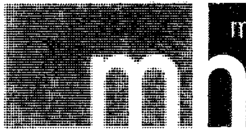
TWENTY-SECOND ANNUAL TAX SYMPOSIUM

October 26, 2013
SHERATON DETROIT NOVI
NOVI, MICHIGAN

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

Copyright 2013
Maddin, Hauser, Wartell, Roth & Heller, P.C.
All rights reserved. This material may not be reproduced in whole or in part without prior written approval.



maddin hauser

Maddin Hauser Wartell Roth & Heller PC
attorneys and counselors

28400 Northwestern Highway Third Floor Southfield, MI 48034-1839 (248) 354-4030 fax (248) 354-1422 www.maddinhauser.com

October 26, 2013

Dear Tax Symposium Participant:

Welcome to our Twenty-Second Annual Tax Symposium. As we prepare for this year's program, we are again struck by uncertainties, many of which impact our clients, our businesses and our tax practices.

Last year we faced presidential and congressional elections. We also faced the uncertainties of the expiring Bush tax cuts, as well as concerns over health care reform. This year (as we prepare our materials) the uncertainty shift to budgetary and debt limit concerns and a federal government that has been shut down for more than two weeks. Even if there is a resolution of these uncertainties by the time you read this, in all likelihood, it will be a "short term fix," precipitating a re-run in the near future.

So where does this leave us as tax practitioners and business owners? It leaves us with the unsettled result that we must give our clients (and make our own decisions) the best reasoned advice possible under the circumstances. A crystal ball would certainly be helpful again!

Please visit our website at www.maddinhauser.com to find out more about the firm. As always, we appreciate your attendance at this Program and welcome your comments and suggestions.

Very truly yours,

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

CIRCULAR 230 DISCLAIMER: Tax advice contained in this communication and our Tax Symposium Book, including attachments/enclosures, is not intended or written to be used, and may not be used, for the purpose of: (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax-related matters addressed herein.

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.
TWENTY-SECOND ANNUAL TAX SYMPOSIUM PROGRAM

Registration and Breakfast	8:00 – 8:30	
STEVEN D. SALLEN – Opening Remarks	8:30 – 8:40	
GARY M. REMER The End of DOMA – Forget Constitutional Rights! What Does This Do to the Tax System?	8:40 – 9:00	Page 1
JAMES M. REID Hot Issues and Strategies to manage UIA Tax Liability	9:00 – 9:20	Page 9
DANIELLE M. SPEHAR The Second Certainty: Exemptions, Uncapping and Other Property Tax Issues	9:20 – 9:35	Page 18
GEORGE V. CASSAR, JR. Permanent Estate/Gift Tax Laws: Oxymoronic?	9:35 – 9:55	Page 59
WILLIAM E. SIGLER Roundup of Recent Tax Developments	9:55 – 10:20	Page 73
Break	10:25 – 10:35	
STUART M. BORDMAN Shareholder Control Agreements and Rights of Minority Shareholders	10:35 – 10:55	Page 120
MARC S. WISE What Do We Do Now? Health Care Reform in 2014	10:55 – 11:15	Page 128
KATHLEEN H. KLAUS Professional Negligence Claims Against Accountants and Tax Preparers – How to Spot and Avoid Potential Liability	11:15 – 11:35	Page 158
GEOFFREY N. TAYLOR The Estate Planner's Menu: Daily Specials	11:35 – 11:55	Page 161
CHARLES M. LAX Qualified Retirement Plan Considerations in Mergers and Acquisitions	11:55-12:15	Page 174
Question and Answer	12:15-12:30	
Attorney Biographies		Page 186

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

THE END OF DOMA – FORGET CONSTITUTIONAL RIGHTS **WHAT DOES THIS DO TO THE TAX SYSTEM?**

By: Gary M. Remer, Esq.

I. THE IMPACT OF WINDSOR ON DOMA

A. US v. Windsor.

1. Enacted in 1996, the Defense of Marriage Act (DOMA) defined marriage for purposes of Federal law as the legal union between one man and one woman, as husband and wife, specifying the word "spouse" refers only to "a person of the opposite sex who is a husband or a wife."

2. Many Federal benefits, rights and privileges were restricted to married couples in heterosexual relationships.

3. As a result of the court's action, same sex couples will be treated in the same manner as heterosexual couples for tax purposes.

B. The Facts of the Case.

1. Edith Windsor and Thea Spyer met in 1963 and formed a long term relationship.

2. In 1993, they became domestic partners in New York, and in 2007, the couple was married in Canada.

3. In 2009, Spyer died, leaving her entire estate to Windsor. Because of DOMA, Windsor was not considered married to Spyer and therefore did not receive the benefit of the Federal tax marital exemption.

4. The Federal estate tax was determined as though the estate had been left to an unrelated individual, which resulted in an estate tax liability of $363,053.

5. As executor, Windsor sued for a refund, arguing that DOMA violated the equal protection guarantee of the U.S. Constitution because it recognizes marriages of heterosexual couples, but not of same sex couples.

C. The Scope of this Decision.

1. Although the case involved estate taxes, the Supreme Court's decision has far ranging impact.

2. A 1997 Government Accountability Office report identified 1,049 Federal statutory provisions in which marital status was a factor in determining or receiving benefits, rights, and privileges.

3. In 2004, the GAO revised the figure to 1,138 Federal statutory provisions, taking into account laws enacted since DOMA was signed into law.

4. Nearly 200 of those provisions involved taxation.

II. <u>THE INCOME TAX RAMIFICATIONS OF FEDERAL RECOGNITION</u>

A. The Internal Revenue Service.

1. Two months after the Supreme Court decision, the Department of Treasury ruled that legally married same sex couples will be treated as married for Federal tax purposes.

2. The decision has a host of implications, even for couples who live in states that don't recognize same sex marriages.

3. It affects how couples will be treated in terms of all Federal taxes, including income taxes, estate and gift taxes, health insurance, retirement accounts and employee benefits.

4. The ruling applies to any same sex couple legally married in any state, the District of Columbia, a U.S. Territory, or a <u>foreign country</u>. It does <u>not</u> apply to registered domestic partners, civil unions, or other formal relationships recognized under state laws.

B. State Law Issues.

1. Michigan Tax Rules require that if you file a Federal joint return, you must file a joint Michigan return. However, the State of Michigan Constitution bans recognizing same sex marriage for any purpose.

2. Michigan is one of 37 states with laws or constitutional bans barring same sex marriage, which is recognized in 13 states and the District of Columbia.

3. Michigan taxes are not due until April, so there is time for the Legislature to handle the question. However, it should be noted that the state same sex marriage ban faces an October Federal Court hearing, where it could be struck down.

C. Federal Tax Changes.

1. Same sex couples may now obviously file a joint Federal tax return. Now there is further clarification after the <u>Windsor</u> decision that legally married same sex couples may filing a joint return may claim a child as a dependent and pool itemized deductions.

2. Employees who elected domestic partner coverage need to be careful with an awareness of tax implications. Unless the partner was also a tax dependent of the employee (that is, gross income less than $3,800 annually in 2012), the cost of the partner's health coverage was considered imputed taxable income to the employee. Further, the employee's pre-tax dollars (for example, from a health savings account) cannot be used to pay premiums.

3. Employers that have been imputing income to employees for the value of employer paid health plan coverage for same sex spouses should immediately discontinue income imputation for all payroll tax withholding reporting purposes going forward.

4. Employers can recoup excess FICA and income tax withholding remitted earlier in 2013 by making the appropriate adjustment on their next quarterly Form 941. Prospective payroll and income tax withholding for affected employees' paychecks for the remainder of the year can also be reduced to compensate for over withholding early in the year.

5. Employers that allow health plan participants to make after tax premium contributions toward same sex spousal coverage, may now allow these payroll withholdings to be processed as pre-tax contributions made through a cafeteria plan. New cafeteria plan elections from the affected participants are not required.

III. THE WEALTH TRANSFER RAMIFICATIONS OF FEDERAL RECOGNITION

A. The Unlimited Marital Deduction.

1. Under current law, state taxes are due on estates exceeding $5,000,000.00, unless the surviving spouse inherits the estate, in which case no taxes are due.

2. With the end of DOMA, the prior issue of a surviving partner inheriting an entire estate has been eliminated.

B. Transfer Between Partners and Spouses.

1. For heterosexual married couples, there was no limit on the money or property that can be transferred between themselves. There is no gift tax and no limit.

2. It meant that if a couple who was not treated as married; each partner was limited to transfers of money or property of $13,000 per year.

3. This now is a thing of the past under the right circumstances.

C. Retirement Accounts.

1. For heterosexual married couples, when the owner of an IRA dies, the surviving spouse may rollover the balance of the affected IRA with no tax implications. However, the process for proceeds of a decedent's IRA to pass to a non-spousal beneficiary tax free is complicated and must be followed to the letter.

2. Post Windsor, legally married same sex couples will have the same simplified rollover rules that are available to heterosexual couples.

IV. NON-TAX FEDERAL BENEFITS

A. Private Employment Issues and Benefits.

1. Now that DOMA has been struck down, married same sex couples with employer sponsored retirement benefits should immediately review their beneficiary designations and form of benefit elections to ensure that their designations and elections are accurate and complete.

2. If your spouse is covered under your employer's health plan *and* you are considered validly married by the Federal government, you and your spouse should be eligible for the following additional Federal protections:

   a. The value of your spouse's health insurance will not be treated as taxable income to you or to your spouse.

   b. Your spouse and children have the right to remain in your health plan if you lose your job or hours are reduced, or if you divorce or separate, through COBRA continuation coverage.

   c. While most health plans only let you enroll at specific times, marriage or divorce are "qualifying events" that will let you enroll or unenroll outside those specific time periods.

3. Certain rights are now provided to married employees with respect to retirement benefits.

   a. The default form of benefit for a defined benefit pension plan must be a joint survivor annuity. This means that a portion of the participant's pension will continue to be paid to their spouse if they die before the spouse does.

b. The spouse has to be given written consent if they want to name anyone else as the beneficiary for the retirement plan.

c. Being married entitles your spouse to more options in taking distributions from their retirement plan and preferential tax treatment on those distributions.

d. It may also allow you to take money out of retirement, without tax penalty, to pay expenses like medical costs, tuition or funeral expenses for your spouse.

e. Finally, if there is a divorce, the courts can assure that your ex-spouse receives a portion of the retirement benefits through a Qualified Domestic Relations Order.

B. Bankruptcy.

1. Married couples can file a joint petition for bankruptcy. This means that their combined property and debts are part of the same bankruptcy, and the debts of both spouses are discharged.

2. Now that DOMA has been overturned, married same sex couples living in states that respect their marriages will be considered married for bankruptcy purposes.

C. Family and Medical Leave Act.

1. The Family and Medical Leave Act provides important protection for eligible workers.

2. It allows them to take up to 12 weeks of unpaid leave in a 12 month period to care for a spouse with serious medical

conditions, or 26 weeks to care for an eligible service member spouse with a serious injury or illness.

3. It also allows an employee to take job protected leave for the birth or adoption of a child, or to care for a child who has a serious health condition, regardless of whether the child is biologically related to the employee.

4. Workers are entitled to resume their same or equivalent job.

5. If you live in a state that respects your marriage, you will be considered married for FMLA purposes, and will be entitled to take FMLA leave to take care of a sick spouse.

V. SO WHAT DO WE DO NOW?

A. Take this as an opportunity to meet with your clients to do both tax and estate planning.

B. Make sure that proper designation of beneficiary forms are updated and they have the appropriate benefits.

HOT ISSUES AND STRATEGIES TO MANAGE UIA TAX LIABILITY

By: James M. Reid IV, Esq.

I. ASSESSING THE CURRENT UNEMPLOYMENT LANDSCAPE

A. Tax rate and tax base for employers in Michigan.

1. Determining the tax rate for new employers.

a. The tax rate for all new employers, except certain construction companies involved in large projects, is 2.7%.

b. That rate is paid on the first $9,500.00 of wages during the calendar year for each employee.

2. Determining the tax rate for existing employers.

a. There are three separate components that determine a fully experienced employer's tax rate. (A fully experienced employer is an employer who is in its fifth year or more of business.)

i. The Chargeable Benefit Component ("CBC") is made up of the total unemployment charges against the employer for the most recent five years.

ii. The Account Building Component ("ABC") is a reserve account for possible payment of future benefits. The amount required in this component is based on the payroll for the most recent year.

iii. The Non-Chargeable Benefits Component ("NBC") is used to pay benefits that cannot be charged to a specific employer's account.

b. All of these components are taken into consideration when determining an employer's tax rate. The maximum computed tax rate for 2013 for a fully experienced employer is 10.3%. The lowest computed tax rate is .06%. This does not include the obligation assessment [up to 2.16% for the year 2013] and/or any penalties for missing reports which could add up to another 3%.

B. Potential Charges to an employer's UIA Reserve Account.

1. Starting in January 2012, Michigan was first State in the country to cut unemployment benefits from 26 weeks to 20 weeks.

2. This change benefits Michigan employers by lowering the unemployment taxes they could be required to pay from a reserve account by over $2,000.00 per employee.

3. As a basic rule for calculating unemployment benefits: (1) the Unemployment Insurance Agency ("UIA") multiplies the highest amount of wages paid in any base period quarter by 4.1 percent; (2) For each dependent claimed, the UIA adds $6.00 per dependent up to five dependents; (3) The weekly benefit amount is capped at $362.00 per week.

4. To determine how many weeks are available, the UIA multiplies the total base period wages by 43% and then divides by the weekly benefit amount.

5. The weekly benefit amount is cannot be less than 14 weeks or more than 20 weeks.

II. POTENTIAL LIABILITY

A. Employer's Tax Rate.

1. The maximum computed tax rate is 10.3% per $9,500.00 of wages earned by each employee.

2. This does not include the obligation assessment [up to 2.16% for the year 2013] and/or any penalties for missing reports which could add up to another 3%.

B. Becoming a liable employer.

1. An employer that employs at least one employee for covered employment in at least 20 weeks during the calendar year and pays remuneration in the amount of at least $1,000.00. MCL 421.41(1);

2. An employer files an employer registration report when it intends to hire one or more employees in Michigan; or

3. The UIA in the course of adjudicating an application for unemployment benefits by an individual [i.e. independent contractor] that previously performed services for the employer, determines that the employer is liable. See MCL 421.14.

C. Becoming an eligible employee.

1. The employee has the burden of proving that the employee is:

a. Able to work;

b. Available for full-time, suitable work;

c. Actively seeking work; and

d. Reporting for benefits as directed by the Agency, or had good cause for not reporting or filing as directed.

2. The employee must be unemployed and register to work by filing his/her resume with the Michigan Talent Bank and by report to the local Michigan Works! Agency service center.

D. Charging an employer's account.

1. If the separating employer paid wages of at least $2,072.00, the separating is charged 100% of the first two weeks of benefit payments.

2. After the first two weeks of benefit payments, each employer that falls within the base period is responsible for its pro rata share of benefits.

3. If an employee left an employer to accept permanent full time work for another employer, that should be reported to the UIA because benefits charges can be transferred to the new employer.

E. Becoming a Successor Employer

1. Pursuant to MCL 421.41(2) an "Employer" is defined as:

Any individual, **legal entity**, or employing unit **that acquires the** organization, trade, or **business, or 75% or more of the assets of another** organization, trade, or **business, which at the time of the acquisition was an employer subject to this act**.

2. Pursuant to MCL 421.22, there will be a mandatory transfer of the transferor-employer's experience account to the transferee-employer if the commission deems a "transfer of business" has occurred. A transfer of business requires both:

    1. That the transferee is an employer subject to this act on the transfer date, has become subject to this act as of the transfer date under section 41(2)(a) or elects to become subject to this act as of the transfer date under section 25.

    2. That the transferee has acquired and used the transferor's trade name or good will, or that the transferee has continued or within 12 months after the transfer resumed all or part of the business of the transferor either in the same establishment or elsewhere.

When read in conjunction, the laws say that there will be a mandatory transfer of experience accounts and thus a "transfer of business" if:

1. The **new owner was already an "employer" liable for the payment of unemployment taxes**, **becomes an "employer" on the date of the transfer**, or elects to become liable; **AND**

2. The new owner has **used the trade name or good will of the former business**, **OR** has **continue all or part of the business** of the former owner; **AND**

3. There was **a transfer of 75% or more of the assets of the former business** to the new owner.[1]

F. Disclosure of Liability Pursuant to MCL 421.15

1. Timing of Disclosure:

At least 2 calendar days . . . before the acceptance of an offer, the transferor . . . shall disclose to the transferee on a form provided by the unemployment agency, **the amounts of the transferor's outstanding liability, and tax payments, tax rate, and cumulative benefit charges for the most recent 5 years** . . . .

2. Failure to Disclose:

Failure of the transferor to provide accurate information required by this subsection is a misdemeanor punishable by imprisonment for not more than 90 days, or a fine of not more than $2,500, or both. In addition, **the transferor . . . is liable to the transferee for any consequential damages resulting from the failure to comply with this subsection.**

III. CIRCUMVENTING REQUIREMENTS TO MAKE UNEMPLOYMENT CONTRIBUTIONS MAY RESULT IN SEVERE LIABILITY

A. State Unemployment Tax Act ("SUTA") Dumping.

1. SUTA Dumping is defined as transferring a trade or business, or a party of a trade or business for the purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under the Michigan Employment Security

[1] Unemployment Insurance Agency, *Transfer of Business (Successorship),* Department of Licensing and Regulatory Affairs.

Act. It is characterized by the abandonment of an employer's unemployment insurance history.

2. A person that engages in SUTA Dumping is subject to personal liability.

   a. A person that knowingly transfers a trade or business or a portion of the trade or business to another employer for the sole or primary purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under this act is liable. See MCL 421.22b;

   b. An officer of agent an employing unit that conspires with one or more persons to take the above action in effort to reduce the employer's contribution rate is liable. See MCL 421.54b; or

   c. A person that knowingly advises another person to transfer a trade or business to reduce the employer's contribution rate is liable. See MCL 421.22b(2)(c)(ii).

3. SUTA Dumping liability is significant.

   a. Liability will include the amount owed plus damages equal to three times that amount. (MCL 421.53(a)(i));

   b. If the amount obtained or withheld from payment as a result of the intentional failure to comply is $25,000.00 or more but less than $100,000.00, then liability may include one of the following:

      i. If Imprisonment for not more than two years.

ii. The performance of community service of not more than two years but not to exceed 4,160 hours.

iii. A combination of the above that does not exceed two years (MCL 421.54b(1)(b)(i)).

c. If the amount obtained or withheld from payment as a result of the intentional failure to comply is more than $100,000.00, then liability may include one of the following:

i. Imprisonment of not more than five years.

ii. The performance of community service of not more than five years but not to exceed 10,400 hours.

iii. A combination of the above that does not exceed five years (MCL 421.54b(1)(b)(ii)).

d. In addition to the foregoing, a civil fine up to the amount of $5,000.00 may be imposed. (MCL 421.22b(2)(c)(ii)).

B. Employee Misclassification.

1. Employers that utilize the services of independent contractors may be subject severe penalties if such independent contractors are misclassified employees.

2. The State has determined that Michigan employers are all too often misclassifying the individuals they hire as independent contractors rather than employees.

3. Executive Order 2008-1 created an Interagency Task Force to target employers who may be misclassifying their employees.

4. The Task Force (a) evaluates and examines Michigan businesses for employee misclassification; (b) refers employers who are misclassifying employees to the Michigan Attorney General or local and federal prosecutors; and (c) enforces harsh penalties relating to employee misclassification, including paying quadruple the amount of taxes owed on any misclassified wages.

THE SECOND CERTAINTY: EXEMPTIONS, UNCAPPING AND OTHER PROPERTY TAX ISSUES

By: Danielle M. Spehar, Esq.

I. MICHIGAN PRINCIPAL RESIDENCE EXEMPTION ("PRE")

A. General Property Tax Act, Public Act 206 of 1983, as amended.

1. MCL Sections 211.7cc and 211.7dd, address PRE.

2. Formerly known as the Homestead Exemption.

3. Exempts a principal residence from the tax levied by a local school district for school operating purposes up to 18 mills.

B. Separate program from the Homestead Property Tax Credit (filed annually with your Michigan Individual Income Tax Return).

C. Qualification.

1. Must be:

a. A Michigan resident.

b. Who owns and occupies the property as a principal residence.

2. Principal Residence: "The one place where on owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established."

a. Permitted evidence of a principal residence.

i. Driver's License.

ii. Voter Registration Card.

iii. Cancelled checks listing the property address.

iv. Statements such as medical, bank or charge accounts.

v. Income tax records and insurance policies.

b. No one factor taken alone is controlling over any other factor.

D. Submission of claim for PRE.

1. Principal Residence Exemption Affidavit, Form 2368 (Exhibit A)

2. Filed with Assessor for the city or township in which the property is located.

3. Deadline for filing for taxes levied after December 31, 2011

a. Has changed from May 1 to June 1

i. Will reduce that year's summer and winter taxes.

ii. Will reduce all future years taxes.

b. Second deadline of November 1 added.

i. Will reduce that year's winter taxes.

ii. Will reduce all future years taxes.

E. Determining eligibility for PRE.

1. New guidelines issued by Michigan Department of Treasury in March 2013 (Exhibit B). http://www.michigan.gov/taxes/0,1607,7-238-43535_43539---,00.html

a. Compiled questions and answers from the previous four volumes published

b. Amends outdated information and includes new information.

c. Examples.

i. Ownership: Chapter 3 of Exhibit B.

ii. Qualified Principal Residence Property: Chapter 4 of Exhibit B.

iii. Multi-Purpose Property: Chapter 5 of Exhibit B.

iv. Estates and Trusts: Chapter 7 of Exhibit B.

F. Rescission.

1. Must file a Request to Rescind Homeowner's Principal Residence Exemption Form (Exhibit C) when person no longer owns or occupies the property as a principal residence.

2. PRE will be removed from the local property tax roll by the assessor beginning with the next tax year.

3. Failure to rescind PRE may result in additional taxes, interest and penalties.

4. Conditional rescission may allow an owner to receive a PRE on his/her current Michigan property and on previously exempted property simultaneously for up to three years.

a. To qualify owner must submit an owner's Conditional Rescission of Principal Residence Exemption (Exhibit D).

b. Must be filed with Assessor for the city or township in which the property is located on or before May 1 of the first year of the claim.

II. TRANSFERS OF OWNERSHIP - UNCAPPING.

A. Section 211.27a(6) of the General Property Tax Act defines "transfer of ownership" generally as the conveyance of title to or a present interest in property, the value which is substantially equal to the value of the fee interest (Exhibit E).

1. Section 211.27a(6) provides a variety of examples of what constitutes a transfer of ownership for taxable value uncapping purposes.

2. Section 211.27a(7), on the other hand, contains a list of certain transfers that are exempt from the definition of "transfer of ownership" that would not result in your property's taxable value uncapping.

B. Why is a transfer of ownership significant?

1. In accordance with the Michigan Constitution as amended by Proposal A of 1994, a transfer of ownership will cause the taxable value of the transferred property to uncap in the calendar year following the year of the transfer of ownership.

2. Taxable value is the value used to calculate the property taxes for a property.

C. Michigan State Tax Commission (STC) – New Guidelines.

1. Issued June 2013 (Exhibit F).
http://www.michigan.gov/taxes/0,1607,7-238-43535_57482---,00.html

2. Includes STC's prior Bulletins and memoranda pertaining to transfer of ownership and taxable value uncapping issues.

3. Examples.

   a. Trusts: Pages 3 and 4 of Exhibit F.

   b. Ownership Changes of Legal Entities: Pages 6 and 7 of Exhibit F.

   c. Exemptions.

      i. Contained in MCL 211.27a(7)(a)-(s).

      ii. "Exemption statutes are to be **strictly construed** in favor of the taxing unit and against the exemption claimant."

      iii. A person or entity seeking a property tax exemption must demonstrate entitlement to the exemption by a preponderance of the evidence.

      iv. A property tax exemption cannot be inferred or implied.

      i. Foreclosures and forfeitures: Page 16 of Exhibit F.

      iv. Redemptions of tax-reverted properties: Page 17 of Exhibit F.

III. <u>LEGISLATIVE MODIFICATION TO THE GENERAL PROPERTY TAX ACT.</u>

A. New transfer of ownership exemption.

B. P.A. 497 of 2012

1. Beginning December 31, 2013, there is an exemption for transfer of residential real property if the transferee is related to the transferor by blood or affinity to the first degree AND the use of the property does not change following the transfer.

2. Affinity to the first degree includes: spouse, father or mother, father or mother of the spouse, son or daughter, including adopted children and son or daughter of the spouse.

3. Does not address properties that are owned by or transferred to a trust.

date a deed conveying title to the property is recorded in the office of the register of deeds in the county in which the property is located.

Does a second transfer of ownership occur when a land contract is paid in full and a deed in fulfillment of the land contract is given?

No. The law specifically states that a property's taxable value is not to be uncapped when a deed conveying title to the property is subsequently recorded with the register of deeds.

Is the assignment of a seller's interest in a land contract a transfer of ownership?

No, this is considered a transfer of a security interest and is exempt by law from being a transfer of ownership.

Is the assignment of a buyer's interest in a land contract a transfer of ownership?

Yes, the assignment of a land contract buyer's interest in a property conveys equitable title to the property and a change in the beneficial use of the property occurs resulting in a transfer of ownership.

Trusts

Is a conveyance of property to a trust a transfer of ownership?

Yes. 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. *See MCL 211.27a(6)(c).*

What or who is a present beneficiary of a trust?

A present beneficiary of a trust is the person who has the enjoyment and beneficial use of the property during the life of the trust.

What or who is a trustee of a trust?

A trustee of a trust is the person or agent who is appointed to administer the trust. Note that banks are often trustees.

Is the trustee (or successor trustee) of a trust the same as the beneficiary of that trust?

Not necessarily. The trustee (or successor trustee) of a trust can be, and often is, a completely different individual than the trust's beneficiary. The beneficiary of a trust is best determined from an examination of the trust instrument.

Is a transfer of property by a husband and wife to a trust 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.

Is a transfer of property by a husband and wife to a trust with the husband and wife as present beneficiaries and their child as a contingent beneficiary a transfer of ownership?

No. The child is not a present beneficiary. The only present beneficiaries are the settlor of the trust and the settlor's spouse. The husband and wife are the sole present beneficiaries and fall within the exception outlined at MCL 211.27a(6)(c).

What or who is a contingent beneficiary of a trust?

A contingent beneficiary of a trust is a person who does not currently have the enjoyment and beneficial use of the property held in trust. The trust document names the contingent event, such as, the beneficiary's attaining a certain age, or death of the settlor. If and when the contingent event occurs, the contingent beneficiary changes status to present beneficiary, and gains *beneficial use* of the property held in trust.

Is a conveyance of property which constitutes a distribution from a trust a transfer of ownership?

Yes. However, a conveyance of property which is a distribution from a trust is not a transfer of ownership if the distributee is also the sole present beneficiary of the trust or the spouse of the sole present beneficiary or both. *See MCL 211.27a(6)(d).*

Note: Not all transfers of property from trusts are distributions from the trusts. A transfer of property from a trust to someone other than a beneficiary (or contingent beneficiary) of that trust is ***not*** *a distribution from that trust. It is simply a transfer of property from a legal entity (the trust) to a person and the transfer should be considered in that context.*

What happens if the sole present beneficiary of a trust changes?

A change in the sole present beneficiary of a trust is a transfer of ownership, unless the change merely adds or substitutes the spouse of the sole present beneficiary (and provided that no statutory exception or exemption applies). *See MCL 211.27a(6)(e).*

Is a conveyance of property to a trust a transfer of ownership if: The grantor is the settlor (creator) of the trust or the settlor's spouse or both. The sole present beneficiary of the trust is the settlor of the trust or the settlor's spouse or both.

No. 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. *See MCL 211.27a(7)(f).*

2. The lessee has a bargain purchase option. A bargain purchase option is defined by law 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. Even if the lease agreement qualifies as a "transfer of ownership" under MCL 211.27a(6)(g), the lessee is still required to follow the notification requirements under 211.27a(10), which states the transferee must notify the assessing officer on the proscribed form within 45 days of the transfer of ownership, to qualify as a transfer of ownership by the taxing unit. (Walgreen's Co. v. Macomb Twp. (2008). 760 N. W.2d 594, 280 Mich. App. 58).

Can the leasing of personal property be considered a transfer of ownership?

Generally, no. However, the leasing of personal property that a leasehold improvement, or a leasehold estate can be a transfer of ownership.

When a lease is initiated covering only a portion of a real property parcel, and the lease is for more than 35 years (or contains a bargain purchase option), does a transfer of ownership occur?

Yes. However, only the taxable value for that part of the property subject to the lease is uncapped in the year following the transfer of ownership. In other words, a partial uncapping of the parcel's taxable value occurs.

If a lessee assigns the lessee's interest in a lease which had an original term of more than 35 years and which has a remaining term of more than 35 years at the time of the lease assignment, does a transfer of ownership occur?

Yes, this is a conveyance by lease of a property with a lease term of more than 35 years and is a transfer of ownership.

If a lessee assigns the lessee's interest in a lease which had an original term of more than 35 years and which has a remaining term of 35 years or less at the time of the lease assignment, does a transfer of ownership occur?

No, since the remaining term of the lease is not more than 35 years.

<u>Ownership Changes of Legal Entities (Corporations, Partnerships, Limited Liability Companies, etc.)</u>

Can the conveyance of an ownership interest of a legal entity (such as a corporation, a partnership, etc.) which owns property be a transfer of ownership—even though title to the property remains unchanged?

Yes, a 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. *See MCL*

211.27a(6)(h). However, this is not applicable to cooperative housing corporations (discussed separately).

A limited liability company owns real property and conveys of 25.0 percent of the ownership interest in 2011. In January of 2012, a conveyance of 25.1 percent of the ownership interest of the limited liability company occurred. Did a transfer of ownership of the real property occur? If so, when?

A transfer of ownership of the property owned by the limited liability company occurred in January of 2012 since at that point; more than 50.0 percent of the ownership interest in the limited liability company had been conveyed. The property's taxable value is to be 100% uncapped for 2013.

As of January of 2011, 50.1 percent of the ownership interest of a limited liability company was been conveyed and the taxable value of the property was uncapped for 2012. If, in March of 2013, 50.0 percent of the ownership interest in the limited liability company is conveyed, does another transfer of ownership occur?

No. The percentage of ownership interest conveyed is cumulative from the date of the last transfer of ownership. Between January of 2011 and March of 2013, not more than 50.0 percent of the ownership interest is conveyed. Therefore, no transfer of ownership occurs as of March of 2013.

Company A owns all the membership interest in a limited liability company. The limited liability company owns a piece of real property. In 2011, Company A sells and conveys its ownership interest in the limited liability company to Company B. Did a transfer of ownership of the property occur?

A transfer occurred when Company A sold and transferred its membership interest in the limited liability company to Company B. Therefore, the property's taxable value shall be uncapped for 2012. *See Signature Villas, L.L.C. v. City of Ann Arbor, 269 Mich. App 694, 714 NW2d 392 (2006).*

Tenancies in Common

What is a tenancy in common?

A tenancy in common is a form of property co-ownership in which two or more persons own the property with no right of survivorship between them. When one tenant in common dies, her interest passes to her heirs or devisees. In this type of shared ownership arrangement title does **not** automatically to the surviving tenant(s) in common.

Foreclosures and Forfeitures

Is a transfer of property due to a foreclosure or forfeiture a transfer of ownership?

Generally, no. It is not a transfer of ownership when a financial institution or a land contract seller takes a property back through foreclosure or forfeiture of a recorded mortgage or land contract. *See MCL 211.27a(7)(d).* This response 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.

A Sheriff's Deed is utilized in foreclosure by advertisement and will be recorded with the register of deeds. A redemption affidavit will also be recorded with the register of deeds and will contain information regarding the redemption period and rights should the homeowner redeem and recover his/her rights to the property. During the redemption period, the purchaser holds equitable title to the property but the original homeowner continues to have legal title and possession. Consequently, should the homeowner redeem the property during the redemption period this would not be considered a transfer of ownership.

Is a transfer of property through a deed or a conveyance in lieu of foreclosure or forfeiture a transfer of ownership?

No. Such transfers and conveyances are to be treated in the same way as a foreclosure or forfeiture.

When the entity or person (bank, land contract seller, etc.) that has taken a property back through foreclosure or forfeiture later transfers the property, is that transfer a transfer of ownership?

Yes.

Is there a time limit that a mortgagee (usually a bank) can hold a property, after acquiring it through foreclosure, without a transfer ownership occurring?

Yes. If a mortgagee which has received a property through foreclosure does not transfer or convey the property within one year of the expiration of the redemption period, the taxable value of the property must be uncapped for the following assessment year.

The redemption period is the period during which the former owner may pay the debt due and reclaim the property and is established by statute. The redemption period varies in length and can range from one month to one year, but is usually six months.

The one-year time limit discussed does not apply to a land contract seller who has reacquired property due to a foreclosure or forfeiture. A land contract seller who has reacquired property through foreclosure or forfeiture may hold the property indefinitely without a transfer of ownership occurring.

A property was sold on land contract in 2010. This sale was a transfer of ownership and the property's taxable value was uncapped for tax year 2011. In 2012 the land contract seller takes the property back through foreclosure or forfeiture, because the land contract buyer defaulted on the land contract payments. Should the taxable value for 2011 and subsequent years be recapped as if the 2010 transfer of ownership never occurred?

No. The 2010 transfer of property was a transfer of ownership. At that point, beneficial use of the property transferred to the land contract buyer and the land contract buyer acquired equitable title to the property. It should also be noted that the equitable title held by the land contract buyer could have been mortgaged or conveyed to someone else (subject to valid terms of the land contract). This transfer of ownership is not undone when the land contract seller takes the property back. No statutory authority exists to allow the recapping to be performed. The uncapped taxable value must remain in place for 2011 and the 2011 taxable value must be used as the base for subsequent taxable value determinations.

Redemptions of Tax-Reverted Properties

Public Act 123 of 1999 significantly altered the property tax reversion process and establishes a three-year tax-reversion process. Annual tax-lien sales were eliminated in favor of an annual forfeiture and judicial foreclosure process. Due process and notification procedures were significantly strengthened and changes were made to expedite the handling of abandoned tax-reverted properties.

What are tax-reverted properties?

Tax-reverted properties are properties with property taxes which have not been timely paid and therefore the property owner no longer has clear title to the property.

What is meant by "redemption"?

Redemption occurs when the owner of a tax-reverted property buys back (redeems) the tax-reverted property by paying appropriate delinquent taxes and related fees.

If the original owner redeems the tax-reverted property, has a transfer of ownership occurred?

No. *See MCL 211.27a(7)(e).*

Example: Taxes have not been paid on a property for two years, delinquent tax notices have been sent to taxpayer, and a judicial foreclosure hearing for delinquent taxes is schedule to be held on the last day of March. Prior to the last day in March, the owner then redeems (pays the needed sum to clear the tax lien) within the redemption period. The lien is removed from the property. Transfer by redemption by the owner is not a transfer of ownership.

PERMANENT ESTATE/GIFT TAX LAWS: OXYMORONIC?

By: George V. Cassar, Jr.

I. INTRODUCTION

Whenever we talk about tax laws and tax reform, the word "permanent" is usually the farthest from our thoughts because we are trained to know that nothing is ever permanent when it comes to tax laws. That is except when Congress or the IRS tells us that something is NOT permanent. At this point our brains don't know what to make of it because the non-permanency of tax law is so obvious, Congress must be trying to tell us something, right? Why are they telling us the obvious? What are they hiding?

