supreme Court has vacated the judgment of the Court of Appeals in the case of *Lorillard Tobacco Company v. Department of Revenue*, and remanded the case for reconsideration in light of L. 2014, P.A. 282. In *Lorillard* (Dkt. No. 313256, 09/16/2014 (unpublished)), the Court of Appeals held that a taxpayer could elect to use the 3-factor apportionment formula provided for by the Multistate Tax Compact (Compact) to apportion its business income tax for the period ending December 2008 under the Michigan Business Tax (MBT). L. 2014, P.A. 282 retroactively repealed the Compact effective beginning January 1, 2008, and states that it was the legislature's intent to repeal the Compact as of that date and require taxpayers to use the sales-factor apportionment formula of the MBT. (*Lorillard Tobacco Co. v. Department of Treasury*, Mich. S. Ct., Dkt. No. 150664, 07/28/2015.)

R. Income Tax Treatment of Income Attributable to Estates, Trusts and Beneficiaries. The Michigan Department of Treasury has issued a release that explains the income tax treatment of income attributable to estates, trusts, and beneficiaries. The publication replaces Michigan Revenue Administrative Bulletin No.

1988-19, 05/27/1988. (Michigan Revenue Administrative Bulletin No. 2015-15, 08/20/2015.)

1. Overview. Under the Michigan Income Tax Act, income received by an estate or trust will keep its character (interest, dividend, capital gain, business income, etc.) whether the income is retained by the estate or trust or is distributed to the beneficiaries. If income is retained by the estate or trust, the income will usually be taxed to the estate or trust. If the income is distributed to beneficiaries, the income will usually be taxed to the beneficiaries. The taxation of the income under the Michigan Income Tax Act depends on the residency of the taxpayer for certain types of income and on the source of the income for other types of income. The fiduciary of the estate or trust should provide a beneficiary with a federal Form 1041 Schedule K-1 that reports the income attributable to that beneficiary. The fiduciary should also provide supplemental information to a beneficiary identifying income that is attributable to Michigan.

2. Resident Estates or Trusts. The Michigan Income Tax Act defines a resident estate and a resident trust in Mich. Comp. Laws Ann. § 206.18(b) and Mich. Comp. Laws Ann. § 206.18(c), respectively. Under Mich. Comp. Laws Ann. § 206.18(b), the estate of a decedent is a resident estate if the decedent was domiciled in Michigan at the time of death. Under Mich. Comp. Laws Ann. § 206.18(c), a trust is a resident trust if the trust was created by the will of a decedent who was domiciled in Michigan at the time of death. Resident trusts also include any trust created by, or consisting of property of, a person domiciled in Michigan at the time the trust becomes irrevocable. Resident estates and resident trusts are subject to Michigan income tax on all income from any source, except for income that is attributable to another state according to the allocation or apportionment provisions of the Michigan Income Tax Act. The taxable income of a resident estate or resident trust is federal taxable income subject to Michigan adjustments

3. Nonresident Estates or Trusts. A nonresident estate or trust is one that does not meet the definition of a resident estate or trust. In addition, a trust that meets the definition of a resident trust may nonetheless become a nonresident trust if all the following are true: the trustee is not a Michigan resident; the trust assets are not held, located or administered in Michigan; and all of the beneficiaries are nonresidents. Nonresident estates and trusts are subject to Michigan income tax on income sourced to Michigan, including: income derived from real or tangible personal property located in Michigan; income from a business, trade, profession, or occupation conducted in Michigan; income from services performed in Michigan; and income earned, received, or acquired in Michigan. Nonresident trusts and estates are taxed on the Michigan-sourced income that is not taxable to the beneficiaries.

4. Grantor Trust. No fiduciary income tax return is required when the grantor is treated as the owner of the trust's assets under IRC §671 through IRC §678. Instead, the grantor reports the trust's income, deductions, and credits on the grantor's individual Michigan income tax return.

5. Taxable Income of Beneficiary of Estate or Trust. Beneficiaries who are residents of Michigan are subject to Michigan income tax on all sources of income distributed from an estate or trust after adjustments. For income that is allocable based

on residency, the allocation is based on the residency of the beneficiary regardless of the residency of the estate or trust. Nonresident beneficiaries are subject to Michigan income tax on income distributed by an estate or trust if the income is allocated to or apportioned to Michigan. For example, rents and royalties from real or tangible personal property located in Michigan and capital gains and losses from sales or exchanges of those properties are allocated to Michigan. Royalty income from patents and copyrights are allocated to Michigan if they are used in Michigan. Business income is subject to allocation or apportionment. The net income from Michigan oil and gas wells is not subject to tax if the oil and gas is subject to Michigan severance tax. After 2012, income and expenses subject to the nonferrous metallic mineral extraction severance tax are not taxable. Nonresident beneficiaries are not subject to Michigan income tax on interest and dividends or on capital gains or losses from the sale of intangible property even if the income is distributed from a Michigan estate or trust.

6. Allocation of Michigan Income Additions and Subtractions to Beneficiaries. The allocation of Michigan income additions and subtractions must be in proportion to the beneficiary's share of distributable net income of the estate or trust. If the distributable net income of an estate or trust is zero or less than zero, the share of each beneficiary's Michigan additions and subtractions is in proportion to each beneficiary's share of the income for that year (determined under local law or the terms of the instrument) which is required to be distributed currently, plus any other income distributed. Any balance of the Michigan additions and subtractions not allocable to any beneficiary is allocated to the estate or trust.

Example: A trust has income, for trust accounting purposes, of $10,000, and the Michigan net rental income is $5,000. Certain expenses paid by the trustee are chargeable to principal under the terms of the trust instrument but are nevertheless deductible for federal income tax purposes and have the effect of reducing distributable net income to zero. The trust instrument requires that $4,000 of income be distributed to the beneficiary. An additional $3,000 is paid to the beneficiary under the discretionary authority of the trustee, and the remaining $3,000 of income is accumulated by the trust. The beneficiary's $7,000 share is 70% of the total income for trust accounting purposes, so that 70% of the adjustment ($5,000 x 70% = $3,500) is allocated to the beneficiary. The beneficiary will add $3,500 to federal adjusted gross income to determine Michigan income. The remaining $1,500 of the net adjustments belongs to the trust and is added to the federal taxable income of the trust to determine the trust's Michigan income.

III. EMPLOYEE BENEFITS

A. Inflation Adjustments. For tax year 2015, Revenue Procedure 2014-61 provides the following annual inflation adjustments:

	2015	2014	2013
IRAs			
IRA Contribution Limit	$5,500	$5,500	$5,500
IRA Catch-Up Contributions	1,000	1,000	1,000
IRA AGI Deduction Phase-out Starting at			
Joint Return	98,000	96,000	95,000
Single or Head of Household	61,000	60,000	59,000
SEP			

	2015	2014	2013
SEP Minimum Compensation	600	550	550
SEP Maximum Contribution	53,000	52,000	51,000
SEP Maximum Compensation	265,000	260,000	255,000
SIMPLE Plans			
SIMPLE Maximum Contributions	12,500	12,000	12,000
Catch-up Contributions	3,000	2,500	2,500
401(k), 403(b), Profit-Sharing Plans, etc.			
Annual Compensation	265,000	260,000	255,000
Elective Deferrals	18,000	17,500	17,500
Catch-up Contributions	6,000	5,500	5,500
Defined Contribution Limits	53,000	52,000	51,000
ESOP Limits	1,070,000 210,000	1,050,000 210,000	1,035,000 205,000
Other			
HCE Threshold	120,000	115,000	115,000
Defined Benefit Limits	210,000	210,000	205,000
Key Employee	170,000	170,000	165,000
457 Elective Deferrals	18,000	17,500	17,500
Control Employee (board member or officer)	105,000	105,000	100,000
Control Employee (compensation-based)	215,000	210,000	205,000
Taxable Wage Base	118,500	117,000	113,700

B. Guidance Issued on After-Tax Distributions and Rollovers. The IRS released Notice 2014-54 dealing with the treatment of after-tax money distributed or rolled over from retirement plans. The new rules are effective for distributions after December 31, 2014. The Notice sets forth following rules:

1. All distributions that are scheduled to be made at essentially the same time are treated as a single distribution for purposes of allocating between pretax and after-tax, even if the participant directions that the distributions go to different destinations. Reasonable delays to facilitate plan administration are ignored (i.e., are not treated as separate distributions).

2. If the total amount of any direct rollovers exceeds the pretax funds distributed, then the entire pretax amount is allocated to the direct rollover. If there is more than one direct rollover, the participant can select how to allocate the amount between them, but must inform the plan administrator of the allocation prior to the distribution.

3. If the pretax amount distributed equals or exceeds the total amount of direct rollovers, then the direct rollovers consist entirely of pretax funds. But if the participant also makes a 60-day rollover then:

a. If the pre-tax funds exceed the sum of all the rollovers (direct and 60-day), then all rollover funds are pretax.

b. Otherwise, all the direct rollovers consist of pretax funds and the remaining pretax funds are allocated to the 60-day rollover. If there are multiple 60-day rollovers, then, subject to the rules limiting 60-day rollovers of after-tax funds to employer plans, the participant can select how to allocate the amount between them.

4. Any remaining pretax funds distributed to the participant are subject to income tax, to withholding, and potentially to the premature distribution penalty tax.

5. Notwithstanding Rule A, distributions to different destinations may require multiple Forms 1099-R. For example, the instructions require separate 1099-R forms when a distributions have different codes in Box 7.

C. Guidance Issued on Lifetime Income From Defined Contribution Plans. The IRS has issued guidance in Notice 2014-66 providing a special rule that allows qualified defined contribution plans to provide lifetime income by offering, as investment options, a series of target date funds (TDFs) that include deferred annuities among their assets, even if some of the TDFs within the series are available only to older participants.

D. Application of One-Per-Year Limit on IRA Rollovers.

1. In Announcement 2014-15, the IRS said that it would apply the *Bobrow* interpretation of Section 408(d)(3)(B) for distributions that occur on or after January 1, 2015. Tax Court in *Bobrow v. Commissioner*, T.C. Memo. 2014-21, held that the one-rollover-per-year limitation of Code Section 408(d)(3)(B) applies on an aggregate basis, meaning that an individual could not make an IRA-to-IRA rollover if he or she had made such a rollover involving any of the individual's IRAs in the preceding 1-year period. This means that an individual receiving an IRA distribution on or after January 1, 2015, cannot roll over any portion of the distribution into an IRA if the individual has received a distribution from any IRA in the preceding 1-year period that was rolled over into an IRA. However, as a transition rule for distributions in 2015, a distribution occurring in 2014 that was rolled over is disregarded for purposes of determining whether a 2015 distribution can be rolled over under Section 408(d)(3)(A)(i), provided that the 2015 distribution is from a different IRA that neither made nor received the 2014 distribution.

2. In Announcement 2014-32, the IRS subsequently made it clear that the new interpretation will apply beginning January 1, 2015, and said that a distribution from an IRA received during 2014 and properly rolled over (normally within 60 days) to another IRA, will have no impact on any distributions and rollovers during 2015 involving any other IRAs owned by the same individual. This will give IRA owners a fresh start in 2015 when applying the one-per-year rollover limit to multiple IRAs. Although an eligible IRA distribution received on or after January 1, 2015, and properly rolled over to another IRA will still get tax-free treatment, subsequent distributions from any of the individual's IRAs (including traditional and Roth IRAs) received within one year after that distribution will not get tax-free rollover treatment. As this guidance makes clear, a rollover between an individual's Roth IRAs will preclude a separate tax-free rollover within the 1-year period between the individual's traditional IRAs, and vice versa.

E. Cash Balance Plan Guidance. Almost four years after proposing regulations for cash balance and other hybrid plans, the Internal Revenue Service recently issued final regulations addressing the market rate of return limits, as well as other aspects of the sweeping changes that were made in this area by the Pension Protection Act of 2006. 79 Fed. Reg. 56442 (Sept. 19, 2014). Sponsors of defined benefit plans that contain cash balance or hybrid pension formulas need to consider if plan changes will be required before 2016. The most critical compliance issue for most plans will be to determine if the plan's existing interest crediting features meet the final rules, and, if they do not, how to transition to a new, compliant regime. Traditional defined benefit plan sponsors may conclude that the more complete regulatory framework in this area now presents a good opportunity to take advantage of a hybrid pension benefit formula.

F. IRS Seeks Information Regarding Hard-To-Value Assets in IRAs with New Boxes and Codes on Forms 5498 and 1099-R. Each year, IRA providers file with the IRS two returns: Form 5498 (reporting the account's value as of the preceding year-end) and (if there has been a distribution from the account) Form 1099-R reporting the distributions made during the preceding year. In the 2014 edition of these forms, the IRS added some new boxes and codes, pertaining to hard-to-value assets (or, as the IRS calls them, assets without a readily available FMV). The reporting regarding such assets is optional for the 2014 reports, but beginning with reports for the 2015 year it will become mandatory. It has always been the case that Form 5498 required the IRA provider to report the "fair market value" of the IRA as of the preceding year-end. However, except for a rule dealing with certain deferred annuities, the IRS has never provided any specific valuation rules for IRAs. Whatever may have been the case in the past, IRA owners and providers will need to take the annual valuation requirement more seriously in the future. The IRS's interest in valuation relates to calculating the tax on non-cash distributions and determining the amount of the required minimum distributions.

G. Revisions to EPCRS. IRS Revenue Procedure 2015-27 made several revisions to the Employee Plans Compliance Resolution System ("EPCRS") effective July 1, 2015. However, Plan Sponsors are permitted, at their option, to apply the provisions of Rev. Proc. 2015-27 on or after March 27, 2015. Major changes to EPCRS include:

1. Correction of Overpayment Failures. The IRS indicated that some plans have demanded recoupment of large amounts from plan participants and beneficiaries on account of plan administration errors made over lengthy periods of time, and that plan participants and beneficiaries, particularly those who are older individuals, may have financial difficulty meeting some corrective actions that have been sought by plan administrators, including the return of overpayments with substantial accumulated interest. IRS also noted that some plans may be interpreting the correction rules in Rev. Proc. 2013-12 as requiring a demand for recoupment from plan participants and beneficiaries in all cases. Rev. Proc. 2015-27 clarifies existing correction rules for overpayments paid to plan participants. Plans have some flexibility to correct this plan failure and don't have to secure overpayments from affected plan participants or beneficiaries in every situation. In addition, The IRS is requesting

comments from the public on expanding EPCRS correction rules to provide additional guidance on the recovery or recoupment of overpayments.

2. Self-Correction of Section 415(c) Failures. Plan sponsors can use SCP to correct certain recurring excess annual additions if they act within a specified time. The timeframe to distribute excess annual additions is increased from 2-1/2 months to 9-1/2 months.

3. Required Minimum Distributions. Reduced fees may apply to a larger group of plan sponsors if a plan's sole failure is the late payment of required minimum distributions and it affects 300 or fewer plan participants. Plans must meet specific conditions to qualify for the reduced fee.

4. Participant Loans that do not Comply with Code 72(p). Plan sponsors may be eligible for new reduced fees based upon the number of participants with bad loans. They must meet specific conditions to qualify for the reduced fee.

5. IRS Letter 5265 replaces Appendix D as the IRS Acknowledgement Letter. Applicants who want a written acknowledgment letter from the IRS for their VCP submission must include a partially completed IRS Letter 5265. Appendix D is superseded and no longer permitted. Also, if a VCP applicant wishes to use model VCP documents, the plan sponsor must submit the current version of Form 14568 (and, if applicable, Forms 14568-A through 14568-I). Appendix C, Appendix C Schedules and Appendix D are no longer part of Revenue Procedure 2013-12 because they were replaced by official IRS forms and letters.

6. Required Determination Letter Applications. Rev. Proc. 2015-27 clarifies when a plan sponsor is required to submit a determination letter application to the IRS when they are resolving qualification failures by adopting retroactive plan amendments, including IRS pre-approved plans.

7. Expanded Correction Period for Amendments. The correction period for adopting certain corrective plan amendments is extended if the plan sponsor submits a required determination letter application concurrently with a VCP submission.

H. Additional Safe-Harbor Correction Methods. IRS Revenue Procedure 2015-28 added two safe-harbor correction methods to the Employee Plans Compliance Resolution System ("EPCRS") effective April 2, 2015. The two new safe harbor correction methods are for missed elective deferrals. The new methods are:

1. Automatic Contribution Arrangement - Correction within 9-1/2 Months. This new safe harbor EPCRS correction method is for automatic contribution features (including automatic enrollment and automatic escalation of elective deferrals) in plans described in Code section 401(k) and Code section 403(b). See, Appendix A Section .05(8).

2. No/Reduced QNEC for Corrections within 3 Months/SCP Correction Period for Significant Failures. This special safe harbor correction method is for plans (including those with automatic contribution features) that have failures that are of limited duration and involve elective deferrals. See, Appendix A Section .05(9).

I. Obligation to Retain Documentation for Loans and Hardship Withdrawals. In IRS' Employee Plans Newsletter, Issue Number 2015-4, dated April 1, 2015, the IRS has reminded plan sponsors that they are ultimately responsible for tracking plan loans and hardship distributions, notwithstanding that most employers rely on a third-party administrator (a "TPA") to handle participant loans and hardship withdrawals—typically through the TPA's website.

1. Plan Loans. According to the IRS, the plan sponsor's files should include all of the following documents, in paper or electronic format, for each plan loan: (i) the participant's loan application, along with records of its review and approval; (ii) an executed promissory note; (iii) for home loans, proof that the loan proceeds were used to purchase or construct a primary residence; (iv) proof of all loan repayments; (v) in the event of a default, proof of collection activities; and (vi) in the event of a deemed distribution of loan proceeds, the related Form 1099-R. A repayment period of more than five years is permissible only if the purpose the plan loan is to purchase or construct a primary residence. The guidance stresses that self-certification of this requirement is not permitted. In fact, if a participant requests a repayment period of more than five years, the plan sponsor's file must include documentation of the home purchase before the loan is approved.

2. Hardship Withdrawals. The guidance also reminds plan sponsors that they must keep records of all hardship withdrawals. In fact, the IRS pointedly notes that failure to have these records for prior hardship withdrawals on file for examination is itself a qualification failure that should be corrected using the Service's Employee Plans Compliance Resolution System ("EPCRS"). The sponsor's files should contain the following documents for each hardship withdrawal, in paper or electronic format: (i) the participant's application for a hardship withdrawal, and records demonstrating its proper review and approval; (ii) financial information and documentation that substantiates the participant's "immediate and heavy financial need" (as that phrase is defined in the Treasury Regulations); (iii) Proof that the hardship withdrawal was made in accordance with the applicable plan provisions and the Tax Code; and (iv) records of the actual distribution and the related Form 1099-R reporting it to the IRS. Some TPAs and sponsors allow participants to electronically self-certify that they qualify for a hardship distribution. But as the guidance stresses, self-certification is never sufficient to demonstrate the nature of the participant's hardship. To qualify for a hardship withdrawal, a participant must prove that the withdrawal is "necessary" to meet an "immediate and heavy" financial need. While self-certification is permitted to show that a distribution was necessary, it is not permitted to show that the need is immediate and heavy. Thus, the guidance reminds sponsors that they must obtain documentation showing the nature of the hardship.

J. DOL Proposes New Fiduciary Rule for Retirement Advisors. The DOL has proposed a new fiduciary rule which will expand the types of retirement investment advice covered by fiduciary protections. Under DOL's proposed definition, any individual receiving compensation for providing advice that is individualized or specifically directed to a particular plan sponsor, plan participant, or IRA owner for consideration in making a retirement investment decision will now be a fiduciary. Such decisions can include, but are not limited to, what assets to purchase or sell and whether to rollover from an employer-based plan to an IRA. The fiduciary can be a

broker, registered investment adviser, insurance agent, or other type of adviser. At least two areas that will not make one a fiduciary are:

1. Providing General Investment Education. The DOL's proposal carves out education from the definition of retirement investment advice so that advisers and plan sponsors can continue to provide general education on retirement saving across employment-based plans without triggering fiduciary duties.

2. Simple "Order-Taking." If a broker is simply in the role of executing an order to buy or sell without providing any recommendation, that transaction does not constitute investment advice. In such circumstances, the broker has no fiduciary responsibility to the plan sponsor.

K. Plans Do Not Necessarily Have to Recoup Overpayments. Rev. Proc. 2015-27, requests comments on the actions a retirement plan sponsor should take if it discovers that it has overpaid benefits to a former participant. Historically, many plan trustees have believed that they were required as a fiduciary matter to seek repayment of the overpayments, plus interest, from the former participant. However, requiring repayment may be financially difficult for a former participant. The Revenue Procedure gives two possible alternatives: (i) retroactively amend the plan to conform to the way it was actually operated, or (ii) have the plan sponsor make up the overpayments. In either case, the correction itself must be permissible under the tax qualification rules applicable to retirement plans. Depending on the size of the error, and how quickly it is discovered, the plan may need to file with the IRS make a retroactive amendment and/or pay a penalty in order to avoid plan disqualification.

L. IRS Eliminating Determination Letters for Certain Plan Amendments. The IRS announced on April 30, 2015, that in order to continue its determination letter program with the limited resources available, it must eliminate the ability of most individually designed plans to seek determination letters for plan amendments. Beginning in 2017, the IRS will no longer review most applications for amended individually designed plans. However, the IRS will continue to review initial plan applications and plan termination applications for individually designed plans, and possible certain other types of amendments. The change is ostensibly necessary because resource constraints have reduced to fewer than 100 the number of employees working on plan determination letter applications.

M. Special Penalty Relief Available to Certain Small Retirement Plans for Late Returns Filed by June 2, 2015. IRS News Release 2015-74 reminds taxpayers of the one-year temporary pilot program launched on June 2, 2014, which is designed to help small businesses with retirement plans that may have been unaware of the reporting requirements that apply to these plans. Normally, the plan administrators and sponsors of these plans who fail to file required annual returns, usually Form 5500-EZ, can face stiff penalties -- up to $15,000 per return. By filing late returns by June 2, 2015, eligible filers can avoid these penalties.

N. Deferred Compensation Is Includable in Executive's Income. In legal memorandum ILM 201518013, the IRS concluded that a failure under Section 409A, applicable to deferred compensation subject to a substantial risk of forfeiture that lapses during the tax year, results in income inclusion of the deferred amount, regardless of

whether the failure is corrected during the same tax year but before the substantial risk of forfeiture lapses. Under a retention agreement, an executive would receive a bonus for remaining employed until the vesting date -- the third anniversary of the agreement's execution date. The corporation determined that the agreement failed to meet the requirements of Section 409A(a), because it could accelerate payment of the bonus. The corporation corrected the failure in the third year by removing its discretion to accelerate payment of the bonus. The executive provided services through the third year, and the substantial risk of forfeiture lapsed. The corporation asserted that the bonus should not be includable in the executive's income under Section 409A for any tax year, because the agreement was amended to comply with Section 409A(a) before the vesting date. The IRS noted that its contrary conclusion, based on Section 409A(a)(1)(A)(i), is consistent with proposed regulations (REG-148326-05) on Section 409A income inclusion. An example under the proposed regulations shows that whether or not an operational failure occurs on or after the date a substantial risk of forfeiture lapses has no consequence to the amount includable in income. Further, nothing suggests that such a correction during the tax year would result in different consequences. Rather, the statute and the regulations provide that if a failure occurred at any time during the tax year, there is an amount includable in income that is determined based on the amounts deferred at the end of the tax year, reduced by the amounts subject to a substantial risk of forfeiture at the end of the tax year and the amounts previously included in income for a year before that tax year. Thus the IRS determined that the retention bonus is deferred compensation, and that the retention agreement is a nonqualified deferred compensation plan subject to the requirements of Section 409A(a) beginning on the agreement's execution date. The failure to meet the requirements of Section 409A(a) began on the execution date of the agreement and continued until it was corrected in the third year. The amount includable in income under Section 409A for the first and second years is reduced to zero because the entire deferred amount was subject to a substantial risk of forfeiture at the end of those years. However, the entire deferred amount was vested, meaning no longer subject to a substantial risk of forfeiture, at the end of the third year. Therefore, the amount includable in income under Section 409A for the third year is not reduced by any nonvested amount, and the entire deferred amount is includable in the executive's income under Section 409A for the third year.

