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**THE
ACCOUNTANT'S
BUSINESS
MANUAL
Volume 2**

THE ACCOUNTANT'S BUSINESS MANUAL

A Two-Volume Service

Prepared for the AICPA by

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Volume 2 TABLE OF CONTENTS

(See also detailed Tables of Contents with each chapter)

E-BUSINESS

1. Definition and Scope of E-Business 3
 2. Internal Issues When Implementing E-Business 6
 3. Marketplace Issues When Implementing E-Business 18
 4. Web Presence Implementation Issues 34
 5. Benefits of an E-Business Initiative and a Web Presence 40
- Suggested References 41
- Appendix 1:* Web Site Features, Tips, and Tricks Checklist 43
- Appendix 2:* Terminology You Are Likely to Encounter 46
- Appendix 3:* Five Steps in the Web Site Development Process 48
- Appendix 4:* Web Site Costs 53
- Appendix 5:* Tips for Selecting Web Hosts and Web Designers 56

SOCIAL SECURITY AND OTHER ISSUES FACING ELDERLY OR DISABLED CLIENTS

1. Introduction 3
 2. Social Security 3
 3. Supplemental Security Income 22
 4. Medicare 24
 5. Medicaid 34.1
 6. Planning for Substitute Decision Making 39
- Suggested References 41
- Appendix 1:* Sample Advance Directive/Health Care Power Appointment of Surrogate (see *Toolkit CD-ROM*)

HUMAN RESOURCES

1. Recruitment 5
2. Recruitment Sources 8

TABLE OF CONTENTS

3. Interviewing	11
4. Reference Checking and Testing	15
5. Communication With Applicants	16
6. New Employee Orientation	17
7. Employee Development and Promotion	18
8. Compensation	21
9. Benefit Programs	31
10. Flexible Work Arrangements	33
11. Termination	36
Suggested References	41
<i>Appendix 1:</i> Sample Firm Hiring Policy (see Toolkit CD-ROM)	
<i>Appendix 2:</i> Sample Staffing Needs Request Form (see Toolkit CD-ROM)	
<i>Appendix 3:</i> Sample Management Questionnaire to Clarify Job Requirements (see Toolkit CD-ROM)	
<i>Appendix 4:</i> Sample Job Descriptions (see Toolkit CD-ROM)	
<i>Appendix 5:</i> Sample Application for Employment (see Toolkit CD-ROM)	
<i>Appendix 6:</i> Standard Interview Questions Form (see Toolkit CD-ROM)	
<i>Appendix 7:</i> Sample Interview Questions (see Toolkit CD-ROM)	
<i>Appendix 8:</i> Sample Inappropriate Interview Questions (see Toolkit CD-ROM)	
<i>Appendix 9:</i> Sample Interview Rating Report, and Interviewer's and Interview Evaluation Forms (see Toolkit CD-ROM)	
<i>Appendix 10:</i> Reference Check (see Toolkit CD-ROM)	
<i>Appendix 11:</i> Job Offers and Rejections (see Toolkit CD-ROM)	
<i>Appendix 12:</i> Sample Employee Personal Information Update (see Toolkit CD-ROM)	
<i>Appendix 13:</i> Orientation Checklist (see Toolkit CD-ROM)	
<i>Appendix 14:</i> Job Description Outline (see Toolkit CD-ROM)	
<i>Appendix 15:</i> HR Dependency Chart (see Toolkit CD-ROM)	
<i>Appendix 16:</i> Sample Annual Work Plan (see Toolkit CD-ROM)	
<i>Appendix 17:</i> Continuing Education Course Evaluation (see Toolkit CD-ROM)	
<i>Appendix 18:</i> Sample Professional Development Appraisal (see Toolkit CD-ROM)	

TABLE OF CONTENTS

- Appendix 19:** Sample Performance Evaluation Process Chart
(see *Toolkit CD-ROM*)
- Appendix 20:** Checklist for an Office at Home (see *Toolkit CD-ROM*)
- Appendix 21:** Exit Interview Form (see *Toolkit CD-ROM*)
- Appendix 22:** Separation Interview Checklist (see *Toolkit CD-ROM*)
- Appendix 23:** Termination Checklist (see *Toolkit CD-ROM*)
- Appendix 24:** Sample Employee Handbook (see *Toolkit CD-ROM*)
- Appendix 25:** Sample Employee Code of Conduct (see *Toolkit CD-ROM*)
- Appendix 26:** Interview Contact Control (see *Toolkit CD-ROM*)
- Appendix 27:** New Employee Prospect Referral Form (see *Toolkit CD-ROM*)
- Appendix 28:** Sample Employment Agreement (see *Toolkit CD-ROM*)
- Appendix 29:** Sample Severance Agreement (see *Toolkit CD-ROM*)
- Appendix 30:** Request for Travel Arrangement (see *Toolkit CD-ROM*)

FEDERAL INDIVIDUAL TAX NOTES

1. Tax Relief Related to Hurricane Katrina 7
2. Individual Income Developments 17
3. Individual Deduction Developments 27
4. Retirement Plan Issues 48
5. Fringe Benefits 51
6. Tax Calculations and Tax Credits 59
7. Filing and Compliance Matters 71

FEDERAL CORPORATE TAX NOTES

1. Tax Relief Related to Hurricane Katrina 7
2. S Corporation Developments 17
3. Depreciation and Amortization 24
4. Accounting Method Changes 35

TABLE OF CONTENTS

- 5. Compensation, Retirement Plan, and Fringe Benefit Issues 41
- 6. Other Major Developments 56

CASH MANAGEMENT

- 1. Introduction 3
- 2. Definition and Objectives 4
- 3. Accelerating Cash Inflows 6
- 4. Decelerating Cash Outflows 16
- 5. Use of Banks 19
- 6. Cash Management Reports 24
- 7. Cash Planning Techniques 27
- 8. Interest Rate Risk 35
- 9. Fraud and Risk Management 37
- Suggested References 43

BUSINESS AND SUCCESSION PLANNING

- 1. Introduction 3
- 2. What Is a Business Plan? 4
- 3. Contents of a Business Plan 6
- 4. Financing 21
- 5. The Accountant's Role 23
- 6. Succession Planning 28
- Suggested References 35
- Appendix 1:* Sample Business Plan Outline 39
- Appendix 2:* Sample Format for Financial Statement Projections (*also see Toolkit CD-ROM*) 42
- Appendix 3:* Business Planning Software 47
- Appendix 4:* Sample Cash Flow Statement Format (*also see Toolkit CD-ROM*) 50
- Appendix 5:* Sample Business Plan 52
- Appendix 6:* Small Business Administration (SBA) 8(a) Business Plan (*see Toolkit CD-ROM*)
- Appendix 7:* Succession Planning Checklist (*see Toolkit CD-ROM*)

TRADE AND PROFESSIONAL ORGANIZATIONS

(see *Toolkit CD-ROM*)

IRS PRACTICE AND PROCEDURE

1. Mission and Organization of the Internal Revenue Service 5
2. Practice Before the IRS 5
3. IRS Procedure for Examining Returns 23
4. Types of Examinations 27
5. How to Prepare for an Examination 34
6. Criminal and Civil Tax Fraud 37
7. Results of the Examination 41
8. Assessment and Collection of Tax 43
9. Appeals Process 52
10. Obtaining a Refund 56
11. Rulings, Determinations, Technical Advice 58
12. Problem Resolution: National Taxpayer Advocate 63
13. Tax Shelter Disclosure Regulations 64
14. Alternative Dispute Resolution 69
15. Circular 230 76

Suggested References 84

Resource: Where to Obtain Out-of-State Tax Forms (see *Toolkit CD-ROM*)

Appendix 1: Recognition and Authorization Requirements for Persons Appearing Before the IRS (see *Toolkit CD-ROM*)

Appendix 2: Record Retention (see *Toolkit CD-ROM*)

Appendix 3: Sample Circular 230 Disclosure Statements (see *Toolkit CD-ROM*)

Appendix 4: Covered Opinions (see *Toolkit CD-ROM*)

BUSINESS PERFORMANCE MEASURES

1. Performance Measurement Defined 3
2. Evaluating the Need for Performance Measures 4
3. Historical Assessment 6
4. Critical Success Factors 10

TABLE OF CONTENTS

5. Key Performance Indicators	11
6. Financial Ratios	14
7. Performance Targets	15
8. Action Plans	16
9. Monitoring and Reporting Systems	18
10. Periodic Realignment Of Targets	19
References	20
<i>Appendix 1:</i> Client Readiness Questionnaire (<i>also see Toolkit CD-ROM</i>)	22
<i>Appendix 2:</i> Checklist for Planning Documents and Existing or Prior Consulting Relationships (<i>also see Toolkit CD-ROM</i>)	24
<i>Appendix 3:</i> Value Chain Illustration	25
<i>Appendix 4:</i> Key Performance Indicator Work Plan (<i>also see Toolkit CD-ROM</i>)	26
<i>Appendix 5:</i> Financial Ratios (<i>also see Toolkit CD-ROM</i>)	30
<i>Appendix 6:</i> Realignment Questionnaire (<i>also see Toolkit CD-ROM</i>)	36

INDEX

E-BUSINESS

1. DEFINITION AND SCOPE OF E-BUSINESS

1.1 The Stages and Technologies of E-Business

2. INTERNAL ISSUES WHEN IMPLEMENTING E-BUSINESS

2.1 The Retreat

2.2 Business Intelligence and Tools for Making Decisions

2.2.1 Internal records

2.2.2 Secondary data

2.2.2.1 Public information

2.2.2.2 Privately generated information

2.2.2.3 Information quality

2.2.3 Primary data

2.3 Identifying the Gaps in Current Process and the Systems Supporting Them

3. MARKETPLACE ISSUES WHEN IMPLEMENTING E-BUSINESS

3.1 E-Business Models

3.1.1 Content sponsorship

3.1.2 Direct selling

3.1.3 Online retailing

3.1.4 Infomediary

3.1.5 Intermediary

3.1.6 Aggregator or portal

3.2 Marketing communications Online

3.2.1 Advertising online

3.2.1.1 Banner ads

3.2.1.2 Sponsorships

3.2.1.3 E-mail advertising

3.2.2 Public relations online

3.2.3 Sales Promotions online

3.3 Customer Relationship Management

3.3.1 Relationship capital

3.3.2 Relationship strategies

3.3.3 What is CRM?

3.3.4 CRM process

3.3.4.1 Identify customers

3.3.4.2 Differentiating customers

3.3.4.3 Customizing the marketing mix

3.3.5 Implementation Issues for CRM

3.3.6 Privacy

3.3.6.1 Privacy standards

4. WEB PRESENCE IMPLEMENTATION ISSUES

4.1 Web Site Trends

4.2 Web Site Security

4.2.1 Username-password (aka challenge-response)

4.2.2 Secure server

4.2.3 Software certificates

4.2.4 Physical devices

5. BENEFITS OF AN E-BUSINESS INITIATIVE AND A WEB PRESENCE

SUGGESTED REFERENCES

APPENDIX 1: Web Site Features, Tips, and Tricks Checklist

APPENDIX 2: Terminology You Are Likely to Encounter

APPENDIX 3: Five Steps in the Web Site Development Process

APPENDIX 4: Web Site Costs

APPENDIX 5: Tips for Selecting Web Hosts and Web Designers

1. DEFINITION AND SCOPE OF E-BUSINESS

E-business is a rapidly changing area, with new terminology emerging continuously. IBM coined the term *e-business*, and others have picked up its use. In its narrowest sense, e-business is almost equivalent to the term *e-commerce*, which is the process of completing a market transaction electronically. From a technologist's viewpoint, e-business is often seen as the business use of any current technology tied to the Internet. Another definition is e-business is a set of business processes and systems that tie organizations together in all of their communications, transactions, and interfaces by means of Internet-enabled technologies, increasing value to each participant by reducing redundancies, trimming costs, and increasing productivity and timeliness. The Gartner Group suggests that e-business involves "the continuous optimization of a firm's business activities through digital technology." The authors suggest that e-business can be defined as "strategically utilizing technology throughout an organization to seamlessly integrate all business processes to facilitate the best possible customer experience." Such activities as digital communication, telecommunications, e-commerce, online research, customer relationship management, supply chain management, and enterprise resource planning can be placed under the umbrella of e-business.

E-business concepts not only relate to e-business practices, but also affect non-e-practices in other departments and functional areas within a company. As you read through the various concepts, you are likely to find yourself thinking about specific organizations and asking such questions as:

- How can this idea be implemented, given the current dynamics of a specific organization?
- How might this affect the roles of various key people within the organization, such as the chief financial officer (CFO)?
- Can these ideas, and the potential benefits that would result from their implementation, be effectively communicated to coworkers and management?
- How should the e-business concept improve the overall performance of the organization?

CPAs can most effectively plan for e-business challenges by first assessing their current roles. Are you in an organization planning or undergoing a transition to e-business? Are you in public practice with an interest in advising clients about e-business issues? Regardless of

your situation, if you are interested in knowing more about undertaking an e-business transformation, this chapter includes essential e-business concepts and the authors' approach to an e-business project. Whether you are in industry and are part of, or lead, the project team, or whether you are in public practice and provide your client services, everyone has plenty of opportunity to pitch in. If you are in industry, understand that it will be difficult for you to perform your regular 50-hour-a-week job and take this on as well, especially if you are the project leader. If you are in public accounting and your client is undergoing an e-business transformation, you can bet that this project will spread your client's key people pretty thin. That means they likely will be looking for some outside assistance. If they don't get it from you, they likely turn to a competitor. So, now that everyone knows they can play a critical role, let's look at how e-business evolves so you can better assess your company's or client's current stage of development and anticipate subsequent phases.

1.1 The Stages and Technologies of E-Business

A typical organization experiences several stages of e-business maturity. At first, companies will struggle to provide employees routine access to services, such as access to e-mail and the Internet. New benefits emerge, and new problems arise with each new capability. For example, a company may need to limit employee access to certain Web sites and the amount of time employees spend online, and a company may need to determine whether employee online behavior should be monitored and e-mail use should be allowed for personal use. Most companies have long since solved these issues and realized the more savvy and comfortable their employees are interacting in an electronic environment, the more the organization benefits. Even though it is true that some people take advantage of loose company policies in this area, most organizations have found it better to allow the majority of the people to expand their technology-use comfort zones than to limit everyone's use to control a few (especially since those few are often uncontrollable regardless of the policies).

The next development phase is establishing a presence on the Web. Today, most companies have some form of Web site. Those that took the plunge early have redesigned their sites on average three to four times to augment site functionality. Typically the first initiative was to create a flat, static, informational Web site to reach the marketplace. Using dynamic content could keep the Web site looking fresh and avoid massive periodic redesigns, which tended to destroy any presence or recognition that had been achieved through the old site. Many early

adopters quickly broadened their concept of Web use from simply having a Web site to creating a Web presence that would reach potential customers 24 hours a day, 7 days a week, 365 days a year. Experience is the best teacher for understanding what works and what doesn't in this arena. Logically, the evolution into a Web presence is a road paved with both customer and employee feedback about how this resource can provide the greatest value.

Web sites are developed to provide the marketplace with external access to company information or to provide employees with internal access to corporate networks, called intranets. Early on, some companies opted to do little in the way of creating an external Web site yet made great strides with intranets. Intranets, like e-mail, can quickly change the way a business operates. In the best implementations, intranets have transformed the way workers communicate; created more consistency through one-source dissemination of corporate processes, policy, forms, documents, templates, and other items; enhanced the ability for groups to work together and collaborate; minimized redundancy of information and therefore misapplication of out-of-date information, and more. Overall, intranets have helped organizations achieve new levels of productivity and interactivity.

E-commerce is the next step in the typical e-business evolution. Many goods and services are easily described, sold, and delivered over the Internet. Although it was once thought that certain products would not flourish using this distribution channel, like the sales of coffee or candy because of the lack of certain sensory stimuli like missing aroma, the marketplace has proven otherwise. The Internet is merely another delivery mechanism, another channel, another touch point for companies to interact and do business with their customers—and it should be thought of as such.

A novice mistake made while implementing an e-commerce site is companies often confuse e-commerce with the fax machine. If you are going to use the Web, *use the Web*. That is, do not direct everyone to a telephone number or have them print forms that they then have to fill out and fax for processing. Using e-commerce means all the necessary steps required to carry out a transaction have been incorporated into the customer's experience. That includes estimating costs, such as shipping, providing alternative feature selections, delivering online help to assist in product/service selection, enabling the user to set up an account so they can buy the offering, tracking the order, and whatever else the users expect in order to carry out a non-e-transaction.

The good news about this stage is that CPAs, whether in industry or public, are called in. Why? Because this stage automates the business transactions, and that is the CPA's domain. It is important during this stage that you make sure the company executives see you as not only

someone who can automate the assembly line (so to speak), but also who can think strategically enough to consider revenue opportunities, increased service levels, and other benefits, not merely cost reductions and efficiency.

E-business is the final maturation phase in the cycle and, in its highest form, is characterized by partnerships and the automation of connections among an entire supply chain. Notice in this description, e-business is not about technology. It is about strategy to integrate all the processes, from the first contact with the customer; through the sales of products and services; through the scheduling, manufacturing, and delivery of those offerings; and through their continued maintenance and support. *E-business* is just another term for doing business today. Obviously, you can do business without any customer e-interactions, just as you can do business with only e-interactions. The most successful approach, however, is to thoroughly integrate all business processes and “e-ify” as many as possible to allow continuous customer interaction and access.

2. INTERNAL ISSUES WHEN IMPLEMENTING E-BUSINESS

As you can quickly see, because e-business affects all aspects of an organization, it follows that an e-business team should be created to represent all the major areas in an organization. The best e-business team represents a cross-functional slice of the organization. Some people come from information technology (IT), of course, and might include programmers, analysts, database managers, and system administrators, depending on the organization’s size and technology capability. Marketing must be represented because the Web has proven to be a significant marketing medium. And the list goes on. Customer service, accounting, production, warehouse/shipping, public relations, corporate, and many more departments within a business need to be represented if the identified solutions are to be embraced, supported, and implemented throughout the organization.

An e-business team leader needs to be appointed. A leader is someone who can work with all types of people, understands technology, and can manage large projects, but most important, a leader understands the business’s processes and the transactions they generate. This e-business team leader commonly is chosen from accounting or IT, and even though the strengths of each are obvious, both groups have their weaknesses. Often, the IT person is overly enamored with the technology rather than the business strategy. Remember, e-business is not just about

the technology, which is an enabler. The business strategy, however, is most often rooted in creating additional customer loyalty, retention, and value, and has to be the driving force if the effort is going to be successful. On the other hand, while accountants are often a great choice because they know the business process and transactions and have a broad understanding of technology, there is a risk here, too. The accountant too often focuses too much on streamlining processes rather than utilizing technology to create strategic advantage. So, generally speaking, if you are a CPA, consider the following:

The good news is that:

- You love to cut costs,
- You get excited about efficiency, and
- Process and procedure are your favorite tools.

The bad news is that:

- You tend to automate first those functions that consume your department's time rather than make the company money, such as general ledger over inventory.
- You think that anything having the word *revenue* in it is a responsibility belonging to the marketing department (or someone else).
- You think of customer service as a cost center rather than your best bet for repeat and/or increasing business.

In most companies, those who keep the customer top-of-mind in all their discussions rise to the top. Those who keep the company running smoothly hit the glass ceiling just below the top executive tier. So, as a CPA taking on a project such as e-business, leverage what you are good at, but balance your natural urge to "operationize" everything with the need to optimize strategic advantage.

If you are wondering what we mean when we use the term *strategic advantage*, think of Hertz and its development of the Gold premier membership program years ago. Hertz used technology to allow the bus driver to alert the rental counter that the traveler had arrived, so Hertz personnel could begin verification that the car and paperwork were ready, so that the traveler could immediately drive the car off the lot. Hertz also used hand-held devices providing almost instant check-in with a receipt on the traveler's arrival back to the lot. All rental car companies were performing these business processes, but only Hertz found a way to create a strategic advantage by simultaneously saving the traveler precious time, providing instant necessary documentation, and streamlining the processes. This higher level of personalized service was more than enough for many frequent travelers to shift all their business to Hertz. So, not only did the company create more customer

loyalty and improve retention, Hertz also benefited with increased volume. To deliver an effective e-business solution, therefore, you have to strike a balance between technology and strategy, between functional areas within the business, and between corporate and customer objectives.

Now, back to creating your e-business team. In addition to creating the team, you need to establish an approval body to review their work. If you are a small to medium-sized business, the e-team should likely report directly to executive management. However, if you are a medium-sized to large business, you should set up an approval body that should also be cross-functional and perhaps organized as a steering committee. All related projects should be estimated, approved, and ranked according to priority for the e-business team. There should be one executive sponsor, an executive-level person who acts as the champion and evangelist of the entire e-business effort. Obviously, the executive management team should be involved at some level because e-business decisions directly affect an organization's ability to achieve its strategy.

At this point, we have identified our e-team members, have a steering committee if appropriate, and are ready to begin "e-ifying" your business. The first course of action is to get them all together and conduct a planning retreat to establish the team's mission, objectives, priorities, and budget.

2.1 The Retreat

The retreat should be conducted in an interruption-free setting, preferably for a day and a half to two days. If this is not possible, set up a series of sessions, with each lasting a minimum of two to three hours. This is important because it takes 30 to 45 minutes for everyone to relax and begin a meaningful dialog. With this in mind, let's begin our basics review.

The first step is to define what you are trying to accomplish with this e-business initiative. To do this, you need to consider what is important to the company and what is important to those it serves. This works out to be similar to your company's current mission statement, but narrowed to just focus on the e-business team's project. Consider the following example of a credit union's e-business team's mission statement:

The mission of the e-business team is to develop an infrastructure that allows access and services such that the normal banking transactions of our members can all be managed without ever coming to our facilities and, for the most part, be done easily and securely from their home or office.

Short and sweet, this set the tone for what the credit union's e-team needed to accomplish. Considering the mission statement, the first focus was to identify what services the members currently use, as well as those they want to use. Next, the e-business team needed to evaluate their technology's current capabilities. Then, the team compared those capabilities to the service-set they desired, to identify gaps. Finally, a plan to fill those gaps was created.

Don't misunderstand: The mission statement is not the answer to an organization's problems. We are saying, however, that it marks the beginning of *plan accountability*.

Plan accountability is a framework that promotes consistency among all the elements of a plan, from the mission through specific goals, plans, objectives, and tasks.

Consider our credit union example. If one of the objectives identified from this process was to create a way of consolidating the reporting of all of a customer's investments, the first question someone should ask is, "How would this new consolidation reporting service deliver the mission statement promise of *providing access and services to all the normal banking transactions of our members?*" Assume the answer was that the e-business team wanted to become the members' one-stop-shop for all their financial needs; the idea may be worthy of pursuit, but it is inconsistent with the priorities set by the mission statement. On the other hand, if the answer was that most members had retirement accounts with the credit union, and had made it clear that consolidation of all of those accounts to better manage their scattered assets was a priority, the story changes. The mission statement provides a kind of sanity check to make sure the initiatives being considered are in line with what you want to accomplish. This helps you avoid the resource depletion that occurs when projects constantly veer off course.

The reality of business today is that too many projects get side-tracked because they try to take advantage of a short term opportunity while treating their long-term strategic advantage as an unwanted step-child. Plan accountability is the process used to verify that the mission, goals, and plans of an organization are consistent. And when they are not, either change the goals or change the mission. For example, if a primary objective of the credit union's e-business team was to become a one-stop-shop for all its members financial needs, this idea should be reflected somewhere in the e-business team's mission.

At this point, the emphasis shifts to the identification of the steps necessary to achieve the mission. This leads us to the goal and objective-setting portion of the planning retreat. To determine the organization's goals, establish break-out groups and pose the question:

What should our team's top three to five objectives be?

Why just three to five? Because an objective (or goal) is a very broad definition, such as "Provide best of breed online banking functionality, such as statements, and transaction postings, bill-paying functionality," or "Develop access to cash so the average member pays no fees with only five minutes of travel." These are not easily or quickly accomplished. They usually take numerous actions to complete, too. When you open up planning to as many objectives as you can identify (seven to even a dozen or more), you find that there not only becomes a wide disparity between their relative importance, but you also quickly overload the team with more work than can be realistically completed.

When looking for your three to five objectives, give careful consideration to the mission statement. For example, the credit union's e-business mission statement contains the phrase "develop an infrastructure that allows access and services so the normal banking transactions of our members can all be managed without ever coming to our facilities," which is most likely the foundation of the objective-setting process. For example, one objective is likely to be around "building the infrastructure," another around "determining what the normal banking transactions of our members is (both today and in the near future)," and finally, finding a way of "delivering those services without every having to come to the bank." By taking the time to decide what this phrase really means, you begin to break this mission down into objectives, plans, and tasks. Answer such questions as:

- What online access do our members want and expect?
- What online capabilities do they consider important when choosing a financial institution?
- What parts of our infrastructure can we build upon, and what parts do we have to rebuild?

The purpose of this process is to uncover what e-capability your team wants to build to ensure the future success of your organization. Therefore, staying with this same logic, after you have identified your objectives, propose an action plan for each one. Additionally, everywhere appropriate with each objective and action plan, you need to determine progress checkpoints to make sure your project comes in on time and on budget.

Now that the retreat is over and your team is comfortable with its mission and objectives, two efforts need to be considered. The first is, "Do you know enough about the company's performance and its customers' motivations to develop effective business solutions?" Most groups need to do a little research in this area to set the team members

to the same perspective. The second initiative is to understand the current business processes and the systems supporting those processes, and identify the gaps. We discuss both, but we start with how business intelligence and tools for making decisions can provide insight as to how to approach this complex project.

2.2 Business Intelligence and Tools for Making Decisions

Accurate and timely information is crucial to any business and helps managers make better decisions. Using good business intelligence as the foundation for the many decisions that have to be made in a project this complex is critical. It is also important to take advantage of the many tools available to assist you in such a task. For example, a decision support system is an interactive, flexible, computerized information system that enables managers to obtain and manipulate information for the purposes of decision making. Also, the Internet and the World Wide Web can be very useful in gathering necessary information. (To learn more about the differences and the relationship between the Internet and the greater World Wide Web, refer to the “Did You Know . . . ?” section on www.webopedia.com.)

Business intelligence must rely on several sources of information. We discuss the role of internal company records and secondary data from public and private sources, as well as primary data generated through marketing research.

2.2.1 Internal records

Internal records provide an important source of information for decision makers. The accounting records provide sales, cash flows, expenses, and profitability data important for evaluating management and marketing effectiveness. Records of online sales can be compared to advertising expenditures in different media to assess the effectiveness of each. Ordering and inventory information can help improve delivery time and accounts receivable cycles. As accountants, using this information to set performance metrics, quantify company objectives, and create key operating statistics is second nature to us. In this context, however, we need to think about what outcomes we should expect from our e-business effort and create metrics for evaluation. For example, if your sales have been growing at a rate of 15 percent for the past three years, how are you anticipating this to change given that you are adding this additional e-channel? Another example might be if your cost for servicing your customers is currently at 20 percent of sales, what are you expecting those costs to be by adding a self-help customer center?

Even though your overall costs are likely to go up, it's hoped your customer service-cost-to-sales falls with the launch of this support alternative. There are literally hundreds of identifiable and quantifiable metrics, depending on the objectives of the e-business project, that have their baseline in your current internal records.

Another important internal information category is that of individual customers and their activity. At a minimum, customer databases should include customer names, contact information, and purchase history. Online storage and retrieval techniques have facilitated the growth and use of customer information. Many online sites require the visitor to register and then all contacts can be tracked. A company might have information about inquiries, purchases, calls to customer service, and the response to special promotions and offers.

Many Web sites track movement and navigation as users browse from screen to screen. This tracking can collect information about time on site, time per page, and the path taken through the Web site. In addition, a company can often identify the Web site that the user visited immediately before and after its own, the type of browser used, and geographic origin of the request. This information can be used to improve content and organization of Web pages and can give some insights about the competition that your customer is visiting. This data is generated automatically in Web site logs and can be very useful.

2.2.2 Secondary data

Many outside sources of information exist and should be used when the needed data is not available from the firm's internal records. Secondary data is information that has been previously collected, often for reasons unrelated to the decision at hand. Using secondary data can save time and money, and should always be consulted before initiating primary research. The secondary data may help solve the researcher's problem, or it may help to frame the problem statement and suggest an appropriate approach to a primary research project. The disadvantage of secondary data is often that there is a mismatch between the unique problem of the researcher and the purpose for which the secondary data was gathered. Further, secondary data may not be up-to-date and the collection process is often unknown, which may affect the data quality. Gathering secondary data has traditionally been tedious and frustrating. Researchers often had to make many trips to the library and wait weeks for information from government agencies, trade organizations, or other sources. The Internet has eliminated a significant amount of the legwork associated with the collection of secondary data.

2.2.2.1 Public information

A great deal of information is available from public sources on the Internet. Most U.S. government organizations provide online information in their respective specialties. For example, census information, patent office procedures, economic analysis, transportation statistics, and agricultural trends can all be found at various government Web sites. International organizations such as the World Trade Organization or the International Monetary Fund are good sources of information about countries other than the United States.

Other sources of public information include university libraries and their periodical newspaper and book databases. Some can be accessed via the Internet and others through the local library's Web site. A great deal of industry-specific information is available at literally thousands of specialty association Web sites, and most of it is free to visitors. A good way to start a search is by using a major Internet search engine, such as www.Google.com or www.askjeeves.com, or directories such as www.yahoo.com. More than 80 percent of Internet users find the sites they are looking for through search engines, and 57 percent of Internet users search the Internet everyday (source: www.searchenginecolossus.com/).

2.2.2.2 Privately generated information

Many companies and individuals post relevant information to Web sites. Company Web sites often provide insight into the mission, products, partners, organization, personnel, and current situation. Universities, politicians, and individuals create Web sites containing commentary and other useful data. Large research firms, such as Forrester Research, are a good source of information, because they post summary or sample statistics on their sites as a means of encouraging the purchase of full reports. More specialized sites include the Gartner Group and IDC for e-business, Jupiter Communications for Web advertising, and Comscore for Internet audience measurement services that report details of Web site usage, including site traffic, intensity, and visitor demographics.

For stories about U.S. population characteristics and social and cultural trends, American Demographics and Marketing Tools can be very useful (www.demographics.com). Finally ZDnet is an excellent source of articles about technology, including product reviews and comparisons (www.zdnet.com).

Another important source of privately generated information comes from news aggregators, such as www.bizinfo.reuters.com or www.newsdesk.com. These are firms that monitor a number of media sources, presenting selected stories to users either by sending stories to the user's inbox via e-mail or by allowing users to take it from a specially tailored Web site.

2.2.2.3 *Information quality*

It is important to be cautious when using secondary data for decision making because it has many limitations. This caution is especially important when using information found on the Internet for several reasons. Anyone can publish on the Web, and there is often no review process equivalent to the editorial process provided by other media publishers. There is no organization providing oversight to the content of the Internet or monitoring data accuracy. According to Strauss and Frost (2001), the following steps can be taken to evaluate the quality of secondary data found on line:

- *Discover the Web site's author.* A site published by a well-known organization is more credible than one published by an unknown author. Sometimes the site names can be misleading, making it difficult to determine the source of the information. Once the author is identified, try to determine that author's level of expertise.
- *Determine how current the Web site's information is.* Some Web sites change every day, and others have been neglected for years. Checking the hyperlinks is one way to assess how up-to-date the Web site is. A site with many broken links is a site that has probably not been updated recently.
- *Consider how comprehensive the coverage of the topic is on a particular Web site.* Some Web sites are very narrow in focus and may not give a broad enough treatment to put the information in context.
- *Determine accuracy.* Accuracy is of primary importance, and it is always wise to try to validate the data by locating similar information from other sources, either on the Internet or from hard copies at the library.

2.2.3 **Primary data**

Primary data is information you collect through original research or surveys to solve a particular problem. Usually it is wise to search for secondary data first, because collecting original or primary data is expensive and time-consuming. The advantages of primary data are that you know it is current, and it can be collected in a way that is directly relevant to the problem or decision at hand. Further, it is proprietary information that is not available to competitors.

The Internet has affected the primary data collection process in many ways. Using digital technology, it is possible to collect information about how long consumers spend shopping, what advertisements they open, and the path they take through a Web site. The Internet has made the use of customer and employee surveys efficient, rapid, and low-cost. The administrative effort alone to prepare, send, compile, and

report the results of surveys used to make it too difficult for most small businesses to conduct surveys. Services such as www.zoomerang.com have changed all that because in a matter of hours, a complex survey can be put together and distributed via e-mail, with the results automatically tabulated over the survey period, for a yearly subscription fee of around \$600 dollars. This fee allows you to create as many different surveys as you want, with the right to send out 10,000 total surveys during that period. This allows businesses to gain critical perspectives and insights from employees and customers for less cost than the postage alone using the traditional paper surveys.

By using e-mail surveys and pop-up ads, gathering information from consumers on a very large scale has become practical, as well. "For example, every twenty-four hours AOL subscribers are invited to participate in a short survey. The company collected about two million responses from consumers over a period of eighteen months and used this data to evaluate its customer support." (Krishnamurthy, 2003, page 270) Consider sites such as www.startsampling.com, an organization that lets you get consumer feedback from your members as they sample your product or provide you personal insights into the habits.

"Clickstream data is the record of an individual's movement through time at a Web site." (Krishnamurthy, 2003, page 279) Analysis of clickstream data can be used for path analysis, advertising effectiveness, and shopping cart behavior. Path analysis involves clustering consumers on the basis of the route taken to get to the site and the path used to navigate within the site. This can answer questions such as how many clicks it took to find the desired information, as well as what site the user came from and where they went after leaving your site. Advertising effectiveness is another common application for clickstream data. It can be determined whether the user clicked on a banner ad or responded to an e-mail, which helps a firm assess the effectiveness of its marketing communications. Shopping cart analysis is another useful application for clickstream data. One problem many retailers face online is that a large proportion of online shopping carts are abandoned after items have been selected. Using clickstream analysis may help to determine what customers were interested in, what caused them to lose interest, and when they left the site.

2.3 Identifying the Gaps in Current Process and the Systems Supporting Them

This step is not nearly as difficult as it might at first seem. One of the problems of using a term such as *e-business* is that most accountants' first instinct is they need to get a technology specialist to take on the

project. Although this may be true because of your limited bandwidth, it is certainly not necessary. You need to know little about technology to perform this analysis, but it is helpful to know a great deal about the business itself.

The authors like to start by flowcharting the processes, from first customer contact, through delivery of the product or service, to any ongoing support of that product or service after the sale. If you have never done a flowchart, that probably works in your favor. We are not looking for the technically accurate use of symbols or the latest implementation on flowchart presentation. We are looking for a simple roadmap to who does what, and at each step, what transactions or paper are created, what processes are initiated, and what resources are committed. As was said well in the tag line of the movie Jerry Maguire, "Show me the money," for the e-business team, the tagline is "Follow the transactions." So your process may start with, "Order desk receives a phone call from a new customer" as the first box, which leads to three branches: "New customer wants information," "New customer wants an engineer to visit and determine feasibility of product/service solving the problem," and "Customer wants to order a product." It is simple. You just trace what happens, what choices occur, what paper is created, what money is transferred, and what resources are allocated.