Well, how could Congress follow that kind of blockbuster with another hit? They were going to have to dig deep to wow us again. Well guess what? They did and they did it the only way that they could. That's right: they came out by telling us that the new tax laws are "permanent." Wait, what? Permanent? How is that even possible? Isn't tax law and permanent and oxymoron? Webster's Dictionary defines an Oxymoron as: *a combination of contradictory or incongruous words (as* cruel kindness*); broadly: something (as a concept) that is made up of contradictory or incongruous elements.* The phrase "cruel kindness" is an oxymoron. The phrase "almost pregnant" is an oxymoron. The phrase "permanent tax law" most certainly has to be an oxymoron, right?

There is an ancient Chinese proverb that doubles as a curse: *May you live in interesting times.* Well friends, these are definitely interesting times. The past dozen years or so have brought significant changes to the area of estate planning. Consider the following changes since 2000:

- The Estate and Protected Individuals Code (EPIC).
- The Uniform Principal and Income Act was rewritten.

- The Rule Against Perpetuities was largely repealed.
- The Michigan Trust Code
- Trust Decanting
- The amounts exempt from the estate, gift and generation skipping transfer taxes grew from $675,000 to $5,250,000.
- The estate tax did not apply at all in 2010 for most decedent's estates.
- The Great Recession.
- The work of updating and republishing the Restatements of Property (Wills and Donative Transfers) and Trusts was completed.
- Legislation to authorize self-settled asset protection trusts exists in at least 14 states.
- Same sex marriage laws have changed drastically, even in the past few months since the upholding of various related laws by the United States Supreme Court. Even prior to that, same sex marriage was permitted in nine states and the District of Columbia, another five states allowed same sex civil unions and several more states recognized domestic partnerships. Stay tuned for what is sure to be many more changes in this area of the law. Can we expect to see changes as relates to estate planning and estate tax laws as well (i.e. marital deductions, etc.)? One would think so.
- Artificial reproductive technology is becoming more and more common and presenting challenges in our area of law. Questions concerning what legal rights these after-born children may have as an heir to an estate are a growing concern for many and the issue is becoming more of a reality than many think.

Obviously, the foregoing suggests that we need to help our clients create estate plans that deal with a variety of contingencies, not all of which can be easily foreseen.

Not surprisingly, the one area where people have had the greatest amount of uncertainty because of the confusing message between the permanency and

non-permanency of the law is dealing with the estate and gift tax laws. While in the back of their minds they know there is never such a thing as permanent tax law, the thought of knowing that it was going to "expire" brought on a whole new psychological effect that many didn't expect. Many of our clients felt more "comfortable" doing nothing than taking a position knowing that the then current laws were going to "expire." Fast forward to January 2013 and all of a sudden clients feel ready to plan given the permanency of the estate and gift tax laws. Or are they?

II. DOES THE SUN STILL SET?

A. As you will recall, the Bush Tax Cuts, more commonly known as EGTRRA (the Economic and Tax Recovery Act of 2001), substantially reduced a variety of Federal taxes. Because of incomprehensible Senate Rules, it could only last for ten years unless similar cuts were made in expenditures or 60 Senators voted for it. As enacted, the Bush Tax Cuts were scheduled to expire as of December 31, 2010 (i.e. the original Sunset). In December 2010, Congress enacted and President Obama singed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, which created some new wrinkles like and "optional tax" for 2010, "portability" for unused exemptions for surviving spouses, a $5 million tax base and a 35% maximum rate, but otherwise for Estate and Gift Tax purposes, extended the Bush Tax Cuts to December 31, 2012 (i.e. the second Sunset).

B. Many were concerned that Congress and the President would not be able to reach an agreement and urged clients to make gifts before the end of 2012 before the end of the year when the Bust Tax Cuts and the 2010 modifications would expire resulting in our return to a $1 million tax base and graduated rates reaching a top rate of 55% over $3 million. Simultaneously, they were concerned with a potential

"claw back" if the government would determine the tax laws in the future to mean that a lower tax base at the time of death than at the time of making a gift could result in bringing the gift back into the estate for estate tax purposes (i.e. claw back). As such, many clients made huge gifts right up to the eve of the New Year, some using Family, LLCs, others using Spousal Limited Access Trust (SLATS), many Dynasty Trusts and the gifting of life insurance policies or premiums, etc. The common thread through most of the gifts was to try to do so in a way that gave away the asset but not control – as in most cases.

C. They were partially correct. On December 31, 2012 the Bush Tax Cuts did expire. Estate and Gift Taxes were the side show. The main drama was all the changes to the income tax rules and all sorts of expenditure issues. Early in the morning on January 1, 2013 the Senate passed the American Taxpayer Relief Act of 2012 ("ATRA 2012"), the house passed it at 11:00 p.m. on January 1, 2013 and the President signed it late in the evening of January 2, 2013. The basic exclusion amount for 2012 for the federal estate and gift taxes is $5,250,000. The GST Exemption amount is also $5,250,000.

D. Again, at the end of the day the Estate and Gift taxes were the sideshow: the increase in revenue came from increased marginal income and capital gain tax rates relative to their 2012 levels for annual income over $400,000 ($450,000 for couples); a phase-out of certain tax deductions and credits for those with incomes over $250,000 ($300,000 for couples). Estate and Gift taxes increased relative to 2012 levels on estates over $5 million (from 35% to 40%). Other changes included the expiration of payroll tax cuts (a 2% increase for most taxpayers earning approximately $110,000). These changes would all be made permanent. I personally closed three deals the last week of the year, one on New Year's Eve day, that was

the sale of a business for just under $5,000,000 where if the deal didn't get closed the sellers were looking at an additional 5% in capital gains tax or $250,000. These changes had real impact on a number of taxpayers.

E. A reduction in spending due to budget sequestration was delayed for two months under the act and the debt ceiling was not changed, which will lead to further debate over the next few months. And now we anticipate there will be further drama, but probably not as dramatic as that of December 2010 and December 2012.

F. So does the Sun Still Set? Yes, Virginia, there is a Santa Claus and the sun still continues to set every night. It also rises every morning. But when we are talking tax law, estate and gift tax laws specifically, there is no "scheduled" sunset on the horizon yet experience tells us that as sure as the sun will rise tomorrow, there will be tax law changes in the future. The only question remains what and when.

III. WITH THEE TAX EXEMPTION, I THEE WED

A. As you may recall, prior to the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, the estate tax exemption amount was a "use it or lose it" type of exemption.

1. In other words, if Dad died with a $5 million estate and left his entire estate to Mom, there was no estate tax owed on the death of Dad because Mom was a U.S. Citizen and due to the unlimited marital deduction, Dad could leave the entire amount to Mom estate tax free.

2. Unfortunately, when Mom subsequently died, assuming she did not remarry, there was no unlimited marital deduction available so the kids got to use Mom's estate tax exemption amount. If that amount was $3.5 million, which meant a taxable estate of

approximately $1.5 million assuming Mom had the full $5 million estate when she died.

3. The kids then tell the IRS that they want to use Dad's estate tax exemption amount as well but the IRS would respond that Dad never actually "used" his exemption amount so it was gone. The result was a lost exemption at the cost of $750,000 in estate taxes due to the IRS upon Mom's death.

4. Such situations required us estate planners to create two separate Trusts for Mom and Dad, to create the A/B Trusts or Marital and Family (credit shelter) Trusts just for the purposes of preserving that exemption amount. The result was additional cost to the clients but more importantly, much confusion and discomfort for clients who had to create two separate Trusts, the need to equalize their assets between the two Trusts because of not knowing who would pass away first and much consternation for clients who just didn't comprehend how why they needed to take jointly owned assets and divide them into his and hers.

B. Enter Portability, which was first introduced in 2011 in the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. Portability means that the survivor of a married couple could take advantage of the unused portion of the applicable exclusion amount of the first spouse to die. Portability applies to a decedent whose deaths occurred after 2010. To obtain the benefit of portability, a timely estate tax return must be filed by the statutory executor at the first spouse's death in order to elect portability. The Temporary Treasury Regulations relax some of the reporting requirements slightly. See Treas. Regs. 20.2010-2T(a)(7).

C. Unfortunately, when it was first introduced at the end of 2010, portability only applied to individuals and their spouses who died in 2011 and 2012. Even the craftiest of estate planners had a hard time planning to use the portability portion of the tax laws given that it required not only their clients to die but their client's spouses to die as well, all within a 24 month period.

D. With the passage of the American Taxpayer Relief Act of 2012 (ATRA), the exclusion and exemption amounts under the transfer taxes that existed in 2012 have been made permanent. That included the concept of portability and now it will be available to all decedent's estates for individuals who died after December 31, 2010.

E. Some peculiar problems associated with portability include:

1. Generation Skipping Transfer Tax Planning: If client planning is based on maximum use of GST tax exemption amounts to fund dynasty style trusts for descendants, remember that portability only applies to the deceased spousal unused exclusion amount ("DSUEA") for estate tax purposes under Chapter 11 only. There is no equivalent to the DSUEA for generation skipping transfer tax purposes under Chapter 13.

2. Sacrificing Important Benefits of Trusts on the Altar of Simplicity: For many couples, the temptation will be to embrace an "I love you plan" that leaves the assets of the first spouse to die outright to the surviving spouse. The approach has its advantages: It is easy to understand, easy to provide for in the planning documents, easy to administer, and offers a second basis step up when the surviving spouse dies. On the other hand, some important benefits of trust based planning will be list in this kind of plan:

a. The asset protection that is available with spendthrift trusts and discretionary trusts.

b. The ability to ensure professional management of assets.

c. The protection of assets for eventual delivery to the descendants of the first spouse to die, which may be a significant issue in second marriages or when a second marriage might occur after the death of the first spouse to die.

d. A shelter from estate taxation for the appreciation in the value of assets between the deaths of the first spouse to die and the surviving spouse.

e. The preservation of the benefit of all or part of the basic exclusion amount belonging to the first spouse to die in the event the surviving spouse remarries and survives a second spouse.

3. Forcing a Personal Representative to File an Estate Tax Return: Clients and their advisor need to consider whether to require (or enable someone to require) filing an estate tax return in the estate of a first spouse to die in order to claim the DSUEA and who will pay the cost. Consider the following:

   a. This is a case where a second marriage takes place and the children from both spouses do not get along. Husband dies with a modest estate of $3 million and with the exception of leaving $500,000 outright to his Wife, the entire $2.5 million is left to his children of the prior marriage. His oldest son is named as the Executor of his estate and is advised by the estate attorney that filing

an estate tax return is not necessary because the overall estate was less than $5 million, the cost would be over $10,000 to prepare and the delays would result if taking longer to make distributions to the children. The Wife, on the other hand, is furious because she is already at a taxable estate of $7 million and desperately needs the $2.5 million of the Husband's DSUEA so she sues the son to force him to file an estate tax return and thus preserve the DSUEA, which will most surely benefit her children and not the Husband's children.

b. Husband could have avoided all of this contentiousness by including in his Estate Plan a provision directing his Personal Representative to file an estate tax return. Alternatively, Husband and Wife also could have spared the children the fight by addressing the question in their Prenuptial Agreement.

4. ATRA 2012 made one additional important change concerning portability. In a technical correction, the reference to "basic exclusion amount" in IRS Section 2010(c)(4)(B)(ii) was changed to "applicable exclusion amount." This change brings the statute in line with Example 3 in the Joint Committee on Taxation Technical Explanation concerning the IRS' generous construction of the statute in its temporary and proposed regulations dealing with portability. The distinction is important if someone's (W1's) first spouse dies (H1), H1's Deceased Spousal Unused Exclusion Amount passes to W1, who marries H2, and W1 then dies. Under the technical correction, H2's applicable exclusion amount consists of his own basic exclusion amount, plus W1's DSUEA amount, which included H1's DSUEA amount. Remember, it is the DSUEA of the last

spouse to die that counts but if someone is resourceful and has the good fortune of being wealthy and marrying less wealthy and unhealthy mates (bad choice of words, I know) they could literally give away millions during their lifetime and still have a significant exemption amount available upon their death. It just takes planning.

5. As such, the new and most important question in the dating game may be "How much unused exemption amount do you have/plan to have when you die and how unhealthy are you?" Alternatively, for the entrepreneurial singles among us, the opening line on your dating profile may be "Marry me for my Unused Exemption Amount" or "Unused Exemption Amount for sale." Just imagine the possibilities in negotiating that prenuptial agreement.

IV. GIVE ME, GIVE ME, GIVE ME!

Throughout the years in the estate and gift tax law area, the big "on again, off again" concept has been whether the estate and gift tax exemption amounts were to be unified or not. In other words, did you have the same exemption amount for both your lifetime gifts as well as your estate transfers upon death or would the exemptions be separate, providing for one amount relative to lifetime transfers and another amount for transfers upon death. We've seen both regimes (the Bush Tax Cuts kept the gift tax exemption at $1 million while raising the estate tax exemption amounts up to $3.5 million at its peak in 2009) and luckily for us (or for our beneficiaries), one of the important "Nonchanges" that came out of ATRA 2012 was that the estate and gift tax exemptions did not un-unify and thus remain unified – permanently – for now.

Well, as they say, numbers speak louder than words so let's take a look at how they exemption amounts play out under ATRA 2012, thus allowing for greater lifetime gifts.

At the heart of the exemption amounts going forward, the basic exclusion amount and the GST Exemption amount are indexed for inflation beginning with 2011. Even with modest inflation, one can expect regular increases of the basic exclusion amount in excess of $120,000 per year. Indexing is going to have a profound effect on the basic exclusion amount. Consider the following estimate of the basic exclusion amount over the next ten years if inflation is approximately the same as recent years:

2013	$5,250,000
2014	$5,380,000
2015	$5,510,000
2016	$5,650,000
2017	$5,790,000
2018	$5,930,000
2019	$6,080,000
2020	$6,230,000
2021	$6,380,000
2022	$6,540,000

The graduated rates applicable for estate and gift tax purposes remain on the books, but reach a maximum of 40%. Because the marginal transfer tax rate at the amount of the basic exclusion amount is 40%, the federal estate and gift tax rate and the generation skipping transfer tax rate are effectively 40% flat tax rates.

For clients who continue to have taxable estates, it is important to remember that the net effective tax rate (28.57%) on taxable gifts continues to be significantly below the effective tax rate (40%) on taxable estates. This is because the gift tax is tax exclusive (the donor does not pay a gift tax on the dollars used to pay gift taxes), while the estate tax is tax inclusive (the estate pays estate tax on the dollars used to pay the estate tax). Thus, as before,

paying gift tax when the estate is certain to be taxable remains a sound strategy.

With the permanent indexing of the basic exclusion amount for estate and gift tax purposes one must consider whether an estate actually will be taxable in the future before embarking on a gift planning strategy that will require payment of gift taxes. Depending upon the amount of the client's wealth, his or her age and heath, and the nature of the client's assets and their prospects for growth in the future, payment of gift taxes could prove unnecessary. Consider 65 year old husband and wife clients with an estate of $13,000,000, who each have their full basic exclusion amounts available and whose estate is not growing because of the nature of their investments, their annual exclusion gifts to family members, use of estate tax freeze planning, and lifestyles. If they both live at least 10 years and we experience modest inflation, one might expect the basic exclusion amounts will exceed the size of the taxable estate at the time of the death of the surviving spouse.

Just make sure that as with all tax planning advice, you get this conversation in writing and document your file accordingly...just in case permanent indexing, permanent tax law and everything else that is permanent doesn't turn out as planned.

V. CONCLUSION

A. We did not fall of the fiscal cliff. In fact, by removing the sunset from the foreseeable horizon, the government has pushed the cliff out indefinitely into the future.

B. Our current federal estate and gift tax laws most closely resemble the laws we had in place for 2011 and 2012 under the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010.

C. For 2013, the federal estate and gift tax base is indexed to $5,250,000.

D. There is no concern for "claw back" issues any longer since there was no reduction in the tax base.

E. The maximum rate of 40% stated in the alternative the unified credit for estate and gift tax purposes is $2,045,800.

F. Generation skipping transfer tax rate is also 40% and modifications made by EGTRRA continue to apply.

G. Portability allowed the unused exemption of a deceases spouse to be used by is made permanent and a retroactive technical correction in the Committee reports and the Temporary Regulations was adopted by the legislature. Clarified that a surviving spouse can use the DSUEA to make a gift and get another DSUEA upon remarrying and surviving another spouse. Also clarified that remarriage alone does not affect and individual's DSUEA. The DSUEA is still based on the "last deceased spouse." An estate tax return must be filed within the normal 9 months (15 months with extension). This is the principal objection, as it is often less expensive to have a family or credit shelter trust than to prepare and file an estate tax return. There is no statute of limitations on the required estate tax return.

H. EGTRRA's repeal of the credit for state death taxes and the substitution of a deduction was made permanent. If you have clients with property in other states, you should get advice of counsel in those states. We can help.

I. EGTRRA's modifications to IRC 6166 extension of time to pay estate taxes are permanent.

J. Many of us need to follow up on our year end planning. Gift tax returns need to be filed for those that made year end gifts in contemplation of the sunset of the 2010 Tax Act.

K. The merely wealthy client may not need to federal estate tax planning. Of course, one can disagree about who is "merely wealthy," but those who have never made a taxable gift and are U.S. residents or citizens with a net worth of less than $5 million surely meet that category. This is NOT to say that these individuals don't need estate planning BECAUSE THEY MOST CERTAINLY DO.

L. The potentially high net worth client still needs federal transfer tax (estate, gift and GST tax) planning. These are people who might be worth more than $5 million dollars. This client may be reluctant to carry out estate tax planning, which was regarded as basic for someone worth $2 million two years ago.

M. The high net worth client still needs federal transfer tax (estate, gift and GST tax) planning. These people will need sophisticated planning. If they made large gifts as part of getting ready for the "fiscal cliff," there may be serious limits on what can be done for them. GRATS may be just one option but other options need to be carefully considered and adapted to each situation.

N. Basic estate planning and the needs to plan to carry out one's goals and dreams, to do divorce planning and asset protection planning, to protect clients and their issue from in-laws and out-laws continues to be very important. Some say more important now than ever.

ROUNDUP OF RECENT TAX DEVELOPMENTS

By: William E. Sigler

Table of Contents

Page

I. FEDERAL 1

II. MICHIGAN 10

III. EMPLOYEE BENEFITS 19

IV. HEALTH CARE 31

V. ESTATE PLANNING 40

VI. MERGERS & ACQUISITIONS 43

VII. REAL ESTATE 45

I. FEDERAL

A. American Taxpayer Relief Act of 2012. On January 3, 2013, President Obama signed into legislation H.R. 8, the "American Taxpayer Relief Act of 2012" (the "Act"). Generally effective as of tax year 2013, the Act makes permanent some of the 2001 and 2003 tax cuts enacted during President George W. Bush's administration, and temporarily extends other tax incentives from 2009.

1. Tax Rates. For tax years beginning after 2012, the income tax rates for individuals will stay at 10%, 15%, 25%, 28%, 33% and 35%—instead of moving to 15%, 28%, 31%, 36% and 39.6% as would have occurred under the "Economic Growth Tax Relief Reconciliation Act" (the "EGTRRA") sunset—but with a 39.6% rate applying for income above a certain threshold. The threshold for the 39.6% rate is income in excess of the "applicable threshold" over the dollar amount at which the 35% bracket begins. The applicable threshold is $450,000 for joint filers and surviving spouses, $425,000 for heads of household, $400,000 for single filers, and $225,000 for married taxpayers filing separately (one-half of the otherwise applicable amount for joint filers). These dollar amounts are inflation-adjusted for tax years after 2013.

2. PEP Limitations to Apply to "High-Earners" For tax years beginning after 2012, the Personal Exemption Phaseout ("PEP"), which had previously been suspended, is reinstated with a starting threshold of $300,000 for joint filers and surviving spouses; $275,000 for heads of household; $250,000 for single filers; and $150,000 for married taxpayers filing separately (one-half of the otherwise applicable amount for joint filers). Under the phaseout, the total amount of exemptions that can be claimed by a taxpayer subject to the limitation is reduced by 2% for each $2,500 (or portion thereof) by which the taxpayer's adjusted gross income ("AGI") exceeds the applicable threshold. These dollar amounts are inflation-adjusted for tax years after 2013.

3. Pease Limitations to Apply to "High-Earners" For tax years beginning after 2012, the "Pease" limitation on itemized deductions, which had previously been suspended, is reinstated with a starting threshold of $300,000 for joint filers and surviving spouses, $275,000 for heads of household, $250,000 for single filers, and $150,000 for married taxpayers filing separately (one-half of the otherwise applicable amount for joint filers). Thus, for taxpayers subject to the "Pease" limitation, the total amount of their itemized deductions is reduced by 3% of the amount by which the taxpayer's AGI exceeds the threshold amount, with the reduction not to exceed 80% of the otherwise allowable itemized deductions. These dollar amounts are inflation-adjusted for tax years after 2013.

4. Capital Gain and Dividend Rates. For tax years beginning after 2012, the top rate for capital gains and dividends will permanently rise to 20%—up from 15%—for taxpayers with incomes exceeding $400,000 ($450,000 for married taxpayers). And, taking into consideration the 3.8% surtax on investment-type income and gains for tax years beginning after 2012, the overall rate for higher-income taxpayers will be 23.8%. This is a significant increase. Under the EGTRRA/"Jobs and Growth Tax Relief Reconciliation Act" ("JGTRRA") sunset provisions, long-term capital gain was to be taxed at a maximum rate of 20% with an 18% rate for assets held more than five years and dividends paid to individuals were to be taxed at the same rates that apply to ordinary income. For taxpayers whose ordinary income is generally taxed at a rate below 25%, capital gains and dividends will not be taxed. That is, the rate is 0%. Under the EGTRRA/JGTRRA sunset provisions, long-term capital gain of lower-income taxpayers was to be taxed at a maximum rate of

10% with an 8% rate for assets held more than five years and dividends were to be subject to ordinary income rates. Taxpayers who are subject to a 25%-or-greater rate on ordinary income, but whose income levels fall below the $400,000/$450,000 thresholds, will continue to be subject to a 15% rate on capital gains and dividends. The rate will be 18.8% for those subject to the surtax.

5. Estate Tax and Estate Planning. The Act provides for a permanent exemption level of $5,000,000 for estate, gift, and generation-skipping transfer ("GST") tax—as indexed for inflation. But, the Act also permanently increases the top estate, gift, and GST tax rate from 35% to 40%. The Act also continues the portability feature that allows the estate of the first spouse to die to transfer his or her unused exclusion to the surviving spouse. All changes are effective for individuals dying and gifts made after 2012.

6. Permanent AMT Relief. The Act provides permanent alternative minimum tax ("AMT") relief. The AMT is the excess, if any, of the tentative minimum tax for the year over the regular tax for the year. In arriving at the tentative minimum tax, an individual begins with taxable income, modifies it with various adjustments and preferences, and then subtracts an exemption amount (which phases out at higher income levels). The result is alternative minimum taxable income ("AMTI"), which is subject to an AMT rate of 26% or 28%. Prior to the Act, the individual AMT exemption amounts for 2012 were to have been $33,750 for unmarried taxpayers, $45,000 for joint filers, and $22,500 for married persons filing separately. Retroactively effective for tax years beginning after 2011, the Act permanently increases these exemption amounts to $50,600 for unmarried taxpayers, $78,750 for joint filers, and $39,375 for married persons filing separately. In addition, for tax years beginning after 2012, it indexes these exemption amounts for inflation.

7. Miscellaneous Credits. Prior to the Act, the 2012 nonrefundable personal credits—other than the adoption credit, the child credit, the savers' credit, the residential energy efficient property credit, the non-depreciable property portions of the alternative motor vehicle credit, the qualified plug-in electric vehicle credit, and the new qualified plug-in electric drive motor vehicle credit—were to be allowed only to the extent that the individual's regular income tax liability exceeded their tentative minimum tax, determined without regard to the minimum tax foreign tax credit. Retroactively effective for tax years beginning after 2011, the Act permanently allows individuals to offset their entire regular tax liability and AMT liability by the nonrefundable personal credits.

8. Recovery Act Extenders. The Act extends, for a period of five years, the following items that were originally enacted as part of the American Recovery and Investment Tax Act of 2009 and were slated to expire:

a. The American Opportunity tax credit, which permits eligible taxpayers to claim a credit equal to 100% of the first $2,000 of qualified tuition and related expenses and 25% of the next $2,000 of qualified tuition and related expenses (for a maximum tax credit of $2,500 for the first four years of post-secondary education);

b. Eased rules for qualifying for the refundable child credit; and

c. Various earned income tax credit ("EITC") changes relating to higher EITC amounts for eligible taxpayers with three or more children, and increases in threshold phaseout amounts for singles, surviving spouses, and heads of households.

9. Historical Individual Extenders. The Act extends the following items for beyond their prior termination date as shown in the listing below:

a. The exclusion for discharge of qualified principal residence indebtedness, which applied for discharges before January 1, 2013 and is now continued to apply for discharges before January 1, 2014;

b. The treatment of mortgage insurance premiums as qualified residence interest, which expired at the end of 2011 and is now revived for 2012 and will continue through 2013;

c. The option to deduct state and local general sales taxes, which expired at the end of 2011 and is now revived for 2012 and will continue through 2013;

d. The special rule for contributions of capital gain real property made for conservation purposes, which expired at the end of 2011 and is now revived for 2012 and will continue through 2013;

e. The above-the-line deduction for qualified tuition and related expenses, which expired at the end of 2011 and is now revived for 2012 and will continue through 2013; and

f. Tax-free distributions from individual retirement plans for charitable purposes, which expired at the end of 2011 and is now revived for 2012 and will continue through 2013. Because 2012 has already passed, a special rule permits distributions taken in 2012 to be transferred to charities for a limited period in 2013. Another special rule permits certain distributions made in 2013 as being deemed made on December 31, 2012.

10. Depreciation Provisions Modified and Extended. The following depreciation provisions are retroactively extended by the Act through 2014:

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

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

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

d. Increased expensing limitations and treatment of certain real property as §179 property;

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

f. The election to expense mine safety equipment.

The Act also extends and modifies the bonus depreciation provisions with respect to property placed in service after December 31, 2012, in tax years ending after that date.

11. Business Tax Breaks Extended. The following business credits and special rules are also extended:

a. The §41 research credit is modified and retroactively extended for two years through 2013;

b. The §45D new markets tax credits is retroactively extended for two years through 2013;

c. The §45P employer wage credit for employees who are active duty members of the uniformed services is retroactively extended for two years through 2013;

d. The §51 work opportunity tax credit is retroactively extended for two years through 2013;

e. The enhanced charitable deduction for contributions of food inventory under §174(e) is retroactively extended for two years through 2013;

f. 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 under §512(b)(13)(E)(iv) is extended through December 31, 2013;

g. Exclusion of 100% of gain on certain small business stock acquired before Jan. 1, 2014;

h. Basis adjustment to stock of S corporations making charitable contributions of property under §1367(a) in tax years beginning before December 31, 2013;

i. The reduction in S corporation recognition period for built-in gains tax under §1374(d)(7) is extended through 2013, with a 10-year period instead of a 5-year period;

12. Pension Provision. For transfers after December 31, 2012 in tax years ending after that date, plan provisions in an applicable retirement plan (which includes a qualified Roth contribution program) can allow participants to elect to transfer amounts to designated Roth accounts with the transfer being treated as a taxable qualified rollover contribution under §408A(e).

B. Applicability Date of Repair Regulations Delayed. On November 20, 2012, the IRS announced in Notice 2012-73 that the temporary regulations concerning the deduction and capitalization of expenditures related to tangible property -- the so-called repair regulations -- will be amended so that they apply to tax years beginning on or after January 1, 2014. This makes the use of the temporary regulations optional until the final regulations are issued. Taxpayers who choose to apply the rules in the temporary regulations for tax years beginning on or after January 1, 2012, can use the procedures in Rev. Proc. 2012-19 and Rev. Proc. 2012-20 to obtain automatic consent to change their accounting method. For taxpayers who choose to apply the provisions of the final

regulations to tax years beginning on or after January 1, 2012, the IRS says it will publish new automatic consent procedures when the final regulations are issued. Separately, the IRS and Treasury announced they are working to develop and publish guidance under the IRS's industry issue resolution (IIR) program on the repair versus capitalization issue for tangible property.

C. **Final Regs on Information Disclosures by Return Preparers**. The IRS has issued final regulations (T.D. 9608) on the disclosure and use of tax return information by return preparers, providing updated guidance on the use of return information to solicit return preparation business and on the disclosure or use of statistical compilations of data as part of a preparer's business operations. Effective December 28, 2012, the final regs adopt, with minor changes and clarifications, proposed regs (REG-131028-09) issued in January 2010. Under the final regulations, a tax return preparer may, without taxpayer consent, compile a list of some taxpayer-specific information that may be used to contact the taxpayers on the list for two purposes: (i) providing tax information and general business or economic information or analysis for educational purposes, and (ii) soliciting additional tax return preparation services. A tax return preparer may not use the list to solicit non-tax-return-preparation services. The final regulations do not adopt a request to include soliciting accounting services as a list maintenance purpose. The final regulations also retain the provisions in the proposed regulations that require written consent for all other purposes not expressly allowed by the regulations.

D. **Simplified Option for Claiming Home Office Deduction**. The Internal Revenue Service announced a simplified option that many owners of home-based businesses and some home-based workers may use to figure their deductions for the business use of their homes. The new optional deduction, capped at $1,500 per year based on $5 a square foot for up to 300 square feet, will reduce the paperwork and recordkeeping burden on small businesses by an estimated 1.6 million hours annually. Currently, they are generally required to fill out a 43-line form (Form 8829 often with complex calculations of allocated expenses, depreciation and carryovers of unused deductions. Taxpayers claiming the optional deduction will complete a significantly simplified form. Though homeowners using the new option cannot depreciate the portion of their home used in a trade or business, they can claim allowable mortgage interest, real estate taxes and casualty losses on the home as itemized deductions on Schedule A. These deductions need not be allocated between personal and business use, as is required under the regular method. Business expenses unrelated to the home, such as advertising, supplies and wages paid to employees are still fully deductible. Current restrictions on the home office deduction, such as the requirement that a home office must be used regularly and exclusively for business and the limit tied to the income derived from the particular business, still apply under the new option. The new simplified option is available starting with the 2013 return most taxpayers file early in 2014. Further details on the new option can be found in Revenue Procedure 2013-13. Revenue Procedure 2013-13 is effective for taxable years beginning on or after Jan. 1, 2013.

E. **Voluntary Classification Settlement Program Modified**. The IRS has modified its Voluntary Classification Settlement Program (VCSP). In Announcement 2012-46, in effect until June 30, 2013, the IRS is temporarily permitting employers who have not filed Forms 1099 for their workers to participate in the program by paying a larger amount of past due tax than would be due under the normal VCSP. In Announcement 2012-45, which modifies and supersedes Announcement 2011-64, the IRS liberalizes some of the program's rules. VCSP is a program under which employers can reclassify independent

contractors as employees and limit the resulting federal payroll taxes for their most recent tax year, plus avoid related penalties and interest for prior years. As originally announced, employers had to submit an application and agree to prospectively treat their workers as employees for federal employment tax purposes in future tax periods. Employers were also required to agree to extend the period of limitation on assessment of employment taxes for three years for each of the three calendar years beginning after the date of the agreement. In return, employers paid 10% of the employment tax liability otherwise due for the most recent tax year, which was not subject to interest or penalties. In addition, the IRS agreed not to conduct an employment tax audit with respect to the employer's worker classification for prior years. The employment tax liability for the most recent year was determined under the reduced rates of Sec. 3509, which provides that for failure to deduct and withhold taxes arising from a worker misclassification, the employer's liability for the employee's portion of FICA tax is limited to 20% of the normal employee FICA tax. To be eligible for the program, employers could not currently be under audit by the IRS for any issue, or be under audit by the U.S. Labor Department or a state agency concerning worker classification. Employers whose worker classification had been previously audited must have complied with the results of the audit. Also, employers must have consistently treated workers as nonemployees, for whom they must have filed all required Forms 1099 for the previous three years. After a year of experience with the program, and in response to feedback from taxpayers and their representatives, (i) a taxpayer under IRS audit, other than an employment tax audit, is now eligible to participate, and (ii) a taxpayer is no longer required to agree to extend the limitation period on employment tax assessment as part of the VCSP closing agreement with the IRS. The IRS reiterated the current eligibility requirement that a taxpayer that is a member of an affiliated group under Sec. 1504(a) is not eligible to participate in the VCSP if any member of the affiliated group is under employment tax audit. The IRS also emphasized that a taxpayer is not eligible to participate in the VCSP if the taxpayer is contesting in court the classification of the class or classes of workers from a previous IRS or Labor Department audit. In response to requests from taxpayers that requested VCSP relief but did not qualify for the VCSP program because they had not filed Forms 1099 for their workers, the IRS announced a temporary program for those taxpayers (Announcement 2012-46). To be eligible to participate in the temporary expansion, the taxpayer must furnish to the workers and electronically file all required Forms 1099, consistent with the nonemployee treatment, for the workers being reclassified for the previous three years, before executing the temporary eligibility closing agreement with the IRS. If the IRS approves a taxpayer's application, the taxpayer will (i) pay 25% (compared with 10% in the regular VCSP) of the employment tax liability that would have been due on compensation paid to the workers being reclassified for the most recent tax year if those workers were classified as employees for that year, determined under the reduced rates of Sec. 3509(b); and (ii) pay a reduced penalty for unfiled Forms 1099 for the previous three years for the workers being reclassified. Approved taxpayers will not be liable for any interest and penalties on the liability and will not be subject to an employment tax audit for the worker classification of the class or classes of workers for prior years. The taxpayer must certify in the VCSP temporary eligibility expansion closing agreement that it has furnished to the workers and has electronically filed all required Forms 1099 for the previous three years for the workers being reclassified.

F. IRS Publishes Proposed Regs on Material Adviser Penalties. The IRS has published proposed regulations (REG-160873-04) addressing the penalty under section 6708 for failing to make available lists of advisees regarding reportable transactions. The proposed regs reflect changes to section 6708 made by the American Jobs Creation Act of 2004, which significantly increased the amount of the penalty and

eliminated the maximum calendar-year limit on the penalty. Section 6112 requires material advisers to maintain lists of advisees and other information regarding reportable transactions and to make that information available to Treasury on written request. Under section 6708(a)(1), if a material adviser fails to comply with a written request for the section 6112 list within 20 business days after the request is made, the material adviser is subject to a penalty in the amount of $10,000 for each day of the failure after the 20th business day. However, the penalty will not be imposed on any day that the failure is due to reasonable cause. The proposed regs provide that a failure for purposes of section 6708 includes the failure to furnish a list in a timely manner and in the form required under section 6112 and its corresponding regulations.

G. Partnership's Cancellation of Loan Notes from a Partner. The IRS ruled in PLR 201314004 that a partnership's cancellation of loan notes from a partner will be treated as a distribution from the partnership to the partner under reg. section 1.731-1(c)(2).