O. Claim for Ongoing Breach of Fiduciary Duty to Monitor Investments and Remove Imprudent Ones was not Barred by 6-year Statute of Limitations. *Tibble v. Edison Int'l*, No. 13-550 (U.S. May 18, 2015) is a unanimous decision by the U.S. Supreme Court involving a retirement plan fiduciary's duty to continuously monitor plan investments.

1. Facts. In 2007, petitioners, beneficiaries of the Edison 401(k) Savings Plan(Plan), sued Plan fiduciaries, respondents Edison International and others, to recover damages for alleged losses suffered by the Plan from alleged breaches of respondents' fiduciary duties. The petitioners argued that respondents violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. Petitioners argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available. Because ERISA requires a breach of fiduciary duty complaint to be filed no more than

six years after "the date of the last action which constitutes a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation," 29 U. S. C. §1113, the District Court held that petitioners'complaint as to the 1999 funds was untimely because they were included in the Plan more than six years before the complaint was filed, and the circumstances had not changed enough within the 6 year statutory period to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class funds. The Ninth Circuit affirmed, concluding that petitioners had not established a change in circumstances that might trigger an obligation to conduct a full due diligence review of the1999 funds within the 6-year statutory period.

2. Decision. The U.S. Supreme Court reversed the Ninth Circuit holding that "[A] fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones. A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." The case was remanded by the U.S. Supreme Court for further proceedings consistent with its decision.

P. Amounts Deferred Under Stock Option Includable in Income. In ILM 201521013, the IRS determined that certain amounts must be included in income because the taxpayer's nonstatutory stock option failed to meet the requirements of Section 409A(a). Before a specified date, a parent corporation agreed to grant a taxpayer a nonstatutory option to purchase some of the parent's common stock. Also before that date, an option agreement providing for those grants under the terms of a plan were executed. Under the agreement, the common stock would be issued on a particular date, subject to any necessary corporate action. The common stock was traded on a "when-issued" basis on an over-the-counter market. Before the end of the third year, the parent declared a dividend per share to be paid to holders of its common stock. The parent adjusted the unvested portion of the taxpayer's option as of the dividend declaration date by reducing the exercise price per unvested option share by the amount of the dividend. The IRS concluded that the grant date of the taxpayer's nonstatutory stock option for purposes of Section 409A is the date on which the conditions for grant of the option were completed. The IRS also concluded that stock traded on a when-issued, over-the-counter market is readily tradable on an established securities market for purposes of determining the fair market value of service recipient stock underlying a nonstatutory stock option. Thus, the common stock was treated as having been readily tradable on the grant date of the option. For the option to be exempt from Section 409A, the exercise price may not be less than the FMV of the underlying stock on the option's grant date, determined based on a reasonable method using actual when-issued transactions in the stock reported by the over-the-counter market. The taxpayer's nonstatutory stock option failed to meet the requirements of Section 409A(a) from the grant date because the exercise price was less than the applicable FMV of the underlying stock on the grant date, and the terms of the option did not provide for exercise dates that were permissible payment events. As a consequence, the option was treated as a nonqualified deferred compensation plan subject to Section

409A(a) from the grant date until the end of the tax year during which the option is either fully exercised or expires. Because the taxpayer's nonstatutory stock option failed to meet the Section 409A(a) requirements, the total amount deferred under the option at the end of the tax year of the Section 409A failure, including any payments of deferred amounts made under the option during the tax year, would be ordinarily be includable in income. However, the statute of limitations on assessments had expired for the first two tax years. As a consequence, the IRS addressed the amounts subject to income inclusion only for the third year. It describes the methods under the proposed Section 409A regulations (REG-148326-05) for calculating the amount of the income inclusion, the additional 20 percent income tax, and the additional interest income tax under Section 409A(a)(1). However, because calculation of the additional interest income tax must consider the taxpayer's other tax attributes for the applicable tax years, the IRS said it would provide separate advice on the calculation of that tax.

Q. Permanent Program Provides Penalty Relief for 1-Participant Plans. The IRS has issued Rev. Proc. 2015-32 establishing a permanent program to provide relief to plan administrators who fail to timely file Form 5500-EZ, "Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan." For years beginning after 2006, one-participant retirement plans with assets of $250,000 or less at the end of the plan year are not required to file a Form 5500 series return. The permanent program replaces a temporary pilot program established by Rev. Proc. 2014-32 that provides administrative relief from the penalties imposed under sections 6652(e) and 6692 for failure to timely comply with the annual reporting requirements under sections 6047(e), 6058, and 6059. The permanent program generally follows the requirements of the pilot program, but some changes have been made to reflect comments on the pilot program and the addition of a payment requirement with all submissions. The payment for each submission is $500 for each delinquent return for each plan, up to a maximum of $1,500 per plan. The permanent program provides that the applicant must submit the delinquent return on the Form 5500-EZ that applied for the plan year for which the return was delinquent. However, for returns for plan years before 1990, the applicant may use a current-year Form 5500-EZ, listing the dates of the plan year for which the return was delinquent. Before 2009 some plans were required to file returns on Form 5500 rather than Form 5500-EZ. Under the pilot program, those filers were required to file a Form 5500 return for the applicable year rather than a Form 5500-EZ return. To simplify the program, filers that would have been required to file a Form 5500 return under the pilot program are instead required under the permanent program to file a current-year Form 5500-EZ return, listing the dates for the plan year for which the return was delinquent. The pilot program provided that multiple returns for multiple plans could be included in a submission. Because the permanent program requires a payment based on the number of delinquent returns for each plan, delinquent returns for each plan must be submitted separately. Under the permanent program, applicants must include a Form 14704, "Transmittal Schedule - Form 5500-EZ Delinquent Filer Penalty Relief Program (Rev. Proc. 2015-32)," with each submission. Unlike the pilot program, the IRS will contact the applicant if the Form 14704 is not included, the documents submitted are inconsistent with the Form 14704, a required signature on a delinquent return is not provided, or the amount of payment is incorrect. The relief provided under Rev. Proc. 2015-32 is effective June 3, 2015. Returns submitted before that date will be processed in accordance with Rev. Proc. 2014-32.

R. Disqualification of IRA Used to Fund Business Startup. In *Ellis v. Comm'r of Internal Revenue*, No. 14-1310 (8th Cir. June 5 2015), the Eighth Circuit Court of Appeals held that the tax court had properly found the taxpayer to be engaged in a prohibited transaction by directing the company he funded through his IRA to pay him a salary. Mr. Ellis formed CST Investments, LLC (CST), to engage in the business of used automobile sales. The operating agreement contemplated that Mr. Ellis's IRA would provide an initial capital contribution of $319,500 in exchange for a 98 percent ownership in CST. Mr. Ellis's IRA did not exist at the time CST was formed. He received the funds from a 401(k) that he had established with his previous employer, and he deposited the amount in his IRA. To compensate him for his services as general manager, CST paid Mr. Ellis a salary of $9,754 in 2005 and $29,263 in 2006. The court held that if a disqualified person engages in a prohibited transaction with an IRA, the plan loses its status as an individual retirement account under Section 408(a), and its fair market value as of the first day of the taxable year is deemed distributed and included in the disqualified person's gross income.

S. Policies Were Split Dollar Life Insurance Arrangements. In *Our Country Home Enterprises Inc. et al. v. Commissioner*, 145 T.C. No. 1, Nos. 25764-10, 25765-10, 11520-11, 11521-11, 12744-11, 12745-11, and 12746-11, the U.S. Tax Court said that the Sterling Benefit Plan, a purported welfare benefit plan, is actually a split-dollar life insurance plan whose participants receive taxable income from the arrangement. Under the Sterling Plan, employers make payments into an account set aside for each employee. If the employee dies before retiring, the amount in the account would be given to the designated beneficiary of the plan. The employee is also entitled to the funds in the account upon retirement. Under the income tax regulations, a split-dollar life insurance plan is a compensatory arrangement between an owner and a non-owner of a life insurance policy that must meet a three-pronged test (i) the arrangement must be entered into in connection with the performance of services and the plan is not a group-term life insurance plan under Tax Code Section 79; (ii) the employer pays all or a portion of the premiums; and (iii) the employer designates the beneficiary of the plan or the owner has an interest in the cash value of the policy. The Tax Court found that the Sterling Plan met all three prongs of the test. In effect, the court said that the plan essentially amounted to a tax shelter that the employers put money into to claim deductions and the employees extracted money from upon retirement to avoid tax. The seven petitioners had agreed to serve as test cases for issues related to the Sterling Plan, and parties in some 40 other cases pending before the court agreed to be bound by the final decision.

T. Proposed Regulations Modify Section 83(b) Election Requirement. The IRS has published proposed regulations (REG-135524-14) on property transferred in connection with the performance of services, eliminating the requirement that taxpayers submit a copy of a Section 83(b) election with their tax return for the year in which the property subject to the election was transferred. The proposed regulations affect some taxpayers who receive property transferred in connection with the performance of services and make an election under Section 83(b) to include the value of substantially non-vested property in income in the year of transfer. A Section 83(b) election must be filed with the IRS by 30 days after the date that the property is transferred to the service provider. Treas. Reg. §1.83-2(c) provides that the election is made by filing a copy of a written statement with the IRS office with which the person

who performed the services files his or her return. The person who performed the services must also submit a copy of the statement with his or her income tax return for the tax year in which the property was transferred. Many taxpayers who wish to electronically file their annual income tax return can't because of the requirement to attach the Section 83(b) election statement to the return. To remove this obstacle to e-filing an individual tax return, the proposed regulations eliminate the Treas. Reg. §1.83-2(c) requirement. According to the preamble to the regulations, the service center that receives the elections generates an electronic copy, which eliminates the need for taxpayers to submit a copy with their returns. The regulations are proposed to apply as of January 1, 2016, and would apply to property transferred on or after that date. Taxpayers may rely on the regulations for property transferred after December 31, 2014. Comments are due by October 15, 2015.

U. Contraction of Employee Plans Determination Letter Program.

1. In Announcement 2015-19 the IRS has indicated that, effective January 1, 2017, it is eliminating the staggered 5-year determination letter remedial amendment cycles for individually designed plans and will limit the scope of the determination letter program for individually designed plans to initial plan qualification and qualification upon plan termination. In addition, effective July 21, 2015, the IRS will generally no longer accept determination letter applications that are submitted off-cycle.

2. The current determination letter period — Cycle E — is open for individually designed retirement plans sponsored by employers with EINs ending in 0 or 5, and governmental plans. The deadline for Cycle E plans to submit their determination letter requests is January 31, 2016. This Announcement sets the termination date for the current program at December 31, 2016, which will allow the next group, Cycle A plans for individually designed retirement plans sponsored by employers with EINs ending in 1 or 6, to get in one last letter under the program.

3. Despite the inability to obtain an IRS "stamp of approval" on a plan change, plan sponsors will still be expected to keep their plans up-to-date. The deadline for adopting amendments to reflect mandated changes and fix errors in discretionary changes is referred to as the "remedial amendment period." In general, this period starts when a defective amendment is adopted, or should have been adopted, and ends with the tax filing date applicable to the plan sponsor's business tax return. Under the existing remedial amendment cycles, the remedial amendment period extends to the end of the plan's applicable amendment cycle. Under the Announcement, this extension will no longer be available after December 31, 2016. However, any open remedial amendment periods for individually designed plans will remain open until December 31, 2017. This additional time does not necessarily mean all amendments can wait until the end of 2017. Discretionary amendments still need initial adoption by the end of the plan year the amendment is put into operation. And a plan amendment that relies on anti-cutback relief — such as an amendment to correct a cash balance plan's faulty market-based interest crediting rate — would still need to be adopted by the cutoff set for obtaining relief.

V. Required Minimum Contributions for Single-Employer Pension Plans. The IRS has issued final regulations on determining the required minimum contributions for single-employer defined benefit pension plans (T.D. 9732). The

regulations also explain how the Section 4971 excise tax for failure to satisfy the required minimum contribution is calculated. They finalize proposed regulations that were issued in 2008.

1. Minimum Contributions.

a. Section 430, which was added to the Code by the Pension Protection Act of 2006 (PPA), P.L. 109-280, specifies the rules that apply for minimum funding of single-employer defined benefit plans. Under those rules, if the value of plan assets (less the sum of the plan's prefunding balance and funding standard carryover balance) is less than the funding target, the minimum required contribution under Section 430(a)(1) is the sum of the plan's target normal cost and the shortfall and waiver amortization charges for the plan year. If the value of plan assets (less the sum of the plan's prefunding balance and funding standard carryover balance) equals or exceeds the funding target, the contribution is the plan's target normal cost for the plan year reduced (but not below zero) by the amount of the excess.

b. Payment of any required minimum contribution must be made by 8½ months after the end of the plan year. Any funding shortfall for earlier plan years must be made up by making quarterly payments of 25% of the required annual payment. The regulations provide the due dates for each installment, and they permit the plan sponsor to make a standing election to allow the enrolled actuary to use the funding standard carryover balance and the prefunding balance to satisfy any otherwise unpaid portion. This election may be suspended by written notice to the actuary.

c. The payment is calculated as the lesser of 90% of the required minimum contribution or 100% of that amount (determined without regard to any Section 412(c) funding waiver) for the preceding plan year. Interest at the rate of the plan's effective interest rate plus 5 basis points applies to any payment of a quarterly installment made after the due date.

d. The payments for plans that have unpaid contributions are treated as late contributions for the earliest plan year for which there is an unpaid minimum required contribution (to the extent necessary to correct that required contribution). To the extent the contribution exceeds that amount, the excess is treated as a late contribution for the next earliest plan year for which there is an unpaid minimum contribution (to the extent necessary to correct that next earliest unpaid minimum required contribution). The allocation is repeated until all unpaid minimum required contributions have been corrected or until the entire contribution is allocated, whichever comes first.

e. Under the new final rules, the shortfall amortization installments for a shortfall amortization base established for a plan year generally are the annual amounts necessary to amortize that shortfall amortization base in level annual installments over the seven-year period beginning with that plan year. Treas. Reg. § 1.430(h)(2)-1(f)(2) provides that these installments are determined assuming that they are paid on the valuation date for each plan year and using the Section 430(h)(2)(C) or (D) interest rates.

f. The shortfall amortization installments are not redetermined in later plan years to reflect subsequent changes in interest rates, and they are not redetermined even if the valuation date for a plan changes after the plan year was established. In that case, the dates on which the installments are assumed to be paid are changed to the anniversaries of the new valuation date, and the difference in present value attributable to this change is reflected in any new shortfall amortization base.

g. The final rules also determine how to calculate these amounts for short plan years, in which case the amortization payments are prorated.

2. Excise Tax.

a. Section 4971 imposes an excise tax on the employer for a failure to meet minimum funding requirements. For a single-employer plan, the tax is 10% of the aggregate unpaid minimum required contributions for all plan years remaining unpaid as of the end of any plan year ending with or within a tax year.

b. In addition, Section 4971(b) imposes an additional tax if the minimum funding requirements remain unsatisfied for a specified period. Section 4971(f)(1) imposes a 10% tax on the amount of the liquidity shortfall for a quarter that is not paid by the due date for the installment for that quarter. Section 4971(f)(2) adds an excise tax that applies if a plan has a liquidity shortfall at the close of five consecutive quarters.

c. The excise tax is imposed on unpaid minimum required contributions for all years until corrected, which was not the rule before the PPA was enacted. The final regulations apply this rule to unpaid minimum required contributions for all years, without special treatment for pre-PPA funding deficiencies, because the statute provides the same rules for all unpaid contributions for all years.

W. IRS Ends Lump Sum Windows for Individuals in Pay Status. the IRS has issued Notice 2015-49 , which prohibits the use of lump sum payments to replace lifetime income being received by retirees under defi ned benefi t pension plans, effective in large part as of such date. Th is lump sum window approach—which has been increasing in popularity over the last several years following a line of private letter rulings that expressly sanctioned this approach (often referred to as the Ford/GM rulings)—has been a method favored by plan sponsors to manage the ever-increasing costs of maintaining a defined benefit plan. Under this so called de-risking strategy, the plan sponsor would amend its plan to allow a participant to elect a lump sum payment that was not otherwise available under the plan terms for a specific period of time. Now this window approach will be limited to individuals not already in pay status (e.g., deferred vested participants), which still has value but will no longer provide a solution for addressing pension liability for retirees in pay status.

IV. HEALTH CARE

A. Section 4980H—Employer 'Play-or-Pay' Mandate.

1. Section 4980H of the Internal Revenue Code, as added by the Affordable Care Act, requires "applicable large employers" with 50 or more full-time employees (including full-time equivalent employees) to offer health coverage to full-time employees and their children or pay a penalty. Even employers that offer coverage may incur a penalty if that coverage does not provide "minimum value" to plan participants or if it is not "affordable."

2. Although the effective date of the employer shared responsibility or play-or-pay mandate was scheduled by statute to become effective in 2014, the IRS delayed this requirement until January 1, 2015. (Employers with fiscal year plan years may not have to meet the requirements of 4980H until the first day of the 2015 plan year if certain requirements are met.) For employers with between 50 and 99 full-time employees, the mandate is delayed an additional year until 2016.

3. Under Section 4980H(a) and the IRS final rule, "applicable large employers" must offer "minimum essential coverage" to at least 95 percent (70 percent in 2015) of their full-time employees (and their children) or pay a penalty if any full-time employee receives a federal subsidy to purchase insurance through a health exchange. The 4980H (a) penalty is $2,000 for each full-time employee in excess of 30 employees, indexed to inflation. For 2015 only, the penalty will exempt the first 80 full-time employees instead of 30. Employers will pay a penalty under Section 4980H(b) if a full-time employee receives a premium tax credit to purchase health insurance on an exchange because:

a. The employer health coverage offered did not provide "minimum value," that is the plan's share of the total allowed costs of benefits provided under the plan is not at least 60 percent of those costs;

b. The employer health coverage offered was "unaffordable," or

c. The employee was not among the 95 percent (70 percent in 2015) of full-time employees offered coverage.

4. The penalty under Section 4980H(b) is the lesser of $2,000 for each full-time employee in excess of 30 (80 in 2015) or $3,000 for each full-time employee who receives a premium tax credit to enable him or her to purchase coverage through the health insurance exchanges. Individuals must have household incomes between 100 percent and 400 percent of the federal poverty level to be potentially eligible for a federal subsidy.

5. The IRS final rule allows employers to use of one of three safe harbors to determine whether the health plan they offer is affordable. Health coverage is deemed affordable if that employee's required contribution for the calendar year for the employer's lowest cost self-only coverage that provides "minimum value" during the year does not exceed 9.5 percent of:

a. That employee's Form W-2 wages from the employer for the calendar year;

b An amount equal to 130 multiplied by the employee's hourly rate of pay as of the first day of the coverage period or the lowest hourly rate during the calendar month or 9.5 percent of the employee's monthly salary for salaried employees; or

c. The federal poverty level for a single individual. Because a plan's affordability is based on self-only coverage, some employers may have shifted costs to family coverage, while keeping employee-only coverage "affordable."

6. Because the penalty under Section 4980H only applies with respect to full-time employees, the determination of full-time employee status is critical to compliance with the employer play-or-pay mandate. The ACA defines a full-time employee as one working 30 or more hours a week, calculated on a monthly basis. Note that the IRS "common law" definition of employee is used for this purpose. The IRS final rule specifies that the monthly equivalency of 30 hours per week is 130 hours. An employee's hours of service include the following:

a. Each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and

b. Each hour for which an employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

7. The IRS final rule allows employers to use the "look-back" measurement method as an alternative to a strict monthly measurement of hours of service. Employers can use the look-back method for determining the full-time status of ongoing as well new employees as an alternative to a monthly calculation. Under the look-back approach for ongoing employees, an employer would determine each employee's full-time status by looking back at a defined measurement period of three to 12 months to determine full-time status for a subsequent "standard stability period."

8. If an employee worked an average of 30 hours per week during the measurement period, the employer would treat the employee as full-time during the subsequent stability period, the duration of which would be at least the greater of six consecutive calendar months or the length of the measurement period. If an employee did not work an average of 30 hours per week during the standard measurement period, the employer would treat the employee as not full-time during the subsequent stability period, which may be no longer than the associated measurement period.

9. Employers may also use the look-back measurement method for new variable hour, part-time or seasonal workers. The effect of using the look-back method for such new employees is that the employer can wait until the beginning of the subsequent initial stability period to offer coverage to such employees who worked an average of 30 hours a week during the initial measurement period. By contrast, new

employees who are hired to work a full-time scheduled must be offered coverage by the first day of the fourth calendar month after the date of hire to avoid a potential penalty.

B. Recordkeeping Requirements.

1. The ACA requires employers and/or health insurance issuers to report to the IRS information about employer-sponsored health coverage. These reporting requirements were delayed until the 2015 tax year to coincide with the delay in the employer play-or-pay mandate. Specifically, Section 6056 of the Internal Revenue Code, as added by the ACA, requires applicable large employers (ALEs), those subject to the play-or-pay mandate, to provide information to the IRS about the type of health coverage offered to their full-time employees. ALEs must also provide this information to employees. Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, is to be used to report the information required under Section 6056 with respect to each covered employee, and Form 1094-C is to be used to transmit the 1095-C return to the IRS. The IRS will use these forms to determine whether the employer owes a penalty under Section 4980H, and whether employees are eligible for premium tax credits.

2. Section 6055 of the ACA requires health insurance issuers and employers that sponsor self-insured health plans that provide individuals with "minimum essential coverage" to report to the IRS information concerning the type and period of coverage offered for the purposes of enforcing the ACA's individual mandate. Form 1095-B is to be used to report the information required under Section 6055, and Form 1094-B is to be used to transmit the 1095-B return to the IRS. Self-insured ALEs report the information required under both Sections 6055 and 6056 on a single combined Form 1095-C.

C. Employer Reimbursement for Individual Health Policies.

1. On September 13, 2013, the Departments of Treasury, Labor and HHS published guidance on the application of the ACA market reforms to health reimbursement arrangements (HRAs), certain health flexible spending arrangements (health FSAs) and certain other employer health care arrangements.

2. On May 13, 2014, two FAQs were made available on the IRS website addressing employer health care arrangements. This guidance explained that employer health care arrangements, such as HRAs and employer payment plans, are group health plans and, as such, subject to the ACA's prohibition on annual limits and the requirement to provide certain preventive services without cost sharing (the ACA "market reform" requirements). This guidance provided that these employer health care arrangements will not violate these ACA market reform provisions when integrated with a group health plan that complies with the market reform requirements. The guidance also stated that an employer health care arrangement—such as a stand-alone HRA—cannot be integrated with individual market policies to satisfy the ACA market reforms and therefore would be subject to excise taxes under Section 4980D of the Internal Revenue Code of $100/day per applicable employee.

3. In FAQs released on November 6, 2014, the Departments clarified that the payment or reimbursement by the employer of individual market health policies on an after-tax basis does not cure the problem. Regardless of whether the employer

treats the money on a pre-tax or post-tax basis, the arrangement is group health plan coverage subject to the ACA market reform applicable to group health plans. Employer health care arrangements cannot be integrated with individual market policies and will violate the ACA's annual limit and preventive services requirements. This prohibition appears to apply to reimbursement for individual policies purchased through an ACA exchange as well as in the individual market outside of the exchange. In effect, an employer is left with only one option if it does not want to offer a health plan to its employees, but wants to help its employees buy individual coverage. Employers can increase employees' taxable wages to help their employees purchase individual policies. However, the employer cannot condition the receipt of the addition wages on the purchase of an individual health insurance policy. The employees must remain free to use the "no strings attached" additional wages however they want.