In this process, you find multiple entry points. For example, in this case, we started with a customer calling. What about when a sales person calls on prospects? How about getting a response from a flyer you sent out? Or maybe you get an e-mail from someone who visited your brochureware Web site? The point is, while the job of flowcharting everything is simple, what makes it difficult is identifying all the points of entry, all the deviations that occur in normal day-to-day business, what really happens rather than what is supposed to happen, and so much more. This step may be one of the most enlightening within the e-business project. Notice how much of this discussion was about technology. As we stated earlier, the step is all about how the business is transacted.

Once you have a pictorial view of how the business works, the next step is to look at the various systems supporting each process. For example, some processes, such as inventory management, are likely supported by an industry-specific software application. Such processes, however, as scheduling, quality control, warranty, and many others might be supported by manual processes, department-developed spreadsheet templates, custom-written applications, or some combination.

Next, on your flowcharts, highlight the various processes supported by each automated solution. What remain (items not highlighted) are all of the manual processes that fall outside of the installed systems.

What is also evident is how many processes are supported by partially or marginally automated approaches. It is important here to keep your mission and objectives in mind. You don't necessarily have to automate everything. Because of the costs and rarity of certain transactions, you might have to isolate certain exceptions and handle them outside of your e-business system. For example, for a specific set of customers fitting a unique profile, you might direct them to call a special number for assistance.

Several benefits come out of this exercise. First, the authors have never gone through this detailed review without identifying numerous areas for process improvement. "Process improvement" may sound very sophisticated, but the improvements almost always come from the discontinuance of duplicate, out-dated, or useless functions. In addition, when partially or marginally automated approaches are supporting critical or strategic capabilities, bringing this into clear view of the executive team creates needed resource reallocations.

Now, it's time for the e-business team to identify the gaps in automation, processes that need to be automated, and automated processes that need to be integrated. The basis for this gap analysis is rooted in the mission and objectives outlined previously. The team, logically, does not have to worry about the automation and integration of processes outside the scope of their project. However, good project planning includes integration points, so many of these skipped processes can be easily incorporated later.

Let's come back to the author's definition of *e-business*: "strategically utilizing technology throughout an organization to seamlessly integrate all business processes to facilitate the best possible customer experience." Given this and the project's mission and objectives, the team needs to lay out the steps necessary to provide that exceptional customer experience and supply all the links, integration, user interfaces, and support necessary to achieve it. For example, if one of the objectives is to be able to provide shipment tracking, not only does the e-business team have to design and develop the user experience and the Web interface to be able to track and review the progress of the shipment in question, but the internal systems also need to be integrated so status reports from the drivers are instantly available anywhere in the system as soon as they are received.

"E-ifying" your business, most often, forces you to tear apart and rebuild the many band-aid solutions that have been placed in service over the many years as short-term fixes to the at-the-time chaos. Thousands of these solutions are in place at any time with almost every business of any size. These band-aid solutions almost always cost the company in one or more ways, for example, extra money, resources, quality, customer satisfaction, timeliness, and more. So, typically, the

e-business team is set up to be heroes as they unveil the reality of what really happens day in and day out within the organization.

3. MARKETPLACE ISSUES WHEN IMPLEMENTING E-BUSINESS

Our e-business team is focused on implementing corporate strategy, streamlining processes, using technology to seamlessly integrate the organization's transactions and interactions, and it has done research to better understand its customers and determined the appropriate company metrics to evaluate the results of their e-efforts. Now it's time to look at how you can better e-connect to the marketplace. Let's start this discussion by reviewing some e-business models. Next, we want to look at techniques for communicating online. And finally, we discuss how and why customer relationship management has to be a cornerstone in our e-business foundation.

3.1 E-Business Models

An e-business model describes a method of operation that enhances a company's profitability by supplying revenue or by controlling costs while offering greater value, access, and/or appeal to the consumer. The popular press has created and popularized many new terms describing e-business models, but most models are rooted in existing business concepts. In this section, we discuss six different models. The first three are content sponsorship, direct selling, and online retailing. These three models represent popular ways that businesses sell directly to customers using e-marketing. Another model, infomediary, might best be described as an intermediary that aggregates and sells information. Next to be discussed is the intermediary model, which involves many kinds of middle-men that position themselves between sellers and buyers, presumably adding some sort of value to the transaction. Finally, we review the newest model, which is aggregator or portal, which is some combination of all five.

3.1.1 Content sponsorship

The content sponsorship model revolves around the creation of a Web site that attracts visitors interested in the information or activity provided. Online content may educate, entertain, or provide convenient tools for the consumer. Content sites sometimes provide an opportunity for a digital community to develop where users can discuss topics and

compare experiences. Many content sponsorship businesses built their customer base by giving their basic service for free. This was often done to build market share and starve out competitors. The intention was to build a loyal customer base and then sell advertising space to companies who wanted the attention of the same customers. The content sponsorship model can be compared to television, magazines, or other media that sell print space or airtime. Often, the content sponsorship model is used in combination with other models to generate more revenue. For example, many content sponsors sell products and services to their customers who use the Web site's free services.

3.1.2 Direct selling

The direct selling model involves the manufacturer selling directly to the consumer, bypassing wholesale and retail channels. Direct selling results in a shorter distribution channel and the elimination of intermediaries. When this model is successful, it can result in huge savings in sales-related expenses for the producer. The manufacturer can capture some of the margin that previously went to the intermediary. Dell computer is a famous example of a very successful direct-selling model that targets both businesses and the consumer. The direct selling model also offers benefits for the consumer in the form of lower prices, and possibly faster delivery.

There are also disadvantages associated with the direct selling model for both customers and producers. The producers must assume responsibilities for communicating with customers and serving many individuals rather than a few intermediaries. In other words, they must perform some of the functions and support traditionally offered by wholesalers and retailers. This model might also disenfranchise many loyal intermediaries so they discontinue relationships with the manufacturer, thereby negatively affecting overall sales volume. On the customer side, they may incur higher search costs to locate products, spend more time interacting with multiple manufacturers, and/or inadvertently overlook key integration, training, and support products or services that were bundled within an intermediary's offering.

3.1.3 Online retailing

One of the most well-known models on the Internet is online retailing. Organizations create a Web site that offers goods and/or services for sale to consumers and businesses. What differentiates this model from the direct selling method is that the online retailer offers products from a variety of manufacturers, similar to the traditional retailer. Online

retailers range from pure play Internet organizations, such as Amazon.com, to traditional retailers with a complementary Web presence, such as Walmart.

3.1.4 Infomediary

An infomediary is an organization that assembles and distributes information. Infomediaries act as a filter between organizations and consumers. One type of infomediary is a marketing research firm. Normally the infomediary pays the consumer for sharing his or her information and then resells it in the form of marketing research reports on various topics, such as shopping habits or product preferences. Some marketing research infomediaries obtain the information covertly and do not compensate the consumer. This is done through the use of such techniques as cookies, which track users and record the Web pages visited as they navigate the Internet.

Another type of infomediary is a permission-marketing organization. In this scenario, the consumer agrees to receive messages from advertisers. The permission marketer compensates the consumer for access to his or her computer screen. The consumer may receive money, points toward shopping, or free Internet service and must share demographic and other personal information with the permission-marketing organization. The permission marketer then resells this information to advertisers that are trying to reach a particular demographic or psychographic profile. The benefit to advertisers is they have an opportunity to communicate with a very specific target market of consumers who have expressly agreed to receive those messages.

3.1.5 Intermediary

There are two broad categories of intermediaries; brokers and agents. The broker creates a market space where buyers and sellers complete transactions, but the broker never takes possession of the items for sale. The broker usually charges the buyer or the seller a fee based on the transaction, but they typically don't represent either party. What the broker provides is information or negotiation services that help both parties complete an exchange of some type. Exchanges and auctions are the best online examples of the brokerage model. Other examples of online brokerage services are exchanges such as Ameritrade and E*Trade for stocks, and Autobytel and Carpoint in the automobile category.

Agents, unlike brokers, do represent either the buyer or the seller, depending on who pays the fee. Selling agents represent one party and usually earn a commission for each sale. Manufacturers' agents represent more than one seller. On the Internet, manufacturers' agents

are often called seller aggregators because they represent many companies on one Web site. A familiar example is the many travel reservation sites available online. These travel sites can be classified as aggregators because they are paid commissions by the airlines and hotels they represent.

A shopping agent represents a buyer rather than a seller. Shopping agents are Web sites that allow a consumer to search for and display lists of merchants that sell a particular product as well as the prices at which they sell them. Shopping agents can also allow the consumer to specify attributes other than price in their search. For example, consumers can compare shipping policies, return policies, and product features and rate each on a scale from “not important” to “must have.” Shopping agents help individual buyers obtain the prices and value they desire quickly and efficiently. The site www.activebuyersguide.com is a great example of this.

3.1.6 Aggregator or portal

A final business model just beginning to emerge is electronic portal to a specific market segment. Although this category could technically be called an intermediary, the authors have created a separate category for it because of its likely future significance as well as the fact that it is usually a combination of all the models previously discussed. Portals often provide content to a specific market segment, have an online retail store with a variety of offerings from other manufacturers, direct sell their own products and services (which might be services allowing disparate products or services to more seamlessly integrate with each other), act as an infomediary to both the market segment they serve as well as other vendors desiring access into the market-segment channel, and as an intermediary. Well-known technology research groups such as IDC have been espousing the value and long-term importance of these models, but few have found the success required to fulfill the promise at this time. However, portals should come of age over the next few years as various technologies continue to evolve and because of company efforts from organizations such as Microsoft, who have bet the company strategy on this model.

3.2 Marketing Communications Online

The Internet is a powerful tool for communicating with the company stakeholders: employees, customers, shareholders, suppliers, and others. Marketing online consists of several different types of promotions, including advertising, public relations, and sales promotions. Advertising is any form of paid communication in which the sponsor or company

is identified. The content is usually persuasive in nature and seeks to advocate a product, service, or idea. Pop-up and banner ads are currently the predominant form of advertising on the Internet, but other forms such as sponsorships are also important. The marketing function that evaluates public attitudes and executes a plan to earn public understanding and acceptance is called public relations. Many companies have Web sites that serve as public relations vehicles. Sales promotions are usually intended to stimulate purchasing in the short term and include coupons, free samples, contests, and special offers. Examples of all of these techniques can be found online.

3.2.1 Advertising online

Advertising can be used either to build brands or to elicit a response from the potential customer. The focus of brand advertising is on building the brand name, rather than on immediate sales. In contrast, direct response advertising is designed to create action on the part of the consumer. The action might be a simple inquiry or an actual purchase. Research has shown that the Internet can be used effectively for building brands. (Cyber Dialogue as cited at www.emarketer.com). The real advertising strength of the Internet, however, is for direct response communication because of the unique opportunity for two-way communication with consumers. Traditional advertising, such as print and television, provide a one-way communication from the company to the consumer. The Internet allows the consumer to respond immediately to the advertisement.

3.2.1.1 Banner ads

Banners are rectangles placed around the edges of Web sites. Banners come in many sizes from small buttons to very large ads that occupy a significant portion of the screen. When users click on a banner, they are automatically linked to the advertised Web site. Three interesting types of banner ads are pop-ups, pop-unders, and interstitials. Pop-up ads appear abruptly when a consumer first visits a Web site or at any point while browsing the Web. Pop-under ads open in a new window that is visible only when the user closes the current window. An interstitial banner ad occupies the entire computer screen and appears when a user moves from one Web site to another. The user must initiate closure of interstitial, pop-up, and pop-under ads. The advantage of such ads is that the user is surprised and the response rates, at least initially, were better than for traditional banner ads. The downside is that consumers have become annoyed by the intrusive use of pop-up, pop-under, and interstitial ads. Some consumers install software designed to defeat these intrusive ads, thus making it harder to reach

consumers with a marketing message. For banner ads to succeed, they must have two characteristics. The first is the ability to attract the user's interest and the second is a clear call to some desired action. The banner ad must take the user to a Web site where the desired action is clear and easy.

3.2.1.2 Sponsorships

Unlike banner ads, which are placed on many different Web sites, sponsorship is a long-term promotional agreement with a few sites. The key purpose of a sponsorship is to benefit from the traffic and brand strength of a Web site in the hopes of gaining traffic to one's own Web site. The most popular sites for sponsorships are the portal sites such as AOL and Yahoo because of the popularity of these access points to the Internet. Smaller more specialized Web sites may offer the advantage of more specially targeted groups of consumers.

Sponsorships are increasing as a method of advertising on the Web because they often integrate editorial content and advertising. This approach is popular with advertisers because it gives them additional exposure and offers the impression that the site endorses the product.

The downside of the traditional sponsorship relationship is the number you can have. If you have too many on your site, the sponsors don't feel they get the attention and endorsement that they are paying for. In other words, the visual landscape becomes too crowded. For the organization being paid by the sponsors who are looking for more revenue opportunities, they naturally want more ad-space paying customers. "Where there is a market, there is a way," and "sponsored links" are the newest evolution. For example, if you do a search on computer-based training on www.google.com, you not only see those listings matching the search criteria, but on the right-hand side, you see a number of training developers and tools listed for easy access. Even though this type of sponsorship does not provide the level of visibility and perceived endorsement that traditional sponsorships have, it does create many more advertising alternatives and, in this case, selective endorsement by specialty area. We don't know how effective this approach is, but we do know it has some positive impact because the authors have used these links on numerous occasions to find products or services.

3.2.1.3 E-mail advertising

E-mail is the least expensive form of online advertising and is usually in the form of text sent to a large list of individual addresses. It is inexpensive compared to its closest equivalent—direct mail—because there is no postage charge, no paper costs, and very little handling, and it can be automatically personalized. E-mail ads offer a convenient

way to direct users to Web sites using hyperlinks and offer a means of two-way communication between the customer and the advertiser. The disadvantages of e-mail advertising are the potential for alienating consumers barraged with unsolicited and unwanted e-mail—what is known as “spam.” Spam’s negative effects can be somewhat reduced by using highly targeted mailing lists so consumers receive messages that interest them. E-mail distribution lists can be generated in-house from Web site registrations, subscriptions, or purchase records. Highly targeted e-mail lists can be purchased from list brokers. Usually the list broker sends the advertising message to the purchased list, rather than turning over the list. The best lists are ones made up of individuals who have opted in, that is, signed up to receive commercial e-mail about products that are of interest to them. Research has shown that lists with members who have opted in get much higher response rates than those who have not. According to Strauss and Frost (2001), opt-in lists can generate response rates as high as 25 percent. Compare this to the 1 percent response rates for banner ads.

An interesting variant of e-mail advertising is something called viral marketing. This happens when users forward e-mail to others on their e-mail lists, thus extending the reach of the ads. Viral marketing has been compared to word-of-mouth advertising, but is much more powerful because contacting friends using e-mail is much faster than face-to-face or phone conversations. It is almost as easy to send an e-mail to 20 friends as to 1, especially if distribution lists are already in place.

3.2.2 Public relations online

Public relations is used to create goodwill for a company among a number of different groups. The targets of public relations messages include shareholders, employees, media outlets, suppliers, the local community, and customers. Web content designed to create a positive attitude toward the company or its brands can be called public relations. Many companies provide Web content that is meant to entertain, inform, or persuade. Some corporate sites feature information about products or the company without interactive features. These sites are often called brochureware. They are the digital equivalent of public relations brochures placed online. One advantage is the low cost of establishing a Web presence using brochureware. Another advantage is that information can be disseminated more quickly and at reduced cost compared to traditional methods. Press releases and corporate reports can be placed on the Web site and are available for shareholders and the public. Instruction manuals and corporate newsletters can be placed online so they can be accessed by customers or employees.

Online posting can save time and money by eliminating the need for printing and distributing materials.

Interactive Web sites can also be useful for public relations but are more expensive to create and implement. Often users visit Web sites looking for information. A well-designed interactive site can simplify the user's search for the required information. For example, a site might include a location finder to assist users with locating a dealer in their area. Users might be asked to input their zip code and the site then returns a list of nearby dealers. This is a far better solution than presenting a long list of dealers for the users to wade through.

3.2.3 Sales promotions online

Tactics designed to get an immediate response from the customer are often categorized as sales promotions. They are different from advertising because they lead to an immediate increase in sales and they are usually time specific. In other words, they are usually available for a short period of time. Examples include coupons, rebates, product samples, contests, and special offers. "Marketers report three to five times higher response rates with online promotions than with direct mail." (Strauss and Frost, 2001) Online coupons may be more effective than traditional paper coupons. The most common way to distribute coupons has been through the Sunday newspaper. Interested consumers had to comb through hundreds of coupons to find the few that were of interest to them. The redemption rate of newspaper coupons has been about 1 percent or 2 percent. Online, the consumer has a better chance of easily locating useful coupons by simply searching for the product of interest and related coupons can be printed just before shopping. Thus online coupons should result in higher redemption rates than traditional coupons. Sales promotions online are often combined with advertising. When consumers register for a promotion, their name and e-mail can easily be added to the company e-mail database. These names can then be used for future communication with prospects and customers. Techniques like this allow companies to quickly expand their prospect and customer database. Through consistent and repetitive messaging to this targeted, interested marketplace through a variety of e-alternatives, businesses can significantly increase revenues and bottom-line profits for literally pennies on the dollar that they have traditionally spent.

3.3 Customer Relationship Management

Relationship marketing is a strategy of building long-term partnerships with customers. Companies can build these partnerships by offering

value and providing customer satisfaction. The benefits to the company should include loyal customers and additional referrals, which ultimately lead to increased sales and profits. Additionally, marketing costs may fall because serving existing customers is less expensive than attracting new ones. Customer relationship management (CRM) is the process of identifying, attracting, differentiating, and retaining customers, which is the global approach the authors are taking to introduce CRM. However, when you look at this topic from an implementation standpoint, CRM is often broken down into a three-pronged approach; focusing on techniques and processes to improve customer service, using sales force automation tools to better connect and understand customers, and marketing automation.

3.3.1 Relationship capital

In an atmosphere where a seemingly endless number of businesses are vying for the consumer's attentions, customer loyalty may be more valuable than gold. A firm's ability to build and maintain relationships with customers, suppliers, and partners may be the difference between success and failure. It is this relationship capital that provides the springboard for future business. The central belief and benefit of relationship marketing is that if you take good care of your customers, they:

- Reward you with their loyalty (customer retention)
- Continue to purchase the current product or service
- Probably purchase any extended products or services (additional offerings from the same organization, whether related or unrelated)
- Refer you to their friends and business associates

3.3.2 Relationship strategies

Customer relationships can be practiced at three levels. At the lowest level companies build a financial bond with customers by using pricing strategies. The firm uses pricing incentives to encourage customers to continue doing business with it. Frequent buyer cards and frequent flyer programs are examples of level-one relationship building. This level of relationship marketing is popular with consumers, but it is the least effective strategy because it can be easily copied by other organizations, and it does not lead to a sustainable competitive advantage.

The second level of relationship marketing includes financial incentives, but also tries to create social bonds between the company and the customer. This may be the familiar birthday card from your dentist or hairdresser or the special service offered by your banker.

Level-two relationship marketing has greater potential for long-term advantage than does level one. This kind of relationship involves personal communication between the firm and the customer.

The third level of relationship marketing includes financial and social bonds, but adds structural bonds to the mix. Structural bonds are created by offering added-value that is delivered through structures that enhance the relationship. Federal Express offers software (not over the Web, but application software) to business customers so they can ship and track packages using their own computer. This creates a structural bond because customers come to rely on the convenience of this software and are less likely to switch to another shipper. All of the major Web portals are trying to create structural bonds with customers. For example My Yahoo! allows customers to tailor their interface to include things such as local weather, stock portfolios, and news items. Once consumers have invested the effort in customizing their interface, they are reluctant to start over with a different portal. In this case, the more My Yahoo's technologies become integrated into the day-to-day routines and actions of their customers (as it becomes their operating desktop), the more structural that relationship. The more structural the relationship, the stronger the bond between company and customer.

3.3.3 What is CRM?

Customer relationship management is an individualized marketing method that uses customer information to build long-term, personalized, and profitable relationships with each customer. The focus is on share of customer rather than on share of market. Whereas mass marketers develop a product and try to find customers to buy the product, CRM develops a customer and tries to find products for that customer. How can businesses really communicate with customers one at a time? The answer is in the use of database technology. The Internet is an effective tool for generating relationships with customers because it is a two-way medium that allows the company to interact with the customer.

3.3.4 CRM process

A marketing database is a tool that helps marketers reach customers and prospects with one-to-one communications. The information contained in marketing databases helps companies know and understand their customers. By analyzing the information, marketers can identify sales opportunities and drive the communications process to capitalize on them. The process involves gathering information about customers, differentiating between customers, and customizing effective marketing messages and mix for those customers.

3.3.4.1 Identify customers

Information is the essence of customer relationship management. Many firms gather information from a variety of sources such as at the time of purchase, from the sales force, and from Web activity, and use this as a basis of their marketing database. Another method of building a database is in the form of a response list. A response list includes the names and addresses of individuals who have responded to an offer of some kind, usually by e-mail or registering at a Web site for a contest, service, or special offer. A firm can gain customer and prospect information directly in the form of voluntary disclosure, or by tracking behavior on the Web, or a combination of both.

A quick way to begin building a marketing database is to purchase a compiled list. There are a great many compilations available, ranging from those owned by the large list brokers to small groups or associations willing to sell their membership list.

3.3.4.2 Differentiating customers

It is often useful to enhance the database beyond the customer's name and e-mail address. Companies can learn more about prospects or customers by including demographic, lifestyle, and behavioral data in the database. Customer profiles allow marketers to differentiate customers by more than product purchases. For example, it might be useful to know which customers had purchased mountain bikes in the last year through past sales data. However, if you also knew those customers' income, interests, and shopping habits, you would have a better understanding of the customer.

Firms often distinguish customers by how valuable they are. Some customers purchase more often, spend more money, and are more loyal than others. By learning about the best and most profitable customers, firms can understand how to maximize marketing communications and cross-selling opportunities as well as provide service to the very best customers. Further, by understanding the profiles of the best customers, companies can look for prospects that match the profile and increase the likelihood of creating more good customers. There is a belief in marketing that most organizations focus way too much energy finding new customers, when often their current customers are being underserved. Therefore, the most often overlooked optimum strategy is to better serve (sell more of the same, complimentary, or new products or services) the customers you have, than those you don't. For many businesses, even new customers are more of a byproduct of referrals rather than pure marketing persuasion anyway.

An important tool used to identify the firm's most valuable customers is called recency-frequency-monetary analysis (RFM). Research has shown that customers who purchased recently, often, and spent a certain

amount of money are most likely to purchase again. Using this data, the company can build a simple equation to identify the “best customers” and assign a score to each name in the database. Customers can be ranked by this RFM score and marketing communications can be tailored accordingly. Some firms take RFM analysis a step further by considering profitability in the equation. For example, a customer who has spent a large amount of money may fail to make it to the top of the list if all his or her purchases were sale items. If a frequent flyer travels extensively but only buys heavily discounted tickets, he or she was probably not as valuable as a business traveler spending the same amount of money but buying expensive last-minute tickets. Some customers buy a lot of merchandise, but make frequent returns. It may cost more to service this kind of customer and make them less profitable.

Another way to analyze customer data is to do lifetime value analysis (LTV). RFM information can be used to create a lifetime value model for customers. Whereas RFM considers how valuable a customer is in the short-term to the company, LTV projects the customer’s value into future years. One of the assumptions underlying LTV calculations is that it is less expensive to market to a repeat customer than to new customers. It costs more to identify new customers and gain their trust than it does to retain loyal customers.

Customer lifetime value can be used in a number of ways. It can be used to determine how much it costs to obtain a new customer. It can be used to calculate the level of spending that is profitable to retain a customer. It can also be used to create a profile of what the most valuable customers are like and this can be used to target similar individuals that are likely to become valuable customers. Most importantly, lifetime value analysis enables companies to identify its most valuable customers and profit from them by building long-term relationships.

3.3.4.3 Customizing the marketing mix

The purpose of identifying and differentiating customers according to demographics (for example, age, gender, income, and ethnicity), psychographics (for example, personality, motives, values, and lifestyles), behavior (such as buying frequency, where you shop), or value (that is, RFM, LTV) is so the company can create a customized offering to groups or individuals. One advantage of customization is the ability to deliver personalized promotional messages to each customer. For example, Amazon.com creates a personalized experience each time the same customer visits its Web site. Customers are greeted by name and provided with a customized Web page offering book, music, and video suggestions based on the customer’s past purchases and viewing behavior. Customization can apply to the entire marketing mix, not just promotion. Dynamic pricing can be used to tailor prices to specific

users. For example, Federal Express maintains millions of prices for various business users based on shipping volume. Distribution decisions can be customized to the user's preferences. For example, some customers may prefer to order online and then pick the product up at a local brick and mortar outlet. Others may opt for a specific type of shipping. Finally, product offerings can be customized to suit the user's requirements. Interaction between the company and customers is what makes CRM and customization work. Both the organization and the customer learn from the interaction, and in an ideal situation, both benefit from the relationship.

3.3.5 Implementation issues for CRM

CRM has many benefits and can be cost-effective. This is true because it is more far profitable to retain customers and extend additional products and services to them than it is to attract new ones. Or, it is less expensive to sell multiple products to one customer than to sell the same number of products to multiple customers. CRM can also create positive word of mouth about a company, product, or Web site. This happens when happy customers tell their friends and family about the positive experiences with a company. Word of mouth can be especially powerful on the Internet because a user can send information to a hundred friends almost as easily as they can to one friend.

With all these benefits, one has to ask why not all businesses are using CRM. One reason may be that CRM systems have a high failure rate. Recent studies indicate that CRM systems have nearly a 70 percent failure rate. (Jim Ericson, August, 2001) This statistic is mostly attributable to flawed implementation. Sometimes companies lose sight of the big picture when installing CRM software. A CRM package does not automatically improve customer loyalty and increase sales per customer. Companies must be willing to honestly evaluate the customer experience with the company and solve problems if they exist. A CRM system cannot solve a basic failure of the company in the customers' eyes. Another common reason for CRM installations failure is the lack of executive sponsor. Because CRM is demanding and expensive to install, it challenges the company to a great extent. Without an executive sponsor, a project of this magnitude is destined to struggle and may lose direction. Lack of integration is another serious problem. A CRM strategy cannot succeed without integration. Integrating CRM with other internal systems is difficult but necessary to give the customer a seamless experience. A lack of integration may make it impossible to create customer profiles that include shipping preferences and spending habits. The result may be a system with many manual steps across

multiple departments which can result in duplicate data entry, wasted effort, and data errors.

3.3.6 Privacy

Customer relationship management is intended to establish and maintain long-term relationships between the firm and its best customers. A customer relationship system requires a database with individual profiles that contain large amounts of personal data on each customer. The existence of these extensive databases leads to questions of trust and privacy. Can consumers trust the company to manage their personal information in an ethical manner while guarding their privacy? Do consumers really care about the privacy of their personal information?

Public opinion polls consistently find strong support among Americans for privacy rights and laws to protect their personal information from government and commercial entities. The Pew Internet & American Life Project surveyed 2,117 Americans about trust and privacy online. They found that American Internet users overwhelmingly want the presumption of privacy when they go online. The vast majority of American Internet users think it is an invasion of their privacy for businesses to monitor users' Web browsing. By a two-to-one margin they reject the argument made by some businesses that Web tracking can be helpful.

Consumers want companies to get their permission before using their personal information. Eighty-six percent of Internet users are in favor of "opt-in" privacy policies that require Internet companies to ask people for permission to use their personal information. A March 2000 BusinessWeek/Harris Poll went even further, showing 86 percent of users want a Web site to obtain "opt-in" consent before collecting users' names, address, phone number, or financial information. The same poll shows that 88 percent of users support opt-in as the standard before a Web site shares personal information with others.

About one quarter of those surveyed would not offer personal information to a Web site under any circumstances, while nearly two thirds of those surveyed would be willing to provide it under the right circumstances.

More than 90 percent of Internet users want privacy violators to be disciplined for misuse of information. "If an Internet company violated its stated privacy policy and used personal information in ways that it said it wouldn't, 11% of Internet users say the company's owners should be sent to prison; 27% say the owners should be fined; 26% say the site should be shut down; 30% say the site should be placed on a list of fraudulent Web sites." (Pew Internet and American Life)

There are several approaches to protection of consumer privacy. The first is legislative. The legislative perspective is based on the belief that companies cannot be trusted to safeguard the consumer information they gather and that state or federal laws are needed to protect consumers. The current government position is to create public-private partnerships to develop safeguards in this arena, according to a February 2003 White House document titled *The National Strategy to Secure Cyberspace*. However, protecting privacy, and many of its related areas such as antis spam rules, identity theft initiatives, fraud and more, continues to accelerate as a critical issue as we continue to evolve into a digital society with information about everything we do stored electronically somewhere. With the Federal Trade Commission (FTC) receiving more than 10,000 consumer complaints about fraudulent and deceptive business practices each week, and with it receiving more than 100,000 consumer complaints about identity theft since 1998, and with greater enforcement of the Gramm-Leach-Bliley Act (from remarks of FTC Chairman Timothy J. Muris at the Privacy 2001 Conference, Cleveland, Ohio, October 4, 2001), you can bet that this area will receive more legislative attention in the future. Therefore, it is always important when taking on an e-business project to take time to understand what is occurring on the legislative front that would affect the implementation decisions you make.

The second approach to the protection of consumer privacy, in contrast, is the self-regulatory approach that the Internet industry has proposed. The most prevalent areas for self-regulation are privacy policies and seal-of-approval programs.

Many companies state their privacy policy online. A good privacy policy should include the following principles developed by the FTC.

1. Data collectors must disclose information practices before collecting personal information.
2. Individuals must be given a choice about whether and how personal information collected from them may be used other than the original purpose.
3. Consumers must be able to access and contest the accuracy and completeness of data collected about them.
4. Data collectors must take reasonable steps to safeguard information gathered from consumers from unauthorized use. They must also take reasonable measures to assure that the information collected from consumers is accurate.

Even the best privacy policy provides limited protection for the consumer because it is not a contract. Most companies reserve the right to change its policy without prior notice to the consumer. Further,

many privacy policies are written in dense legal jargon that may not be understood by the customer.

Seal-of-approval programs are another approach advocated to build the trust of the Internet public. To help businesses assure visitors that their sites follow certain guidelines, several certification authorities have sprung up. These are third-party programs in which member companies agree to be audited on their privacy practices, business processes, security, and other areas to assure the customer that “what the company says” is “what the company does.” Only organizations that meet the requirements may exhibit the seal on their Web sites. TRUSTe, the Better Business Bureau OnLine, and the AICPA’s WebTrust are examples of programs that businesses can join if they pay a fee and meet certain procedural guidelines.

Although TRUSTe and BBB OnLine are far more prevalent, the AICPA’s WebTrust program is the most comprehensive and offers an assurance service in the true sense of the word. Each candidate is periodically audited according to the WebTrust principles and criteria, and the Web site must disclose a number of policies to be in compliance. This kind of work is not that different from that discussed in this chapter, except the work encompasses a smaller subset of tasks than an entire e-business effort. The CPA has the ideal skills for taking on this type of project as it is all about processes and compliance with them. The difference here is that you are not having to create and automate those processes, but rather verify that they exist and that they are being followed as the company prescribes. Even though the WebTrust seals have been slower to be supported than expected, the WebTrust review process has a significantly wider use. Many executives choose to go through the WebTrust process to ensure they are living up to their public promises. To learn more about this quickly growing area, either visit www.aicpa.org/Webtrust/index.htm or www.cpaWebtrust.org.

The weakness of this approach is that only a limited number of companies choose to participate in this strictly voluntary process. More information about any of these certifications can be found at TRUSTe (<http://www.truste.org>), BBB OnLine (<http://www.bbbonline.org>), and the AICPA (<http://www.aicpa.org>).

3.3.6.1 Privacy standards

One of the World Wide Web Consortium’s initiatives, Platform for Privacy Preferences (PPP), is on the subject of privacy. This initiative tries to automate the communication between a Web site and a user in relation to privacy. It involves the following steps:

- A user’s personal information is stored in his or her browser (for example, Internet Explorer) in a standard format.

- Web site privacy policies are translated into a standard format by answering a series of questions.
- Users set their preferences in their browser.
- The privacy policy data is placed in a specific file at the Web site and the user's browser automatically downloads the privacy policy when the site is accessed.
- The privacy policy is then compared to the user's preferences and the site automatically decides whether to transfer information or not, and to show a warning before the transfer.

There are a number of criticisms of this approach. Some critics believe that PPP is designed to facilitate the transfer of data to Web sites rather than protect individual privacy. It is very one-sided information exchange. There are detailed data elements relating to the user and no data elements relating to the requestor. There is also nothing in PPP that enforces or even assists in the enforcement of the agreements that are struck through its algorithms. In this sense, PPP facilitates the technical while ignoring the larger issues.

Many Americans believe the current self-regulatory framework is insufficient to protect privacy. A February 2002 Harris Poll showed that 63 percent of respondents thought current law inadequate to protect privacy. A June 2001 Gallup poll indicated that two-thirds of respondents favored new federal legislation to protect privacy online. A July 2001 Markle Foundation study concluded that 64 percent favored rules to protect consumers on the Internet, and 58 percent reported that self-regulation wasn't enough to ensure adequate accountability. A March 2000 BusinessWeek/Harris Poll found that 57 percent of respondents favored laws that would regulate how personal information is used. In that same poll, only 15 percent supported self-regulation. Companies must become more aware of consumer concerns about privacy—and act in an ethical manner to earn their trust. CRM is based on that trust, and customers must believe that the information they share be used in a responsible manner. Companies must carefully craft their marketing programs to ensure the privacy of the customers while still meeting the company's objectives.

4. WEB PRESENCE IMPLEMENTATION ISSUES

Thus far, we have created an e-business team, done the internal review and work necessary to understand the team's objectives and gaps that need to be filled, and done an external review of how we might want

to communicate to our marketplace. Now is the time to look at some implementation issues to create the desired Web presence. In this chapter, we have only two sections: Web site trends and Web site security. However, look at the appendixes to fill the implementation gaps:

Appendix 1: Web Site Features, Tips, and Tricks Checklist

Appendix 2: Terminology You Are Likely to Encounter

Appendix 3: Five Steps in the Web Site Development Process

Appendix 4: Web Site Costs

Appendix 5: Tips for Selecting Web Hosts and Web Designers

4.1 Web Site Trends

Internet usage is growing every day, if media reports are to be believed. Nearly 123 million people had accessed the Internet, according to Nielsen's NetRatings (as of February 2000). The worldwide estimate of the number online as of September 2002 is 605.60 million (www.nuaa.com/surveys/how_many_online/index.html).

The users are distributed throughout the world as follows:

World total	605.60 million
Africa	6.31 million
Asia/Pacific	187.24 million
Europe	190.91 million
Middle East	5.12 million
Canada and USA	182.67 million
Latin America	33.35 million

The average household logs on 18 times and visits 10 sites a month. How long does the average user take to view one Web page? Customers may pause an average of 53 seconds on a page before leaving. Some of the emerging demographic trends include:

- The increase and eventual majority of women as a Web audience
- The increase and eventual majority of non-English-speaking Web visitors
- The increase in new beginner-level Web visitors
- The increase in average age of people getting online

If an organization wishes to do business with any of these groups, its site design should reflect the tastes and needs of the particular audience. For example, to attract a beginner, the site should be very clean, intuitive, and navigable, and offer lots of help, terminology definitions, and education in general.