H. Nonresident Filing Requirements and Foreign Asset Reporting. Taxpayers that lived overseas, including those individuals with dual citizenship, U.S. citizens or resident aliens or members of the military serving outside the U.S. on the regular due date of their tax return, are granted automatic two-month extensions to file their income tax return pushing their deadline to Monday, June 17, 2013. A statement must be attached to the taxpayer's return explaining which of the two situations apply in order for the extension to be granted. Nonresident aliens who received income from U.S. sources during 2012 normally have a filing deadline of April 15. A June 17th deadline applies if the nonresident alien is not an employee, is not self-employed or does not receive non-employee compensation subject to U.S. income tax withholding or if he or she has no office or place of business in the United States. Generally, U.S. Citizens, resident aliens and in some cases nonresident aliens are also required to report specified foreign financial assets on Form 8938 if the aggregate value of those assets exceed certain thresholds at any time during the tax year. The thresholds vary depending on filing status but start as low as $50,000. The form is due with the taxpayer's annual return. Separately, taxpayers with foreign accounts whose aggregate value exceeds $10,000 at any time during the tax year must file Treasury Department Form TD F 90-22.1. This threshold does not vary depending on filing status and the form is due by June 30, 2013. Failure to file either form can result in harsh penalties from the IRS. Incomplete or non-filing of Form 8938 or TD F 90-22.1 carries a penalty of $10,000.

I. Defense of Marriage Act Unconstitutional. On June 26, 2013, the Supreme Court, in *United States v. Windsor*, 133 S. Ct. 2884 (2013), ruled that Section 3 of the federal Defense of Marriage Act ("DOMA"), which was first enacted in 1996, is unconstitutional. That section of DOMA provided that only persons of the opposite sex could be recognized as "spouses" and "married" for purposes of federal law, including ERISA and the Internal Revenue Code. Notably, the Supreme Court decision leaves intact Section 2 of DOMA which permits a state to not recognize marriages performed in other states.

J. Tax Treatment of Severance Pay. On June 28, 2013, the IRS provided a taxpayer with an information letter on whether severance pay is subject to Social Security tax, Medicare tax, and federal income tax withholding (INFO 2013-0023). The guidance relies upon prior guidance in Rev. Rul. 2008-29, 2008-1 C.B. 1149 and Rev. Rul. 71-408, 1971-2 C.B. 340. The Supreme Court on October 1, 2013, granted the government's petition for certiorari in *United States v. Quality Stores*, No. 12-1408. In its petition, the

government framed the issue as whether severance payments made to employees whose employment was involuntarily terminated are taxable under FICA. In its brief opposing certiorari, Quality Stores described the question presented as whether supplemental unemployment compensation benefits, as defined under Section 3402(o), constitute wages for purposes of FICA. In *United States v. Quality Stores*, the Sixth Circuit held that supplemental unemployment compensation benefits are not taxable as wages under FICA. The Sixth Circuit's decision, 693 F.3d 605 (6th Cir. 2012), created a split with the Federal Circuit, which held in favor of the government on the same issue in CSX Corp v. United States, 518 F.3d 1328 (Fed. Cir. 2008).

K. **501(c)(4) Scandal**. In the wake of the IRS scandal involving Section 501(c)(4) organizations, the IRS has instituted an optional expedited process for certain organizations applying for recognition of exemption under Section 501(c)(4) whose applications have been pending with the IRS for more than 120 days as of May 28, 2013. Organizations can make representations to the IRS under penalties of perjury regarding their past, current, and future activities and receive a determination letter based on those representations.

L. **Tax Guidance on Recognition of Legal Same-Sex Marriages**. On August 29, 2013, the IRS announced (IR-2013-72) the release of guidance and related documents on the recognition of same-sex marriages for federal income tax purposes. However, the ruling does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law. According to the IRS, Rev. Rul. 2013-17 implements federal tax aspects of the June 26, 2013, Supreme Court decision invalidating a key provision of the 1996 Defense of Marriage Act. Under the ruling, same-sex couples will be treated as married for all federal tax purposes, including income, gift, and estate taxes. The ruling applies to all federal tax provisions in which marriage is a factor. Any same-sex marriage legally entered into in one of the 50 states, the District of Columbia, a U.S. territory, or a foreign country is covered by the ruling, but registered domestic partnerships and similar formal relationships recognized under state law are not. Legally married same-sex couples must file their 2013 federal income tax return using either the married filing jointly or married filing separately filing status. Refund claims generally may be filed for tax years 2010, 2011, and 2012, the IRS said. Treasury and the IRS intend to issue streamlined procedures for employers who wish to file refund claims for payroll taxes paid on previously taxed health insurance and fringe benefits provided to same-sex spouses. Treasury and the IRS also intend to issue further guidance on cafeteria plans and on how qualified retirement plans and other tax-favored arrangements should treat same-sex spouses for periods before the effective date of Rev. Rul. 2013-17. The following table illustrates some possible effects:

		DOMA	Post-DOMA
1.	No additional Cost Services. (e.g., excess capacity services, such as airline, bus, or train tickets; hotel rooms)	No additional cost services provided to same-sex spouses resulted in imputed income to the employee	Same-sex spouse may be provided such services on a tax-free basis the same as opposite-sex spouse
2.	Employee Discounts	Employee discount offered to a same-sex spouse resulted in imputed income to the employee or former employee	Same-sex spouse may be provided such services on a tax-free basis the same as opposite-sex spouse
3.	Retirement Planning Services	These services provided to a same-sex spouse resulted in imputed income to the employee	Same-sex spouse may be provided such services on a tax-free basis the same as opposite-sex spouse
4.	On-premises Athletic Facilities	Use of the facilities by a same-sex spouse resulted in imputed income to the employee	Same-sex spouse may be provided such use of the facilities on a tax-free basis the same as opposite-sex spouse

M. Guidance on Application of Windsor to Employment Taxes. The IRS has issued Notice 2013-61 for employers and employees to make claims for refund or adjustments of overpayments of FICA and income tax withholding for some benefits provided and remuneration paid to same-sex spouses resulting from the Supreme Court's decision in *United States v. Windsor*. The guidance provides special administrative procedures for employers to correct overpayments of employment taxes for 2013 and prior years for some same-sex spouse benefits and remuneration paid to same-sex spouses, including overpayments that result from a taxpayer's retroactive application of the holdings of Rev. Rul. 2013-17. For 2013 overpayments, the guidance provides two alternative special administrative procedures. Under the first alternative, employers may use the fourth quarter 2013 Form 941, "Employer's QUARTERLY Federal Tax Return," to correct overpayments of employment taxes for the first three quarters of 2013. Under the second alternative, employers may file one Form 941-X, "Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund," for the fourth quarter of 2013 to correct overpayments of FICA taxes for all quarters of 2013. For overpayments of FICA taxes for years before 2013, employers may correct all four calendar quarters of a calendar year on one Form 941-X filed for the fourth quarter of that year if the limitations period on refunds hasn't expired and, for adjustments, if the limitations period won't expire within 90 days of filing the adjusted return. The normal procedures require employers to file a Form 941-X for each calendar quarter for which a refund claim or adjustment is made. The special administrative procedures provided in the guidance are optional. Employers may use the regular procedures instead of the special administrative procedures for correcting employment tax overpayments for same-sex spouse benefits and remuneration paid to same-sex spouses.

N. IRS Must Honor Corporation's Designation of Voluntary Tax Payments. In *James R. Dixon et ux. v. Commissioner*, 141 T.C. No. 3, Nos. 9962-05L, 9965-05L, The Tax Court held that the IRS could not proceed with a levy to collect taxes from individuals after the corporation that employed them made payments that it designated as income tax payments withheld on their behalf, finding that the IRS must honor the corporation's designation of the tax payments to discharge the individuals' income tax liabilities.

O. Partner Guarantors May Need to Document Net Worth. Treasury and the IRS are developing a set of proposed section 752 partnership debt allocation rules that could extend a net worth maintenance requirement to a host of different types of partner guarantors and indemnitors other than disregarded entities, including possibly to individuals. The requirement may include providing documentation -- possibly financial statements -- to substantiate net worth, an IRS official said September 20, 2013. There are some criteria the lender would normally ask for to ensure that the guarantor could pay on the guarantee, said Beverly Katz, special counsel, IRS Office of Associate Chief Counsel (Passthroughs and Special Industries). "We would probably require that there be certain terms like maintaining your net worth, [providing] financial statements, things of that nature," she said.

II. MICHIGAN

A. Principal Residence Exemption. L. 2012, S990 (P.A. 324), effective 10/09/2012, allows a homeowner to retain a principal residence exemption after moving into a nursing home or assisted living facility if: (i) the owner continues to own the property while residing in the nursing home or assisted living facility; (ii) the owner has not established a new principal residence; and (iii) the owner maintains or provides for the maintenance of the property while residing in the nursing home or assisted living facility. In addition, the property cannot be occupied, cannot be for sale, cannot be leased, and cannot be used for any business or commercial purpose. For residential or timber-cutover property that is contiguous to the dwelling, contiguity will not be broken by a boundary between local tax collecting units.

B. Governor Signs Bill Reducing the City of Detroit Personal Income Tax Rates. On December 19, 2012, Governor Rick Snyder approved a bill that reduces the City of Detroit's personal income tax rates, as well as eliminating further scheduled rollbacks of those rates. The bill is tied to two other bills that allows the City of Detroit to incorporate a lighting authority and to dedicate a portion of the City Utility Users Tax revenue to support bonds for that authority (L. 2012, S970 (P.A. 394); L. 2012, H5688 (P.A. 392); L. 2012, H5705 (P.A. 393), all effective 12/19/2012). L. 2012, S970 (P.A. 394) provides that beginning January 1, 2013, and each year thereafter, the Detroit personal income tax rates are 2.4% for resident individuals and 1.2% for nonresident individuals. Currently, the rates are 2.5% for resident individuals and 1.25% for nonresident individuals. The bill further provides that beginning January 1 of the year immediately following the year that all bonds, obligations, and other evidence of indebtedness issued by a Lighting Authority have been fully paid and each year following, the city's personal income tax rate will drop to 2.2% for resident individuals and 1.1% for nonresident individuals. The bill does not amend the city's corporate income tax rate, which is currently 1%. The bill eliminates the scheduled rollback of the City of Detroit's personal income tax rate. Previously, the city's maximum tax rate was scheduled to be reduced each July 1 by 0.1% until it was 2% for resident individuals (and 1% for nonresident individuals). The bill also deletes provisions allowing the city to apply to the State Administrative Board for certification that the rate not be reduced if specified conditions exist.

C. Phaseout of Personal Property Taxes. On December 20, 2012, Governor Rick Snyder approved a package of bills that phase-out the state's personal property tax on commercial and industrial property. Under the package, local governmental units would be partially reimbursed for the lost personal property tax revenues from a component of the use tax to be known as the "Metropolitan Areas Component Tax." However, the personal

property tax phase-out is repealed if voters reject the changes to the use tax under H6026 (L. 2012, S1065; L. 2012, S1066; L. 2012, S1067; L. 2012, S1068; L. 2012, S1069; L. 2012, S1070 ; L. 2012, S1071 ; L. 2012, H6022; L. 2012, H6024; L. 2012, H6025; and L. 2012, H6026, all effective 12/20/2012).

1. Personal property tax exemptions.

a. Staring December 31, 2013, L. 2012, S1070 enacts an exemption for commercial and industrial personal property if the combined taxable value of all such property owned by the taxpayer is less than $40,000 in the local tax collecting unit. However, commercial and industrial property of a business where the taxable value of the property in a local unit is $40,000 or more will *not* be exempt.

b. Starting December 31, 2015, L. 2012, S1071 enacts an exemption for personal property taxes for "qualified previously existing personal property," which means eligible manufacturing property that has been subject to or exempt from the collection of taxes for the immediately preceding 10 years, or would have been if located in the state during that period.

c. Starting December 31, 2015, L. 2012, S1069 enacts an exemption for "qualified new personal property" which means eligible manufacturing property that has met all of the following conditions: (i) purchased after December 31, 2012; (ii) was not before January 1, 2013, subject to or exempt from taxation and was not in use or placed in service in the state; and (iii) before January 1, 2013, was not in use or placed in service outside of the state.

d. These exemptions are repealed if the voters reject the changes to the use tax under H6026 described below.

2. Property subject to a specific tax not eligible for the exemption.

a. L. 2012, S1066 provides that if a facility was subject to a technology park facilities exemption certificate on December 31, 2012, that portion of the facility that is eligible manufacturing personal property will remain subject to the technology park facilities tax and will remain exempt from ad valorem property taxes until that eligible manufacturing personal property would otherwise be exempt under the personal property tax exemptions enacted under the legislative package.

b. L. 2012, S1065 provides that if a facility was subject to an industrial facilities exemption certificate on December 31, 2012, that portion of the facility that is eligible manufacturing personal property will remain subject to the industrial facilities tax and will remain exempt from ad valorem property taxes until that eligible manufacturing personal property would otherwise be exempt under the personal property tax exemptions enacted under the legislative package.

c. L. 2012, S1068 provides that if a facility was certified as a qualified business under the Enterprise Zone Act on December 31, 2012, that portion of the facility that is eligible manufacturing personal property will remain subject to the specific tax levied under the Enterprise Zone Act and will remain exempt from ad valorem property taxes until that eligible manufacturing personal property would otherwise be exempt under the personal property tax exemptions enacted under the legislative package.

3. Industrial personal property. L. 2012, S1067 provides that if new personal property exempt under MCL § 211.9f on December 31, 2012 is eligible manufacturing personal property, that eligible manufacturing personal property will remain exempt under the industrial personal property exemption under MCL § 211.9f until the later of: (i) the date that eligible manufacturing personal property would otherwise be exempt under the personal property tax exemptions enacted under the legislative package; or (ii) the date that eligible manufacturing personal property is no longer exempt under the resolution adopted under Mich. Comp. Laws Ann.§ 211.9f(1).

4. Special assessment for essential services. Under L. 2012, H6024, starting January 1, 2016 a new special assessment can be levied by local units for "essential services"—police, fire, and ambulance services and equipment, and jail operations—on industrial real property and commercial real property belonging to taxpayers claiming the eligible manufacturing personal property exemption located in the local unit. The assessment would be collected like property taxes on the July tax bill. The special assessment cannot be levied on companies that are exempt from personal property taxes because the combined taxable value of all personal property owned by the taxpayer in a local unit is less than $40,000. The legislation contains a formula for local units to use to calculate the amount of the special assessment levy.

5. Local unit reimbursement. Under L. 2012, H6025, local governmental units would receive partial reimbursement of personal property tax revenues lost to be paid out of a portion of use tax revenues, to be known as the Metropolitan Areas Component Tax. This applies only to a municipality that has experienced a reduction in taxable value of over 2.5% as a result of the personal property tax exemptions. That tax would be levied by a newly-created Michigan Metropolitan Areas Metropolitan Authority.

6. Use tax changes.

a. Under L. 2012, H6026, the use tax would be divided into two components: (i) the metropolitan areas component levied by the metropolitan authority; and (ii) the state component levied by the state. The total of the two would equal 6%, the maximum allowed by the State Constitution. The rate of each component would be calculated annually by the Department of Treasury. The state component would be the portion of the rate remaining after sufficient revenues had been generated by the metropolitan areas component.

b. Two percent of the use tax is constitutionally dedicated to the School Aid Fund and so would not be part of the calculations. It would remain part of the state component tax.

c. These amendments to the Use Tax Act will not take effect unless approved by a majority of the voters at a statewide election to be held at the August regular election date in 2014. If approved, the changes would take effect January 1, 2015.

7. Metropolitan Extension Rights-of-Way Oversight Act amended. L. 2012, H6022, amends the Metropolitan Extension Rights-of-Way Oversight Act to give the powers of the authority established in that Act to the new Metropolitan Areas Metropolitan Authority.

D. CIT Sales Factor—Sale of Business. The Michigan Court of Appeals has ruled that the transfer of title and possession of tangible and intangible property which constituted an entire business line were not "sales" for purposes of the sales factor of the apportionment formula under the former Michigan Single Business Tax (SBT). The taxpayer was a producer and distributor of alcoholic beverages with activities both within and outside of Michigan. In 2004, the taxpayer sold one of its business lines that was incorporated in Delaware. In preparing its Michigan SBT return, the taxpayer classified the sale of the business unit as a sale for purposes of the sales factor under MCL § 208.7(1)(a)(iii) and included the entire amount in the denominator of the sales factor and none of the amount realized in the numerator, since the business line was incorporated in Delaware, thus substantially reducing its tax liability on sales of alcohol in Michigan that year. The Department of Revenue argued, and the Court of Appeals agreed, that MCL § 208.7(1)(a)(iii) applies only to transactions where the taxpayer's "sale" is allowing a person to possess and use tangible and intangible property, and not sales that transfer title and possession of the property. The court ruled that the inclusion of the amount realized on the sale of the business line in the denominator of the sales factor was improper. *Sidney Frank Importing Co., Inc. v. Department of Treasury*, Mich. Ct. App., Dkt. No. 306742, 12/04/2012 (unpublished).

E. Flow-through Entity Withholding. L. 2013, S65 (P.A. 15), effective retroactive to 01/01/2013, amends provisions under which a flow-through entity that receives an exemption certificate from a corporation may not withhold a tax on the distributive shares of business income of that corporation. The bill would refer to a "member" rather than a "corporation" in these provisions. Under the bill, a flow-through entity that receives an exemption certificate from a member other than a nonresident individual (previously, corporation) may not withhold a tax on the distributive share of business income of that member if certain conditions are met. Also, under the bill, the exemption certificate must certify that the member (previously, the corporation) will pay the corporate income tax required on the distributive share of the business income received from any flow-through entity in which the member (previously, corporation) has an ownership or beneficial interest. Finally, the bill provides that the Department of Treasury can require the member to file the exemption certificate and provide a copy to the flow-through entity (previously, the corporation had to file the exemption certificate with the Department and provide a copy to the flow-through entity).

F. Revenue Administrative Bulletin Describing Control Test and Two Relationship Tests. The Michigan Department of Treasury has issued Michigan Revenue Administrative Bulletin No. 2013-1, 01/07/2013, describing the control test and the two alternative relationship tests that determine whether two or more entities are a unitary business group under the corporate income tax. Under the corporate income tax (CIT), a unitary business group ("UBG") is two or more qualifying United States persons that are corporations, insurance companies, or financial institutions that satisfy both a control test and one of two alternate relationship tests. A unitary business group is a single taxpayer under the CIT and must file a combined return. Foreign persons and foreign operating entities cannot be included in a unitary business group. If a group of entities satisfies the control test as described in Mich. Comp. Laws Ann.§ 206.611(6), and, if that same group also satisfies one of two relationship tests, that group of entities will constitute a UBG. The control test is satisfied when one person owns or controls, directly or indirectly, more than 50% of the ownership interests with voting or comparable rights of the other person or persons. A person owns or controls more than 50% of the ownership interests with voting rights or ownership interests that confer comparable rights to voting rights of another

person if that person owns or controls: (1) more than 50% of the total combined voting power of all ownership interests with voting (or comparable) rights or (2) more than 50% of the total value of all ownership interests with voting (or comparable) rights. Entities that satisfy the CIT control test constitute "controlled groups of entities." If there is any agreement that an owner will vote his or her ownership interests in the manner specified by another owner of the entity, the ownership interests with voting rights owned by the first owner will be considered to be owned by the other owner. However, if there is any evidence of an implied or oral agreement or concerted action between or amongst owners or other persons, the Department will examine all of the facts and circumstances in determining whether the ownership interests owned by a person or persons possess voting (or comparable) rights. If, under this RAB, an entity is a member of more than one controlled group of entities, the entity will be treated as a member of the controlled group with respect to which it satisfies the relationship test under Mich. Comp. Laws Ann.§ 206.611(6). If the entity satisfies the relationship test with more than one of those groups, it must elect to be treated as a member of only one of the controlled groups in question. This election will remain in effect until the unitary relationship between the entity and the rest of the members of its elected controlled group is discontinued, or until revoked with the approval of the Department. Similarly, if the application of this RAB results in a group of entities that comprise two or more overlapping controlled group of entities, but not one single controlled group of entities, the UBG will be that controlled group of entities that satisfies the relationship test under Mich. Comp. Laws Ann.§ 206.611(6). If more than one controlled group of entities satisfies the relationship test, the members must elect the controlled group of entities that will file as a UBG. This election will remain in effect until the unitary relationship between the entity and its elected controlled group is discontinued, or until revoked with the approval of the Department. Under Mich. Comp. Laws Ann.§ 206.611, ownership and control includes indirect ownership and control. Indirect ownership includes ownership through attribution. An individual constructively owns the ownership interests owned, directly or indirectly, by any of the following: (i) is or her spouse (other than a spouse who is legally separated from the individual under a decree of divorce or a decree of separate maintenance); (ii) his or her children (including legally adopted children) and grandchildren; and (iii) his or her parents. With regards to partnerships, ownership interests owned, directly or indirectly, by or for a partnership will be considered as owned by any partner having an interest of 5% or more in either the capital or profits of the partnership in proportion to his interest in capital or profits, whichever is greater. With regards to corporations, if 50% or more in value of the stock in a corporation is owned, directly or indirectly, by or for any person, such person will be considered as owning the ownership interests owned, directly or indirectly, by or for such corporation, in that proportion to which the value of the stock which such person so owns bears to the value of all the stock in such corporation. With regards to trusts and estates, ownership interests owned, directly or indirectly, by or for an estate or trust will be considered as owned by any beneficiary who has an actuarial interest of 5% or more in such ownership interests, to the extent of such actuarial interest. The definition of a UBG, in addition to satisfying the control test, requires that the group of persons have business activities or operations that: (i) result in a flow of value between or among persons in the group, or (ii) are integrated with, dependent upon, or contribute to each other. A taxpayer need only meet one of the two alternative tests to satisfy the relationship test. The United States Supreme Court described a unitary business as a functionally integrated enterprise whose parts are mutually interdependent such that there is a flow of value between them. There must exist "some sharing or exchange of value not capable of precise identification or measurement-beyond the mere flow of funds arising out of a passive investment. . . ." In determining whether a flow of value exists, a relevant question in the inquiry is whether contributions to income resulted from "functional

integration," "centralization of management," and "economies of scale." No one fact is determinative of whether functional integration, centralization of management or economies of scale exist. Rather, the statutory test requires that the totality of facts and circumstances surrounding the business activities and operations be weighed and examined for cumulative effect.

G. **Insurance and Education Reimbursements Compensation under SBT.** The Michigan Court of Appeals has approved for publication a decision that a medical professional services corporation's payment of continuing medical educational (CME) expenses and medical malpractice insurance (MMI) premiums was on behalf of and for the benefit of the physicians and physician's assistants in its employ, and so those payments constituted compensation for purposes of the corporation's SBT tax base calculation. *Orthopaedic Associates of Grand Rapids, PC v. Department of Treasury*, Mich. Ct. App., Dkt. No. 308319, 02/19/2013, approved for publication 04/11/2013.

H. **Failure to Timely File Petition.** The taxpayer's challenge of the assessments on his three parcels of commercial property were properly dismissed by the Tax Tribunal because the Tribunal did not receive the taxpayer's petition before the due date for filing the petition. The taxpayer sent his petition to the Tax Tribunal by first-class mail, as well as sending copies of the petition to the city and other designated recipients. The city and the other designated recipients received copies of the petition by the filing deadline, but the Tax Tribunal has no record of receiving the petition or the filing fee. Although the taxpayer relied on Mich. Comp. Laws Ann.§ 205.735a(7)(a) to argue that the petition was timely filed when it was sent by first-class mail on May 23, 2011, eight days before the May 31 filing deadline, this argument fails because the Tax Tribunal has no record of ever receiving the petition and the taxpayer has no evidence of any postmark. Because the taxpayer did not provide evidence of a postmark, he failed to establish that the petition was timely filed under Mich. Comp. Laws Ann.§ 205.735a(7), and so the Tribunal did not err by finding that the taxpayer failed to invoke the Tribunal's jurisdiction. *John Jameson v. City of Northville*, Mich. Ct. App., Dkt. No. 308961, 04/23/2013 (unpublished).

I. **Marketplace Fairness Act.** The U.S. Senate has passed S743, the Marketplace Fairness Act of 2013. S743 generally provides that states can require remote sellers (online and catalog retailers) to collect sales tax on goods shipped to consumers in the state. The bill provides an exception for small retailers that have gross annual receipts in total remote sales in the United States for the preceding calendar year of $1 million or less. The term "state" refers to the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any tribal organization (as defined in section 4 of the Indian Self-Determination and Education Assistance Act). The term "remote sales" refers to sales into states in which the seller would not legally be required to pay, collect, or remit state or local sales and use taxes except as provided under the Marketplace Fairness Act. The House of Representatives has not yet passed the Marketplace Fairness Act. President Obama has announced that he would sign this legislation.

J. **Transfer of Residential Property.** The Michigan State Tax Commission has issued a release explaining L. 2012, H4753 (P.A. 497), which provides that beginning with transfers that occur on December 31, 2013 and after, for purposes of the property tax cap, a transfer of residential real property is not a transfer of ownership if the transferee is related to the transferor by blood or affinity to the first degree and the use of the residential

real property does not change following the transfer of ownership. Residential real property is defined as real property classified as residential real under Mich. Comp. Laws Ann.§ 211.34c. Affinity to the first degree includes 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. The provisions of the act are not limited to homestead property, meaning the act applies any residential real property, regardless of residency, the application of a Principal Residence Exemption, or how many residential real parcels the taxpayer owns. The use of the property cannot change; assessors are instructed that any changes in the use of the property during their annual property classification review should be noted and any change in the use of the property should result in an immediate uncapping. (Michigan State Tax Commission Bulletin No. 2013-5, 05/13/2013.)

K. **Tax Lien Arising After Foreclosure Judgment**. The purchaser of a parcel of real property at a tax foreclose who purchased the property in September 2005 and recorded the deed in October 2005, was liable for property taxes assessed against the property for all of 2005, because the tax lien arose after the judgment of foreclosure. Mich. Comp. Laws Ann.§ 211.78k(5)(c) provides that all liens against foreclosed property are extinguished and Mich. Comp. Laws Ann.§ 211.78k(6) provides that a foreclosing governmental unit's title is not subject to any recorded or unrecorded lien. The liens existing on the property at the time of the judgment of foreclosure were extinguished and the treasurer took absolute fee simple title to the property. However, the tax lien that went into effect on July 1, 2005 clearly arose after the judgment of foreclosure and therefore is not extinguished by operation of law under Mich. Comp. Laws Ann.§ 211.78k(5)(c). Therefore the purchaser was liable for the 2005 taxes. In addition, the plain language of Mich. Comp. Laws Ann.§ 211.78m(11) and Mich. Comp. Laws Ann.§ 211.78m(12) support the tax tribunal's conclusion that the cancellation of taxes due under this statutory section applies only to a transfer of ownership of foreclosed property to the state, city, village, township or to a retaining foreclosing governmental unit and does not apply to a sale to a private party. *Elm Investment Co. v. City of Detroit*, Mich. Ct. App., Dkt. No. 309738, 05/14/2013 (unpublished).

L. Power of Attorney Must Be Strictly Construed And Cannot Be Extended By Construction. In *Bonar v. Department of Treasury*, Michigan Court of Appeals No. 310707 (May 30, 2013 - - Unpublished), the Michigan Court of Appeals, noting that, in Michigan, a power of attorney must be strictly construed and cannot be extended by construction, rejected a taxpayer's appeal in an officer liability case, which was based on the taxpayer's attorney not having received notice of the assessments, because the taxpayer's power of attorney identified the authorization as applying to a different entity than the assessments, and therefore the attorney was not entitled to notice.

M. Apportionment of Michigan Business Tax Under the Multistate Tax Compact.

1. Anheuser-Busch, Inc. The Michigan Court of Claims has held that the Multistate Tax Compact is a binding compact that cannot be repealed by a conflicting statute and so the taxpayer can elect to apportion its business income tax component of the Michigan Business Tax according to the three-factor apportionment formula under Article IV of the Compact. The court also found that the modified gross receipts tax component of the Michigan Business Tax is not an "income tax" under the Multistate Tax Compact and so cannot be apportioned according to the Multistate Tax Compact. *Anheuser-Busch, Inc. v. Michigan Department of Treasury*, Mich. Ct. Claims, Dkt. No. 11-85-MT, 06/06/2013. The

Michigan Supreme Court subsequently denied a request to review the Michigan Court of Claims decision. *Anheuser-Busch, Incorporated v. Department of Treasury*, Mich. S. Ct., Dkt. No. 147438-9 & (10), 08/02/2013.

2. International Business Machines Corp. On July 3, 2013, the Michigan Supreme Court granted the taxpayer's motion to review the Michigan Appellate Court decision in *International Business Machines Corp. v. Department of Treasury*, which denied the taxpayer the use of the Multistate Tax Compact's three-factor apportionment election. The Michigan Supreme Court ordered the following issues to be briefed: (1) whether the taxpayer could elect to use the apportionment formula provided in the Compact in calculating its 2008 Michigan Business Tax (MBT) liability (2) whether the MBT's apportionment provision, MCL 208.1301, repeals by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact. *International Business Machines Corp. v. Department of Treasury*, leave to appeal granted, Mich. Sup. Ct, No. 146440 (7/3/13).

N. Opt-Out From Flow-Through Withholding. The Michigan Department of Treasury has issued a release explaining how flow-through entities can opt-out of the state's flow-through withholding requirement. (Notice to Taxpayers Regarding Available Opt-Out from Flow-Through Withholding, Mich. Department of Treasury, 06/19/2013.) L. 2011, Public Act 38 expanded withholding obligations for flow-through entities under the Michigan Income Tax Act effective January 1, 2012. Specifically, Mich. Comp. Laws Ann.§ 206.703 requires a flow-through entity that meets certain thresholds to withhold tax on the distributive share of income of each nonresident individual, C corporation, or other flow-through entity. However, L. 2012, Public Act 217 and L. 2013, Public Act 15 create a broad exception to the withholding obligation of a flow-through entity so long as the flow-through entity receives an exemption certificate from a member other than a nonresident individual. To exercise this exception, a member must complete and provide an exemption certificate to the flow-through entity and certify that it will (i) file all returns required under the Michigan Income Tax Act, (ii) pay or withhold the tax required under the Michigan Income Tax Act on the distributive share of the business income received from the flow-through entity, and submit to the taxing jurisdiction of Michigan for purposes of collection of the tax under the Michigan Income Tax Act, including any interest and penalties. The member and the flow-through entity must each retain a copy of the exemption certificate but should not provide a copy to the Department except upon the Department's request. The Department may revoke the exemption certificate if the member or the flow-through entity is not abiding by the terms of the certificate or the requirements of Mich. Comp. Laws Ann.§ 206.703(16). Form 4912 (Certificate of Exemption for Flow-Through Withholding Payments) is for use by a C corporation or other flow-through entity member that elects to be exempt from withholding. Nonresident individuals may not make this election. The form can be found on the Department's website.

O. Irrevocable Trust Can Claim MBT Small Business Credit. An irrevocable trust is not subject to the Michigan Business Tax (MBT) small business alternative credit disqualifiers or reduction percentages applicable to individuals under Mich. Comp. Laws Ann.§ 208.1417(1)(a) and Mich. Comp. Laws Ann.§ 208.1417(1)(c). Under the MBT, the small business alternative credit is available to any taxpayers with gross receipts that do not exceed $20 million and with adjusted business income minus the loss adjustment that does not exceed $1.3 million as adjusted annually for inflation. However, an individual,

partnership, limited liability company, or S corporation is disqualified from claiming the credit if the individual or any owner of the listed entity receives more than $180,000 as a distributive share of the adjusted business income minus loss adjustment of the individual or listed entity. Also, the credit is subject to reduction percentages if the distributive share of the adjusted business income minus the loss adjustment of the individual, partnership, limited liability company, or S corporation is greater than $160,000 but less than or equal to $180,000. Since an irrevocable trust is not listed as being subject to the disqualifiers or reduction percentages, irrevocable trusts are not subject to the disqualifiers or reduction percentages listed under Mich. Comp. Laws Ann.§ 208.1417(1)(a) and Mich. Comp. Laws Ann.§ 208.1417(1)(c). However, the credit is not available to an irrevocable trust if the trust has gross receipts that exceed $20 million or has adjusted business income minus loss adjustment that exceeds $1.3 million as adjusted annually for inflation. (Michigan Letter Ruling No. 2013-3, 06/26/2013.)

P. Combined Reporting for Income From Flow-Through Businesses. In a consolidated action, the Michigan Supreme Court has held that individual taxpayers can combine the flow-through income from their businesses and then apportion the income using the businesses' combined apportionment factors, instead of apportioning the income of each entity separately. The Michigan Income Tax Act (ITA) does not limit apportionment of income to domestic businesses during the 1994 and 1995 tax years, and that the apportionment could properly be applied to a foreign entity to the extent that the foreign entity and the individual taxpayer's in-state business were unitary. *Malpass, et al. v. Department of Treasury*, Mich. S. Ct., Dkt. Nos. 144430-144432, 145367-145370, 06/24/2013.

Q. Michigan Defines "Actively Solicits" for Corporate Income Tax. Nexus is one of the tests a company must go through to determine whether it is required to file a return in Michigan. Under the Corporate Income Tax (CIT), a company will have nexus with Michigan if it actively solicits business in Michigan. Newly released Revenue Administrative Bulletin (RAB) 2013-9 has defined the term "actively solicits" for purposes of determining if a taxpayer has nexus with Michigan. The RAB defines "actively solicits" to mean either of the following: (i) speech, conduct, or activity that is purposefully directed at or intended to reach persons within this state and that explicitly or implicitly invites an order for a purchase or sale; or (ii) speech, conduct, or activity that is purposefully directed at or intended to reach persons within this state that neither explicitly nor implicitly invites an order for a purchase or sale, but is entirely ancillary to requests for an order for a purchase or sale. Active solicitation includes, but is not limited to, solicitation through: (i) the use of mail, telephone, and e-mail; (ii) advertising, including print, radio, internet, television, and other media; and (iii) maintenance of an internet site over or through which sales transactions occur with persons within Michigan. For example, Michigan has identified the following as forms of active solicitation: sending credit applications, sustaining an internet site with online shopping, services or subscriptions, distribution of mail order catalogs, and media advertising.

R. Same-Sex Couples Filing Joint Federal Income Tax Returns Must File Michigan Income Tax Returns as Single Filers. On June 26, 2013, the Supreme Court of the United States invalidated section 3 of the federal Defense of Marriage Act (DOMA) which had established a separate federal definition of marriage. Following the Court's decision, the Internal Revenue Service announced that it will accept joint returns from same-sex couples who have state-sanctioned marriages. The IRS will recognize those marriages based on the "state of celebration" instead of the "state of residency." The IRS

guidance affects same-sex couples with state-sanctioned marriages from other jurisdictions who are Michigan residents or who have income attributable to Michigan. Beginning with 2012 federal income tax returns that are filed after September 15, 2013, those couples can no longer claim "unmarried" status on their federal tax returns. Instead, they must file joint or married filing separately returns as married taxpayers. However, the Michigan Department of Treasury has announced that same-sex couples who file a joint federal income tax return must continue to file income tax returns for Michigan with each individual using the single filing status. The Michigan Income Tax Act limits a joint return to a married couple who are "husband and wife." Michigan has defined marriage under Article 1 section 25 of the Michigan Constitution as a union of one man and one woman. Under Michigan law the phrase "husband and wife" means a man and a woman who are married to each other. Each individual who has income attributable to Michigan and who has filed a joint return with the IRS as a same-sex couple must separately report adjusted gross income (AGI) for Michigan income tax as a single filer. Each individual must recalculate their federal adjusted gross income as if they had filed a single federal return. The Department will provide a worksheet on its website that can be used to recalculate income. Filing as single individual may affect the filer's eligibility for Michigan tax credits.

III. EMPLOYEE BENEFITS

A. 2013 Retirement Plan Limits. In general, many of the pension plan limitations changed for 2013 because the increase in the cost-of-living index met the statutory thresholds that trigger their adjustment. Other limitations were unchanged.