D. Limited Transition Relief to Small-Employer Premium Reimbursement Arrangements. In a series of notices and FAQs, the IRS has indicated that an employer's reimbursement of an employee's premiums for individual health insurance violates certain provisions of the Affordable Care Act ("ACA"). While reiterating this viewpoint, Notice 2015-17 grants a limited period of relief for smaller employers. Nonetheless, employers must comply with these ACA constraints by June 30, 2015. The prior guidance, particularly Notice 2013-54, the IRS described a premium-reimbursement arrangement as a type of "group health plan" to which various ACA mandates apply. These include the prohibition of any annual or lifetime limit on coverage for essential health benefits, as well as unlimited, first-dollar coverage for preventive-care services. By its very nature, a premium-reimbursement arrangement is unable to satisfy either of these ACA mandates. It would therefore trigger the employer excise tax imposed under Section 4980D of the Tax Code, which is $100 per day for each affected employee. This excise tax has to be self-reported and paid using IRS Form 8928. Subsequent FAQs applied this same analysis to even after-tax reimbursements of employees' individual health insurance premiums. Following those FAQs, the only option left to an employer for assisting its employees in purchasing individual health coverage are after-tax payroll deductions. The key is that an employee must have "an unfettered right to receive the employer contributions in cash." Notice 2015-17 recognizes that impermissible premium-reimbursement arrangements have been relatively common, particularly in the small-employer market. And although the ACA created "SHOP Marketplaces" as a place for small employers to purchase affordable health insurance, the Notice concedes that the SHOPs have been slow to get off the ground. Hence, there is a need for this transitional relief. Under this relief, any employer that is not an "applicable large employer" (an "ALE") may reimburse (or pay directly to an insurer) employee premiums for individual health insurance coverage throughout all of 2014 and the first six months of 2015. For this purpose, an ALE is defined as an employer that (including all other members of its controlled group) had 50 or more full-time employees (including any full-time equivalents) during the prior calendar year. For 2014, this determination would be made on the basis of the employer's calendar-year 2013 workforce. For the first half of 2015, the determination would be based on 2014. In either event, an employer may take advantage of prior guidance allowing this test to be based on any consecutive 6-month period during the applicable look-back year. Although ALEs with 50 to 99 full-time employees (including full-time equivalents) may rely on a different transition rule to avoid any ACA "play-or-pay" penalties during 2015, there is no similar relief in Notice 2015-17. Thus, such a

"mid-sized employer" may not take advantage of this transition relief for employer reimbursements of individual health insurance premiums. Note that this transition relief applies only to a small employer's reimbursement (or direct payment) of health premiums, including premiums under Medicare Part B or D. It does not allow stand-alone health reimbursement arrangements ("HRAs") that reimburse other medical expenses. Any such HRA must either be "integrated" with an employer group health plan, limited to the reimbursement of former employees' expenses, or "frozen" to new contributions as of December 31, 2013.

E. CMS Announces Special Enrollment Period. On February 20, 2015, the Centers for Medicare & Medicaid Services (CMS) announced a special enrollment period (SEP) for individuals and families who did not have health coverage in 2014 and are subject to the fee or "shared responsibility payment" when they file their 2014 taxes in states which use the Federally-facilitated Marketplaces (FFM). This special enrollment period will allow those individuals and families who were unaware or didn't understand the implications of this new requirement to enroll in 2015 health insurance coverage through the FFM. For those who were unaware or didn't understand the implications of the fee for not enrolling in coverage, CMS will provide consumers with an opportunity to purchase health insurance coverage from March 15 to April 30. If consumers do not purchase coverage for 2015 during this special enrollment period, they may have to pay a fee when they file their 2015 income taxes. Those eligible for this special enrollment period live in states with a Federally-facilitated Marketplace and (i) currently are not enrolled in coverage through the FFM for 2015, (ii) attest that when they filed their 2014 tax return they paid the fee for not having health coverage in 2014, and (iii) attest that they first became aware of, or understood the implications of, the shared responsibility payment after the end of open enrollment (February 15, 2015) in connection with preparing their 2014 taxes.

F. IRS Releases Initial Guidance on the Cadillac Tax. The IRS has released Notice 2015-16, its first guidance on the excise tax on high cost employer-sponsored health coverage (i.e., the Cadillac tax) which will become effective in 2018. The Cadillac tax is a 40 percent nondeductible excise tax on the aggregate cost of "applicable employer-sponsored coverage" (referred to in the Notice and here as "applicable coverage") that exceeds certain dollar limits. The Notice is intended to "initiate and inform" the process of developing regulatory guidance on the Cadillac tax and, as such, does not offer guidance on which taxpayers may rely. However, it does discuss some of the major issues surrounding the implementation of the Cadillac tax and offers potential approaches for resolving those issues. It also seeks comments from interested parties on these issues as well as on related issues under COBRA. The Notice focuses on three key topics relating to the Cadillac tax: (i) what types of coverage constitute applicable coverage subject to the Cadillac tax; (ii) how to determine the cost of applicable coverage; and (iii) how to apply the annual statutory dollar limits to the cost of applicable coverage.

G. More Guidance on "Cadillac" Tax. In Notice 2015-52, the IRS issued additional guidance on the excise tax on high-cost employer-sponsored healthcare coverage. Section 4980I imposes a nondeductible 40 percent excise tax on any excess benefit provided in employer-sponsored health insurance. The tax, scheduled to take effect in 2018, will apply to the cost of coverage exceeding $10,200 for self-only

coverage and $27,500 for other than self-only coverage, with the annual limits being indexed for inflation for future years. The IRS previously released guidance in Notice 2015-16 outlining options it is considering as it works to implement the excise tax. Section 4980I(c)(1) provides that the coverage provider is liable for the excise tax, which is the health insurer for coverage under group health plans and the employer for health savings accounts and Archer medical savings accounts. For all other types of applicable employer-sponsored coverage, the coverage provider is "the person that administers the plan benefits." Notice 2015-52 provides two approaches for determining who administers plan benefits: either the person responsible for performing the plan's "day-to-day functions," or the person with "ultimate authority or responsibility under the plan." The IRS may give employers flexibility to decide whether the employer or a third-party administrator will be liable for the excise tax. Another noteworthy development in Notice 2015-52 is the agency's approach to allocating contributions to HSAs, Archer accounts, flexible spending accounts, and health reimbursement accounts, for purposes of determining the cost of applicable coverage under section 4980I. The notice indicates that the IRS is considering an approach that would allocate contributions on a pro rata basis over the plan year regardless of the timing of contributions. The IRS explains in Notice 2015-52 that it anticipates that coverage providers will seek reimbursement for any taxes owed on the additional excise tax reimbursement income. Excise tax reimbursements are excluded from the cost of applicable coverage under Section 4980I(d)(2)(A), and the notice indicates that the agency is considering whether any income tax reimbursement could also be excluded from the cost of applicable coverage. Notice 2015-52 also provides further guidance on the age and gender adjustment to the applicable dollar limit and indicates the IRS will develop adjustment tables to simplify the calculation of the adjustment.

H. Penalty Relief Related to Incorrect or Delayed Forms 1095-A. IRS Notice 2015-30 provides penalty relief for taxpayers who received a Form 1095-A, Health Insurance Marketplace Statement, that was delayed or that the taxpayer believes to be incorrect and who timely filed their 2014 income tax return, including extensions. The Notice provides relief from the penalty under Section 6651(a)(2) of the Internal Revenue Code for late payment of a balance due, the penalty under Section 6651(a)(3) for failure to pay an amount due upon notice and demand, the penalty under Section 6654(a) for underpayment of estimated tax, and the accuracy-related penalty under Section 6662. This relief applies only for the 2014 taxable year.

I. Supreme Court Upholds ACA Subsidies for Insurance Purchased on Federally-Facilitated Exchanges. In *King v. Burwell*, No. 14-114 (U.S. June 25, 2015), the U.S. Supreme Court upheld the Section 36B tax credits for insurance purchased on any Exchange created under the Act, whether Federal or State. The petitioners were four individuals who live in Virginia, which has a Federal Exchange. They did not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of the petitioners' income, exempting them from the Act's coverage requirement. However, an IRS regulation interprets the Act as making tax credits available on "an Exchange," 26 CFR §1.36B–2, "regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR §155.20. As a result of the IRS Rule, petitioners would receive tax credits. That would make the cost

of buying insurance less than eight percent of their income, which would subject them to the Act's coverage requirement. Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. The Court of Appeals for the Fourth Circuit affirmed. The U.S. Supreme Court rejected the Fourth Circuit's reliance on the IRS' interpretation of the Act to resolve the statutory ambiguity. The Fourth Circuit had relied upon an analysis set forth in *Chevron U. S. A. Inc. v. Natural Resources Defense Council*, Inc., 467 U. S. 837. According to the U.S. Supreme Court, *Chevron* does not provide the appropriate framework for this case. The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance." Had Congress wished to assign that question to an agency, the U.S. Supreme Court felt that it surely would have done so expressly. And, the Court said, it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy. Given that the statue is ambiguous, the Court said that it must look to the broader structure of the Act to determine whether one of Section 36B's "permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371. The Court began its analysis by noting that the Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts guaranteed issue and community rating requirements. 42 U. S. C. §§300gg, 300gg–1. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS, unless the cost of buying insurance would exceed eight percent of that individual's income. 26 U. S. C. §5000A. And third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. §36B. In addition to those three reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish "such Exchange" if the State does not. 42 U. S. C. §§18031, 18041. Relatedly, the Act provides that tax credits "shall be allowed" for any "applicable taxpayer,"26 U. S. C. §36B(a), but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under [42 U. S. C. §18031]," §§36B(b)–(c). Under petitioners' reading, the Act would not work in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way, because so many individuals would be exempt from the requirement without the tax credits. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange. The Court found that it was implausible that Congress meant the Act to operate in this manner. Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation, but those requirements only work when combined with the coverage requirement and tax credits. It thus stands to reason that Congress meant for those provisions to apply in every State as well. The Court also found that the structure of Section 36B itself also suggests that tax credits are not limited to State Exchanges. Together, Section 36B(a), which allows tax credits for any "applicable taxpayer," and Section36B(c)(1), which defines that term as someone with a household income between 100 percent and 400 percent of the federal poverty line, appear to make anyone in the specified income

range eligible fora tax credit. According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. As a result, the U.S. Supreme Court affirmed the lower court decisions rejecting the petitioner's arguments.

J. HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Provisions. On September 8, 2015, the Department of Health and Human Services ("HHS") Office of Civil Rights ("OCR") published a sweeping proposed rule implementing section 1557 of the Patient Protection and Affordable Care Act ("ACA"). 80 Fed. Reg. 54172. This rule prohibits discrimination in health programs and activities on the basis of race, color, national origin, sex, age, or disability. Notably, section 1557 is the first law to prohibit sex discrimination in health care programs.

V. ESTATE PLANNING

A. Inflation Adjustments. For tax year 2015, Revenue Procedure 2014-61 provides the following annual inflation adjustments:

1. Lifetime Exclusion. The lifetime gift tax and estate tax exclusion will increase from $5,340,000 to $5,430,000 in 2015.

2. Annual Exclusion. The gift tax annual exclusion will not increase for 2015 and remains at $14,000.

3. GST Exemption. The generation-skipping transfer tax exemption will also increase from $5,340,000 to $5,430,000 in 2015.

4. Non-Citizens. The gift tax annual exclusion for gifts to non-citizens spouses will increase from $145,000 to $147,000 for 2015.

B. Merger is Constructive Gift. In *Cavallaro v. Commissioner*, T.C. Memo. 2014-189, the Tax Court held that a merger of two family-owned businesses resulted in a substantial taxable gift. Mr. Cavallaro started a tool manufacturing company called Knight Tool Co. ("Knight"). Knight was co-owned by Mr. and Mrs. Cavallaro. As his sons became adults, all three were involved in the business. In the 1980s, Knight developed what turned out to be a valuable technology for applying liquids during the manufacturing process. In the late 1980s, the sons formed Camelot Systems, Inc. ("Camelot"), which would exclusively sell Knight's products. The Cavallaro sons each owned one-third of Camelot. In the mid-90s, due to the rise in value of the technology, Mr. and Mrs. Cavallaro sought estate planning advice from their CPA and an estate planning attorney. Both advisors separately recommended merging Knight and Camelot. After the merger, the Cavallaros would own the surviving company, with each shareholder's ownership proportionate to his or her relative ownership and the value of the shares owned in Knight and Camelot, respectively. In executing the merger, the estate planning attorney determined that the primary asset of the companies, the liquid-dispensing technology, was owned by Camelot, despite a lack of evidence to support this claim. With a couple of minor exceptions, the technology was treated as owned by Knight, e.g., Knight claimed R&D credits related to the technology, Knight paid the salaries of the employees who developed the technology, Knight registered the trademarks related to the technology, and Knight was the designated assignee for the technology on related patent applications. Notwithstanding the historical treatment of

the technology, the estate planning attorney determined that when Camelot was formed and Mr. Cavallaro handed over the books of Camelot to his sons, this act conferred the technology and all related improvements to the technology to Camelot. At the time of the merger, affidavits and a "Confirmatory Bill of Sale" were executed to support this position. Based on the position of the estate planning attorney, an appraisal was performed which assigned a value to the post-merger company and to Knight and Camelot premerger, for purposes of determining each individual's ownership in the post-merger company. The post-merger company was valued at $75 million, with Knight being assigned a value of $15 million and Camelot being assigned a value of $60 million based on the fact that Camelot owned the liquid dispensing technology. As a result, the sons were granted an 81% ownership in the post-merger company and Mr. and Mrs. Cavallaro owned 19% of the post-merger company. The merger occurred in 1995. In January 1998, the IRS opened an audit of Knight and Camelot, and in February the IRS opened a gift tax audit of the Cavallaros for the 1995 tax year. In July 2005, the Cavallaros filed gift tax returns for the 1995 tax year, reporting no taxable gifts and no gift tax liability. In November 2010, the IRS issued its notice of deficiency to the Cavallaros, asserting a $12.9 million gift tax liability based on its determination that, at the time of the merger, Camelot had zero value. The notice of deficiency also asserted failure to file and fraud penalties. Due to the lack of evidence supporting the position that Camelot owned the liquid-dispensing technology, the Tax Court concluded that Camelot did not own the technology and therefore the Cavallaros' appraisals based on this premise were disregarded in their entirety. Because the appraisal reports were disregarded, the Cavallaros did not meet their burden on the valuation issue. As a result, the IRS expert's report, which valued the post-merger company at $64.5 million (approximately $10 million lower than the taxpayers' report) was accepted, with 65% of the post-merger company value attributed to Knight and 35% of the post-merger company value assigned to Camelot. Based on this valuation, the difference between the value of 81% of the post-merger company that the sons received (81% x $64.5 million, or $52.2 million) and the premerger value of Camelot (35% x $64.5 million, or $22.6 million) resulted in total taxable gifts of $29.6 million. The fraud penalty was conceded by the IRS prior to trial. The Tax Court excused the failure-to-file penalty and the accuracy-related penalty (which was asserted by the IRS after the fraud penalty was conceded), concluding that Mr. and Mrs. Cavallaro reasonably relied on their advisors and therefore had reasonable cause.

C. IRS Challenge to Installment Sales with Grantor Trusts Based on Valuation of Intra-Family Loans. In two cases before the Tax Court involving intra-family loans (*Estate of Donald Woelbing v. Commissioner* (Docket No. 030261-13) and *Estate of Marion Woelbing v. Commissioner* (Docket No. 030260-13)), the IRS is attacking installment sales to intentionally defective grantor trusts (IDGTs). A sale to an IDGT will only be respected for estate tax purposes if the promissory note is treated as debt rather than equity. Among the IRS's arguments is their claim that the installment note, which utilized the AFR in effect for the month of the sale, is not worth its face value because it carries an artificially low and commercially unreasonable interest rate. Previous attacks by the IRS have focused on whether promissory notes bearing interest at the AFR should be respected as debt in intra-family sales and whether these sale transactions are "bona fide transactions" for transfer tax purposes.

D. Executor May Recover Some Estate Tax From Insurance Beneficiary. In *Thomas H. Smoot III v. Dianne Smoot*, No. 2:13-cv-00040, the U.S. District Court held that the executor of his father's estate may recover from his father's former wife the estate tax attributable to life insurance proceeds she received, but that he isn't entitled to prejudgment interest, attorney fees, or the former wife's portion of tax attributable to non-life insurance assets she received. The case revolved around Code Section 2206 which states that the "executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio." Essentially, this was a case construing the tax apportionment provision in the decedent's Will, which provided that: "All transfer, estate, inheritance, succession and other death taxes which shall become payable by reason of my death, other than any tax on any generation-skipping transfer and any additional estate tax imposed pursuant to Section 2032A(c) of the Internal Revenue Code of 1986, as amended, shall be charged against and paid by the recipient of such property or from the property to be received, . . ." The amount of tax to be charged against the recipient shall be determined by multiplying a fraction, the numerator being the federal estate tax value of the property to be distributed to the recipient, and the numerator [sic] being the total value of my taxable estate, all values being those that are as finally determined for federal estate taxes purposes; times the federal estate tax payable by my estate. . . ." Thus, while Section 2206 is not mandatory, and wouldn't apply if the decedent's Will had provided for taxes to be paid from the residue, it did apply in this case where the Will provided for the taxes to be apportioned, which was arguably more fair than paying taxes from the residue, at least in the case where a specific bequest, or real or personal property, was not involved.

E. Son Held Liable for Tax on Distributions From Father's IRA. In Elroy *Earl Morris et ux. v. Commissioner,* T.C. Memo. 2015-82, No. 30167-13, the Tax Court held that a couple failed to report taxable IRA distributions the husband received on his father's death, rejecting their arguments that they received erroneous advice from a law firm and that it would be inequitable to hold the husband solely liable for the tax since he voluntarily shared the proceeds with his siblings.

F. Tax Court Approves Crummey Trust with No-Contest Clause. In 2007, the taxpayers, Israel and Erna Mikel, a husband and wife, made a gift to an irrevocable trust with a value of $1,631,000. The trust contained beneficiary withdrawal rights designed to qualify gifts as present interests, so that the annual gift tax exclusion would be available. In December 2011, they each filed separate gift tax returns reporting the gifts, claiming an annual exemption of $720,000, based on the contention that each party's gift included a $12,000 gift of a present interest to each of the trust's 60 beneficiaries. To qualify for the annual exclusion as a present interest, the beneficiary must receive an unrestricted right to the immediate use, possession, or enjoyment of property. The IRS disallowed the claimed exclusions, determining that the beneficiaries lacked legally enforceable rights to withdraw funds from the trust, and that the Mikels had instead made gifts of future, not present, interests. The IRS contended that the beneficiaries did not receive a present interest in property because their rights of withdrawal were not legally enforceable in practical terms. According to the IRS, a right of withdrawal is legally enforceable only if the beneficiary can go before a state court to enforce that right, something the IRS believed a beneficiary of the trust would

be reluctant to do. Under the terms of the trust, a beneficiary would be extremely reluctant to go to court because the trust contained an "in terrorem," or no-contest clause, under which benefits would be denied to anyone who challenged the terms of the trust. The Tax Court, in *Mikel v. Commissioner*, T.C. Memo 2015-64, disagreed, and ruled that the Mikels' transfers to the trust qualified for the annual gift tax exclusion.

G. Final Regulations on Deceased Spousal Unused Exclusion Amount. The IRS has issued final regulations (T.D. 9725) that provide guidance on the estate and gift tax applicable exclusion amount generally, as well as on the applicable requirements for electing portability of a deceased spousal unused exclusion ("DSUE") amount to the surviving spouse and on the applicable rules for the surviving spouse's use of the DSUE amount. Effective June 12, 2015, the final regulations adopt, with some changes, proposed regulations (REG-141832-11) published in June 2012. The final regulations provide that an extension of time to elect portability will not be granted to any estate that is required to file an estate tax return because the value of the gross estate equals or exceeds the threshold amount described in Section 6018, but the extension may be granted under Treas. Reg. 301.9100-3 to estates with a gross estate value below that threshold and thus not otherwise required to file an estate tax return. The final regulations do not adopt the suggestion of commenters to allow a surviving spouse who is not an executor as defined in Section 2203 to file an estate tax return and make the portability election in specified circumstances. The final regulations also reject a recommendation for the IRS to provide a shorter version of the estate tax return to be used by estates that are not otherwise required to file an estate tax return but do so only to elect portability. The final regulations also allow a surviving spouse who becomes a U.S. citizen after the death of the deceased spouse to take into account the DSUE amount of the deceased spouse.

H. IRS Will Only Issue Estate Tax Closing Letters on Request. On its website, the IRS has announced that, for estate tax returns filed on or after June 1, 2015, estate tax closing letters will be issued only upon request by the taxpayer. IRS asks taxpayers to wait at least four months after filing the return to make the closing letter request.

I. Proposed Section 2704 Regulations. The IRS has expressed its intention to issue proposed regulations under Section 2704 that may have the effect of making it more difficult to obtain valuation discounts on transfers of interests in family businesses. Section 2704 generally disregards restrictions in determining the value of an interest that do not "ultimately reduce the value of such interest to the transferee." The proposed regulations would add to the kinds of restrictions presently disregarded, and could include liquidation rights, restrictions on the transferee becoming a full-fledged partner or member, and certain interests in family entities held by charities.

J. Consistent Basis Reporting.

1. Background. The basis of property acquired from a decedent generally is the fair market value (FMV) of the property on the decedent's date of death. Similarly, property included in the decedent's gross estate for estate tax purposes generally must be valued at its FMV on the date of death. Although the same valuation standard applies to both provisions, current law does not explicitly require that the

recipient's basis in that property be the same as the value reported for estate tax purposes.

2. New Rules. On July 31, 2015, the President signed into law H.R. 3236, the "Surface Transportation and Veterans Health Care Choice Improvement Act of 2015" (the Act) which imposes a new basis consistency standard. In general, the basis of property received by reason of death under Code Sec. 1014 must equal the value of that property for estate tax purposes. A new information reporting requirement is designed to ensure that the basis consistency standard is met.

a. Under the Act, effective for property with respect to which an estate tax return is filed after July 31, 2015, the basis of any property to which Code Section 1014(a) applies (i.e., the rules for determining basis of property acquired from a decedent), can't exceed:

i. In the case of property the final value of which has been determined for purposes of the tax imposed by Chapter 11 (i.e., the estate tax) on the estate of the decedent, such value, and

ii. In the case of property not described in (i), above, and with respect to which a statement has been furnished under new Code Sec. 6035(a) (see below) identifying the value of such property, such value. (Code Sec. 1014(f)(1), as amended by Act Sec. 2004(a))

b. The basis consistency rule in Code Sec. 1014(f)(1) only applies to a property whose inclusion in the decedent's estate increased the liability for the tax imposed by Chapter 11 (reduced by credits allowable against such tax) on the estate. (Code Sec. 1014(f)(2))

c. For purposes of Code Section 1014(f)(1), the basis of property has been determined for purposes of the estate tax imposed by Chapter 11 if:

i. The value of such property is shown on a return required under Code Sec. 6018 and that value is not contested by IRS before the expiration of the time for assessing a tax under the estate tax rules;

ii. In a case not described in (A), above, the value is specified by IRS and that value is not timely contested by the executor of the estate; or

iii. The value is determined by a court or pursuant to a settlement agreement with IRS. (Code Sec. 1014(f)(3))

d. IRS may by regulations provide exceptions to the application of Code Section 1014(f). (Code Sec. 1014(f)(4))

K. New Information Reporting Requirements for Persons Inheriting Property.

1. Required Statement. Under the Act, effective for property with respect to which an estate tax return is filed after July 31, 2015, the following new

information reporting requirements apply to inherited property (Code Sec. 6035(a), as added by Act Sec. 2004(b)(1)):

a. The executor of any estate required to file a return under Code Section 6018(a) must furnish to IRS and to each person acquiring any interest in property included in the decedent's gross estate for Federal estate tax purposes a statement identifying the value of each interest in such property as reported on the estate tax return and such other information with respect to such interest as IRS may prescribe.

b. Each person required to file a return under Code Sec. 6018(b) (returns by certain beneficiaries) must furnish to IRS and to each other person who holds a legal or beneficial interest in the property to which such return relates a statement identifying the information described in (1), above.