Another trend is that both small and large businesses have sprinted out of the Web starting gate faster than medium-sized businesses. Large businesses have the financial resources to develop e-business capabilities quickly, and small businesses have the decision-making abilities to commit to an e-business strategy as part of their overall business plan. Caught in the middle are medium-sized businesses; some that have waited have to catch up in the e-business arena if they want to remain competitive long-term. Follow the trends at sites such as www.idc.com, www.nielsen-netratings.com, www.nua.com/surveys/how_many_online/index.html and www.computereconomics.com.

4.2 Web Site Security

Web site security is a topic often discussed and cussed by both users and businesses alike. Customers submit information via the Web only if they are confident that their personal information, such as credit card numbers, financial data, or medical history, is secure. One of the key characteristics of an effective Web site is easy and quick access of the Web pages by anyone from the Internet (public network). It is this very same access that makes Web sites vulnerable. Web sites have five main vulnerabilities:

1. *Web defacement.* Here attackers take advantage of weaknesses that allow them override the existing Web page(s) with their own. This could be done either by directly changing the code on the existing Web page or copying an unauthorized Web page with the same name as the existing Web page (thus replacing it). For example, a hacker uploads the unauthorized Web page exploiting File Transfer Protocol (FTP) weaknesses, such as guest account with full access (read, write, and delete) that does not require a password.
2. *Denial of service.* One of the most common attacks, the hacker sends an extremely high volume of requests to the Web site, thus overflowing the buffer and crashing the server.
3. *Unauthorized disclosure.* Here the attacker is able to gain access to sensitive information (such as Social Security number and credit card information) through unauthorized means. This would be possible by either modifying the Web page to provide the hacker with the information or by breaking into the database server containing the information.
4. *Spoofing.* The low cost of Web site creation and ease of copying existing pages makes it all too easy to create illegitimate sites that appear to be published by established organizations. In fact, con artists have illegally obtained credit card numbers by setting up professional-looking storefronts that mimic legitimate businesses.

5. *Date alteration.* The content of a transaction in transit is intercepted and altered either maliciously or accidentally. Data sent in clear text is vulnerable to such alteration.

On one hand, the more secure a site is, the more effort the users have to go through to use and navigate the site. A site that is too restrictive or difficult to navigate drives users away; a site that is too “loose” may incur liability or a bad reputation among users. The trick is for the business to use a security model that provides an adequate level of security without being too burdensome to the user. Three common security models include username-password (aka challenge-response), secure server (aka https), software certificates, and physical devices. Many Web sites today incorporate more than one of the standard approaches to construct an overall security model for a Web site. For example, a user may have to enter their username and password to enter an area of the site. Once authenticated, the site may pass the user over to a secure server for the execution of a financial transaction. Web site security is an extension of normal computer security since the Web site is customer facing whereas many other internal applications are not. Studies have shown that lack of proper security is the greatest deterrent to more people using e-commerce. However, there is probably more likelihood of a waiter at a restaurant capturing a person’s credit card information and even signature facsimile than there is risk of loss over the Web if the proper security models are put in place. The challenge is to match the proper security level with the activities desired by the user of the site. For instance, the following layered model is commonly used when planning security for a Web site:

- Authentication (only if its conducting transactions)
- Safe passage (as Internet is a public domain, any sensitive or private information should be encrypted)
- Protection of physical servers (both from external and internal sources)
- Protection of html files/folders from write/delete access

4.2.1 Username-password (aka challenge-response)

As the name implies, users are prompted to enter a username and password as they enter a site or a section of the site. One of the most common security models, it is also the most prone to be compromised. As such, typical businesses tend to protect content or member-only information (as opposed to executing e-commerce transactions) through the use of username-password. Of course, the Web design process for this approach has its problems. First, there must be a way

to ensure that the chosen username is unique among the user population (that is, it has not previously been chosen by someone else). This is not always easy to do and can be a source of frustration to users who are looking for a common name that they can use everywhere (for example, unique usernames that are easy to remember on AOL's Instant Messenger are scarce). Once the chore of picking a unique username is out of the way, the site must then ask the user to select a password that they can remember (hopefully without writing it down). While this is not difficult (since there is no requirement for the user to pick a unique password from others), users may often misspell the password they intend. Thus, most sites ask users to rekey the password just to make sure they have entered it properly. Of course, if greater security is required, a specific password construction may be demanded (for example, the password must be a minimum of eight positions and contain at least one capital letter and one number). Many businesses tend to shy away from such restrictions unless they are handling financial data because it tends to be frustrating to users. It is very common for Internet banking sites (including many national banks) to use the Social Security number of the customer and a four-digit password for customers to access their financial information. In many cases, the customers are not required to change their passwords at all.

Some sites may choose to rely on a username-password model but desire even more security. Typically the best way to accomplish this is to ask rotating questions about personal information the user supplied in his or her profile. For example, one time the site may request the last four digits of a user's Social Security number and the next time the site may ask for the year the user was born. All of this is in addition to the standard username-password.

4.2.2 Secure server

Once a business starts to embark on executing e-commerce transactions, the ante on security is elevated. Often a secure server is used whereby communications from the user to and from the server are encrypted. Encryption makes it almost impossible for someone who might be able to intercept the transmission to decrypt the communication. When executing banking transactions, both a secure server with at least 128-bit encryption (aka know as "strong encryption") is de rigour (browsers often start at 64-bit encryption level and this is one case where users must enhance their browser to effectuate banking transactions). Standard businesses with e-commerce sites should at least use a secured server model, although they may not choose to elevate the encryption to the more secure 128-bit level. Users can verify that the site is encrypting communicated data by the presence of a padlock or unbroken key in the browser window.

Because a browser typically expects to operate without talking to a secure server, most businesses first ask the user to authenticate by means of a username-password and, once authenticated, are then automatically redirected to a secure server site.

4.2.3 Software certificates

Another form of authentication is to use a physical certificate that is issued by the business (or trusted certificate authority or CA) that identifies the user (or even a server). Users must then accept the certificate and install it in their browser. Once installed many certificates (not all though—there are different levels of certificates that can be issued) can be used to digitally “sign” transmissions indicating that the user is indeed the originator of the communication. These same certificates can also be used to encrypt communications (similar to a secure server) and only those who have been given the “key” in advance can decrypt the transmission.

Installing the certificate can be baffling to many users. Once installed, however, certificates are easy to use. In the future, there will be a heavier degree of reliance upon software certificates as a means for authentication and as a basis for security. Even the American Bar Association has issued guidelines regarding the positive enforceability of transactions that use a certificate-based model for security and authentication.

A “cookie,” or token of information that is stored on a user’s machine, is *not* considered to be a good form of security because cookies are often fragile and can easily be deleted. They can be, however, a shortcut to storing information that the user does not want to have to continually re-key. Once again, there is a delicate trade-off between “ease of use” and security. Today, many users opt for “ease of use,” although with the growing volume of users and financial transactions, users begin to have to weather a more secure and less “friendly” site in the future to conduct business over the Web.

4.2.4 Physical devices

Physical devices are akin to software certificates in that they are a tangible piece of information that must be present at the time of authentication. Like software certificates, hardware devices must be ported from place to place and controlled. An example of a physical device used for security would be the American Express Blue Card, which contains a chip inside the card that can be used to authenticate a transaction. Smart cards such as these are gaining popularity overseas but have yet to be used widely in the United States because of the necessity to carry the physical device to effectuate a transaction.

5. BENEFITS OF AN E-BUSINESS INITIATIVE AND A WEB PRESENCE

Many businesses benefit tremendously from having a Web presence. Some companies, such as Amazon.com and ebay.com exist solely on the Web and have no “brick and mortar” presence. As stated earlier, the most successful approach is to “e-ify” an existing successful business to provide it with another effective marketing and distribution channel. Some of the most common benefits are:

- A global reach. You can offer, sell, and support your products and services almost anywhere at anytime. Small businesses are not geographically to a mile radius. In addition, if the Web site is translated into languages other than English, the company’s offerings reach even more people, because research shows that non-English speaking visitors will represent the eventual majority of Web users.
- A low-cost marketing channel. A Web site can provide significant marketing advantages, as we have discussed throughout this document. Most businesses, especially small ones, have the same big weakness—good products or services that no one knows about. A well-thought-out Web presence can help attract and retain business using a variety of low-cost strategies (such as e-mail, newsletters, coupons).
- A tech-savvy presence. A Web site enables an organization to illustrate to clients and prospective clients that it is up-to-date with technology trends and committed to changing and growing with the times.
- Customer self-service. Knowing the most common frequently asked customer questions (FAQs), or problems customers encounter when using your offerings, is a great first step to leveraging the Web’s self-service capability. The greater the knowledge base you put together on the Web, the more clients can help themselves, the less personnel it takes to support your offerings, and greater the level of satisfaction customers’ experience. There is nothing worse than a customer purchasing a product over the weekend who then has a typical problem setting it up, and no place to go to ask questions. A good Web site is the solution. If your self-service help desk is successful, you might find staffing it full-time with chat capability and quick turn-around e-mails might be the logical low cost next step to offload your current phone support costs.
- 24/7/365. The company can maintain a presence with clients and prospective clients 24 hours a day, 7 days a week, 365 days a year.
- A platform for future technological advances. By taking the first step in creating a Web site, you are building a foundation for further,

phased technological growth. As the organization grows and changes, it can layer new technologies on top of the initial platform. The first site can be developed quickly and improved on as the business's Web knowledge and expertise grows.

- An opportunity to educate customers about the best way to do business with you.
- An opportunity to provide additional customer value through articles, newsletters, tips, and other actionable Web-based content.
- An opportunity to deliver services digitally. There is a tremendous amount of time and money spent communicating and distributing information with customers, employees, investors, etc. By having this kind of information on your company intranet or on the Web site, such information as company documentation, press releases, product manuals, and internal process forms are easily, instantly, and inexpensively distributed just in time for those who need or want the information.

There are many good reasons to “e-ify” your business, and we have just scratched the surface with what we covered in this document. However, the best reasons the authors can think of is that ignoring the electronic side of doing business would be like trying to swim with one hand tied behind your back. Although it is certainly possible to do this, it takes significant effort to make incremental progress and it is easy for others to outpace you. E-business is just one of the ways we do business today. It allows you to reach out to those you serve 24 hours a day, 7 days a week, 365 days a year, without the cost burden traditionally required to do this. The marketplace is moving in this direction. Therefore, either your competitors already have, or will soon be, creating e-business initiatives of their own. Five years ago, “e-ifying” your business was a luxury. Five years from now, it will be standard operating procedure. The bad news is that implementing something this complex is not a yes or no issue. It is too big a leap for most companies to holistically do successfully in one iteration. It is an evolution. So, the sooner you get started, the sooner this important evolution can begin.

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APPENDIX 1: Web Site Features, Tips and Tricks Checklist

Some of the features, tips, and tricks to creating a quality Web site include presenting or considering the following:

- **Company information**
Name, logo, contact information, address, map, directions, phone, and e-mail address. Many sites neglect to include important phone numbers.
- **Employee directory**
Names, biographical information, photos, service or product affiliations, phone numbers, and e-mail addresses. Some organizations do not post employee names for fear of headhunters.
- **Products and services**
Catalog, prices, photos, descriptions, characteristics, and delivery information.
- **Advice, in the form of articles, newsletters, tips, checklists, interviews, forms, white papers, presentations, and case studies**
- **Links to other sites**
- **Customer testimonials**
Customer testimonials, referral letters, or other positive feedback can be collected over time. Placed together in a notebook, file, or inbox, they can be periodically added to a special section on the site.
- **Important information and policies**
Legal information and policies, such as privacy policy, security policy, return policy, copyright, and usage disclaimer.
- **Audio and video information**
The Web is multimedia capable and willing, so companies that make good use of it stand out. Show your product in use, or someone discussing how your service is delivered. However, don't put out video, audio, or animation just to be cute—your serious visitors likely feel like you wasted their time.
- **A site search engine**
If the site is over 20 pages, add a search feature that helps surfers find what they are looking for easily.
- **A feedback page**
This can include e-mail or bulletin board areas.
- **An e-mail subscription page to “opt-in” for news information, a newsletter, product updates, and other items, to capture visitors e-mail addresses**
The organization should have some form of regular (once a month, quarterly, annual) communication with those who sign up, which can

something as simple as mentioning one or two quick tips or news items, or it can be as expansive as a full-blown regular newsletter.

- Customer service features, such as a hot line, order tracking, or account maintenance
- Private sections for existing customers
This typically involves limiting certain areas of the site to specific customers.
- A set of tools, such as a loan calculator, tax calculator, or budget tool
The tools you offer should make sense to the audience you are attracting. If you are a travel site, offer some kind of travel planning tool or easy access to signing up for a variety of frequent traveler programs. Be creative. This type of application keeps the site interactive and offers visitors a reason to come back.
- Personalization and customization for visitors
A site is personalized when each user views a different home page than the next visitor. Examples of this can be seen at My Yahoo! or Amazon.com. Personalization can be used very effectively to provide the user with the exact information he or she has requested and can be used to increase sales. For example, once a visitor has purchased a few things, Amazon.com uses a combination of data mining and personalization to suggest products that would likely be of interest based on those purchases.
- A discussion group
If this application is being considered, first find out the likelihood of audience participation, to judge whether it be worthwhile to pursue. Content must constantly be monitored, and the board must be constantly “fed” with the company’s staff comments and e-mails to people inviting them to contribute. A business considering the addition of a discussion group application should also include a copyright notice where applicable and legal disclaimers that the content posted may not necessarily reflect the company’s views.
- New, actionable content
Keep the Web site information fresh, updated, and loaded with “news they can use.” Sites announcing events that have already occurred and those that haven’t changed in a year promote the idea that the organization is sloppy or unprofessional, which likely affects customer perception negatively.
- Relevant links
Visitors want an easy way to get more information about some of the topics you cover and the products and services you have. Create links to a strategic partner’s site so the customer can gain a more detailed

understanding about some aspect of using your offerings. A link to a manufacturer of a component, or contractor to install it, or a warranty company to extend its life, for example, might be all the logical relevant links your site should offer.

- **Navigable**
The three-click rule means the average visitors should be able to find what they want in three clicks or less. This is a critical component of your design consideration. The potential customer loses patience with your site very quickly, and therefore moves on, if your user interface is not simple, easy, and intuitive to use.
- **Answer the e-mail**
When the site provides e-mail links, testing can make sure the links work, but your processes need to ensure that someone timely answers them. If a visitor requests information and doesn't have a reply within 24 to 48 hours, they likely move on to their next alternative. If replies, because of a company's current situation (such as during extended holiday, incredibly busy seasons, or current project backlog) are going to take longer than 24 to 48 hours, post notice on the site so expectations are set correctly.
- **Pages download quickly**
Know your customers. If many of them visit your site with slow bandwidths, such as 56k modems, then keep your site graphically simple so the pages load fast. If your audience predominately comes to you via DSL, cable, or other high-bandwidth alternatives, then your flexibility with heavy graphics and video are much greater. You don't want to frustrate your audience by having them constantly wait as the various Web pages load. Also, as a side note, when you offer file download capability, let your customers know, based on various bandwidths, how long a process is likely to take so they can plan accordingly.
- **Coupons and incentives**
Some users are attracted to discounts. If this vehicle works as a means for you to quickly build your customer database, get creative. As we discussed earlier, coupons and incentives can be very beneficial if done in a way that makes sense to your audience.

APPENDIX 2: Terminology You Are Likely to Encounter

As with any technical area, technology has developed its own vocabulary. Here are some terms and acronyms you are likely to encounter when having discussions about better use of the Internet:

ASP. This acronym has a double meaning. In the context of Web pages, it stands for a Microsoft technology, active server pages. At the end of the Web page address, a user may see a file name that ends in .asp. This type of file exists dynamically and is generated from a combination of Microsoft technologies. The acronym, however, could also stand for application service provider, which is a company that offers or outsources the use of software packages through the Internet.

AVI (audio video interleaved). This is a standard format for digital video.

BPS (bits per second). This is the measurement of the speed of data transfer in a communications system.

Browser. A browser is a class of software that interprets Web languages and displays Web pages. The two most prominent Web browsers are Microsoft's Internet Explorer and Netscape's Communicator.

C++ This is a fast, powerful programming language.

CGI (common gateway interface). When a user completes a form with information, there must be a way to send it from the browser form to the server, and CGI acts as a standard to define this transfer of information.

Domain. Domain refers to a portion of a Web site address, such as aicpa.org.

DNS (domain name server). DNS is a numerical address of a Web site consisting of four sets of numbers, such as <http://209.111.241.38>.

FTP (file transfer protocol). FTP is a protocol for transporting files from one server to another. It is also a program that does the same thing. A user needs FTP to update its small Web site so the files on its local computer can be transferred to its Web server.

GIF (graphics interchange format). A type of graphics file that is small and suitable for the Internet. It is not high enough in quality to be used in print media.

HTML (Hypertext markup language). This is a tag-based programming language for Web pages. A browser is the software that interprets the HTML and turns it into the Web pages that a user sees.

HTTP (Hypertext transport protocol). This communications protocol enables the Web and allows the display of Web pages.

Java. This Internet programming language is independent of hardware platform.

JavaScript. A scripting language used in Web sites, JavaScript differs from the Java language above.

JPEG (Joint Photographers Expert Group). This type of graphics file is higher in quality than GIF and is suited for the Web.

KPS (kilobits per second). This stands for one thousand bits per second.

MBPS (megabits per second). This stands for one million bits per second.

MPEG (Motion pictures expert group). It is a standard for the compression of moving images.

PDF (portable document format). A type of file created by Adobe Acrobat Reader, this is a common way to make graphical or forms-based documents available to Web surfers without giving them editing control over the document.

POP (post office protocol). This refers to a type of Internet e-mail account.

TCP/IP (transmission control protocol/Internet protocol). This is the primary network protocol of the Internet and of intranets.

URL (uniform resource locator). The address of the Web site, such as <http://www.aicpa.org>, is its URL.

VBScript. This scripting language is used in Web sites.

WAV. As a file format for audio signals, WAV is generally also the file extension for audio files.

APPENDIX 3: Five Steps in the Web Site Development Process

Developing a Web site is a special type of systems project, but some of the traditional systems development techniques are appropriate here. One approach is to use a traditional systems development methodology that incorporates phases such as feasibility, requirements analysis, design, programming (buy or build), testing, implementation, and maintenance. Presented below are some major parts of this process.

Step One: Domain Registration

A domain name is the extension (for example, .com, .org, .net, .tv, .name) address of the site. It is also part of the uniform resource locator (URL). An example of a domain name is aicpa.org, while the full URL is <http://www.aicpa.org>. A user types in the URL in the browser window to travel directly to the home page of the site.

For this to work, all domain names must be registered so they can be attached to their physical servers, or the machine that contains the Web page files. This is done by means of a directory structure, and a variety of companies (Network Solutions, Register) can handle the domain registration process. Once an organization or user has determined the domain name it wants, and has found that it is available, it can register the name in two ways. If it already has a Web host selected, it should go through its Web host to register the name to simplify the process. If the company does not have a Web host, and therefore does not have the physical Web server information yet, the domain name can be registered directly with, for example, a provider like Register.com.

Naming the site is crucial. Most of the acronyms are gone (two, three or four letters representing the first letter of each word that is in the name of your business). The trend over the past few years was to use as few of letters or numbers as possible in the naming of your site. As the letter combinations began to disappear, professionalizing the name became popular. For example, if your CPA firm was Jones, Jones and Jones CPAs, there is a strong likelihood that www.jjj.com would be taken, but that www.jjjcpa.com was probably available. However, the trend today is to simplify. If you are Disney, then reserve the name [Disney.com](http://www.Disney.com). If you are John Smith, CPA, then reserve [johnsmith.com](http://www.johnsmith.com). You want to make it easy for someone to find you. And naturally, today, their first guess is going to be to type the name of your company and add “.com.” Additionally, new extensions continue to be released to open up more naming options. For example, .com, .net and .org have been around for a long time, but extensions like .tv, .biz, .info are newer extensions,

with more being released as the need arises. There has been work done, for example, to create a professional extension, “.pro,” for accountants, lawyers, and others who have supporting licensing organizations monitoring them.

Another trend is reserve several versions of your name if you can, including the most common misspellings. For example if your site name was bobbybraun.com, you might also reserve bobbybraun.net, bobbaun.com, and the most common likely misspelling—bobby brown.com. A Web host can point all of these domain names to the same site to ensure that the customer can easily find you. If a company hasn't reserved its name, it should do so immediately before a competitor or other party reserves it and all its likely extensions. This may be important because a site with your name and a different extension may become a public relations nightmare. Consider www.whitehouse.gov versus www.whitehouse.com. The first is a site that updates the public on news, policies, activities of the President and the White House. The second is an adult-oriented site. So, visit <http://www.networksolutions.com> or <http://www.register.com>, to reserve your names now.

Step Two: Functionality Development

Deciding exactly what the Web site should do and what should be presented is the most difficult task of the entire process. That is why we spent time early with our e-business team assessing the strategy. You want to have the commonly expected functionality, such as company and product and service information, directions to the office, a company phone directory, and a list of products on special for the month, but you also want the site to help you conduct your day-to-day business, for example, answer common questions, have a help desk, offer products for sale, and deliver shipping information. Your Web site is a 24/7/365 interface to your marketplace. Make sure you leverage your Web presence in such a way that many of your customers' common needs can be taken care of, and your company can reduce costs and/or increase revenue through this effort.

Besides moving as many business processes to the Web as possible, the next largest component is content development. Luckily, content is everywhere, and it should be recycled. Look in the company's business plan and other planning documents; marketing brochures and other support materials; and press releases, business cards, product catalogs, sales presentations, customer testimonials, and photos of the recent picnic or awards dinner. All these items tell the story of the business and can be transported, or “Web-ified,” for use on the site.

Once these materials have been gathered, a list can be made of what will and won't be included. As has been the theme of this chapter,

the guiding focus should be the overall strategy and purpose of the site and how the company's inclusion of the information can add value. If the list is turned into a hierarchy chart, a site map is created. For example, the list might include a newsletter, a white paper, a contact page, a map, and the president's biography. A chart may start with the home page, which describes the company and products very generally. The home page might include a library section and a company section. The library contains the newsletter and white paper, and the company information section contains the contact information, the president's biography, and the site map.

Step Three: Presentation Design

What should the company's Web pages look like? A Web site should contain a combination of text and graphics, laid out in a professional-looking design. It can start with a graphic of the company logo and name. These should be prominent at the top of the page.

Site design should be visually appealing, intuitive in navigation, and reflective of the corporate culture or "look." If the organization is young, still developing, and energetic, the Web site should probably reflect this. There are plenty of multimedia tools to help create this kind of feel. A conservative culture might want to also reflect this using conservative colors and graphics. It's a good idea to have all of the company's public face (for example, marketing materials, letterhead, logo, and Web site) to have the same "look and feel," which is an important step if you want to create a brand image with your customers.

A few things to stay away from in Web site design include frames, too many graphics, and pop-up windows. Frames are maintenance-intensive, do not work the same in all browsers, and are generally frowned upon from a style standpoint. Both pop-up windows and heavy use of graphics, including too many swirling and flashing objects on one page, can be considered annoying by users because they usually do not add value to the content.

Web pages can be static or dynamic. In this context, dynamic is not meant as exciting, but refers to areas of sites in which the dynamic portion is assembled on the fly from underlying data sources. Web pages can also be coded from scratch with no automation or modularized into nonredundant components. The use of Web design programs and good basic systems design techniques keep the Web site from becoming a dinosaur or a maintenance nightmare. Everyday, more tools are made available to make what used to be extremely complex almost routine.

To get design ideas, go to any of the search engines and look at other sites in your industry. Consider what they are doing, but don't

stop there. Look outside your industry for the freshest ideas in Web design. One final suggestion on the design front is to find yourself a good Web design firm to assist you in all of this (unless you have your own design department). This step in the project takes a great deal of creativity. Even if you are good at this, recognize that sometimes you are so deep in the forest that you don't see the trees. An outside design perspective about what might be effective might be the best money you spend. You know what the business purpose is, and you need to make sure that is achieved. But you want to have people on this project that can let you know what the latest techniques, alternatives, and tools are to assist you. As well, you want some real creativity put behind the look and feel of your Web site. Remember, you are building a public brand image. If you haven't already done so, this is the time to make sure that you are putting a consistent and desirable "public face" on your organization. How you present yourself on the Web is a great starting point.

Step Four: Testing and Implementation

Once all the Web pages have been created on a new site, they should be tested. Links and buttons, for example, should be tested to make sure they work as anticipated. Consistency in look and feel (for example, font size, navigation bar placement, and color scheme) should be reviewed to make sure each page is displaying correctly. A copy editor should check for not only grammar errors and spelling mistakes, but also conciseness and clarity of the message. All the graphics should be checked to make sure they load correctly and quickly. Any graphics that are too large should be reworked in a graphics package to fit the site's requirements.

If any forms are used, a test should be done to make sure the user can easily navigate and edit the document, and upon submission, another test should determine that the data is captured correctly. If a database is being used, the records should be reviewed to make sure the data is being collected accurately.

Most important, test that the e-business functionality is properly passing the data between all the necessary applications and system.

Because there are too many of these testing cases to memorize or remember, a test plan is usually created. A test plan is a document used during testing that lists every item to be tested, assigns a tester, and contains a column to record the results of the test. Once a site is thoroughly tested, it can be moved (uploaded) from the production test site to a live site (accessible to the public). A retest should be conducted as soon as the files are installed to ensure the installation

worked correctly and that there are no environmental problems that were overlooked.

Step Five: Maintenance

Once the initial Web site is up and operational, it doesn't take long for it to become out of date. You need to constantly change it to reflect what is currently going on with your business right now, including changes to products and new services. The best approach to this conundrum is to set a maintenance schedule and delegate this responsibility to an employee. The employee should be constantly looking for changes he or she sees in the company's offerings or situation, such as the announcement of a new strategic alliance, training on how to use a specific functionality, another installment of a newsletter, an employee recently promoted who can be spotlighted, or a testimonial letter from a customer. The employee should be trained to update the site and work with the webmaster. Clearly, the employee should also be instructed on what kind of information is not suitable for publication on the Web site to avoid public relations disasters.

There can be more work than simply maintaining a site. If there are forms on the site such as a customer feedback form, this information must be evaluated by the right parties. If there is an e-mail sign-up function, an employee must manage the process. If the site captures orders, the orders must be processed. All these functions must be delegated to employees who have the skill sets and training to get the job done. The new jobs must be added to their existing accountabilities and be part of their performance review process.

APPENDIX 4: Web Site Costs

Not counting costs such as the integration work required to connect various systems to the Web site interface, or the indirect costs of the e-business team performing its evaluation and implementation, or the software required to handle the transaction once they have been processed by the Web interface, there are several other costs of developing a Web site. The most inexpensive is domain registration (unless you want to buy a name someone else is already using—then this can get quite expensive). Another is the hosting of the site, which consists of storage and file transfer costs. A third, which is by far the largest cost, is the cost of development and design, which includes the delivery of all of the functionality that the e-business team has defined (including design, navigation, and look and feel). Some specific cost components of implementing a Web site are described here.

Domain Registration

As discussed above, the company can register its name(s) directly with a registrar or through its Web host. The cost per name is usually around \$35 for one year, but the price goes down quickly the more years you buy. The Web host may also charge a separate setup fee, or just roll the procurement of the name into its standard setup fee.

Hosting

Hundreds of excellent companies host Web sites for businesses. A vast majority of Fortune 500 companies do not attempt to host their own sites and instead use hosting companies. The complexity of hosting a site requires employees to become experts in network administration, performance loading and balancing, 24/7 support, information security, Web standards and domain updates, telecommunications, backup and disaster recovery, database management, program troubleshooting and debugging, help desk, and much more. Yet some businesses have tackled their own Web hosting at great financial expense and time. Unless a company is committed to this task full-time or has very unique requirements, it makes both financial and strategic sense to outsource Web hosting to someone who is focused and devoted to this line of business.

Web host companies offer a number of services that fall into two primary categories: virtual and dedicated. In a virtual setup, a company's Web site shares a machine with other companies. This is the least expensive solution and be the right one for the vast majority of small

businesses. Typically, this service costs from \$25 to \$75 per month, depending on storage and capability requirements. Included in the service can be e-mail post office protocol (POP) accounts; file transfer capabilities; Telnet or terminal access where batch jobs and other commands can be executed; secure server availability; forms, database, and programming processing; video and audio capability; a control panel with maintenance options; and much more. There may be extra charges and setup fees for some features. Companies expecting less than 10,000 hits per day (most receive several hundred or less) with Web sites containing less than a few hundred pages can select the less expensive virtual solution.

A dedicated solution earns a company its own Web server. This solution is appropriate for larger sites with a heavy amount of traffic. It is also correct for companies with unique processing, database requirements, or security issues. Dedicated servers can range almost anywhere in price, from a few hundred dollars a month, to hundreds of thousands of dollars a month, depending on the business's specific requirements.

Design Costs

The costs to design a Web site vary from site to site, because not all Web sites are the same size or offer the same functionality. Some general cost ranges of Web sites for initial design and implementation only, not including maintenance, depending on the size of the company, might be:

- Small business: \$1,000–\$10,000
- Medium-sized business: \$10,000–\$50,000
- Large company or special type of site, such as online banking: \$1 million and up

The most common costs that get left out of Web site budgets include marketing, strategy, and maintenance. On the flip side, some costs are actually free. Beware of taking shortcuts, however. Remember that you want the site to appear inviting and reflect the company image and brand. On the other hand, a Web site is merely another vehicle for exposing your company to the marketplace. Balance the amount of money you are willing to invest in your Web presence with how you plan to use it, what your expectations are, how you expect your customers to use it, and your overall expected ROI.

Other Web Site Development Costs

Other costs to consider when developing a Web site include:

- **Maintenance.** Much of the maintenance cost is an indirect cost as people from your organization need to continually update information, respond to requests, and react to feedback. If you choose to redesign your Web site every year or so, you have to repeatedly pay fees similar to those described above. The authors believe your Web site should be a reflection of your branding and image, and therefore, constant complete redesigns are a reflection of poor marketing planning. However, new functionality should always be considered if it better promotes your products and services, assists customers, or improves the bottom line of your company's performance.
- **Customization.** Factor in costs to integrate the site's electronic commerce transactions with the back office.
- **Hardware and software.** These could include a graphics package, a Web development package, and servers if the company hosts its own site. If the company uses a hosting service, it still needs to buy software, such as Microsoft's Front Page, to update the site, graphics software to create or change images, video editing software if creating streaming video to be available on the Web, and the like.
- **Training.** Consider training costs for employees who are responsible for various Web duties. The tools in this technology area are constantly changing and improving, so training is an ongoing necessity if you want to get the most out of your Web presence investment.
- **Help desk.** Costs of support function for people who visit the Web site and need assistance. For many companies, they outsource this to their Web host, or other help-desk services.
- **Marketing.** The cost of implementing a complete online marketing plan and integrating Web marketing with the company's existing marketing plan needs to be budgeted.

APPENDIX 5: Tips for Selecting Web Hosts and Web Designers

Selecting a Web Host

Some of the criteria with which to judge a Web host include technical expertise, reliability, reputation, support, price, and experience. Some of the questions to ask a prospective vendor you are evaluating include:

- Is support available? If so, what are the hours?
- Are setup instructions clear and posted? Most sites are lax in offering clear setup rules, which means everyone must call the help line. As a test, call the help line and see how long it takes to get connected, and how well the questions are answered.
- How fast the Web host's site load? Ask the Web host to furnish the names of similar customer sites. Test how long it takes for these sites to load.
- What hardware platforms do they offer, and do they offer the services your business needs? This should include customer programming needs, file transfer availability, newsletter distribution capability, password protection for certain areas, multimedia capabilities, and whatever else your design calls for.
- Is the price within the budget? Are there setup fees? Monthly fees? Per megabyte fees?

Selecting a Web Designer

The other partner in Web development is the Web designer. In many cases, this and the Web host are the same company. Some Web designers also prefer to work with specific Web hosts and can shelter a client from the technical decisions of Web host selection. Some questions to ask potential Web designers are:

- Are they familiar with your industry? Ask them for Web sites they have created that are in the same industry or if not, perform similar functionality.
- Does their style fit your company? Even though some work for large companies, Web designers are individuals with individual tastes. Can the designer match the style your company needs to portray? The best way to answer this is to visit several sites they have designed.
- Do they offer the services and functionality that you need? You don't want the standard answer to be, "We can program that." You are looking for the comment, "Yes, we created a similar function for . . ."

- Can they lead you through a systematic design process if you have any doubts about what you want or how you want it presented?
- Do they have artists on staff who can manipulate graphics or create them?
- Do they offer content creation or editing?
- If programming is necessary, what programming languages do they use? Does that fit with the company's standards and needs?
- Can they handle ongoing maintenance? Would they train one of your employee's to handle the routine maintenance tasks?
- Do they offer site marketing? Offline? Online? Exactly what do they do to market/promote the site?
- How do they price their services? Is the fee in line with your budget?

SOCIAL SECURITY AND OTHER ISSUES FACING ELDERLY OR DISABLED CLIENTS

1. INTRODUCTION

2. SOCIAL SECURITY

2.1 Introduction

2.2 Funding

2.2.1 Employees

2.2.2 Self-employed persons

2.3 Retirement Benefits

2.3.1 Eligibility

2.3.2 Amount of benefit

2.3.2.1 Annual earnings limitation

2.3.2.2 Early or delayed retirement

2.3.2.3 Maximum family benefit

2.3.3 Dependent coverage

2.3.3.1 Spouse

2.3.3.2 Former spouse

2.3.3.3 Child

2.3.4 Taxation of retirement benefits

2.3.5 Applying for retirement benefits

2.4 Survivor's Benefits

2.4.1 Lump-sum death benefit

2.4.2 Surviving spouse

2.4.3 Surviving divorced spouse

2.4.4 Surviving child

2.4.5 Surviving parent

2.5 Disability Benefits

2.5.1 Eligibility

2.5.2 Disability benefits

2.5.3 Definition of disability

3. SUPPLEMENTAL SECURITY INCOME

3.1 Introduction

3.2 Resources

3.3 Income

3.4 Reporting Requirements

4. MEDICARE

4.1 Introduction

- 4.2 Medicare Hospital Insurance (Part A)
 - 4.2.1 Eligibility
 - 4.2.2 Coverage
- 4.3 Medicare Medical Insurance (Part B)
 - 4.3.1 Eligibility
 - 4.3.2 Coverage
- 4.4 What Medicare Does Not Cover
- 4.5 Filing a Medicare Appeal
 - 4.5.1 Appealing decisions by peer review organizations
 - 4.5.2 Appealing all other hospital insurance (Part A) decisions
 - 4.5.3 Appealing decisions on medical insurance (Part B) claims
 - 4.5.4 Appealing decisions by health maintenance organizations and competitive medical plans
- 4.6 Supplemental Health Insurance
- 4.7 Medicare + Choice MSA Plan
- 4.8 Medicare Prescription Drug Benefits (Part D)
 - 4.8.1 Medicare's prescription drug coverage
 - 4.8.2 Individuals with limited income and resources may qualify for assistance from Medicare
 - 4.8.3 Drugs excluded from Part D plans

5. MEDICAID

- 5.1 Introduction
- 5.2 Eligibility
 - 5.2.1 Categorically needy
 - 5.2.2 Optional categorically needy
 - 5.2.3 Medically needy
- 5.3 Medicaid Benefits
- 5.4 Resource Requirements
 - 5.4.1 Excluded resources
 - 5.4.2 Spousal resources
 - 5.4.3 Transferring excess resources

6. PLANNING FOR SUBSTITUTE DECISION MAKING

- 6.1 Durable Power of Attorney
- 6.2 Living Will (Advance Directive)
- 6.3 Health Care Surrogate

SUGGESTED REFERENCES

APPENDIX 1: Sample Advance Directive (Living Will) (see *Toolkit CD-ROM*)

1. INTRODUCTION

In 2004, there were over 47 million workers receiving Social Security benefits, compared to approximately 25 million at the end of 1990 and approximately 19.5 million at the end of 1980. Senior citizens represent one of the fastest growing segments of the U.S. population. In addition, in 2003, over 6.8 million workers were receiving Social Security disability benefits.¹ This chapter presents an overview of the U.S. Social Security system and certain other issues of increasing relevance to the practitioner representing elderly or disabled clients.