Plan Limits for Plan Year	2013	2012
401(k), 403(b), 457 Elective Deferral Limit	$17,500	$17,000
Catch-Up Contribution Limit	$5,500	$5,500
Annual Compensation Limit	$255,000	$250,000
Defined Contribution Limit	$51,000	$50,000
Defined Benefit Limit	$205,000	$200,000
Key Employee	$165,000	$165,000
Definition of Highly Compensated Employee	$115,000	$115,000
Social Security Wage Base	$113,700	$110,100

B. Employer Could Withdraw From Multiemployer Defined Benefit Plan in Critical Status. In *Trustees of the Local 138 Pension Trust Fund v. F.W. Honerkamp Co. Inc.*, Docket No. 11–1322–cv (2d Cir. Aug. 17, 2012), the Second Circuit Court of Appeals held that the Pension Protection Act of 2006 (PPA; P.L. 109-280) did not prevent an employer from withdrawing from a multiemployer defined benefit plan after the plan entered critical status. The court noted that it knew of no other court (other than the lower district court) that had considered whether the PPA prohibited employers from withdrawing from multiemployer pension plans in critical status. The court also noted that the PPA was silent on the issue. The court stated it was necessary, as part of statutory interpretation, to look at Congressional intent by reviewing the text and structure of the statute. Although there is no explicit statement in the PPA of an employer's right to withdraw, the court found that the statute did appear to assume that there would be withdrawals in these circumstances by revising the calculation of withdrawal liability when the plan withdrawn from was in critical status. Specifically, ERISA §305(e)(9) provides that the calculations of an employer's withdrawal liability should disregard contribution surcharges and benefit reductions imposed automatically by a rehabilitation plan once a plan enters critical status.

C. Exception to Anti-Cutback Rule for Elimination of Payment Options During Bankruptcy. The IRS has issued final regulations (T.D. 9601) that provide a limited exception to the anti-cutback rules to permit a plan sponsor that is a debtor in a bankruptcy proceeding to amend its single-employer defined benefit plan to eliminate a single-sum distribution option (or other optional form of benefit providing for accelerated payments) under the plan if certain specified conditions are satisfied.

D. Deadline to Amend a Defined Benefit Plan to Satisfy Section 436 Extended. The deadline to adopt an interim amendment for Section 436 has been extended by IRS Notice 2012-70 to the latest of: (a) the last day of the first plan year that begins on or after January 1, 2013, (b) the last day of the plan year for which Section 436 is first effective for the plan, or (c) the due date (including extensions) of the employer's tax return for the tax year ... that contains the first day of the plan year for which Section 436 is first effective for the plan. However, if an application for a determination letter for an individually designed plan is filed on or after February 1, 2013 (or, in the case of a plan described in section 104 or 105 of PPA '06, as amended, the first day of the plan year for which Section 436 is first effective for the plan, if later), the restated plan submitted with the application must incorporate an amendment with respect to Section 436.... The notice also provides that a plan amendment adopted with respect to Section 436 that eliminates or reduces a Section 411(d)(6) protected benefit does not cause the plan to fail to meet the anti-cutback requirements of Section 411(d)(6) if the amendment is adopted by the deadline described above and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of Section 436.

E. Differences in Types of Plan Disqualification. Disqualification of a qualified plan can cause serious tax consequences for the plan trust, the employer and the participants. However, some plan disqualifications are more serious than others. If one of the reasons the IRS disqualifies the plan is its failure to satisfy the coverage or nondiscrimination requirements (or, for defined benefit plans, the minimum participation requirements of Code 401(a)(26)), the highly compensated employee (HCE) must include in gross income, for his/her taxable year in which the plan's trust taxable year ends, the total value of his/her vested account balance (accrued benefit for a defined benefit plan) determined as of the close of the trust's taxable year. By contrast, in a typical plan disqualification (not involving coverage or nondiscrimination), a participant only will include

in gross income contributions (to the extent vested) made during the disqualified years. The more serious form of plan disqualification was recently illustrated in a Tax Court case. In *Yarish v. Commissioner*, 139 T.C. 11 (2012), Dr. Yarish, a plastic surgeon, owned five separate medical practices. He formed a management company and received consulting fees from each of the medical practices. The management company established an ESOP that owned 90% of the stock of the management company. The only participant in the ESOP was Dr. Yarish. The IRS determined that the consulting practice was related to the medical practices. Consequently, the plan failed coverage and the IRS included in gross income his entire $2,439,503 account balance. The IRS also assessed $619,540 of other taxes and accuracy-related penalties against Dr. Yarish for issues related to this case.

F. Update and Restatement of the Employee Plans Compliance Resolution System. The IRS has issued Rev. Proc. 2013-12 updating the comprehensive system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of Section 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code. This system, known as the Employee Plans Compliance Resolution System ("EPCRS"), permits plan sponsors to correct failures on a tax-favored basis. The components of EPCRS are the Self-Correction Program ("SCP"), the Voluntary Correction Program ("VCP"), and the Audit Closing Agreement Program ("Audit CAP"). This revenue procedure modifies and supersedes Rev. Proc. 2008-50, 2008-2 C.B. 464, the prior consolidated statement of the correction programs under EPCRS.

G. Next Round of Qualified Defined Contribution Plan Restatements.

1. Pre-Approved Plans.

The first six-year restatement cycle for pre-approved (i.e., prototype or volume submitter) defined contribution plan documents ended on April 30, 2010. This was the deadline for employers to re-adopt pre-approved plan documents that reflected the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Since then, adopting employers have simply had to adopt occasional interim or discretionary amendments to keep their plan documents in compliance with new laws and regulations. However, the second six-year restatement cycle officially got underway on February 1, 2011, when the IRS opened its doors for document providers to submit restated documents for approval. This submission period ended on April 2, 2012, and the IRS is now reviewing those documents. Based on the EGTRRA restatement experience, the IRS is expected to issue opinion and advisory letters for these documents (commonly referred to as "PPA restatements" since the major changes reflected in these documents are those made by the Pension Protection Act of 2006 (PPA)) in early 2014. Once those letters are issued, adopting employers will have approximately two years to re-adopt those documents:

Sponsoring Organization Submits to IRS for Review and Approval	02/01/11 – 04/02/12
IRS Review and Approval Period	04/02/12 – 04/30/14 (est.)
Employer Re-Adoption Period	05/01/14 – 04/30/16 (est.)

2. Individually Designed Plans.

Employers that have individually-designed plan documents are subject to a different five-year restatement cycle. Their PPA restatement deadlines are determined by either their Employer Identification Number (EIN) or special situation. Some of these plans have already been submitted for PPA determination letters, as indicated below:

Cycle	Last Digit Employer EIN	Special Situations	Filing Period
A	1 or 6		02/01/11 - 01/31/12 (CLOSED)
B	2 or 7	Multiple Employer Plans (Not Governmental)	02/01/12 - 01/31/13 (CLOSED)
C	3 or 8	Most Governmental Plans (see Cycle E Special Situations, below)	02/01/13 - 01/31/14
D	4 or 9	Multiemployer/Taft-Hartley Plans (Not Governmental)	02/01/14 - 01/31/15
E	5 or 0	Governmental Plans that take advantage of special option offered by Rev. Proc. 2012-50	02/01/15 - 01/31/16

H. Defined Benefit Plan Amendment. In Announcement 2013-37, the IRS extended to January 31, 2014, the deadline to submit on-cycle applications for opinion and advisory letters for sponsors and practitioners maintaining defined benefit mass submitter lead plans for the plans' second six-year remedial amendment cycle. Under Rev. Proc. 2007-44, 2007-2 C.B. 54, and Rev. Proc. 2011-49, 2011-44 I.R.B. 608, the submission period for these applications was scheduled to expire October 31, 2013.

I. New Enforcement and Reporting Rules Applicable to Multiple Employer Welfare Arrangements (MEWAs). On March 1, 2013, the Department of Labor published two sets of final regulations relating to multiple employer welfare arrangements (MEWAs) - one containing enforcement rules and the other reporting requirements. (In general, a MEWA is any arrangement which is established or maintained for the purpose of offering or providing health or other welfare benefits to the employees of two or more employers). Previously, the DOL's primary enforcement tool against fraudulent and abusive MEWAs was court-ordered injunctive relief. Now, ERISA permits the DOL to issue cease and desist orders, without prior notice or a hearing, when it appears that a MEWA has engaged in conduct which: (i) is fraudulent; (ii) creates an immediate danger to the public safety or welfare; or (iii) causes or can be expected to cause significant, imminent and irreparable public injury. The DOL is also authorized to issue a summary order to seize the assets of a MEWA that the DOL determines to be in a financially hazardous condition. The final regulations set forth procedures that the DOL will follow to issue cease and desist and summary seizure orders. The regulations provide that a cease and desist order may apply to MEWAs and to persons having custody or control of assets of the MEWA, authority over management of a MEWA, or any role in the transaction of a MEWA's business. Thus, a cease and desist order or summary seizure order could apply to a third party administrator. For purposes of the enforcement rules, a MEWA is an arrangement, as defined in ERISA, that either is an ERISA plan or offers benefits in connection with one or more ERISA plans.

The regulations expressly exclude an health insurance issuer and/or HMO that is licensed to provide health insurance to the public and employers from the definition of a MEWA.

J. **Changes to 401(k) Plan Deduction Rules?** In Private Letter Ruling 201229012, the IRS ruled that a plan does not include the compensation of a participant who is only eligible for the elective deferral portion of the plan (i.e., not benefiting under the nonelective or matching portions of the plan). The IRS based its conclusion on the fact that Code §404(n), as added by EGTRRA, disregards elective deferrals when applying the 25% deduction limit. The IRS concluded that since elective deferrals are disregarded in applying the deduction limits, a participant who is only benefiting under the elective deferral portion of the plan should be disregarded when determining which employees are beneficiaries under the plan for purposes of applying the deduction limits. The ruling interprets Code §404(a)(3)(A)(i) which limits defined contribution deductions to "25 percent of the compensation otherwise paid or accrued during the taxable year to the beneficiaries under the stock bonus or profit-sharing plan."

K. **IRS Issues 403(b) Plan Fix-It Guide.** On February 21, 2013, the Internal Revenue Service (IRS) added to its "self-help" resources a new "403(b) Plan Fix-It Guide" to provide guidance more specifically directed at 403(b) plan sponsors that identify qualification or operational plan failures under their 403(b) plans. Additionally, the IRS issued as a companion piece a booklet entitled "Voluntary Correction Program Submission Kit," which provides more detailed directions to 403(b) plan sponsors on how to complete and file a correction filing with the IRS specifically relating to the failure to adopt a written 403(b) plan document. This new "fix-it" tool addresses 10 potential errors (likely the most common 403(b) plan errors), including, but not limited to, ineligible organizations offering 403(b) plans, failure to adopt a written plan document as required by the final 403(b) regulations, violation of the universal availability rule, failure to appropriately limit elective deferrals and failure to follow the underlying terms of the plan document. Although these types of failures are not necessarily new (i.e., they could have occurred in prior years), the IRS is slowly bringing 403(b) plans under more scrutiny as the dollars being contributed to these types of plans continue to increase. The IRS is developing more expertise in this area and is training more agents to be able to identify the particular differences between 401(k) plans and 403(b) plans, and the specific nuances and legal requirements of operating 403(b) plans. Since the 403(b) regulations were issued in 2007, this is the first step in which the IRS is taking a more active role to ensure compliance under these types of plans. Revenue Procedures 2013-12 (Employee Plans Compliance Resolution System, or EPCRS) may be used with respect to any 403(b) plan corrections going forward. It incorporates in greater detail the "403(b) Plan Fix-It Guide." Although prior EPCRS guidance such as Revenue Procedure 2008-50 was often applied to 403(b) plans by analogy for correcting errors, new Revenue Procedure 2013-12 is drafted to be directly applicable to 403(b) plans. Consequently, given the IRS movement toward greater scrutiny of 403(b) plans, tax-exempt organizations that have not recently conducted any type of internal compliance review are encouraged to review, at a minimum, the mistakes highlighted in the "403(b) Plan Fix-It Guide" to determine whether greater analysis is required with respect the compliance and operation of their 403(b) plans.

L. **Unjust Enrichment' Defense Did Not Override Terms of Health Plan Document**. In *U.S. Airways, Inc., in its Capacity as Fiduciary and Plan Administrator of the U.S. Airways, Inc. Employee Benefits Plan V. McCutchen et al.*, No. 11–1285, decided April 16, 2013, the health benefits plan established by petitioner U.S. Airways paid $66,866 in medical expenses for injuries suffered by respondent McCutchen, a US Airways employee,

in a car accident caused by a third party. The plan entitled U.S. Airways to reimbursement if McCutchen later recovered money from the third party. McCutchen's attorneys secured $110,000 in payments, and McCutchen received $66,000 after deducting the lawyers' 40% contingency fee. U.S. Airways demanded reimbursement of the full $66,866 it had paid. When McCutchen did not comply, U.S. Airways filed suit under §502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes health-plan administrators to bring a civil action "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." McCutchen raised two defenses to U.S. Airways' request for an equitable lien on the $66,866 it demanded: (i) that, absent over-recovery on his part, U.S. Airways' right to reimbursement did not kick in; and (ii) that U.S. Airways had to contribute its fair share to the costs he incurred to get his recovery, so any reimbursement had to be reduced by 40%, to cover the contingency fee. Rejecting both arguments, the District Court granted summary judgment to US Airways. The Third Circuit vacated. Reasoning that traditional "equitable doctrines and defenses" applied to §502(a)(3) suits, it held that the principle of unjust enrichment overrode US Airways' reimbursement clause because the clause would leave McCutchen with less than full payment for his medical bills and would give US Airways a windfall. There are a number of lessons to be learned from the Court's McCutchen decision. First, plan sponsors may want to review their reimbursement language to make clear precisely how it is intended to apply. A well-drafted provision should address first-dollar recovery, whether the plan is going to share in the legal fees incurred in pursuing the recovery, and many other issues. As McCutchen makes clear, a well-drafted reimbursement provision will be enforced as written. Second, plan sponsors should keep in mind the reality that a completely one-sided reimbursement provision may give a participant (and the participant's attorney) little incentive to bring a lawsuit against a third party which, in turn, will mean no reimbursement for the plan. Thus, a plan sponsor may want to include language in the reimbursement provision stating that it is willing to consider alternative arrangements in individual cases, but that those arrangements must be negotiated in advance. Third, McCutchen reaffirms that the plan is the operative document, and that the SPD is simply a communication about the plan. Thus, if a plan sponsor wants to be able to enforce a reimbursement provision, the plan sponsor should make sure that provision is part of the plan, and not just the SPD. In this regard, McCutchen is the exception that proves the rule. In McCutchen, the reimbursement provision appears to have been in the SPD rather than the plan, but the Court stated it was overlooking that problem because the parties and the two lower courts had all treated the reimbursement provision as if it were part of the actual plan. Other plan sponsors may not be so lucky. Fourth, while the Court's decision is good news for plan sponsors because it reaffirms the primacy of the plan document, it is not entirely clear how those statements are to be squared with the Court's decision just last term in *CIGNA Corp. v. Amara*. In that case, a majority of the Court suggested that in a lawsuit brought under § 502(a)(3) the terms of the plan are not necessarily controlling, and that participants might be able to recover amounts above and beyond those provided in the plan using theories such as estoppel or surcharge. It will be up to the lower courts to reconcile those two positions.

M. FASB Disclosure Requirements: Employer Participation in Multiemployer Plan. The Financial Accounting Standards Board (FASB) issued Accounting Standards Update No.2011-09, Compensation--Retirement Benefits--Multiemployer Plans (Subtopic 715-80): Disclosures about an Employer's Participation in a Multiemployer Plan (Posted 9/28/11). As announced July, the new required disclosures include: (i) the amount of employer contributions made to each significant plan and to all plans in the aggregate; (ii) an indication of whether the employer's contributions represent more than five percent of total contributions to the plan; (iii) an indication of which plans, if

any, are subject to a funding improvement plan; (iv) the expiration date(s) of the collective bargaining agreement(s) and any minimum funding arrangements; (v) the most recent certified funded status of the plan, as determined by the plan's so-called "zone status," which is required by the Pension Protection Act of 2006 (if the "zone status" is not available, an employer will be required to disclose whether the plan is less than 65 percent funded, between 65 percent and 80 percent funded, or at least 80 percent funded); and (vi) a description of the nature and effect of any changes affecting comparability for each period in which a statement of income is presented. Prior to the issuance of this Update, employers were required to disclose only their total contributions to all multiemployer plans in which they participate. For public entities, the enhanced disclosures will be required for fiscal years ending after December 15, 2011. For nonpublic entities, the enhanced disclosures will be required for fiscal years ending after December 15, 2012. Early application will be permitted.

N. DFVCP Update. The U.S. Department of Labor (DOL) has published an updated version of its Delinquent Filers Voluntary Compliance Program (DFVCP). This is the first comprehensive update made to the program since 2002. The majority of the changes are a result of the DOL's migration to a fully electronic filing system for Form 5500. Paper filings will no longer be accepted for late filers under DFVCP.

1. Background. The DFVCP was created in 1995 to encourage employers to voluntarily submit late Form 5500 filings to the DOL in return for a reduced penalty fee. Eligibility for the program is limited to employers who have not been notified in writing that they have failed to timely file an annual report. Program eligibility is limited to plans subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Thus, employers filing Form 5500-EZ are not eligible. Since plans filing a Form 5500-EZ are not under Title I of ERISA, they fall under IRS jurisdiction. The IRS has been working on the Form-5500-EZ delinquent filer program and hopefully it will be announced this year or next year. Plan sponsors who fail to file Form 5500 on a timely basis can be subject to civil penalties under Section 502(c)(2) of ERISA and penalties under the Internal Revenue Code.

2. Delinquent Filings for 2008 and Earlier Plan Years. Filers must use the most current year EFAST2 forms and schedules, attaching a pdf image file of the correct year's Schedules B, DB, MB, E, P, R, and T, as applicable. The correct plan year dates should be entered at the beginning of Form 5500. Form 5500-SF cannot be used when filing a delinquent annual report for any plan year beginning before January 1, 2009, as the form did not exist prior to 2009.

3. Delinquent Filings for 2009 and Later Plan Years. Filers must use the correct plan year form and schedules unless the filing is for a plan year more than three years old. Moving forward, the EFAST2 system capability will allow for the processing of current year forms and the three prior plan years. Historically, the majority of filings submitted under DFVCP filings have been no more than three years late, so the DOL expects that the majority of delinquent filers will be able to use the correct year form and schedules. When a delinquent filing is for a plan year that is more than three years old, the most current version of Form 5500/5500-SF and schedules must be used. There is an exception for a delinquent defined benefit plan filer that requires a correct year Schedule SB or Schedule MB to be attached as a pdf image file.

4. Schedule C Changes. New and expanded Schedule C reporting requirements were introduced for the 2009 plan year regarding service provider fees and indirect compensation received from certain sources. Thus, when filing for plan years prior to 2009, delinquent filers may attach a pdf image file of the correct year's Schedule C rather than attempt to complete the more detailed Schedule C that began in 2009.

5. 403(b) Plans. 403(b) plans subject to Title I of ERISA had limited reporting requirements prior to the 2009 plan year. Delinquent filings for plan years prior to 2009 are permitted to use the current EFAST2 form but are only required to address the few questions required to be answered under the limited reporting requirements applicable to the prior 2009 Form 5500 filings.

6. Schedule SSA and IRS Form 8955-SSA. These forms cannot be submitted to the DOL under the DFVCP. They must be submitted directly to the IRS.

7. Online Payment of Penalties. The DOL provides an online calculator for determining applicable penalty amounts and an electronic penalty payment system. Filers who elect to pay a DFVCP penalty by check must also include a paper copy of Form 5500 (without schedules) that had been filed with EFAST2. Filers who pay electronically are not required to mail paper copies of Form 5500.

8. Additional Support. The DOL has created an online tool to help filers determine the appropriate Form 5500/5500-SF and schedules to use when filing delinquent or amended reports under EFAST2.

9. Daily Penalties. The DFVCP penalty is $10 per day. The penalty starts from when the form was due, without extensions. So, if a Form 5558 is filed to extend the filing due date, and the form is not filed by the extended due date, then the penalty is calculated from the original due date, without the extension.

10. Small Plan Filer Cap. If the plan is a small plan (less than 100 participants or by 80-120 participants under the alternate rule), the maximum penalty for a single late Form 5500 or 5500-SF is $750. For multiple years, the maximum is capped at $1,500 per plan. This cap is only available if for all delinquent years the plan was a small plan.

11. Large Plan Filer Cap. If the plan is a large plan (100 or more participants or under the 80-120 rule), the maximum penalty for a single late Form 5500 or 5500-SF is $2,000. For multiple years, the maximum is capped at $4,000 per plan.

12. Special Cap for Tax-exempt Employers. If a small plan is sponsored by a tax-exempt entity, the per-plan cap is $750 per DFVCP submission, provided that during all years that are late the plan was a small plan.

13. DFVCP relief requires the filing of all the delinquent forms and payment of the fee. Approval under the DFVCP is accepted by the IRS as well as the DOL. Thus, no penalties would be due to the IRS or the DOL when the DFVCP filing has been approved by the DOL. The reason the DFVCP is so important is that the reduced fees under DFVCP are substantially less than the statutory fees the IRS and the DOL may assess. IRS penalties apply to plans subject to the filing requirements under Code Section 6058. Generally, these include all qualified plans, funded deferred compensation plans, and

Code Sec. 6039D plans, which are fringe benefit plans. The IRS penalty (under Code Sec. 6652(e)) is $25 a day with a maximum of $15,000 (which would occur after 600 days) for a required plan year filing. The IRS would have to demand the penalty but has the ability to excuse or reduce the penalty for a reasonable cause. The "reasonable cause" statement may be attached with a late filing of a Form 5500 or in response to the late filing penalty assessment. The penalty may be imposed on the employer or plan administrator depending on who is responsible for the filing. The IRS may also disqualify a plan that fails to comply with the reporting requirements. The DOL can access a civil penalty of up to $1,100 per day (cost-of-living adjusted from $1,000) with no limit under ERISA Sec. 502(c)(2). Normally, the DOL assesses $300 per day (up to $30,000 per year) for a late filer until a completed form is filed. The penalty is imposed on the plan administrator. The DOL may impose a penalty on a timely filed form that has items missing. For example, $150/day for missing auditors report up to a $50,000 cap; $100/day for missing financial reporting items with a maximum of $36,500; and $10/day for other report items capped at $3,650. The fee for missing Schedules SB/MB (or prior to 2008 Schedule B) is a flat $1,000 regardless of how late the form (Code Sec. 6692). Form 8955-SSA or the old Schedule SSA is based on the number of participants reported on the schedule, and the fee is $1/participant not included up to $5,000 per plan year (Code Sec. 6652(d)). If any other schedules are missing, Form 5500 is considered incomplete and the penalties above for not filing apply.

O. Prohibited Transactions With IRAs. In *Lawrence F. Peek et ux. et al. v. Commissioner*; 140 T.C. No. 12; Nos. 5951-11, 6481-11, the Tax Court, sustaining accuracy-related penalties, held that two individuals engaged in prohibited transactions by personally guaranteeing loans to a company owned by their IRAs and that as a result, the accounts that held the company's stock ceased to be IRAs and the individuals were liable for taxes on the gain from the sale of the company's stock. Lawrence Peek and Darrell Fleck participated in a joint business venture to purchase a fire safety company. Peek and Fleck each established IRAs into which they rolled over funds from other retirement accounts. In 2001 they set up a new corporation, the FP Co., and their IRAs each acquired 50 percent of the shares of the new corporation. FP Co. then purchased the fire safety company, in part with loans that were personally guaranteed by Peek and Fleck. In 2003 and 2004, Peek and Fleck rolled over their FP Co. stock into Roth IRAs. In 2006 the Roth IRA sold the FP Co. stock at a gain. The IRS sent Peek and Fleck notices of deficiency finding them liable for accuracy-related penalties and taxes on the gain they received from the stock sale. Tax Court Judge David Gustafson found that Peek and Fleck engaged in prohibited transactions under section 4975(c)(1)(B), which prohibits any direct or indirect extension of credit between a retirement plan and a disqualified person. The court held that the loan guarantees made on behalf of FP Co. were indirect extensions of credit by Peek and Fleck -- disqualified persons -- to the IRAs through FP Co. The court further held that the IRAs ceased to qualify as IRAs when the prohibited transaction occurred in 2001 and that the prohibited transactions continued because a loan guarantee persists until the loan is repaid. When Peek and Fleck attempted to convert the IRAs to Roth IRAs, the Roth IRAs also failed to qualify because of the prohibited transactions. The court concluded that the gain from the sale of FP Co. stock was taxable as capital gain to Fleck and Peek as the creators and beneficiaries of the accounts. The court also held Peek and Fleck liable for accuracy-related penalties on the resulting tax underpayments, finding that they were negligent in failing to report the gain on the stock sale because they were advised that prohibited transactions could result in the disqualification of the accounts as IRAs. The court further found that they had not reasonably relied on their accountant's advice or acted in good faith in failing to report the gains.

P. Multiemployer Plan Withdrawal Liability. Under ERISA Section 4001(b)(1), all employees of "trades or businesses" (whether or not incorporated) that are under common control are treated as employed by a single employer and all such trades and businesses are treated as a single employer. Based upon that section, the courts have long held that each "trade or business" under common control with an employer contributing to a multiemployer plan is jointly and severally liable, along with that employer, for the employer's withdrawal liability. See, e.g., *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986). This is the case even though the various trades and businesses may have nothing in common except ownership. In *Central States, Southeast and Southwest Areas Pension Fund v. Nagy*, 2013 U.S. App. LEXIS 7912 (7th Cir. 2013), the Seventh Circuit Court of Appeals held an individual personally liable for withdrawal liability because the individual owned the stock of the withdrawing corporate employer and also engaged in activities that qualified as trades or businesses by (i) owning and leasing property to the employer; and (ii) providing management services as an independent contractor. In 2007, Ready Mix stopped using Teamsters labor and ended its participation in the Fund. This action constituted a complete withdrawal from the Fund, resulting in the Fund's assessing Ready Mix withdrawal liability of approximately $3.6 million. Earlier, in 1972, Ready Mix purchased property to serve as its base of operations. In 1986, the property was conveyed to the owner, Charles F. Nagy, who then leased the property back to Ready Mix pursuant to a triple-net lease that made Ready Mix responsible for utilities, insurance and tax payments, in addition to maintenance and repair. Though Nagy owned the property individually, it remained the primary facility for Ready Mix. The district court held that Nagy's leasing activity was a passive investment and not a trade or business. The court of appeals disagreed, holding that a bright-line "categorical" rule applies when a property owner in common control with a withdrawing employer leases property to that employer: the leasing activity is categorically a trade or business within the meaning of Section 4001(b)(1). In addition, from the early 1990s through 2005, Nagy managed the operations of a country club, of which Nagy was a director, shareholder and president. In 2005, when the club's board of directors decided to sell the club's golf course, Nagy took the lead in preparing the sale. After the sale, he continued to manage the club's remaining assets, working from his home. Nagy was paid for these services as an independent contractor, without payroll deductions, as reflected on Forms 1099-MISC for tax years 2005, 2006, 2007 and 2008. Nagy reported this income, which exceeded $200,000 in total, on Schedule C of his federal income tax returns. The Seventh Circuit affirmed the district court's decision that Nagy provided management services to the club as an independent contractor. In rejecting Nagy's argument that he was an employee of the club, the court relied primarily on the method and form by which Nagy was paid. Instead of receiving a salary through a payroll system, Nagy was paid on an hourly basis with no withholdings or fringe benefits, and was only given Forms 1099-MISC to document the compensation. The court noted that in previous cases, Form 1099 tax treatment weighs heavily in favor of independent-contractor status. Accordingly, Nagy's management services activity was also found to be a trade or business under common control with Ready Mix, and was a second reason for his personal liability for Ready Mix's withdrawal liability.

Q. 403(b) Program Creates Concerns About Future of Individually Designed Plans. In Revenue Procedure 2013-22, which established a preapproved plan document program for Section 403(b) plans, the IRS stated that due to "limited resources" it did not "contemplate the issuance of individual determination letters to sponsors of § 403(b) plans" (61 PBD, 3/29/13; 40 BPR 813, 4/2/13). This was unexpected, because in a draft version of the revenue procedure released in 2009, IRS had indicated that it would offer a

determination letter program for individually designed 403(b) plan documents (70 PBD, 4/15/09; 36 BPR 941, 4/21/09). Many tax-exempts are likely to face challenges because they tend to have highly customized 403(b) plans. Plans discovered to have problems still have the remedial amendment period. They can also take advantage of the IRS's voluntary correction programs under the Employee Plans Compliance Resolution System.

R. Required Annual Fee Disclosure. On October, 20, 2010, the Employee Benefits Security Administration (EBSA) published a final regulation on disclosure requirements for participant-directed individual account plans (29 CFR § 2550.404a-5). The regulation requires that plan administrators disclose detailed investment-related information to plan participants and beneficiaries about the plans' designated investment alternatives. Covered plans operating on a calendar-year basis had to furnish a comparative chart of the investment alternatives for the first time no later than August 30, 2012, and subsequently "at least annually thereafter. The regulation defines "at least annually thereafter" to mean at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis. This timing requirement was intended to ensure that participants and beneficiaries receive consistent and regular information about their plan's investment alternatives. In Field Assistance Bulletin No. 2013-02, EBSA said that a plan administrator may furnish the "2013 comparative chart" no later than 18 months after the prior comparative chart was furnished. For example, if a plan administrator furnished the first comparative chart on August 25, 2012, the "2013 comparative chart" would be due no later than August 25, 2013. In accordance with this Bulletin, however, the Department will take no enforcement action based on timeliness if the plan administrator furnishes the "2013 comparative chart" by February 25, 2014.

S. PBGC Proposed Regulations would Simplify and Coordinate Premium Rate and Payment Rules. Under current rules, for a plan terminating in a standard termination, the final premium may be due months after the plan is terminated. The proposed rule creates a new premium due date for terminating plans that coordinates with the final step in a standard termination. As a practical matter, this accelerates the premium deadline for terminating plans that close out within the first six and one-half months of the final year. However, the PBGC is also proposing to exempt plans from variable-rate premiums for the final year (even if the termination date comes within that year), which reduces the burden of computing a variable-rate premium under this accelerated deadline.

T. Effect of Windsor on Favorable Determination Letters. The IRS indicated in the September 13, 2013 Edition of Employee Plan News that favorable determination letters do not rule on Defense of Marriage Act language, and that as of September 9, 2013, letters will include a caveat that the IRA has not made any determination about plan language (including any amendments) related to Section 3 of DOMA or *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated that section.

U. ERISA Definition of Marriage Includes Same-Sex Persons Validly Married in State Where Marriage Was Celebrated. In Technical Release No. 2013-04, the Department of Labor said that the term "spouse" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages. Similarly, the term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state law. The terms "spouse" and "marriage," however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage

under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law.

V. Possible Effects of Windsor. As a result of *Windsor*, employers will need to review their employee benefits (including retirement, health, and fringe benefits) and payroll practices to comply with the new law. Some possible effects on retirement benefits are set forth below:

		DOMA	Post-DOMA
1.	Qualified Joint and Survivor Annuity (Qualified Plans and ERISA 403(b) Plans Subject to Annuity Rules	Same-sex spouse treated as nonspouse beneficiary – not required to consent to single life annuity, lump sum, *etc.*, payouts.	Same-sex spouse now entitled to 50-percent survivor annuity protection (and participant may elect 75-percent survivor annuity), unless consent to another form of payment
2.	Qualified Preretirement Survivor Annuity (Qualified Plans and ERISA 403(b) Plans Subject to Annuity Rules)	Same-sex spouse not treated as spouse for qualified pre-retirement survivor annuity protection (though plan may allow)	Same-sex spouse now entitled to 50-percent survivor annuity protection unless consent to waive (where plan doesn't subsidize cost)
3.	401(k) and ERISA 403(b) Plans Not Subject to Annuity Rules – Payment of Account Balance at Death	Same-sex spouse treated as nonspouse beneficiary-not required to consent to another beneficiary designated by participant	Same-sex spouse now entitled to 100 percent of account balance at death unless consent to another beneficiary
4.	Hardship Distribution (401(k) and 403(b) Plans	If plan allows, participant may designate same-sex spouse as primary beneficiary when electing hardship distribution for medical, tuition and funeral expenses of such spouse	Plans now required to recognize same-sex spouse as spouse or primary beneficiary (for medical tuition and funeral expense purposes) for purposes of these hardship distributions
5.	Rollovers (All plans)	Same-sex spouse may make direct rollover onto to an inherited IRA	Same-sex spouse now able to roll over plan distribution to own IRA or employer plan account
6.	Loans and Spousal Consent (All plans)	Same-sex spouse is not required to consent to a plan loan or a plan distribution	Same-sex spouse must consent to a plan loan (for pension plans). Similarly, all Plans that require spousal consent to a Plan distribution (or loan) will now need consent from the same-sex spouse
7.	QDROs (All plans)	Same-sex spouse does not have rights of "alternate payees" to obtain QDROs awarding share of participant's benefits	Same-sex spouse now able to obtain QDRO (consistent with state law)
8.	Controlled Group/Testing (All plans)	The same-sex spouse was generally not taken into account	The family attribution rules under Code Sex. 414 now must take into account a same-sex spouse. Similarly, the constructive ownership of stock under Code Sec. 318 must now take into account a

		DOMA	Post-DOMA
			same-sex spouse. This implicates "highly compensated employee" determination for non-discrimination testing, and "key employee" status for top heaving testing.
9.	Maximum Benefit Limitations (Defined Benefit and Money Purchase Pension Plans)	The benefits payable to an opposite-sex surviving spouse under a qualified joint and survivor annuity are not included in Code Sex. 415(b) testing. However, benefits payable to a same-sex surviving spouse are included in applying the Code Sex. 415(b) limited at the time of a participant's benefit commencement	The benefits payable to a same or opposite-sex surviving spouse are not included in Code Sec.4159b) testing.
10.	Other ERISA Provisions (All plans)	The same-sex spouse was generally not taken into account	The same-sex spouse must now be considered in a number of other respects under ERISA, such as (1) eligibility for one participant plan exception, (2) ERISA disclosures to spouses, (3) party in interest/disqualified person status, (4) right to bring benefit claims, and (5) prohibited transaction class exemptions

IV. HEALTH CARE

A. Guidance Issued on Essential Health Benefits and Other Individual and Small Group Market Reforms. The U.S. Department of Health and Human Services (HHS) has issued two sets of proposed regulations issued under the Affordable Care Act (ACA) that will affect the design, availability, and cost of health insurance plans, primarily in the individual and small group markets. Most significantly, HHS has published proposed regulations defining the "essential health benefits" that must be included in insurance plans in these markets. These regulations address cost-sharing limits and the valuation of coverage. The second set of regulations addresses specific insurance market reforms. All of this guidance generally takes effect in 2014.