2. Timing. The statements required under (a) and (b), above, must be furnished as prescribed by IRS, but not later than the earlier of:

a. The date which is 30 days after the date on which the return under Code Sec. 6018 was required to be filed (including extensions, if any), or

b. The date which is 30 days after the date such return is filed. (Code Sec. 6035(a)(3)(A))

3. Adjustments. Where there is an adjustment to the information required to be included on a statement filed under Code Section 6035(a)(1) or Code Section 6035(a)(2) after the statement has been filed, a supplemental statement must filed not later than the date which is 30 days after such adjustment is made. (Code Sec. 6035(a)(3)(B))

4. Regulations. IRS is empowered to issue regulations necessary to carry out the new Code Section 6035 basis reporting rules, including the application of the rules to property with regard to which no estate tax return is required to be filed, and situations in which the surviving joint tenant or other recipient may have better information than the executor regarding the basis or FMV of the property. (Code Sec. 6035(b))

5. Penalties. Those failing to follow the new Code Section 6035 information reporting requirements are subject to the penalty for failure to file rules of Code Section 6724, and those reporting inconsistent estate basis are subject to the penalty for inconsistent reporting under Code Section 6662. (Code Sec. 6724(d)(1), Code Sec. 6662(b))

L. Fifth Circuit Applies Cap on Gift Tax Transferee Liability. In United States v. Elaine T. Marshall et. al.; No. 12-20804 (5th Cir. 2015), the Court held that the total payment for gift tax and interest was limited to the gift's fair market value. In 1995, J. Howard Marshall sold a large block of Marshall Petroleum, Inc. stock to his company. Because the stock was sold at a bargain price, there was an increase in the value of the remaining shares and thus an indirect gift to the other shareholders. These shareholders included former wife Eleanor Stevens, son E. Pierce Marshall, daughter-

in-law Elaine T. Marshall and trusts for other heirs. J. Howard did not pay gift tax prior to passing away. Following extensive negotiations between the estate and the IRS, in 2012 the District Court published several orders. First, the shareholders were liable for gift tax under Sec. 6324(b). Second, former wife Eleanor Stevens was recipient of an indirect gift. Third, estate representatives E. Pierce Marshall and Finley Hilliard were personally liable due to distributions that they had made from the estate. The court noted that the stipulated value for the gifts was $84,191,754. This amount of indirect gift created a potential tax of $47,509,047. Because the estate failed to pay the IRS deficiency, the Service pursued an action against the beneficiaries under Sec. 6324(b). First, the court held that former wife Eleanor was a beneficiary of a grantor retained income trust (GRIT) and therefore there was an indirect gift to her. Because executors Finley Hilliard and E. Pierce Marshall knew she had a gift tax obligation, they were both liable. The estate claimed that the specific language of Sec. 6324(b) limited the payment to "the extent of the value of such gift." Because the gift was approximately $84 million, the tax plus interest should be limited to that total amount. The IRS observed that 20 years had passed between the date of the gift and the current proceeding. With two decades for accrual, there was approximately $75 million of interest. If Sec. 6324(b) is combined with Sec. 6901, then under the IRS position the tax and full amount of the interest should be paid. Judge Priscilla Owen noted that the statute text was clear. Therefore, the Court held that the total for tax and interest would be limited to the fair market value of the gift. Dissenting Judge Prado would read Sec. 6324(b) and Sec. 6901 together and require payment of the full amount of the interest. Prado observed that if this were not the case, then once the tax plus interest reach the gift fair market value there is an incentive to defer payment as long as possible because no further interest will accrue. The court held that the tax plus interest was limited to $84,191,754, the fair market value of the gift.

M. IRS Delays New Estate Tax Filing Requirement. Code Section 6035(a)(1), enacted July 31, 2015, as part of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (P.L. 114-41), requires executors to send statements identifying the value of any interest in property included in a decedent's gross estate if the estate is required by Section 6018(a) to file Form 1041, "U.S. Income Tax Return for Estates and Trusts." Notice 2015-57 provides that the due date of any statement required under Section 6035 is delayed until February 29, 2016, to allow time for the government to develop guidance implementing the reporting requirements. Practitioners are concerned that heirs will be bound by decisions made when they are not involved in the process.

N. Gift Tax May Be Assessed at Any Time. In partially redacted field attorney advice, the IRS concluded that the assessment statute of limitations exception under Section 6501(c)(9), which allows a gift tax to be assessed at any time, applies to a donor's gift tax return because he failed to adequately disclose his transfer of interests in two partnerships. The field advice indicates that partnership interests were given in * * * (Taxpayer ID: * * *) and in * * * (Taxpayer ID: * * * [)]. The assets of the partnership were primarily farm land. The land was independently appraised by a certified appraiser. Discounts of * * *% were taken for minority interests, lack of marketability, etc[.], to obtain a fair market value of the gift. It goes on to state that this valuation description does not include "a detailed description of the method used to determine the fair market value of the property transferred, including any financial data . . . utilized in

determining the value of the interests." § 301.6501-1(f)(2)(iv). This description recites that Donor had the land appraised, not that he had the partnership or the donated partnership interest appraised. The description does not identify "any restrictions on the transferred property that were considered in determining the fair market value". Id. This description further suggests (by asserting that the assets are primarily farm land and that the land was appraised) that * * * and * * * are properly valued based upon the net value of their assets. Id. If that is the case, the return's valuation description is not "detailed" as required by the regulation. There is no financial data (e.g., actual land values) used in determining the value of the gifts. Id. There is no explanation of the method (e.g., comparable sales) used to determine the value, nor any explanation of either how the * * *% discount breaks down between different discount types or the basis for the discounts taken. The "etc" in the return's description suggests that unlisted discounts were applied to the gifts. Id. There is also no statement regarding the 100 percent value of either * * * or * * *, even though both entities appear to be valued based upon their net assets.

O. Redemption of Family Corporations' Interests Not Self-Dealing. In PLR 201448023, the IRS ruled that the redemption by a family corporation -- a corporation in which living descendants of a private foundation own more than 35 percent of the total combined voting power -- of the interest in such corporation held by the decedent's estate or by one of several trusts will not be self-dealing if several conditions are met. Code Section 4941(d)(2)(F) and Treas. Reg. § 53.4941(d)-3(d)(1) provide that a stock redemption between a private foundation and a corporation is not an act of self-dealing so long as the corporation makes a bona fide offer on a uniform basis to redeem the stock held by the foundation and the stock of the same class held by every other stockholder, and the foundation receives no less than the fair market value of its stock. Under the provisions of Treas. Reg. § 53.4941(d)-1(b)(7), a disqualified person may do whatever a private foundation could do by reason of Section 4941(d)(2)(F) without being in violation of indirect self-dealing under Section 4941(d)(1).

Accordingly, the IRS determined that the redemption by the family corporation of the interest in that corporation held by a decedent's estate or trust will not constitute an act of indirect self-dealing and need not comply with Treas. Reg. § 53.4941(d)-1(b)(3) so long as the corporation offers to redeem all interests held by every other person that are of the same class as that held (prior to the redemption) by the estate or trust on the same terms, the estate or trust receives the redemption price for its interest, and there is no extension of credit with respect to the redeemed interest between the estate or such trust and such family corporation.

VI. MERGERS & ACQUISITIONS

A. Final E&P Regs Issued for Tax-Free Transfers and Asset Reorganizations. Effective November 10, 2014, the IRS has issued final regulations (T.D. 9700) clarifying the rules under Section 312 on the allocation of earnings and profits in tax-free transfers from one corporation to another and modifying the definition of an acquiring corporation for Section 381 purposes regarding some acquisitions of assets.

1. The IRS has historically interpreted the Code Section 312 as providing that a transferor corporation's E&P does not move to a transferee in whole or

in part other than in a transfer described in Code Section 381 or, to the extent provided under Treas. Reg. § 1.312-10 (dealing with allocation of E&P in certain corporate separations), in a divisive reorganization. IRS has interpreted the regulations to provide that, in a corporate reorganization described in Code Section 381, the acquiring corporation succeeds to the full E&P account of the transferor corporation. Accordingly, the E&P account is not divided if the acquiring corporation in an acquisitive asset reorganization later transfers target assets to one or more controlled subsidiaries.

2. In the preamble to its 2012 proposed regulations, the IRS noted that practitioners had suggested that this result may be unclear under then-current law. For example, Treas. Reg. § 1.381(c)(2)-1(d) provides that where some of the acquired assets are transferred to one or more controlled corporations, or all of the acquired assets are transferred to two or more controlled corporations, the allocation of E&P is made without regard to Code Section 381; and Treas. Reg. § 1.312-11(a) provides for proper adjustment and allocation of E&P for asset transfers in connection with reorganizations, and cross-references to the Code Section 381 regulations for specific rules.

3. The proposed regulations clarified that, except as provided in Treas. Reg. § 1.312-10, if property is transferred from one corporation to another and no gain or loss is recognized, no allocation of the transferor's E&P is made to the transferee unless the transfer is described in Code Section 381(a), i.e., liquidations of controlled subsidiaries and certain reorganizations (Types A, C, F, acquisitive D, and acquisitive G). The proposed regulations further clarified that, in a transfer described in Code Section 381(a), only the acquiring corporation (as defined in Treas. Reg. § 1.381(a)-1(b)(2)) succeeds to the E&P of the distributor or transferor corporation (within the meaning of Treas. Reg. § 1.381(a)-1(a)). (Prop. Reg. § 1.312-11(a)) The proposed regulations provided that the rules for the allocation of E&P conform to the rules for the allocation of other tax attributes under Code Section 381.

4. After it promulgated the E&P proposed regulations, the IRS received comments suggesting that they caused confusion because the existing definition of "acquiring corporation" under Treas. Reg. § 1.381(a)-1(b)(2) focused on whether the direct transferee corporation in a reorganization further transferred all of the assets it received in the Code Section 381 transaction. (Preamble to Prop. Reg. 05/06/2014)

5. As a result, in May, 2014, IRS issued proposed regulations under Code Section 381 which provided that, in a transaction described in Code Section 381(a)(2), the term "acquiring corporation" means the corporation that directly acquired the assets transferred by the transferor corporation, even if the direct transferee corporation ultimately retained none of the assets so transferred. (Prop. Reg. § 1.381(a)-1(b)(2)(i))

6. The IRS has now finalized both of the above sets of proposed regulations, with only one change which IRS characterizes as not being substantive. (Treas. Reg. § 1.312-11(a); Treas. Reg. § 1.381(a)-1(b)(2)(i))

a. The proposed Code Sec. 312 regulations provided that "except as provided in §1.312-10, in all other cases in which property is transferred from

one corporation to another and no gain or loss is recognized (or is recognized only to the extent of the property received other than that permitted to be received without the recognition of gain), no allocation of the E&P of the transferor is made to the transferee." The final regulations remove the language "and no gain or loss is recognized (or is recognized only to the extent of the property received other than that permitted to be received without the recognition of gain)." (Reg. § 1.381(a)-1(b)(2)(i))

b. IRS believes that this language may inappropriately imply that allocation of E&P may be permitted in cases in which gain not expressly described is recognized on the transfer of property between corporations (for example, gain required to be recognized under Code Section 367 or Code Section 1001). This clarifying, non-substantive change confirms that, except as provided in Treas. Reg. § 1.312-10, in all other cases in which property is transferred from one corporation to another, no allocation of E&P is made.

B. Court lowers hurdle to make claim for withdrawal liability. In *Tsareff v. ManWeb Services, Inc.*, Case No. 14-1618 (7th Cir. July 27, 2015), the U.S. Court of Appeals for the Seventh Circuit held that an asset purchaser's pre-closing knowledge of a seller's potential multiemployer plan withdrawal liability could be sufficient to obligate the purchaser for the seller's withdrawal liability even where (i) the amount of the withdrawal liability was not determined until after the sale and (ii) such liability was not assumed by the purchaser under the asset purchase agreement.

WAGE AUDITS – CHALLENGES INVOLVING DRIVERS, TIPPED, AND MINIMUM WAGE EMPLOYEES

By: James M. Reid, IV

I. LEARNING OBJECTIVES

A. Train employers regarding wage and hour obligations

B. Discuss litigation trends/unintentional violations

C. Identify strategies to reduce liability

II. WHAT SHOULD YOU KNOW ABOUT WAGE AND HOUR AUDITS?

A. The U.S. Department of Labor enforces compliance with the Fair Labor Standards Act (regarding minimum wage and overtime compliance)

B. Audits are NOT Random.

1. Complaint.

2. Industry Specific Issue.

C. Two years of payroll records will be reviewed (TIP: MAKE SURE THE AUDIT IS NOT AT THE EMPLOYER'S OFFICE)

D. Liability may include double damages for back pay and civil penalties.

E. Common issues are improper classifications, unlawful deductions, insufficient wages, and failure to maintain accurate records.

F. The records need to be reviewed by a professional (lawyer/accountant) before the audit takes place.

III. WHAT ARE YOU DOING NOW?

A. Are you legally compensating your drivers?

B. Are you using "Split Rate" pay?

C. Do you need to track mileage?

D. Are your drivers reporting tips?

E. What are your responsibilities?

IV. WHAT IS A "TIPPED EMPLOYEE"?

A. Customarily and regularly receives more than $30 per month in tips.

B. Do not confuse income with reimbursement.

C. Do not use tip income to cover mileage reimbursement.

D. Do use tip income to satisfy the minimum wage requirement.

V. WHAT DO YOU NEED TO DO FOR TIPPED EMPLOYEES?

A. Provide a written notice that the employee is being treated as a tipped employee. (Although oral notice is permissible, it is not recommended since it is harder to prove)

B. Provide the IRS pamphlet to employees "Tips on Tips."

VI. WHAT IS THE MINIMUM WAGE FOR TIPPED EMPLOYEES?

A. Federal law requires $2.13 per hour.

B. State laws may be higher.

C. Must use higher amount.

D. Example: Michigan law requires $3.10 (38% of Michigan Minimum Wage).

E. Michigan minimum wage will increase:

1. January 1, 2016, $8.50 ($3.23 tipped employees);

2. January 1, 2017, $8.90 ($3.38 tipped employees);

3. January 1, 2018, $9.25 ($3.52 tipped employees).

VII. YOU MUST NOTIFY EMPLOYEES OF THE MINIMUM WAGE INCREASE

A. Keep updated posters in your store.

B. Suggestions: www.laborlawcenter.com.

VIII. WHAT IS THE TIP CREDIT?

A. Difference between required payment from the employer and the minimum wage.

B. Example: Michigan requires the employer to pay a tipped employee $3.10 per hour.

C. The minimum wage is $8.15 per hour.

D. Accordingly the tip credit is $5.05.

E. If the tips plus the minimum hourly wage rate do not equal or exceed the minimum hourly wage, the employer is required to pay any shortfall.

F. Tips in excess of the statutory tip credit may not be credited against mileage reimbursements.

G. Tips cannot be credited against required reimbursements.

IX. WHAT ARE SPLIT WAGES?

When you pay a different hourly rate for different jobs.

Example: A driver is only considered a tipped employee when they are on the road.

X. ARE SPLIT WAGES PERMISSIBLE?

A. Okay to pay a different wage for a different job.

B. Do not take a tip credit for work unrelated to delivering or another job that customarily receives at least $30 per month in tips.

C. Must provide written notification of your policy to employees (Although oral notice is permissible, it is not recommended since it is harder to prove).

XI. MUST I REIMBURSE FOR EXPENSES?

A. Yes for company expenses incurred by employees receiving the minimum wage.

B. Federal Fair Labor Standards Act does not specifically address this issue.

C. Case law and DOL Field Operation Handbook requires reimbursement when business expenses incurred by an employee would result in an employee receiving below minimum wage during a pay period.

D. Employers may not directly or indirectly avoid paying employees at least minimum wage.

XII. WHAT ARE THE REQUIREMENTS TO REIMBURSE FOR CAR EXPENSES?

A. Generally you must cover minimum wage employees costs incurred on behalf of the company for:

1. Gasoline (including taxes);

2. Maintenance and repairs;

3. Oil;

4. Insurance;

5. Vehicle registration fees; and

6. Depreciation.

XIII. WHAT IS THE IRS RATE?

A. Currently 57.5 cents per mile.

B. DOL will use this as SAFE HARBOR.

C. National rate developed by outside vendor for use by the IRS.

D. May be much lower depending on where you are located.

E. You do not have to use this, BUT you have to be able to prove by having a reasonable basis for the rate you adopt and the mileage your drivers actually drive per shift.

XIV. WHAT ARE YOUR OPTIONS?

A. Option 1. Reimburse employees 57.5 cents per mile based upon the most efficient delivery route that company software calculates.

B. Option 2.

1. Retain an expert to calculate the actual average maintenance costs of vehicles in your area.

2. Then reimburse on per mileage basis based upon the most efficient delivery route that company software calculates.

3. Runzheimer International http://pages.runzheimer.com/Contact-Us.html?source=website specializes in making these calculations.

4. Lesser rates may be acceptable depending on your location.

C. Option 3.

1. Internally calculate the actual average maintenance costs of vehicles relating to company business.

2. Then reimburse on per mileage basis based upon the most efficient delivery route that company software calculates.

3. Some good examples of calculations may be found at: http://www.companymileage.com/howmileageratedetermined.html, https://turbotax.intuit.com/tax-tools/tax-tips/Small-Business-Taxes/Business-Use-of-Vehicles/INF12071.html, or http://www.smbiz.com /sbfaq024.html.

D. Option 4.

1. Pay a flat delivery fee per delivery which is calculated to determine the average mileage per store over a 1 to 2 week period multiplied by 57.5 cents per mile (or whatever you use as a reasonable basis to calculate the expense as identified on Option 2 and Option 3).

2. Re-calculate the average mileage at least annually.

3. Create a policy that gives employees the ability to report deliveries that significantly exceed the average mileage calculations to minimize the likelihood that an employee files a complaint with the Department of Labor.

E. Option 5.

1. Take advantage of the full tip credit (meaning pay the tipped employee minimum hourly wage rate) and pay more in mileage reimbursement or a higher flat delivery fee.

2. This could be a win/win since the Employer and Employee will benefit from tax savings.

3. Reimbursements are not taxable income.

F. Option 6.

1. Pay all delivery employees at least minimum wage plus tips and avoid any delivery fees/reimbursement obligations (assuming the tips cover same).

2. As long as the employee is receiving at least non-tip minimum wage ($7.25 per hour federal), reported tips received may be used to offset any costs of mileage reimbursement, etc.

3. State minimum wage may be different.

AFFORDABLE CARE ACT – 3 THINGS TO KNOW

By: Marc S. Wise, Esq.

I. SPECIAL 2015 TRANSITIONAL RULES FOR EMPLOYERS WITH 50 TO 99 FTES

A. Employers that employed on average at least 50 full-time employees (including full-time equivalents) but fewer than 100 full-time employees (including full-time equivalents) ("mid-size employers") on business days during 2014 will not be liable for the "Pay or Play" penalties for any calendar month during 2015 if they meet the conditions below. For employers with non-calendar-year health plans, the relief applies to any calendar month during the 2015 plan year, including months during the 2015 plan year that fall in 2016.

1. During the period beginning on February 9, 2014 and ending on December 31, 2014, the employer did not reduce the size of its workforce or the overall hours of service of its employees in order to qualify for the transition relief. However, an employer that reduced workforce size or overall hours of service for bona fide business reasons is still eligible for relief.

2. During the period beginning on February 9, 2014 and ending on December 31, 2015 (or, for employers with non-calendar-year plans, ending on the last day of the 2015 plan year), the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014. An employer will not be treated as eliminating or materially reducing health coverage if:

   a. It continues to offer each employee who is eligible for coverage an employer contribution toward the cost of employee-only coverage that either

i. is at least 95% of the dollar amount of the contribution toward such coverage that the employer was offering on February 9, 2014, or

ii. is at least the same percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014;

b. In the event of a change in benefits under the employee-only coverage offered, that coverage provides minimum value after the change; and

c. It does not alter the terms of its group health plans to narrow or reduce the class or classes of employees (or the employees' dependents) to whom coverage under those plans was offered on February 9, 2014.

B. Employers that are close to the 50 full-time employee threshold in determining if they are subject to the ESR provisions do not have to use the full twelve months of 2014 to measure whether they crossed the threshold. They may measure during any consecutive six-month period (as chosen by the employer) during 2014.

C. In order to use this transitional rule, mid-size employers cannot have changed their plan year after February 9, 2014 to begin on a later calendar year date.

II. "APPLICABLE LARGE EMPLOYER" DETERMINATION

A. The ACA defines an "applicable large employer" for a calendar year as an employer that employed an average of at least 50 full-time employees on more than 120 business days during the preceding calendar year. For this purpose, the term "full-time employees" means the sum of the employer's full-time employees and full-time equivalent employees ("FTEs"). For this

determination, employees working less than 30 hours per week are combined to determine the number of FTEs.

B. The ACA does not require employers to provide health insurance coverage to its employees. However, employers that do not provide minimum "essential health benefits" as defined by the U.S. Department of Health and Human Services ("HHS"), may be liable for an additional tax. The two new taxes ("Pay or Play") are:

1. Failure to Provide Health Insurance Coverage (IRC 4980H(a)) - Full-time (30 hours per week) employees must be offered health insurance. The additional tax for any month is $166.67 multiplied by the number of actual full-time employees employed by the employer during such month ($2,000 per year). In calculating this monthly tax, the first 30 full-time employees are subtracted from the penalty.

2. Failure to Pay a Specific Amount (IRC 4980H(b)) - Full-time (30 hours per week) employees cannot be required to pay more than 9.5% of their W-2 income for individual coverage. The employer penalty for requiring employees to pay more than 9.5% of their W-2 income is $250.00 per month ($3,000 per year). This penalty only applies to those full-time employees that use the government health exchange and receive the government health credit.

The total tax penalty may not be greater than the tax penalty that would apply if the employer offered no coverage at all.

III. FULL-TIME EMPLOYEE ANALYSIS

A. The Pay or Play provisions of the ACA impose tax penalties (described above) on an "applicable large employer" that either fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, or fails to offer affordable coverage or

coverage that provides minimum value where one or more full-time employees is certified to receive a premium tax credit or cost-sharing reduction.

B. Although the new Pay or Play requirements are generally effective for health plan years beginning on or after January 1, 2015, the determination of "full-time" for 2015 is based on an employee's hours in 2014.

C. The guidance from the IRS defines an applicable large employer for a calendar year as an employer that employed on average at least 50 full-time "equivalent" employees on more than 120 business days during the preceding calendar year. For this purpose, the term "full-time equivalent employees" means the sum of the employer's full-time employees and full-time equivalent employees ("FTE's"). "Full-time" is defined as working 30 hours or more per week or 120 hours or more during a month. Monitoring the 30/120 hour requirement each month during a calendar year will create administrative complexity for large employers, especially employers with employees whose hours vary on a daily, weekly or monthly basis. In order to ease this administrative burden, the IRS issued an IRC 4980H Safe Harbor. The IRS Safe Harbor contains rules for dealing with new and existing full-time and part-time employees.

1. <u>4980H Safe Harbor - Determining the Full-Time Status of Hourly Employees</u>

The 4980H Safe Harbor is an optional method that large employers may use in determining the full-time status of its hourly employees. In order to avoid penalties, large employers will establish a measurement period during which an employee's hours are measured. Each employee who averages 30 hours of service per week during the measurement period will then be treated as full-time for health care purposes, regardless of the hours actually worked during the subsequent period. In addition, such employee

must also be offered qualifying health care coverage during the subsequent stability period. The 4980H Safe Harbor works differently depending on whether the employee is a new employee or an existing employee.

2. New Employees and the 4980H Safe Harbor

The Safe Harbor looks at two types of new employees: (i) Employees who are reasonably expected on their date of hire to work full-time ("New Full-Time Employees"); and (ii) Employees in which it cannot be determined on the date of hire whether they are reasonably expected to work full-time during the "measurement period" ("New Hourly Employees").

a. **New Full-Time Employee**: For an employee determined to be a New Full-Time Employee, the employer must offer health insurance coverage to such employee that begins after a waiting period determined by the employer that is no more than 90 days.

b. **New Hourly Employees:** For employees determined to be New Hourly Employees, the employer may establish an initial measurement period during which the new employee's hours are measured. Health insurance coverage does not need to be offered to such new employees during the initial measurement period, which may range from 3 to 12 months, as determined by the employer. The initial measurement period can begin on the date of hire, or the employer can establish an administrative period before the initial measurement period begins. A likely beginning date would be the first day of the month following the date of hire.

If the New Hourly Employee is determined during the initial measurement period to be working full-time (30 hours), then the employee's stability period must be no shorter than the initial measurement period used, but in no event less than 6 months. The health insurance coverage would be required to begin as soon as the initial measurement period ends, or following an administrative period.