2. SOCIAL SECURITY

2.1 Introduction

The Social Security Act, published as Chapter 7 of Title 42 of the United States Code, governs a wide variety of programs that presently cover nine out of ten workers in the United States. The administration of the Social Security Act is the responsibility of the Social Security Administration, an independent federal agency headquartered in Baltimore, Maryland, with approximately 1,300 local offices located throughout the United States, the U.S. Virgin Islands, Puerto Rico, Guam, and American Samoa. Information regarding the Social Security Administration can be obtained by calling (800) 772-1213 or by visiting the Social Security Administration's Web site at <http://www.ssa.gov>.

The Social Security Act provides for programs such as old age, survivors, and disability insurance benefits (commonly referred to as OASDI or Social Security benefits), Supplemental Security Income benefits, and Medicare benefits, each of which is discussed further below. While the future of the Social Security system remains the subject of great controversy and concern, Social Security provides the primary source of retirement and disability benefits for many Americans.

2.2 Funding

Social Security benefits are generally funded by the withholding of taxes from employees and contributions by employers pursuant to the Federal Insurance Contributions Act (FICA) and by the collection of self-employment taxes from self-employed individuals.

¹Source: Social Security Administration.

Out of every dollar that workers and their employers pay to Social Security taxes:

- Eighty-five cents goes to a trust fund that pays for monthly benefits to retirees and their families.
- Fifteen cents goes to a trust fund that pays benefits to people with disabilities and their families.

The entire amount of taxes collected for Medicare goes to a trust fund that pays for some of the costs of hospital and related care for all Medicare beneficiaries.

2.2.1 Employees

The FICA tax imposed on employees consists of the following two components:

- A tax of 6.20 percent of wages up to the “Social Security wage base” (\$94,200 for 2006) which is used to fund OASDI benefits (retirement, survivor, and disability benefits)
- A tax of 1.45 percent of total wages which is used to fund Medicare hospital insurance benefits

FICA taxes are collected from the employee through withholding from the employee’s paycheck. The employer also pays a tax equal to the total FICA tax collected from the employee.

Example. For an employee earning \$400,000 per year, total FICA taxes will be calculated as follows:

Employee Portion:	
$6.20\% \times \$ 94,200 = \$5,840.00$	
$1.45\% \times \$400,000 = \underline{\$5,800.00}$	
Total	\$11,640.00
Employer Portion:	<u>\$11,640.00</u>
Total:	\$23,280.00

2.2.2 Self-employed persons

Self-employed persons having “net earnings from self employment” in excess of \$400 annually are subject to self-employment tax consisting of the following two components:

- A tax of 15.30 percent on net earnings from self-employment up to the Social Security wage base (\$94,200 for 2006) to fund OASDI benefits

- A tax of 2.9 percent on total net earnings from self-employment to fund Medicare hospital insurance benefits

For purposes of calculating net earnings from self-employment, an individual is entitled to a deduction equal to the product of (a) net earnings from self-employment (computed without the deduction) up to the Social Security wage base, multiplied by (b) 50 percent of the total self-employment tax rate.

Example. For an individual having net earnings from self-employment of \$53,000, the self-employment tax is calculated as follows:

Net Earnings:	\$53,000.00
Less: \$53,000 × 7.65%	(\$ 4,054.50)
	\$48,945.50
Times: Total Tax Rate	× 15.3%
Self-Employment Tax	\$ 7,488.66

Farm optional method. Taxpayers with gross self-employment earnings from farming of not more than \$2,400 can elect to report as net earnings from self-employment two-thirds of gross earnings. If gross earnings exceed \$2,400, the taxpayer may elect to report as net earnings from self-employment the greater of actual net earnings or \$1,600. There is no limit on the number of times an eligible taxpayer may elect to use the farm optional method.

Nonfarm optional method. Self-employed taxpayers who are not engaged in farming may elect to compute net earnings from self-employment under the nonfarm optional method for any year if

- Actual earnings for the year are less than \$1,600.
- Net earnings from nonfarm self-employment constitute less than two-thirds of the taxpayer's gross income from nonfarm self-employment for the year.
- The taxpayer had net earnings from self-employment of \$400 or more in at least two of the three years immediately preceding the year in question.

If a taxpayer is eligible to elect the nonfarm optional method, he or she can elect to treat two-thirds of his or her gross nonfarm income (up to \$1,600 per year) as his or her net earnings from self-employment for the year. The advantage of the election is that it allows taxpayers to pay into the Social Security system based on a higher earnings level (thereby potentially increasing benefits payable). A taxpayer may elect to use the nonfarm optional method no more than five times.

Example. Farley, who is otherwise eligible to elect the nonfarm optional method, has gross nonfarm self-employment income of \$2,000, with net earnings of \$500. Farley can elect to report self-employment earnings of \$1,333 (two-thirds of \$2,000) rather than \$500.

2.3 Retirement Benefits

2.3.1 Eligibility

Eligibility for Social Security retirement benefits is determined by the number of “Social Security credits” (previously called “quarters of coverage”) earned by a worker from employment or self-employment subject to Social Security. The maximum number of Social Security credits that can be earned during a calendar year is four. For years prior to 1978, an individual generally earned one Social Security credit for each calendar quarter during which the individual earned \$50 or more. Beginning in 1978, the amount of quarterly earning required to earn a Social Security credit has increased annually, from \$250 per calendar quarter in 1978 to \$970 per calendar quarter in 2006.

In order to achieve “fully insured status,” which is required in order to receive Social Security retirement benefits, workers must earn the following number of Social Security credits:

<u>A worker reaching age sixty-two in:</u>	<u>Is fully insured if he or she has earned at least the following number of Social Security credits:</u>
1983	32
1984	33
1985	34
1986	35
1987	36
1988	37
1989	38
1990	39
1991 or later	40

Certain employees of nonprofit organizations who were at least fifty-five years old on January 1, 1984, can achieve “deemed fully insured status” with less than the number of Social Security credits set forth above.

Beginning October 1, 1999, the Social Security Administration (SSA) launched the largest customized mailing ever undertaken by a federal agency by sending out an annual Social Security Statement (formerly Personal Earnings and Benefit Estimate Statement) to 125 million workers who are ages twenty-five and older and not receiving

Social Security benefits. SSA staggered the mailing of the statements for workers to automatically receive their statements about three months before their birth month.

Practice Tip. If a worker has not received a Social Security statement, the worker or an authorized representative can obtain a printout of his or her Social Security credits, and an estimate of the worker's future Social Security retirement benefits, by completing Form SSA-7004-SM, Request for Earnings and Benefit Estimate. Copies of Form SSA-7004-SM can be obtained and submitted on the Internet at <http://www.socialsecurity.gov>.

2.3.2 Amount of benefit

The amount of a worker's OASDI benefits is based on the worker's "primary insurance amount" or PIA. A worker's PIA is calculated based on average taxable earnings over the worker's career and is designed to partially replace the income lost as a result of retirement, disability, or death. The actual mechanics of the PIA calculation are quite complicated and beyond the scope of this chapter. The Social Security Administration has produced a software program, known as ANYPIA, that will perform the calculations. Copies of ANYPIA can be obtained for \$47 by calling (703) 605-6000, or can be downloaded free of charge from the Social Security Administration's Web site. For 2006, the average monthly Social Security retirement benefit for an individual worker is \$1,002. For married couples both receiving benefits, the average monthly retirement benefit is \$1,648.

2.3.2.1 Annual earnings limitation

Workers under full retirement age (The full retirement age for 2006 is 65 and 8 months). An individual receiving Social Security retirement benefits who has not reached full retirement age by the end of 2006 can receive up to \$12,480 of earned income without a reduction of benefits. For each \$2 of earned income above \$12,480, the individual's retirement benefit will be reduced by \$1.

Workers who have already reached full retirement in 2005 see no reduction in the amount of the monthly benefit no matter how much the worker earned after reaching full retirement age.

In the year the worker reaches full retirement age (see Section 2.3.2.2 for definition of *full retirement age*), the benefits will be reduced \$1 for every \$3 the worker earned over \$33,240 (2006) until the month the worker reached full retirement age. Therefore, if the earned income in the months preceding full retirement age was less than \$33,240 (2006), there would be no reduction in Social Security benefits.

In most cases it pays for an individual who is continuing to work beyond full retirement age to start to collect his or her Social Security

at full retirement age, and not defer higher benefits payable at age seventy. An individual who defers benefits would have to reach age eighty-five before the total payments received equal payments that would have been received if the benefits started at full retirement age.

Planning Tip. In 2006 if a worker who attains age 65 and 8 months and delays payments until age seventy, an individual can bump up retirement credit by 7.5 percent a year, so that by waiting until age seventy to collect Social Security, the individual's maximum monthly income will increase from \$2,053.00 to about \$2,720.00. This should be considered for someone who is planning to continue to work until age seventy and has a younger spouse who has limited working experience. By waiting to start drawing benefits, it will give a spouse a bigger pension to live on after the death of the working spouse.

To qualify for the special monthly benefit, an individual cannot perform substantial services in self-employment before age sixty-five. Substantial services are judged based on amount of time devoted to business, type of service rendered, and how services rendered compare with those performed in the past. Work totaling more than forty-five hours in a month is generally considered substantial. Work of fewer than fifteen hours in a month is not considered substantial. Consulting services of fifteen hours or more per month performed by the former owner of a business are generally treated as substantial services.

What counts as earnings. For purposes of the limitations on earned income discussed above, the following amounts are treated as earnings:

- Gross wages earned by an employee during the year (regardless of when received by the employee)
- Net earnings from self-employment received during the year (regardless of when they are earned)
- Cash tips of \$20 or more per month
- Director's fees

For purposes of the limitations on earned income discussed above, the following amounts are generally *not* treated as earnings:

- Passive income (such as interest, dividends, and rent from real estate activities in which a nondealer did not materially participate)
- Gain from the sale of capital assets
- Retirement income (such as payments from an IRA, pension plan, and certain trusts and annuity plans that are exempt from tax)
- Retirement payments received by retired partners from a partnership if:

- The retirement payments are to continue for life under a written agreement that provides for payments to all partners (or to a class or classes of partners)
 - The partner's share of capital was paid in full before the end of the partnership's taxable year and there is no obligation from the partnership to the partner except to make retirement payments
- Social Security benefits
 - Sick pay received more than six months after the last month in which the worker performed services
 - Workers' compensation and other unemployment compensation benefits

2.3.2.2 *Early or delayed retirement*

Full retirement age. The amount of a worker's Social Security retirement benefit depends on whether the worker retired before, at, or after the worker's "full retirement age" as listed on the following chart:

<u>For a worker born in:</u>	<u>Full retirement age is:</u>
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943 through 1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

For surviving spouse see Section 2.4.2 for definition of full retirement age.

Early retirement. A worker who has achieved fully insured status can elect to begin receiving reduced Social Security retirement benefits for the first month following the month of his or her sixty-second birthday. If a worker elects to receive early retirement benefits, the retirement benefit payable to the worker is permanently reduced by a percentage that is determined based on the number of months between the month in which the worker first elects to receive early retirement benefits and the month in which the worker will attain full retirement age. The number of intervening months is then divided by 180 (up to a maximum

of 36 intervening months). Any intervening months in excess of 36 are then divided by 240.

The following chart details the amount of benefits received by taking early retirement.

<u>For a worker born in:</u>	<u>Worker will turn 62 in:</u>	<u>The percentage of benefits worker receives if worker takes early retirement (%)</u>
1937 and before	1999 and before	80
1938	2000	79½
1939	2001	78½
1940	2002	77½
1941	2003	76¾
1942	2004	75%
1943–54	2005–16	75
1955	2017	74½
1956	2018	73½
1957	2019	72½
1958	2020	71¾
1959	2021	70%
1960 and later	2022 and later	70

Example. Adams, a worker born in 1962, plans to begin receiving retirement benefits for the first full month following his sixty-second birthday. Adams' full retirement age is sixty-seven. Accordingly, there are sixty months between the month of his first payment and the month in which he will attain full retirement age. Thus, Adams' retirement benefits will be permanently reduced by 30 percent, calculated as follows: 36 months divided by 180 (20 percent), plus 24 months divided by 240 (10 percent).

If an individual earned 40 credits, he or she can start receiving Social Security benefits at age 62 or at any month between age 62 and full retirement age. However, the benefits will be permanently reduced based on the number of months the individual receives benefits before he or she reached full retirement age.

Example. If full retirement age is 66, the benefits will be reduced as follows:
 25 percent at age 62;
 20 percent at age 63;
 13¾ percent at age 64; or
 6¾ percent at age 65.

Delayed retirement. A worker electing to delay receipt of Social Security retirement benefits beyond full retirement age is entitled to a "delayed retirement credit" which permanently increases the retirement benefit payable to the worker. The delayed retirement credit is

earned for each month during which a fully insured worker has attained full retirement age, but has not yet attained age seventy, and elects not to receive Social Security retirement benefits. The amount of the delayed retirement credit that can be earned by a worker is set forth on the following chart and depends on the year of birth.

<u>Year of birth:</u>	<u>The monthly delayed retirement credit is:</u>	<u>Yearly rate of increase:</u>
1931–1932	5/12 of 1%	5.0%
1933–1934	11/24 of 1%	5.5%
1935–1936	1/2 of 1%	6.0%
1937–1938	13/24 of 1%	6.5%
1939–1940	7/12 of 1%	7.0%
1941–1942	5/8 of 1%	7.5%
1943 or later	2/3 of 1%	8.0%

Example. Baker, a worker who attained age 65 in 2000, elects not to receive retirement benefits until the month in which he attains age seventy. Baker's full retirement age is sixty-five. Baker's retirement benefit will be permanently increased by 30 percent, calculated as follows: 60 months multiplied by 1/2 of 1 percent (.05) or 5 years at 6.0% per year.

Planning considerations. The decision of whether to take reduced early retirement benefits, normal retirement benefits, or the delayed retirement benefit will depend on a number of factors, the most important being whether the benefit will be reduced or eliminated because of the annual earnings limitations described in Section 2.3.2. Another important consideration is that a worker electing to receive early retirement benefits will receive benefits for a longer period of time than a worker who waits until full retirement age or beyond. As a general rule of thumb, it will be twelve to fifteen years after full retirement age before the aggregate increased benefit payable at full retirement age exceeds the aggregate benefit payable at the reduced early retirement rate.

Example. Carter is entitled to receive retirement benefits of \$600 per month beginning at his full retirement age of sixty-five. Carter can elect to receive reduced retirement benefits of \$480 per month (80 percent of \$600) beginning at age sixty-two. If Carter elects to receive full retirement benefits, then by age seventy-seven he will have received total benefits of \$86,400 (144 months times \$600 per month). If Carter elects to receive reduced early retirement benefits, then by age seventy-seven he will have received the same amount of total benefits (180 months times \$480 per month).

2.3.2.3 Maximum family benefit

The maximum retirement benefit payable to a retired worker and his or her family is computed based on the worker's PIA. For 1998, the maximum family benefit is equal to:

- 150 percent of the first \$609 of the worker's PIA, plus
- 272 percent of PIA over \$609 up to \$880, plus
- 134 percent of PIA over \$880 up to \$1,147, plus
- 175 percent of PIA over \$1,147.

If the worker's PIA is \$1,600, the monthly computation of maximum family benefit is as follows:

$$\begin{array}{r}
 150\% \times 609 = 914 \\
 272\% \times 271 = 737 \\
 134\% \times 267 = 358 \\
 175\% \times 493 = 793 \\
 \hline
 1,600 = 2,802
 \end{array}$$

2.3.3 Dependent coverage

The spouse, former spouse, and children of a worker may be entitled to Social Security retirement benefits based on the earnings history of the worker.

2.3.3.1 Spouse

The spouse of a worker may be entitled to Social Security retirement benefits based on the earnings history of the worker in the following circumstances:

- The worker has achieved fully insured status.
- The spouse has filed an application for spouse's benefits.
- The spouse is not entitled to a retirement benefit based on a PIA that equals or exceeds one-half of the worker's PIA.
- The spouse is either (a) age sixty-two or over; or (b) caring for a child under age sixteen or a disabled child who is entitled to benefits based on the worker's earnings history.
- The spouse meets one of the following requirements:
 - The spouse has been married to the worker for at least one year at the time of the application for benefits.
 - The spouse is the natural parent of a natural child of the worker.
 - The spouse was entitled or potentially entitled to certain benefits under the Social Security Act or the Railroad Retirement Act.

The retirement benefit payable to an eligible spouse is generally one-half of the worker's PIA, subject to the limitation on annual earnings of the worker and the limitation on maximum family benefits discussed. In addition, if the worker has elected to take reduced early retirement benefits, the spouse's benefit will be reduced in a similar (but not identical) fashion.

2.3.3.2 Former spouse

In addition to the spouse, the former spouses of a worker may be entitled to Social Security retirement benefits on the basis of the worker's earnings history in the following circumstances:

- Either (a) the worker has achieved fully insured status, or (b) the former spouse has achieved fully insured status and has been divorced from the worker for at least two continuous years
- The former spouse has filed a claim for former spouse's benefits
- The former spouse is not entitled to a retirement benefit based on a PIA that equals or exceeds one-half of the worker's PIA
- The former spouse is age sixty-two or over
- The former spouse is not married
- The former spouse had been married to the worker for at least ten years prior to the date of divorce

2.3.3.3 Child

A natural or adopted child of a worker (and, in some cases, a grandchild or stepgrandchild of a worker) may be entitled to Social Security retirement benefits on the basis of the worker's earnings history in the following circumstances:

- The worker has achieved fully insured status
- The child is dependent upon the worker
- An application for child's insurance benefits is filed
- The child is unmarried
- The child is either (a) under age eighteen; (b) age eighteen to nineteen and a full-time elementary or secondary school student; or (c) age eighteen or over and disabled.

2.3.4 Taxation of retirement benefits

The taxation of Social Security retirement benefits (and Tier 1 Railroad Retirement Benefits) is governed by Section 86 of the Internal Revenue Code.

50 percent inclusion. Section 86 generally provides that a worker is taxable on the lesser of:

- One-half of the retirement benefits received during the year
- One-half of the excess of (a) the worker’s “provisional income” for the year over (b) the “base amount”

A worker’s “provisional income” is equal to the sum of:

- The worker’s adjusted gross income for the year; plus
- Any tax-exempt interest earned by the worker during the year; plus
- Any amounts earned by the worker during the year in a foreign country, U.S. possession, or Puerto Rico that are excluded from gross income; plus
- One-half of the worker’s Social Security benefits for the year.

For 2006, the base amount is:

- \$32,000 for a married worker filing jointly.
- \$0 for a worker who is married at the end of the year, does not file a joint return, and lives with his or her spouse at any time during the year.
- \$25,000 for any other worker.

Example: Davis is an unmarried worker receiving annual Social Security retirement benefits of \$10,000. Davis has adjusted gross income for the year of \$21,000 and receives \$4,000 of tax-exempt interest during the year. Davis’ provisional income for the year is \$30,000 ($\$21,000 + \$4,000 + 1/2$ of \$10,000). Accordingly, Davis is taxable on the lesser of (a) \$5,000 ($1/2$ of his retirement benefits) or (b) \$2,500 ($1/2$ of the excess of \$30,000 provisional income over \$25,000 base amount).

85 percent inclusion. Workers with provisional income in excess of the “adjusted base amount” are subject to inclusion of up to 85 percent of Social Security retirement benefits. For 2006, the adjusted base amount is:

- \$44,000 for a married worker filing jointly.
- \$0 for a worker who is married at the end of the year, does not file a joint return, and lives with his or her spouse at any time during the year.
- \$34,000 for any other worker.

For those workers, the amount of Social Security retirement benefits includable in gross income is equal to the lesser of:

- 85 percent of the retirement benefits received during the year
- The sum of:
 - 85 percent of the excess of provisional income over the adjusted base amount; plus
 - The lesser of (x) the amount that would be taxable under the 50 percent inclusion test, or (y) one-half of the difference between the adjusted base amount and the base amount (currently \$6,000 for married workers filing jointly, \$4,500 for unmarried workers).

Example: Evans is an unmarried worker receiving Social Security retirement benefits of \$12,000 for the year. She has adjusted gross income of \$40,000 for the year and receives \$5,000 of tax-exempt interest for the year. Because Evans has provisional income in excess of \$34,000, she is subject to the 85 percent inclusion provisions. Nonetheless, the first step in calculating the portion of Evans' retirement benefits that are subject to tax is to calculate the result under the 50 percent inclusion provisions as follows:

Provisional income	\$51,000
Less base amount	(25,000)
Excess provisional income	\$26,000
Divided by 2	\$13,000
1/2 of retirement benefits	\$ 6,000

Thus, under the 50 percent inclusion provisions, Evans is subject to tax on \$6,000 of retirement benefits. Under the 85 percent inclusion provisions, Evans is subject to tax on the lesser of (a) \$10,200 (85 percent of retirement benefits) or (b) \$18,950 (the sum of (x) \$14,450 [85 percent of the excess of \$51,000 provisional income over \$34,000 adjusted base amount] plus (y) the lesser of (i) \$6,000 [as determined above under the 50 percent inclusion rules] or (ii) \$4,500). Thus, Evans is taxable on \$10,200 of retirement benefits.

2.3.5 Applying for retirement benefits

In order to receive Social Security retirement benefits before full retirement age, a worker must file an application with the Social Security Administration. The application, which should be filed by the last day of the first month for which the worker desires to receive benefits, can generally be completed over the telephone by calling a local Social Security office. A worker who chooses not to apply for retirement benefits prior to reaching full retirement age should contact the Social Security Administration two to three months prior to reaching full retirement age, even if he or she is not planning to retire.

2.4 Survivor's Benefits

In addition to the retirement benefit discussed above, Social Security benefits may also be payable to a spouse, former spouse, child, or parent of a deceased worker in the circumstances described below.

2.4.1 Lump-sum death benefit

Upon the death of a worker who is fully insured or “currently insured,” a lump-sum payment of \$255 is payable to a surviving spouse of the worker who was living in the same household as the worker at the time of the worker’s death or was eligible for or entitled to survivor’s benefits (as discussed below) based on the worker’s earnings history at the time of the worker’s death. If there is no eligible surviving spouse of the worker, the lump-sum death benefit is payable to minor children of the worker who are eligible for or entitled to survivors’ benefits based on the worker’s earnings history at the time of his or her death. The lump-sum death benefit is payable in addition to any other survivor’s benefits that may be payable to the recipient. A surviving spouse or child generally must apply to receive the lump-sum death benefit within two years after the worker’s death.

For purposes of the Social Security Act, a worker is “currently insured” if he or she has earned at least six Social Security credits during the full thirteen-quarter period ending with the calendar quarter in which the worker:

- Died.
- Most recently became entitled to Social Security disability benefits.
- Became entitled to Social Security retirement benefits.

2.4.2 Surviving spouse

A surviving spouse of a deceased worker may be entitled to a survivor’s benefit based on the worker’s earnings history if:

- The spouse is age sixty or over (or age fifty or over and disabled).
- The worker was fully insured at the time of death.
- The spouse is not entitled to a Social Security retirement benefit that is equal to or larger than the worker’s PIA.
- The spouse has filed a claim for survivor’s benefits.
- The spouse is not married (waived if the marriage occurs after the spouse is age sixty [or after age fifty if disabled]).
- One of the following conditions (the “survivors conditions”) is satisfied:

- The spouse was married to the worker for at least nine months prior to the worker's death.
- The spouse is the biological parent of a child of the worker.
- The spouse legally adopted a child of the worker during the marriage and before the child reached age eighteen.
- The spouse was married to the worker at the time they both adopted a child under age eighteen.
- The worker legally adopted a child of the spouse during the marriage and before the child reached age eighteen.
- The spouse was potentially entitled to Social Security benefits during the month before the spouse married the worker.

The amount of a surviving spouse's benefit is 100 percent of the worker's PIA subject to reduction or elimination by the maximum family benefit limitation or the limitation on annual earnings. In addition, if a surviving spouse elects to receive spouse's benefits prior to full retirement age, the amount of the benefit is permanently reduced by a certain percentage for each month that benefits are payable prior to full retirement age. Full retirement age for a surviving spouse is not the same as full retirement age for retirement benefits. See Section 2.3.2.2 for the definition of full retirement age for retirement benefits.

<u>For surviving spouse born in:</u>	<u>Full retirement age is:</u>
1939 or earlier	65
1940	65 and 2 months
1941	65 and 4 months
1942	65 and 6 months
1943	65 and 8 months
1944	65 and 10 months
1945–1956	66
1957	66 and 2 months
1958	66 and 4 months
1959	66 and 6 months
1960	66 and 8 months
1961	66 and 10 months
1962	67

(Text continued on page 17)

If a surviving spouse does not qualify for a survivor's benefit based on the worker's earnings history, the spouse may still be entitled to a mother's or father's benefit based on the worker's earnings history if:

- The spouse is caring for a child of the deceased worker who is under age sixteen or disabled and who is entitled to child's benefits based on the worker's earnings history.
- The worker was fully insured or currently insured at the time of death.
- The spouse has filed an application for mother's or father's benefits.
- The spouse is not entitled to a Social Security retirement benefit that is equal to or larger than the amount of the mother's or father's benefit.
- The spouse is not married.
- One of the "survivors conditions" described above is satisfied.

The amount of the father's or mother's benefit is equal to 75 percent of the worker's PIA, subject to reduction or elimination by the maximum family benefit limitation or the limitation on annual earnings.

2.4.3 Surviving divorced spouse

A surviving divorced spouse of a deceased worker may be entitled to a survivor's benefit based on the worker's earnings history if:

- The former spouse is age sixty or over (or age fifty or older and disabled).
- The worker was fully insured at the time of death.
- The former spouse is not married at the time of the worker's death (waived in the case of certain accidental deaths or if remarriage occurs after age sixty [age fifty if disabled]).
- The former spouse is not entitled to a Social Security retirement benefit that is equal to or greater than the worker's PIA.
- The former spouse filed a claim for survivor's benefits.
- The former spouse was married to the worker for at least ten years at the time the divorce became final.

The amount of the former spouse's benefit is calculated in the same manner described above for a surviving spouse.

If a surviving divorced spouse does not qualify for a former spouse's benefit based on the worker's earnings history, the former spouse may still be entitled to a mother's or father's benefit based on the worker's earnings history if:

- The former spouse is caring for a child of the deceased worker who is the natural or legally adopted child of the former spouse and who is under age sixteen or disabled and who is entitled to child's benefits based on the worker's earnings history.
- The worker was fully insured or currently insured at the time of death.
- The former spouse has filed an application for mother's or father's benefits.
- The former spouse is not entitled to a Social Security retirement benefit that is equal to or larger than the amount of the mother's or father's benefit.
- The former spouse is not married.
- One of the "survivors conditions" described above is satisfied.

The mother's or father's benefit payable to a surviving former spouse is calculated in the same manner described above for a surviving spouse who is entitled to mother's or father's benefits.

2.4.4 Surviving child

A surviving child of a deceased worker may be entitled to a survivor's benefit based on the worker's earnings history if:

- The worker was fully insured or currently insured at the time of death.
- The child was dependent on the deceased worker.
- The child is not married.
- A claim for child's insurance benefit is filed on behalf of the child.
- One of the following conditions is satisfied:
 - The child is under age eighteen.
 - The child is under age nineteen and a full-time elementary or secondary school student.
 - The child is age eighteen or older and under a disability that began before age twenty-two.

The amount of the child's benefit is 75 percent of the worker's PIA, subject to reduction or elimination by the maximum family benefit limitation.

2.4.5 Surviving parent

A surviving parent of a deceased worker may be entitled to a survivor's benefit based on the worker's earnings history if:

- The worker was fully insured at the time of death.
- The parent files an application for parent's benefits.
- The parent has reached age sixty-two.
- The parent is not entitled to a Social Security retirement benefit that is equal to or larger than the amount of the parent's insurance benefit payable.
- The parent was receiving at least one-half support from the worker (evidence of such support must be filed with the Social Security Administration within a specified time period).
- The parent has not remarried following the worker's death.
- One of the following conditions is met:
 - The parent is the natural parent of the worker.
 - The parent had legally adopted the worker before the worker reached age sixteen.
 - The parent became the worker's stepparent by a marriage ended before the worker reached age sixteen.

The amount of the parent's benefit is 82½ percent of the worker's PIA if only one parent is entitled to parent's benefits. If more than one parent is entitled to parent's benefits, the amount is 75 percent of the worker's PIA for each parent. In each case, the amount of the parent's benefit is subject to reduction or elimination by the maximum family benefit limitation or the limitations on excess earnings.

2.5 Disability Benefits

2.5.1 Eligibility

Disabled worker. A worker who is "disabled" within the meaning of the Social Security Act (as discussed below) may be entitled to Social Security disability benefits if the worker has achieved "disability insured status." To achieve that status, a worker must satisfy each of the following conditions:

- The worker has earned at least twenty Social Security credits during the forty-quarter period that ends with the quarter in which the worker is determined to be disabled.
- The worker has earned at least one Social Security credit for each calendar year after 1950 (or, if later, after the year in which the worker attained age twenty-one).

In addition to achieving disability insured status, a disabled worker must file an application for disabled worker's benefits and complete a waiting

period of five consecutive full calendar months before receiving disability benefits. The five-month waiting period is waived for certain workers who had been entitled to disabled worker's benefits within the previous five years.

Disabled child or surviving spouse. Under certain circumstances, a disabled child of a worker may be entitled to Social Security disability benefits if the child became disabled before age twenty-two. In addition, a disabled surviving spouse or surviving former spouse of a worker may be entitled to disability benefits.

Nondisabled dependents. Social Security benefits may be available to nondisabled dependents of a disabled worker (a) if an unmarried child of a disabled worker is under age eighteen; or (b) if a spouse of a disabled worker is caring for a child of the disabled worker who is under age sixteen (or disabled) and is receiving benefits based on the worker's earnings history.

2.5.2 Disability benefits

The Social Security disability benefit is generally equal to the full amount of the worker's PIA. The benefit may be reduced, however, in any of the following circumstances:

- The sum of the Social Security disability benefit plus any worker's compensation benefits or other disability benefits payable to the worker under a federal, state, or local public law program exceeds 80 percent of the worker's "average current earnings."
- The worker becomes disabled after electing to receive reduced Social Security retirement benefits.
- The benefit is limited by the maximum family benefit limitation.

Social Security disability benefits generally continue until the earliest of:

- The second month after the disability ceases.
- The month before the month in which the recipient attains age sixty-five (after which the benefits are converted into Social Security Retirement benefits).
- The month before the month in which the recipient dies.

2.5.3 Definition of disability

For purposes of the Social Security Act, a disability is defined as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be

expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”

Substantial gainful activity. Substantial gainful activity must involve the performance of physical or mental activities that are productive in nature and that are performed for remuneration or profit. A special definition of substantial gainful activity applies to individuals disabled by blindness. The determination of whether an individual has engaged in substantial gainful activity is generally made by reference to the amount of earnings received from the performance of the activity. As a rule of thumb, earnings of \$860 or more per month from an activity generally demonstrate that the activity is substantial and gainful. Earnings of less than \$300 per month from an activity demonstrate that the activity is not substantial and gainful.

Physical or mental impairment. The regulations issued under the Social Security Act contain a “Listing of Impairments” that identifies physical or mental conditions that, absent evidence to the contrary (such as excess earnings), generally establish that an individual is unable to engage in substantial gainful activity. Examples of such conditions include:

- Diseases of the heart, lungs, or blood vessels that have resulted in serious loss of heart or lung reserves as shown by X-ray, electrocardiogram, or other tests and, in spite of medical treatment, there is breathlessness, pain, or fatigue.
- Severe arthritis that causes recurrent inflammation, pain, swelling, and deformity in major joints so that the ability to get about or use the hands is severely limited.
- Mental illness resulting in marked constriction of activities and interests, deterioration in personal habits or work-related situations, and seriously impaired ability to get along with other people.
- Damage to the brain or brain abnormality that has resulted in severe loss of judgment, intellect, orientation, or memory.
- Cancer that is progressive and has not been controlled or cured.
- Diseases of the digestive system that result in severe malnutrition, weakness, and anemia.
- Acquired immunodeficiency syndrome (AIDS).
- Progressive diseases that have resulted in the loss of a leg or have caused it to become useless.
- Loss of major function of both arms, both legs, or a leg and an arm.
- Serious loss of function of the kidneys.
- Total inability to speak.

Trial work period. An individual receiving Social Security disability benefits who continues to be disabled is entitled to a trial work period of nine months (which need not be consecutive). During that period, any work and earnings are disregarded for purposes of determining whether the individual continues to be disabled. Any month during which the individual performs “insignificant work” does not count as part of the nine-month trial work period. For these purposes, an individual is considered to have performed insignificant work for any month in which (a) the individual’s earnings from employment are \$200 or less, or (b) the individual’s earnings from self-employment are \$200 or less and the individual spends forty hours or less in the performance of self-employment.

Determination of disability. The determination of whether a person is disabled for purposes of the Social Security Act is made by the Disability Determination Services (DDS) office in the person’s home state. The DDS employs physicians and other specialists to evaluate the person’s condition. If the DDS determines that a person is not disabled, the person can appeal the decision in writing to any Social Security office within sixty days after receipt of notice from the DDS.

If the DDS determines that a person is disabled, the DDS will review the person’s condition periodically to determine whether the disability has ceased. Reviews are generally scheduled as follows:

- If improvement is expected: first review scheduled six to eighteen months after initial disability determination
- If improvement is possible: once every three years
- If improvement is not expected: once every five to seven years

If, following a review, the DDS determines that a person is no longer disabled, disability benefits will cease after the second month following the month in which the disability terminated. If the person disagrees with the determination, he or she can file an appeal in writing with any Social Security office within sixty days after the determination. If the person appeals within ten days after the determination, disability benefits will continue during the appeal. If the appeal is denied, the person may be required to return payments received during the appeal period.

3. SUPPLEMENTAL SECURITY INCOME

3.1 Introduction

In addition to the other benefits described in this chapter, the Social Security Act provides for Supplemental Security Income (SSI) for individuals with limited income and resources who are age sixty-five or

older, blind, or disabled. Unlike OASDI benefits, which are financed through FICA and self-employment taxes, SSI is funded from general funds of the U.S. Treasury. SSI benefits are available to elderly, blind, or disabled individuals having “resources” (as discussed below) of \$2,000 or less (\$3,000 or less for married couples) and having monthly income that is less than the maximum federal monthly SSI benefit payable. The amount of SSI benefits payable to an eligible recipient depends on the income and living arrangements of the recipient. For 2006, the maximum monthly federal SSI benefit is \$603 for an individual without an eligible spouse and \$904 for an eligible married couple. In addition, some states supplement federal SSI benefits payable to state residents. For example, a person who receives SSI may be able to get Medicaid, food stamps, or some other social services.