B. Final Regulations on the Fees Imposed to Fund the Patient-Centered Outcomes Research Institute. The Department of Treasury issued final regulations on the fees imposed to fund the Patient-Centered Outcomes Research Institute ("PCORI"), a private non-profit corporation that gathers research-based information to assist patients, practitioners and policy makers in making informed health care decisions. The fees, to be paid by issuers of health insurance policies and sponsors of self-insured health plans, were instituted as part of the Patient Protection and Affordable Care Act ("PPACA" or "Health Care Reform"). They apply to policy and plan years ending on or after October 1, 2012 and before October 1, 2019. The PCORI fee is $2 times the average number of covered lives during the plan year that ends before October 1, 2014 ($1 per covered life for plan years ending before October 1, 2013). After 2014, the fee will increase based on increases in the

projected per capita amount of National Health Expenditures. The plan sponsor pays the fee. The fee applies to lives covered under an "applicable self-insured health plan," which is defined as any plan for providing accident or health coverage if any portion of the coverage is provided other than through an insurance policy. stand-alone dental and vision plans – are exempt from the fee, as are health flexible spending accounts ("health FSAs") that are excepted benefits. A health FSA is an excepted benefit if (i) the maximum benefit that is available to a participant in any given year is not more than two times his or her salary reduction (or, if greater, his or her salary reduction plus $500), and (ii) major medical coverage is made available that same year to employees participating in the health FSA. Health Reimbursement Arrangements ("HRAs") are not exempt. However, the rules provide that when covered lives are counted for purposes of determining the fee under an HRA or a non-exempted health FSA, only the covered employee (and not his or her dependents) must be counted. Employee assistance programs ("EAPs"), wellness programs and disease management programs are exempt if the program does not provide significant benefits in the nature of medical care or treatment. The regulations don't define "significant benefits" for this purpose. Retiree-only medical plans are subject to the fee. Federal, State and local governmental health plans offered by employers must pay the fee. Medicare, Medicaid, CHIP, Federal armed forces or veteran care, and Federal care for Indian tribes are all exempt. Any group plan designed specifically to cover primarily employees working and residing outside the U.S. is exempt.

C. Employer Shared Responsibility Provisions under ACA. The IRS has issued proposed regulations (REG-138006-12) under Section 4980H, as well as a list of questions and answers, with respect to the shared responsibility for employers regarding employee health coverage. These proposed regulations would affect only employers that meet the definition of "applicable large employer" as described in these proposed regulations. The proposed regulations generally incorporate the provisions of Notice 2012-58, as well as many of the provisions of Notices 2011-36, 2011-73, and 2012-17, with some modifications in response to comments. The employer shared responsibility provisions, which become effective in 2014, impose penalties on certain large employers that do not provide health coverage or that provide inadequate or unaffordable coverage. In general, a large employer (one with 50 or more full-time employees, including full-time equivalent employees) could be subject to a penalty if at least one full-time employee is certified to receive an applicable premium credit. Under the new law, there is a refundable tax credit available to individuals whose income is less than or equal to 400% of the federal poverty level and who purchase health insurance through an exchange. For a family of four in 2012, this would apply to those with annual incomes of $92,200 or less. The penalty could arise under the following two situations: (i) a large employer does not offer health coverage to its full-time employees and their dependents; or (ii) a large employer offers its full-time employees and their dependents the opportunity to enroll in health coverage that is deemed unaffordable to the employee or it does not provide minimum value. A large employer is one that has 50 or more full-time employees or full-time equivalents during the preceding calendar year. A full-time employee is one who averages at least 30 hours a week or 130 hours in a calendar month. A full-time equivalent employee is calculated by adding the number of hours for all part-time employees (up to 120 hours per employee) during the month and dividing that amount by 120. The penalty is $2,000 for each full-time employee, excluding the first 30 employees, for those employers that do not provide coverage under the first scenario above. Under the second scenario, where unaffordable or low value coverage is provided, the penalty is $3,000 per full-time employee that receives a premium tax credit for insurance, but the maximum penalty is $2,000 times the number of full-time

employees over the 30-employee threshold. The $2,000 and $3,000 penalties are to be assessed on a monthly basis (1/12th per month).

D. Health Reimbursement Accounts Under the Affordable Care Act. The Affordable Care Act and the Reconciliation Act amended the provisions of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. PHS § 2711 generally prohibits group health plans and health insurance issuers offering group or individual health insurance coverage from imposing lifetime or annual limits on the dollar value of health benefits. Interim final regulations issued June 20, 2010, provide that the PHS § 2711 no limit rules do not apply to health Flexible Spending Accounts (FSAs), Medical Savings Accounts (MSAs) under IRC § 220 and Health Savings Accounts (HSAs) under IRC § 223. However, PHS § 2711 no limit rules do apply to a Health Reimbursement Arrangement (HRA), and its compliance is based on the HRA type. Generally, an HRA is an arrangement that: (i) is paid for solely by the employer and not provided pursuant to salary reduction election or otherwise under a § 125 cafeteria plan; (ii) reimburses the employee for medical care expenses [as defined by IRC § 213(d)] incurred by the employee and the employee's spouse and dependents (as defined in § 152); and (iii) provides reimbursements up to a maximum dollar amount for a coverage period and any unused portion of the maximum dollar amount at the end of a coverage period is carried forward to increase the maximum reimbursement amount in subsequent coverage periods. The regulations identify two types of HRAs. The first type is an "Integrated-HRA". This is an HRA which is integrated with other coverage as part of a group health plan and the other coverage alone would comply with the requirements of PHS § 2711. The fact that benefits under the HRA by itself are limited does not violate PHS § 2711 because the combined benefit satisfies the requirements. The second type is a "Stand-Alone HRA". This form of an HRA is not integrated with other coverage as part of a group plan and other coverage would not comply with the requirements of PHS § 2711, except for HRAs that are limited to retirees. This means that a Stand-Alone HRA that covers active employees and provides "Essential Health Benefits" is subject to the PHS § 2711 no limits requirement. For all practical purposes, employers that have been offering Stand-Alone HRAs will abandon such arrangements since it is unlikely that any employer will grant an employee unlimited coverage for any EHB under an HRA.

E. New HIPAA Regulations Affect Business Associates and Subcontractors. On January 17, 2013, the U.S. Department of Health and Human Services (HHS) released the omnibus regulations under the Health Insurance Portability and Accountability Act (HIPAA), including implementing changes made by the Health Information Technology for Economic and Clinical Health Act (HITECH) (the final rule). The final rule amends the definition of a "business associate" to mean a person or entity that creates, receives, maintains or transmits protected health information to perform certain functions or activities on behalf of a covered entity. The final rule affirms that individuals and entities that are not part of a covered entity's workforce and that engage in activities such as claims processing or administration; data analysis, processing or administration; utilization review; quality assurance; billing; benefit management; practice management; and re-pricing continue to be business associates. The final rule also adds a new category of services, patient safety activities, to the list of functions and activities a person or entity may undertake on behalf of a covered entity that give rise to a business associate relationship. Covered entities were always required to enter into HIPAA compliant business associate contracts with their business associates. Under the final rule, business associates are also required to enter into HIPAA compliant business associate agreements with their subcontractors, first degree subcontractors are required to enter into HIPAA

compliant business associate agreements with their own subcontractors, and so on down the line. Covered entities are not required to enter into business associate contracts with their business associates' subcontractors. The final rules reflect HITECH changes to apply the HIPAA electronic security rules to business associates. For example, business associates and subcontractors must have HIPAA compliant written electronic security policies and procedures. Business associates must timely report "breaches" of unsecured protected health information to a covered entity. Business associates must comply with the final rule beginning September 23, 2013. However, there is a special one-year transition period for implementing business associate agreements that comply with the final rule. A business associate agreement is deemed to comply with the final rule through September 22, 2014, as long as the agreement was in place before January 25, 2013 (the date the final rule was published in the Federal Register), complied with the prior provisions of the HIPAA privacy and security rules, and is not renewed or modified on or after March 26, 2013. If the business associate agreement is renewed or modified at any time between March 26, 2013, and September 23, 2013, the business associate agreement renewal or modification must include the new provisions in the final rule on or before September 23, 2013. The transition period will automatically terminate if the agreement is renewed or modified before September 23, 2014. The automatic renewal of evergreen contracts would not cut off the transition period.

F. Proposed Regs Provide Guidance on Whether Health Plans Provide Minimum Value. The IRS has issued proposed regulations (REG-125398-12) on the health insurance premium tax credit, providing guidance on determining whether healthcare coverage under an eligible employer-sponsored plan provides minimum value and on other aspects of Section 36B. Individuals generally may not receive a premium tax credit if they are eligible for affordable coverage under an eligible employer-sponsored plan that provides minimum value. A plan fails to provide minimum value if it covers less than 60 percent of the total allowed costs of benefits provided under the plan. The proposed regulations provide that taxpayers may determine whether a plan provides minimum value by using the minimum value calculator from the IRS and the Department of Health and Human Services. Taxpayers must use the calculator to measure standard plan features, unless a safe harbor applies, but the percentage may be adjusted based on an actuarial analysis of plan features that can't be measured using the calculator. Some safe harbor plan designs that satisfy the minimum value requirement will be specified in additional guidance, which will provide examples of plan designs that would clearly satisfy the 60 percent threshold if measured using the calculator. The proposed regulations describe three safe harbor plan designs and request comments on other plan designs that could be designated as safe harbors. Plans with nonstandard features that cannot determine minimum value using the calculator or a safe harbor must use the actuarial certification method. The proposed regulations address other issues under Section 38B, including the definitions of modified adjusted gross income and rating area; retiree coverage; partial months of coverage; and filing requirements to reconcile advance credit payments. The proposed regulations also provide guidance on how arrangements, such as health reimbursement arrangements, health savings accounts, and wellness program incentives, influence minimum value calculations. The regulations are proposed to apply for tax years ending after December 31, 2013, and taxpayers may apply them for tax years ending before January 1, 2015.

G. Text of Rev. Proc. 2013-25: 2014 Inflation-Adjusted Amounts for Health Savings Accounts (HSAs). For calendar year 2014, the annual limitation on deductions under Section 223 for an individual with self-only coverage under a high deductible health plan is $3,300. The annual limitation for an individual with family coverage under a high

deductible health plan is $6,550. For calendar year 2014, a high deductible health plan is a health plan with an annual deductible that is not less than $1,250 for self-only coverage or $2,500 for family coverage, and the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed $6,350 for self-only coverage or $12,700 for family coverage.

H. Nondiscrimination Rules for Health Plans. Fully insured health plans that have not retained grandfathered status under the Patient Protection and Affordable Care Act (PPACA) will be subject to the same nondiscrimination rules that have long applied to self-insured plans beginning in January 2014. Like the nondiscrimination rules for self-insured health plans, cafeteria benefit plans and various retirement plans, the PPACA provision is designed to penalize companies that discriminate in favor of highly compensated employees when it comes to offering certain benefits—in this case, fully insured health plans. This discrimination can take the form of favoring highly compensated employees when it comes to eligibility to participate in the plan or in terms of the benefits provided. In general, highly compensated employees meet any of the following criteria: (i) a shareholder who owns more than 10 percent of the company; (ii) an individual who is among the five highest-paid employees in the organization; or (iii) an individual who is among the top 25 percent of employees in terms of compensation. Once the federal government starts enforcing the provision, employers could face an excise tax of $100 for each day the plan is not in compliance for each non-highly compensated employee who is not eligible for the health plan, up to a maximum penalty of $500,000. The IRS postponed enforcement of the provision at the end of 2010, noting that employers need guidance on exactly how these rules should apply to fully insured plans. Since then, there has been little indication of when this guidance might arrive. It is unlikely that guidance will be released in the near future, given the flurry of regulations being issued as we move closer to 2014. The IRS has said it will hold off on enforcement until that guidance has been released, which may be in 2014 or even 2015.

I. Guidance on Eligibility for Minimum Essential Coverage. The IRS has issued guidance (Notice 2013-41) on when, for purposes of the section 36B premium tax credit, an individual is eligible for minimum essential coverage under the Medicaid, Medicare, children's health insurance (CHIP), or TRICARE government-sponsored health programs or under a student health plan or state high-risk pool. In 2014 the premium tax credit will be available to individuals who buy coverage under a qualified health plan through an affordable insurance exchange and are not eligible for other minimum essential coverage.

J. Health Law Employer Mandate Delayed by U.S. Until 2015. On July 2, 2013, the administration announced that it will postpone enforcement of the so-called employer mandate until 2015, after the congressional elections. Under the employer mandate, companies with 50 or more workers face a fine of as much as $3,000 per employee if they do not offer affordable insurance. The Administration's announcement comes in the wake of several public announcements by employers (large and small) who intended to reduce employee hours and freeze hiring to avoid the costs associated with offering health coverage (or paying a penalty). The announcement indicates that during the 2014 transition period, employers are encouraged to maintain or expand health coverage. Presumably, the Administration hopes to stem this trend by delaying the penalty, but it leaves many unanswered questions. The individual mandate, a linchpin of the law that requires most Americans to carry health insurance, remains in effect. But, Congress may

act to postpone that as well. Notwithstanding the delay of the employer mandate, there are many other provisions requiring compliance by January 1, 2014, including:

1. Minimum value compliance for employer-sponsored group health plans still needs to be determined for the 2014 plan year. This information must be reported both in written notices about the new health insurance exchanges, which most employers should have distributed by October 1, 2013, and in summaries of benefits and coverage due during 2014 annual enrollment.

2. New fees and assessments, such as the PCORI and transitional reinsurance fees and health insurer tax.

3. Summaries of benefits and coverage must be prepared and distributed for 2014, using an updated template.

4. Elimination of annual dollar limits on essential health benefits under group health plans, beginning January 1, 2014.

5. No more pre-existing condition exclusions for adults as well as children for plan years beginning in 2014.

6. Grandfathered health plans can no longer exclude adult children under age 26 who have access to other employment-based coverage, effective January 1, 2014.

7. Coverage waiting periods can't be longer than 90 days effective for plan years beginning in 2014.

8. Coverage of clinical trials is required for non-grandfathered group health plans, along with prohibition on discrimination based on participation in a clinical trial.

9. New wellness incentive rules for plan years beginning in 2014.

10. Maximum out-of-pocket limitation will prohibit, for both insured and self-insured non-grandfathered plans, out-of-pocket limits that that exceed $6,350 (self) and $12,700 (family) coverage, for plan years beginning in 2014.

K. PCORI Fee due by July 31, 2013. As part of the Patient Protection Affordable Health Care Act (PPACA), the Patient Centered Outcome Research Institute (PCORI) was created and tasked with assessing a fee on the insurance company for fully insured welfare plans, and on the employer for self-insured welfare plans, including Health Reimbursement Arrangements (HRA) and Flexible Spending Accounts (FSA). If a company offers a self-insured health and welfare plan, a HRA, or a FSA, the company must pay a fee per covered person by July 31, 2013 on Form 720. While the actual fee can be easily calculated (rate x average number of covered lives), determining what plans are subject to the fee and the average number of covered lives can be quite complicated. In some cases, a single individual may count as more than one covered life. For example, if a fully insured medical plan is paired with an HRA, the insurance company would pay for that participant's eligibility to the fully-insured part of the plan, and the employer would pay because he/she is eligible to the HRA. However, if the plan sponsor offers a self-insured welfare plan and an HRA, then the participant would only be counted once. The PCORI fee does not apply to

Health Savings Arrangements (HSAs), stand-alone dental plans, vision plans, accident plans, stop-loss policies, or individuals residing outside of the United States. The fee is assessed as follows:

Plan Years Ending during the year ending	Fee Assessed
September 30, 2013	$1 per average covered life
September 30, 2014	$2 per average covered life
September 30, 2015 – 2019	$2 per average covered life indexed for increases in the projected per capita amount of National Health

After you determine whether the company owes the PCORI fee, there are four optional methods that can be used to calculate the number of covered lives:

1. Actual Count Method. The total count of all lives covered by the plan each day of the plan year divided by the number of days in the plan year.

2. Snapshot Method. The sponsor may select a day (or days) from each quarter to calculate the average number of covered lives. The days selected each quarter must be within 3 days of each other. For example, if a calendar year policy uses January 3rd for the first quarter, April 3rd, July 3rd and October 3rd are used for the second, third and fourth quarters, respectively. The total number of lives covered on these days is then divided by 4 to calculate the average covered lives. If more than one day per quarter is selected, the principle is applied consistently. For purposes of this method the 30th and 31st are treated as the last day of the month.

3. Snapshot Factor Method. This method is the same as above, but self-insured plans have the option of counting participants with self-only coverage as one life and participants with other than self-only coverage as 2.35 lives. For example, if on January 1st a plan has 500 participants with self only coverage and 300 participants with other than self-only coverage the number of covered lives is 1,205 (=500 + 300 X 2.35).

4. Form 5500 Method. A self-insured plan may take the average of the total number of participants covered at the beginning and end of the plan year, if the Form 5500 is filed timely to facilitate the filing of Form 720 by July 31st, and the plan only offers self-only coverage. IF the plan offers other than self only coverage, the average number of covered lives is computed using the total of the number of participants at the beginning and end of the plan year.

L. Final Regulations on Information Disclosure for Insurance Affordability Programs. The IRS has published final regulations (T.D. 9628) on the disclosure of return information under Section 6103(l)(21), as enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. The final regulations define terms and prescribe items of return information in addition to those items prescribed by statute that will be disclosed, on written request, under Section

6103(l)(21). Effective August 14, 2013, the final regulations adopt, with revisions, proposed regulations (REG-119632-11) published in April 2012.

M. Possible Effects of Windsor. As a result of *Windsor*, employers will need to review their employee benefits (including retirement, health, and fringe benefits) and payroll practices to comply with the new law. Some possible effects on health benefits are set forth below:

		DOMA	Post-DOMA
1.	Health Care Coverage (including Dental and Vision)	Plans that provide for coverage of (nondependent) same-sex spouse must impute taxable income equal to the value of the coverage	Same-sex spouse coverage is now tax-free
2.	Pre-Tax Reimbursements Under HRAs, Flexible Benefit Plans and Health Savings Accounts	Employee may not pay for health coverage of same-sex spouse with pre-tax dollars or reimburse medical expenses from such accounts (Note: HRAs may reimburse for expenses of as same-sex spouse, if the value of coverage is imputed to the employee's income)	Employee can now use pre-tax dollars to pay for health, dental and vision coverage – or medical expenses of same-sex spouse, without imputation of income
3.	Employment Taxes	Social Security (FICA) and federal unemployment (FUTA) taxes payable on imputed income associated with coverage of same-sex spouse	No FICA or FUA tax on employer-provided, including from pre-tax flex account, coverage of same-sex spouse
4.	COBRA	Same-sex spouse covered as dependent not entitled to spousal COBRA rights	Same-sex spouse is entitled to full COBRA rights (up to 36 months of coverage) in the event of participant's termination of employment, divorce or legal separation
5.	HIPAA Special Enrollment Rights	Same-sex spouse not entitled to special enrollment rights	Same-sex spouse may be immediately added to employee's coverage, including where spouse loses coverage under another plan
6.	Dependent Care Assistant	Employee may not use dependent care account (DCAP) to pay for care of dependent same-sex spouse on pre-tax basis	Employee can now use DCAP dollars, on pre-tax basis, to pay for care of same-sex dependent (subject to dollar cap or, if less, earned income of same-sex spouse)

N. Health Information Privacy. The Office for Civil Rights and Office of the National Coordinator for Health Information Technology have collaborated to develop model Notices of Privacy Practices for health care providers and health plans to use to communicate with their patients and plan members. The HIPAA Privacy Rule gives individuals a fundamental right to be informed of the privacy practices of health plans and health care providers, as well as to be informed of their privacy rights with respect to their personal health information. Health plans and covered health care providers are required to

develop and distribute a notice that provides a clear, user friendly explanation of these rights and practices. OCR and ONC have provided separate models for health plans and health care providers. The options are: (i) notice in the form of a booklet; (ii) a layered notice that presents a summary of the information on the first page, followed by the full content on the following pages; (iii) a notice with the design elements found in the booklet, but formatted for full page presentation, and (iv) a text only version of the notice. The models reflect the regulatory changes of the Omnibus Rule and can serve as the baseline for covered entities working to come into compliance with the new requirements. In particular, the models highlight the new patient right to access their electronic information held in an electronic health record, if their provider has an EHR in their practice. Covered entities may use these models by entering their specific information into the model and then printing for distribution and posting on their websites. For more information, see: http://www.hhs.gov/ocr/privacy/hipaa/modelnotices.html.

N. Unlawful For Employers to Pay for an Employee's Individual Health Insurance Policy on a Tax-Free Basis. On September 13, 2013, the Internal Revenue Service and Department of Labor issued Notice 2013-54 on how the Affordable Care Act ("ACA") applies to arrangements under which an employer reimburses an employee for all or a portion of the premium cost of an individual health insurance policy. In the past, the IRS has permitted employers to reimburse or otherwise pay for employee individual health insurance premiums on a tax-free basis. Rev. Rul. 61-146. Some employers have considered dropping their employee health coverage and instead subsidize employee purchases of individual insurance policies on the ACA exchange marketplace that will take affect this October. Because all policies offered through the exchanges must comply with ACA's market reforms, an employer could reasonably believe that such an arrangement should not be unlawful under the ACA because the policies themselves would be ACA compliant. The Notice generally provides that such an arrangement violates ACA's market reform rules unless the reimbursements are made on an after-tax basis and the arrangement qualifies for ERISA's payroll practice exemption, i.e., a continuation of no more than 100 percent of an employee's regular pay, with all payments made from the employer's general assets. Employers must self-report and pay excise taxes of $100 per day per each affected individual under Code Section 4980D for violations of ACA market reforms.

O. Small Business Health Care Tax Credit. For tax years 2010 through 2013, eligible small employers are entitled to a 35 percent tax credit for health insurance premiums they pay for employees. Tax-exempt entities are eligible for a 25 percent credit. To qualify for the credit, an employer must: (i) have fewer than 25 full-time equivalent (FTE) employees for the tax year, (ii) pay average annual wages of less than $50,000 per FTE, and (iii) pay not less than 50 percent of the premium for qualifying employee health insurance. Employers with less than 10 FTEs and average annual wages of $25,000 or less are eligible for the full credit. There is a phase-out of the credit for employers that have between 10 and 25 FTEs or average annual wages between $25,000 and $50,000. All employers calculate the credit using IRS Form 8941, Credit for Small Employer Health Insurance Premiums. Taxable employers claim the credit on their federal tax return and can apply the credit to both regular and alternative minimum tax. Tax-exempt employers claim the credit by filing Form 990-T, Exempt Organization Business Income Tax Return, and can receive a refundable credit up to the amount of the employer's payroll taxes. In 2014, the credit will continue to be available, but with significant modifications. Employers will only be eligible for the credit if they purchase health insurance through the new Small Business Health Options Program (SHOP). The SHOP is one component of the internet-based health

insurance marketplace, also known as an exchange, which launches on Oct. 1, 2013. Other upcoming changes include: (i) the maximum credit increases to 50 percent (35 percent for tax-exempt organizations), (ii) the $50,000 and $25,000 average annual dollar amounts will be indexed for inflation, (iii) the credit is based on the lesser of the employer's actual premium payments or the average premiums in the small group market in its employees' rating area, and (iv) the credit is only available for two consecutive tax years after 2013, but it can be carried back or carried forward.

V. ESTATE PLANNING

A. American Taxpayer Relief Act of 2012. On January 3, 2013, President Obama signed into legislation H.R. 8, the "American Taxpayer Relief Act of 2012" (the "Act"). Generally effective as of tax year 2013, the Act makes permanent some of the 2001 and 2003 tax cuts enacted during President George W. Bush's administration, and temporarily extends other tax incentives from 2009. The estate, gift and GST tax area had fewer changes than anticipated. Although the top tax rates increased to 40%, the tax hikes are offset by the permanence of the $5 million estate, gift and GST tax exemptions, subject to annual inflation adjustments, as well as the permanent unification and portability of the estate and gift tax exemption. While this removes most individuals from estate exposure, clients in decoupled states should still appreciate the impact of state estate taxes.

1. States Decoupled From the Federal Estate Tax. Note the significant impact of the state estate tax. For states decoupled from the federal estate tax, the combined maximum marginal estate tax rate could reach close to 50% (*e.g.*, 49.6% in New York).

2. Lifetime Gifts. The higher federal estate tax rate increases the incentive for making lifetime gifts, particularly for individuals with estates over the applicable estate tax exemption ($5.25 million for individuals, $10.5 million for married couples). First, most states do not impose a separate state gift tax on lifetime gifts. Second, due to the tax-exclusive nature of the gift tax and the tax-inclusive nature of the estate tax, it costs less to make a gift than a testamentary bequest.

3. Trust Taxation. With the higher income tax rates, client trust planning must carefully consider the potential income tax impact. With grantor trusts, the client will report and pay the trust's tax liability, which may be particularly burdensome where the top combined tax rate on investment income ranges from 23.8% (long-term capital gains and qualified dividends) to 43.4% (other passive investment income). Non-grantor trusts, however, are more quickly impacted by both the higher income tax rates and the Medicare Tax, as the threshold for application of both is only $11,950. For example:

> "H and W have $500,000 in wages and must report $500,000 of interest and rents earned by a grantor trust. Their total tax liability under current law would equal approximately $362,096, likely too burdensome for the couple to sustain. Alternatively, if the trust was a non-grantor trust, the couple's taxes would be $162,196, but the non-grantor trust's overall taxes would be roughly $214,658, for a combined tax liability of $376,854."

4. Planning Options.

a. Life Insurance. As before the Act, using gifts to fund the acquisition of life insurance through a properly structured trust remains both an income and estate tax-efficient planning option. For income tax purposes, investment in a life insurance policy can minimize the income and Medicare tax burdens, whether held by a grantor or non-grantor trust. Also, growth within the policy, and policy loans and withdrawals (up to basis in the contract) should be income and Medicare-tax free. For grantor trusts structured as a spousal lifetime access trust, the client's spouse could still have access to the trust funds, if income is needed during life (alternatively, an independent party could be given the discretionary power to add the spouse as a beneficiary in the future). In addition, for estate tax purposes, the trust will protect the insurance death benefit from estate tax and can maximize estate tax deferral for multiple generations if structured as a GST-exempt trust.

b. Allow for Tax Reimbursement. Depending on applicable state law, the terms of a grantor trust can authorize (but should not mandate) discretionary trust distributions to the grantor to reimburse him or her for the taxes paid on the trust's income. Care must be taken, however, to avoid the potential risk for estate tax inclusion. A mandatory reimbursement provision would result in estate tax inclusion. Further, even with regard to a discretionary reimbursement clause, any understanding or pre-existing arrangement between a grantor and a trustee regarding the trustee's exercise of this discretion could cause estate tax inclusion. Also, if the reimbursement clause would subject the trust assets to the claims of A's creditors under applicable state law, this would be a basis for estate tax inclusion. In such cases, the client may consider including the grantor's spouse as a trust beneficiary or giving an independent party the discretionary power to add the spouse as a beneficiary in the future.

c. Allow for Termination of Grantor Trust Status. Even if the grantor trust cannot include a reimbursement provision, it should allow for the "turning-off" of grantor trust status during the grantor's lifetime, in the event the tax burden becomes economically impractical for the grantor to bear.

d. Distribute Trust Income. Given the low threshold for application of the Medicare Tax and the 39.6% top marginal income tax rate to non-grantor trusts (*e.g.*, $11,950), the income of most non-grantor trusts will be subject to maximum taxation if not distributed. Thus, trustees will want to review whether to make increased distributions to beneficiaries who will not be subject to the Medicare Tax. Further, given the top tax income tax rate of 39.6% on trust income in excess of $11,950, trustees also will have a greater incentive to distribute trust income to beneficiaries in lower brackets. Finally, there will be additional incentives to adjust trust investment portfolios toward tax-exempt and tax-deferred investments, including insurance products, muni-bonds, etc.

B. Various Tax Benefits Increase in 2013 Due to Inflation Adjustments.

1. Annual Exclusion. The annual exclusion for gifts rose to $14,000 for 2013, up from $13,000 for 2012.

2. "Kiddie Tax." The amount used to reduce the net unearned income reported on a child's tax return subject to the "kiddie tax," is $1,000 for 2013, up from $950 for 2012.

C. Tax Court Determines Value of Interests in Artwork for Estate Tax Purposes. In *Estate of James A. Elkins Jr. et al. v. Commissioner*, 140 T.C. No. 5; No. 16597-10, The Tax Court determined the pro rata fair market value of a decedent's undivided fractional interests in 64 works of art for estate tax purposes, holding that the estate was entitled to a 10 percent discount.

D. Using Voting Trusts to Preserve S corporation Status after Death. PLR 201226019 provides guidance to S corporation owners who choose to use a voting trust to maintain voting control of the corporation, by illustrating a structure that allows the voting trust to remain a permissible S corporation shareholder upon the death of a voting trust certificate holder.

E. Sixth Circuit Extends Bankruptcy Protection to IRA But Leaves Room for Doubt. IRAs are protected in bankruptcy only if the IRAs are tax exempt. IRAs are tax exempt only if they do not engage in prohibited transactions. One prohibited transaction is the direct or indirect loan between the IRA owner and a party in interest, such as the bank or other financial institution that holds the IRA assets (i.e., the IRA Custodian). Recently the DOL declared that boilerplate provisions in IRA account documents that allow the IRA Custodian to offset amounts in the IRA against debts owed to the IRA Custodian by the IRA owner constitute a prohibited loan. The Sixth Circuit Court of Appeals ruled that the IRA would be protected. The court concluded that "because the debtor had no other account with the IRA Custodian, there was no way in which the improper offset could have occurred." *Daley v. Mostoller*, No. 12-6130 (6th Cir. June 17, 2013).

F. Gift Valuation May Include Estate Tax Indemnity. The Tax Court's decision in *Steinberg v. Commissioner*, 141 T.C. 8 (2013), reverses previous Tax Court precedent that the assumption of potential Section 2035(b) estate tax liability was too speculative to be reduced to a monetary value in a gift tax valuation (see, *McCord v. Commissioner*, 120 T.C. 358 (2003), rev'd and remanded sub nom. succession of *McCord v. Commissioner*, 461 F.3d 614 (5th Cir. 2006). Jean Steinberg, then 89, entered into a binding gift agreement in April 2007 with her four adult daughters. Steinberg said she would make gifts of cash and securities to her daughters under a net gift agreement in exchange for her daughters' agreeing to assume and pay any federal gift tax liability connected with the gifts. Steinberg's daughters also agreed to assume any federal or state estate tax liability imposed under section 2035(b) for the gifts if Steinberg died within three years of the gifts. Under Section 2035(b), a decedent's gross estate includes gift taxes paid on any gift made by the decedent within three years of her death. An appraiser calculated that the aggregate fair market value of Steinberg's net gift -- that is, the FMV of the securities, minus the gift tax Steinberg's daughters paid and the actuarial value of the assumption of potential Section 2035(b) estate tax -- equaled $71.6 million. The assumption of the Section 2035(b) estate tax liability was valued at $5.8 million. Steinberg reported taxable gifts equal to $71.6 million and total gift tax of $32 million on her 2007 gift tax return. In July 2011 the IRS issued a notice of deficiency after increasing the value of Steinberg's net gift to $75.6 million and disallowing the assumption of Section 2035(b) estate tax liability. The IRS also increased Steinberg's 2007 total gift tax liability to $33.8 million. Steinberg filed a petition challenging the IRS's notice of deficiency in October 2011. The IRS moved for summary judgment in September 2012, and argued that the daughters' assumption of potential Section 2035(b) estate tax liability did not constitute consideration in money or money's worth under section 2512(b) in exchange for the gifts. The IRS argued that the donees' assumption of potential Section 2035(b) estate tax liability was worthless and provided no

benefit to Steinberg. Because the assumption was worthless, it was not consideration for a gift under the estate depletion theory of gift tax, the Service said. Under that theory, a donor receives consideration in money or money's worth if the donor's estate receives some benefit from the consideration offered for a gratuitous transfer. The IRS pointed to the Tax Court's decision in *McCord* -- that reducing a taxpayer's potential Section 2035(b) estate tax liability to monetary value was too speculative -- in arguing that Steinberg's daughters' agreement to assume Section 2035(b) estate tax liability was worthless. *McCord* was later reversed by the Fifth Circuit, which held in part that there was nothing too speculative about the legally binding assumption of the potential Section 2035(b) estate tax liability when the gift was made. Judge Kathleen Kerrigan, writing for the Tax Court, disagreed with the IRS's assertion that the assumption of potential Section 2035(b) estate tax liability was worthless, and reversed the Tax Court's prior decision in McCord. Noting that the Tax Court was not bound by the Fifth Circuit's decision reversing McCord, Kerrigan nonetheless said that she agreed with the Fifth Circuit's reasoning. Kerrigan said that the question whether Steinberg would survive three years after making the gift was a simple contingency based on the possibility of survivorship. Also, a bona fide net gift agreement existed between Steinberg and her daughters, Kerrigan said. Kerrigan wrote that the Tax Court could not say it was impossible to value the potential Section 2035(b) estate tax liability assumed by Steinberg's daughters. Kerrigan also agreed with the Fifth Circuit's reasoning in Succession of McCord that "a willing buyer and a willing seller in appropriate circumstances may take into account a donee's assumption of potential Section 2035(b) estate tax liability in arriving at a sale price." Kerrigan disagreed with the IRS's assessment that the assumption of potential estate tax liability failed under the estate depletion theory because a "donee's assumption of potential Section 2035(b) estate tax liability may provide a tangible benefit to the donor's estate." The estate depletion theory states that the benefit to the donor in money or money's worth, rather than the detriment to the donee, is what determines whether any consideration provided by the donee should be taken into account in offsetting a gift.

VI. MERGERS & ACQUISITIONS

A. Final regulations under section 336(e) provide basis step-up opportunities for non-corporate acquirers.

1. Background. After more than twenty years of waiting for guidance, final Treasury regulations have been issued under Code Section 336(e) that allow taxpayers to elect to treat the sale, exchange, and/or distribution of a corporation's stock in a subsidiary as a deemed disposition of the subsidiary's underlying assets. The election and resulting deemed asset sale treatment of the transaction would result in a "step-up" in basis of the assets of the target. In that respect, it is similar to the election provided under Code Section 338(h)(10) for certain stock purchases. However, the Code Section 336(e) election provides a broader range of possible application because it does not require that an acquirer of corporate stock be a corporation and the election will be made only by the seller and the target.

2. Qualified Stock Disposition. A qualified stock disposition for purposes of these rules is generally a transaction or series of transactions in which stock of a U.S. corporation sufficient to satisfy the 80 percent vote and value tests under the consolidated group rules is sold, exchanged or distributed during the 12-month distribution period. In certain cases, stock sold, exchange or distributed in multiple transactions within a 12-month period may be aggregated. The regulations provide two models for the deemed asset sale. Special considerations apply to S corporation targets.

3. Basic Model. Under the basic model, for qualified stock dispositions not described, in whole or in part, in Code Section 355(d)(2) or (e)(2), "old target" is treated as selling its assets to an unrelated person for the aggregate deemed asset disposition price. "New target" is treated as acquiring all of its assets from an unrelated person for an amount equal to the adjusted grossed-up basis. New target remains liable for the tax liabilities of old target (including the tax liability for the deemed disposition tax consequences). Old target and seller are treated as if, old target transferred all of the consideration deemed received from new target in the deemed asset disposition to seller and old target ceased to exist. In most cases, the transfer will be treated as a distribution in complete liquidation to which Code Sections 331 or 332 and Sections 336 or 337 apply. Seller is deemed to purchase from an unrelated person, immediately after the deemed liquidation of old target, the amount of stock distributed in the qualified stock disposition (new target stock) and to have distributed such new target stock to its shareholders. Seller recognizes no gain or loss on the distribution of such stock.

4. Sale-to-Self Model. Under the sale-to-self model, for a qualified stock disposition resulting, in whole or in part, from a disposition described in Code Section 355(d)(2) or (e)(2), old target is treated as selling its assets to an unrelated person for the aggregate deemed asset disposition price and is not deemed to liquidate after the deemed asset disposition. Immediately after the deemed asset disposition, old target is treated as acquiring all of its assets from an unrelated person in a single, separate transaction for an amount equal to the adjusted grossed-up basis. Immediately after, seller is treated as distributing the stock of old target actually distributed to its shareholders in the qualified stock disposition. No gain or loss is recognized by seller on the distribution.