If the New Hourly Employee is determined during the initial measurement period to not be working full-time, the employee may then be treated as not working full-time during the stability period. No 4980H penalty would apply for failing to offer such employee health insurance. The stability period for a new employee who is determined not to be a full-time employee cannot be more than 1 month longer in duration than the initial measurement period. Furthermore, the stability period for the New Hourly Employee cannot be longer than the "standard measurement period" (discussed below) that is applicable to ongoing employees.

In establishing an administrative period before or after the initial measurement period, the total administrative period cannot exceed 90 days. Furthermore, the administrative period and the initial measurement period cannot extend beyond the last day of the first calendar month after the employees date of hire.

3. Ongoing Employees and the 4980H Safe Harbor

An ongoing employee is an employee who has been employed for one entire "standard measurement period." A "standard measurement period" is defined as a period determined by the employer for measuring hours of service for existing employees. This period may range from 3 to 12 months.

Once an employee is determined to work full-time during the standard measurement period, the stability period for such employee must be no shorter than the standard measurement period, but not less than 6 months. The stability period must begin immediately after the standard measurement period or an administrative period of not more than 90 days.

An ongoing employee who is determined to not be a full-time employee during the standard measurement period can be treated as not being a full-time employee during the following stability period.

APPLICABLE LARGE EMPLOYER ANALYSIS

A. Number of full-time employees: An employee who averages at least 30 hours of service per week or 120 hours in a calendar month.

		# of Full-Time EEs
1	January	
2	February	
3	March	
4	April	
5	May	
6	June	
7	July	
8	August	
9	September	
10	October	
11	November	
12	December	
13	**Total**	

B. Number of full-time equivalent employees:

COUNT HOURS OF SERVICE FOR ALL NON FULL-TIME EMPLOYEES (INPUT NO MORE THAN 120 HOURS PER EMPLOYEE)

		Aggregate Hours	Aggregate Hours	Equivalent Employees (round monthly result to nearest 100th)
14	January		÷ 120 =	
15	February		÷ 120 =	
16	March		÷ 120 =	
17	April		÷ 120 =	
18	May		÷ 120 =	
19	June		÷ 120 =	
20	July		÷ 120 =	
21	August		÷ 120 =	
22	September		÷ 120 =	
23	October		÷ 120 =	
24	November		÷ 120 =	
25	December		÷ 120 =	
26	Add Lines 14-25 | Total			
27	Add Lines 13 & 26 | Total			
28	Divide total in line 27 by 12 and round down: Total			

If the number in line 28 is less than 50 (100, in 2015), then employer is NOT an applicable large employer.
If the number in line 28 is 50 (100, in 2015) or more, then employer IS an applicable large employer.

1. Hours of service includes any hour for which the employee is paid or is entitled to payment.
2. Controlled and affiliated service group rules apply.
3. Seasonal workers are generally included in the count of full-time and full-time equivalent employees.

IV. ACA SMALL GROUP CHANGES

A. The ACA provided that employers with 51 to 100 FTEs were to be classified as "small" employers for insurance market purposes.

B. Expansion of the small group definition would subject non-grandfathered insured plans of employers with 51-100 employees to the ACA community rating standards and requires them to cover all essential health benefits. With expansion, these 51-100 groups would face worse rate structures, narrow networks and restricted access to out-of-network services.

This change was scheduled to occur under the ACA on January 1, 2016.

V. ACA SMALL GROUP CHANGES – PLAN YEAR PROBLEM

A. Many insurance agents were recommending that mid-size clients change their policy years to begin on October 1, 2015 to delay the impact of the community rating. October 1, 2015 was the last day in which plan sponsors could change their policy year to delay the community rating and small group designation.

B. Changing the policy year after February 9, 2014 could impact the use of the pay or play penalty transitional rule for employers with 50 to 99 FTEs.

C. Employers that changed their policy years prior by October 1, 2015 would delay the community rating requirement and small group designation for one year.

D. A few weeks ago congress passed the "Protecting Affordable Coverage for Employees" (Pace) Act. On October 7, 2015, President Obama signed the Pace Act which repealed this classification provision in the ACA.

E. States will now be able to decide whether a small group is 50 FTEs or smaller or whether it wants to expand the definition to 100 FTEs.

F. Mid-size employers that changed their plan year to avoid the small group designation and who also restarted the deductible (coverage maintenance violation) may have violated the coverage maintenance requirements and would be subject to the pay or play penalties beginning on January 1, 2015.

VI. PAY OR PLAY PENALTIES UNDER IRC 4980(H)

A. Employers with at least 50 full-time equivalent employees ("FTEs") must offer health coverage that meets minimum standards and that is considered affordable or face a non-deductible excise tax.

B. This analysis is based on the employee census for the prior calendar year.

C. **There are two types of excise taxes**

1. On the **failure to offer coverage**, Code Section 4980H(a) provides employers with 50 or more FTEs may be subject to this new tax. Employers that fail to offer health benefits during any month for which a full-time employee has enrolled in a subsidized plan using a premium assistance tax credit or certain government cost-sharing reductions would be liable for an additional tax.

   The annual tax per "full-time" employee is $2,000 (adjusted for COLA). The tax is calculated on a monthly basis.

   The additional tax for any month is 1/12 of the $2,000 ($166.67) multiplied by the number of actual full-time employees employed by the employer during such month. In calculating

this monthly tax, the first 30 full-time employees are subtracted from the penalty. The credit is 80 FTEs for the 2015 plan year.

2. As to the **failure of the employer pay a specific amount** of health costs, Code Section 4980H(b) requires employers with 50 or more FTEs who offer health coverage to "full-time" 30 hour per week employees that exceeds 9.5% of the employees' compensation (or use of another affordability method) for single coverage are also subject to a tax if any full-time employee enrolls in an insurance plan offered through a government insurance exchange and qualifies for taxpayer-subsidized coverage.

   The annual tax is $3,000 (adjusted for COLA). The tax is calculated on a monthly basis. The additional tax for any month is 1/12 of the $3,000 ($250.00) multiplied by the number of actual full-time employees receiving government subsidized health insurance on the insurance exchange.

3. The total tax penalty may not be greater than the tax penalty that would apply if the employer offered no coverage at all. These tax penalties are non-deductible expenses.

4. Employers with 50 to 99 FTEs in 2014 will not be subject to these penalties in 2015 if they complied with the transitional rule requirements.

VII. FORM 1094/1095 REPORTING AND DISCLOSURES

A. **This is new IRS reporting required in early 2016 for the 2015 calendar year.**

B. **In general:**

1. ***For Small employers with fully-insured group health plan,*** the carrier will prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-B and 1095-B.

2. ***For Small employers with self-funded group health plans,*** the plan itself is the issuer of coverage. The employer/plan sponsor will need to prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-B and 1095-B.

3. ***For Large employers (including employers with 50-99 FTEs) that maintain fully-insured group health plan*** the employer must prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-B and 1095-C.

4. **In the case of a large employer that maintains a self-funded group health plan,** the employer will prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-C and 1095-C (including Part III), which will include the information ordinarily included in the Forms 1094-B and 1095-B.

C. There are also special rules in the instructions if the employer maintains a health reimbursement plan or when employees have been offered COBRA.

D. For multiemployer plans, the employer can take credit for the union employees eligible under the plan. There are specials codes to use in completing the Form 1095-C.

E. Detailed information will be needed to prepare the Form 1095-C. Employers need to review the forms and instruction and try to figure out how they will be able to obtain this information to report to the IRS.

VIII. FORM 1094/1095 ELECTRONIC REPORTING REQUIREMENTS

A. If the employer is not using a service to prepare the required filings, you should note that employers that are filing 250 or more forms 1095-C must file electronically.

B. These employers must file under the IRS Affordable Care Act Information Returns System (AIR).

C. Employers who utilize a payroll vendor, CPA, or other entity may have a limited role in the filing process if the third-party is considered a transmitter. Employers should confirm with the entity that it is the transmitter and that the employer will not be obligated to complete the electronic filing application process.

D. Employers who process payroll in-house that plan to file the forms on their own should familiarize themselves with publication 5165.

IX. FORM 1094/1095 REPORTING REQUIREMENTS – CONTROLLED GROUP ISSUES.

A. Each entity in the controlled group must issue its own Forms W-2 to its employees. When employees work for multiple employers in the controlled group, separate Forms W-2 must be issued by each employer.

B. Each entity in the controlled group must issue its own Forms 1095-C to the employees. This rule applies even if the entities in the controlled group all participate in the same group health plan.

C. When an employee works for and is paid separately by more than one entity in the controlled group, separate FICA, FUTA and SUTA wage bases apply.

D. We have seen a number of employers using captive administrative service companies for all of its employees to avoid all of the separate filing requirements.

E. The captive service company is the common law employer of the employees and it retains the sole authority over the assigned employees. The captive service company contracts with the various employers in the controlled group to provide employees.

F. The captive service company handles all human resources and employee administrative functions. All reporting is handled by the captive administrative service company.

X. CADILLAC TAX

As part of the ACA, Congress enacted new Code Section 4980I effective as of January 1, 2018. This new provision imposes a 40% excise tax on high cost employer sponsored health coverage that exceeds an amount that exceeds statutory thresholds. Limited guidance is currently available on the application of this excise tax.

A. **Basic Formula**

1. The excise tax attributable to an employee's employer-sponsored coverage is 40% of the employee's "excess benefit." An employee's excess benefit is simply the sum of the employee's monthly excess amounts for the taxable period. Generally the taxable period for which the excess benefit is calculated is a calendar year, although the period could be shorter. The IRS could also provide different taxable periods for employers of varying sizes.

2. An employee's "excess amount" for a month is the amount, if any, by which the aggregate cost of the employee's applicable

employer-sponsored coverage for the month exceeds 1/12 of the annual limitation for the calendar year including that month.

B. **Determining the Aggregate Cost of Coverage**

1. The aggregate cost of an employee's applicable employer-sponsored coverage is the sum of the costs for each coverage.

2. In general, the cost of a particular coverage is determined under rules similar to the rules for determining the applicable premium for COBRA purposes. The "applicable premium" is the plan's cost for similarly situated beneficiaries with respect to whom a qualifying event has not occurred (without regard to whether that cost is paid by the employer or the employee). The cost of coverage does not include the cost of any excise tax that may be due. For purposes of the high-cost coverage excise tax, separate cost amounts must be calculated for self-only and "other than self-only" coverage, i.e., family coverage, even if for COBRA purposes the plan calculates only one premium for all qualified beneficiaries.

3. Because the excess benefit that determines the excise tax is the sum of monthly excess amounts, it is necessary to know the monthly cost of each applicable employer-sponsored coverage. If cost is ordinarily determined on a basis other than monthly, the cost must be allocated to the months in the taxable period in the manner to be prescribed by the IRS.

   The monthly excess amount for any month will be the excess (if any) of:

   a. The aggregate cost of the applicable employer-sponsored coverage of the employee for the month, over

b. An amount equal to 1/12 of the annual limit for the calendar year in which the month occurs.

4. The annual limit for any calendar year will be a dollar amount which, for 2018, will be:

a. For an employee with self-only coverage, $10,200 × the "health cost adjustment percentage", determined by taking into account only "self-only" coverage; and

b. For an employee with coverage other than self-only coverage, $27,500 × the "health cost adjustment percentage," determined by taking into account only coverage *other than* "self-only" coverage.

C. **Health Cost Adjustment Percentage**

1. A "health cost adjustment percentage" is designed to increase the thresholds for application of the excise tax in case the actual growth in the cost of U.S. health care between 2010 and 2018 exceeds the projected growth for that period. The "health cost adjustment percentage" will be equal to 100%, plus the excess (if any), of:

a. The percentage by which (i) the per employee cost for providing coverage under the Blue Cross/Blue Shield standard benefit option under the Federal Employees Health Benefits Plan (FEHBP) for plan year 2018 (determined by using the benefit package for this coverage in 2010), exceeds (ii) the cost for plan year 2010, over

b. 55%.

2. Under an employer-specific age and gender adjustment, the threshold for any taxable period, will be increased by an amount equal to the excess (if any) of:

   a. The premium cost of the Blue Cross/Blue Shield standard benefit option under the FEHBP for the type of coverage provided to the individual in that taxable period if priced for the age and gender characteristics of all employees of the individual's employer, over

   b. That premium cost for the provision of that coverage under the option in that taxable period if priced for the age and gender characteristics of the national workforce.

The new threshold amounts (as indexed) are then increased for any employee by the age and gender adjusted excess premium amount, if any. For an employee with individual coverage in 2019, if standard FEHBP coverage priced for the age and gender characteristics of the workforce of the employee's employer is $11,400 and IRS estimates that the premium cost for individual standard FEHBP coverage priced for the age and gender characteristics of the national workforce is $10,500, the threshold for that employee is increased by $900 ($11,400 less $10,500) to $11,304 ($10,404 plus $900).

D. **Qualified Retirees and High-Risk Professions**

There will be increased dollar limits for an individual who will be a "qualified retiree", or who participates in a plan sponsored by an employer the majority of whose employees covered by the plan are engaged in a "high-risk profession", or employed to repair or install electrical or telecommunications lines. Specifically, the dollar amount for individuals will be increased by $1,650. The dollar amount for family coverage will be increased by $3,450.

E. **Excise Tax Liability**

1. Under the ACA, each "coverage provider" will pay the excise tax on its "applicable share" of the excess benefit for an employee for any taxable period. For this purpose a "coverage provider" will be:

   a. The health insurance issuer, if the applicable employer-sponsored coverage consists of coverage under a group health plan that provides health insurance coverage;

   b. The employer, if the applicable employer-sponsored coverage consists of coverage under an arrangement under which the employer makes contributions to an HSA or Archer MSA; or

   c. The person that administers the plan benefits (defined below), for any other applicable employer-sponsored coverage.

F. **"Applicable Share" Defined**

1. A coverage provider's "applicable share" of an excess benefit for any taxable period will be the amount that bears the same ratio to the amount of the excess benefit as:

   a. The cost of the applicable employer-sponsored coverage provided by the provider to the employee during the period, bears to

   b. The aggregate cost of all applicable employer-sponsored coverage provided to the employee by all coverage providers during the period.

G. **Responsible Party For Calculating The Tax**

1. Under ACA, each employer will be required to calculate for each taxable period, the amount of the excess benefit subject to the excise tax, and the applicable share of the excess benefit for each coverage provider. The employer will also have to notify IRS and each coverage provider of the amount determined for the provider, at the time and manner as IRS may prescribe.

2. For applicable employer-sponsored coverage made available to employees through a multiemployer plan, the plan sponsor will have to make the calculations, and provide the required notice.

Example: In 2018, an employee elects family coverage under a fully-insured health care policy covering major medical and dental with a value of $31,000. The health cost adjustment percentage for that year is 100%, and the age and gender adjusted excess premium amount for the employee is $600. The amount subject to the excise tax is $2,900 ($31,000 less the threshold of $28,100 ($27,500 multiplied by 100% and increased by $600)). The employer reports $2,900 as taxable to the insurer. The insurer calculates and remits the excise tax to the IRS.

Alternatively, in 2018 an employee elects family coverage under a fully-insured major medical policy with a value of $28,500 and contributes $2,500 to a Health FSA. The employee has an aggregate health insurance coverage value of $31,000. If the health cost adjustment percentage for that year is 100% and the age and gender adjusted excess premium amount for the employee is $600, the amount subject to the excise tax is $2,900 ($31,000 less the threshold of $28,100 ($27,500 multiplied by 100% and increased by $600)). The employer reports $2,666 ($2,900 × $28,500/$31,000) as taxable to the

major medical insurer which then calculates and remits the excise tax to IRS.

If the employer uses a third-party administrator for the Health FSA, the employer reports $234 ($2,900 x $2,500/$31,000) to the administrator and the administrator calculates and remits the excise tax to IRS. If the employer is acting as the plan administrator of the Health FSA, the employer is responsible for calculating and remitting the excise tax on the $234 to IRS.

H. **"Applicable Employer-Sponsored Coverage" Defined**

1. The ACA provides that "applicable employer-sponsored coverage," for any employee, will be coverage under any group health plan made available to the "employee" by an employer, which is excludable from the employee's gross income under Code Section 106, or would be so excludable if it were employer-provided coverage.

2. Applicable employer-sponsored coverage will not include:

   a. any coverage (through insurance or otherwise) relating to coverage for on-site medical clinics, or any coverage for long-term care;

   b. any coverage under a separate policy, certificate, or contract of insurance that provides benefits substantially all of which are for treatment of the mouth (including any organ or structure within the mouth), or for treatment of the eye; or

   c. any coverage relating to coverage for a specified illness or disease (e.g., cancer-only policies), and hospital indemnity or other fixed indemnity insurance (e.g.,

$100/day)), the payment for which is *not* excludable from gross income, and for which a Code Section 162(l) deduction (the deduction for health insurance costs of self-employed individuals) is not allowable.

Coverage will be "applicable employer-sponsored coverage" without regard to whether the employer or employee pays for the coverage.

3. For a self-employed individual (as described in Code Section 401(c)(1)), coverage under any group health plan providing health insurance coverage will be treated as applicable employer-sponsored coverage if a deduction is allowable under Code Section 162(l) with respect to all or any portion of the cost of the coverage.

4. Applicable employer-sponsored coverage will also include coverage under any group health plan established and maintained primarily for its civilian employees by the U.S. government, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any such government. (Code Section 4980I(d)(1)(E))

I. **"Employee" Defined.**

The term "employee" will include any former employee, surviving spouse, or other primary insured individual.

J. **Determining the Cost of Applicable Employer-Sponsored Coverage**

1. The ACA provides that the cost of applicable employer-sponsored coverage will be determined under rules similar to the Code Section 4980B(f)(4) rules (under which the applicable

premium for the excise tax on the failure to satisfy the COBRA continuation coverage rules is determined), except that any portion of the cost of the coverage that is attributable to the tax imposed under the above rules will not be taken into account, and the amount of the cost will be calculated separately for self-only coverage and other coverage.

2. For applicable employer-sponsored coverage under a health flexible spending arrangement (a "health FSA," as defined in Code Section 106(c)(2)), the cost of the coverage will be equal to the sum of:

   a. the amount of employer contributions under any salary reduction election under the health FSA, plus

   b. the amount determined under Code Section 4980I(d)(2)(A), above, for any reimbursement under the health FSA in excess of the salary reduction elections.

3. For applicable employer-sponsored coverage consisting of coverage under an arrangement under which the employer makes contributions described in Code Section 106(b) or Code Section 106(d) (relating to HSA or Archer MSA contributions, respectively), the cost of the coverage will be equal to the amount of employer contributions under the arrangement.

4. Where cost will be determined on other than a monthly basis, the cost will be allocated to months in a taxable period on such basis as IRS may prescribe. (Code Section 4980I(d)(2)(D))

TRUSTS AND THE FEDERAL INCOME TAX MAN

By: Geoffrey N. Taylor

I. OVERVIEW

A. A trust is created when a grantor transfers property to a trustee for the benefit of a third person, the beneficiary. A trust is a separate taxpayer, like an individual, and normally must file an income tax return on Form 1041. Income earned by the trust assets constitute income earned by the trust.

1. The party liable for taxes on trust income typically depends on the terms of the trust agreement and on who receives the income (i.e., the trust itself, a trust beneficiary, or, in some cases, the trust's grantor).

2. Trust income retained by the trust is taxed to the trust, while distributed income is taxed to the beneficiary who receives it. Thus, trust income is taxable to the trust or to the beneficiary, but not to both.

B. In general, trusts are taxed like individuals.

1. A trust may earn tax-exempt income, may deduct certain expenses, and is allowed a small exemption as follows:

a. $300 for a "simple trust." A trust is a simple trust if it requires all income to be distributed and if it makes no principal distributions during the year.

b. $100 for a "complex trust." Complex trusts are generally all trusts other than simple trusts and grantor trusts (a discussion of grantor trusts is beyond the scope of this

outline). The balance of this outline will focus on complex trusts.

2. No standard deduction is allowed.

3. The tax brackets for income taxable to a trust are much more compressed than the brackets applicable to individuals and can result in far higher taxes than for individuals:

If Taxable Income is Between:	The Tax Due Is:
0 - $2,500	15% of taxable income
$2,501 - $5,900	$375 + 25% of the amount over $2,500
$5,901 - $9,050	$1,225 + 28% of the amount over $5,900
$9,051 - $12,300	$2,107 + 33% of the amount over $9,050
$12,301 +	$3,1780 + 39.6% of the amount over $12,300

4. Income has the same character in the hands of the trust beneficiaries as it had when the trust received it.

C. Summary of the trust income tax return:

1. Determine taxable income before the distribution deduction.

2. Determine distributable net income.

3. Determine accounting income.

4. Determine distribution deduction.

5. Allocate distributable net income among the beneficiaries.

6. Trust pays the tax on any balance.

II. COMPUTING A TRUST'S TAXABLE INCOME

A. Trust income for federal income tax purposes.

1. Accounting Income.

a. Income earned by the trust typically is in the form of interest (both taxable and tax-exempt), dividends, rents, and capital gains. Accounting income is used to determine the amount that (i) will be subject to federal income tax and (ii) is required to be distributed to an income beneficiary. Accounting income refers to trust income that is allocated to the income beneficiary and not to the trust / remainder beneficiary. For example, a capital gain is generally added to the principal for the benefit of the remainder beneficiary.

b. A trust's accounting income can be defined by the trust agreement and/or state law.

c. Accounting income is not affected by the Internal Revenue Code.

d. A trust will realize income if it distributes appreciated property in satisfaction of a pecuniary bequest. The trust is treated as if it sold the property to the beneficiary at its fair market value.

2. Tax-exempt income.

a. Like an individual, a trust can earn tax-exempt income.

b. Expenses directly related to the production of taxable income are fully deductible. Expenses directly related to the production of tax-exempt income, including margin

interest incurred to purchase municipal bonds, are not deductible.

c. Indirect expenses are allocated between taxable and tax-exempt income proportionally. This allocation is calculated as follows: Gross tax-exempt income / gross accounting income = percentage of expenses not deductible against taxable income.

3. Losses.

If losses exceed gains, losses are allocated to the trust. Capital losses can be deducted against ordinary income to the extent of the lesser of the capital loss or $3,000. Excess capital losses may be carried forward indefinitely. Unused capital loss carryovers can be passed through to the trust beneficiaries in the year of the termination of the trust.

B. Deductions.

1. Generally, deductions allowed to individuals are also allowed on trust returns. These include:

a. State, local, and real property taxes.

b. Administrative expenses (e.g., trustee fees).

c. Miscellaneous itemized deductions, some of which are subject to a limitation of 2% of the trust's adjusted gross income.

2. Depreciation deductions.

a. The depreciation deduction is apportioned between the trust and the beneficiaries on the basis of the trust

income allocable to each, unless the governing instrument or local law requires or permits the trustee to maintain a depreciation reserve.

b. Thus, if all of the trust accounting income is to be distributed to the beneficiary, the depreciation deduction is allocated in full to the beneficiary, and no part of it is deductible by the trust.

3. Distribution deduction.

a. A trust is allowed to deduct an amount equal to the amount distributed to the income beneficiary. This is referred to as the income distribution deduction. A trust's income distribution deduction generally is the sum of:

i. Distributions of income required to be made ("Tier One distributions," discussed below); plus

ii. Distributions of income and principal otherwise properly made ("Tier Two distributions," discussed below).

b. The income distribution deduction is limited to the distributable net income of the trust (discussed below).

4. Disallowance of double deduction.

a. The deduction of expenses on both the estate tax return and a trust tax return is prohibited.

b. Examples include personal representative fees, legal and accounting fees, probate court fees, insurance, and expenses incurred in selling assets required to be sold.

C. Distributable net income.

1. Distributable net income ("DNI") is a calculation used to allocate income between a trust and its beneficiaries and to restrict the amount of the deduction allowable to a trust for distributions to its beneficiaries. The DNI rules create a tax presumption that any distribution is made first from trust income. Beneficiaries are taxed only to the extent of DNI. Distributions made in excess of DNI are treated as tax-free distributions of principal.

2. DNI is the trust's taxable income with certain modifications. DNI is computed as follows:

   a. Total trust income other than tax-exempt income.

   b. Plus tax-exempt income less direct and indirect expenses attributable thereto.

   c. Plus capital gains if:

      i. Gain is allocated to accounting income rather than corpus; or

      ii. Gain allocated to principal is required to be distributed or is actually distributed by the trustee.

   d. Less deductible expenses.