3.2 Resources

For purposes of SSI, resources generally include cash and other liquid assets and any other property that an individual or the individual’s spouse could convert to cash to obtain support and maintenance. The following items, however, are not counted as resources:

- An individual’s principal place of residence (regardless of value)
- One wedding ring and one engagement ring (regardless of value)
- Items needed because of a person’s physical condition (such as a wheelchair or prosthetic devices)
- Other household goods having an aggregate value of less than \$2,000
- One automobile, regardless of value, if used to provide necessary transportation, or, if not so used, to the extent its current market value does not exceed \$4,500
- Certain life insurance
- Burial spaces and certain burial funds of up to \$1,500

3.3 Income

For SSI purposes, monthly income generally includes all earned or unearned income, and the value of property or services, actually or constructively received by an individual during the month. The following items, however, are generally not treated as income:

- Medical care and services
- Social services

- Gain from the sale, exchange, or replacement of a resource
- Income tax refunds
- Loan proceeds

Even if an item is treated as income for SSI purposes, there are numerous exclusions for items of income that are not counted for purposes of SSI monthly income limitation (including most payments under federal assistance programs).

3.4 Reporting Requirements

Persons receiving SSI benefits are responsible for reporting changes that could affect the amount of their benefits. Reports can be made by phone, by mail, or in person and must be made by within ten days after the end of the month in which the change occurred. Fines of up to \$100 are imposed for failing to report changes timely. In addition, criminal penalties (including imprisonment) can be imposed on a person who intentionally makes false statements on an SSI report.

An individual must file a report if he or she:

- Moves or changes address.
- Has a change in his or her household.
- Has a change in income.
- Has a change in resources.
- Receives help with living expenses.
- Leaves the United States.
- Marries or ends a marriage.
- Has a change in citizenship or alien status.
- Improves in condition while receiving benefits based on disability or blindness.
- Starts or stops attending school.
- Violates a condition of parole.
- Becomes eligible for any other benefits.

In addition, many states impose additional SSI reporting requirements.

4. MEDICARE

4.1 Introduction

Medicare is a federal health insurance program for people sixty-five or older, people of any age with permanent kidney failure, or people with

certain other disabilities. Medicare is administered by the Health Care Financing Administration (HCFA) and covers eligible recipients receiving medical or hospital care anywhere in the United States (including the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa). Medicare is divided into two parts: hospital insurance (Part A) and medical insurance (Part B). Hospital insurance helps pay for inpatient hospital care and certain outpatient follow-up care and is financed by the hospital insurance portion of the FICA and self-employment tax. Medical insurance helps pay for doctors' services and other medical services and is financed by the monthly premiums paid by people enrolled in the program (see section 4.3.1, below) and by general federal revenues.

4.2 Medicare Hospital Insurance (Part A)

4.2.1 Eligibility

To be eligible for Medicare hospital insurance coverage, people age sixty-five or older must meet at least one of the following criteria:

- They are entitled to monthly Social Security or railroad retirement benefits.
- They have worked long enough to be insured under Social Security or the railroad retirement system.
- They have worked long enough in federal employment (see the table at the end of this section) to be insured for Medicare purposes.

People are entitled to coverage before sixty-five if they meet one of the following conditions:

- They have been entitled to Social Security disability benefits for twenty-four months.
- They have worked long enough in federal employment and meet the requirements of the Social Security disability program.

People are eligible at any age if they need maintenance dialysis or a kidney transplant for permanent kidney failure and:

- Are insured or getting monthly benefits under Social Security or the railroad retirement system.
- Have worked long enough in federal employment.

Spouses and children of workers may also be eligible for maintenance dialysis or kidney transplant. Under certain conditions spouses, divorced spouses, widows, widowers, or dependent parents of a worker may be

eligible for hospital insurance at age sixty-five based on the worker's earnings history. This may also apply to disabled widows or widowers under sixty-five, disabled surviving divorced spouses under sixty-five, and disabled children eighteen or older.

**WORK CREDITS NEEDED FOR
FEDERAL EMPLOYEES**

<i>If you reach age 65 in</i>	<i>Years you need</i>
1983	7¼
1984	7½
1986	8
1990	9
1994 or later	10

People receiving Social Security or railroad retirement checks do not have to apply for hospital insurance; it will begin automatically at age sixty-five (except for federal employees, who should apply three months before their sixty-fifth birthday). People who plan to keep working after age sixty-five should also file an application three months prior to turning sixty-five. Those not eligible for coverage at sixty-five because they do not have enough work credits or are not receiving benefits can purchase hospital insurance for a monthly premium of \$393.00 for workers with less than thirty Social Security credits; \$216.00 per month for workers with thirty to thirty-nine Social Security credits in 2006 (provided that they also purchase medical insurance). People with permanent kidney failure should apply for Medicare as soon as the condition appears. There is a twenty-four-month waiting period for disabled workers under sixty-five and a two-month waiting period for people receiving maintenance dialysis treatment.

4.2.2 Coverage

Hospital coverage (per benefit period) provides benefits for inpatient care, skilled-nursing-facility care, home health care, and hospice care. A benefit period commences on the day the beneficiary enters a hospital and ends 60 days after the termination of hospitalization or skilled nursing care. If a person needs in-patient hospital care, Medicare hospital insurance covers the first ninety days of a hospital stay and includes sixty additional lifetime reserve days that can be used at the discretion of the patient. After the patient has been out of the hospital or skilled nursing care for 60 days, a new benefit period can begin. Coverage includes:

- Semiprivate room and board (no television or telephone).
- General nursing service.
- Lab tests, X-rays, other radiology services, and radiation therapy.
- Drugs furnished by the hospital.
- Medical supplies.
- Rehabilitation services.
- Cost of special-care units.
- Blood transfusions after the first three pints.

For patients requiring home health services, Medicare coverage includes:

- Part-time skilled nursing care.
- Physical and speech therapy.
- Medical supplies and services provided by an agency.
- Occupational therapy.

Skilled nursing facility care and hospice care are also available to patients whose conditions require these services.

The following chart summarizes the hospital insurance-covered services, and the patient's financial obligations for 2006.

MEDICARE (PART A): HOSPITAL INSURANCE-COVERED SERVICES

<i>Services</i>	<i>Benefit</i>	<i>Medicare Pays</i>	<i>Patient Pays</i>
HOSPITALIZATION	First 60 days	All but \$952	\$952
Semiprivate room and board, general nursing, and miscellaneous hospital services and supplies. (Medicare payments based on benefit periods.)	61st to 90th day	All but \$238 a day	\$238 a day
	91st to 150th day*	All but \$476 a day	\$476 a day
	Beyond 150 days	Nothing	All costs
SKILLED NURSING FACILITY CARE	First 20 days	100% of apprvd. amt.	Nothing
Patient must have been in a hospital for at least 3 days and must enter a Medicare-approved facility generally within 30 days after hospital discharge.† (Medicare payments based on benefit periods.)	Additional 80 days	All but \$119.00 a day	\$119.00 a day
	Beyond 100 days	Nothing	All costs

<i>Services</i>	<i>Benefit</i>	<i>Medicare Pays</i>	<i>Patient Pays</i>
HOME HEALTH CARE Medically necessary skilled care.	Part-time or intermittent care for as long as patient meets Medicare conditions.	100% of approved amount; 80% of approved amount for durable medical equipment.	Nothing for services; 20% of approved amount for durable medical equipment.
HOSPICE CARE Pain relief, symptom management, and support services for the terminally ill.	As long as doctor certifies need.	All but limited costs for outpatient drugs and inpatient respite care.	Limited cost sharing for outpatient drugs and inpatient respite care.
BLOOD	Unlimited if medically necessary.	All but first 3 pints per calendar year.	For first 3 pints.‡

* This 60-reserve-days benefit may be used only once in a lifetime.

† Neither Medicare nor private Medigap insurance will pay for most nursing home care.

‡ To the extent that the blood deductible is met under one part of Medicare during the calendar year, it does not have to be met under the other part.

Source: U.S. Department of Health and Human Services, Social Security Administration.

4.3 Medicare Medical Insurance (Part B)

4.3.1 Eligibility

People eligible for hospital insurance will automatically be enrolled for medical insurance unless they specifically refuse it at the time they become eligible for hospital insurance. The monthly premium for 2006 is \$88.50 (for 2005, it was \$78.20). People who must apply for medical insurance include:

- People planning to work past full retirement age who are not receiving retirement benefits but need Medicare for health insurance.
- People at full retirement age who are not eligible for hospital insurance.
- People with permanent kidney failure.
- People eligible for Medicare on the basis of federal employment.

Planning Tip. Low income individuals may be eligible for the Qualified Medicare Beneficiary Program which pays for all out-of-pocket expenses (premiums, deductibles, copayments) for which the individual would otherwise be responsible.

The initial enrollment period for the worker and his or her spouse begins three months before the month of the applicant’s full retirement age and continues three months after that date. For each year that a worker fails to enroll during a period of eligibility, there is a 10 percent penalty for premium cost unless the worker is covered by health insurance based on current employment.

4.3.2 Coverage

Medical insurance coverage provides for doctors’ services and many other medical services and includes:

- Medical and surgical treatment.
- Services of a doctor’s nurse.
- Physical and occupational therapy.
- Speech therapy.
- Drugs and biologicals that must be administered by a doctor or nurse (which excluded most prescription drugs that can be taken without the involvement of medical personnel).
- Medical supplies and equipment (does not include basic first-aid equipment).
- Medically required ambulance services (if other forms of transport would cause injuries to the patient).
- Blood transfusions provided on an outpatient basis.
- Diabetes glucose monitoring and education.

The following chart summarizes medical insurance-covered services, and the patient’s financial obligations, for 2006.

MEDICARE (PART B): MEDICAL INSURANCE-COVERED SERVICES

<i>Services</i>	<i>Benefit</i>	<i>Medicare Pays</i>	<i>Patient Pays</i>
MEDICAL EXPENSES Doctors’ services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, ambulance, diagnostic tests, and more.	Medicare pays for medical services in or out of the hospital.	80% of approved amount (after \$124 deductible).	\$124 deductible,* plus 20% of approved amount and limited charges above approved amount.†
CLINICAL LABORATORY SERVICES Blood tests, biopsies, urinalyses, and more.	Unlimited if medically necessary.	100% of approved amount.	Nothing for services.

<i>Services</i>	<i>Benefit</i>	<i>Medicare Pays</i>	<i>Patient Pays</i>
HOME HEALTH CARE Medically necessary skilled care.	Part-time or intermittent skilled care for as long as patient meets conditions for benefits.	100% of approved amount; 80% of approved amount for durable medical equipment.	Nothing for services; 20% of approved amount for durable medical equipment.
OUTPATIENT HOSPITAL TREATMENT Services for the diagnosis or treatment of illness or injury.	Unlimited if medically necessary.	80% of approved amount (after \$124 deductible).	\$124 deductible, plus 20% of billed charges.
BLOOD	Unlimited if medically necessary.	80% of approved amount (after \$124 deductible and starting with 4th pint).	First 3 pints plus 20% of approved amount for additional pints (after \$124 deductible).‡

* The patient pays the first \$124 each year of expenses for covered services. Thereafter, Medicare Part B pays 80% of covered expenses.

† Physicians who do not accept assignment of Medicare claims are limited by law as to the amount they can charge a Medicare beneficiary for covered services. The charge cannot be more than 120% of the Medicare fee schedule amount for physicians who do not participate in Medicare.

‡ To the extent that the blood deductible is met under one part of Medicare during the calendar year, it does not have to be met under the other part.

Source: U. S. Department of Health and Human Services, Social Security Administration.

4.4 What Medicare Does Not Cover

Services and supplies not covered by either hospital insurance or medical insurance include:

- Custodial care such as help with bathing, eating, and taking medicine.
- Most nursing home care.
- Dentures and routine dental care.
- Eyeglasses, hearing aids, and examinations to prescribe or fit them.
- Personal-comfort items such as a phone or TV in a hospital room.
- Prescription drugs and patent medicines.
- Routine physical checkups and related tests.
- Routine foot care.

4.5 Filing a Medicare Appeal

Decisions on the amount Medicare will pay on a claim, or on whether services received are covered by Medicare, may be appealed.

The notices sent from Medicare telling of the decision made on a claim will also tell exactly what appeal steps can be taken. Claimants have at least 60 days from the date they receive the notice in which to file their appeals. For more information about appeal rights claimants should call any Social Security office, the Medicare intermediary or carrier, or the peer review organization (PRO) in their states. The following is a brief summary of the different Medicare appeals processes.

4.5.1 Appealing decisions by peer review organizations

Peer review organizations (PROs) are groups of doctors in each state who are paid by the federal government to help Medicare decide when hospital care is necessary and whether such care meets standards of quality accepted by the medical profession. Medicare-participating hospitals can provide a brochure, "An Important Message From Medicare," which describes a hospital patient's appeal rights and supplies the name, address, and phone number of the PRO in that state.

If claimants disagree with the decision of a PRO, they can appeal by requesting a reconsideration. Then, if they disagree with the PRO's reconsideration decision and the amount in question is \$200 or more, claimants can request a hearing by an Administrative Law Judge.

Cases involving \$2,000 or more can eventually be appealed to a Federal Court.

4.5.2 Appealing all other hospital insurance (Part A) decisions

Appeals of decisions on all other services covered under Medicare hospital insurance (skilled-nursing-facility care, home health care, and hospice services) are handled by Medicare intermediaries. If claimants disagree with the intermediary's initial decision, they may request a reconsideration. The request can be submitted directly to the intermediary or through the claimant's Social Security office. If there is further disagreement with the intermediary's reconsideration decision and the amount in question is \$100 or more, the claimant can request a hearing by an Administrative Law Judge. Cases involving \$1,000 or more can eventually be appealed to a Federal Court.

4.5.3 Appealing decisions on medical insurance (Part B) claims

Under Medicare medical insurance, either the claimants, their doctors or their suppliers submit the claim for payment. Medicare will send the claimant an explanation of the decision of the claim on a form called “An Explanation of Medicare Benefits” (EOMB). The EOMB also explains how the claimant can appeal denials or payment decisions with which he or she disagrees, and gives the name, address, and state-wide toll-free number of the carrier (the names and addresses of the carriers and areas they serve are also listed in the back of *Your Medicare Handbook*).

If a claimant disagrees with the decision on the claim, he or she can ask the carrier to review it. Claimants have up to six months from the date on the EOMB to request the review and the request must be sent to the carrier in writing.

If there is further disagreement with the carrier’s written explanation of its review decision and the amount in question is \$100 or more, the claimant can request a hearing by the carrier. (Other claims that have been reviewed within the previous six months can be counted towards the \$100 amount.)

If there is disagreement with the carrier hearing decision and the amount in question is \$500 or more, claimants are entitled to a hearing before an Administrative Law Judge. Cases involving \$1,000 or more can eventually be appealed to a Federal Court.

4.5.4 Appealing decisions by health maintenance organizations and competitive medical plans

If the claimant is a member of a Medicare-certified health maintenance organization (HMO) or competitive medical plan (CMP), the same appeal rights that all other Medicare beneficiaries have apply. However, the initial steps of the grievance or appeals procedure may vary from plan to plan. Federal law requires Medicare-certified HMOs and CMPs to provide a full, written explanation of appeal rights to all members at the time of enrollment. If claimants are members of such a plan and have not received a written explanation of appeal rights, they should request one from their plan’s membership office or write to: Health Care Financing Administration, Office of Prepaid Health Care, Humphrey Bldg., 200 Independence Ave., S.W., Washington, D.C. 20201.

4.6 Supplemental Health Insurance

Insurance companies offer supplemental (or MediGap) policies designed to provide coverage for amounts in excess of the amounts

covered by Medicare and for services that are excluded from Medicare coverage. By law, Medicare supplemental insurance policies must follow a uniform format and must provide certain minimum coverage. You can obtain more information about Medicare supplemental insurance policies from the state insurance commissioner's office of the relevant state. In addition, many employers offer group health insurance for retired workers that supplements the coverage provided by Medicare.

If a worker first enrolls in Medicare Part B at age 65 or older, he or she will have six months under "Medigap open enrollment period" to acquire a Medigap policy. During that period, the worker has the right to buy Medigap policy of his or her choice regardless of any health problems. The insurance company cannot refuse a person a policy or charge more than other applicants during the open enrollment period.

For workers age 65 or older who are currently employed by a firm with 20 or more employees and who accept the employer's health insurance plan, Medicare if purchased could be the secondary payer. This means the employer's plan pays first on hospital and medical expenses, and Medicare may pay secondary benefits. The worker does not need a Medigap policy, but he or she may not be able to purchase one because the Medigap open enrollment period will have expired. The employed individual would have been better off if he or she did not enroll in Part B until he or she retired.

Medicare beneficiaries can assign their Medicare benefits to an HMO or a managed care organization (MCO). HMOs and MCOs are required by law to provide all Medicare benefits. Many HMOs and MCOs also offer additional benefits, such as prescription drug coverage, to encourage enrollment. Beneficiaries who choose to assign their Medicare benefits to an HMO or MCO are, however, generally required to obtain health care services from "participating" doctors and hospitals.

4.7 Medicare + Choice MSA Plan

Effective for taxable years beginning after December 31, 1998, the Balanced Budget Act of 1997 provides that individuals who are eligible for Medicare are permitted to choose either the traditional Medicare program or a new type of plan called Medicare + Choice MSA (medical savings accounts). See the Insurance chapter, herein, for a detailed discussion of using medical savings accounts.

If the individual chooses the Medicare + Choice MSA plan, the Secretary of Health and Human Services (not the individual) makes specified contributions directly into the Medicare + Choice MSA, and the individual is not eligible for regular Medicare.

Under a Medicare + Choice MSA plan, the individual must have a high-deductible medical insurance policy (no more than \$6,000 in

1999). Medicare will not pay for any medical expenses. The individual's medical expenses will be paid out of the Medicare + Choice MSA funds, plus any amount the high-deductible insurance plan pays.

4.8 Medicare Prescription Drug Benefits (Part D)

On December 8, 2003, the President signed H.R.1, the Medicare Prescription Drug Improvement and Modernization Act of 2003. This new law provides improved Medicare coverage by adding prescription drug coverage beginning in 2006. Part D prescription drug coverage will work differently from Medicare Part A and Part B. Part D coverage will not be available directly from Medicare as coverage will be with private insurers. Each plan may be a little different. The premium can be deducted from the Social Security check. Most of the drug coverage costs are paid by the federal government through private insurers.

Covered Part D drugs are drugs dispensable by prescription, biological products or insulin and corresponding medical supplies or vaccines. If a drug is otherwise covered under Part D, but paid for under Part A or B, then the drug would not be considered for Part D payment.

4.8.1 Medicare's prescription drug coverage

Effective January 1, 2006, Medicare beneficiaries are expected to pay an average of \$32 monthly premiums and a \$250 deductible. The actual amount will vary, as each insurance company will set its own charges and benefit packages. Some will offer a lower co-pay but charge higher premiums. Those who have drug coverage now with their employer's retiree policies can keep that coverage as long as it is as good as the basic Part D benefit which is as follows:

<u>Annual Drug Costs</u>	<u>Medicare Part D Pays</u>	<u>Patient Pays</u>
\$ 250	0	100%
\$ 251–\$2,250	75%	25%
\$2,251–\$5,100	0	100%
\$5,101 and up	95%	5%

<u>Summary</u>	<u>Annual Prescription Drug Savings</u>	<u>Out-of-Pocket Cost Plus Premium</u>
\$1–\$2,250	\$1,500	\$ 750
\$1–\$5,100	\$1,500	\$3,600
\$1–\$8,000	\$4,255	\$3,745

The above figures will be increased by a statutory formula annually.

4.8.2 Individuals with limited income and resources may qualify for assistance from Medicare

Starting in 2006, individuals with annual income below \$14,355 for a single person or \$19,245 for a couple with assets (other than a home) under \$11,500 for a single person or under \$23,000 for a couple can apply for assistance. Depending on the level of need:

- Premiums may be reduced or eliminated;
- Deductibles may be reduced or eliminated;
- Co-insurance and co-pay amounts may be reduced;
- Coverage gap may be eliminated.

If one lives in Alaska or Hawaii, income limits are higher.

Seniors who receive Medicaid or Supplemental Security income payments and are on Medicare will automatically qualify for additional savings, including subsidies to help pay premiums.

4.8.3 Drugs excluded from Part D plans

The following drugs are excluded from Part D by Medicare:

- Drugs used for anorexia, weight loss, or weight gain;
- Drugs used to promote fertility;
- Drugs used for cosmetic purposes or hair growth;
- Drugs used for symptomatic relief of cough and colds;
- Prescription vitamins and mineral products, except prenatal vitamins and fluoride preparations;
- Non-prescription drugs;
- Inpatient drugs;
- Barbiturates (sleeping pills);
- Benzodiazepines (central nervous system depressants).

Each Part D plan will provide its own formulary or list of covered drugs. The formulary will include both generic and brand name drugs.

5. MEDICAID

5.1 Introduction

The Medicaid program, first established by Congress in 1965, is a federal program operated at the state level to provide medical assistance to

families with aged, blind, or disabled members who cannot afford necessary medical services. The federal Health Care Financing Administration (HCFA) is responsible for the administration of the Medicaid program, but has delegated that authority to the departments of health (or equivalent agency) of the individual states. The individual states set eligibility requirements and determine the scope of Medicaid services provided within the state, provided that such requirements and services meet certain federally established minimum guidelines. Funding for the Medicaid program comes from both the federal government and the individual states.

While Medicaid benefits are available only to persons who satisfy certain need-based criteria, Medicaid has become an important resource for paying for nursing home care (even for middle-income Americans). Given that the Medicare program (discussed in section 4 above) only pays for a limited amount of nursing home care, and given the high cost of long-term nursing home care, more and more Americans must first look to individual assets, then long-term health care insurance and the Medicaid program to provide for their nursing home care needs.

Medicaid is sufficient for people who have no other means of financing nursing home care, but for those who do, it has many restrictions, such as double rooms, questionable care (particularly now that some chains are establishing Medicaid-only facilities), a small spending allowance, confiscation of income to help pay, and liens on houses of recipients. Long-term health care insurance is a much better vehicle to handle nursing home care.

5.2 Eligibility

All states must provide Medicaid benefits to persons who are “categorically needy.” In addition, states may elect to provide Medicaid benefits to persons who qualify as “optional categorically needy” or “medically

(Text continued on page 35)

needy.” Since Medicaid is state specific, and each state has slightly different rules, the state of residence rules should be examined.

5.2.1 Categorically needy

General requirements. The categorically needy generally include the following:

- Aged, blind, or disabled persons who are eligible for SSI benefits (see section 3 above)
- Individuals qualified for Medicare hospital insurance (Part A) benefits whose income does not exceed 120 percent of the federal poverty guideline and whose resources do not exceed the SSI limits
- Qualifying lower-income pregnant women and their infants

Section 209(b) states. Because the SSI program is more liberal than the assistance programs offered by several states prior to the enactment of SSI, states are allowed to elect to apply standards that are more restrictive than the SSI standards for purposes of determining eligibility for Medicaid assistance. The states making such an election (known as “Section 209(b) states”) are:

Connecticut
Hawaii
Illinois
Indiana
Minnesota
Missouri
Nebraska
New Hampshire
North Dakota
Ohio
Oklahoma
Utah
Virginia

5.2.2 Optional categorically needy

The optional categorically needy generally include the following:

- Persons eligible for SSI (but who are not actually receiving benefits)
- Persons receiving optional state supplements to SSI benefits (but not receiving federal SSI benefits)
- Persons who are ineligible for SSI benefits because they reside in certain medical institutions

5.2.3 Medically needy

Spend-down states. In so-called “spend-down” states, a person is considered medically needy if his or her income (after deducting medical expenses) is below a threshold level and his or her countable resources are below a threshold level. Accordingly, a person must “spend-down” his or her income each month on medical expenses in order to qualify as medically needy for the month.

Income cap states. In so-called “income cap” states, a person is considered medically needy if such person’s income is below a threshold level. If the person’s income for a month exceeds the threshold, then the person is not considered medically needy even if the person’s medical expenses exceed his or her income for the month.

5.3 Medicaid Benefits

For eligible recipients, Medicaid benefits generally include the following:

- Nursing home care
- Inpatient and outpatient hospital care
- Physician’s services
- Laboratory and X-ray services
- Nursing services
- Home health services
- Dental services
- Prescription drugs
- Hospice services
- Physical therapy services

5.4 Resource Requirements

In order to qualify for Medicaid benefits, a person must not have “countable resources” in excess of a prescribed threshold amount.

5.4.1 Excluded resources

For Medicaid purposes, the following resources are generally excluded from the determination of eligibility:

- An individual’s principal place of residence with an equity of less than \$500,000 (or \$750,000, if increased by the state)

- One wedding ring and one engagement ring (regardless of value)
- Items needed because of a person's physical condition (such as a wheelchair or prosthetic devices)
- Other household goods having an aggregate value of less than \$2,000
- One automobile, regardless of value, if used to provide necessary transportation, or, if not so used, to the extent its current market value does not exceed \$4,500
- Certain life insurance and burial insurance
- Certain business property essential to the individual's ability to support himself or herself

5.4.2 Spousal resources

For Medicaid purposes, the resources of each spouse are generally counted in determining the Medicaid eligibility of one spouse (although the income of a spouse is generally not counted in determining the eligibility of the other spouse if the other spouse enters a nursing home after September 29, 1989). For 2005, if one spouse is institutionalized, the other spouse (referred to as the "community spouse") may retain resources equal to the greater of \$19,020 or one-half of the total resources of the couple up to a maximum of \$95,100. The value of any resources of either spouse above that limit is deemed to be available for the support of the institutionalized spouse.

5.4.3 Transferring excess resources

In order to achieve Medicaid eligibility (especially in the case of a person in a nursing home), many clients may wish to transfer ownership of "excess resources."

Warning. Practitioners must be extremely cautious when counseling clients to transfer assets in order to obtain Medicaid eligibility. As discussed below, such transfers may result in criminal sanctions against the client and any professional that counsels the client to transfer assets.

Effective February 8, 2006, the transfer of assets without adequate consideration within 60 months prior to applying for Medicaid benefits leads to a period of ineligibility for benefits for a period of months equal to the total value of the assets transferred divided by the average monthly cost for a private nursing home patient in the transferor's state of residence.

A period of ineligibility will not result, however, if the transfer was made to any of the following:

- The transferor's spouse
- The sole benefit of the transferor's spouse
- A child of the transferor under age 21
- A blind or disabled child of the transferor
- A trust that is solely for the benefit of a disabled individual under age 65

If a transfer of assets results in a period of ineligibility, however, the transferor and, arguably, any professional advising the transferor to make the transfer, may be subject to criminal sanctions. The Health Insurance Portability and Accountability Act enacted in August 1996 makes it a crime for any person to “knowingly and willfully dispose of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a [State Medicaid plan] if disposing of the assets results in a period of ineligibility for such assistance.” While the precise scope of that provision is unclear, and has been subject to great controversy and criticism, practitioners must

(Text continued on page 39)

use extreme caution when advising clients to transfer assets if the transfer will result in a period of Medicaid ineligibility under the rules discussed above.

6. PLANNING FOR SUBSTITUTE DECISION MAKING

There are situations in which an elderly or disabled client may no longer be competent to make important decisions regarding his or her own care or the management of his or her assets. Even a young, able-bodied client may suffer an injury or disability that renders him or her incapable of making decisions. In such an event, it is important that the substitute decision maker be someone acting solely in the client's best interest. Accordingly, the professional advisor should recommend that clients consider the legal documents described below whereby they can designate the substitute decision maker in the event of incapacity. Note that the following legal documents are subject to the provisions of state law governing such documents (and that the laws of the different states vary widely) and should be prepared only by an attorney familiar with the laws of the relevant states.

6.1 Durable Power of Attorney

A durable power of attorney allows a client (the principal) to designate an attorney-in-fact to manage his or her assets and affairs. All powers of attorney terminate on the death of the principal. There are basically three kinds of power of attorney:

- **Simple power of attorney**—This document can grant limited or unlimited rights to the attorney in fact to act on behalf of the principal until the principal is incapacitated, becomes disabled, or dies.
- **Durable power of attorney**—Like the simple power of attorney, a durable power of attorney can grant limited or unlimited rights to the attorney in fact to act on behalf of the principal. The main difference is that a durable power of attorney does not terminate upon the principal becoming incapacitated or disabled.
- **Springing powers of attorney**—Like the other two types of power of attorney, a springing power of attorney can grant limited or unlimited rights to the attorney in fact to act on behalf of the

principal. The difference is that, unlike a simple power of attorney or a durable power of attorney, both of which become effective immediately upon execution, the springing power of attorney becomes effective only upon the incapacity or disability of the principal, and only remains in effect until the principal is no longer incapacitated or disabled.

A durable power of attorney generally lists broad powers that the attorney-in-fact may exercise on behalf of the grantor, such as:

- The power to manage or sell assets of the grantor
- The power to bring lawsuits, and defend against lawsuits, in the name of the grantor
- The power to deal with the grantor's pension plans, retirement benefits, and insurance policies
- The power to vote with respect to stocks and other securities owned by the grantor
- The power to make gifts of the grantor's assets

A durable power of attorney can be revoked by the client at any time (except during periods of legal incapacity).

6.2 Living Will (Advance Directive)

A living will (also known as an "advance directive") is a legal document in which the patient expresses his or her wishes to receive (or not to receive) certain artificial life-prolonging medical treatments, such as artificial feeding, mechanical breathing devices, and kidney dialysis. A living will is only effective in the event that the patient is incapable of communicating his or her present desire to the treating physician, and can be revoked or amended by the patient at any time. A living will directing that life-prolonging procedures be withheld will generally not be respected if the patient is pregnant. There are certain legal formalities that must be respected when executing a living will and, at present, not all states recognize a living will as a legally binding document. (See appendix 1, "Sample Advance Directive (Living Will)," on the *Accountant's Business Manual Toolkit CD-ROM*.)

6.3 Health Care Surrogate

A health care surrogate (medical power of attorney) is a legal document whereby a person appoints another individual to make health care decisions in the event the person is incapable of providing informed

consent. The designated surrogate is generally prohibited from consenting to treatment such as the following:

- The withholding or withdrawing of life-prolonging medical treatment (which is why it is necessary to have both a health care surrogate and a living will)
- Abortion
- Sterilization
- Electroshock therapy
- Voluntary admission to a mental health facility

A health care surrogate generally can address subjects such as:

- Whether or not the patient wishes to make anatomical gifts (organ donation).
- Whether the surrogate has the power to consent to an autopsy with respect to the patient.
- The manner in which the patient wishes to have his or her remains disposed of (burial versus cremation).

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HUMAN RESOURCES

1. RECRUITMENT

- 1.1 Policy and Objectives
- 1.2 Determining Needs
- 1.3 Development of a Job Description

2. RECRUITMENT SOURCES

- 2.1 Unsolicited Applications
- 2.2 Print Advertisements
- 2.3 Open Houses
- 2.4 Job Fairs
- 2.5 Campus Recruiting
- 2.6 Employment Agencies

3. INTERVIEWING

- 3.1 The Process of Elimination
 - 3.1.1 Related skills
 - 3.1.2 Basic qualifications
 - 3.1.3 Work experience
 - 3.1.4 Education
 - 3.1.5 Personal characteristics
 - 3.1.6 The application itself
- 3.2 Preparing for the Interview
 - 3.2.1 Know the job
 - 3.2.2 Determine the objective of the interview
 - 3.2.3 Plan the format
 - 3.2.4 Learn about the applicant in advance
 - 3.2.5 Provide for privacy

4. REFERENCE CHECKING AND TESTING

- 4.1 References
- 4.2 Testing

5. COMMUNICATION WITH APPLICANTS

- 5.1 Job Offers
- 5.2 Informing Rejected Applicants
- 5.3 Responding to and Retaining Applications and Resumes

6. NEW EMPLOYEE ORIENTATION

7. EMPLOYEE DEVELOPMENT AND PROMOTION

- 7.1 Systems Design

HUMAN RESOURCES

- 7.2 Individual Work Plans
- 7.3 Continuing Education
 - 7.3.1 On-the-job training
 - 7.3.2 Continuing education providers
- 7.4 Performance Review Process

8. COMPENSATION

- 8.1 Compensation Objectives
- 8.2 Job Analysis—Job Descriptions
 - 8.2.1 How are job descriptions used
 - 8.2.2 Responsibility planning
- 8.3 Job Evaluation
 - 8.3.1 Internal equity
 - 8.3.2 External competitiveness
- 8.4 Salary Ranges
- 8.5 Performance Reviews
 - 8.5.1 Setting goals with subordinates
 - 8.5.2 Measure results against goals
- 8.6 Merit Guides

9. BENEFIT PROGRAMS

- 9.1 Objectives of a Benefit Plan
- 9.2 What You Can Afford
- 9.3 Cafeteria Plans

10. FLEXIBLE WORK ARRANGEMENTS

- 10.1 Types of Flexible Arrangements
- 10.2 Flextime
- 10.3 Compressed Workweeks
- 10.4 Job Sharing
- 10.5 Telecommuting
- 10.6 Leaves and Sabbaticals

11. TERMINATION

- 11.1 Performance Evaluation and Documentation
- 11.2 Guidelines for Termination
- 11.3 Prior to Finalizing a Termination Decision
- 11.4 After the Decision to Terminate Has Been Finalized
- 11.5 During the Termination Interview
- 11.6 After the Termination Interview

SUGGESTED REFERENCES

APPENDIX 1: Sample Firm Hiring Policy (see Toolkit CD-ROM)

HUMAN RESOURCES

- APPENDIX 2: Sample Staffing Needs Request Form (see Toolkit CD-ROM)**
- APPENDIX 3: Sample Management Questionnaire to Clarify Job Requirements (see Toolkit CD-ROM)**
- APPENDIX 4: Sample Job Descriptions (see Toolkit CD-ROM)**
- APPENDIX 5: Sample Application for Employment (see Toolkit CD-ROM)**
- APPENDIX 6: Standard Interview Questions Form (see Toolkit CD-ROM)**
- APPENDIX 7: Sample Interview Questions (see Toolkit CD-ROM)**
- APPENDIX 8: Sample Inappropriate Interview Questions (see Toolkit CD-ROM)**
- APPENDIX 9: Sample Interview Rating Report, and Interviewer's and Interview Evaluation Forms (see Toolkit CD-ROM)**
- APPENDIX 10: Reference Check (see Toolkit CD-ROM)**
- APPENDIX 11: Job Offers and Rejections (see Toolkit CD-ROM)**
- APPENDIX 12: Sample Employee Personal Information Update (see Toolkit CD-ROM)**
- APPENDIX 13: Orientation Checklist (see Toolkit CD-ROM)**
- APPENDIX 14: Job Description Outline (see Toolkit CD-ROM)**
- APPENDIX 15: HR Dependency Chart (see Toolkit CD-ROM)**
- APPENDIX 16: Sample Annual Work Plan (see Toolkit CD-ROM)**
- APPENDIX 17: Continuing Education Course Evaluation (see Toolkit CD-ROM)**
- APPENDIX 18: Sample Professional Development Appraisal (see Toolkit CD-ROM)**
- APPENDIX 19: Sample Performance Evaluation Process Chart (see Toolkit CD-ROM)**

HUMAN RESOURCES

- APPENDIX 20: Sample Checklist for an Office at Home (see Toolkit CD-ROM)**
- APPENDIX 21: Exit Interview Form (see Toolkit CD-ROM)**
- APPENDIX 22: Separation Interview Checklist (see Toolkit CD-ROM)**
- APPENDIX 23: Termination Checklist (see Toolkit CD-ROM)**
- APPENDIX 24: Sample Employee Handbook (see Toolkit CD-ROM)**
- APPENDIX 25: Sample Employee Code of Conduct (see Toolkit CD-ROM)**
- APPENDIX 26: Interview Contact Control (see Toolkit CD-ROM)**
- APPENDIX 27: New Employee Prospect Referral Form (see Toolkit CD-ROM)**
- APPENDIX 28: Sample Employment Agreement (see Toolkit CD-ROM)**
- APPENDIX 29: Sample Severance Agreement (see Toolkit CD-ROM)**
- APPENDIX 30: Request for Travel Arrangement (see Toolkit CD-ROM)**

1. RECRUITMENT

Given the expansion of laws and regulations affecting business today, companies should establish recruitment and hiring policies that are clear and concise and that take into consideration the internal environment as well as the objectives and goals of the organization. These should include procedures and guidelines that clearly identify the approach the organization intends to use in identifying the potential employees who will best meet the long-term needs of the organization.