5. Effective Date. The final regulations apply to a qualified stock disposition that occurs on or after May 15, 2013.

B. PBGC Initiates Pension Plan Termination in Leveraged Acquisition. The PBGC has initiated proceedings to terminate a pension plan in connection with Compagnie de Saint-Gobain's sale of its US metal and glass containers business to Ardagh Group. When the PBGC takes over a pension plan, the PBGC becomes obligated to pay the plan's participants and thereby depletes its insurance fund. Because of an unusual and limited statutory framework, the PBGC's principal means of protecting its insurance fund in LBO transactions is the threat of terminating the plan. ERISA provides the PBGC with discretion to terminate a pension plan if, among other things, the loss to the PBGC is expected to increase unreasonably if the plan is not terminated. If a plan were involuntarily terminated in this manner before the transaction, the PBGC has a claim against the plan sponsor and all of its affiliates for the unfunded plan liabilities. For example, if the PBGC is concerned that an LBO transaction with an underfunded plan located at the sold business could result in a significant increase in the risk of loss to the PBGC, the PBGC could threaten to terminate the pension plan before the transaction, thus crystallizing the liability against both the seller and the sold business. This threat could have the effect of scuttling the transaction, as neither the banks nor the seller would be likely to proceed in light of this uncertainty. However, in practice, the PBGC generally seeks not to end a transaction but rather to negotiate with the plan sponsor to obtain protections for the insurance fund as an alternative to terminating the plan. These alternatives could include promises of additional cash contributions to the plan, letters of credit to secure promises to make future contributions to the plan, pledges of security interests in certain assets, parent or affiliate guarantees or ongoing information requests. In the Saint-Gobain deal, the PBGC has said that it is concerned that Ardagh, a noninvestment grade buyer headquartered in

Luxembourg that will finance the $1.7 billion transaction with $1.45 billion of debt, will end up in bankruptcy and leave the PBGC with a $500 million unfunded liability. The PBGC has said that it tried to negotiate with Saint-Gobain to obtain guarantees and additional contributions to the plan, but Saint-Gobain has to date only reported that it views its plan as very well-funded. (This discrepancy likely arises because the PBGC values liabilities on a "wind-up" rather than "going-concern" basis, which has the effect of magnifying underfunding.) In a highly unusual step, the PBGC on April 18, 2013 acted on its threat and filed a complaint in a Pennsylvania court to involuntarily terminate the plan.

C. Investment Fund May Be Responsible for Controlled Group Pension Liabilities of Portfolio Companies. On July 24, 2013, the U.S. Court of Appeals for the First Circuit issued a significant decision addressing the potential liability of private equity funds under the Employee Retirement Income Security Act (ERISA). The First Circuit found that a private equity fund qualified as a "trade or business" under ERISA and thus was potentially liable for withdrawal liability owed to a multiemployer pension plan by a portfolio company in which the fund had invested. Although not binding on other circuits, the court's decision increases a private equity fund's potential exposure to ERISA liabilities incurred by its portfolio companies. *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, No. 12-2312, 2013 WL 3814984 (1st Cir. July 24, 2013).

VII. REAL ESTATE

A. Net Investment Income Tax Regulations. The proposed regulations on net investment income ("NII") under section 1411 are comprehensive and have been generally well received, but that they are also complex and raise questions about interactions with issues outside section 1411. Section 1411 imposes on some individuals a 3.8 percent tax on the lesser of NII (which includes capital gains, dividends, annuities, royalties, interest, rents, and income from some trades or businesses) or the amount by which an individual's modified adjusted gross income exceeds $200,000 ($250,000 for joint filers and surviving spouses). On November 30 the government issued proposed regulations and related guidance (REG-130507-11).

1. Passive Activity Grouping Rules. Some practitioners had requested that the government consider allowing taxpayers a fresh start to the passive activity grouping rules under Treas. Reg. § 1.469-4. Treasury and the IRS did grant that wish. The consistency rule for activity grouping under Treas. Reg. § 1.469-4(e) generally prohibits a regrouping of activities unless the original grouping was clearly inappropriate or there was a change in facts and circumstances that makes the original grouping clearly inappropriate. Taxpayers can in some cases change the status of an activity from passive to non-passive or vice versa by moving in or out of material participation. For real estate professionals, the NII tax creates an incentive to convert passive income to non-passive income, either through treatment as a qualifying real property professional or by regrouping activities. For example, a real estate professional with net passive income from rental activities and little or no passive losses from other sources is an ideal candidate for qualifying real property professional treatment. Prior to the enactment of section 1411, that taxpayer would have preferred to avoid non-passive treatment as a qualifying real property professional, often by forgoing the election to aggregate and treat all rental activity as a single activity in testing for material participation, because the general rule was that net income activities should, to the extent possible, be characterized as passive to permit the deduction of passive losses from other sources. But with the enactment of Section 1411, passive income will now be subject to the 3.8 percent tax. Therefore, the real estate professional in that example should

make the aggregation election to convert the net income from his rental activities into non-passive income in 2013 and beyond. Similarly, a taxpayer with business activities generating net income would have adopted an activity grouping permitting those activities to be treated as passive so that the resulting net passive income could absorb passive losses from other sources. Net passive income will be subject to the 3.8 percent tax in 2013 and going forward, so this taxpayer may wish to regroup his or her business activities, if possible, to convert the income to non-passive income that is exempt from the NII tax, particularly if the taxpayer has little or no net passive losses from other sources.

2. Properly Allocable Deductions. Section 1411 subjects only "net" investment income to the 3.8 percent tax, and the proposed regulations make a credible start at identifying properly allocable deductions. For example, the government has allowed pre-2013 net passive loss carryforwards to reduce net passive income treated as NII in 2013 and thereafter.

3. Carving Out Income. The tax targets a specific type of investment income for higher-income earners apart from that picked up by FICA and Self-Employment Contributions Act taxes. As a result, it is possible that non-wage distributions from personal service S corporations may be one of the few paths to receive income untouched by one of those three taxes. Personal service S corporations have an incentive to pay partners or sole members as little in wages as is still considered reasonable compensation in order to avoid incurring large payroll taxes, which are based on wages. Those partners and members seek to classify income beyond their reasonable compensation as non-wage distribution. Some commentators have suggested that an "actively participating state-law limited partner" could best avoid the NII, FICA, and Self-Employment Contributions Act taxes, but that If you can't do it in a partnership or limited liability company, then probably an S corporation is the best alternative that is available.

B. Parent-Child Transfers. The Legislature has added another exception to the definition of "transfer of ownership" under the uncapping provisions of the General Property Tax Act ("Act"). Public Act 497 of 2012 provides that effective December 31, 2013, transfers of "residential real property" (as defined in MCL 211.34c), from a transferor to a transferee who is related by blood or affinity to the first degree are not "transfers of ownership" and do not "uncap" the taxable value of the property, provided that the use of the property does not change following the transfer. MCL 211.27a(7)(s). The Legislature added this exception to permit parents to transfer residential real property to children without triggering an uncapping of taxable value. Neither a trust nor an estate would be related to the child "by blood or affinity," suggesting that the new provisions of subsection (7)(s) would not apply to a transfer to a child from a parent's revocable trust or estate.

SHAREHOLDER CONTROL AGREEMENTS AND RIGHTS OF MINORITY SHAREHOLDERS

By: Stuart M. Bordman, Esq.

I. SECTION 488 OF THE MICHIGAN BUSINESS CORPORATION ACT (THE "ACT")*

A. Shareholder Agreement.

1. Allows the shareholders of a corporation to alter governance by adopting a shareholder agreement.

2. Allows, within limits, flexibility for corporate governance without regard to the number of shares owned by any shareholder.

3. Section 488 allows:

a. For restrictions on the power of the board of directors or elimination of the board of directors entirely.

b. Unequal distributions to shareholders.

c. For the designation of directors and officers without the need for elections.

d. Weighted voting power among shareholders and directors and director proxies, e.g. a specified person may have 2 votes as a director.

e. Delegation to shareholders, or other persons of management powers normally reserved for the board of directors, including the right to break deadlocks among directors or shareholders.

f. Dissolution of the corporation on the request of one or more of the shareholders or the occurrence of a specified event.

Section 488(1)(h) also contains a "catch-all" provision that adds further flexibility by validating any other provisions not specifically enumerated in the statute, as long as the provisions are not "contrary to public policy".

4. Cautionary note – S Corporations.

An S corporation may only have one class of stock. Accordingly, the drafter must be certain that neither the shareholder agreement, articles of incorporation or bylaws inadvertently creates a second class of stock. Under Regs. § 1.1361-1(1)(1), an S corporation has one class of stock if all outstanding shares confer identical rights to distribution and liquidation proceeds. The regulations further state that differences in rights that occur under the corporate charter, articles or bylaws, by operation of state law, or under binding agreements relating to distribution and liquidation proceeds must be taken into account in making this determination. As long as there is identity in liquidating and distribution rights, provided in these so-called "governing provisions," no second class of stock is created. Tax Management Portfolio 730-3rd, page A-43.

5. Examples of control provisions in a shareholder agreement.

a. Each Shareholder shall be a director of the Corporation and there shall be no other directors of the Corporation.

b. Dr. A will be President of the Corporation for as long as he is an employee and shareholder of the Corporation,

desires to serve as President of the Corporation, and is not prevented from serving as President of the Corporation as a result of illness or other incapacity. Nothing contained in this Agreement shall reduce, limit or supercede the powers of the President of the Corporation as set forth in the Bylaws of the Corporation.

c. Dr. B will be Vice-President of the Corporation, Dr. C will be Secretary of the Corporation and Dr. D will be Treasurer of the Corporation. Each of B, C and D shall hold the aforementioned offices for as long as he is a shareholder and employee of the Corporation, desires to serve and is not prevented from serving as a result of illness or other incapacity.

d. In the event any corporate office (President, Vice President, Secretary, or Treasurer) is vacant, the vacancy shall be filled by a majority vote or consent of the shareholders.

e. The following corporate action shall require (i) the vote or consent of a majority of the shareholders and (ii) the consent of Dr. A:

(A) The purchase of another medical practice or testing laboratory;

(B) The merger or consolidation with another medical practice;

(C) The sale of all or substantially all of the assets of the Corporation;

(D) The liquidation or dissolution of the Corporation;

(E) The opening of a new office or the closing of an existing office;

(F) Entering into, extending or modifying any office lease;

(G) Retaining the services of any physician; or

(H) The termination of the employment of any physician employed by the Corporation who is a party to this Agreement.

II. SECTION 487 OF THE ACT: BALANCE SHEET, STATEMENTS, MAILING TO SHAREHOLDERS, ETC.

A. Upon the request of the shareholder, the Corporation shall mail to the shareholder its balance sheet as of the end of the preceding year; its statement of income for the fiscal year and, if prepared, a statement of source and application of funds for the fiscal year.

B. A shareholder shall have the right to inspect books and records for any proper purpose.

III. SECTION 489 OF THE ACT: ACTION TO ESTABLISH ILLEGAL ACTS OF DIRECTORS; REMEDIES; LIMITATIONS.

A. A circuit court has discretion regarding relief including the power to require the corporation or those responsible for wrongful acts to purchase the shares of a shareholder at fair market value.

B. Willfully unfair conduct may include termination of employment.

*A copy of each Section of the Act discussed is attached.

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1487 Request for balance sheet, statement of income, and statement of source and application of funds; inspection of records; court order; definition; holder of voting trust certificate deemed shareholder.

Sec. 487. (1) Upon written request of a shareholder, a corporation shall mail to the shareholder its balance sheet as at the end of the preceding fiscal year; its statement of income for the fiscal year; and, if prepared by the corporation, its statement of source and application of funds for the fiscal year.

(2) Any shareholder of record, in person or by attorney or other agent, shall have the right during the usual hours of business to inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records, if the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose. A proper purpose shall mean a purpose reasonably related to such person's interest as a shareholder. The demand shall be delivered to the corporation at its registered office in this state or at its principal place of business. In every instance where an attorney or other agent shall be the person who seeks to inspect, the demand shall be accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder.

(3) If the corporation does not permit an inspection within 5 business days after a demand has been received in compliance with subsection (2), or imposes unreasonable conditions upon the inspection, the shareholder may apply to the circuit court of the county in which the principal place of business or registered office of the corporation is located for an order to compel the inspection. If the shareholder seeks to inspect the corporation's books and records other than its stock ledger or list of shareholders, he or she shall first establish that he or she has complied with this section respecting the form and manner of making demand for inspection of the documents, that the inspection he or she seeks is for a proper purpose, and that the documents sought are directly connected with the purpose. If the shareholder seeks to inspect the corporation's stock ledger or list of shareholders and has established compliance with this section respecting the form and manner of making demand for the inspection of the documents, the burden of proof shall be upon the corporation to establish that the inspection that is sought is for an improper purpose or that the records sought are not directly connected with the person's purpose. The court may, in its discretion, order the corporation to permit the shareholder to inspect the corporation's stock ledger, a list of shareholders, and its other books and records on conditions and with limitations as the court may prescribe and may award other or further relief as the court may consider just and proper. The court may order books, documents and records, pertinent extracts, or duly authenticated copies, to be brought within this state and kept in this state upon terms and conditions as the court may prescribe.

(4) A director shall have the right to examine any of the corporation's books and records for a purpose reasonably related to his or her position as a director. The director may apply to the circuit court of the county in which the principal place of business or registered office of the corporation is located for an order to compel the inspection. The court may, in its discretion, order the corporation to permit the director to inspect any and all books and records, on conditions and with limitations as the court may prescribe and may award other and further relief as the court may consider just and proper.

(5) If the court orders inspection of the records demanded under subsection (3) or (4), it shall also order the corporation to pay the shareholder's or director's costs, including reasonable attorney fees, incurred to obtain the order unless the corporation proves that it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder or director to inspect the records demanded.

(6) As used in this section, "the right to inspect records" includes the right to copy and make extracts from the records and, if reasonable, the right to require the corporation to supply copies made by photographic, xerographic, or other means. The corporation may require the shareholder to pay a reasonable charge, covering the costs of labor and material, for copies of the documents provided to the shareholder.

(7) A holder of a voting trust certificate representing shares of the corporation is deemed a shareholder for the purpose of this section and section 485.

History: 1972, Act 284, Eff. Jan. 1, 1973;—Am. 1989, Act 121, Eff. Oct. 1, 1989.

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1488 Shareholder agreement.

Sec. 488. (1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with this act in 1 or more of the following ways:

(a) It eliminates the board or restricts the discretion or powers of the board.

(b) It governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to limitations in sections 345 and 855a pertaining to the protection of creditors.

(c) It establishes who shall be directors or officers of the corporation, or the terms of office or manner of selection or removal of directors or officers of the corporation.

(d) In general or in regard to specific matters, it governs the exercise or division of voting power by or between the shareholders and directors or by or among any of the shareholders or directors, including use of weighted voting rights or director proxies.

(e) It establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among the shareholders, directors, officers, or employees of the corporation.

(f) It transfers to 1 or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders.

(g) It requires dissolution of the corporation at the request of 1 or more of the shareholders or upon the occurrence of a specified event or contingency.

(h) It otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of the shareholders or directors, and is not contrary to public policy.

(2) An agreement authorized by this section shall meet both of the following requirements:

(a) Be set forth in a provision of the articles of incorporation or bylaws approved by all persons who are shareholders at the time of the agreement, or in a written agreement that is signed by all persons who are shareholders at the time of the agreement and made known to the corporation.

(b) Be subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise.

(3) The existence of an agreement authorized by this section shall be noted conspicuously on the face or back of a certificate for shares issued by the corporation or on the information statement required by section 336. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement does not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who did not have knowledge of the existence of the agreement at the time ownership is transferred is entitled to rescission of the purchase. A purchaser has knowledge of the existence of the agreement at the time ownership is transferred if the agreement's existence is noted on the certificate or information statement in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time ownership of the shares is transferred. An action to enforce the right of rescission authorized by this subsection must be commenced within 90 days after discovery of the existence of the agreement or 2 years after the shares are transferred, whichever is earlier.

(4) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(5) If the agreement ceases to be effective for any reason and is contained or referred to in the corporation's articles of incorporation or bylaws, the board may without shareholder action adopt an amendment to the articles of incorporation or bylaws to delete the agreement and any references to it.

(6) An agreement authorized by this section that limits the discretion or powers of the board shall relieve the directors of, and impose upon the person or persons in whom the discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement. The person or persons in whom the discretion or powers are vested are treated as a director or directors for purposes of any indemnification and any limitation on liability under section 209(1)(c).

(7) The existence or performance of an agreement authorized by this section is not grounds for imposing

© Legislative Council, State of Michigan

personal liability on any shareholder for the acts or debts of the corporation or for treating the corporation as if it were a partnership or unincorporated entity, even if the agreement or its performance results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(8) Dissolution pursuant to an agreement authorized in subsection (1)(g) shall be implemented by filing a certificate of dissolution under section 805.

(9) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

(10) The failure to satisfy the unanimity requirement of subsection (2) with respect to an agreement authorized by this section does not invalidate any agreement that would otherwise be considered valid.

History: Add. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001.

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1489 Action by shareholder.

Sec. 489. (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

(2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

History: Add. 1989, Act 121, Eff. Oct. 1, 1989;—Am. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001;—Am. 2006, Act 68, Imd. Eff. Mar. 20, 2006.

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

WHAT DO WE DO NOW? HEALTH CARE REFORM IN 2014

By: Marc S. Wise, Esq.

I. HEALTH CARE COMPLIANCE IN 2014

The implementation of the Patient Protection and Affordable Care Act ("PPACA") comes into full effect for the 2014 plan year. As of September 9, 2013, 109 distinct regulations implementing PPACA have been issued totaling 10,516 pages. Many of these regulations apply to employer sponsored group health plans.

Employers have a number of disclosure obligations in 2014 and subsequent years. A summary of these obligations and some practical tips are as follows:

A. October 1, 2013. Exchange Notices.

The U.S. Department of Labor ("DOL") issued guidance on the required distribution of notices describing the coverage options under the new health care marketplaces. This notification is required under the Federal Fair Labor Standards Act which generally applies to any business that has $500,000 or more in annual revenue.

B. Required Notification.

Employers must provide each full or part-time employee, at the time of hiring (or with respect to current employees, not later than October 1, 2013), a written notice:

1. Informing the employee of the existence of the Marketplace (referred to in the statute as the Exchange) including a description of the services provided by the Marketplace, and the manner in which the employee may contact the Marketplace to request assistance;

2. If the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code (the Code) if the employee purchases a qualified health plan through the Marketplace; and

3. If the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

C. Providing Notice To Employees.

Employers must provide a notice of coverage options to all employees, regardless of whether they are enrolled in the health plan, or whether they are part-time or full-time employees. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

D. Timing and Delivery of Notice.

Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the Department of Labor will consider a notice to be provided at the time of hiring if the notice is provided within 14 days of an employee's start date.

With respect to employees who are current employees before October 1, 2013, employers are required to provide the notice not later than October 1, 2013. The notice is required to be provided automatically.

The notice must be provided in writing in a manner calculated to be understood by the average employee. It may be hand delivered or provided by first-class mail. Alternatively, the notice may be provided electronically if the requirement of the Department of Labor's electronic disclosure safe harbor is met.

E. Model Notice.

To satisfy the content requirements under the Fair Labor Standards Act, the Department of Labor has provided model language to use. There is one model notice for employers who do not offer a health plan and another model for employers who offer a health plan for some or all employees.

1. Affordable Coverage.

a. Part B of the Notice requires that a box should be checked if the coverage meets the minimum value standard and is affordable.

The employer can use 9.5% any one of the following affordability safe harbors:

i. W-2 (Box 1) income Rate of Pay;

ii. Federal Poverty Level; or

iii. Rate of Pay.

The costs for the single coverage should assume all employees are non-smokers and no one qualifies for any wellness incentives. Also, if dental and/or vision is bundled with the health insurance, the bundled premium should be used.

2. Coverage may be considered to be "affordable" for only some of the otherwise eligible employees. Modifications to the model notice may be necessary.

3. The employer has the following two choices when coverage is not affordable to all employees:

   a. Assuming the health coverage provides minimum value, the employer can provide a version of the notice that indicates the coverage is affordable and that has the fifth box on page two of the notice checked. The employer would also have a separate notice for employees where the coverage is not affordable and that have the fifth box on page two of the notice left blank.

   b. In the alternative, the employer can provide the same notice for all employees with the fifth box on page two of the notice checked, with a notation proving language like the following:

      This coverage is not considered to be affordable for eligible employees earning less than $17,684.21.

   c. Insurance Affordability Calculator.

      Example: The cost for single coverage health insurance is $280 per month. The employer pays 50% of the cost of single coverage.

$70.00	Employee cost per check (paid two times per month)
24	# of checks
$1,680.00	Annual employee cost
9.50%	Divide annual employee cost by 9.5%

$17,684.21	Insurance is affordable at this compensation level

F. Penalties. The U.S. Department of Labor ("DOL") stated in a FAQ issued on September 10, 2013 that penalties will not be imposed for the failure to issue the exchange notice.

It is unclear where the DOL obtained its authority to state that no penalties will be applicable for non-compliance. Section 18B of the Fair Labor Standards Act ("FLSA") states that any employer subject to the FLSA "shall provide" written notice to current and future employees and that the DOL's Technical Release No. 2013-02, issued in May 2013, states that Section 18B of the FLSA generally provides that an applicable employer "must provide" each employee with a notice. It is unclear what a court of law would do in such instance.

Furthermore, the Notice of Exchange could be viewed as a required disclosure under ERISA regarding the health care benefits which could provide a private cause of action by the employees. Since the burden of preparing and distributing the notice is not great relative to the potential liability, we advise employers to provide the notice.

1. October 1, 2013. Revised COBRA Documents.

   The U.S. Department of Labor has modified the standard COBRA notice to reflect the new health care exchanges. Standard COBRA documents should be modified to reflect this new language beginning November 1, 2013.

2. January 1, 2014. Summary of Benefits and Coverage ("SBC"). The government updated the SBC template that describes coverage beginning on or after January 1, 2014, and before January 1, 2015. The updated SBC template includes a

statement as to whether the group health plan provides minimum essential coverage and whether that coverage meets the minimum value requirements (i.e., the plan must cover at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan).

The updated templates are not required for SBCs issued for the 2014 plan year; however, if the group health plan does not use the updated templates for the upcoming open enrollment, the new guidance requires the plan or insurance company to include a disclosure with the SBC. That disclosure may be in the form of a cover letter stating whether the plan provides minimum essential coverage and meets the minimum value requirements. The guidance from the government includes sample language for that disclosure.

3. January 1, 2014. Individual Mandate. Since all individuals will be required to have health insurance or they will be subject to an income tax penalty, additional employees may decide to participate in the employer's group health plan. You should assume additional employees will want to participate in the employer's group health plan and budget accordingly.

4. Employee Health Plan Changes – 2014 Plan Year.

   a. No pre-existing conditions exclusions.

   b. 90-day waiting period maximum. Using the first day of the month following 90 days will not be permissible.

   c. Grandfathered plans must now extend coverage to dependent children even if they are eligible for other employer coverage. SPDs should be modified.

d. Employers may offer wellness programs that provide incentives of up to 30% of the cost of group health coverage (50% for smoking cessation programs) as opposed to 20% under current regulations.

5. September 23, 2014. HIPAA Business Associate Agreements.

On January 25, 2013, the Department of Health and Human Services ("HHS") issued significant new guidance on the rules that govern protected health information (PHI) under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), hereinafter referred to as "the Omnibus Rule." The Omnibus rule requires group health plans and their business associates to make changes to business associate agreements.

September 23, 2014 for Existing Contracts: Business associate agreements that were in existence on January 25, 2013, that are compliant with HIPAA, and that are not revised or renegotiated between March 26, 2013 and September 23, 2013, will not have to be revised to incorporate the new requirements until September 23, 2014.

September 23, 2013 for Non-Compliant Agreements: If a contract that exists on January 25, 2013, is not otherwise compliant with HIPAA, a new contract must be adopted by September 23, 2013.

New or Renegotiated Business Associate Contracts: Business associate agreements that are renegotiated, revised, or that are entered into after March 26, 2013, must include the provisions required by the Omnibus Rule.

6. October 1, 2014. Group health plans that engage in elective transactions must implement the International Classification of

Disease, 10th Revision (ICD-10) standard code regulations and procedures.

7. November 5, 2014. Group health plans that engage in elective transactions (except small health plans – those with annual receipts of $5 million or less) must obtain a standard coverage health plan identifying number (HPID).

8. November 15, 2014. Insurance issuers and sponsors of self-insured group health plans must submit their enrollment counts to HHS by November 15 of each applicable year (the first enrollment counts will be due November 15, 2014) for the Transitional Reinsurance Fee ("TRF").

   Within 30 days, HHS will notify the plan of its required contribution amount. Contributions must then be made within 30 days of the notification from HHS. HHS will provide details on the submission of enrollment counts and contributions in future guidance.

   The $63 per year/per covered life TRF must be paid to the federal government by insured and self-insured group health plans beginning in 2014. The TRF applies to calendar-years 2014 through 2016. The government expects to collect approximately $12 billion dollars in 2014 for this fee.

   The TRF contribution requirement does not apply to several types of coverage, including:

   HIPAA excepted benefits (such as stand-alone dental and vision coverage).

Health reimbursement arrangement (HRA) coverage that is integrated with a self-insured group health plan or health insurance coverage.

Health savings accounts (HSAs).

Health flexible spending arrangements (health FSAs).

Employee assistance plans (EAPs), disease management programs or wellness programs that do not provide major medical coverage.

Plans limited to prescription drug benefits.

Stop loss or indemnity reinsurance policies.

TRICARE and other military health benefits.

Coverage provided by Indian tribes to tribal members and their dependents.

Indian Health Service health programs.

Medicare (if primary), Medicaid or CHIP.

Federal or state high-risk pools, including the Pre-Existing Condition Insurance Plan Program.

Basic health plan coverage offered by insurers under contract with a state.

9. December 15, 2014. HHS will notify insurance issuers and sponsors of self-insured group health plans by December 15, 2014 of the Transitional Reinsurance Fee they owe. The fee must be paid within 30 days after the notice date.

10. December 31, 2014. Employers must adopt amendments to flexible spending arrangements to reflect the $2,500 limit on employee contributions to health FSAs. The effective date of the amendment must be retroactive to the first day of the 2013 plan year.

11. February 28, 2016. For 2015 insurers and self-insured employers that provide minimum essential coverage must file a return with the IRS and provide a statement to each participant that includes identifying information for the employer and each covered individual, details of the individual's coverage, and information concerning the employer's contribution to the cost of coverage. (IRS Notice 2013-45). This reporting was initially required for 2014. IRS transitional relief stated that no penalties will be imposed for the failure to timely and accurately report 2014 coverage under Code Section 6055.

    Information to be reported includes the name of each individual enrolled in minimum essential coverage, the name and address of the primary insured individual, the TIN and months of coverage for each individual who is covered under the policy or program and other specified information.

12. January 2016. Code Section 6056 requires employers to report to the IRS information about their compliance with the Code Section 4980H employer shared responsibility (pay or play) provisions based on their 2015 data.

    Employers with more than 50 full-time employees must file a return with the IRS and provide a statement to each participant that includes information concerning the group health coverage; the cost of coverage; the employer's share of the cost of benefits provided under the plan; the number of full-time

employees for each month; the name, address and TIN of each covered employee, and the months for which the employee and any dependents are covered. Under proposed IRS regulations, only applicable large employers ("ALE") (50 or more full-time employees) would be subject to the Code Section 6056 filing and statement furnishing requirements (and only with respect to their full-time employees). Generally, the ALE member providing the reporting would be the common law employer.

The proposed IRS regulations provide that a separate return is required for each full-time employee, accompanied by a single transmittal form for all of the returns filed for a given calendar year. The return may be made by filing Form 1094-C (a transmittal) and Form 1095-C (an employee statement), or other forms that IRS designates.

Code Section 6056 returns would have to be filed with IRS annually, no later than February 28th (March 31st if filed electronically) of the year immediately following the calendar year to which the return relates, i.e., the same filing schedule applicable to Forms W-2 and 1099. Due to the reporting postponement under IRS Notice 2013-45, the first Code Section 6056 returns required to be filed would be for the 2015 calendar year and would have to be filed no later than March 1, 2016 (because February 28, 2016 is a Sunday), or March 31, 2016, if filed electronically.

Employee statements would be furnished annually to full-time employees on or before January 31st of the year immediately following the calendar year to which the employee statements relate. The first employee statements for calendar year 2015

would have to be furnished no later than February 1, 2016 (because January 31, 2016 is a Sunday).

The proposed IRS regulations would require electronic filing of Code Section 6056 information returns except for an ALE member filing fewer than 250 returns during the calendar year. Each Code Section 6056 return for a full-time employee would be a separate return and all returns would be aggregated for the 250-return threshold.

Example: An ALE member required to file 150 Code Section 6056 returns and 200 Forms W-2 would be required to electronically file Code Section 6056 returns.

II. HEALTH CARE ECONOMICS – PLANNING FOR PAY OR PLAY

A. January 1, 2015. Employer Shared Responsibility Rules (Pay or Play) become effective. (IRS Notice 2013-45).

B. The pay or play provisions of PPACA are found in Section 4980H of the Internal Revenue Code ("Code"). This Code Section was initially effective as of January 1, 2014 and imposes a penalty on an "applicable large employer" ("ALE") 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 within the meaning of Code Section 4980H. The penalty applies where one or more full-time employees is certified to receive a premium tax credit or cost-sharing reduction. The effective date of the penalty under Code Section 4980H has been postponed until January 1, 2015.

PPACA does not require employers to provide health insurance coverage to its employees. However, employers that do not provide

affordable minimum "essential health benefits" may be liable for an additional tax.

C. Employers with at least 50 full-time equivalent employees ("FTE's") must offer health coverage that meets minimum standards and that is considered affordable or face an excise tax.

There are two types of excise taxes:

1. Tax for Failure to Provide Coverage. Employers with 50 or more FTE's (these employers are considered "large" employers) will be subject to this new tax. Employers that fail to offer the essential 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. 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.

2. Tax for Employer Failure to Pay a Specific Amount of Health Costs. Employers with 50 or more FTE's who offer health coverage to "full-time" 30 hour per week employees that exceeds 9.5% of the employees' compensation 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. 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.

D. Delay of Code Section 4980H. In Notice 2013-45, the IRS delayed application of Code Section 4980H penalties for applicable large employers until 2015. However, the Notice did not make any changes to the proposed regulations or to the safe harbors for measuring employee hours.

Employers wishing to use the safe harbors will need to apply the provisions of the proposed regulations and focus on a compliance date well in advance of January 1, 2015. This is because the IRS safe harbors use look-back measurement periods to lock in an employee's full-time or part-time status for a designated stability period. Since the stability periods will begin January 1, 2015, employers wishing to lock in an employee's status for 12 months, and also use an administrative period for enrollment and related activities, will need to start measuring hours in 2013.

This IRS has provided safe harbors for both new and ongoing employees which will allow employers to avoid making a determination as to an individual's full-time employee status on a month-by-month basis.

Ongoing Employees – 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. If employees are expected to work 30 hours or more per week, the employer can deem these employees full-time

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.

Employers may also adopt an "administrative period" of up to 90 days after the end of each measurement period to allow for enrollment during the next stability period. During the administrative period employees must continue to offer coverage to ongoing employees deemed full-time during the previous stability period to avoid gaps in coverage. For new employees, the administrative period when combined with the initial measurement period may not extend beyond the last day of the first calendar month beginning on after the one-year anniversary of the employee's start date.

An ongoing employee who is determine 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.

E. Safe Harbor Example for Ongoing Employees.

The following example illustrates the safe harbor parameters for ongoing employees.

1. Measurement period: 12-month period, from October 15 through October 14 each year.

2. Stability period: 12-month period, from January 1 through December 31 each year.

3. Administrative period: October 15 through December 31 each year. This allows time to calculate hours from the measurement period, determine eligibility, distribute enrollment materials, and conduct open enrollment.

4. Plan/Policy Year: Calendar year.

XYZ Co. sponsors a group health plan. Only employees who average at least 30 hours per week using the look-back measurement period are eligible for coverage.

Employee A and Employee B were hired in 2007 and have worked continuously for XYZ since then. They are considered ongoing employees because they have been employed for at least one complete standard measurement period. Employee A averaged 30 hours per week from October 15, 2013 to October 14, 2014 and for all prior standard measurement periods. So long as Employee A remains an employee, Employee A must be treated as a full-time employee for the period January 1 to December 31, 2015, the stability period that corresponds to the standard measurement period that ended on October 14, 2014. This is the result regardless of Employee A's actual hours during the 2015 calendar year. In addition, because (under the assumed facts) Employee A was employed an average of 30 hours per week during the standard measurement period from October 15, 2013 to October 14, 2014, Employee A is offered coverage for the entire 2015 stability period and, if enrolled, would continue such coverage during the administrative period of October 15 to December 31, 2015.

Employee B averaged fewer than 30 hours per week during the period October 15, 2013 to October 14, 2014. Employee B is not treated as a full-time employee for the period January 1 to December 31, 2015, regardless of how many hours Employee B works in 2015. However, if Employee B was employed an average of 30 hours per week for the standard measurement period from October 15, 2014 to October 14, 2015, then Employee B must be treated as a full-time employee for the entire 2016 stability period. If Employee B enrolled in XYZ's health plan for 2016, Employee B would be entitled to continue such coverage for all of 2016, including the administrative period from October 15 to December 31, 2016. Employee B's loss of full-time status during the measurement period ending October 14, 2016 does not affect his full-time status for the 2016 stability period which does not end until December 31, 2016.

Summary: Employers cannot wait until 2015. The hours worked in 2013 and 2014 will be used to determine health care eligibility and Code Section 4980H penalties beginning January 1, 2015.

F. Safe Harbor Parameters for New Employees.

1. New Non-Variable-Hour and Non-Seasonal Employees.

If an employee is reasonably expected at his or her start date to be a full-time employee (i.e., work on average at least 30 hours or more per week) and is not a seasonal employee, the look-back and stability period safe harbors do not apply. If an applicable large employer does not offer coverage to such employee by the end of the employee's 90th day of employment, the employer may be subject to a penalty for

those 90 days as well as for any subsequent months of employment for which coverage is not offered.

2. New Variable-Hour and Seasonal Employees.

a. Variable Hour Employees - An employee is a "variable-hour employee" if it cannot be determined on the employee's start date that the employee is reasonably expected to work an average of at least 30 hours per week during the initial measurement period (based on the facts and circumstances on the employee's start date).

Employers Must Assume New Variable-Hour Employees Will Work for the Entire Initial Measurement Period. A new employee who initially is expected to average at least 30 hours per week may nevertheless be a variable-hour employee if the period of employment exceeding 30 hours per week is expected to be limited, and it cannot be determined that the employee will average at least 30 hours per week over the entire initial measurement period. However, an employer cannot take into account the likelihood that the employee may terminate employment before the end of the initial measurement period. Therefore, an employer cannot classify an employee as a variable-hour employee based solely on the expectation that the employee will terminate employment at some point before the initial measurement period ends (and therefore will not average 30 hours per week over the entire initial measurement period).

b. Treatment of Seasonal Employees.