3. Amounts required to be distributed are deductible in the current year regardless of whether they are actually distributed. Discretionary distributions are generally deductible only in the year they are made.

4. DNI is first apportioned dollar for dollar to the beneficiaries who receive the income required to be distributed. Remaining DNI

is divided proportionately among beneficiaries receiving discretionary distributions or other payments. Payments are considered made first from DNI to the extent of DNI. IRS rules do not require or allow tracing of the actual source of payment. These rules are intended to prevent the trustee from manipulating distributions so that the beneficiaries in higher tax brackets receive nontaxable distributions of principal while beneficiaries in lower tax brackets receive distributions of taxable income.

5. DNI is allocated among beneficiaries according to a tier system. The purpose of the tier system is to expose beneficiaries who receive mandatory distributions of income to the maximum amount of DNI based on the income they are entitled to receive. The remaining DNI is allocated among the remaining beneficiaries.

   a. Tier One. DNI is allocated first to beneficiaries who receive income that is required to be distributed.

   b. Tier Two. DNI is allocated second to all other amounts properly distributed to beneficiaries, including discretionary distributions. After DNI is allocated to Tier One beneficiaries, any remaining DNI is allocated pro-rata among the other beneficiaries based on the income distributions they receive.

6. The beneficiaries are treated as if they received the DNI distributed by the trust on the last day of the trust's taxable year and must include the taxable portions of DNI in their income for the tax year in which the trust's tax year ends.

III. ADMINISTRATIVE ISSUES

A. Income tax returns for trusts are known as fiduciary tax returns (Form 1041). That is because the fiduciary (the trustee) is generally responsible for filing the return and paying any taxes owed from the trust assets. Trusts are also generally required to file a state income tax return.

B. A return is required if:

1. The trust has taxable income;

2. The trust has gross income of $600 or more; or

3. A trust beneficiary is a non-resident alien.

C. Estimated Income Tax Payments.

1. A trust must make estimated tax payments on a quarterly basis; i.e., April 15th, June 15th, September 15th and January 15th beginning with its first tax year.

2. The safe harbor for avoiding the penalty for underpayment of estimated tax is to make quarterly payments of 90 percent of the current year's tax liability. Unless the trust experiences a significant increase in income during the year, most should qualify by making payments equal to 100 percent of the prior year's tax liability (110% if the trust's adjusted gross income is more than $150,000).

D. A trust must select a calendar tax year, unless it is eligible to make an election to be taxed as part of the estate as described below, in which case the trust may have a fiscal tax year.

E. Election to Treat Revocable Trust as Part of an Estate.

1. Section 645 permits a decedent's qualified revocable trust to elect to be taxed as part of the estate. This treatment is permitted for a period of two years after the date of the decedent's death, or if a federal estate tax return is filed, the date that is six months after the final determination of the estate tax liability.

2. A "qualified revocable trust" is any trust, or part of a trust, that on the day the decedent died was treated as owned by the decedent because the decedent held the power to revoke.

3. The election is made by filing a Form 8855 by the due date of the Form 1041 for the first taxable year of the estate. If there is no personal representative, the election is made by the trustee for the first taxable year of the trust filing as an estate.

4. The regulations provided that if there is an estate, a taxpayer identification number must be obtained for the estate, and a separate tax identification number must be obtained for the trust until the period for combined reporting is over. If there is no estate, the trust must obtain a tax identification number for the election period and a new one at the end of the period.

F. A trust may elect to treat amounts properly distributed in the first 65 days of the next tax year as though they were made in the current year (the "65-day rule").

G. The trustee or an authorized representative must sign Form 1041. If there are joint fiduciaries, only one is required to sign the return.

PUTTING THE LID ON UNCAPPING IN MICHIGAN

By: Gary A. Kravitz

I. WHAT WAS THE PURPOSE OF PROPOSAL A?

A. Cut and cap local taxes.

B. Reduce disparities across school districts.

II. WHAT DID PROPOSAL A DO?

A. Eliminated the use of local property taxes as a source of school funding and created a new state education tax. School districts began to get per-pupil payments from the State.

B. The state sales tax increased from 4 cents to 6 cents on the dollar. The extra two cents was to go to the school aid fund, the state budget for schools.

C. Required the state's lowest-funded school districts to receive a basic level of education funding, which raised the amount they received and significantly closed the gap between low-funded schools and others.

III. HOW DOES IT WORK?

A. A new state education tax was created – 6 mills assessed on taxable value. This money goes into the school aid fund.

B. Proposal A also capped how much the taxable value can increase. Growth in taxable value is capped at 5 percent or the rate of inflation, whichever is less.

C. Proposal A means taxpayers can no longer vote to tax themselves extra to pay for ordinary school operations for their local schools. However, local

taxpayers may vote to approve new taxes to fund construction, technology, and land purchases.

IV. TAXABLE VALUE VS. TRUE CASH VALUE/STATE EQUALIZED VALUE

A. Taxable value is the value used to calculate the property taxes for a property. In general, the taxable value multiplied by the appropriate millage rate yields the property taxes for a property. Taxable value is capped by Proposal A. If there is a transfer of ownership and the taxable value is uncapped, then the taxable value becomes the same as the State Equalized Value.

B. A property's true cash value is not necessarily the same as its sale price for a variety of reasons. An assessor must determine the true cash value of a property which has sold in the same manner that the assessor determines the true cash values of properties which have not sold. Therefore, an assessor may not automatically set an assessed value or a taxable value at half of a property's selling price. MCL 211.27.

C. The assessed value is 50% of the true cash value.

D. The State Equalized Value (SEV) is often equal to the assessed value. However, the SEV may be slightly different than the assessed value due to an equalization factor or multiplier that the state or the county may impose in order to equalize the assessments. SEV is uncapped.

V. WHAT IS TRANSFER OF OWNERSHIP?

A. Michigan statute defines "transfer of ownership" generally as the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. MCL 211.27a(6).

B. MCL 211.27a(6) (a-j) provides a variety of examples of what constitutes a transfer of ownership for taxable value uncapping purposes. If a transfer of

property (or ownership interest) meets one of these definitions and does not fall under one of the exemptions noted in the statute, that transfer is a transfer of ownership.

C. A transfer of property by deed is a transfer of ownership. MCL 211.27a(6)(a).

D. A transfer of property by land contract is a transfer of ownership. MCL 211.27a(6)(b) The transfer of ownership occurs on the date the land contract is entered into, not the date the land contract is recorded, nor the date the land contract is satisfied and not the date a deed conveying title to the property is recorded in the office of the register of deeds.

E. A transfer into a trust is generally considered a transfer of property. MCL 211.27a(6)(c). However, this provision is subject to significant exceptions as will be discussed below. Pursuant to MCL 211.27a(6)(c), a conveyance to a trust after December 31, 1994 is a transfer of ownership. However, if the grantor stated on the deed is the settlor (creator) of the trust or the settlor's spouse or both and the sole present beneficiary of the trust is the settlor of the trust or the settlor's spouse or both, the conveyance is not a transfer of ownership. MCL 211.27a(6)(c)(i).

F. A lease of real property is a transfer of ownership if one or both of the following conditions exists: (1) the lease term exceeds 35 years, including all options to renew the lease, or (2) the lessee has a bargain purchase option. A bargain purchase option is defined by the statute as the right to purchase the leased property at the end of the lease for 80 percent or less of what the property's projected true cash value at the end of the lease. The statute also provides that the taxable value will be uncapped in the year following the year that the lease was entered into.

G. Conveyance of an ownership interest in a legal entity (such as a corporation, a partnership, etc.) which owns property is a transfer of

ownership of that property provided that the ownership interest conveyed is more than 50 percent of the total ownership interest. MCL 211.27a(6)(h).

H. Transfer of property held as a tenancy in common, except that portion of the property not subject to the ownership interest conveyed. MCL 211.27a(6)(i).

1. Last phrase means that you could have partial uncapping. Example: Peter, Paul and Mary own 25, 25, and 50 percent respectively of chartreuseacre as tenants in common and Mary sells her 50 percent interest in chartreuseacre to Bob in 2011 that is considered a transfer under the Act. In 2012, chartrueseacre will be subject to a partial 50% uncapping of the property's taxable value.

2. Tenancy in common means that there is no right of survivorship. If a tenant in common dies, his share passes to his heirs or devisees.

I. A conveyance of an ownership interest in a cooperative housing corporation, except that portion of the property not subject to the ownership interest conveyed. MCL 211.27a(6)(j).

1. Last phrase means that you could have partial uncapping.

2. Uncapping will only occur as to the unit sold.

VI. SOME EXCEPTIONS TO TRANSFERS OF OWNERSHIP (NOT AN EXHAUSTIVE LIST)

A. It is a solidly established principal that property tax "exemption statutes are to be strictly construed in favor of the taxing unit and against the exemption claimant." *Association of Little Friends, Inc. v City of Escanaba*, 138 Mich. App 302 (1984); *Town & Country Dodge Inc. v Department of Treasury*, 420 Mich. 226 (1984).

B. A transfer of property from one spouse to another spouse is not a transfer of ownership. MCL 211.27a(7)(a) and MCL 211.27a(7)(s).

C. A transfer from a husband, a wife, or both whose sole purpose is to create or disjoin (terminate) a tenancy by the entireties is not a transfer of ownership. MCL 211.27a(7)(b).

D. Generally, a conveyance of a property subject to a life lease retained by the grantor is not a transfer of ownership.

1. However, this transfer of ownership exemption only applies to that portion of the property conveyed that is subject to the life lease.

2. Any portion of the property conveyed that is not subject to the life lease does experience a transfer of ownership upon the conveyance of the property. A partial uncapping can, therefore, occur with conveyances involving life leases. See MCL 211.27a(7)(c).

3. A life lease is where an owner transfers property to a third party but retains the right to use and control the property during the owner's lifetime.

4. A life estate renders the same result as a life lease.

E. A transfer of property due to a foreclosure or forfeiture is not a transfer of ownership when a financial institution or a land contract seller takes the property back through foreclosure or forfeiture of a recorded mortgage or land contract. MCL 211.27a(7)(d).

1. This applies to foreclosures of mortgages and land contracts through circuit court proceedings, the foreclosure of mortgages by advertisement, and the forfeiture of property by summary proceedings.

2. A Mortgagee that receives property through a foreclosure has one year after the expiration of the redemption period to convey the property. Property will uncap in the following assessment year if not conveyed.

F. An original owner redeeming tax-reverted property does not result in an uncapping. MCL 211.27a(7)(e).

G. A transfer to establish, assign, or release a security interest a transfer of ownership does not result in an uncapping. MCL 211.27a(7)(i).

H. A transfer pursuant to a court order, unless a specific monetary consideration is specified does not result in an uncapping. MCL 211.27a(7)(g).

I. A transfer of property between affiliated corporations (i.e. connected by stock ownership to a common parent corporation) will not result in an uncapping. MCL 211.27a(7)(j).

J. A transfer of property between commonly controlled entities will not result in an uncapping. MCL 211.27a(7)(l).

1. See Michigan Revenue Administrative Bulletin 1989-48 for determining whether entities are commonly controlled.

2. Common control falls into three basic categories: Parent-Subsidiary; Brother-Sister; Combined Group of Trades or Businesses.

K. Other exemptions include:

1. Transfers by Boy Scout, Girl Scout, Camp Fire Girls, YMCA, YWCA resulting from a consolidation or merger. MCL 211.27a(7)(q).

2. Transfer of qualified agricultural property. MCL 211.27a(7)(n).

3. Transfer of qualified forest property. MCL 211.27a7(o).

VII. NEW DEVELOPMENTS THAT HAVE LIMITED UNCAPPING

A. *Klooster v City of Charlevoix,* 486 Mich 932 (2011) involved a father who deeded real property to himself and his child as joint tenants with rights of survivorship shortly before the father's death. Soon after the father's death, the son quit claimed the property to him and his brother as joint tenants with rights of survivorship. The Michigan Supreme Court ruled that the death of the only other joint tenant (the father) constituted a conveyance. In interpreting MCL 211.27a(7)(h) the Court ruled that there are three separate types of conveyances (termination of joint tenancy, creation of joint tenancy and creation of successive joint tenancy) and depending upon which type of conveyance is presented will determine whether a conveyance has occurred.

1. What is a joint tenancy? A joint tenancy is a form of concurrent ownership wherein each co-tenant owns an undivided share of property and the surviving co-tenant has the right to the whole estate. On the death of each joint tenant, the property belongs to the surviving joint tenants, until only one individual is left. Example: Five people own a property as joint tenants. Each joint tenant has a 20 percent interest in the property (100/5 = 20). If one of the five dies, his/her interest is divided equally among the remaining four joint tenants, giving each of the remaining four a 25 percent interest in the property.

2. Creation of a Joint Tenancy: no uncapping at initial transfer as long as one of the original grantors and one of the recipients of the property are the same person.

Example: Simon purchases purpleacre in 2014 and then in 2015 conveys purpleacre to himself and his son, Garfunkel, as joint tenants with rights of survivorship. No uncapping in this example.

3. Termination of Joint Tenancy: According to the Department of Treasury (interpreting *Klooster*), if there is a transfer of ownership and the resulting owner is not an initial joint tenant, then there is a transfer of ownership.

   Example: Ringo purchases mauveacre in 2008. In 2009, Ringo conveys mauveacre to himself and his son, George, as joint tenants with rights of survivorship. Ringo dies weeks after the conveyance, leaving George as the sole owner. No uncapping. Ringo was the original owner and was an initial joint tenant when the joint tenancy was created.

4. Successive Joint Tenancy: conveyance from one joint tenancy directly into another joint tenancy.

   a. Example: Paul purchases puceacre in 2013. In 2014 Paul conveys puceacre to himself and his son John as joint tenants with rights of survivorship. In 2015, John and Paul convey puceacre to themselves and John's friend, Jones, as an additional joint tenant. No uncapping. The creation of a joint tenancy with John, Paul and Jones and joint tenants does not result in an uncapping. Since Paul, who is the original owner and an initial joint tenant in the first joint tenancy, also held an interest in the succeeding joint tenancy, there is no uncapping.

   b. *Klooster* is an example where you have a non-successive joint tenancy because the son, who created the second joint

tenancy with his brother, was not an original owner at the time of the creating of the initial joint tenancy.

5. Problems with Joint Tenancies.

a. Grantor exposes the property to creditors of the other joint tenants.

b. Lack of cooperation issues between the joint tenants. You cannot make a decision on the disposition of the property without the consent of the other joint tenants.

B. *Anderson v Chocolay Township* (2013 Michigan Tax Tribunal Decision)

1. Lady Bird deeds do not constitute a transfer.

a. Lady Bird deed where grantor grants children a remainder interest and then grants herself a life estate with the power to convey the property without consent of the remaindermen children.

b. Upon the death of the grantor, the property will transfer to remaindermen children without need for probate.

c. Since the children had no present legal right to control, possess or enjoy the property, the children's interest did not presently vest. Thus, no transfer of ownership.

d. Important to note that the death of the original owner will result in a transfer that results in an uncapping.

2. Transfer into unequal joint tenancy does not constitute a transfer.

a. Due to Medicaid veterans administration issues, grantor had to then covey property to herself with a 1% interest and the

rest of the 99% went equally to her three children. (so called Lion-Cub Deeds)

b. Tax Tribunal determined that MCL 565.49 allowed for unequal joint tenancies.

C. New regulations/statute.

1. First Stab – 2012 PA 497.

a. A transfer of residential real property will not uncap if the new owner is related to the transferor by blood or affinity to the first degree and the use of the property after the transfer continues to be residential real property.

i. Example: John and Jane Doe transfer their residential real property to their daughter Judy on January 15, 2014. Is this a transfer of ownership? No, as long as Judy maintains the same use of the property. MCL 211.27a(7)(s).

ii. 2014 Amendment limited this provision to transfers between December 31, 2013 through December 30, 2014.

iii. Confusion over what "blood or affinity to the first degree" meant.

iv. State Tax Commission defined first degree blood relative to be a person who shares approximately 50% of their genes with another member of the family. Parents, children or siblings fall into this definition. Further, the Department of Treasury has defined affinity to the first degree as including the following relationships: *spouse, father or mother, father or*

mother of the spouse, son or daughter, including adopted children and son or daughter of the spouse.

2. 2014 PA 310 – the new additions to the law:

   a. Transfer into a trust of residential real property will not be an uncapping event if:

      i. sole beneficiary or beneficiaries are settlor's mother, father, brother, sister, son, daughter, adopted child, grandchild, and

      ii. the residential property is not used for commercial purposes. MCL 211.27a(6)(c)(ii) and MCL 211.27a(7)(f)(ii).

      iii. Only applies to transfers on or after December 31, 2014.

      iv. Prior exception only applied if the sole present beneficiary(ies) were the settler or the settlor's spouse, or both, as noted above. MCL 211.27a(6)(c)(i). Also note that property does not have to be residential under this prior exception. MCL 211.27a(7)(f)(ii) also covers this exception.

      v. Residential Real Property is defined in MCL 211.34c(e).

      vi. Trick Question: Is a transfer of property by a husband and wife to a trust on December 20, 2014 with the husband and wife and their child as present beneficiaries a transfer of ownership? Yes. The child is a present beneficiary and is not the settlor of the trust or the settlor's spouse. MCL 211.27a(6)(c)(ii)

does not apply as the conveyance occurred prior to December 31, 2014 when this exception went into effect.

b. Distribution from a trust of residential real property will not be an uncapping event if:

   i. receiving party is settlor's or settlor's spouse's mother, father, brother, sister, child, adopted child, grandchild, and

   ii. residential real property is not used for commercial purpose. MCL 211.27a(6)(d)(ii).

   iii. Only applies to transfers on or after December 31, 2014.

   iv. Previous exception only applied if the distributee was the sole present beneficiary or the spouse of the sole present beneficiary (or both). MCL 211.27a(6)(d)(i). This earlier exception was not limited to residential real property.

c. With respect to residential real property, a change in the sole present beneficiary(ies) of a trust will not result in an uncapping if:

   i. the change adds or substitutes the settlor's mother, father, brother, sister, child, adopted child, grandchild, and

   ii. the residential real property is not used for any commercial purpose after the conveyance. MCL 211.27a(6)(e)(ii).

iii. Only applies to changes on or after December 31, 2014.

iv. Previous exception only applied if the change added or substituted the souse of the sole present beneficiary. MCL 211.27a(6)(e)(i). This earlier exception was not limited to residential real property.

d. Conveyance by will or intestate succession for residential real property will not be an uncapping event if:

i. the person receiving the residential real estate is the decedent's mother, father, brother, sister, child, adopted child, grandchild, and

ii. the residential real estate is not used for any commercial purpose. MCL 211.27a(6)(f)(ii).

iii. Only applies to conveyances on or after December 31, 2014.

iv. Previous exception only applied if the conveyance was to the decedent's spouse. MCL 211.27a(6)(f)(i). This earlier exception was not limited to residential real property.

e. Transfer of residential real property will not result in an uncapping event if

i. transferee is the transferor's mother, father, brother, sister child, adopted child, or grandchild, and

ii. the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(7)(t).

iii. Only applies to transfers on or after December 31, 2014.

iv. This replaces the "blood or affinity" to the first degree section.

f. Conveyance of residential real property from a trust will not result in an uncapping event if:

i. the person receiving the property is the settlor's or the settlor's spouse's mother, father, brother, sister, child, adopted child, or grandchild; and

ii. the residential property is not used for any commercial purpose following the conveyance. MCL 211.27a(7)(u).

iii. Only applies to transfers on or after December 31, 2014.

IF IT AINT' BROKE, DON'T FIX IT; BUT IF IT IS, USE VCP

By: Charles M. Lax

I. THE EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM ("EPCRS") OF THE INTERNAL REVENUE SERVICE ("IRS") IS MADE UP OF THREE SEPARATE PROGRAMS:

A. Self-Correction Program ("SCP") – a program where under limited circumstances a plan may self-correct a plan failure without sanction and without IRS approval.

B. Voluntary Correction Program ("VCP") – a program where a wide range of plan failures may be corrected by the payment of a compliance fee and the issuance of a Compliance Statement by the IRS.

C. Audit Closing Agreement Program ("CAP") – a program where a plan failure is discovered during the course of an IRS audit (or other dealings with the IRS), and in lieu of disqualification, the IRS enters into a Closing Agreement which specifies the correction methodology and a negotiating monetary sanction amount is paid.

II. GENERAL CORRECTION PRINCIPLES UNDER EPCRS

A. The following general correction principles are to be used in all three of the component programs of EPCRS:

1. Full correction is required for all affected participants and beneficiaries and for all taxable years (whether closed or not).

2. The correction should restore the plan and affected participants or beneficiaries 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. To the extent possible, a methodology already provided for in the Internal Revenue Code ("Code"), regulations or other guidance is preferable.

   b. Plan assets should be retained in the plan unless the law requires otherwise.

   c. The correction should not violate other Code provisions.

   d. To the extent possible, correction should be made by providing additional benefits to non-highly compensated employees.

B. In rare instances the IRS will allow a correction method that does not conform if no other reasonable option is available.

III. CATEGORIES OF QUALIFICATION FAILURES COVERED BY EPCRS

A. Operational failures where the plan was not operated according to the plan document or the Code requirements.

B. Plan document failures where the document does not comply with the Code's requirements, including the failure to timely adopt required amendments.

C. Demographic failures where the plan fails minimum coverage, minimum participation or non-discrimination testing.

D. Employer eligibility failures where the employer is not eligible to sponsor a type of retirement plan (for example, for-profit corporation trying to sponsor a section 403(b) plan).

IV. SELF-CORRECTION PROGRAM

A. General eligibility rules.

1. The eligibility requirements for SCP are:

   a. It is available only for certain operational failures.

   b. There must be established plan procedures that are "reasonably designed to promote and facilitate overall compliance."

   c. Any failure must have occurred as a result of an oversight, mistake, or "because the procedures that were in the plan, while reasonable, were not sufficient to prevent the occurrence of a failure."

   d. The plan sponsor must make retroactive correction to all relevant failures for all participants and beneficiaries.

2. The failure cannot be egregious.

3. SCP is not available if the plan is under examination.

   a. SCP will not be available for correcting any failure in a plan for any plan year that is under an Employee Plans Division examination. However, it may be available if the plan is under a general income tax audit.

   b. The IRS may permit agreed upon self correction during an examination.

B. Availability of SCP under these circumstances.

1. Operational failures are discovered and corrected within two years of the end of the plan year in which the failure occurred (not

discovered) and are eligible for SCP relief, even if the operational failure is not insignificant.

2. SCP is also available for "insignificant" operational failures that are discovered after the time period of self correcting the failure has elapsed.

   a. The factors to be considered in determining whether operational failures under the plan are insignificant include, but are not limited to:

      i. The occurrence of other failures during the relevant time period.

      ii. The percentage of plan assets and contributions involved.

      iii. The number of years over which the failure occurred.

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

      v. The number of affected participants relative to the number of plan participants who could have been affected.

      vi. The reasonableness of the timing for correction after the failure was discovered.

      vii. The reason for the failure (for example, transcription of data, transposition of numbers, or minor arithmetic errors).

b. No single factor is determinative. The fact that one or more of the factors are not applicable to a given case will not prevent the plan from being eligible for SCP.

c. A plan with more than one operational failure in a single year may be eligible for SCP if the violations in the aggregate are considered insignificant. Furthermore, failures will not be considered significant merely because they occur in more than one year.

V. VOLUNTARY CORRECTION PROGRAM

A. General description.

1. A plan sponsor at any time before an audit may pay a Compliance Fee and receive a Compliance Statement from the IRS for correction of all qualification failures (operational, plan document, demographic, and employer eligibility).

2. Qualified plans, 403(b) plans, SEPs, and SIMPLE IRA plans are all eligible for VCP.

3. Under VCP, there are special procedures available for anonymous submissions or group submissions.

B. The key elements of the VCP include:

1. The employer submits an application with its Compliance Fee.

2. The employer identifies various qualification failures in its application.

3. The employer outlines the changes in administrative procedures that will ensure the failures do not occur in the future.