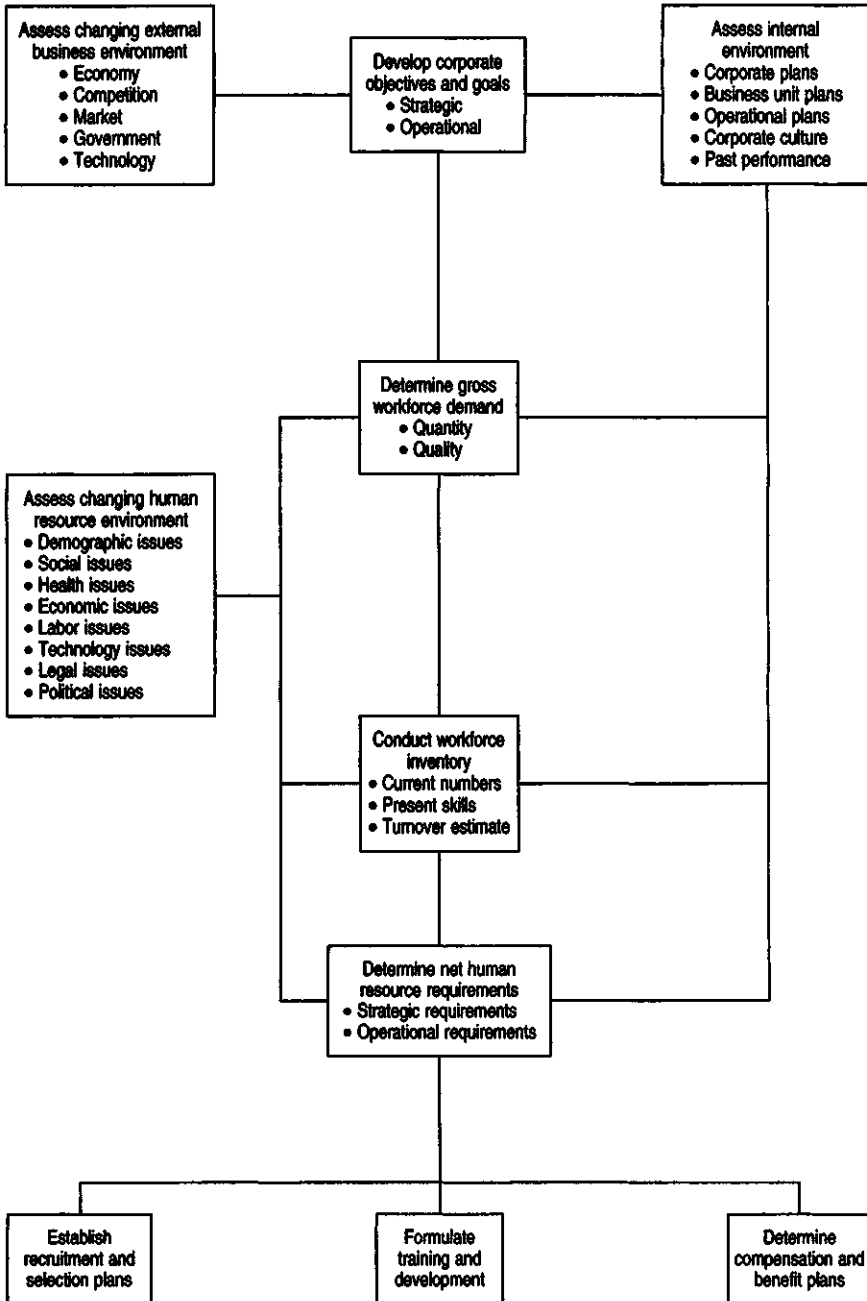
Most people would agree that planning for the firm's human resources is as important for an organization's success as is planning for its physical and financial resources. Human resource planning is a process by which a firm ensures that it has the right number of people, the right kind of people, in the right places, at the right time, doing what is economically most useful. However, if a business is to join the ranks of the most progressive organizations, it must expand beyond mere head-count planning.

Today, businesses are expected to plan, develop, and implement an integrated set of policies and programs designed to improve productivity, boost quality, and control costs, while managing diverse issues such as corporate culture and business ethics. To be fully effective, the overall business strategic plan needs to be integrated with the human resource plan. Effective human resource planning is a process that determines how the organization will move from its current to its desired human resource position as defined by its business plan and the changing environment. Exhibit 1 depicts a flowchart of human resource planning.

1.1 Policy and Objectives

If an organization recognizes people as key to its success, then the recruitment and selection of employees is likely to become the most important management function. Recruitment and selection policies and practices can make the difference between a workforce that is mediocre and one that is exemplary. That, in turn, can have a major impact on operations, growth, and profitability. The process of identifying and hiring personnel entails labor costs that add to the importance of making sure that recruitment is conducted carefully and results in the selection of quality people. Hiring costs have been skyrocketing, not only because of advertising, but also because of the time involved in campus interviewing, in-house interviewing, relocation, benefits and, most importantly, the time of the organization consumed by these activities.

Exhibit 1: Human Resource Planning



Another compelling reason to be concerned with recruitment and selection methods is the danger of employment discrimination charges. Complaints of discrimination in employment, whether justified or not, are very costly in terms of time, money, and reputation. Lawsuits can be devastating to growth and profitability. Therefore, the many pitfalls that can lead to charges of discrimination must be avoided in hiring practices.

Finally, companies today are faced with the erosion of the “employment at will principle”—the idea that employers have the right to discharge an individual at any time and for any reason. The conflict surrounding this issue is sufficient warning that the decision to hire an individual should be made with extreme caution and care, since dismissals can engender protracted and costly litigation.

The key to successful recruitment and selection practices and procedures is a clear, consistent, and well-thought-out corporate policy. A recruitment policy ensures a greater degree of uniformity in position approval and hiring practices, which is becoming more important as society becomes increasingly intolerant and suspicious of favoritism, nepotism, and other forms of personal preferences among employers.

Without a company policy, managers and supervisors act hesitantly, indecisively and sometimes with regard only to expedience. Uncertain of what the corporate policy is, they grope for answers, and the result is inconsistent recruitment practices, contradictory procedures, exposure to regulatory discipline, and threats of litigation.

A sample firm hiring policy is shown in appendix 1 (see the *Accountant's Business Manual Toolkit CD-ROM*).

1.2 Determining Needs

As stated in the AICPA management consulting service Practice Administration Aid¹ on human resource planning, seven areas should be considered before beginning the employment process:

- Identify the purpose of the position and justify its cost.
- Draft a job description detailing areas of accountability, responsibility, and specific duties.
- Evaluate the pros and cons relative to the utilization of part-time, full-time, seasonal, and potential “shared jobs.”
- Consider internal promotions and transfers.
- Evaluate the labor market with an eye to future employment needs.

¹AICPA, MCS Practice Administration Aid, *Human Resource Planning and Management for an MAS Practice*. New York: AICPA, 1991.

- Understand specifically what the company is looking for in background, skill level, qualifications, salary range, and so forth.
- Research opportunities and obligations that take advantage of federal and local programs, grants, and other legal obligations the company may have.

In larger organizations, administrators or human resource departments may require the completion of a personnel requisition form for additional or replacement staff. The form summarizes the impact on budget and organizational functioning as well as all approvals required for hiring. A sample staffing needs request form is shown in appendix 2 (see the *Accountant's Business Manual Toolkit CD-ROM*). Appendix 3 (also on the *Toolkit CD-ROM*) is a sample management questionnaire to clarify job requirements.

1.3 Development of a Job Description

Job descriptions have increased in their relative importance to an organization primarily because of the Americans with Disabilities Act (ADA), 1990, which gives their existence or absence greater weight when deciding whether an employer's decisions to hire were reasonable or discriminatory. A job description enables interviewers to understand all parameters of a job before the recruitment process begins and allows the applicants to know specifically what the responsibilities, duties, and accountabilities for a given position will be. Appendix 4 provides sample job descriptions (see the *Toolkit CD-ROM*). Appendix 27 provides a New Employee Prospect Referral Form for employees who refer prospective employees.

2. RECRUITMENT SOURCES

Once a determination has been made regarding the need for a given position, the specific criteria have been developed, and the job description is in place, the specific recruiting mechanism must take over. Inevitably, there are two resources for recruitment: internal and external.

Internally, by means of manpower and career development planning, individuals may be selected for given positions as promotions or transfers. Employers can only benefit when they allow employees to grow within their careers and capabilities. The more knowledge and skills employees possess, the greater their potential contribution. Training, combined with transfers or promotions to different responsibilities, enables employees to accumulate more knowledge so that their talents can be developed to meet the employers' needs. For this reason, many

employers identify employees with potential for promotion early on and actively encourage them to pursue advanced training. Likewise, when a job posting system is in place, employees can be notified of all job vacancies. Job openings should be announced through a variety of methods—and current employees should be adequately informed—to minimize any appearance of discrimination. In order to take advantage of the value of knowledge of “Corporate Culture,” all businesses should establish an internal job posting system. This allows current, valued employees with an understanding of the company’s direction and mission to become aware of job vacancies, assess their *own* skill level in response to the dictates of the job description, and make applications accordingly. Internal posting has a positive impact not only on the firm but on employees that recognize the commitment that a company is making to the growth and development of its staff.

External recruitment can take many avenues:

- Walk-ins
- Unsolicited resumes received in the mail
- Advertising in newspapers and industry publications
- Resumes received through college placement offices
- On-campus interviews
- Personal referrals
- Employment agencies and professional recruiters

Before launching a search for a suitable applicant, all unsolicited applications and resumes that have been received (as well as those of people who have been rejected for previous positions) should be reviewed. It simply is not cost-effective to start every search from scratch.

2.1 Unsolicited Applications

Often unsolicited applications are an effective and inexpensive source of potential candidates. People who apply directly often turn out to be good candidates. They probably applied because the company is conveniently located or is in an industry in which they have experience. They may have heard of the company or have familiarized themselves with it. Many firms meet the majority of their workforce needs in this way. At the very least, receipt of the resume or application should be acknowledged, as a matter of courtesy; in most cases, a follow-up letter should be sent.

2.2 Print Advertisements

When it is necessary to extend a search for candidates, the most common method is to place a newspaper advertisement. Recruitment ads should be viewed as part of the company's overall effort to sell a job to prospective employees. The aim of this ad, as with an entire recruitment program, is not to attract the largest number of applicants, but to attract the most qualified applicants. The ideal candidate should want to answer the ad as soon as possible.

Where advertisements are published affects the time and money spent in recruiting. The key is not to select publications with the largest readership, but ones that are most likely to be read by the kinds of applicants being sought.

Newspapers' help wanted sections are read by nearly everyone who is looking for a position. A newspaper ad is easy to place, and often appears within days of its submission. Ads in trade and professional journals are usually cost-effective, since they are normally read by people with precisely the qualifications for those trades or professions. The problem is that many of these publications are published infrequently, monthly at best, and have long lead times. Thus, it can take weeks and even months for an ad to appear and for suitable candidates to respond.

2.3 Open Houses

When a company is seeking to employ several individuals in the same job category, or planning a rapid expansion into a new service area or locale for which it may be considering a substantial number of people, it may want to consider the feasibility of holding an open house. This is a cost-effective way of screening a large number of applicants over a one- to two-day period. It is also a good way to get managers and supervisors to meet large numbers of prospective employees and to discuss the vacancies with them personally. For the potential employees, an open house can serve to introduce them to the company and its staff and effect some self-selection among applicants.

2.4 Job Fairs

Though similar to an open house mentioned earlier, this involves many companies located within a geographical area. By exhibiting at job fairs, a company can learn whether or not its salaries are competitive, and about employment trends and changes in the labor market. Participation in a job fair is normally very cost-effective since advertising and rental costs for the site are shared with other employers. The major cost is the expenditure of time.

2.5 Campus Recruiting

It is useful to maintain an ongoing relationship with administrators, faculty members, and counselors at local schools, colleges, and universities. This kind of recruitment offers many advantages over the other techniques. One significant advantage is that people are recruited with recent state-of-the-art knowledge. New graduates can often make significant contributions because of their enthusiasm. College students are particularly interested in getting their careers off to a good start and they normally want to work for a good company. For them, this generally means one with growth potential, opportunities for advancement and personal development, and a good reputation in the community. See Hiring Foreign Nationals section 2.3.5 for employment options for F-1 foreign students and section 2.3.6 for H-1B eligibility for work authorization for foreign students who qualify for a professional position.

2.6 Employment Agencies

Many employment agencies are part of a nationwide recruiting network. These agencies have the capability to recruit from outside the immediate labor market area. This is particularly important if you are trying to fill positions that require special skills and talents that are not easily available locally. Fees of employment agencies, particularly for key, highly paid personnel, can be high. Agencies usually charge a fee of anywhere from 10 percent to 15 percent of the placed applicant's annual salary, with some fees as high as 30 percent.

3. INTERVIEWING

How many people need to be interviewed to fill a job opening? Ideally, one—if that person meets all the job requirements. It is not true—although many people believe otherwise—that the greater the number of applicants interviewed, the better the chance of finding the ideal employee. One person with the right qualifications is all it takes. And the best interview candidates can be identified before any meetings take place, through an effective screening process.

3.1 The Process of Elimination

3.1.1 Related skills

Although it may be important to be critical in evaluating resumes and other applicant information, it is also necessary to be able to recognize the transferability of skills and abilities. The failure to do the latter may

result in bypassing individuals who lack exactly the ideal experience or education, but who nevertheless have excellent capabilities. Applicants with less experience than desired in a certain field may have other qualities that could prove suitable for the job.

3.1.2 Basic qualifications

The resumes or job applications received should indicate which individuals are sufficiently qualified to be given further consideration. The first step is to check for the *minimum* requirements that have been established for the job. These may include minimum skills, basic levels of education, or the same or related experience. Only those applicants having at least these basic qualifications should be considered. This screening process prevents wasted time spent interviewing unsuitable applicants.

3.1.3 Work experience

The best way to evaluate work experience is to design a checklist of job specifications and duties and compare the applicants' experience against the established job criteria. The more experience an applicant has in a greater number of specified areas, the better prospect he or she may be.

The applicant's job history, including the frequency of job change, should be used to evaluate growth, development, and achievement over a period of time. There is substantial evidence that an individual's employment history is a major predictor of tenure—how long an individual will remain with the company. These factors should all be used to rate the applicant in terms of related work experience.

3.1.4 Education

An applicant's academic, vocational, or professional education should be examined in terms of how it relates to a job's requirements. First, check the degree earned, if any, and the major area of study, and determine whether they are relevant to the job. In many cases, an applicant's educational background will help to assess not only a candidate's ability to perform a job, but his or her intellectual ability to cope with difficult situations or to prioritize a number of different kinds of assignments. Educational background should have more importance for jobs that require specialized knowledge or for applicants with little or no related work experience.

3.1.5 Personal characteristics

When screening applicants who are still good prospects at this stage, look for factors that are potentially significant indicators of success in

the job, such as personality, motivation, and interests. Consider the amount of independent action and judgment required, the pressures of the job, and the future potential of the job and the employee. There may be, as well, long-term consideration of the applicant's potential for future promotion.

3.1.6 The application itself

The appearance of the resume or application says something about the applicant.

- Is the resume or application neat and legible?
- Is the information presented well?
- Are there inconsistencies or contradictions?

Observe whether there are any omissions in the application, or questions that have been left unanswered. Although an applicant should not be rejected because of failure to answer a question, it should be noted that if the applicant is invited to interview, these gaps should be filled in. A sample application is found in appendix 5 (see *Toolkit CD-ROM*).

3.2 Preparing for the Interview

There are five major steps in preparing for interviews, and each plays a critical role in the selection process.

3.2.1 Know the job

The most important part of preparing for an interview is to know the job. The interviewer should carefully review the job description to understand the job to be filled and the qualifications it requires. The interviewer needs to review the job duty specifics and know how the job fits into the specific function or department of the organization. The interviewer will also need to know relevant information, such as travel and overtime requirements, opportunities for promotion, and working conditions.

3.2.2 Determine the objective of the interview

Although the general purpose of interviewing is to select a candidate for a position, each particular interview should have a specific objective. Screening interviews are intended to select potential candidates for further consideration. Once several good candidates have been selected, the objective of the next interview may be to determine the best-qualified candidates. In this instance, individuals are judged against each other in an attempt to establish which ones have overall superiority.

In a number of circumstances, individuals may be interviewed to determine whether they have potential for later hiring.

3.2.3 Plan the format

Planning is an important part of preparing to interview. Things to be determined in advance include:

- The number of interviews to be conducted and by whom before making the final decision
- The approximate time allotment for each interview
- The specific issues to be covered

Included in appendix 6 (see the *Accountant's Business Manual Toolkit CD-ROM*) is a sample form for listing interview questions. Maintaining a standard set of core questions and topics ensures that all important job-related issues will be covered in the interview and establishes a uniform set of topics on which an array of candidates' responses can be judged.

Additionally, the *Accountant's Business Manual Toolkit CD-ROM* contains two more forms for interviews. Appendix 7 contains an extensive set of sample questions which can be used during the interview process. Appendix 8 contains a list of questions that are inappropriate to ask during an interview or on an application. Adding such questions may be discriminatory if not directly job-related, as rejected candidates could contend they were turned down due to their race, sex, age, religion, or non-affective disabilities. If desired, questions from appendix 7 can be used in conjunction with appendix 8 in designing a standard set of interview questions.

3.2.4 Learn about the applicant in advance

An essential part of the interview strategy is for the interviewer to carefully review in advance each candidate's job application or resume. This practice precludes using interview time to ask for information that has already been provided, as well as giving the interviewer a chance to get acquainted with the applicant before the meeting. The application form or resume provides some clues about the candidate. Specific questions to be asked by the interviewer may be based on aspects of the person's background.

3.2.5 Provide for privacy

Make sure that there will be no interruptions during an interview. Arrange for privacy. If a private office is not available, reserve a conference room. Inform the receptionist that there are to be no telephone

calls, messages, or other interruptions during the interview. Intrusions can distract attention and destroy the momentum of an interview.

In order to establish a controlled, objective evaluation procedure, it is useful to prepare an interview report following each candidate's interview. The report helps to standardize evaluation criteria so that, regardless of each candidate's personal differences in expression, experience, and bearing, the interviewer can characterize responses in standardized terms to permit comparative evaluation. Appendix 9 (see the *Accountant's Business Manual Toolkit CD-ROM*) shows a sample interview rating report, and interviewer's and interview evaluation forms. Immediately following an interview a numerical rating of suitability can be calculated for comparison with other candidates. Appendix 26 (see the *Accountant's Business Manual Toolkit CD-ROM*) contains a form to document and schedule contacts to be made with the candidate.

4. REFERENCE CHECKING AND TESTING

4.1 References

Due to the legal ramifications of the release of information received from a reference check, all employers are cautioned to check with applicable state statutes, which vary widely. A number of states restrict employers from releasing information without written authorization from the applicant.

Because most companies are reluctant to give any information other than name, dates of employment, and positions held, it is advantageous for all employers to have a *consent to release employment information* form prepared for all employees to sign when they leave the organization. Likewise, you may wish to develop a form to include in the interviewing packet that all applicants will sign, which is a release of information to you from the respective applicant's prior employers. Appendix 10 is a form to use in collecting telephone reference check information (see the *Accountant's Business Manual Toolkit CD-ROM*).

4.2 Testing

After reviewing all the information contained on an application or resume, having conducted the interview itself, and having performed any reference checking that was feasible, an employer may also choose to test candidates for their ability to perform certain key job duties.

Some standardized ability tests measure the candidate's relative skill levels in typing, keyboarding, and calculating. Employers can themselves

devise tests of particular specific job skills, such as written communication, logical problem solving, proofreading, or aptitude for specific complex tasks. These measure how well an individual may perform an activity on the job.

A second kind of test is called a “screening test.” Screening tests include those for drug and alcohol abuse, polygraph or written integrity or honesty tests, and medical examinations. The administration of any of these tests entails a legal concern about whether negative results are attributable to race, sex, nationality, religious affiliation, age, or disability.

It should be noted that under the new ADA, businesses employing fifteen or more persons can ask medical questions or require a medical examination of job candidates only after a conditional job offer has been made.

It should be noted that although personality tests, aptitude tests, drug tests, and so forth, are still prevalent in the employment process, studies indicate that their use is waning.

5. COMMUNICATION WITH APPLICANTS

5.1 Job Offers

Candidates should be notified whether or not they have been selected for a position within a week or two of having been interviewed. A person is either right or wrong for a job, and procrastination in the decision-making process is counterproductive. There is no reason to think that a better candidate will appear next week; that other person almost never materializes, and in the meantime, a good candidate who has been kept waiting may no longer be available.

When a decision is made to hire an individual, one person within the firm should be designated to respond with a job offer. Job offers are usually made verbally, followed by a letter of confirmation stating the starting date and salary agreed upon by the firm and the candidate. Appendix 11 (see the *Accountant's Business Manual Toolkit CD-ROM*) contains a sample job offer letter. Appendix 28 (see the *Accountant's Business Manual Toolkit CD-ROM*) contains a Sample Employment Agreement, that when properly drafted, can set the ground rules for any new employment relationship.

It is wise to set up a special file for all application forms from applicants who were rejected for employment. This should include not only the application forms, but a record of all correspondence between the company and the applicants and all reputable telephone contacts.

If, at some future date, the firm is called upon to explain why a certain candidate was not hired, these records will provide all the necessary information. For *every* new employee, an employer must verify both the employee's identity and work authorization by filling out Form I-9. See Hiring Foreign Nationals section 7.1 for instructions on completing Form I-9.

(Text continued on page 17)

5.2 Informing Rejected Applicants

As soon as applicants are no longer under consideration, they should be informed. If a candidate is interviewed and immediately eliminated from consideration, a letter should be sent out the next day. Appendix 11 on the *Accountant's Business Manual Toolkit CD-ROM* contains a sample rejection letter.

Every individual who has been interviewed should receive a response. Not to do so is unprofessional and creates a poor image. People who receive no response will communicate this to their friends and other potential employees.

5.3 Responding to and Retaining Applications and Resumes

All businesses who have an image to maintain in the community should respond to all requests for employment—be these walk-in candidates, telephone inquiries, or unsolicited resumes. A firm should preserve a good positive image in the event that these candidates become viable at the time of the next vacancy.

Retain potentially viable resumes and applications. As stated earlier, the second step in any recruitment process, once needs have been defined, is to review all the resumes and applications that are on file. This pool of potential candidates can reduce additional costs in advertising and preliminary screening.

6. NEW EMPLOYEE ORIENTATION

In order for the employee and the company to start out well together, it is imperative that a proper orientation program be established. Specific objectives of this program should be—

- Making the employee comfortable in the new work environment.
- Developing and maintaining a positive attitude on the part of the employee toward the organization, the supervisor, and the job.
- Making the employee productive in terms of quantity, quality, safety, and dependability.
- Developing an employee who will be a team player as well as an individual performer.
- Enabling the employee to work independent of close supervision as soon as possible.

In order to accomplish the preceding objectives, good communication will be required from the first day of employment. Employees will obviously need to learn more about the employer than can be communicated in an interview. They will need to know how to “sense the environment” and become aware of the political pitfalls that impact all organizations. Much is being written about “coaching” or “mentoring.” It is a time-tested way to ensure that all new employees are trained in the culture of the organization as well as in the technical aspects of the job. According to the AICPA’s *Management of an Accounting Practice Handbook*, “The firm is the biggest winner in a mentoring program.” Three parties are involved in any such program—the protege, the mentor, and the firm. While all parties grow, the firm benefits in very tangible ways.

It is essential that an organization have a checklist specifically designed to cover the necessary aspects that all new employees will be expected to learn. Appendix 13 (see the *Accountant’s Business Manual Toolkit CD-ROM*) contains a sample orientation checklist.

Appendix 12, “Sample Employee Personal Information Update,” on the *Accountant’s Business Manual Toolkit CD-ROM*, illustrates a form that can be used at a later time to update personal information of the employee originally obtained at the time of employee orientation. See Appendix 24, “Sample Employee Handbook,” and Appendix 25, “Sample Employee Code of Conduct,” on the *Accountant’s Business Manual Toolkit CD-ROM* for illustrative examples of materials that can be updated on an annual basis.

7. EMPLOYEE DEVELOPMENT AND PROMOTION

7.1 Systems Design

The entire human resources (HR) process is designed to ensure that an organization attracts, retains, and develops talented employees who will accomplish the mission of the organization. Accordingly, it must be a comprehensive system that is integrated and clearly laid out. There should be a clear linkage and interdependency between individual work plans, performance evaluations, job expectations, promotions, salary adjustments, and the overall operating budget of the organization. The elements of this process should be placed on a specific timetable, building in not only the required due date, but also the lead times that are necessary to support the process. For example, if performance evaluations are scheduled for July 1, written evaluations from supervisors may need to be received no later than June 15 and supervisors may need to receive the paperwork to prepare written evaluations no later than June 1.

The overall HR process must also relate directly to the financial budget. Management will have a difficult time approving salary adjustments without knowing the effect it has on the budget. Likewise, management and employees need to have a clear definition of what a promotion means. Depending on how these issues interrelate, a promotion could mean simply a title change, a salary adjustment, or an actual shift in responsibilities. See Appendix 15 on the *Toolkit CD-ROM* for a chart describing the dependency of HR issues on the budget process.

7.2 Individual Work Plans

While written job descriptions (see section 1.3) may describe the general and even specific expectations and tasks for a position, they may not effectively motivate employees to achieve individual excellence in their job. Job descriptions that are designed around a collection of “tasks” might encourage employees to focus on becoming task-masters rather than pursuing the higher mission of the organization. This concept can be illustrated by employees who believe they should be promoted because they can document how they have completed every task on a job description, even though they may be unpromotable because they lack the vision to deal with the big-picture issues.

Consider having supervisors work with employees to develop individualized annual work plans that will challenge and reward them for making improvements in their job performance. An individualized work plan might include such specific goals as a percentage increase in efficiency or realization over the previous year, a specific number of new proposals presented, or a certain number of marketing calls made. The work plan may also include less quantifiable goals, such as increasing knowledge and education in a specific business niche. When creating their own annual work plans with input and guidance from supervisors, employees have an ownership stake in improving themselves and the organization. It is the supervisor’s job to ensure that the work plan is aligned with the overall mission of the organization. Employees should clearly understand how their compensation relates to achieving both the spirit and specifics of the work plan goals. See appendix 16 on the *Toolkit CD-ROM* for an example of an annual employee work plan in a service organization.

7.3 Continuing Education

A training plan should be developed for each staff person to maximize the training opportunity of job assignments. Experienced personnel

should be evaluated on their effectiveness in training and developing subordinates so that the subordinates gain appropriate experience.

7.3.1 On-the-job training

One of the most effective mechanisms of providing on-the-job training is through feedback on work completed. Reviewer comments and personal evaluation sessions allow a less experienced staff to learn from experienced staff as they take on more complex tasks. Although the tendency of many experienced technicians is often to “fix it myself,” on-the-job training and successful staff development occur only through adequate feedback. One-on-one review of work and constructive evaluation also help develop good personal communication skills. The ability to express and accept differing points of view is essential to building solid business relationships with clients and customers. Even though on-the-job training is very important in attaining and maintaining competence, this type of informal learning would not qualify for accredited continuing education (CE).

7.3.2 Continuing education providers

Continuing education courses are offered by numerous private providers and by industry trade associations. Most private providers announce courses through direct marketing techniques such as the Internet and direct mail, as well as in professional journals and at professional meetings, conferences, and conventions.

Employers who value lifelong learning understand that CE requires a significant time and financial investment. Because of this, it is important to adequately plan and evaluate CE sessions. Appendix 17 on the *Toolkit CD-ROM* illustrates a sample form for staff evaluation of CE courses. The participant gives the course an overall rating and rates the subject matter and instructor (if applicable). The participant also details new concepts learned, and recommends whether others should attend. Course evaluations should be as thorough as possible and they should be retained for a period of time. Employers should specifically track and keep records of these sessions by individual, to assure that everyone receives adequate training in required areas, and to provide information for CE reporting requirements. In addition, tracking and evaluating CE sessions eliminates redundancy in attendance, and allows better selection and planning for CE courses in the following year.

7.4 Performance Review Process

Each employee has a right to know how he or she is performing. Ongoing communication is essential to give constant feedback in

addressing performance concerns and acknowledging superior effort or results. This is important not only at the time of salary or promotion determination, but also at the time of the potential discharge of an employee. All performance evaluations should be documented, dated, and signed by the employee and respective supervisor. Appendix 18, "Sample Professional Development Appraisal," on the *Toolkit CD-ROM*, is a sample form designed to document and assist in the evaluation and career planning process.

The entire process for evaluating, promoting, adjusting salary, and establishing goals should be scheduled in advance to ensure its timely completion. The process begins by assigning team members to complete written evaluations. Multiple perspectives on an employee's performance will ensure that individual bias or paradigms do not distort the evaluation. If multiple evaluations are completed for each person, one concise report may summarize the information and maintain anonymity of the evaluators if desired. Written evaluations provide a basis for evaluating employees for promotion and preliminary salary increases.

Management may wish to approve promotions before meeting with the employee. The performance evaluation meeting may then be used to communicate the promotion or obtain additional feedback from the employee prior to finalizing promotion decisions. The evaluation meeting is also an opportunity to set annual work plan goals for the coming year. With the wealth of information derived from the evaluation process and the promotion decisions, employees can be better evaluated against their peer group and marketplace for compensation. See appendix 19 on the *Toolkit CD-ROM* for a flowchart and timeline describing the review process.

8. COMPENSATION

8.1 Compensation Objectives

The fundamental objective of a salary administration plan is to ensure that employees are paid in relation to the value of the work they perform. The company should receive a fair return on its salary investments and, in turn, individual employees should receive a fair compensation for their abilities and efforts.

The specific objectives of any plan should be—

- To pay competitive salaries as an attraction to superior people and motivation for them to do their best.

- To establish and maintain a logical, consistent scheme of value relationships among positions that represent an objective analysis of the division of responsibility.
- To pay individuals fairly according to their relative contribution to the effectiveness of operations, the objective measurement of which is considered to be the relative value of the work each individual performs and the results achieved.
- To establish and maintain a competitive, sound salary structure—one that provides strong inducement to individuals to advance and to assume greater responsibilities.
- To establish and maintain salary ranges for the respective salary grades that afford ample latitude for recognizing and rewarding performance improvement and superior performance.
- To establish and maintain logical earnings relationships between supervisors and their subordinates.
- To maintain a competitive compensation structure that is applied subject to various economic pressures such as inflation, salaries at other companies, and the profitability of the organization.
- To establish meaningful differentials in compensation between individuals performing at significantly different levels and administer adjustments so as to recognize these differentials.
- To comply fully with provisions of all government regulations regarding compensation.
- To plan and implement all compensation expenditures through the budget system.
- To communicate to all employees the compensation policy and the methods of administering this policy.

8.2 Job Analysis—Job Descriptions

The advantage of having carefully prepared, properly used job descriptions should be obvious to anyone in the management field. But because so many organizations have not prepared and used their job descriptions properly, many of these benefits have been lost or overlooked. Consider the following:

1. Job descriptions clarify who is responsible for what within the organization. They also help define relationships between individuals and between departments. When used to advantage, they can settle grievances, nip conflicts in the bud, and improve communications.

2. Job descriptions help the jobholder understand the responsibilities of the position. This not only enables the employee to assess the relative importance of everything he or she is accountable for, but also provides a sense of where the job fits into the larger responsibilities of the organization as a whole.
3. Job descriptions are helpful to job applicants, to employees, to supervisors, and to human resources staff at every stage in the employment relationship, from recruitment to retirement. They provide information about the knowledge, training, education, and skills needed for each job. They prevent unnecessary misunderstandings about responsibilities and duties. They can guide both a new employee who may have forgotten or misunderstood some aspects of the job, and a supervisor who may think the new hire does not fully understand the job. Best of all, they provide this information in a completely objective and impersonal manner.
4. Job descriptions help management analyze and improve the organization's structure. They reveal whether all company responsibilities are adequately covered and where these responsibilities should be reallocated to achieve a better balance.
5. Accurate job descriptions provide a basis for job evaluation, wage and salary surveys, and an equitable wage and salary structure. (Job descriptions can be used to either support or discredit comparable worth and other job description complaints, and for this reason they should reflect only the truth about the job in question.)

Despite these and many other potential benefits, job descriptions have traditionally suffered a poor reputation among managers and supervisors. In fact, even companies that have spent a great deal of time and money preparing job descriptions often end up ignoring or underutilizing them. Exhibit 2 depicts uses of the position descriptions.