Under the proposed regulations, new seasonal employees are treated the same as new variable-hour employees for purposes of the safe harbors. Therefore, employers should be able to apply the measurement period/stability period safe harbors for seasonal employees, even though they work more than 30 hours per week when they are hired. The proposed regulations reserve the definition of a seasonal employee (which is not defined for this purpose in the statute), and provide that, as set forth in IRS Notice 2012-58, employers are permitted, through 2014, to use a reasonable, good faith interpretation of the term.

3. Safe Harbor Examples for New Variable-Hour Employees.

The following examples illustrate how the safe harbors work for new variable-hour employees.

a. Example 1: Full-Time Employee During The Initial Measurement Period.

For ongoing employees, XYZ Co. uses a 12-month standard measurement period of October 15 to October 14, an administrative period of October 15 to December 31, and a stability period equal to the calendar year. For new variable-hour employees, XYZ uses a 12-month initial measurement period starting on the employee's start date and an administrative period starting on the day after the last day of the initial

measurement period and ending on the last day of the first calendar month that begins on or after the last day of the initial measurement period.

Employee C is hired on May 10, 2013. Therefore, C's initial measurement period is May 10, 2013 to May 9, 2014. If C averages at least 30 hours per week during this measurement period, then C will have to be treated as a full-time employee for the stability period running from July 1, 2014 to June 30, 2015. The administrative period runs from May 10, 2014 (the day after the last day of the initial measurement period) to June 30, 2014 (the last day of the first calendar month that begins after the end of the initial measurement period). XYZ Co. may use this administrative period to calculate C's average hours, provide enrollment information, and complete C's enrollment in the plan. C will have full-time status during the stability period ending June 30, 2015, regardless of the actual hours worked during the stability period. If C terminates employment, then full-time status ends on the termination date.

XYZ must also measure C's hours during the standard measurement period running from October 15, 2013 to October 14, 2014. If C averages at least 30 hours per week during the standard measurement period, C must be treated as a full-time employee from January 1 to December 31, 2015, regardless of the hours actually worked during 2015. It should be noted

that C already has full-time employee status from January 1 to June 30, 2015, based on full-time status during the initial measurement period. This status cannot be taken away, so long as C continues as an employee.)

b. Example 2: Not a Full-Time Employee During Initial Measurement Period, but Becomes a Full-Time Employee During Standard Measurement Period.

Assume the same measurement, administrative, and stability periods as in Example 1 above. Employee D also is hired on May 10, 2013. Therefore, D's initial measurement period is May 10, 2013 to May 9, 2014. D averages 28 hours per week during this initial measurement period. D does not have to be treated as a full-time employee for the stability period running from July 1, 2014 to June 30, 2015, based on the hours worked during the initial measurement period.

However, XYZ must also measure D's hours during the standard measurement period running from October 15, 2013 to October 14, 2014. Assume that D averages at least 30 hours per week during the standard measurement period. D must now be treated as a full-time employee from January 1, 2015 to December 31, 2015. D's status as full-time employee based on hours worked during the standard measurement period overrides D's status as a non-full-time employee

during the initial measurement period. Therefore, D must be treated as a full-time employee starting on January 1, 2015 (the first day of the stability period associated with the standard measurement period running from October 15, 2013 to October 14, 2014), even though D did not earn that status during the initial measurement period.

c. Example 3: 11-Month Initial Measurement Period With Split Administrative Period.

CDE, Co. uses an 11-month initial measurement period that <u>begins on the first day of the first calendar month after a new variable-hour employee's start date</u>. The administrative period is two calendar months starting on the last day of the initial measurement period. The stability period is 12 months. Employee E is hired on May 10, 2013. Therefore, E's initial measurement period runs from June 1, 2013 to April 30, 2014. E averages 30 hours per week during this initial measurement period. D must be treated as a full-time employee for the stability period from July 1, 2014 to June 30, 2015.

In this example, the administrative period is 82 days: the 21 days from the start date to May 31, 2013, plus the 61 days from May 1 to June 30, 2014.

The plan also complies with the limit on the combined length of the initial measurement period plus the administrative period, since the

administrative period does not extend beyond the last day of the first calendar month (June 2014) beginning on or after the first anniversary (May 10, 2014) of E's start date.)

d. Example 4: Change in Employment Status During Initial Measurement Period.

LMN, Co. uses a 12-month initial measurement period that begins on the new variable-hour employee's start date. The administrative period runs from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period. Employee F is a new variable-hour employee hired on May 10, 2013. F's initial measurement period runs from May 10, 2013 to May 9, 2014, and the administrative period ends June 30, 2014. On September 15, 2013, LMN promotes F to a position in which F is reasonably expected to average at least 30 hours of service per week.

For penalty purposes, F will be treated as a full-time employee as of January 1, 2014. January 1, 2014 is the earlier of the first day of the fourth calendar month following the change in position (which occurred in September 2013) or the first day of the calendar month after the end of the initial measurement period plus the optional administrative period (July 1, 2014).

4. Safe Harbor Examples for Seasonal Employees.

The proposed IRS regulations also include the following example involving a seasonal employee. Proposed Treas. Reg. § 54.4980H-3(c)(5), Example 11.

Employer D uses a 12-month initial measurement period for new seasonal employees that begins on the start date. Employer D hires Employee S, a ski instructor, on November 15, 2013 with an anticipated season running through March 15, 2014. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith interpretation of that term. Employee S's initial measurement period runs from November 15, 2013, through November 14, 2014. Employee S is expected to have 50 hours of service per week from November 15, 2013 through March 15, 2014, but is not reasonably expected to average 30 hours of service per week for the 12-month initial measurement period.

The example concludes that Employer D cannot determine whether Employee S is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period and, therefore, Employer D may treat Employee S as a variable-hour employee during the initial measurement period.

The point of the example is to show that employers can apply the measurement and stability periods to new employees who are expected to average more than 30 hours per week, even for an extended time period, as long as they can be classified as seasonal employees.

Once an employee is determined to work full-time during the initial or standard measurement period, the stability period for such employee must be no shorter than the standard measurement period, but not less than 6 months and the employee will be considered a full-time (30 hour) employee even if their average hours are below 30. The stability period must begin immediately after the standard measurement period or an administrative period of not more than 90 days.

As discussed, employers are allowed up to a 90-day administrative period between the measurement and stability periods, in order to communicate benefits and to secure enrollment. This administrative period can neither lengthen nor reduce the measurement or stability periods. However, to prevent gaps in coverage, it will overlap with the prior stability period.

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

G. 2015 is a long way off. Should we do anything in 2013/2014?

Delay of Code Section 4980H. In Notice 2013-45, the IRS delayed application of Code Section 4980H penalties for applicable large employers until 2015. However, the Notice did not make any changes to the proposed regulations or to the safe harbors. Employers wishing to use the safe harbors will need to apply the provisions of the proposed regulations and focus on a compliance date well in advance of January 1, 2015. This is because the safe harbors use look-back measurement periods to lock in an employee's full-time or part-time

status for a designated stability period. Since the stability periods will begin January 1, 2015, employers wishing to lock in an employee's status for 12 months, and also use an administrative period for enrollment and related activities, will need to start measuring hours in 2013.

H. Penalties for Non-Compliance.

Many of PPACA's mandates are made in the form of amendments to the Public Health Service Act ("PHSA"), which applies directly to insurers and governmental plans. However, PPACA makes these provisions applicable to employer-sponsored health plans (including self-insured plans) through ERISA § 715 (which adds the new PHSA provisions to ERISA) and Code § 9815 (which adds the new PHSA provisions to the Code).

A summary of some of the applicable penalties are as follows:

Requirement	Penalty
Provision of minimum essential coverage to full-time employees through a group health plan by employers with 50 or more employees. PPACA § 1513; Code § 4980H	If the employer does not provide coverage and at least one full-time employee receives coverage through an Exchange, the employer is penalized $2,000/yr for each full-time employee. If the employer provides unaffordable coverage, the employer must pay lesser of: $3,000/year for each full-time employee receiving the premium credit or $2,000/year for each full-time employee. For purposes of calculating the $2,000/employee penalty, the first 30 employees are disregarded. Note: This penalty applies to employer sponsors of private sector group health plans through Code § 4980H.

Uniform explanation of coverage (summary of benefits and coverage) and 60-day notice of material modifications made other than in connection with a plan's renewal. PHSA § 2715; PPACA § 1001	$1,000 fine for each willful failure to comply.
Individual Mandate PPACA § 1501(b), Code § 5000A(c)	The applicable penalty is the greater of the flat dollar penalty or the gross income penalty. The flat dollar penalty in 2014 is $95.00 per individual to a maximum of $285 per family. The penalty in 2015 is $325 per individual to a maximum of $975 per family. The penalty in 2016 is $695 per individual to a maximum of $2,085 per family. The flat dollar penalty is halved for dependents under 18. The gross income penalty in 2014 is 1% of household income in excess of a specified filing threshold, 2% in 2015 and 2 ½% in 2016 and beyond. Waivers are allowed for specified individuals and circumstances. The gross income penalty is capped at the national average premium of a bronze level Exchange plan.
Nondiscrimination Rules PHSA § 2716; PPACA §§ 1001, 10101	$100/day for each responsible entity, for each individual affected by the violation.
No Lifetime Limits or Annual Limits beginning in 2014 PHSA § 2711; PPACA § 1001	$100/day for each responsible entity, for each individual affected by the violation.
Group Health Plan	$100/day for each responsible entity, for each

Coverage must Extend Eligibility for Dependents to Age 26 PHSA § 2714; PPACA § 1001	individual affected by the violation.
No Retroactive Rescissions of Coverage after Enrollment PHSA § 2712; PPACA § 1001	$100/day for each responsible entity, for each individual affected by the violation.
First Dollar Coverage for Preventive Care PHSA § 2713; PPACA § 1001	$100/day for each responsible entity, for each individual affected by the violation.
Revised Appeals Process, PHSA § 2719; PPACA § 1001	$100/day for each responsible entity, for each individual affected by the violation.
Disclosure in all Plan Materials Providing Notice of Grandfathered Status for Health Plan PPACA § 1251	$100/day for each responsible entity, for each individual affected by the violation.
Disclosure of Plan Information to HHS PHSA § 2715A; PPACA § 1311(e)	$100/day for each responsible entity, for each individual affected by the violation.

Prohibition on Emergency Room Restrictions PHSA § 2719A; PPACA § 1001	$100/day for each responsible entity, for each individual affected by the violation.
Prohibition on PCP Restrictions PHSA § 2719A; PPACA § 10101	$100/day for each responsible entity, for each individual affected by the violation.
No Pre-Existing Condition Exclusions for Participants Under 19; No Pre-Existing Condition Exclusions (beginning 2014) PHSA § 2704; PPACA §§ 1255, 10301	$100/day for each responsible entity, for each individual affected by the violation.
Limit on Employee Out-of-Pocket Expenses PHSA § 1302, PPACA § 1101	$100/day for each responsible entity, for each individual affected by the violation.
Identification by Employers that Self-Insure of those Offered Group Health Coverage and Dates of Coverage; Certification by Employers of 50 or More Full-Time Employees of Whether all Full-Time Employees and Dependents were Offered Group Health Care Coverage PPACA § 1514	$100/day for each responsible entity, for each individual affected by the violation.

Required Coverage for Clinical Trials for Life-Threatening Diseases PHSA § 2709	$100/day for each responsible entity, for each individual affected by the violation.
90-Day Limit on Waiting Periods PHSA § 2708; PPACA § 1201	$100/day for each responsible entity, for each individual affected by the violation.
Increase in Wellness Program Incentives from 20% of the Total Cost of Coverage to 30% (50% for tobacco cessation programs) PHSA § 2717; PPACA § 1001	$100/day for each responsible entity, for each individual affected by the violation.
Community Rating Restrictions Regarding Premium Variations for Health Insurers Providing Individual or Small Group Policies and Insurers Offering Large Group Policies using an Exchange PPACA § 1334	$100/day for each responsible entity, for each individual affected by the violation.
Automatic Enrollment PPACA § 1511, Fair Labor Standards Act § 18A	$100/day for each responsible entity, for each individual affected by the violation. No compliance required until regulations are issued.

HOW TO AVOID A MALPRACTICE CLAIM – A CASE STUDY

By: Kathleen H. Klaus, Esq.

I. INTRODUCTION TO ACCOUNTING MALPRACTICE BASICS

A. Elements of negligence claim are (a) existence of relationship/duty; (b) breach of the standard of care; (c) causation; and (d) damages.

B. Michigan statute favors accounts by limiting scope of duty to "clients," only, absent written disclosure of broader scope. MCL 600.2962

C. Two-tiered statute of limitations.

Claim must be filed by the later of two years from the end of the relationship or six months from discovery of facts giving rise to claim. MCL 600.5805(1); 600.5838(1).

II. CASE STUDY - ACCOUNTANT MALPRACTICE

A. Hypothetical case summary:

Accountant Q was retained by an investor in Company X to perform undefined "services" in connection with an acquisition Company X was making of Company Y. The attorney on the deal made a suggestion to Q and Company X concerning the tax treatment of certain aspects of the acquisition. Q accepted the suggestion at face value and did not perform any additional research. Q completed an audit and completed tax returns of Company Y and X based on the suggested tax treatment. After several years, Company Y and X retain accountant T to perform the audit and tax returns. T questions the prior year's tax treatment, but is assured by Q and the client that the tax treatment was valid. T completes its audit and tax returns based on Q's tax treatment in prior years. The IRS audits Company Y and

determines that the initial tax treatment was incorrect. It assesses taxes, fines and penalties. Q and T are sued by Company Y.

B. These facts are hypothetical and do not reflect a real case. They were crafted to highlight certain issues that appear regularly in accounting malpractice cases.

C. First issue: **Clearly define the scope of the engagement.**

1. Q did not believe that he was retained to provide tax advice with regard to the acquisition structure. However, Q did not have an engagement letter that limited the type of advice he was providing.

2. Do not allow "engagement creep." Once the attorney included Q in the discussions about the tax treatment with regard to the acquisition, even a solid engagement letter may not protected Q from an argument that Q assumed a duty to provide advice on the matter.

3. T's defense would have been strengthened by a letter to the client asking for an acknowledgement that the client was not asking T to review the tax treatment chosen by Q. Boilerplate not as strong as a specific letter addressed to the specific situation.

D. Second issue: **Clearly define who you client is.**

1. Q did not believe he had a relationship with Company Y and thought he was retained by the investor in Company X.

2. Michigan law allows accountants to limit scope, but accountants have to take advantage of the law by identifying the client in the engagement letter.

E. Third issue: **Clearly establish a trigger which ends the relationship.**

1. Claims accrue at the end of the matter out of which the claim for malpractice arose.

2. However, Michigan recognizes the "last treatment" rule for accrual of claims against professionals. *Levy v. Martin,* 463 Mich 478 (2001).

   a. In *Levy,* the accountant completed the plaintiff's annual tax returns for years. After an audit, the plaintiff sued for damages based on tax returns that were completed outside of the limitations period. Michigan Supreme Court found that the "matter out of which the malpractice arose" was annual tax return. It was one "big engagement."

   b. This can be addressed in an engagement letter that states the engagement terminates upon a certain event, *e.g.* the submission of a specific audit of tax return.

F. Fourth issue: **Buy insurance.**

These cases are expensive to defend.

III. <u>RISK MANAGEMENT - THE ENGAGEMENT LETTER</u>

A. Each of these issues may be addressed by a well-written engagement letter.

B. Well-written means plain language so there can be no question that the client understands its terms.

C. If the work changes, you can and should amend the engagement letter.

THE ESTATE PLANNER'S MENU: DAILY SPECIALS

By: Geoffrey N. Taylor, Esq.

I. INTRODUCTION

A. Now that the federal estate tax exemption is $5,250,000 ($10,500,000 for a married couple) and indexed to increase in future years for inflation, is estate planning even necessary any longer?

B. Although the American Taxpayer Relief Act of 2012 rendered gift and estate tax planning a consideration for wealthier clients only, the same non-tax reasons for estate planning remain.

C. All clients have to make the typical decisions in connection with an estate plan.

1. Who will make financial and medical decisions for me if I cannot make them for myself?

2. Who will receive my assets upon my passing and under what conditions?

3. Who will take care of any minor children I may have?

D. However, every client is unique.

E. Therefore, it is incumbent on trusted advisors, such as accountants, attorneys, and financial planners, to familiarize themselves with the client's situation and that of the client's family.

F. The following are some of the more common "special" contexts in which those typical decisions must be made.

II. SPECIAL CLIENTS

A. Divorced or divorcing.

1. Can estate plan documents be changed during divorce proceedings?

2. Do estate plan documents even need to be changed after the divorce is finalized?

3. Under MCL 700.2807, a divorce revokes:

   a. A "disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument;" and

   b. A "disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse."

   c. A "nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in a fiduciary or representative capacity, including, but not limited to, a personal representative, executor, trustee, conservator, agent, or guardian." Under MCL 700.1103(a), an agent "includes, but is not limited to, an attorney-in-fact under a durable or nondurable power of attorney and an individual authorized to make decisions as a patient advocate concerning another's health care."

4. MCL 700.2807 also provides each "provision of a governing instrument is given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section."

5. What is a governing instrument? Under MCL 700.1104(k), a governing instrument means "a deed; will; trust; insurance annuity policy; account with POD designation; security registered in beneficiary form (TOD); pension, profit-sharing, retirement, or similar benefit plan; instrument creating or exercising a power of appointment or a power of attorney; or dispositive, appointive, or nominative instrument of any similar type."

6. So must anything be done? [SOME CLIENTS DON'T WANT THIS – WON'T COVER ERISA PLANS]

7. What if there is a minor child from the marriage and the custodial parent is adamant the child's other biological parent does not get custody of the child upon the custodial parent's death?

B. Second Marriage.

1. Everyone knows the divorce rate in the United States is high. Divorce can be a result of incompatibility between couples, infidelity issues, lack of trust and understanding, and financial pressures.

2. The statistics quoted are often as follows:

   a. First marriage – 40% to 50%

   b. Second marriage – 60%

   c. Third or more marriage – 70%+

3. The statistic quoted for remarriage often is approximately 50% although, like divorce, this rate varies by gender, race, age and other factors.

4. Marital agreements are written contracts that are entered into before or after a marriage. They establish the property rights the parties will have as a result of the marriage, particularly upon death or divorce, and permit married couples to modify and waive legal property rights each would otherwise have. Marital agreements are very practical in second and third marriages, where they can:

   a. Provide that the property each spouse brings to the marriage will ultimately pass to that spouse's family;

   b. Set forth how the spouses agree to pay household expenses, taxes, and other obligations;

   c. Provide for continued benefits for the surviving spouse, such as the right to live in the marital home and the right to income from part or all of the deceased spouse's assets; and

   d. Provide for burial arrangements of the spouses.

5. When spouses in a second marriage have children from a prior marriage and/or the existing marriage, there are several approaches that can be taken.

6. Approach #1 - Separate all assets and just take care of your children.

   a. Spouses generally cannot be disinherited under Michigan law.

   b. This allows family heirlooms and businesses to be protected and family members can easily understand how the estate plan operates before and after death.

c. This does not work well if one of the spouses is not financially independent. Distribution of the marital residence is also tricky.

7. Approach #2 - Take care of your spouse but make sure your children eventually get your assets.

   a. This is probably the most common approach.

   b. Use of a qualified terminable interest property or "QTIP" trust in this context is ubiquitous because it provides a surviving spouse a lifetime benefit from the QTIP trust assets but it allows the predeceasing spouse to control how the remaining QTIP trust assets will be distributed upon the surviving spouse's death (e.g., to the predeceasing spouse's children). All income must be paid to the surviving spouse, even if the spouse remarries. Principal may, but need not be, distributable to the surviving spouse and principal distributions can cease if the surviving spouse remarries.

   c. QTIPs can present problems, however. If the surviving spouse lives for a considerable amount of time after the death of the first spouse, the outright distributions to the predeceasing spouse's children are delayed for that time period. The surviving spouse may also not like the thought of her stepchildren eagerly awaiting her death in order to receive their outright inheritance. The surviving spouse will want investments which maximize income, while the children will want investments which maximize growth. The deceased spouse's children cannot receive QTIP distributions during the surviving spouse's lifetime.

d. In some situations a spouse will provide for a portion of the spouse's assets to go to a QTIP trust with the remaining portion going directly to the spouse's children.

8. Approach #3 - Leave everything outright to your spouse, then to the children of both spouses.

a. The spouses create a joint trust and fund that joint trust with all of their assets, both separate and mutual. At the death of the first spouse, the joint trust remains revocable and the surviving spouse is entitled to all of the assets in the trust. When the surviving spouse dies, the remaining assets in the joint trust are distributed outright to all of the children of both spouses.

b. This approach requires the spouses to trust each other immensely.

c. It is very simple and easy to understand since all the assets are funded into one trust. The surviving spouse has access to all of the assets of both spouses.

d. Because the joint trust does not become irrevocable until the surviving spouse dies, the surviving spouse can disinherit the children of the deceased spouse.

C. Business owner.

1. When the business owner dies, one of three things happen: the business is continued, sold, or liquidated.

2. Many owners feel very strongly that the business pass to the next generation. This is particularly true where there are no co-owners of the business and if there are co-owners when they don't have a buy/sell arrangement in place.

3. When one or more, but not all of the children, are active in the business, equalizing the shares for the children is often a very difficult issue with which to deal. How can this be accomplished?

4. If there are sufficient assets to equalize the shares, it can be fairly straightforward. To the extent that the active children received some or all of the business interests, the inactive children receive other estate assets of equal value. However, the children may disagree as to the value of the business interests. In that case a professional appraiser can be used, although this still might not resolve the dispute.

4. If there are insufficient assets to equalize the shares, the issue becomes even more difficult.

5. One option is to create voting and nonvoting interests. The voting interests are given to the children who are active in the business and the nonvoting interests are given to the children who are not active in the business. The active children can also be given an option to purchase the interests of the inactive children at fair market value. Again, disagreement as to valuation can create problems.

6. Another option is having the client purchase a life insurance policy, the proceeds of which would be used to fund the equal shares for the inactive children.

III. SPECIAL BENEFICIARIES

A. Special needs.

1. For clients with a special needs beneficiary (typically a child), the nomination of a guardian to continue to care for the child

upon the client's incapacity or passing is critical. The client's Will should describe in as much detail as possible why the guardian nominated therein is the best choice to help the probate court make an informed decision in the best interests of the child.

2. There are several approaches from which a client can choose in providing for a special needs child:

   a. Distributing assets outright to the child. Those assets would then count against the beneficiary's eligibility for means-tested government benefits.

   b. Disinheriting the child altogether. This would obviously not affect the beneficiary's eligibility for government benefits, but many clients, particularly ones with significant resources, consider this approach too harsh because the beneficiary is left to rely solely on government aid.

   c. Distributing the assets to a family member or friend with the understanding that person will use the assets for the benefit of the child. Because the recipient would not be required to do so, many clients feel this approach leaves too much to chance.

   d. Establishing a special needs trust ("SNT") for the benefit of the child. SNTs represent the hallmark of techniques used to provide for a special needs beneficiary.

3. SNTs can be used used when the child is receiving government benefits or is expected to receive such benefits in the future.

4. In most instances, the benefits programs of concern are Medicaid and Supplemental Security Income.

5. SNTs are designed to allow assets to be used for the benefit of the child without disqualifying the child from receiving means-tested government benefits.

6. Usually, the trustee of the SNT has the discretion, but not the requirement, to use assets of the SNT to pay for items or services for the benefit of the child. Those items or services often include programs of training, education and treatment; supplemental dietary needs; entertainment; nonmedical transportation; personal nonpublic-funded items including clothing (excluding everyday clothing needs), furniture, television, radio, vacation, travel and lodging expenses (excluding everyday housing needs); expenses of an appropriately equipped vehicle; payments to third parties for the child's household assistance; and similar items not otherwise provided through government benefits. In general, assets in a SNT supplement, but do not supplant, the benefits the child receives through government programs.

7. A trust protector can also be appointed to direct the trustee's actions, remove and replace the trustee under defined conditions, and amend the provisions of the SNT to ensure the child continues to qualify for means-tested government benefits.

B. Incarcerated.

1. Under the State Correctional Facility Reimbursement Act, the state is entitled to attach a prisoner's assets in order to reimburse the state for the cost of imprisonment.

2. The amount of the reimbursement, less the cost of investigation and collection, is added to the state's general fund.

3. The prisoner must report his or her income and assets upon sentencing. The state may also require the prisoner to resubmit the report for the purpose of obtaining current information regarding the prisoner's assets. The prisoner's assets include "property, tangible or intangible, real or personal, belonging to or due a prisoner or former prisoner." Assets do not include the following two exceptions:

   a. "The homestead of the prisoner up to $50,000.00 in value."

   b. "Money saved by the prisoner from wages and bonuses paid the prisoner while he or she was confined to a state correctional facility."

4. The state's claim is capped at 90% of the prisoner's assets.

5. The state can seize assets belonging to someone under the jurisdiction of the Michigan Department of Corrections, which include probation and parole.

6. Michigan courts have consistently held inheritances and beneficial interests in trusts can be used to reimburse the state. The Michigan Court of Appeals has held prisoners cannot disclaim benefits to avoid reimbursement.

7. For clients with a would-be beneficiary who is incarcerated, the decision to include the person as a beneficiary can be difficult.

8. If the client decides to include the person as a beneficiary, the approaches that can be taken are the same as with a special needs beneficiary as described above.

9. The Michigan Court of Appeals, relying on the reasoning articulated by the Michigan Supreme Court in another case, has held that the Michigan Department of Corrections, through the Michigan Department of Treasury, cannot reach a beneficiary's interest in a discretionary trust because of the nature of the beneficiary's interest." The Court explained that, since the beneficiary's receipt of any funds is dependent upon the trustee's exercise of discretion, the beneficiary has no ascertainable interest in the trust's assets.

10. However, great care must be taken in drafting the trust to ensure that any benefits intended for the beneficiary are received properly and are not seized by the state.

C. Spendthrift.

1. With few exceptions, clients with beneficiaries who are somewhat young (e.g., under age 30) prefer that the shares for those beneficiaries be held in continuing trusts rather than distributed outright. It is rare for clients to want distributions of any significance to be made to a beneficiary who is 18, which is the age of majority in Michigan. The thinking is a youthful beneficiary is far more likely to squander his inheritance than a beneficiary who is more "mature." However, just because a beneficiary is older does not mean the beneficiary will not be foolish with his inheritance.

2. "Spendthrift" beneficiaries spend money beyond their means and as a result very often have creditor problems.

3. In these cases, the beneficiary's interest should be held in a continuing trust for his benefit to "protect him from himself."

4. The Michigan Trust Code provides considerable protection for beneficiaries in these situations. Under MCL 700.7502:

   a. A spendthrift provision is valid and enforceable.

   b. A term of a trust providing that the interest of a trust beneficiary is held subject to a "spendthrift trust," or words of similar import, restrains both voluntary and involuntary transfer of the trust beneficiary's interest.

   c. The trust beneficiary's interest in a trust may not be transferred in violation of a valid spendthrift provision and trust property is not subject to enforcement of a judgment until distributed directly to the trust beneficiary.

5. An example of a spendthrift provision is as follows:

   "To the extent permitted by law, the principal and income of the trust is not available for the payment of the debts of any beneficiary or subject to alienation or anticipation by a beneficiary."

6. This means that the beneficiary cannot voluntarily assign his interest in a trust.

7. The same thinking applies to a beneficiary who is financially prudent but who is at risk to an involuntary assignment of his interest in the trust to satisfy claims of his creditors (physicians, businesspersons who have personally guaranteed loans, etc.)

8. Michigan law again provides considerable protection for these types of beneficiaries. MCL 700.7505 provides a creditor of the beneficiary of a discretionary trust (i.e., a trust whereby trust income or principal may be distributed only in the exercise of

the trustee's discretion) cannot reach trust assets allocated to the beneficiary until a distribution is actually made. MCL 700.7503 provides similar protection for a beneficiary of a support trust (i.e., a trust pursuant to which the beneficiary receives distributions for his health, education, support, and maintenance).

9. However, the protection is not limitless. MCL 700.7504 provides the interest of a trust beneficiary may be reached in satisfaction of an enforceable claim against the trust beneficiary by any of the following:

    a. A trust beneficiary's child or former spouse who has a judgment or court order against the trust beneficiary for support or maintenance;

    b. A judgment creditor who has provided services that enhance, preserve, or protect a trust beneficiary's interest in the trust; and

    c. The state or the United States.

10. Again, great care needs to be taken while drafting the trust to ensure the requirements of discretionary and support trusts are met and the trust assets are thereby protected.

QUALIFIED RETIREMENT PLAN CONSIDERATIONS IN MERGERS AND ACQUISITIONS

By: Charles M. Lax, Esq.

I. MOST QUALIFIED RETIREMENT PLANS HAVE SOME BAGGAGE

A. Buyer's perspective.

1. Wants to determine the extent of any risk--qualitative and quantitative.

2. Wants the seller to bear as much risk as possible.

B. Seller's perspective.

1. Wants to minimize the buyer's perception of any risk.

2. Wants the buyer to bear as much risk as possible.

II. TYPE OF TRANSACTION

A. Stock (or entity) purchase or merger (or combination) of entities.

1. Buyer's/surviving entity's risk is the greatest in this type of transaction because it inherits seller's baggage (liabilities). Buyer can help limit its economic risk through due diligence and good representations and warranties in the purchase agreement.

2. Seller should do their due diligence to determine the extent of the risk prior to a transaction.

a. The baggage may be correctable.

b. If it is correctable, it may be less expensive to do the correction than to later indemnify the buyer for its costs or loss.

c. The economics of the baggage needs to be factored into the economics of the deal, either by a purchase price adjustment or the payment of a post indemnity claim.

B. Asset acquisition by buyer.

1. Considerations for buyer.

a. Buyer and buyer's newly hired employees may feel more comfortable when they are told "nothing changed" with regard to their retirement plan.

b. Much of the risk, however, can be eliminated if seller retains the plan (not assumed) and the plan is then terminated with benefits distributed.

c. Sometimes a seller's plan is merged into buyer's existing plan. This is very dangerous because it could "contaminate" the buyer's existing plan, when it inherits the baggage.

2. Seller may simply not want to spend the time and money or take the responsibility for a plan's termination.

III. AT A MINIMUM, THE FOLLOWING DOCUMENTS MUST BE REVIEWED BY A BUYER

A. The last full set of plan and trust documents, including amendments.

B. Forms 5500 for the past three years.

C. Plan audits for the past three years (if required).

D. Actuarial reports for defined benefit plans for the past three years.

E. Year-end valuations for defined contribution plans for the past three years.

F. Most recent Summary Plan Description.

G. The last Determination Letter.

H. Any VCP applications or compliance statements.

I. Any IRS or DOL audit reports, including any closing agreements with the IRS.

IV. WHAT'S THE BIG DEAL ABOUT REPRESENTATIONS AND WARRANTIES IN A PURCHASE AGREEMENT?

A. Representations and warranties are all about who bears the risk of a transaction.

1. Often half or more of a purchase agreement is devoted to representations and warranties.

2. In negotiating representations and warranties, the following issues are considered:

a. How long they survive?

b. Is it absolute or merely to the "best knowledge"?

c. What costs, expenses, etc. get indemnified?

d. Is there a cap on the amount that will be indemnified for a breach?

e. Who are the indemnified and indemnifiers?

B. When faced with a representation that the Seller's plan is tax qualified and meets all requirements of ERISA.

1. Can a seller ever make that representation?

2. Can a buyer ever acquire or assume a plan without it?

V. WHAT ARE POTENTIALLY SOME OF THE "BIG TICKET" ITEMS A BUYER NEEDS TO LOOK OUT FOR?

A. The funding (or underfunding) of an assumed defined benefit plan.

B. The withdrawal liability from a multiemployer pension plan (union plan).

C. The commitments under collective bargaining agreements for future retirement plan contributions or benefits.

D. Improper characterization of a worker as an independent contractor.

E. The failure to file returns or if the plan is large enough (generally more than 100 participants), the failure to complete annual audits.

F. The failure to maintain a plan's qualification under Section 401(a). The most common failures include:

1. Failure to keep plan documents up-to-date.

2. Excluding eligible employees or including ineligible employees.

3. Incorrect application of entry dates.

4. Improperly counting hours of service.

5. Failure to follow the plan's definition of compensation.

6. ADP/ACP failures.

7. Failure to timely deposit 401(k) deferrals or loan repayments.

8. Improper loan administration.

9. The failure to recognize a partial plan termination.

10. Improper hardship distributions.

11. The failure to make required minimum distributions.

12. Failure to obtain spousal consent when required.

VI. DANGER SIGNS FOR A BUYER

A. A historical understaffing of internal benefits operations or an inordinate reluctance to consult expert advisors.

B. Unsophisticated or overwhelmed plan service providers.

C. A lack of historical data, records, or plan documents.

D. Pending or prior VCP filings or closing agreements.

VII. SPECIFIC TYPES OF SITUATIONS TO LOOK OUT FOR

A. Withdrawal liability.

1. What is withdrawal liability?

a. Many years ago, Congress added provisions to ERISA imposing a withdrawal liability on participating employers in multiemployer plans who either completely or even partially withdrew.

b. Congress wanted to make certain that the last employers remaining wouldn't get stuck with funding obligations for the employers that "bailed out."

c. When a withdrawal event occurs, a calculation is done to determine the withdrawing employer's share of the unfunded liability, which then becomes due immediately.

d. The withdrawal liability can be hundreds of thousands of dollars, even if a plan only covered a few union employees.

e. It can even be imposed against commonly owned businesses.

2. In a stock transaction.

a. The buyer should always try to gauge the withdrawal liability, even if it has no plans at that moment to withdraw.

b. Plans may request once each year an estimate of its withdrawal liability.

c. Some buyers may argue that the withdrawal liability or seller's underfunded portion of plan benefits is an "off-balance sheet liability" which should be factored into establishing the purchase price.

3. In an asset sale, the seller will likely cease operations (unless only a division is sold) and, if underfunded, withdrawal liability will be immediately created.

a. In this case, the seller certainly needs to gauge its withdrawal liability, which might substantially reduce the net proceeds of a sale.

b. There is a procedure whereby no withdrawal liability will be triggered if:

i. The buyer funds the pension plan at similar levels for at least five years.

ii. The seller posts a bond with the pension fund to assure payment of the required contribution level.

iii. Under this special provision, both the buyer and seller will remain responsible for withdrawal liability if the buyer withdraws in less than five years.

B. Partial plan terminations.

1. What is a partial plan termination?

a. Section 411(d)(3) of the Internal Revenue Code requires plans that are terminated or partially terminated to fully vest plan participants.

i. The rule of thumb adopted by the IRS is that a partial termination occurs if the turnover rate among Affected Participants (defined below) is 20% or more over the course of a year.

ii. An "Affected Participant" is one who terminated as a result of the employer's actions (downsizing, sale of a division, or being fired) as opposed to the plan participant's death, disability, retirement or quitting.

iii. While the IRS will look at "facts and circumstances," generally the test is pretty mechanical.

b. Section 411(d)(3) of the Internal Revenue Code also requires a plan to fully vest plan participants if there is a complete discontinuance of plan contributions.

i. The IRS' rule of thumb is if the sponsor of a discretionary contribution plan fails to make substantial contributions in three out of five years and there is a pattern of profits earned, the plan is deemed terminated.

ii. Under these circumstances, they will require all participants to be fully vested as of the last day of the year following the year the sponsor made its last substantial contribution.