4. The employer and IRS agree to the methods of correction and revisions to administrative procedures.

5. The IRS agrees not to pursue a plan's disqualification with respect to the specified failures; provided that all corrective actions and changes are completed within 150 days of the issuance of a Compliance Statement.

6. The IRS issues a Compliance Statement which memorializes the terms of the correction.

7. A Compliance Fee is paid. The Compliance Fee is based upon the type of failure and the number of participants.

   a. Generally, the following Compliance Fee amounts are required:

Number of Participants	Compliance Fee
20 or fewer	$ 750
21 to 50	1,000
51 to 100	2,500
101 to 500	5,000
501 to 1,000	8,000
1,001 to 5,000	15,000
5,001 to 10,000	20,000
Over 10,000	25,000

   b. Reduced Compliance Fees are available in certain instances including:

      i. Required plan amendment failures.

      ii. Missed required minimum distributions.

      iii. Default on plan loans.

C. The VCP application will generally include the following:

1. A statement identifying the type of plan being submitted.

2. A description of the plan failures and the years in which the failures occurred.

3. A description of the administrative procedures in effect at the time the failures occurred.

4. An explanation of how and why the failures arose.

5. A description of the methods for correcting the failures that the plan sponsor has implemented or proposes to implement.

6. A description of the methodology that will be used to calculate earnings on any corrective action.

7. Specific calculations of amounts involved for each affected participant or a representative sample of affected participants.

8. A description of the measures that have been or will be adopted to ensure that the same failures do not occur in the future.

9. A statement that to the best of the plan sponsor's knowledge, neither the plan nor the plan's sponsor is under examination by the IRS.

10. A statement that neither the plan nor the plan sponsor has been a party to an abusive tax transaction.

VI. CORRECTION METHODOLOGY FOR COMMON PLAN FAILURES

A. Failure to obtain spousal consent for a distribution when required.

1. Generally, obtaining the spousal consent at a later date is an acceptable correction method.

2. If spousal consent cannot be obtained, the plan participant may repay the entire distribution amount and the plan will then distribute benefits in the form of a qualified joint and survivor annuity.

3. In the event that either of the two specified options listed in 1 and 2 of this section do not occur, the plan sponsor must obtain for the spouse a survivor annuity or a lump sum equivalent of the survivor annuity amount.

B. The failure to make a required minimum distribution.

1. The plan should distribute the required minimum distribution or distributions as soon as possible, including earnings, to the affected plan participants,

2. While SCP can be used to correct missed required minimum distributions, VCP is required in order to obtain a waiver of the 50% excise tax.

C. Defaulted plan loan (generally, requires the reporting of the balance due as a taxable distribution).

1. In the event that the loan default was the result of an operational failure by the plan or plan sponsor, VCP would be available.

2. Other defaults, such as the participant's failure or refusal to repay the loan, are not available for relief under VCP.

3. The correction requires the plan participant to correct by either of the options specified hereunder, or a combination of the two options:

a. The participant makes a lump sum repayment equal to the defaulted amounts plus interest accrued on the defaulted amounts.

b. The outstanding balance of the loan is re-amortized, including accrued interest over the remaining term of the loan or over the maximum period for repayment measured from the original date of the loan.

D. The failure to suspend deferrals following a hardship withdrawal from a 401(k) plan.

1. Deferrals must be suspended for a period of time for a participant receiving a hardship distribution.

2. Correction requires the total deferrals and earnings during the suspension period to be immediately distributed to the participant. Furthermore, any associated match should be forfeited as well as applicable earnings.

E. Required plan amendment failures.

1. All missing amendments should be adopted retroactive to its appropriate effective date.

2. Correction may only be made under VCP, although reduced compliance fees may be available.

F. Excessive deferral amounts.

1. Participant deferrals (for 2015) are limited to $18,000, or $24,000 for participants over age 50.

2. Deferrals in excess of those amounts should be returned to the plan participant and include applicable earnings. Any associated matching amounts contributed by the employer should be forfeited in addition to applicable earnings on the forfeited amounts.

G. Missed opportunity of a participant to defer in a 401(k) plan.

1. This correction is available in either a case where a participant was not allowed to timely begin their deferrals, or where the plan mistakenly limited the amount of their deferrals and a missed opportunity occurred.

2. No employer contribution is required as long as the employee is provided an opportunity to make deferrals for a period of at least nine months during the plan year. This obviously pertains to failures that occur during the first three months of the plan year.

3. Also, no employer contribution is required to correct missed deferrals if deferrals are started by the first payroll date after the earlier of three months after the missed deferral occurred, or the last pay of the month following the month in which the participant informs the plan sponsor of the error.

4. If the missed deferral correction occurs within two plan years, the employer must make a contribution equal to 25% of the missed deferral opportunity. The missed deferral opportunity is calculated either based upon the participant's deferral rate, or if there was no deferral election, based upon the average deferral percentage for the employee's classification.

5. If the correction is made after the second plan year, the employer contribution is increased from 25% to 50%.

H. Failed ADP Test.

1. Correction may be made by a qualified non-elective contribution being made for all non-highly compensated plan participants at a level sufficient to pass the ADP test.

2. An alternative method of correction is for excess amounts to be distributed to the highly compensated employees in a manner sufficient to pass the ADP test; however, the employer must also make a qualified non-elective contribution of a like amount that is allocated pro rata among all non-highly compensated employees.

BIOGRAPHIES

IAN S. BOLTON is a shareholder and member of the firm's Creditor's Rights, Insolvency and Bankruptcy, and Complex Litigation and Risk Advisory Practice Groups. He practices in the areas of bankruptcy and insolvency, business law, landlord-tenant law, property tax appeals and commercial and real estate litigation.

Earning his Juris Doctor with high honors from Wayne State University Law School, Mr. Bolton served as a senior notes and comment editor of the Wayne Law Review and as a junior member of the Wayne State University Moot Court.

Licensed to practice law in Michigan, Illinois and Texas, his professional affiliations include the Building Owners & Managers Association, Programs Committee; American Bankruptcy Institute, Young Lawyers Section; the State Bar of Michigan, Young Lawyers Section; and the American Bar Association. Mr. Bolton was named as a 2015 Michigan *Super Lawyers*® Rising Star.

From September 2005 to September 2006, Mr. Bolton clerked for the US Bankruptcy Court for the Eastern District of Michigan as a shared law clerk. He then served at Skadden, Arps, Slate, Meagher & Flom, LLP in Chicago until August 2008, then moved to Haynes and Boone, LLP until July 2009.

STUART M. BORDMAN is a shareholder, certified public accountant and Chairman of the firm's Franchise and Distribution Practice Group. He concentrates his practice in the areas of franchise, corporate and tax law and has been engaged in franchise work for more than 40 years. One of his clients is a franchisor with more than 500 franchisees. Mr. Bordman began working with this franchisor in the early 1980s when the system was a startup and has continued that relationship as the franchisor has matured into an industry leader. He has counseled franchisors with respect to all issues related to franchise agreements, franchise disclosure documents, registration, contract negotiations and disputes with franchisees. Mr. Bordman has also counseled franchisees in disputes with franchisors and served as a sole arbitrator in a franchisee-franchisor dispute, a mediator, and an expert witness.

He is a lecturer before the Michigan Association of Certified Public Accountants and contributor to Laches, the Oakland County Bar Association publication. Mr. Bordman 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.

Additionally, Mr. Bordman has been continuously selected by his peers for inclusion in the annual edition of **Best Lawyers in America®** since 2013 in the area of franchise law.

BRANDON K. BUCK is a shareholder of the firm and focuses his practice on litigating complex real estate, financial services, construction and title matters. Mr. Buck has obtained favorable results for his clients in district, circuit and federal courts across Michigan.

In addition to the foregoing, Mr. Buck frequently represents clients in contested matters in bankruptcy, including preference actions, relief from stay, claims objections and adversary proceedings.

Mr. Buck also litigates franchise disputes involving terminations, non-competes, intellectual property rights, vicarious liability and claims arising under Michigan's Franchise Investment Law.

Recently, Mr. Buck has spent time counseling clients on regulatory finance and mortgage compliance matters which led him to assist in the development of the **Lending Litigation ToolKit (L2TK™)** - a product designed to reduce institutional costs in the mortgage industry in the handling of portfolio loan level litigation. Additionally, Mr. Buck participated in the largest default servicing audit in U.S. history as directed by the United States Office of the Comptroller of the Currency and Federal Reserve Board (the Independent Foreclosure Review) which focused on the examination and analysis of the foreclosure and default servicing practices of the nation's largest mortgage servicing companies.

Mr. Buck was featured in the February, 2014 issue of **Michigan Banker** magazine and was also profiled in the **Macomb County Legal News** and **Oakland County Legal News** for his franchise law experience.

SARAH J. BRUTMAN is an associate and member of the firm's Defense and Insurance Coverage Practice Group who concentrates her practice on commercial insurance coverage and liability defense. She has extensive experience handling complex litigation matters in both state and federal courts across the country, including construction and insurance matters.

Graduating from Wayne State University Law School *cum laude* in 2004, Ms. Brutman earned her Bachelor of Arts in Political Science *summa cum laude* from the University of Detroit Mercy in 1999. She was named as a Super Lawyer – Rising Star for four consecutive years and was recognized by Hour Magazine as a Top Woman Lawyer in 2013-14. Ms. Brutman is a member of Claims & Litigation Management Alliance.

Ms. Brutman is admitted to practice in the United States District Court for the Eastern District of Michigan and the State of Michigan.

ALEXANDER G. DOMENICUCCI is a shareholder of the firm who specializes in the area of federal and state taxation. He counsels businesses and individuals on a complete range of transactional, planning, and controversy matters.

Mr. Domenicucci has extensive expertise in the taxation of business entities, including "C" corporations, "S" corporations, partnerships, limited liability companies, real estate investment trusts, tax-exempt organizations, and disregarded entities. He advises clients on complex business transactions, including mergers and acquisitions, joint ventures, cross-border transactions, real estate syndications, and tax credit transactions.

In addition to counseling clients on transactional matters, Mr. Domenicucci assists public companies, closely-held businesses, entrepreneurs, and individuals with general tax planning. He advises clients on how to organize their business affairs so as to minimize taxes and reduce potential tax exposure. Mr. Domenicucci also advises clients on the reporting of tax return positions and serves as a resource on highly technical matters and issues.

Mr. Domenicucci also handles audit and controversy matters. He represents clients before federal and state tax authorities during the administrative process.

Mr. Domenicucci has served as a Member of the Michigan Tax Council, the governing body of the Taxation Section of the State Bar of Michigan, since 2011. He currently serves as Vice Chairperson of the Michigan Tax Council. Mr. Domenicucci previously served as the Chairperson of the Federal Income Tax Committee of the Taxation Section.

Mr. Domenicucci is a graduate of Wayne State University Law School, where he served as Editor-in-Chief of *The Wayne Law Review.*

JONATHAN B. FRANK is Of Counsel and a member of the firm's Complex Litigation and Risk Advisory Practice Group. He focuses his practice in the areas of civil litigation, employment, real estate, and business litigation. He also provides arbitration and mediation services in business and real estate cases.

Mr. Frank is admitted to the bar in Michigan and California. He received his undergraduate degree, with distinction, from Stanford University in 1982, and his law degree, cum laude, from the University of Michigan in 1985. At the University of Michigan, he was a finalist in the Campbell Moot Court Competition and received the Gussin Award for Trial Work. Mr. Frank has completed mediator training courses sponsored by the Michigan Supreme Court Administrator's Office and is a Neutral Arbitrator for the American Arbitration Association. He has also been selected by his peers for inclusion in the Michigan edition of ***Super Lawyers***® from 2013-2015.

Mr. Frank is a member of the Oakland County Circuit Court Committee and Oakland County ADR Committee. He also serves on the board of directors of several charitable organizations, including the Detroit Police Athletic League, Detroit Urban Debate League and American Jewish Committee.

MARTIN S. FRENKEL is an experienced business litigator, shareholder, executive committee member and Co-Chair of the **Consumer Finance Regulatory Compliance and Real Property Litigation Practice Group**. He graduated from the University of Michigan in 1991 and Wayne State University Law School in 1994. Mr. Frenkel was formerly employed by the Michigan Department of Attorney General and has been with Maddin Hauser since 1997 where he specializes in real estate and financial services risk management, litigation, and regulatory compliance matters with particular focus on matters involving mortgage, banking, construction, real estate development, landlord/tenant, and title-related issues. He is admitted to practice in Michigan, as well as the federal courts for the Eastern and Western Districts of Michigan, the United States Court of Appeals for the Third and Sixth Circuits, and has been admitted pro hac vice in numerous courts around the country.

Mr. Frenkel led the firm, as one of a small, select group of law firms in the United States, in its participation in the largest default servicing audit in U.S. history as directed by the United States Office of the Comptroller of the Currency and Federal Reserve Board. He possesses a unique combination of expertise and skills in having participated in high-level mortgage regulatory compliance matters, as well as having litigated hundreds of loan level mortgage litigation disputes. This unparalleled perspective allows him to serve his financial services clients efficiently, cost effectively, and with minimized risk while navigating the spectrum of mortgage origination and servicing processes.

Mr. Frenkel has published numerous articles, including: Navigating the Waters of Real Estate Arbitration published in Commercial, Inc. magazine, and Seven Common Mistakes in Selecting/Managing Outside Counsel in the Mortgage Industry which was published as a three part series in the Mortgage Bankers Association News Link. He has also spoken nationally on mortgage industry issues including methods for controlling institutional spending on outside legal counsel and assisted the firm in developing its **Lending Litigation ToolKit (L2TK™)** - a product designed to reduce institutional costs in the mortgage industry in the handling of portfolio level litigation. Mr. Frenkel is also a creator of the firm's **ASPECT™ System** - a product designed to assist in the efficient testing of client compliance with federal mortgage regulatory requirements.

Most recently, Mr. Frenkel was featured in the February, 2014 issue of **Michigan Banker** magazine, as well as in an article published in Crain's Detroit Business focusing on mortgage litigation trends. Additionally, he was previously selected by his peers as one of Michigan's Rising Stars as noted in Michigan Super Lawyers and Rising Star Magazine. Mr. Frenkel's roles with the firm include being a representative to the Mortgage Bankers Association, and the Law Firm Alliance - a worldwide confederation of boutique mid-sized law firms.

MICHELLE C. HARRELL is an experienced litigator, shareholder and Chair of the firm's Complex Litigation and Risk Advisory Practice Group. Ms. Harrell concentrates her practice in the areas of complex commercial litigation, real estate matters (land use/zoning, easements, landlord/tenant), shareholder disputes, receiverships, franchise

and distribution law, hospitality law, family law (divorce and probate), trust disputes (trustees and beneficiaries), class actions defense and Alternative Dispute Resolutions (ADR). She was also named a DBusiness Top Lawyer for 2010 in the areas of Real Estate and Litigation.

Ms. Harrell 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, she participated in moot court competitions and received three American Jurisprudence Awards. Ms. Harrell is a Barrister Emeritus 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 is an approved ADR provider for Macomb County (Family Matters, Probate) and Oakland County (Civil/Commercial, Probate, District Court).

Ms. Harrell authored the article "Caveat Receiver: Practical Tips for Appointing or Serving as a Receiver" for the *Michigan Bar Journal*. Her receivership expertise was the focus of the *Michigan Lawyer's Weekly* article, "Putting the Stress in Distressed" while several of her litigation matters were featured in the *Crain's Detroit Business* story "A&P Stops Paying Rent on Farmer Jack's Spaces: 24 Lawsuits Filed." As of January 1, 2014, Ms. Harrell was appointed by the Mayor of Grosse Pointe Woods to the city's Planning Commission for a three-year term. On October 3, 2014, she was appointed to the Board of Directors of Living Arts. She is also an active member of the Hydrocephalus Association, Michigan Chapter.

DAVID E. HART is a shareholder, a member of the firm's Executive Management Committee, and Co-Chair of the Consumer Finance/Regulatory Compliance and Real Property Litigation Group. Earning his Bachelor Degree in Philosophy and Political Science from the University of Michigan in 1988, he received his Juris Doctor Degree, cum laude, from the Detroit College of Law (now known as Michigan State University 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 was a member of the Board of the MSU/DCL College of Law Alumni Association from 1999 until 2006, serving as the president of the Alumni Association in 2005 and 2006. Active in community and charitable organizations, Mr. Hart served on the Board of Trustees of The Valley School and is currently a Board Member and the Vice President of his synagogue. He concentrates his practice in the areas of title insurance, business disputes, mortgage and real estate litigation, construction disputes, and creditor's rights law, including bankruptcy. Licensed to practice law in Michigan and Ohio, Mr. Hart is a member of the Oakland County and Federal Bar Associations, and The Michigan Land Title Association. He is a frequent lecturer on title insurance and real estate law topics and has been continuously selected for inclusion in the Michigan edition of ***Super Lawyers***® from 2007-2015. Mr. Hart is also a firm representative to the national Mortgage Bankers Association.

MARK R. HAUSER is a founder and Managing Director of the firm who specializes in the areas of real estate, partnerships, finance, corporate and business law, taxation and estate planning.

Mr. Hauser and his team at Maddin Hauser have handled numerous multi-state, multi-property acquisition/disposition and financing transactions. His clients include both local and national real estate investors and developers. Mr. Hauser has extensive experience in the manufactured home industry, both in investing and advising clients.

Mr. Hauser has also handled acquisitions, dispositions and mergers of all types of businesses including chains of supermarkets, drug stores, and newspapers.

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 a senior 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.

Additionally, Mr. Hauser has been continuously selected by his peers for inclusion in the annual edition of ***Best Lawyers in America***® since 1999 in the area of real estate law and the Michigan edition of ***Super Lawyers***® from 2007-2015, as well as ***Chambers USA***. He is a past President of the United Jewish Foundation of Metropolitan Detroit, and has served as a National Vice Chairman and member of the Executive Committee of Jewish Federations of North America.

HARVEY R. HELLER is a shareholder, Managing Director and Chairman of the firm's Defense and Insurance Coverage Practice Group. Harvey is the creator of our Result Focused Case Management System®. 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, the International Association of Defense Counsel, as well as the Claims & Litigation Management Alliance. He has authored articles on the subject of professional liability and has been a featured speaker at professional liability seminars.

Mr. Heller has been continuously selected by his peers for inclusion in the Michigan edition of ***Super Lawyers***® from 2006-2015 and ***Best Lawyers in America***® since 2003 in the areas of insurance law and legal malpractice law-defendants. He also has the added distinction of being recognized as the **2015 "Detroit Lawyer of the Year"** for insurance law. This is a prestigious honor bestowed upon those in high-profile legal specialties in large legal communities. Only a single lawyer, who has earned high ratings in peer review surveys, as well as a high level of respect among their peers in a particular specialty in each community, is honored with this special recognition.

RACHEL A. HUTTON is an associate and member of the firm's Corporate and Employment Practice Group. She focuses her practice on corporate, employment, and real estate matters. Ms. Hutton received her Bachelor of Arts degree, with honors, from the University of Michigan in 2011, and received her Juris Doctor, cum laude, from Michigan State University College of Law in 2014. While in law school, Ms. Hutton worked as a student clinician at the Michigan State University College of Law Rental Housing Clinic, and was a legal intern for the Honorable Judge Mark A. Goldsmith of the Eastern District of Michigan.

JOHN E. JACOBS is a shareholder of the firm who specializes in real estate and other commercial transactions, including the purchase and sale of companies, residential mortgage banking, and finance. Throughout his career, Mr. Jacobs has, among other things, represented mortgage companies in the purchase, sale, origination and servicing of residential mortgage loans. Mr. Jacobs also represents the Michigan Mortgage Lender's Association. He has negotiated and drafted several laws in the State of Michigan. 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 and has been the President of three non-profit organizations.

Additionally, Mr. Jacobs has been continuously selected by his peers for inclusion in the annual edition of *Best Lawyers in America*® since 2009 in the areas of corporate law and real estate law and named as a Top Lawyer by *DBusiness Magazine.*

ERIN A. JOHNSON is an associate in the firm's Real Estate and Corporate and Employment Practice groups, where she advises clients regarding a variety of corporate, employment, and real estate matters. Johnson earned a Bachelor of Fine Arts in Musical Theatre from the University of Michigan, where she graduated *magna cum laude*. After college, she moved to New York City, performing in Broadway musicals such as "42nd Street," "Thoroughly Modern Millie" and "West Side Story."

In 2011, Johnson earned her juris doctor *magna cum laude* from the University of Illinois College of Law, where she served as the Managing Editor of the Elder Law Journal and as the research assistant for Professor Peter B. Maggs. Johnson also competed on the College of Law's trial team and clerked for Judge Holly F. Clemons of the Champaign County Superior Court.

Following law school, Johnson practiced law in Indianapolis, Indiana, for four years as an associate at Ice Miller LLP, where she advised corporate and healthcare clients on a variety of litigation, regulatory, and corporate matters. Throughout her time in Indianapolis, Johnson regularly volunteered with School on Wheels, a non-profit organization that provides educational advocacy and one-on-one tutoring to school-aged children impacted by homelessness, serving as a tutor and the chair of the SPOKES Speakers Bureau.

Johnson is admitted to practice law in the State of Michigan and the State of Indiana.

LINDSEY R. JOHNSON focuses her practice on mortgage and real estate litigation, commercial general liability and bankruptcy. She has handled both federal and state cases involving the FDCPA and TILA on behalf of lenders and servicers, quiet title claims involving commercial and personal property, condemnation claims, premises liability claims and construction cases involving liens, breach of contract, bond issues and account stated claims. Ms. Johnson serves as a case evaluator in Oakland County Circuit and District Court for both commercial and tort disputes. She earned her Juris Doctorate degree, *cum laude*, from Thomas M. Cooley Law School, where she served as a subcite editor of the Thomas M. Cooley Law Review and a teaching assistant for the scholarly writing course. Ms. Johnson also received the Eugene Krasicky Award for writing excellence. She is licensed to practice in Michigan as well as the federal courts for the Eastern and Western Districts of Michigan. Ms. Johnson's professional affiliations include the State Bar of Michigan, and Oakland County Bar Association – Real Estate and ADR Sections.

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. Mr. Kaplow 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). He is a frequent lecturer before professional groups pertaining to tax and corporate matters.

Additionally, Mr. Kaplow has been continuously selected by his peers for inclusion in the annual edition of ***Best Lawyers in America***® since 2013 in the areas of tax law and trusts and estates, as well as the Michigan edition of ***Super Lawyers***® 2006, 2010-2015. He is also listed in ***Who's Who in American Law*** and ***Who's Who of Emerging Leaders in America***. Mr. Kaplow is active in various charitable and Bar related activities.

KATHLEEN H. KLAUS is a shareholder and member of the firm's Defense and Insurance Coverage Practice Group since 2004. She specializes in complex professional liability defense (including lawyers, accountants and insurance agents), employment defense and appellate practice, with an emphasis on taking cases seamlessly from initial intake through trial and appeal. 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. She is licensed to practice in Michigan and Illinois and is admitted to the Third, Fifth, Sixth and Seventh United States Court of Appeals, the United States Tax Court and the United States Supreme Court. Ms. Klaus has been invited to speak at numerous trade and professional organizations on various topics, including the application of the federal RICO statute to insurance claims handling procedures.

Additionally, Ms. Klaus has been continuously selected by her peers for inclusion in the annual edition of ***Best Lawyers in America***® since 2013 in the area of legal malpractice law-defendants. She has also been recognized in the Michigan edition of

Super Lawyers® from 2013-2015, as well as *HOUR Detroit* magazine as one of Michigan's top female attorneys.

GARY A. KRAVITZ is a senior attorney in the firm's Real Estate, Corporate and Business, and Franchise practice groups where he represents clients in real estate matters including property acquisition and disposition, office, retail and industrial lease agreements, option agreements and real estate related litigation. Counseling clients on business law matters including structuring LLCs and corporations, asset and stock purchase transactions and preparing employment agreements, confidentiality and non-compete agreements and shareholder agreements, Mr. Kravitz also assists clients with financial matters in the areas of lending, foreclosures, workouts and refinancing.

Admitted to the bar in Michigan, Mr. Kravitz received his undergraduate degree from Cornell University in 1990, earning his Juris Doctor from George Washington University Law School in 1993, and his Master of Laws (LLM) in Taxation from Wayne State University Law School in 2007.