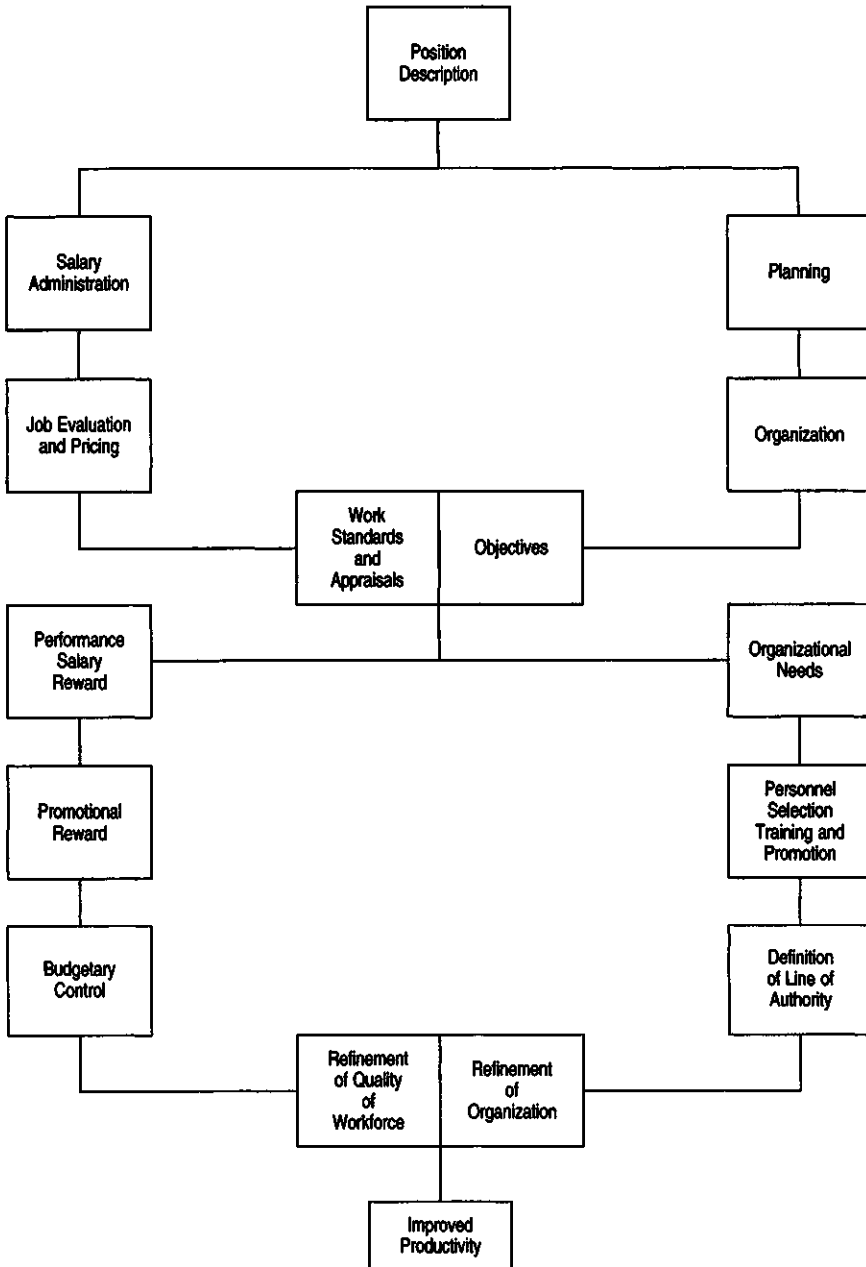
8.2.1 How are job descriptions used

One of the reasons that so many organizations have job descriptions that are not used is that they are simply unaware of their many uses. Many employers think of job descriptions only in terms of wage and salary administration, or as a necessary evil in complying with certain employment laws. But these are only two of the many practical uses for job descriptions, most of which can be grouped under the following four headings.

1. **Personnel Administration.** There is probably no better tool when it comes to human resource planning than a well-written set of job descriptions. Consider their usefulness in the following areas:

— Responsibility planning

Exhibit 2: Use of the Position Description



- Recruitment and screening
 - Hiring and replacement
 - Orientation
 - Training and development
 - Career ladders
2. **Wage and Salary Administration.** Any compensation system requires that jobs be classified and evaluated in terms that make comparisons possible. This is where good job descriptions come in. They are especially valuable in the following compensation-related activities:
- Job evaluation
 - Job classification
 - Wage and salary surveys
 - Pay structure
 - Performance appraisal
3. **Legal Guidance.** Changes in employment legislation have been frequent in recent years, and new issues—such as comparable worth—are always being tested in the courts. Job descriptions are important in complying with a number of the major pieces of government legislation, including the following:
- Fair Labor Standards Act
 - Equal Pay Act
 - Title VII of the Civil Rights Act of 1964
 - Occupational Safety and Health Act
 - Age Discrimination in Employment Act
 - Employment Security Act
4. **Collective Bargaining.** The issue of varying pay rates for similar work has often been raised by unions, who may point to job descriptions as a basis for standardizing these pay rates. Job descriptions have also been used by employers to defend themselves against what they believe are unjustified union demands for uniform rates. Good job descriptions can clarify which jobs are truly similar, and which jobs warrant different pay levels because they require different levels of skill, knowledge, or responsibility, or because they contribute to the organization goals in different ways.

8.2.2 Responsibility planning

Actually, the process of preparing job descriptions serves a useful purpose in itself, particularly if it starts at the upper levels of the organizational hierarchy. The preliminary drafts of managerial and executive job descriptions can be used as a basis for productive group discussion in which managers and executives get together to talk about each other's responsibilities. Such discussions often reveal areas in which overlapping responsibilities or confusion about the limits of responsibility are a problem, or where the organizational structure is faulty. When these problems have been solved, each manager can then repeat the process with his or her own subordinates in reviewing and discussing their job descriptions. A side benefit of this approach is that managers and supervisors are more likely to feel committed to supporting a system that they have helped to create. They are also more likely to use job descriptions for a number of the purposes outlined above, rather than letting them collect dust in a drawer.

Other uses for job descriptions are the following:

- Job posting
- Management by objective programs
- Grievance procedures
- Work flow analysis
- Organizational studies

See Appendix 14 (also see the *Toolkit CD-ROM*) for job description preparation forms.

8.3 Job Evaluation

By definition, job evaluation is the consistent, logical, and equitable analysis and measurement of job responsibilities and duties. The emphasis is put on the *job* since the focus is on duties and responsibilities relative to the firm's goals—not on the employees currently holding the job.

The objectives of job evaluation are to—

- Eliminate or decrease wage and salary inequities.
- Provide accurate data for hiring new employees.
- Assist supervisors in determining which employees qualify for promotion.
- Determine whether employees are qualified for their current jobs.
- Help train supervisors to counsel employees in order to improve job performance.

To properly introduce a job evaluation program, it is important that the details and objectives be communicated first to the managerial and supervisory group and then to the employees whose positions will be evaluated. This communication should be written and should carry the endorsement of top management.

There are various kinds of evaluation plans or systems in use in industry today. The most popular plan is termed “the point factor technique.” For the sake of brevity, this chapter only comments on the following three predominant evaluation techniques:

- Point factor
- Factor comparison
- Ranking

The point factor evaluation is based on well-defined factors or so-called common denominators that apply to the group of jobs being evaluated. The factor of education, for example, is important in determining job worth for any position. Education, as it is commonly used in job evaluation, measures the trade-training or formal knowledge (in terms of years of education) required to perform the job duties under normal supervision. This may have been acquired by education, by outside study, or by training received on jobs of lesser rank. Under this factor are varying degrees, numerically cited, that indicate the levels of education required. Under the point factor plan, when a job is rated on education, a specific numerical score is applied to indicate the required job education. The same procedure is followed in reviewing other factors required by the job as rated.

The factor comparison evaluation technique compares jobs by making judgments concerning which jobs contain more of certain appropriate factors than others. Jobs are compared to one another, one factor at a time. In one such factor comparison plan, certain *universal factors* are used: mental requirements, physical requirements, skill requirements, responsibility, and working conditions. This technique is similar to that of point factor, except that no numerical scores are used. This may prove to be a potential disadvantage because more guesswork is involved.

The third evaluation technique used is that of ranking. Under this technique, jobs are ranked without regard either to factors or to point values. Usually, the determination of job rank is based on its worth to the organization. To assist an organization wishing to rank its jobs, key or benchmark jobs are first ranked. These key jobs are ones that are common throughout industry and are more readily understood by the members involved—jobs, such as janitor, punch-press operator, or clerk/typist.

8.3.1 Internal equity

The objectives of establishing a pay structure are to maintain competitive rates of pay and to maintain differentials between jobs within the organization. This ladder is often called internal equity.

Job evaluation, which has already been discussed, has as its objective the establishment of proper job differentials. The next step then is to analyze and apply competitive pay rates to these jobs—referred to as external competitiveness.

8.3.2 External competitiveness

The approach usually taken is to make a wage or salary survey of the organization's industry and area of operation by benchmark jobs. Benchmark jobs are those that are similar enough in content to allow similar industry comparisons. In making a survey of this kind, it is very important that the comparison be made not on the basis of job title alone, but on careful consideration of job responsibilities as well.

There are many wage and salary surveys available. Employers' associations, chambers of commerce, trade associations, and consulting organizations make such surveys on a periodic basis.

Once an external comparison is completed and compared to the worth in which the evaluation measured the internal equity, a salary range can be developed.

8.4 Salary Ranges

A salary range is established to allow an individual room for growth within a job classification based on job performance over the years. Each individual range moves on an annual basis. Employee performance should be evaluated to be consistent with the company's ability to pay an appropriate salary that is commensurate with performance and that moves the individual up the salary range of the position. The ultimate goal is to ensure that a solid, competent performer is maintained at or near the average (midpoint) of a salary range that is both internally equitable and externally competitive.

8.5 Performance Reviews

The need for emphasis on performance appraisals has already been discussed. Performance appraisals serve more day-to-day purposes outside the human resources function than is generally recognized. For purposes of compensation, the performance appraisal system should help employees and managers set goals for themselves and for the

organization. Goals should be measurable and should be reassessed throughout the year, as summarized in the following sections.

8.5.1 Setting goals with subordinates

Identify goals that are commonly set within the organizational unit for the upcoming budget period. Such goals often relate to profitability, competitive position, and productivity. In addition, the goals can be educational devices to encourage and promote staff development in the following areas:

- Technological leadership
- Employee development
- Public responsibility
- Employee relations

Working organization charts should be prepared that illustrate titles, duties, relationships, and impending changes. As objectives are set for the next budget year with each person, the following should be completed:

- Subordinates should be asked to make notes on their objectives for the coming year. These objectives should cover routine duties, problem-solving goals, creative goals, and personal goals.
- Lists should be prepared of the objectives that subordinates should include, noting innovations and improvements that are needed in each function.
- In personal conferences, subordinates' objectives should be reviewed in detail, and suggestions or changes should be offered.
- Three copies of the employees' objectives should be prepared: one for the employee, one for the firm's records, one for the supervisor.
- Working from the final document, supervisors should ask what they can do to help employees accomplish their goals. Suggestions should be kept with the supervisor's copy of the goals, becoming part of the supervisor's goals.

During the year, each subordinate's goals should be checked as promised milestones are reached.

- Is the employee meeting targets?
- Should the targets be amended?
- Is the supervisor helping the subordinate?

- Use jointly agreed upon goals as tools for coaching, developing, and improving the subordinate's performance on a continuous basis. Reinforce good results by feedback of success.

8.5.2 Measure results against goals

- Near the end of a budget year, subordinates should be asked to prepare a brief statement of performance against budget using their copies of the performance budget as a guide, supplying relevant figures where applicable. Individuals should give reasons for variances and list additional accomplishments not budgeted for.
- A date should be set to go over reports in detail with subordinates.
- The evaluator and subordinate should reach agreement on just how good job performance was, and where improvement should be made.
- Other concerns may be covered at this time—job, opportunity, job-related personal problems.
- Following evaluation, the stage is set for establishing the performance budget for the next year.

8.6 Merit Guides

Since the fundamental concept of the salary program is that individual pay should be based on progress and performance improvement, the performance evaluation becomes a salary recommendation or discussion. Certainly for this philosophy to be meaningful, the individual salary decisions must be appropriately related to judgments about employee performance results. The responsibility for successful achievement of this key relationship, both in actuality and as perceived by employees, rests with the immediate supervisor.

Once an employee's performance results have been measured, the next step is to select the appropriate merit treatment for that person. To assist the supervisor in this decision, a set of percentage and frequency guides should be established for each job classification. The term *guide* is used to distinguish these from rules. The indicated percentages and frequencies are intended to provide a guide for management discretion, not to establish rules within which supervisors must operate. Guides are never the reason for giving or not giving an increase.

Increase guides cannot be effectively applied simply on the basis of performance and the position of the current salary in the range. One additional piece of information is needed—the employee's rate

of performance progress. This factor is important in determining when an increase should be given.

The appropriate use of any guide links performance judgments to individual salary progression. The progression through the salary range should be emphasized as a rate, and the individual's position in the salary range should depend on performance.

Those employees who consistently far exceed performance expectations progress to the upper portions of their salary range, while employees who make steady performance improvement generally retain their position within their salary range. According to this philosophy, it is necessary for the supervisor to determine each employee's performance relative to their peers in addition to their performance results against the established job standard and agreed-upon objectives. These two ingredients will determine precisely the position in the salary range to which an employee will progress and how long it will take the employee to get there. Individual salary increase decisions made by the employee's supervisor will reflect that result.

9. BENEFIT PROGRAMS

9.1 Objectives of a Benefits Plan

Employees provide valuable skills and knowledge that are essential to help a firm grow and prosper. For that work, employees are compensated not only with salary but also with a total benefits program.

The objective of a total benefits program should be able to give employees and their families three things:

1. Protection in time of financial need
2. Security to help them build their personal savings
3. An opportunity to grow in their careers and enjoy a richer life while they are away from their jobs

9.2 What You Can Afford

All payments made to employees for time not worked, along with additions to pay for the employees' benefit, are termed "benefits" or "fringe benefits." In the past, these benefits accounted for only a small part of total compensation—less than 5 percent. In recent years, benefits have become a popular means of attracting and retaining good workers. This development, along with the increase in collective bargaining activity and the advantageous treatment given to benefits under federal tax

laws, has gradually given rise to an employment picture in which certain benefits are now almost universally taken for granted. Benefit costs now account for more than one-third of payroll outlays.

There are many misconceptions in the marketplace today relative to what companies must provide by way of benefits to its employees. Social Security and Medicare payments, unemployment insurance, and workers' compensation (mandated by the individual states), serve as the only required benefits. Recent legislation relative to the American with Disabilities Act and the Family Medical Leave Act stipulates certain policies relative to the granting of time off for employees, but since these are leaves "without pay," they are not considered benefits.

There are basically three types of cost considerations in structuring an employee benefit plan. The most important consideration with respect to profitability is the cost to the organization. There are also two employee-related costs. There are costs to the employee in terms of the payroll deductions required for participation in benefit programs and the amount of other out-of-pocket costs the employee incurs to purchase coverages that are not provided in the benefit and service package. Also, there is the important consideration of the value to the employee. Any benefit program will be a waste of money if the employees perceive no usefulness from the benefits and services offered.

Any benefit program will have to include the mandatory costs of legislated programs such as social security, unemployment compensation, and workers' compensation. Nevertheless, these programs should be carefully considered to avoid any overlap in coverage. Private plans can be tailored to supplement public assistance and as the latter is increased, some reduction in organization benefits can be considered. Pension plans can be integrated with Social Security benefits. Health insurance can carve out Medicare eligibles. Disability insurance can be integrated with workers' compensation. Educational assistance can be made conditional upon the use of available veterans assistance.

A benefit plan should also be cost-effective in terms of employee contributions. This would entail the standard practice of having deductibles for health insurance coverage and schedules of maximum payments and copayments for certain coverages. In other areas, educational assistance can require that the courses taken have some relation to job duties. Also, it may not be economical to provide a standard amount of life insurance for all employees. Younger employees or single workers may not need coverage as extensive as that required by workers with families or older employees.

One way to make sure that benefits are cost-effective is to provide the benefits and services most valued by employees. Benefits systems have tended to grow and change in response to outside events rather than for the purpose of meeting changed employee needs or improving

organizational effectiveness. The most frequent example of this error in thinking is illustrated by similar organizations attempting to duplicate each other's benefit packages. What is good for one company may not always hold true for the next organization.

9.3 Cafeteria Plans

According to a number of surveys, employers are offering increased flexibility to make what are termed "cafeteria plans" more valuable to employees. The cafeteria approach to employee compensation is a method of providing a flexible benefits and services program. Employees receive a specific value for the amount of benefits they may choose from a menu of different items. Usually, there is a core of benefits that the employee must accept. For most other benefits, the employee may pick and choose—or take the cash. The employee picks what benefits he or she wants, provided that the maximum dollar amount allocated to the individual is not exceeded. Some benefits, such as pensions, must be kept in the core of the mandatory benefits because the law requires it.

The advantage of the cafeteria or flexible benefits approach for meeting the demands of a changing workforce is apparent. The established, career-minded employee may be interested in pensions; the traditional one-worker family with two children may not want a lot of group health insurance; one-half of a two-worker family may not be interested in any group insurance at all; the single person may want extra vacation time.

The cafeteria-style benefit plan is highly touted among small businesses today because it enables the employees to participate by purchasing medical, dental, and optical benefits, as well as child care, while paying for these items with pretax dollars.

10. FLEXIBLE WORK ARRANGEMENTS

The objective of any benefit program is to create more satisfied employees, thereby improving performance and positively affecting the bottom line. It is short-sighted to view the costs of providing flexible work arrangements without weighing in the many benefits to the company.

These benefits include managing diversity, enhancing the work-family-life balance, improving the level of staff retention, gaining a recruitment advantage, managing seasonality, improving client services, improving productivity, facilitating education, reducing office space and capital requirements, reducing absenteeism, and enhancing morale.

10.1 Types of Flex Arrangements

Flexible work arrangements don't mean the same thing for every employer. As the name implies, they should create a win-win arrangement which meets the needs of both employer and employee. In each situation this may result in flextime, compressed workweeks, regular part-time, job sharing, work sharing, telecommuting, or sabbaticals.

Given an increasingly diverse workforce, different flex arrangements may be provided to different employees without being discriminatory. In reality, many employees prefer the structure of a regular schedule in an office environment. Both men and women have benefited from such arrangements, particularly in solving child-care or elder-care problems. Flexible arrangements also work in positions of responsibility and generally are not disruptive if managed well. Supervision of flexible work arrangements requires a new kind of management style that emphasizes results rather than oversight, an approach that is necessary to compete in the twenty-first century.

10.2 Flextime

Flextime allows employees to choose their starting and quitting times within limits set by management. A "core time" may be established during which all employees are expected to be present with all other time identified as "flexhours." This requires trust and is a means of empowering staff. The business needs of the company, however, are paramount. Flex programs may need curtailing during busy seasons. Open communication is necessary to ensure that some employees are not overburdened by another's flex schedule.

10.3 Compressed Workweeks

A compressed workweek is a standard workweek that is compressed into fewer than five days. Organizations need to determine if such a schedule would be implemented on an individual basis, within a department, or company-wide. Demographics of the workforce is an important consideration as significantly longer workdays may present problems for parents with younger children or older employees.

Federal and state labor laws should be closely reviewed. The Fair Labor Standards Act requires most employers to pay overtime after forty hours. In certain states overtime must be paid for hours worked in excess of eight a day. Companies requiring full-service coverage over five days may overlap shifts or stagger schedules so that all positions remain covered each day. It is important to ensure that such schedules

coincide with transit system and public transportation availability. Compressed schedules may also require companies to revise vacation and holiday policies in terms of hours rather than days off.

10.4 Job Sharing

Job-sharing and work-sharing arrangements require regular part-time personnel who are part of the core work force and routinely work less than a normal workweek. For most, a part-time arrangement is transitory—allowing them to balance work with some other aspect of their life. Policies should clearly define the circumstances for returning to full-time status in the future and the effect part-time status has on the company's fringe benefit plans.

Job sharing splits the responsibilities of a full-time position. This requires a team approach and good communication. It can also provide valuable mentoring and cross-training of skills as job sharers tend to supervise each other's work. These attributes improve quality assurance and encourage self-empowerment and self-supervision.

10.5 Telecommuting

Flexplace, or telecommuting, refers to staff working in a remote location (generally at home) part of the time. Telecommuting is advantageous where some types of work can be done more effectively outside the office environment with its ringing telephones, distractions, and interruptions.

Telecommuting requires an employee be self-motivated and disciplined. Employees need to evaluate their own strengths and weaknesses and decide if lack of interaction with others enhances or detracts from job productivity and satisfaction. Such arrangements should only be considered after employees are experienced in their duties and familiar with policies and procedures.

Employers should consider the confidentiality of company and customer data kept off-site and whether additional insurance coverage may be needed. Remote locations generally need an investment in technology and office furnishings and policies should address who is responsible for these costs. Technology may include computer, modem, specific software, printer, scanner/fax/copier, additional phone lines, and courier services. Using appendix 20, "Checklist for an Office at Home" (on the *Toolkit CD-ROM*), is a good way to establish basic home office criteria.

10.6 Leaves and Sabbaticals

Leaves and sabbaticals are authorized paid or unpaid periods of time away from work without loss of employment rights. In many cases, the Family and Medical Leave Act now mandates unpaid leave rights for the birth or placement for adoption or foster care of a child, or for a serious health condition of any family member. Sabbaticals may also be granted to long-time employees to restore vitality and prevent burn-out and stress-related illnesses. Employers need to consider how to cover an employee's work during a leave and what positions will be available when an employee is prepared to return full-time.

11. TERMINATION

11.1 Performance Evaluation and Documentation

Measurement of performance is one of the most crucial tasks performed by managers and supervisors. Although performance evaluation may seem to be directly related only to discussions that occur at salary evaluations, it is a topic relevant to many other day-to-day activities in the workplace. Performance evaluation is actually an ongoing communication effort, beginning with the initial job interview, and continuing throughout the employment cycle.

An employee's history of not meeting performance requirements is often the cause for termination. Failure to communicate performance requirements fully is often the underlying problem if a company is faced with employment-related litigation. Inability to meet performance standards must be fully documented in order to support a termination decision. In order to reduce the potential for any future problems, it is essential that performance requirements, and the employee's record of meeting or not meeting those requirements, be communicated at the time an employee is hired, regularly during employment, and again at employment termination.

11.2 Guidelines for Termination

Prior to terminating an employee, the company should consider several questions:

- Does the organization have options other than termination?
- Should management seek a voluntary resignation instead of a termination accompanied by the employee's signed release of all claims?

- How should the grounds for dismissal be worded in order to avoid any potential discrimination lawsuit?
- Should a peer review board or committee be instituted to resolve disputes over potential terminations?
- What individual within the organization should notify the employee of the impending termination?
- When should a terminated employee be physically released from the organization?
- How are inquiries from the outside handled and by whom?
- What impact will a termination have on the company image, operations, and remaining employee morale?
- What sorts of severance benefits, if any, should be offered the terminatee, and under what circumstances?
- What formula should be developed and used to compute the severance and compensation package?
- What company benefits are to continue after the termination and for how long?
- Should job outplacement be considered for the terminated employee?

11.3 Prior to Finalizing a Termination Decision

If termination is being considered due to a violation of company policy, it is imperative that the company adhere to the procedures listed below. Following these procedures will help to protect the company's position if the employee were to sue for wrongful discharge.

- Document all pertinent facts. Documentation of policy infractions is the basis for a "good cause" defense. This documentation should begin at the time infractions, and related disciplinary actions, present the possibility of dismissal. Every violation of policy, regardless of how trivial, should be recorded in the employee's personnel file. All records of violations should fully indicate the resulting disciplinary action, whether formal or informal.
- Use progressive discipline. Establish formal, written guidelines for discipline and follow them rigorously. Under a typical progressive discipline system, an employee will be given an oral warning for the first offense, a written warning for the second, and suspension or termination for the third. If a suspension procedure is implemented,

termination would not normally occur until the fourth offense. The system should also provide for immediate dismissal under certain conditions, such as gross unprofessional conduct, or other activities that management deems highly inappropriate or damaging.

If termination is considered due to repeated poor performance, the performance evaluation process must be scrutinized. In order to defend its position, management should be able to answer the following questions based upon the company's performance evaluation process as it relates to the terminated employee:

- Is it obvious what activity/job/position is being evaluated?
- Are the performance objectives explicit, fair, and realistic?
- Is the evaluation objective, fair, and unbiased as to sex, race, religion, handicap, and national origin?
- Was the employee told of the performance evaluation and notified of the functional areas where performance needed improvement?
- What performance standards are used to evaluate the employee's performance?
- Are the performance criteria and/or performance standards ever changed? If so, the following questions must also be addressed:
 - Are the changes explicitly and formally communicated to the affected employee?
 - Are copies of these communications permanently maintained?
- Are performance standards based on the job analysis?
- Are the same job performance standards applied to all employees holding similar jobs?
- Were the evaluations consistent with sound personnel practices?
- Were the evaluations done by a person thoroughly familiar with the terminated employee's performance?
- Has the employee been given appropriate assistance and guidance toward reaching objectives?
- Were the necessary resources made available to reach the established objectives and standards?
- Does the company provide necessary training to enable the employee to keep relevant knowledge up-to-date?
- Were unsatisfactory performance issues discussed with the employee at reasonable intervals?
- Was the employee advised of the consequences of continued unsatisfactory performance?

- Were deadlines provided for remedial actions?
- Is the company's performance evaluation program formal and has it been formally communicated to employees?
- Have employees ever been evaluated as satisfactory even though the performance was poor, unsatisfactory, or marginally satisfactory?
- Is a complete and accurate file of each employee's performance evaluations maintained? If so, also address the following:
- Does this file support the termination?

Answers to these questions should enable management to assess its position in potential termination based on poor or unsatisfactory performance. Questions that cannot be answered positively and explicitly must alert management to reevaluate its stand on a discharge on grounds of unsatisfactory performance. See Hiring Foreign Nationals section 2.3.6 for special considerations regarding terminating H-1B employees.

11.4 After the Decision to Terminate Has Been Finalized

After the termination decision has been made, several steps should be taken to prepare for the termination interview:

- Check whether there is any employment contract for a definite term.
- Carefully review each provision in the employee handbook.
- Make sure that an impartial third party has reviewed all facts.
- Determine the reason that is to be given for the termination.
- Draft the termination letter.
- Keep a record of the termination notice and all termination-related documents.
- Notify those who are likely to be affected by the termination.
- Employees who could potentially be harmful to the company must be asked, and should be asked, to leave the premises soon after termination notice is given. Compensation in lieu of advanced notice should be arranged.
- Exercise extreme confidentiality in handling terminations.
- Be prepared to ensure a replacement for the terminated employee if the position is not being abolished.
- Scrutinize the details of the severance package.
- Be sensitive to the time in which the employee is notified.

11.5 During the Termination Interview

During the termination interview, several important steps should be followed:

- Come to the point within the first two to three minutes.
- Outline and put into a logical order all the relevant reasons for the termination.
- Keep the termination interview brief and businesslike.
- Determine the terms to be used for the employee's departure.
- Preferably, conduct the exit in a neutral territory.
- Inform the employee of the "bad news" in a way that will alleviate trauma.
- Do not try to compensate the terminated employee for the "psychological shock" of losing the job.
- Offer assistance in helping this person find another job.

11.6 After the Termination Interview

Once the termination interview is complete, be sure the following additional steps are completed:

- Notify all the departments within your organization that are apt to be affected by the employee's departure.
- Have the employee return all company property and make sure that the employee's financial obligations to the firm are cleared.
- Find out whether the employee has any vested rights to the pension, profit sharing, or other related plans.
- Inform the departing employee the kind of contact the company will allow from them after he or she leaves.
- Inform the employee what to expect in terms of future references.
- If you are to assist with outplacement, stay in contact and follow through accordingly.

Perform an exit interview, if possible. See appendixes 21 through 23 (on the *Accountant's Business Manual Toolkit CD-ROM*) for examples of exit interview and related termination forms.

Employee terminations are an extremely serious and sensitive subject and should be treated as such by all managers, executives, and owners. Whether a termination results in a potential lawsuit for wrongful

discharge will often depend on how the termination process is handled. Lawsuits are not only expensive, but are embarrassing to both the terminating organization and the terminated employee. Every effort should be made to ensure that terminations, when inevitable, have been properly handled by management.

SUGGESTED REFERENCES

For publications devoted to specific aspects of human resources and employment law, it is suggested that the reader refer to a specific legal publisher's site or conduct a Web search. Useful sites include www.aspenpublishers.com, www.bender.com, www.cch.com, and www.westgroup.com.

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FEDERAL INDIVIDUAL TAX NOTES

1. TAX RELIEF RELATED TO HURRICANE

KATRINA

1.1 Introduction

1.2 IRS Relief

1.2.1 Additional time to file

1.2.2 Leave donation programs for Katrina victims

1.2.3 IRS expedites charitable applications

1.2.4 Low-income housing credit available for housing Katrina victims

1.2.5 Katrina victims' areas expanded

1.2.6 Removal of aviation fuel

1.2.7 Additional time for tax-exempt bond issuers

1.2.8 AICPA and the IRS to help Katrina victims

1.3 Katrina Emergency Tax Relief Act of 2005 (P.L. 109-73)

1.3.1 Special rules for use of retirement funds for relief relating to Hurricane Katrina

1.3.1.1 Penalty-free withdrawals from retirement plans for Katrina relief

1.3.1.2 Recontributions of withdrawals for home purchases cancelled due to Hurricane Katrina

1.3.1.3 Loans from qualified plans relating to Hurricane Katrina

1.3.1.4 Provisions relating to plan amendments

1.3.2 Employment relief

1.3.2.1 Work opportunity tax credit for Katrina employees

1.3.2.2 Employee retention credit for employers affected by Hurricane Katrina

1.3.3 Charitable giving incentives

1.3.3.1 Temporary suspension of limitations on charitable contributions

1.3.3.2 Additional exemption for housing Hurricane Katrina displaced victims

1.3.3.3 Increase in standard mileage rate for charitable use of vehicles

1.3.3.4 Mileage reimbursements to charitable volunteers excluded from gross income

1.3.3.5 Charitable deduction for contributions of food inventory

1.3.3.6 Charitable deduction for contributions of book inventories to public schools

- 1.3.4 Additional tax relief provisions
 - 1.3.4.1 Exclusions of certain cancellations of indebtedness by reason of Hurricane Katrina
 - 1.3.4.2 Suspension of limitations on personal casualty losses
 - 1.3.4.3 Extended tax filing deadlines relating to Hurricane Katrina
 - 1.3.4.4 Extension of replacement period for nonrecognition of gain for property located in Katrina disaster area
 - 1.3.4.5 Special rule for determining earned income
 - 1.3.4.6 IRS authority to make adjustments regarding taxpayer dependency status

2. INDIVIDUAL INCOME DEVELOPMENTS

- 2.1 Principal Residence Gain Exclusion
 - 2.1.1 Background
 - 2.1.2 Pro-rata gain exclusion
 - 2.1.3 Sale of residence acquired in like-kind exchange within five years of sale
- 2.2 Recapture of Prior Section 197 Amortization of Intangibles
 - 2.2.1 Background
 - 2.2.2 Disposition of multiple amortizable Section 197 intangibles
- 2.3 Gross vs. Net Reporting on Taxable Legal Awards
 - 2.3.1 Background
 - 2.3.2 Second Circuit requires gross reporting
 - 2.3.3 Sixth Circuit allows netting
 - 2.3.4 U.S. Supreme Court decision
 - 2.3.5 American Jobs Creation Act of 2004 change
- 2.4 Carryover Basis for Annuity Contracts
 - 2.4.1 Background
 - 2.4.2 IRS confirms step-up in basis
 - 2.4.3 Annuity exchange defeats step-up
- 2.5 Personal Injury Awards
 - 2.5.1 Background
 - 2.5.2 Physical injury requirement
 - 2.5.3 Prejudgment interest deemed taxable
 - 2.5.4 Amounts received for emotional distress deemed taxable

3. INDIVIDUAL DEDUCTION DEVELOPMENTS

- 3.1 Hobby Losses
 - 3.1.1 Background

- 3.1.2 Racecar activity held to be a business
- 3.1.3 Combining activities when testing hobby loss rules
- 3.2 Passive Loss Developments
 - 3.2.1 Background
 - 3.2.2 Material participation
 - 3.2.3 Rental activities
 - 3.2.4 Incidental rental treated as a business
 - 3.2.5 Grouping of self-rentals
- 3.3 Twelve-month Deduction Rule for Accrual Method Taxpayers
 - 3.3.1 Background
 - 3.3.2 Details of final regulations
- 3.4 Like-kind Exchanges
 - 3.4.1 Background
 - 3.4.2 Determining like-kind product classes
 - 3.4.3 Application of like-kind exchange to principal residence
- 3.5 Alimony
 - 3.5.1 Background
 - 3.5.2 No payments after death of recipient
- 3.6 Clean Fuel Vehicle Deduction
 - 3.6.1 Background
 - 3.6.2 2005 Energy Act repeals clean fuel vehicle deduction
 - 3.6.3 IRS updates list of qualifying vehicles
- 3.7 Sales Tax on Schedule A
 - 3.7.1 Background
 - 3.7.2 Deduction for sales taxes allowed on Schedule A
 - 3.7.3 IRS guidance
- 3.8 Itemized Deductions: Interest Expense
 - 3.8.1 Background
 - 3.8.2 Treating dividend income as investment income
- 3.9 Itemized Deductions: Charitable Contributions
 - 3.9.1 Background
 - 3.9.2 Contributions of intellectual property
 - 3.9.3 Charitable contributions of vehicles
- 3.10 Itemized Deductions: Education Expenses
 - 3.10.1 Background
 - 3.10.2 MBA coursework allowed as a deduction
- 3.11 Itemized Deductions: Club Dues
 - 3.11.1 Background
 - 3.11.2 Deductibility of country club dues disallowed to golf coach

4. RETIREMENT PLAN ISSUES

4.1 Qualified Plan Limits

- 4.2 Bankruptcy Protection
 - 4.2.1 Background
 - 4.2.2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
 - 4.2.3 U.S. Supreme Court previously ruled IRAs protected in bankruptcy
- 4.3 Roth Elective Deferral Plans
 - 4.3.1 Background
 - 4.3.2 Key points of proposed regulations

5. FRINGE BENEFITS

- 5.1 Nonqualified Deferred Compensation Plans
 - 5.1.1 Background
 - 5.1.2 Comprehensive rules for nonqualified deferred compensation arrangements enacted
 - 5.1.3 Definition of a nonqualified deferred compensation plan
 - 5.1.4 Effective date and transition rules
- 5.2 Health Savings Accounts (HSAs)
 - 5.2.1 Background
 - 5.2.2 Eligible individual
 - 5.2.3 High deductible health plan
 - 5.2.4 The Health Savings Account
 - 5.2.5 Maximum HSA contribution
 - 5.2.6 Employer contributions
 - 5.2.7 Withdrawals from the HSA
 - 5.2.8 Further IRS guidance
 - 5.2.9 Guidance on S corporation and partnership contributions
 - 5.2.10 Comparability rules for employer contributions
- 5.3 De Minimis Fringes
 - 5.3.1 Background
 - 5.3.2 Holiday gift coupons deemed taxable

6. TAX CALCULATIONS AND TAX CREDITS

- 6.1 Alternative Minimum Tax
 - 6.1.1 Background
 - 6.1.2 90 percent limit on foreign tax credit repealed
 - 6.1.3 Business credits allowed against AMT
- 6.2 Farm Income Averaging
 - 6.2.1 Background
 - 6.2.2 Farm income averaging and the AMT
- 6.3 FICA and FUTA on ISOs
 - 6.3.1 Background
 - 6.3.2 FICA and FUTA eliminated on ISOs

- 6.4 Child Tax Credit
 - 6.4.1 Background
 - 6.4.2 Change to *qualifying child* definition
- 6.5 Child Dependent Care Credit
 - 6.5.1 General rules
 - 6.5.2 Qualifying Individual
 - 6.5.3 Maximum credit allowed
 - 6.5.4 Requirement that taxpayer maintain a home eliminated
- 6.6 Adoption Credit
 - 6.6.1 Background
 - 6.6.2 Inflation-adjusted amounts for 2005
- 6.7 Hope and Lifetime Learning credits
 - 6.7.1 Background
 - 6.7.2 Inflation-adjusted amounts for 2005
 - 6.7.3 Pre-AGI deduction for higher education tuition
- 6.8 Alternative Motor Vehicle Credit
 - 6.8.1 New alternative motor vehicle credit added by 2005 Energy Act
 - 6.8.2 Qualified fuel cell motor vehicle
 - 6.8.3 Advanced lean burn vehicle credit
 - 6.8.4 Hybrid vehicle credit
 - 6.8.5 Alternative fuel vehicle credit
- 6.9 Residential Energy Credits
 - 6.9.1 Background
 - 6.9.2 Residential energy credits added by 2005 Energy Act
 - 6.9.3 \$500 lifetime credit
 - 6.9.4 30 percent credit for residential energy efficient property

7. FILING AND COMPLIANCE MATTERS

- 7.1 Estimated Tax Payments
 - 7.1.1 Background
 - 7.1.2 Higher income taxpayers
- 7.2 Impact of Uniform Definition of *Child*
 - 7.2.1 Head of household
- 7.3 Dependent Definition: 2005 and After
 - 7.3.1 Background
 - 7.3.2 Qualifying child
 - 7.3.3 Tie-breaking rules
 - 7.3.4 Qualifying relative
- 7.4 Phase-out of Personal Exemptions and Itemized Deductions
 - 7.4.1 Phase-out of personal exemptions
 - 7.4.2 Phase-out of itemized deductions

FEDERAL INDIVIDUAL TAX NOTES

7.5 Tax Shelter Penalties

7.5.1 Penalty for promoting abusive tax shelters

7.6 Reportable Transaction Penalties

7.7 Extension to File Individual Tax Return

7.7.1 Background

7.7.2 Automatic six-month extension allowed

7.8 Dischargeability of Taxes in Bankruptcy

1. TAX RELIEF RELATED TO HURRICANE KATRINA

1.1 Introduction

Both the IRS and Congress have issued relief provisions aimed at helping the victims of Hurricane Katrina. The IRS has relaxed restrictions dealing with hardship distributions from retirement plans, has extended various filing deadlines, and has issued an exception to the general assignment-of-income principles associated with leave-based donations made to qualified charities.