2. One of these two events often precedes a business sale.

a. Struggling businesses are often either downsizing or eliminating discretionary plan contributions.

b. In many cases they may not even realize a partial termination has occurred.

c. The correction could mean going back many years, locating terminated participants who weren't fully vested and paying them the forfeited amount, plus earnings.

C. The failure to provide a 204(h) Notice.

1. Prior to a sale a struggling business may:

a. Freeze or reduce future benefit accruals in a defined benefit plan.

b. Cease or reduce future contributions to a money purchase pension plan.

2. An advance notice must be given to plan participants that the pension plan is being amended to reduce or eliminate those benefit accruals or contributions.

   a. Actual notice is required.

   b. Notice must be given at least 45 days in advance of the effective date (15 days for a plan with less than 100 participants).

3. What happens if there is a failure to give a 204(h) Notice?

   a. The amendment may not be effective and participants continue to accrue benefits or earn contributions.

   b. §4980F of the Code provides for an excise tax of up to $100 per day, per participant for a failure to provide the 204(h) Notice.

D. Special 401(k) plan issues in mergers and acquisitions.

1. General rule is that a 401(k) plan can distribute elective deferrals upon a participant's "severance of employment."

   a. Much more liberal than the old "severance of service" rule.

   b. Under the severance of service rule, if the employees of the acquired business performed the same services at the "same desk," no distribution was possible, even if the plan wasn't assumed.

2. Exceptions to the general rule.

   a. No severance of employment occurs if employees move to another member of a controlled group.

b. No severance of employment occurs when a buyer assumes the plan.

c. No severance of employment occurs when there is a transfer of assets to a plan maintained by the buyer (other than a rollover).

3. Amounts may be distributed on account of a plan termination if the employer does not maintain or establish within 12 months another defined contribution plan.

   a. This one can be a problem when the buyer assumes the plan or there is a transfer of assets.

   b. The only way for the transferred employees to receive their accounts is for the seller to terminate the plan.

CASE STUDIES
2013 TAX SYMPOSIUM

Case Study No. 1

WITHDRAWAL LIABILITY BAGGAGE

Target Company A ("TCA") is in the business of selling building products in the construction industry. Because of the downturn in the economy, it has recently reduced the number of union drivers it employs. These drivers are participants in the Central States Southeast and Southwest Areas Pension Fund. Acquiring Company W ("ACW") is interested in acquiring TCA. ACW believes it may be able to terminate the union contract when it is renewed in 2014. What are the issues that must be considered by TCA and ACW with regard to the union plan?

Case Study No. 2

PARTIAL PLAN TERMINATION BAGGAGE

Target Company B ("TCB") is a small tool and dye shop. Its owner recently died and his affairs are being handled by his children. Acquiring Company X ("ACX") is a competitor that is negotiating to buy TCB. Because of certain contracts, which may not be assigned, TCB and ACX must structure the transaction as a stock sale. TCB has maintained a profit sharing plan for many years. During the past five years, TCB has been unable to make any profit sharing plan contributions and the number of employees of TCB has declined from 54 in 2008 to 17 in 2012. What are the issues that must be considered by TCB and ACX with regard to the profit sharing plan?

Case Study No. 3

DEFINED BENEFIT PLAN FUNDING BAGGAGE

Target Company C ("TCC") is a medium sized architectural firm. TCC maintains a defined benefit plan, which was principally designed as a "tax shelter plan" for its senior licensed architects. Early this year, the plan's actuary informed TCC that a large contribution was due the plan for 2012. TCC recognizes that it will be difficult to make this contribution. Based upon this information TCC was also advised to "freeze accruals" immediately in the plan before plan participants could accrue another year's benefit. Unfortunately, the officer/owner of TCC responsible for overseeing the plan, failed to convey this to TCC's attorney immediately, because of a possible sale to a large architectural firm. During the due diligence period, Acquiring Company Y ("ACY") discovers this problem and informs TCC it must be responsible for its resolution. What can be done?

Case Study No. 4

INHERITING SOMEONE ELSE'S BAGGAGE

Target Company D ("TCD") is a professional corporation engaged in the practice of medicine. It maintains a 401(k) plan. Acquiring Company Z ("ACZ") is a multi-specialty group of physicians acquiring new practices. ACZ also maintains a 401(k) plan. ACZ is presently negotiating to acquire TCD by a merger of TCD into ACZ. How does ACZ deal with the TCZ 401(k) Plan?

ATTORNEY BIOGRAPHIES

LAVINIA S. BIASELL is an associate of the firm. Receiving her Bachelor of Arts degree with High Honors from Michigan State University in 2000, she earned her Juris Doctor degree, Magna Cum Laude, from Michigan State University-Detroit College of Law in 2003. While in law school, Ms. Biasell was a member of American Inns of Court and earned the Carolyn Stell Award for outstanding achievements and public service from the Women Lawyers Association of Mid-Michigan. Admitted to practice by the State Bar of Michigan in 2003, she is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan. Ms. Biasell concentrates her practice in the areas of title insurance coverage and commercial and real estate litigation. Serving on the Board of Women's Bar Association as WLAM Representative, Vice-President and President-Elect, she is also co-chair of the Bench Bar Culinary Challenge Community, which organizes an annual charity event that raises money for local charities.

IAN S. BOLTON is a member of the firm's Creditor's Rights, Insolvency and Bankruptcy group and also practices in the areas of business law, landlord-tenant law and commercial and real estate litigation. He earned his Juris Doctor with high honors from Wayne State University Law School, where he 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. Mr. Bolton is licensed to practice in Michigan, Illinois and Texas, and his professional affiliations include the American Bankruptcy Institute, Young Lawyers Section; the State Bar of Michigan, Young Lawyers Section; and the American Bar Association. He joined the firm as an associate in 2010.

STUART M. BORDMAN is a shareholder of the firm who is an attorney and a certified public accountant. His practice is devoted to general corporate work with extensive experience in health care, franchise work and representation before the Internal Revenue Service. Mr. Bordman was the 1997-98 Chairman of the Oakland County Bar Association Tax Committee. He is a frequent lecturer before the Michigan Association of Certified Public Accountants and a regular contributor to Laches, the Oakland County Bar Association publication. He has written on use tax, corporate finance under the Michigan Business Corporation Act and single business tax. He is a graduate of the Northwestern University School of Law.

BRANDON K. BUCK is a shareholder of the firm. His practice areas are concentrated in real estate, mortgage, and title litigation as well as franchise litigation, creditors rights, and bankruptcy. Receiving his Bachelor of Science degree with honors from Wayne State University in 1998, Mr. Buck earned his Juris Doctor degree with honors from Wayne State University Law School in 2001. During law school he received a board of Governors Scholarship for Academic Excellence and placed first in the law school's Moot Court brief writing competition. Mr. Buck is admitted to practice law in Michigan, the federal courts for the Eastern and Western Districts of Michigan, and in California.

RYANN O'BOYLE BUNCH received her Bachelor's of Arts degree with high distinction from the University of Michigan in August 2000, and her Juris Doctor degree, magna cum laude, from University of Detroit Mercy School of Law in December 2004. While in law school, Ms. Bunch was Editor in Chief of the Law Review. Ms. Bunch was admitted to practice by the State Bar of Michigan in 2005. Ms. Bunch concentrates her practice in the areas of real estate and finance.

GEORGE V. CASSAR, Jr. is a shareholder in the firm who concentrates his practice in the areas of estate and business succession planning, taxation and probate. Mr. Cassar graduated from the University of Michigan with honors and received his law degree with honors from Drake University Law School. He then went on to receive his Masters in Tax Law from Wayne State University Law School. He is a member of the State Bar of Michigan, the American Bar Association, the Federal Bar Association and both the Oakland and Detroit Metropolitan Bar Associations. Mr. Cassar frequently speaks before professional organizations and to their clients regarding estate planning, tax, corporate and probate matters. He is a member of the Financial and Estate Planning Council of Metropolitan Detroit, he serves as a councilman with the Tax Section of the State Bar of Michigan, is a member of the National Academy of Elder Law Attorneys (NAELA), and is a member of the Financial Committee of Inforum (f/k/a The Women's Economic Club of Detroit). Mr. Cassar has also been accepted as a Life Member of the National Registry of *Who's Who in American Law*, named as a *Rising Star* by Michigan Super Lawyers and is a multi-year recipient of the *Five Star Professional Wealth Management Award.* Recognizing the importance of giving back, Mr. Cassar is very active in several charitable and other community organizations, currently serving on the Board of Directors for The Miracle League of Plymouth ("Every Child Deserves a Chance to Play Baseball"), an Officer and Director for Don Bosco Hall in Detroit, Michigan, a Board Member for the Detroit Chapter of Legatus, a Director on the Board for Angie's Toy Chest serving Toys for Tots, and a Trustee on the Board with the Judson Center.

GEORGE A. CONTIS is a shareholder of the firm. He earned his Bachelor of Arts Degree in Economics from the University of Pittsburgh in 1982 and received his Juris Doctor Degree from the University of Detroit in 1985. While at the University of Detroit, Mr. Contis participated in several local and national Moot Court competitions and was selected for membership to the Order of Barristers. He concentrates his practice in the areas of real estate development and finance, lending, transactional law, commercial leasing and business planning. His publications include: Tax Aspects of Divorce in Michigan, Michigan Tax Law Journal, 1984; Bring a Weapon to School, Get Expelled 370 Laches 8, Nov. 1996; and Year End Planning Considerations for 1031 Exchanges, Bar Briefs, December 2000.

MARTIN S. FRENKEL is a shareholder of the firm, an experienced business litigator, and Co-Chair of the Consumer Finance Regulatory Compliance and Real Property Litigation 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 litigation, quasi-litigation,

and regulatory compliance matters including mortgage, banking, construction and title-related disputes. 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 Sixth Circuit, and has been admitted pro hac vice in numerous courts around the country. Mr. Frenkel assisted the firm (as one of only a handful of law firms in the United States) in spearheading 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. His publications include: 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. Mr. Frenkel has 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 Tool Kit (trademark pending) - a product designed to reduce institutional costs in the mortgage industry in the handling of portfolio level litigation. He was featured in an article published in Crain's Detroit Business focusing on mortgage litigation trends and 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.

JOHN P. GONWAY is a shareholder in the firm and specializes in secured lending, real estate, secured financing, mergers and acquisitions and commercial transactions. He received his Juris Doctor, cum laude, from the Wayne State University School of Law. Prior to attending law school, he received his undergraduate degree from James Madison College at Michigan State University. Mr. Gonway is a member of the Real Property, Business Law and Taxation Sections of the State Bar of Michigan and is a member of the Oakland County Bar Association. Mr. Gonway's experience includes the acquisition, financing, construction, development and leasing of all types of commercial real estate, as well as the representation of clients in all aspects of corporate law, commercial law, mergers and acquisitions and commercial transactions.

MICHELLE C. HARRELL is a shareholder and manager of the firm's General and Complex Litigation Practice Group. She received her Bachelor of Science degree in accounting, summa cum laude, from the University of Detroit in 1990 and her Juris Doctor, cum laude, from Wayne State University Law School in 1993. While at Wayne State, Ms. Harrell participated in moot court competitions and received three American Jurisprudence Awards. Michelle is a Barrister 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). She was also appointed to serve as a member of the U.S. Courts Committee of the State Bar of Michigan to further the relationship and effective interaction between the Eastern and Western Districts of Michigan and Michigan State Courts. Ms. Harrell concentrates her practice in the areas of complex commercial, real estate, receiverships and family law litigation. Ms Harrell authored the article "Caveat Receiver: Practical Tips for Appointing or Serving as a Receiver" for the Michigan Bar Journal. Michelle's 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 story "A&P Stops Paying Rent on Farmer Jack's Spaces: 24 Lawsuits Filed." She was also named as a DBusiness Top Lawyer for 2010 in the areas of Real Estate and Litigation. Michelle is 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 selected for inclusion in the Michigan edition of Super Lawyers. 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.

Mark 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. He has extensive experience in the manufactured home industry, both in investing and advising clients.

He 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, Mark obtained his Juris Doctor magna cum laude from Wayne State University in 1967 where he served as an editor of the Wayne Law Review. A member of the Real Estate, Business Law & Taxation Sections of the State Bar of Michigan, Mr. Hauser has lectured at numerous professional seminars for attorneys and accountants on real estate and tax-related issues.

Mark has been continuously selected by his peers to be listed in the "Best Lawyers in America," and is also listed in "Super Lawyers" and "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 United Jewish Communities.

MICHAEL K. HAUSER is a shareholder and a summa cum laude graduate of Wayne State Law School who received his BA magna cum laude from Dartmouth College. A Certified Public Accountant, Mr. Hauser's practice focuses on partnership and corporate tax, federal taxation of real estate transactions, gift and estate tax, and general business matters. His tax practice includes both tax planning and tax controversy work (e.g. handling audits and appealing assessments). An Adjunct Professor in the Cooley Law School LLM program, Mr. Hauser teaches Taxation of Real Estate. He is an author for the Merten's Treatise on Federal Income Taxation, having written the section on Tax-Free Exchanges Under Section 1031. Mr. Hauser has also written several articles for the journal Real Estate Taxation, including: "Avoiding Dealer Status to Obtain Capital Gains," "Dealer Status and the Condominium Conversion" and "Special Allocations of Gain Between Partners In Section 1031 Transactions." Previously, he worked in a mid-sized CPA firm in suburban Detroit servicing small to mid-sized businesses. In law school, Mr. Hauser served as a Note & Comment Editor for the Wayne Law Review, for which he authored "The Tax Treatment of Intangibles in Acquisitions of Residential Rental Real Estate". He also served as an intern with the IRS Chief Counsel's Large and Mid-Sized Business Division, where he researched international tax and tax shelter issues. See website to link to his published articles.

HARVEY R. HELLER is the shareholder in charge of our Insurance Coverage and Defense 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 for inclusion in the annual editions of **Best Lawyers in America** and **Michigan Super Lawyers**.

DANIELLE HESSELL is an associate and member of the firm's General and Complex Litigation Practice Group. Ms. Hessell concentrates her practice in complex commercial litigation, including business disputes, automotive supplier and Uniform Commercial Code litigation, real estate litigation, title insurance defense, construction disputes, consumer protection and financial services litigation, and First Amendment and media law.

Ms. Hessell graduated magna cum laude from Central Michigan University in Mount Pleasant, Michigan, majoring in Biology. She then received her Juris Doctor summa cum laude from Michigan State University College of Law, where she was a Dean King Scholar, an Associate Editor of the Law Review, and earned a certificate from MSU Law's Trial Practice Institute.

Recently, Ms. Hessell has been recognized for her pro bono work, receiving the Legal Aid and Defender Association (LADA) Wayne Pro Bono Spirit Award. She was also named a 2012 Michigan Super Lawyers Rising Star and an Up & Coming Lawyer for 2012 by Michigan Lawyers Weekly.

JOHN E. JACOBS is a shareholder of the firm who specializes in transactions, real estate, residential mortgage banking, and finance. Throughout his career, Mr. Jacobs has represented mortgage companies in the purchase, sale, origination and servicing of residential mortgage loans. Mr. Jacobs 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.

KRISTINA E. JANSSENS is an associate and member of the firm's Real Property and Mortgage Dispute Resolution group. Ms. Janssens specializes in regulatory compliance, litigation, and quasi-litigation matters focusing on mortgage and financial services issues. Ms. Janssens recently assisted the firm in managing the nearly two-year Independent Foreclosure Review overseen by the Office of the Comptroller of Currency and the Federal Reserve which involved the examination of the foreclosure and default servicing practices of the nation's largest mortgage servicers. She received her Bachelor of Arts degree from Michigan State University, and received her Juris Doctor degree from Wayne State University Law School. Her professional affiliations include the State Bar of Michigan and Oakland County Bar Association. She is also a member of the Long-Term Planning Committee of the Real Property Law Section of the State Bar of Michigan.

LINDSEY R. JOHNSON is an associate of the firm practicing primarily in the areas of mortgage and real estate litigation and bankruptcy. She earned her Juris Doctor, Cum Laude, from Thomas M. Cooley Law School, where she served as a subcite editor of the Thomas M. Cooley Law Review, teaching assistant for the scholarly writing course, and was a recipient of the Eugene Krasicky Award. Ms. Johnson is licensed to practice in Michigan as well as the federal courts for the Eastern and Western Districts of Michigan. Her professional affiliations include the State Bar of Michigan, and Oakland County Bar Association - ADR Section.

ROBERT D. KAPLOW is a shareholder of 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. He is 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 specializes in professional liability defense, premises liability defense and employment defense, with an emphasis on taking cases seamlessly from initial intake through trial and appeal. She has been a member of the Firm's Defense Practice and Insurance Coverage Group since 2004. Ms. Klaus graduated from the University of Michigan Law School in 1992 and received a Bachelor of Arts degree, with honors, from the University of Iowa in 1987. She has been included in the nationally known Best Lawyers in America publication since 2012. Ms. Klaus has considerable appellate experience and has been admitted to the appellate courts in both Michigan and Illinois, as well as the Third, Fifth, Sixth and Seventh United States Court of Appeals and the United States Supreme Court. She is also admitted to the United States Tax Court. She is a long standing member of the American Bar Association and the Oakland County Bar Association

CHARLES M. LAX is a shareholder of the firm who has practiced primarily in the areas of employee benefits, taxation, corporate law and mergers and acquisitions. He has authored numerous articles appearing in legal and public accounting journals. Mr. Lax has lectured extensively on qualified retirement plans and other tax topics before the Michigan Institute of Continuing Legal Education, Michigan Association of Certified Public Accountants, American Society of Pension Professionals & Actuaries and other professional groups. He presently serves as ASPPA's Vice Chairman for Regional Conferences and as an emeritus member of the IRS Great Lakes TE/GE Council. Mr. Lax has previously served as a member of the Advisory Committee on Tax Exempt and Government Entities Division of the IRS, the IRS Employee Plans, Ad Hoc Advisory Group for the Assistant Commissioner of Internal Revenue Service, EP, the IRS Regional Council Bar Advisory Group, Central Region, the Advisory Group to IRS Northeast Region's Chief of EP/EO Division, the Chairman of the State Bar of Michigan - Section of Taxation, the Chairman of the State Bar of Michigan Employee Benefits Committee, Co-Chair at the IRS-ASPPA Great Lakes Benefits Conference for 2007 and 2008 and Co-Chair at the ASPPA Annual Conference for 2010 and 2011. He is a Fellow of the American College of Employee Benefits Counsel and recognized by his peers by inclusion in the Best Lawyers in America (Best Lawyers' 2011 Detroit Area Benefits Lawyer of the Year), Chambers USA and Super Lawyers (one of the top 100 lawyers in the State of Michigan for 2008). Mr. Lax has extensive experience in representing clients in tax controversy matters before the Internal Revenue Service and Tax Court of the United States.

MICHAEL S. LEIB is a shareholder in the firm. He is a trial lawyer practicing in the areas of insolvency law, including bankruptcy litigation, and real estate litigation. Mr. Leib is the leader of the firm's Creditor's Rights, Insolvency and Bankruptcy group. A graduate of Kalamazoo College, the University of Montana and Wayne State University

Law School, he is a member of the State Bar of Michigan and is admitted to practice before several courts, including the United States District Court, Eastern District of Michigan and Western District of Michigan, 6th Circuit Court of Appeals and United States Supreme Court. Mr. Leib is also a member of the Board of Directors of the Federal Bar Association of the Eastern District of Michigan and a member of the State Bar of Michigan Judicial Qualifications Committee. Previously serving as the chairperson of the State Bar of Michigan Character and Fitness Committee he is listed in The Best Lawyers in America and Super Lawyers.

KAREN LIBERTINY LUDDEN concentrates her practice on commercial insurance and professional liability coverage and defense and specializes in negotiating global resolutions on complex cases. She is a member of the Firm's Defense Practice and Insurance Coverage Group. Ms. Ludden sits as a commercial case evaluator in Oakland County and a tort case evaluator in Wayne County and is available to sit as a facilitator. She 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 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. She 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, the Federal Bar Association, and the Oakland County Bar Association. Ms. Ludden is admitted to practice in the United States Court of Appeals for the Sixth Circuit, the United States District Courts for the Eastern and Western Districts of Michigan, the Bankruptcy Court for the Eastern District of Michigan, and all Michigan state courts. Ms. Ludden joined the Firm in 2012 with 20 years of experience in private practice.

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 over 45 years, primarily in the areas of real estate, corporate and business law, estate planning and probate.

His 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.

He is a member of the Real Property Law Section Council of the State Bar of Michigan and for many years served as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. Mr. Maddin has been a speaker at numerous ICSC, ICLE, National Business Institute and State Bar of Michigan Real Property Law Section Seminars, and has authored numerous real estate related articles in professional journals.

He has been repeatedly selected by his peers for inclusion in "The Best Lawyers in America," 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 a firm shareholder who has practiced law for more than 40 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.

KATE MATLEN received her Bachelor of Science degree from the University of Michigan in 2007, and received her Juris Doctor degree, *cum laude*, from Wayne State University Law School in 2012. While in law school Kate served as a Senior Articles Editor and a Voting Member of the Editorial Board for the Wayne Law Review. Kate is a member of the State Bar of Michigan, and also has been admitted to practice before the Federal District Court for the Eastern District of Michigan. Kate recently received the honor of becoming a member of Wayne State University's chapter of the Order of the Coif.

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.

DAVID G. MICHAEL is an associate of the firm. His practice is focused in the areas of mortgage and real estate litigation, as well as bankruptcy and insolvency, and landlord-tenant law. He earned his Juris Doctor with honors from Wayne State University Law School, where he served as an associate editor of the Wayne Law Review. A director of the Wayne State University Law School Alumni Association, Mr. Michael's professional affiliations include the State Bar of Michigan, Business Law Section; the American Bar Association, Litigation Section; and the Federal Bar Association. He is a member of the Michigan Mortgage Lenders Association and Co-Chair of the Banking and Lender Liability Sub-Committee of the ABA's Litigation Section's Commercial and Business Litigation Committee.

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 insurance coverage disputes, commercial litigation, and intellectual property disputes, as well as professional liability defense, including insurance agents, real estate agents and financial professionals. He has authored publications and spoken in these areas. 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 the Firm's Commercial Litigation and Banking and Regulatory Compliance Groups, where he serves a range of clients on issues that include mortgage lending practices, employment disputes, and intellectual property claims. Brian graduated from Notre Dame Law School in 1998, after which he clerked for Michigan Court of Appeals Judge Joel Hoekstra.

Brian regularly consults with clients on issues related to the development, sale, and use of software and computer, network, and internet technology, including retention practices for electronically stored information and methods for electronic contracting. Brian also uses his background in law and technology to assist in a broad range of electronic discovery issues.

Brian has also been deeply involved in the nearly two-year Independent Foreclosure Review (IFR). The IFR is overseen by the Office of the Comptroller of Currency and the Federal Reserve and involves the examination and analysis of the foreclosure and default servicing practices of the nation's largest mortgage servicing companies. Brian has assisted in the development of loan testing and remediation strategies and evaluating loan level findings for appropriate remediation. Throughout the IFR, Brian has been able to use his familiarity with mortgage servicer software and systems to help complete the review.

In addition to being a member of the ABA's Law & Technology Group, as well similar State Bar Groups, Brian is also a member of The International Technology Law Association. Brian was featured in an article regarding complex litigation and interviewed regarding mortgage litigation in Michigan for Crain's Detroit. Brian was named a 2012 Top dbusiness Lawyer for Metro Detroit in the area of Information Technology law.

MARK E. PLAZA is a shareholder of the firm and member of the Consumer Finance Regulatory Compliance and Real Property Litigation Group. He received his Bachelor of Arts degree with High Distinction from The University of Michigan in 1999, and received his Juris Doctor degree, cum laude, from Wayne State University Law School in 2003. While in law school, Mr. Plaza was a Senior Articles Editor for the Wayne Law Review and a member of Phi Alpha Delta Law Fraternity. Mr. Plaza was admitted to practice by the State Bar of Michigan in 2003. He is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan, and the United States Court of Appeals for the Sixth Circuit. Mr. Plaza concentrates his practice in real estate, appellate,

construction and financial services litigation, representing financial institutions and insurance carriers in disputes involving mortgage priorities, mortgage loan modifications, title insurance, wrongful foreclosure, construction liens, and adverse possession. Mr. Plaza had his article on the impact of the Saurman decision on mortgage litigation published in Michigan Lawyer's Weekly.

JAMES M. REID, IV is an employment/corporate attorney that advises and represents employers in various legal matters throughout the Country.

Mr. Reid works mainly with employers on a wide spectrum of issues which include counseling and training human resource personnel. He develops and improves employment policies and contracts, handbooks, employment agreements, non-competes, non-disclosure agreements, and unconditional release and separation agreements.

When the need arises, Mr. Reid represents employers in administrative proceedings before the Federal Department of Civil Rights, State Department of Civil Rights and the Unemployment Insurance Agency. He also assists employers with Federal and State wage and hour audits.

Mr. Reid has presented local and national webcasts/podcasts regarding best employee handbooks practices and has authored several articles regarding strategies to update employee handbooks and challenge unemployment benefit claims.

Mr. Reid received a Bachelor of Arts in Political Science-Prelaw from Michigan State University in 2002 and his Juris Doctor degree from Wayne State University Law School in 2005. While at law school, Mr. Reid was an associate editor of the Wayne Law Review. Mr. Reid is admitted to practice before the federal and state courts of Michigan.

GARY M. REMER is a shareholder of Maddin, Hauser, Wartell, Roth & Heller, P.C., of Southfield, MI who received his law degree from the Detroit College of Law at Michigan State University where he graduated summa cum laude in May 1997 and obtained a Bachelor of Arts in Accounting from Michigan State University in 1990. Mr. Remer was a Revenue Agent with Internal Revenue Service, Employee Plans Division, from 1992 through 1996. Joining the law firm in 1997, he concentrates his practice in the areas of employee benefits, health and welfare, corporate law and taxation.

Lecturing extensively on welfare benefit plans, qualified retirement plans and other tax topics, Mr. Remer is the co-author of The Insider's Guide to IRS Plan Audits. He is called upon regularly as an expert in the media, appearing on Channel 7 Action News and WWJ News Radio 950 as well as being quoted in such publications as the Detroit News and Detroit Free Press.

Mr. Remer is a Certified Public Accountant who served as Chair of the MACPA Employee Benefits Task Force. He also served as a Council Member of the State Bar of Michigan Tax Committee.

An adjunct professor for Walsh College, he teaches graduate tax classes focusing on pension and profit sharing plans, section 401 (k) plans, various kinds of stock and stock option plans, IRAs, SEPs, ESOPs, tax sheltered annuities, nonqualified deferred compensation plans, VEBAs, flexible benefit plans, health care plans, insurance plans, and other common fringe benefits.

Mr. Remer was also named in Chambers USA: America's Leading Lawyers for Business 2011, 2012 and 2013 as a Leader in his Field of Employee Benefits & Executive Compensation.

COURTNEY ROSCHEK THOMPSON is an associate and member of the firm's Consumer Finance Regulatory Compliance and Real Property Litigation Group. She specializes in regulatory compliance, litigation, and quasi-litigation matters focusing on mortgage and financial services issues.

Recently, Ms. Thompson has managed the Firm's involvement in the Independent Foreclosure Review (IFR). The IFR is overseen by the Office of the Comptroller of Currency and the Federal Reserve and involves the examination and analysis of the foreclosure and default servicing practices of the nation's largest mortgage servicing companies. She has assisted in the development of loan testing and remediation strategies and evaluating loan level findings for appropriate remediation.

While attending Michigan State University College of Law, Ms. Thompson was an active participant in the Moot Court and Mock Trial Advocacy Board, winning national oral advocacy awards. Since graduating, she continues to coach mock trial teams, including three of the MSU law school's most accomplished teams. Previously, Ms. Thompson worked with the United States District Court for the Eastern District of Michigan in developing and conducting the certification program for trial attorneys desiring to use the shared, advanced technology courtroom.

Ms. Thompson graduated magna cum laude from Western Michigan University in Kalamazoo, Michigan. She later received her Juris Doctorate from Michigan State University College of Law, graduating magna cum laude, and with a certificate from MSU Law's Trial Practice Institute (a focused curriculum teaching the fundamental concepts of litigation, developing enhanced trial skills, and emphasizing professional practice decorum).

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. Mr. Roth has been named as a Best 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 presiding member of its Executive Management Committee. Mr. Sallen received his undergraduate degree from the University of Michigan, and his law degree, *cum laude*, from the *University of Detroit 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.

Mr. Sallen's most recent 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). Mr. Sallen is also the Editor and regular contributor to *Real e-State, an electronic newsletter for real estate professionals*, published quarterly by the Maddin Hauser real estate law practice group. Mr. Sallen is also the creator and owner of an instructional program for commercial real estate brokers entitled, ***Commission-Safe***™ which publishes periodic training materials and business broker tools.

For 2010, Mr. Sallen has been named one of *The Best Lawyers In America by Best Lawyers®*, and a *Top Lawyer* by dbusiness®, both in the field of real estate law.

DAVID M. SAPERSTEIN is a shareholder of the firm. He joined the firm in July, 2001. He is admitted to practice law in Michigan, Ohio, and California (inactive). He 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 has given numerous presentations regarding developments in FINRA arbitrations that were approved for CLE credit in New York, New Jersey, and Illinois.

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. His 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).

Mr. Saperstein currently serves as an officer of B'nai Israel Synagogue of West Bloomfield. He formerly served as the Chair of the Race Judicata Committee of the Oakland County Bar Association, as well as 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:

- "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," Michigan Bar Journal, Volume 71, No. 10 (October 1992)
- "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!" Michigan Bar Journal, Volume 72, No. 10 (October 1993)
- "Qualifying for the Annual GST Tax Exclusion," Laches, No. 387 (April 1998)
- "Innovative Retirement Plan Designs for the Small-Business Employer," Latches, No. 450 (July 2003)
- "Fifty Years of Practice Reversed By New Rules on Post-Death Events," Michigan Tax Lawyer, Volume XXXV, Issue 2 (Summer 2009)
- "Executive Compensation Trends for Emerging Growth Companies," Latches, No. 523 (November 2009)
- "Selling the Keys to the Kingdom Without Bank Financing," Michigan Tax Lawyer, Volume XXXV, Issue 3 (Fall 2009)

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 joined the firm in September, 2000. She is a graduate of the Detroit College of Law and the University of Michigan. Her concentration of law is in the area of real estate and related matters. Ms. Silberstein had fourteen years experience in the real estate industry in the corporate sector before joining the firm.

RONALD A. SOLLISH is a shareholder in the firm who specializes in the areas of employment, real estate, partnership, finance, corporate and business law. Ron is a frequent speaker on legal topics and has spoken to such groups as the Michigan Chamber of Commerce, Michigan Association of Certified Public Accountants, and American Society for Industrial Security. He is licensed to practice law in both Michigan and Illinois. He graduated from the University of Detroit School of Law where he was the managing editor of the Law Review. Ron received his undergraduate degree from the University of Michigan. Ron is a member of the State Bar of Michigan, Illinois Bar Association, American Bar Association and Oakland County Bar Association.

DANIELLE M. SPEHAR is a shareholder and Co-Chair of the firm's Real Estate Practice Group who attended Central Michigan University and earned a Bachelor of Science in Business Administration, summa cum laude. She also earned a Master's Degree in Business Administration from Wayne State University. She acquired her Juris Doctor, magna cum laude, from University of Detroit Mercy School of Law in 1998. Danielle concentrates her practice in the areas of real estate transactions and corporate and business law. She is a member of the State Bar of Michigan and the American Bar Association.

LORI E. TALSKY joined the firm as an associate after graduating summa cum laude from the Detroit College of Law at Michigan State University in January, 1996. Ms. Talsky has an extensive working knowledge of the Canadian legal system. She is a member of the State Bar of Michigan and the American Bar Association.

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.

REBECCA TURNER is a shareholder with Maddin, Hauser, Wartell, Roth & Heller, P.C. in Southfield, Michigan. She concentrates her practice in the areas of franchise law, corporate law and real estate transactions.

Ms. Turner advises both start up and mature franchisors in the areas of corporate organization, disclosure and registration, business operations, contract negotiations, and other business and real estate issues impacting the franchise industry. She also advises franchisees and other companies, assisting them to structure their businesses to promote growth, maximize efficient use of resources and minimize risk. Ms. Turner has a unique inside view of the franchising industry as her family owns and operates multiple franchise concepts.

Ms. Turner was selected by her peers as a 2013 DBusiness Top Lawyer; named a 2008, 2009, 2010 and 2012 Michigan Super Lawyers Rising Star; recognized as one of five 2006 Up and Coming Lawyers by Michigan Lawyers Weekly; and one of 10 women showcased in an article entitled Raising the Bar published in the Crain's Detroit Business issue Focus: Law.

Ms. Turner was awarded the Certified Franchise Executive™ designation by the International Franchise Association. She is a member of the International Franchise Association, Women's Franchise Network of Southeast Michigan, American Bar Association, State Bar of Michigan and Oakland County Bar Association and Oakland County Bar Foundation (Fellow).

Additionally, Ms. Turner is a Past President of the Women's Bar Association, Oakland Region of the Women Lawyers Association of Michigan.

DANIEL WARSH received 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, Daniel 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. Daniel is a member of the State Bar of Michigan, and has also been admitted to practice before the Federal District Court for the Eastern District of Michigan.

STEWART C.W. WEINER is a shareholder of the firm. His practice involves advising businesses and high net worth families and individuals concerning business, construction, real estate, securities, shareholder and entity disputes, succession planning and non-traditional family law and probate issues. Having practiced on both the transactional and litigation sides of the practice, he has a unique and pragmatic sense of how to get to the finish line with respect to achieving client's goals and objectives. When necessary and in the best interest of his clients, he will aggressively pursue taking cases to trial or alternative dispute resolution. He has served as both a mediator and arbitrator for many years. He is a member of the American Bar Association (Construction Forum and Family Law sections), State Bar of Michigan (Construction and Family Law sections) and Oakland County Bar Association. He is a member of the Detroit Area Construction Association.

THOMAS W. WERNER joined the firm in November, 2011 as an associate in the firm's Defense and Insurance Coverage litigation group. In 2004, Tom 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, Tom concentrated his practice on commercial litigation, insurance coverage, and defense of product liability actions throughout the country. Tom has been twice published, and has made several professional presentations, including seminars teaching clients how to properly communicate and draft contracts in order to avoid litigation. Tom 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. Tom was named a 2011 Rising Star by Michigan Super Lawyers.

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 2013 as a *Leader in his Field* of Employee Benefits & Executive Compensation.

STEVEN M. WOLOCK is a shareholder in the firm who received his law degree from the University of Michigan Law School in 1985 and obtained a Bachelor's of Science in Economics from the University of California at Santa Cruz in 1977. Mr. Wolock specializes in general commercial litigation and professional liability litigation and has extensive experience in labor and employment law. Mr. Wolock has been continuously selected for inclusion in the annual editions of **Michigan Super Lawyers since 2007** and **Best Lawyers in America since 2008**.

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 June 2009, Mr. Wolock was appointed by Michigan's Governor to serve as the **attorney member of the Michigan State Board of Accountancy** for a four year term. By statute, the nine member Board of Accountancy is required to have one attorney member.

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).

DAWN T. YEATON is an associate of the firm practicing primarily in the areas of mortgage and real estate litigation. She earned her Juris Doctor, Magna Cum Laude, from University of Detroit Mercy School of Law, where she received the Frank S. Scingstock Award. Ms. Yeaton is licensed to practice in Michigan as well as the federal courts for the Eastern and Western Districts of Michigan. Her professional affiliations include the State Bar of Michigan, and the Oakland County Bar Association.

NOTES

NOTES