Mr. Kravitz is a member of the U.S. Green Building Council's Commercial Real Estate Committee and the State Bar of Michigan's Law Related Education and Public Outreach Committee. He also serves as vice president of the Six Rivers Land Conservancy, an organization focused on conserving, sustaining and connecting natural areas, lands and waters.

CHARLES M. LAX is a shareholder of the firm who practices 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, American Society of Pension Professionals & Actuaries and other professional groups. He presently serves as an Emeritus member of the IRS Great Lakes TE/GE Council. Mr. Lax has previously served as the Chairman of the State Bar of Michigan - Section of Taxation, the Chairman of the State Bar Employee Benefits Committee, the Advisory Committee for TE/GE, the IRS Regional Council Bar Advisory Group - Central Region, the ASPPA Vice Chairman for Regional Conferences, the Co-Chairman of the Great Lakes Benefits Conference for 2007 and 2008 and as Co-Chairman at the ASPPA Annual Conference for 2010 and 2011.

Additionally, Mr. Lax is a Fellow of the American College of Employee Benefits Counsel and has been continuously selected by his peers for inclusion in the annual edition of ***Best Lawyers in America***® since 2006 in the area of employee benefits (ERISA) law. He also has the added distinction of being recognized as the **2011 and 2016 "Detroit Lawyer of the Year"** in employee benefits law.

Mr. Lax has also been recognized by ***Chambers USA***, continuously selected for inclusion in the Michigan edition of ***Super Lawyers***® from 2006-2015 (one of the top 100 lawyers in the State of Michigan for 2008), and named as a Top Lawyer by *DBusiness Magazine*. Mr. Lax has extensive experience in representing clients in tax

controversy matters before the Internal Revenue Service and Tax Court of the United States.

KAREN LIBERTINY LUDDEN is a shareholder and concentrates her practice on commercial insurance coverage and liability defense for national insurers and private clients. She specializes in negotiating global resolutions in complex cases involving product liability, general contractors and subcontractors, class actions, construction defects, premises liability, torts and commercial automobile accidents. She also represents banks in trust disputes. Ms. Ludden sits as a commercial case evaluator in Oakland County and as a tort case evaluator in Wayne County. She is available to sit as a facilitator in commercial liability cases where insurance coverage is at issue.

Ms. Ludden graduated *magna cum laude* from the University of Michigan with a Bachelor of Arts degree in 1990. She graduated from the University of Michigan Law School and published in its *Journal of International Law* in 1993. She is AV Preeminent rated; the highest peer rating available from Martindale-Hubbell. Ms. Ludden has served as a moot court judge for the University of Michigan Law School and has received commendation for her pro bono work. She is a member of the American Bar Association, Federal Bar Association, and Oakland County Bar Association. Ms. Ludden is a member of the Claims & Litigation Management Alliance and sits on the Executive Board for the Michigan Chapter of the Federalist Society.

Ms. Ludden is admitted to practice in the United States Court of Appeals for the Sixth Circuit, United States District Courts for the Eastern and Western Districts of Michigan, Bankruptcy Court for the Eastern District of Michigan, and all Michigan state courts.

MICHAEL W. MADDIN is President Emeritus, a shareholder and a founder of the firm, and remains a member of its Executive Committee. Mr. Maddin has been practicing law for almost 50 years, primarily in the areas of real estate, corporate and business law, estate planning and probate.

Mr. Maddin's accomplishments for clients cover every range of his practice for local and national matters, and many unique transactions deemed not possible or too difficult to handle. Special skills, as described by others, include his ability to focus, develop consensus and negotiate, and most importantly complete the tasks effectively and timely.

Mr. Maddin is a Fellow of the American Bar Foundation and member of the Real Property Law Section Council of the State Bar of Michigan. For many years, he also served as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. He 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.

Additionally, Mr. Maddin has been continuously selected by his peers for inclusion in the annual edition of **Best Lawyers in America®** since 2003 in the area of real estate law.

He has also been named among the top 100 **Michigan Super Lawyers**, and has been awarded special recognition by **Chambers USA**: America's Leading Lawyers for Business. He has been President or Chairman of numerous civic, charitable or fraternal organizations and major groups.

RICHARD J. MADDIN is now Of Counsel to the firm who has practiced law for more than 45 years. He is a graduate of Michigan State University and University of Detroit 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, Alternative Dispute Resolution (ADR) practice, and he is a certified mediator. He is a member of the real estate, litigation, and ADR sections of the State Bar of Michigan and the Southfield and Oakland Bar Associations.

Additionally, Mr. Maddin has been continuously selected by his peers for inclusion in the annual edition of **Best Lawyers in America®** in the areas of construction law, land use and zoning law, litigation-construction, litigation-land use and zoning, litigation-real estate, and real estate law. He also has the added distinction of being recognized as **"Detroit Lawyer of the Year"** in litigation-land use and zoning law. This is a prestigious honor bestowed upon those in high-profile legal specialties in large legal communities. Only a single lawyer, who has earned high ratings in peer review surveys, as well as a high level of respect among their peers in a particular specialty in each community, is honored with this special recognition.

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. She is a member of the State Bar of Michigan and the American Bar Association.

Additionally, Ms. Mayer has been selected by her peers for inclusion in the 2015 and 2016 editions of **Best Lawyers in America®** in the area of professional malpractice law-defendants.

RICHARD M. MITCHELL is a shareholder of the firm. He earned his Juris Doctor Degree from Indiana University Law School in 1991, where he served on the Indiana University Law Review. He also studied law at the University of London, England. He earned his Bachelor of Arts Degree from the University of Michigan in 1988. Mr. Mitchell focuses his practice on complex commercial litigation, including professional liability defense of insurance agents, real estate agents, financial professionals, attorneys and others, products liability and intellectual property. He has authored numerous publications and spoken to many industry professional groups. He is also a member and past president of the Greater Detroit Chapter 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 ten examinations relating to

insurance and business related topics. Mr. Mitchell also serves as a case evaluator in matters pending before the Oakland County Circuit Court.

BRIAN A. NETTLEINGHAM is a shareholder in Maddin Hauser's Complex & General Litigation, Regulatory Compliance, and Real Property practice groups. He services a diverse range of clients on issues that include mortgage lending practices, employment disputes, technology related issues, and intellectual property claims.

Recently, Brian worked with federal regulators for nearly two years, assisting with the largest mortgage default servicing audit in U.S. history. He helped review foreclosure and default servicing practices among the nation's largest mortgage lenders and servicers.

Brian combines his experience handling regulatory compliance matters with his litigation experience to help his financial services clients create efficient and cost effectively ways to navigate increasing complex origination and servicing issues, from compliance to litigation.

Brian graduated from Notre Dame Law School in 1998, after which he clerked for Michigan Court of Appeals Judge Joel Hoekstra. Brian was named a 2012 Top dbusiness Lawyer for Metro Detroit in the area of Information Technology law. He also serves on the Board of Directors of Living Arts, a non-profit organization that helps strengthen the urban neighborhoods of Southwest Detroit through the arts and community development initiatives.

KAREN E. PLAZA is a member of the firm's Consumer Finance Regulatory Compliance and Real Property Litigation Practice Group. She received her Bachelor of Arts degree from the University of Michigan in 2005, and her Juris Doctorate from the University of Detroit Mercy School of Law in 2008. She is admitted to practice law in Michigan and Washington, D.C. Ms. Plaza is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan, U.S. Bankruptcy Court for the Eastern District of Michigan, and United States Court of Appeals for the Sixth Circuit.

Ms. Plaza has extensive litigation, research, and briefing experience in the areas of real property law, commercial litigation, consumer compliance regulations, creditor's rights, and bankruptcy. She has successfully represented clients in matters involving claims arising under the Truth In Lending Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, and Real Estate Settlement Procedures Act and related state law claims. Ms. Plaza's experience also involves quiet title actions, contested foreclosures and evictions. She also has intimate knowledge of the interrelationship between mortgage servicers and mortgage foreclosure firms.

Ms. Plaza has contributed articles to the National Firm, LLC's "State-By-State Update" newsletter and co-authored materials for use in the Norton Bankruptcy Institutes law seminar materials. She has also been published in the Oxford International Encyclo-pedia of Peace.

Ms. Plaza is a member of the Real Property, Litigation, and Young Lawyers Sections of the State Bar of Michigan.

MARK E. PLAZA is a shareholder and member of the firm's Consumer Finance Regulatory Compliance and Real Property Litigation Practice Group. He received his Bachelor of Arts degree, with High Distinction, from The University of Michigan in 1999, and 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* in which he had published his law review note on Title III of the Americans with Disabilities Act. He was admitted to practice by the State Bar of Michigan in 2003. Mr. Plaza is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan and the United States Court of Appeals for the Sixth Circuit.

Mr. Plaza concentrates his practice in appellate, real estate, and financial services litigation, as well as regulatory compliance matters. As a member of the firm's Consumer Finance Regulatory Compliance and Real Property Litigation Practice Group, he possesses a unique combination of skills involving high-level mortgage regulatory compliance matters and numerous loan level mortgage litigation disputes. Mr. Plaza participated in the largest government-mandated default servicing audit in U.S. history. He also has represented financial institutions and insurance carriers in cases involving mortgage priorities, mortgage loan modifications, title insurance, wrongful foreclosure, construction, and adverse possession.

A strong legal writer, Mr. Plaza takes a leading role in appellate matters. His appellate expertise extends to all civil appeals, including representing clients in cases filed with the Sixth Circuit Court of Appeals, Michigan Supreme Court, and Michigan Court of Appeals. Mr. Plaza was recognized in 2014 and 2015 as a **Michigan *Super Lawyers*® Rising Star.**

Mr. Plaza is actively involved with the State Bar of Michigan. Since 2012, Mr. Plaza has been a member of the Law Related Education and Public Outreach Committee, and he serves as Co-Chair of the Law Related Education subcommittee. In the community, Mr. Plaza volunteers as a scoring judge at the annual high school mock trial tournament sponsored by the Michigan Center for Civic Education (MCCE). Additionally, as an avid baseball fan, he serves on the Board of the Miracle League of Plymouth, an organization that assists children with disabilities experience the joy of playing baseball.

JAMES M. REID, IV is a shareholder and member of the firm's Corporate/Employment and Franchise and Distribution Practice Groups. Mr. Reid works mainly with employers on a spectrum of employment issues including; counseling and advising human resource professionals and business owners. He develops and improves employment policies and contracts, handbooks, employment agreements, non-competes, non-disclosure agree-ments, and unconditional release and separation agreements. Mr. Reid often provides legal assistance to employers in litigation, arbitration and administrative proceedings, including; the Equal Employment Opportunity Commission, Michigan Department of Civil Rights, state and federal Departments of Labor, and the

Unemployment Insurance Agency. He also assists employers with federal and state wage and hour audits.

Mr. Reid presents at local and national webcasts, podcasts and conferences regarding best employee handbook practices, strategies for franchisees and other non-union companies to comply with the National Labor Relations Act and respond to union activity. He has also authored several articles regarding strategies to update employee handbooks and challenge unemployment benefit claims.

Mr. Reid joined the firm as a summer associate (clerk) in 2004. He received a Bachelor of Arts in Political Science-Prelaw, cum laude, from Michigan State University in 2002 and his Juris Doctor, cum laude, from Wayne State University Law School in 2005. While at law school, Mr. Reid was an associate editor of the *Wayne Law Review*.

He serves as Chair of the Oakland County Bar Association's Employment Law Committee, is a member of the Society of Human Resources Management, and a member of the State Bar of Michigan (Labor and Employment Law Section e-News Committee). Mr. Reid was named as a 2015 **Michigan *Super Lawyers*® Rising Star** and is admitted to practice before the federal and state courts of Michigan.

JESSE L. ROTH is an associate and member of the firm's Defense and Insurance Coverage Practice Group. In 2014, Mr. Roth earned his Juris Doctor degree, cum laude, from the University of Michigan Law School, where he was awarded a Clarence Darrow Scholarship - a three-year, full-tuition merit scholarship. While in law school, he received a Certificate of Merit in International Corporate Governance. Mr. Roth also served in the chambers of a U.S. Magistrate Judge for the District of New Jersey. Prior to law school, he worked for an educational startup company in Mexico and then for the Cleveland Indians baseball team.

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, estate planning and real estate practice, with a concentration in acquisitions, financing, taxation and estate planning for professionals and wealthy individuals.

With regard to the real estate side of his practice, Mr. Roth has handled the acquisition, sale and financing of apartment complexes, shopping centers, and office buildings. He has also handled workouts for distressed properties. Mr. Roth's most recent publication, entitled Protect More of your Assets from the Estate Tax, appeared in the September 2011 issue of Medical Economics® and the April 2012 issue of Laches, the monthly publication of the Oakland County Bar Association. He co-authored the Michigan statute, which exempts from sales tax the purchase of hi-tech computers used in computer integrated manufacturing and CAD-CAM.

Mr. Roth has also lectured at numerous professional seminars. He is currently on the Advisory Board of Project Chessed, which provides full medical care and prescription

drugs to thousands of families in the metropolitan Detroit area. 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 Karmanos Cancer Institute, The Jewish Fund, Sinai Hospital, Huron Valley-Sinai Hospital, the Anti-Defamation League, Temple Beth Jacob, and Knollwood Country Club.

Additionally, Mr. Roth has been continuously selected by his peers for inclusion in the annual edition of **Best Lawyers in America®** since 2013 in the areas of real estate law and trusts and estates. He has also been named as a Top Lawyer since 2010 by **DBusiness** and has been named in **Michigan Super Lawyers®** since 2007.

STEVEN D. SALLEN began his career at Maddin Hauser in 1983, as a law clerk. Today, he is the President and Chief Executive Officer of the firm, and the presiding member of its executive committee. Mr. Sallen received his undergraduate degree from the University of Michigan, and his law degree, cum laude, from the University of Detroit 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 some of Michigan's most successful manufacturing firms, real estate developers, general contractors, commercial real estate brokers and environmental consulting firms. Mr. Sallen is also the head of Maddin Hauser's Environmental Law Practice Group, and co-chair of the Real Estate Practice Group.

Reflective of his problem-solving approach to transactional issues, Mr. Sallen's many publications include: From Lemons to Lemonade; Successful Management of Lease Termination Negotiations Can Lead to New Opportunities For Commercial Property Owners (*Michigan Lawyers Weekly*, April 21, 2008) and New IRS Rules for Lenders May Help Troubled Commercial Borrowers (*Michigan Lawyer's Weekly*, November 2, 2009).

Additionally, Mr. Sallen has been continuously selected by his peers for inclusion in the annual edition of **Best Lawyers in America®** since 2010 in the area of real estate law. For many consecutive years, Mr. Sallen has also been named a **Michigan Super Lawyer©** and a **Top Lawyer by DBusiness©**, all in the field of real estate law.

DAVID M. SAPERSTEIN is a shareholder of the firm who concentrates his practice in the area of professional liability defense and appellate law, primarily defending attorneys, registered representatives and broker-dealers, insurance agents, accountants, and real estate agents. He joined Maddin Hauser in July, 2001, and is admitted to practice law in Michigan, Ohio and California.

Mr. Saperstein graduated from the University of Michigan Law School in 1993, and the 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 Hamtramck was Wrongly Decided," *16 Michigan Defense Quarterly*, No. 2, p. 7 (2000).

He has given numerous presentations regarding developments in FINRA arbitrations that were approved for CLE credit in New York, New Jersey, and Illinois.

Mr. Saperstein has served as an officer of B'nai Israel Synagogue of West Bloomfield, Chair of the Race Judicata Committee of the Oakland County Bar Association, and other community organizations.

WILLIAM E. SIGLER is a shareholder of the firm. His practice involves business planning, structuring and formation of business entities, mergers and acquisitions, real property acquisitions and dispositions, contract drafting and review, employee benefit plans, executive compensation, and estate and business succession planning. He graduated from Michigan State University and the University of Detroit School of Law where he was an editor of the Law Review. He is a frequent lecturer and has authored many articles, including: "The Beneficiary as Trustee: Designing the Henhouse Around the Fox," *Laches*, No. 567 (April, 2014), "Equity Compensation in LLCs," *Laches*, No. 557 (April 2013), "Selling the Keys to the Kingdom Without Bank Financing," *Michigan Tax Lawyer*, Volume XXXV, Issue 3 (Fall, 2009), "Executive Compensation Trends for Emerging Growth Companies," *Laches*, No. 523 (November, 2009), "Fifty Years of Practice Reversed By New Rules on Post-Death Events," *Michigan Tax Lawyer*, Volume XXXV, Issue 2 (Summer, 2009), "Innovative Retirement Plan Designs for the Small-Business Employer," *Laches*, No. 450 (July, 2003), "Qualifying for the Annual GST Tax Exclusion," *Laches*, No. 387 (April, 1998), "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!" *Michigan Bar Journal*, Volume 72, No. 10 (October, 1993), and "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," *Michigan Bar Journal*, Volume 71, No. 10 (October, 1992)

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 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.

SHERYL K. SILBERSTEIN is a shareholder who concentrates her practice primarily in commercial real estate law, including financing, acquisitions, sales and development of shopping centers, industrial and office buildings, zoning and land use, in addition to residential transactions.

Prior to joining the firm in September, 2000, she had 14 years of experience in the real estate industry in the corporate sector. She is a graduate of the Detroit College of Law and the University of Michigan.

RONALD A. SOLLISH is a shareholder, executive committee member and Chairman of the firm's Corporate/Employment Practice Group. Mr. Sollish specializes in employment, real estate, partnership, finance, corporate and business law. He 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.

Mr. Sollish is licensed to practice law in both Michigan and Illinois and is also a member of the American Bar Association, State Bar of Michigan, Illinois Bar Association and Oakland County Bar Association. He graduated from the University of Detroit School of Law where he was the managing editor of the Law Review. Mr. Sollish received his undergraduate degree from the University of Michigan.

Additionally, Mr. Sollish has been continuously selected by his peers for inclusion in the annual edition of **Best Lawyers in America®** since 2013 in the area of employment law-individuals.

DANIELLE M. SPEHAR is a shareholder, member of the firm's Executive Committee, co-head of the firm's Real Estate Practice Group and member of the firm's Recruiting Committee. She concentrates her practice in the areas of commercial real estate transactions, corporate, and business law and has particular expertise in the acquisition, financing, and sale of multifamily housing developments, including HUD financing. She also has extensive experience in commercial leasing and the acquisition, sale, and development of shopping centers, commercial, industrial, and office buildings. She earned a bachelor of science in business administration from Central Michigan University, where she graduated summa cum laude. She also earned a master's degree in Business Administration from Wayne State University, also graduating summa cum laude, and she earned her juris doctor in 1998 from the University of Detroit Mercy School of Law, where she graduated magna cum laude. She is a member of the Real Property Section and the Commercial Real Estate Development and Ownership Committee of the State Bar of Michigan as well as the American Bar Association.

AARON M. SWEDLER is Of Counsel and part of our firm's Healthcare Practice Group. Mr. Swedler's practice tackles a wide range of healthcare recovery problems from including but not limited to: fully insured and self-insured employee benefit plans and commercial health insurance, medical claims coding and administrative matters, auto accidents and no-fault insurance and commercial liability insurance, government-funded programs and HMO(s), TPA(s) and stop-loss sureties, and PPO(s) and provider or network agreements.

GEOFFREY N. TAYLOR is a shareholder who 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.

DANIEL U. WARSH is an associate and member of the firm's Complex Litigation and Risk Advisory Practice Group. He practices in the areas of corporate litigation, employment law, franchise law, and real estate. Mr. Warsh earned his Bachelor of Arts degree, summa cum laude, from the University of Pennsylvania in 2008, and received

his Juris Doctor Degree from the University of Michigan Law School in 2011. While in law school, he received a Certificate of Merit in International Environmental Law and Policy and served as an Associate Editor of the Michigan Telecommunications and Technology Law Review. Mr. Warsh is a member of the State Bar of Michigan, and has also been admitted to practice before the Federal District Courts for the Eastern and Western Districts of Michigan.

STEWART C.W. WEINER is a shareholder and member of the firm's Complex Litigation and Risk Advisory Practice Group. Mr. Weiner advises businesses and high net worth families and individuals in business, family law and trust litigation matters, as well as construction, securities, shareholder and entity disputes and succession planning issues. Having practiced on both the transactional and litigation sides of the practice and having a Masters of Social Work degree, Mr. Weiner has a unique and pragmatic sense of how to achieve clients' goals and objectives. If necessary, and in the best interest of his clients, he will aggressively pursue taking a case to trial or pursuing alternative dispute resolution. Mr. Weiner has served as a mediator, arbitrator and litigant for many years, both privately and for FINRA (Financial Industry Regulatory Authority). He has a profound commitment to exemplary customer service. Mr. Weiner is a member of the American Bar Association (Construction Forum, Litigation and Family Law Sections), State Bar of Michigan (Litigation, Business Law and Family Law Sections) and Oakland County Bar Association. He frequently writes articles on issues concerning business litigation, family law and trust issues which can be located under his name on the www.maddinhauser.com website.

Mr. Weiner is very active in community and charitable endeavors and has served as the past President of Jewish Family Service, the past President of the Franklin Baseball League, and has served on the Board of Governors of the Jewish Federation of Metropolitan Detroit for many years.

THOMAS W. WERNER joined the firm in November, 2011 as an associate in the firm's Defense and Insurance Coverage Practice Group. In 2004, Mr. Werner graduated with honors from the Indiana University School of Law - Bloomington, where he served as Notes and Comments Editor to the Federal Communications Law Journal. He also served as clerk to the City of Bloomington legal department, where he aided in municipal litigation before multiple courts, including the Indiana Supreme Court. Before joining the firm, Mr. Werner concentrated his practice on commercial litigation, insurance coverage, and defense of product liability actions throughout the country. He is a published author and has made several professional presentations, including seminars teaching clients how to properly communicate and draft contracts in order to avoid litigation.

Mr. Werner is admitted to practice before all courts in the State of Michigan, and before the United States District Courts for the Eastern District of Michigan, the Western District of Michigan, the Western District of Pennsylvania, and the Northern District of Indiana. He was named a 2011 Rising Star by *Michigan Super Lawyers.* In June, 2015, Mr. Werner was elected for a three year term to the Board of Directors for the Michigan

Youth Arts, an organization that provides opportunities to youths across the state to participate in choral, instrumental, visual, film, dance and written arts.

MARC WISE is a shareholder of the firm who received a 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 from Wayne State University. Mr. Wise practices principally in the area of employee benefits with a strong emphasis on health and welfare benefit plan matters. He 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 to health care plans, Mr. Wise counsels clients in the review, redesign and documentation of insured and self-insured programs to comply with the many changes caused by the Patient Protection and Affordable Care Act. As part of his practice, he represents clients before the Internal Revenue Service, the U.S. Department of Labor, and the Pension Benefit Guaranty Corporation. Mr. Wise was also named in Chambers USA: America's Leading Lawyers for Business as a Leader in his Field of Employee Benefits & Executive Compensation (2013-2015).

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. Additionally, Mr. Wolock has been continuously selected by his peers for inclusion in the annual edition of ***Best Lawyers in America®*** since 2008 in the areas of legal malpractice law-defendants and professional malpractice law-defendants. He has also been continuously selected by his peers for inclusion in the Michigan edition of ***Super Lawyers®*** since 2007 in the area of professional liability defense and selected for inclusion in the ***Top Lawyers*** edition of ***dbusiness*** since 2010 in the area of legal malpractice.

Mr. Wolock has served on the Michigan State Court Administrative Office Dispute Resolution Rules Committee and is currently serving on the Michigan Michigan State Court Administrative Office Mediation Confidentiality and Standards of Conduct Committee. He also serves as a panelist on the State Bar of Michigan Attorney Discipline Board. In 2009, Mr. Wolock was appointed by Michigan's Governor to serve as the **attorney member of the Michigan State Board of Accountancy** and served a four year term.

Mr. Wolock has published the following articles on litigation related issues: "Michigan's Sales Representative Act Revisited," Michigan Bar Journal (Nov. 2000); "Mediation Confidentiality: Too Much of a Good Thing?," Laches, Oakland County Bar Association (Jan. 2008); "Legal Malpractice Update: The Legacy of Simko and Winiemko," Michigan Bar Journal (Feb. 2009)(Kathleen Klaus - co-author).

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