Meanwhile, Congress passed the Katrina Emergency Tax Relief Act of 2005 (H.R. 3768), with the legislation enacted by the President's signature on September 23, 2005. This legislation contains provisions designed to provide immediate relief to individuals and businesses. However, it is expected that Congress will take up a second Relief Act, which will comprise stimulus provisions, including accelerated depreciation and enhanced expensing to encourage rebuilding of the area affected by Katrina.

1.2 IRS Relief

In the wake of the disaster caused by Hurricane Katrina and its aftermath, the IRS has released a number of special rulings designed to ease the tax burden for hurricane victims.

1.2.1 Additional time to file

For any return, tax payment, or tax deposit with an original or extended due date that fell on or after August 29, 2005, taxpayers located in areas designated as federal disaster areas have until January 3, 2006, to complete action (IR-2005-96, 9/8/05). This date was later extended from January 3, 2006, to February 28, 2006 (IR-2005-112, 9/28/05).

1.2.2 Leave donation programs for Katrina victims

Employees can donate their vacation, sick, or personal leave in exchange for employer cash payments made to qualified tax-exempt organizations providing relief for the victims of Hurricane Katrina (IR-2005-97, 9/8/05). Employees do not have to include the donated leave in their income and employers are permitted to deduct the amount of the cash payment.

1.2.3 IRS expedites charitable applications

Those who want to set up tax-exempt organizations to benefit Katrina victims can use a speedy application process (IR-2005-93, 9/6/05). New organizations should apply for tax-exempt status by filing IRS Form 1023, "Application for Recognition of Exemption," and write at the top of the form "Disaster Relief, Hurricane Katrina."

1.2.4 Low-income housing credit available for housing Katrina victims

The IRS will waive the low-income housing tax credit rules that would normally prohibit owners of low-income housing from providing housing to victims of Hurricane Katrina who do not qualify as low-income (IR-2005-92, 9/2/05). The action expands the availability of housing for disaster victims and their families.

1.2.5 Katrina victims' areas expanded

In addition to the 31 Louisiana parishes, 15 Mississippi counties, and 3 Alabama counties originally designated as areas qualifying for tax relief, the IRS has extended the number of areas to include 33 additional parishes in Louisiana, 37 additional counties in Mississippi, 3 additional counties in Alabama, and 3 counties in Florida (IR-2005-91, 9/2/05). See the detailed list of these areas at section 1.3, herein.

1.2.6 Removal of aviation fuel

To alleviate local fuel shortages caused by Hurricane Katrina, the IRS will permit vehicles registered for highway use to remove aviation-grade kerosene (aviation fuel) from certain airports without violating the favorable excise tax treatment to which those airport fueling terminals are currently entitled (IR-2005-95, 9/7/05). This relief applies to Louis Armstrong New Orleans International Airport (T-72-LA-2356), Memphis International Airport (T-62-TN-2212); Dallas Love Field Airport (T-75-TX 2663); Dallas Fort Worth International Airport (T-75-TX-2673); and George Bush Intercontinental Airport, Houston (T-76-TX-2818), beginning September 2, 2005, through November 1, 2005.

1.2.7 Additional time for tax-exempt bond issuers

Issuers affected by Hurricane Katrina who have an original filing or payment deadline between August 29, 2005, and December 31, 2005, have until January 3, 2006, to file the return and make any payment due with the return (IR-2005-98, 9/8/05). Tax-exempt bond issuers entitled to the extension should note in red ink at the top of their

return: "Hurricane Katrina Relief." The details of this relief may be found in Announcement 2005-69.

1.2.8 AICPA and the IRS to help Katrina victims

The IRS announced that it will partner with the AICPA to provide assistance to taxpayers at local disaster recovery centers established by the Federal Emergency Management Agency (FEMA) (IR-2005-94, 9/7/05). CPA volunteers will join IRS employees to staff disaster recovery centers to help victims with their financial recovery.

1.3 Katrina Emergency Tax Relief Act of 2005 (P.L. 109-73)

On September 23, 2005, the President signed the Katrina Emergency Tax Relief Act of 2005. A number of key definitions and designations are important in applying the provisions of this legislation.

Definitions Associated with Katrina Emergency Tax Relief Act of 2005

Hurricane Katrina disaster area. Defined as the area with respect to which a major disaster was declared by the President before September 14, 2005, under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of Hurricane Katrina [Act Sec. 2(1)].

Core disaster area. Defined as that portion of the Hurricane Katrina disaster area determined by the President to warrant individual or individual and public assistance from the federal government [Act Sec. 2(2)].

Observation: The core disaster area does not include those parishes or counties designated as eligible for public assistance only. Practitioners will need to be alert to the fact that the provisions of the legislation affect three categories: (1) taxpayers in the Hurricane Katrina disaster area (all locations listed below), (2) taxpayers in the core disaster area (those parishes and counties designated for individual assistance), and (3) all taxpayers, regardless of location.

According to information on the FEMA Web site and IRS guidance dealing with areas entitled to disaster area filing and payment

relief, the following parishes and counties are treated as the Hurricane Katrina disaster area under the Act:

Louisiana: The 31 parishes designated for individual assistance: Acadia, Ascension, Assumption, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Pointe Coupee, Plaquemines, St. Bernard, St. Charles, St. Helena, St. James, St. John, St. Mary, St. Martin, St. Tammany, Tangipahoa, Terrebonne, Vermilion, Washington, West Baton Rouge and West Feliciana. *The 33 Louisiana parishes designated for public assistance:* Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Caldwell, Catahoula, Claiborne, Concordia, Desoto, East Carroll, Evangeline, Franklin, Grant, Jackson, LaSalle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, St. Landry, Tensas, Union, Vernon, Webster, West Carroll and Winn.

Mississippi: The 47 Mississippi counties designated for individual assistance: Adams, Amite, Attala, Claiborne, Choctaw, Clarke, Copiah, Covington, Franklin, Forrest, George, Greene, Hancock, Harrison, Hinds, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kemper, Lamar, Lauderdale, Lawrence, Leake, Lincoln, Lowndes, Madison, Marion, Neshoba, Newton, Noxubee, Oktibbeha, Pearl River, Perry, Pike, Rankin, Scott, Simpson, Smith, Stone, Waithall, Warren, Wayne, Wilkinson, Winston and Yazoo. *The 35 Mississippi counties designated for public assistance:* Alcorn, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Clay, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Itawamba, Lafayette, Leflore, Lee, Marshall, Monroe, Montgomery, Panola, Pontotoc, Prentiss, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster and Yalobusha.

Alabama: The 10 Alabama counties designated for individual assistance: Baldwin, Choctaw, Clarke, Greene, Hale, Mobile, Pickens, Sumter, Tuscaloosa and Washington. *The 12 Alabama counties designated for public assistance:* Bibb, Colbert, Cullman, Jefferson, Lamar, Lauderdale, Marengo, Marion, Monroe, Perry, Wilcox and Winston.

Florida: There are 11 Florida counties designated for public assistance: Monroe, Broward, Miami-Dade, Bay, Collier, Escambia, Franklin, Gulf, Okaloosa, Santa Rose and Walton.

1.3.1 Special rules for use of retirement funds for relief relating to Hurricane Katrina

1.3.1.1 Penalty-free withdrawals from retirement plans for Katrina relief

The legislation allows up to \$100,000 in “qualified Hurricane Katrina distributions” from retirement plans to be exempt from the 10 percent early withdrawal penalty of IRC Sec. 72(t).

A “qualified Hurricane Katrina distribution” is any distribution:

1. From an “eligible retirement plan” defined as:
 - a) An IRA,
 - b) An IRA annuity, other than an endowment contract,
 - c) A Section 401(a) qualified trust,
 - d) A Section 403(a) qualified annuity plan,
 - e) A Section 457(b) eligible deferred compensation plan maintained by a governmental employer, and
 - f) A Section 403(a) annuity contract.
2. Made on or after August 25, 2005, and before January 1, 2007,
3. To an individual whose principal place of abode on August 28, 2005, was located in the Hurricane Katrina disaster area, and
4. An individual who sustained an economic loss due to Hurricane Katrina.

Taxpayers are allowed to recontribute qualified Hurricane Katrina distributions to eligible retirement plans or IRAs tax-free at any time during the three-year period beginning on the day after the date of the distribution, with the aggregate amount of such recontributions limited to the aggregate amount of the qualified Hurricane Katrina distributions made to the taxpayer.

Taxpayers are also allowed to include qualified Hurricane Katrina distributions in taxable income on a pro-rata basis over the three-taxable-year period beginning with the year the distribution is received. Taxpayers are allowed to elect not to have the three-year income-averaging provision apply.

Example. Linda receives a \$60,000 qualified Hurricane Katrina distribution during 2006 for personal living expenses. Unless Linda elects otherwise, the \$60,000 distribution will result in \$20,000 of income being reported in each of her 2006, 2007 and 2008 Forms 1040.

1.3.1.2 Recontributions of withdrawals for home purchases cancelled due to Hurricane Katrina

The legislation allows specific retirement plan or IRA withdrawals for home purchases that were cancelled due to Katrina to be repaid to a qualified plan or IRA tax-free and without penalty. Examples of such

specific withdrawals include hardship distributions from a qualified plan to purchase a home or IRA withdrawals under the first-time homebuyer rule.

A qualified distribution amount must have been received by the taxpayer after February 28, 2005, and before August 29, 2005, with the distribution intended to be used to purchase or construct a principal residence in the Katrina disaster area, with the purchase or construction not occurring due to the Katrina event.

1.3.1.3 Loans from qualified plans relating to Hurricane Katrina

The legislation allows amounts withdrawn as a loan from a qualified employer plan to be increased to the amount of \$100,000 (normally \$50,000) or the greater of \$10,000 or the present value of the employee's nonforfeitable accrued benefit under the plan (normally the greater of \$10,000 or one-half of the present value) for victims of Katrina. Additionally, a one-year postponement of payments for existing plan loans is allowed.

A qualified individual for purposes of this provision means an individual whose principal place of abode on August 28, 2005, was located in the Katrina disaster area and who sustained an economic loss by reason of Katrina.

1.3.1.4 Provisions relating to plan amendments

The legislation allows a qualified plan or IRA to implement legislative or regulatory changes associated with Katrina relief without first having to amend the qualified plan or IRA itself.

1.3.2 Employment relief

1.3.2.1 Work opportunity tax credit for Katrina employees

A Hurricane Katrina employee is treated as a member of a targeted group for purposes of the work opportunity tax credit. Such an employee is defined as any individual who on August 28, 2005, had a principal place of abode in the Katrina core disaster area and who is hired during the two-year period beginning on August 28, 2005, for a position where the principal place of employment is located in the core disaster area, or an employee who on August 28, 2005, had a principal place of abode in the core disaster area and who was displaced from that abode because of Katrina and who was hired during the period beginning on August 28, 2005, and ending on December 31, 2005.

1.3.2.2 Employee retention credit for employers affected by Hurricane Katrina

A new tax credit is added, computed as 40 percent of the first \$6,000 of qualified wages per employee paid by an eligible employer to an eligible employee.

An eligible employer is one which conducted an active business on August 28, 2005, in a Katrina core disaster area and for whom the business is operable on any day after August 28, 2005, and before January 1, 2006, because of Katrina damage.

Caution

The credit is only allowed for small businesses that employed an average of 200 or less employees on business days during the taxable year.

1.3.3 Charitable giving incentives

1.3.3.1 Temporary suspension of limitations on charitable contributions

The percentage limitation on charitable deductions has been temporarily increased for qualified contributions made in cash during a specified period. Additionally, such donations are not subject to the overall phase-out limit on Schedule A itemized deductions.

Individual taxpayers are allowed to deduct qualified contributions up to the amount by which the taxpayer's contribution base (that is, the taxpayer's adjusted gross income (AGI) subject to the normal percentage limitation) exceeds the taxpayer's deduction for other qualified charitable contributions.

Additionally, C corporations are allowed to deduct qualified disaster contributions up to the corporation's entire taxable income, less other contributions; however, contributions by C corporations must specifically be for Katrina relief efforts.

Qualified contributions are cash contributions made during the period beginning on August 28, 2005, and ending on December 31, 2005, to a qualifying charity for which the taxpayer has elected qualified contribution treatment.

Example. Charlie makes \$17,500 of qualified contributions and \$15,000 of other contributions to qualified charities. Charlie's contribution base for 2005 is \$25,000.

Charlie is allowed to deduct \$25,000 for 2005, an amount equal to his contribution base (\$12,500 determined without regard to qualified contributions and \$12,500 of qualified contributions). Charlie's carryover contribution amount of \$7,500 (\$5,000 from unused qualified contributions and \$2,500 from unused regular contributions) carry forward to the next five years, subject to the normal 50 percent of AGI limit.

1.3.3.2 Additional exemption for housing Hurricane Katrina displaced victims

Taxpayers are allowed a \$500 exemption deduction for providing at least 60 days of temporary rent-free housing to a person displaced by Katrina. A specific definition exists within the legislation for an “individual deemed displaced by Katrina.”

The exemption cannot be claimed for the spouse or any dependent of the taxpayer and the ID number of the individual being housed must be included on the tax return of the taxpayer claiming the additional exemption amount.

Observation

The deduction can be claimed in both 2005 and 2006, but cannot be claimed in both years with respect to the same person. The deduction has an overall \$2,000 limit in the aggregate, meaning the exemption can be claimed for no more than four displaced individuals.

1.3.3.3 Increase in standard mileage rate for charitable use of vehicles

The 14¢ per mile standard charitable mileage rate is increased to a rate equal to 70 percent of the business mileage rate for taxpayers using a vehicle in providing donated services to a charity for relief related to Katrina during the period August 25, 2005, to December 31, 2006.

Observation

Accordingly, for the period August 25 through August 31, 2005, the charitable mileage rate for Katrina relief is at 29¢ per mile and for the period September 1 through December 31, 2005, the charitable mileage rate for Katrina relief is at the rate of 34¢ per mile.

1.3.3.4 Mileage reimbursements to charitable volunteers excluded from gross income

Effective for taxable years ending after August 24, 2005, reimbursements to volunteers for the cost of using an automobile in connection with providing donated services for Katrina relief during the period August 25, 2005, through December 31, 2006, are excluded from the volunteer’s gross income to the extent the reimbursement does not exceed the standard business mileage rate and the normal Section 274(d) substantiation requirements are met.

1.3.3.5 Charitable deduction for contributions of food inventory

S corporations, partnerships, and sole proprietorships that donate food inventory on or after August 28, 2005, and before January 1, 2006, are

generally allowed the same deduction that applies to food donations by C corporations (that is, the deduction is equal to the lesser of two times the basis of the food or the basis of the food plus one-half of the appreciation in the market value of the food over the basis of the food).

The aggregate amount of the charitable deduction for contributions of food inventory is limited to 10 percent of the taxpayer's aggregate net income for the year, with the net income computed without regard to the charitable deduction itself.

1.3.3.6 Charitable deduction for contributions of book inventories to public schools

C corporations are allowed a charitable contribution deduction for donations of books to K-through-12 public schools made on or after August 28, 2005, and before January 1, 2006, limited to the lesser of two times the basis of the books or the basis of the books plus one-half of the books' appreciation.

Observation

This provision applies to donations to any charity by any taxpayer throughout the country, with no requirement that either the food inventory or book inventory contributions relate to Katrina relief.

1.3.4 Additional tax relief provisions

1.3.4.1 Exclusions of certain cancellations of indebtedness by reason of Hurricane Katrina

Effective for debt discharges on or after August 25, 2005, and before January 1, 2007, any amount that would otherwise be taxable to an individual because a nonbusiness debt is discharged is excluded from the individual's income, in whole or in part. This provision does not apply to any business debt.

To qualify, a taxpayer's principal place of abode on August 25, 2005, must have been located in the core disaster area, or in the Katrina disaster area, with the taxpayer suffering economic loss because of Hurricane Katrina.

Caution

This provision does not apply to any debt discharged to the extent that security for the indebtedness related to real property, which was located outside of the Katrina disaster area.

1.3.4.2 Suspension of limitations on personal casualty losses

The \$100 per casualty or theft loss floor and the 10 percent-of-AGI floor do not apply to a taxpayer's casualty or theft losses arising in the

Katrina disaster area on or after August 25, 2005. However, other casualty losses are still subject to the normal \$100 and 10 percent-of-AGI limitations.

1.3.4.3 Extended tax filing deadlines relating to Hurricane Katrina

Although the IRS had previously taken administrative action to extend deadlines for Katrina victims for filing tax returns and making tax payments until January 3, 2006, the legislation extends this deadline until February 28, 2006. This extended deadline relates to excise, employment, income, estate, and gift taxes for any taxpayer determined by the IRS to be affected by Katrina.

1.3.4.4 Extension of replacement period for nonrecognition of gain for property located in Katrina disaster area

Under the involuntary conversion provisions of Section 1033, the period for which a taxpayer may replace involuntarily converted property is extended from two years to five years for property that is converted on or after August 25, 2005, by reason of Katrina, assuming substantially all of the use of the replacement property is in the Katrina disaster area.

1.3.4.5 Special rule for determining earned income

Qualified individuals are allowed to elect to calculate their earned income credit and refundable child tax credit for their taxable year that includes August 25, 2005, using their earned income from the previous taxable year, if their earned income from the previous year exceeds their earned income for the taxable year that includes August 25, 2005.

To qualify, taxpayers needed to have their principal place of abode on August 25, 2005, in either the core disaster area or the Katrina disaster area, with the taxpayer displaced from the principal place of abode by reason of Katrina.

1.3.4.6 IRS authority to make adjustments regarding taxpayer dependency status

The IRS has been given the authority for taxable years beginning in 2005 or 2006 to make adjustments that may be necessary to ensure taxpayers do not lose any deduction or credit, or experience a change in filing status, because of temporary relocation due to Katrina.

2. INDIVIDUAL INCOME DEVELOPMENTS

2.1 Principal Residence Gain Exclusion

2.1.1 Background

A taxpayer can elect to exclude up to \$250,000 of gain realized on the sale of a residence if it was owned and occupied as a principal residence for an aggregate of at least two of the five years before the sale or exchange [§121(a)]. The excludable amount is \$500,000 of gain for a married couple filing jointly if either spouse satisfies the ownership test and both satisfy the use test. The exclusion applies to only one sale or exchange every two years, but pre-May 7, 1997, sales are disregarded. The exclusion does not apply to the extent of any depreciation allowable with respect to the rental or business use of a residence after May 6, 1997. If a taxpayer does not satisfy the two-year ownership or residential requirements, a pro rata portion of the exclusion is allowable if the sale or exchange is the result of a change in place of employment or health, or of unforeseen circumstances. An involuntary conversion of a residence is treated as a sale or exchange under the rules.

Observation

The exclusion replaces the former Section 1034 rollover-of-gain rules and the former Section 121 one-time \$125,000 exclusion for taxpayers age 55 or older. However, tax practitioners should recognize that many homeowners currently selling a principal residence have acquired their current residence under the former Section 1034 rollover rules. Those rules deferred the gain from the sale of one residence into the replacement residence, resulting in a lower adjusted tax basis of the replacement residence. The repeal of former Section 1034 has not changed the fact that many current residences have a low tax basis because of prior law.

Definition of a Principal Residence. Regulations clarify that a principal residence may include a houseboat, house trailer, or stock held in a cooperative housing corporation if the dwelling is occupied as a principal residence. If a taxpayer alternates between two properties, using each as a residence for successive periods, the property used a majority of the time during the year is considered the principal residence [Reg. §1.121-1(b)].

2.1.2 Pro-rata gain exclusion

A pro-rated portion of the \$250,000 or \$500,000 gain exclusion is allowed if a taxpayer fails to meet any of the three eligibility tests (two-year ownership, two-year occupancy, or prior sale within two years), if the early disposition occurred by reason of:

1. A change in place of employment;
2. Health reasons; or
3. Other unforeseen circumstances, to the extent provided in regulations [§121(c)(2)].

The portion of the gain exclusion allowed is a fraction, with the numerator calculated as the shorter of the period of actual ownership and use by the taxpayer in the last five years, or the period of time since the taxpayer last claimed a gain exclusion, and the denominator of which is 24 months.

Example. Gene, a single taxpayer, purchases his first residence on September 1, 2004, in Omaha. A year later, Gene's employer requires him to relocate to northern California. Gene sells the Omaha residence on October 1, 2005, and realizes a gain of \$85,000. Because Gene's sale occurred by reason of a change in employment location, he is entitled to claim a pro-rated portion of the \$250,000 gain exclusion. Gene may claim 13/24ths of the \$250,000 gain exclusion, which is approximately \$135,400. Accordingly, this pro-rated gain exclusion will entirely eliminate any taxable reporting from the sale of the Omaha residence.

In late 2004, the IRS issued final regulations that clarified eligibility for the pro-rated gain exclusion for those who fail the two year test upon selling a principal residence. The regulations provide a series of safe harbors for eligibility, and define a number of situations that would qualify for the "unforeseen circumstances" definition (Reg. §1.121-3, T.D. 9152, 8/13/2004).

2.1.3 Sale of residence acquired in like-kind exchange within five years of sale

The American Jobs Creation Act of 2004 enacted a change such that the Section 121 exclusion for gain on the sale or exchange of a principal residence does not apply if the residence was acquired in a Section 1031 like-kind exchange in which any gain was not recognized within the prior five years. The five-year holding period begins on the "date of the acquisition of the property."

Observation

Despite the pro-rated exclusions of Section 121(c) for a taxpayer who does not meet the normal two-year ownership and use requirements by reason of a change in place of employment, health, or unforeseen circumstances, no exceptions are provided in Section 121(d)(10) to the five-year holding period, allowing a similar pro-rata exclusion.

The provision is effective for sales on or after October 22, 2004 [Act Sec. 840, amending §121(d)(10)].

Example. On January 1, 2001, Carol acquires a condo to be used as rental property in a Section 1031 like-kind exchange. She rents the condo to unrelated parties during 2001 and 2002, and on January 1, 2003, moves into the condo and uses it as her personal residence until it is sold on January 2, 2005.

Because Carol acquired the condo in a Section 1031 like-kind exchange within five years of the date of the sale, the five-year holding period of Section 121(d)(10) is not satisfied. Accordingly, Carol must recognize the gain on the sale of the condo, despite the fact she satisfied the normal two-year ownership and use requirements of Section 121(a).

Variation

Assume the same facts except that Carol uses the condo as her personal residence until it is sold on January 2, 2006. Now, because Carol acquired the condo in a Section 1031 like-kind exchange more than five years before the date of the sale, Carol can exclude the gain on the sale of the condo, subject to the normal exclusion limits of Section 121.

Observation

This new provision only restricts attempts to apply the principal residence exclusion to property that formerly was the subject of a Section 1031 exchange. It does not restrict the strategy of converting a highly appreciated residence to rental property status, followed by a Section 1031 exchange.

2.2 Recapture of Prior Section 197 Amortization of Intangibles

2.2.1 Background

From a purchaser's standpoint, a taxpayer must amortize a franchise, trademark, or trade name, or any other Section 197 intangible, over 15 years. However, upon disposition, ordinary income recognition (Section 1245 recapture) occurs, to the extent gain is attributable to the prior amortization [Reg. §1.197-2(g)(8)].

2.2.2 Disposition of multiple amortizable Section 197 intangibles

The 2005 Energy Act has modified the Section 1245 depreciation recapture rules relating to the disposition of amortizable intangible assets. Under this legislation, if a taxpayer disposes of multiple Section 197

intangible assets in a single transaction or series of transactions, depreciation recapture must be calculated as if all of the Section 197 intangibles were a single asset. This rule is designed to force ordinary income recapture to the extent of prior amortization deductions, and prevent manipulation of the sales price allocation in a manner to minimize the recapture. The change is effective for dispositions of intangibles after August 8, 2005 [§1245(b)(9)].

Example. Five years ago, Franco purchased the assets of a restaurant, and has operated that business as a single member LLC (an ignored entity reported as a proprietorship). At purchase five years ago, \$150,000 of Franco's purchase price was allocated to the restaurant's trade name, recipes, and other goodwill, and amortized by Franco over 15 years under Section 197. For health reasons, Franco now sells the restaurant, and the sales agreement allocates \$200,000 to the same Section 197 intangibles. If Franco has amortized \$50,000 of his \$150,000 purchased Section 197 intangibles, he must report \$50,000 of his gain as Section 1245 ordinary income recapture, despite any allocation of the selling price to specific intangibles. The remaining gain on the intangibles represents Section 1231 gain and may be reported as capital gain.

2.3 Gross vs. Net Reporting on Taxable Legal Awards

2.3.1 Background

Other than amounts received on account of personal physical injuries or physical sickness, most legal awards and settlements and all punitive damages represent taxable income to the claimant [§104(a)]. Taxpayers typically receive these awards under contingent fee arrangements, which provide that a portion of the settlement is due for legal services to the taxpayer's attorney or law firm.

A significant tax controversy has arisen within the courts on the question of whether the portion of the award due to attorneys must first be included in gross income of the taxpayer, or whether that portion can be considered as owned by and assigned directly to the attorney. If the award is includable in the taxpayer's gross income, an offsetting deduction for legal fees is allowable. However, this offsetting deduction is generally permitted only as a miscellaneous itemized deduction, assuming the award relates to nonbusiness litigation or an employment-related matter. Because miscellaneous itemized deductions are offset by the 2 percent-of-AGI floor and also are not permitted for AMT, the taxpayer incurs greater tax. The deduction for attorney fees is effectively wasted or greatly diminished.

2.3.2 Second Circuit requires gross reporting

A federal District Court previously held that an individual who received a wrongful termination award from his employer was not taxable on the portion of the award paid directly to his attorneys under their one-third contingent fee arrangement with the taxpayer. After being terminated from employment at IBM in 1993, the individual retained a law firm to represent him in a wrongful employment termination suit. Under the fee agreement between the plaintiff and the law firm, the firm was to receive a contingency fee of one-third of the recovery. Eventually, the individual received a settlement of approximately \$900,000, reportable to him by IBM as \$900,000 of wage income, but \$300,000 was paid directly to the law firm under the contingent fee agreement.

The lower court found that under Vermont law a contingent fee agreement with an attorney created an equitable lien on the proceeds in the favor of the attorney, and accordingly the taxpayer lacked ownership and control over that portion of the lawsuit settlement. As a result, the taxpayer was allowed to report the \$600,000 net amount as income. However, the Second Circuit reversed, requiring reporting of the \$900,000 gross amount. The appellate court viewed the attorney's lien as a security interest rather than a direct property interest in the claim (*Raymond v. U.S.*, 2004-1 USTC ¶50,124, CA-2, 1/13/2004, rev.g. 2003-1 USTC ¶50,196, Dist. Ct., Vt., 12/17/2002).

2.3.3 Sixth Circuit allows netting

The Sixth Circuit, reversing the Tax Court, allowed a taxpayer to report a net settlement as income, treating the portion paid to the law firm as not taxable to the plaintiff. This Sixth Circuit decision represents a significant departure from prior case law, in that the Sixth Circuit did not focus on underlying state law to determine the attorneys' rights to the claim. Rather, the court focused on federal income tax principles, and viewed the plaintiff-attorney contract as similar to a partnership or joint venture. Accordingly, the taxpayer was allowed to report the net proceeds as income (*John W. Banks II v. Comm.*, 2003-2 USTC ¶50,675, CA-6, 9/30/2002, rev'g. TC Memo 2001-48, 2/28/2001).

Example. Curt, a joint filer, reports \$100,000 of income in 2005 from wages and other sources and also collects a legal award on a past employment dispute of \$800,000. This legal award represents a gross settlement of \$1,200,000, less \$400,000 retained by Curt's attorney under a contingent fee arrangement. Curt's 2005 tax results using gross vs. net reporting differ by approximately \$75,000, and are illustrated as follows:

	<u>Gross</u>	<u>Net</u>
Wages and misc. income	\$ 100,000	\$ 100,000
Legal award	1,200,000	800,000
Less \$400,000 legal fee (after 2% and AGI phaseout of Sched. A)	(339,378)	—
Less standard deduction	—	(10,000)
Taxable income	<u>\$ 960,622</u>	<u>\$ 890,000</u>
Regular tax	\$ 310,280	\$ 285,563
AMT	50,220	—
Total tax	<u>\$ 360,500</u>	<u>\$ 285,563</u>

Observation

This issue of gross vs. net reporting of income on claims involving contingent legal fees has resulted in a significant spread between appellate courts. In addition to the preceding cases, appellate courts that have allowed net reporting include the Fifth (*Srivastava*, 2000-2 USTC ¶50,597, 2000), Sixth (*Estate of Clarks*, 2000-1 USTC ¶50,158, 2000), and the Eleventh (*Barlow-Davis*, 2000-1 USTC ¶50,431, 2000), while cases mandating gross reporting include the Third (*O'Brien*, 63-2 USTC ¶9633, 1963), Fourth (*Young*, 2001-1 USTC ¶50,244, 2001), Seventh (*Kenseth* 2001-2 USTC ¶50,570, 2001), Ninth (*Coady*, 2000-1 USTC ¶50,528, 2000), and Tenth (*Hukkanen-Campbell*, 2002-1 USTC ¶50,351, 2001).

2.3.4 U.S. Supreme Court decision

After years of controversy in the courts on the question of gross versus net income reporting of legal settlements and awards, the Supreme Court agreed in early 2004 to hear two cases that had been decided at the Appellate level in favor of taxpayers. The Supreme Court accepted the Sixth Circuit *Banks* decision and the Ninth Circuit *Banaitis* case, both holding that net reporting was allowable (*John W. Banks II v. Comm.*, 2003-2 USTC ¶50,675, CA-6, 9/30/2003 and *S. J. Banaitis v. Comm.*, 2003-2 USTC ¶50,638, CA-9, 8/27/2003).

The Supreme Court reversed both the Sixth Circuit *Banks* opinion and the Ninth Circuit *Banaitis* opinion, holding that the portion of a legal award or settlement paid to an attorney is not excludable from the taxpayer's gross income. Rather, the full amount of the legal award must be included in the taxpayer's income, and the attorney fees are deductible only as a miscellaneous itemized deduction (*John W. Banks II v. Comm.*, 2005-1 USTC ¶50,155, S. Ct. 03-892 and 03-907, 1/24/2005). The Supreme Court held that a taxpayer entering into a plaintiff action

has dominion and control over the claim. Even though the income or award might be speculative, the payment to the attorney represents an assignment of the taxpayer's income and must be recognized first by the taxpayer.

This Supreme Court opinion represents an interpretation of existing law, and accordingly has retroactive impact. To the extent taxpayers have this issue open with the IRS or under litigation, the IRS and courts will now require gross income reporting, with attorney fees only allowable by the individual taxpayer as miscellaneous itemized deductions.

2.3.5 American Jobs Creation Act of 2004 change

In the American Jobs Creation Act of 2004, Congress amended the Internal Revenue Code to allow above-the-line deductibility for attorney fees and court costs incurred in connection with an action involving a claim of unlawful discrimination [§62(a)(19)]. This new deductibility provision is available for fees and costs paid after October 22, 2004, with respect to judgments or settlements occurring after October 22, 2004.

Unlawful discrimination is defined as pertaining to a claim brought under a series of different federal provisions defined within Section 62(e) of the Internal Revenue Code. This includes claims against the U.S. government, private causes of action under the Medicare Secondary Payer statute, claims under the Civil Rights Act, the National Labor Relations Act, the Fair Labor Standards Act, the Age Discrimination and Employment Act, ERISA, the Family and Medical Leave Act, the Americans with Disabilities Act, and a list of similar statutes.

Practice Pointer

In the case of a post-October 22, 2004, legal action that meets the unlawful discrimination claim definition of Section 62(e), the taxpayer claims the attorney fees in the total of adjustments in arriving at AGI. The attorney fees are reported in the total subtractions on line 36 of Form 1040, with the acronym UDC for unlawful discrimination claims.

2.4 Carryover Basis for Annuity Contracts

2.4.1 Background

Following the death of an individual, property acquired from a decedent receives an adjustment in basis. The basis of property to an heir is equal to the fair market value of the property at the date of the decedent's death [§1014(a)]. However, annuities are excepted from this treatment.

Accordingly, following the death of the annuity holder, amounts paid to the beneficiary represent income in respect of a decedent (IRD). The beneficiary must report ordinary income to the extent the annuity benefit exceeds the decedent's basis in the annuity contract [§1014(b)(9)].

In 1970, the IRS ruled that a variable annuity contract received a step-up in basis following the owner's death, assuming the owner died before the annuity starting date specified in the contract (Rev. Rul. 70-143, 1970-1 CB 167). However, in Rev. Rul. 79-335 (1979-2 CB 292), the IRS revoked this position, effective for amounts contributed to deferred variable annuity contracts on or after October 21, 1979.

2.4.2 IRS confirms step-up in basis

In a private letter ruling, the IRS confirmed that a step-up in basis remains available for a deferred variable annuity contract that was purchased and had all contributions to it applied before October 21, 1979 (PLR 200311030). In addition, the IRS privately ruled that a fixed annuity, where all investments in the annuity were made before October 21, 1979, also qualifies for the step-up in basis, where the annuity owner dies before beginning any annuity payments under the contract (PLR 200439016).

Subsequently, the IRS issued a full Revenue Ruling, noting the general rule that upon the death of the owner of a deferred annuity contract, the income on the annuity is includable in the beneficiary's gross income as income in respect of a decedent. This treatment applies whether the beneficiary receives a lump-sum or receives a series of periodic payments under the annuity. However, the IRS also acknowledged that the step-up in basis rules continue to apply for deferred annuity contracts purchased before October 21, 1979, including any contributions applied to those contracts entered into before that date (Rev. Rul. 2005-30, IRB No. 2005-20).

2.4.3 Annuity exchange defeats step-up

The IRS has separately ruled several times that when a pre-October 21, 1979, variable annuity contract has been exchanged for another variable annuity contract under Section 1035 after October 20, 1979, the step-up in basis rule is no longer available (PLR 9245035; TAM 9346002). Accordingly, individuals who own a pre-October 21, 1979, annuity with significant gain should be advised to consider continuing to hold those annuities without entering into any Section 1035 exchange, as any exchange will cause loss of the tax-free basis step-up to the beneficiary of the annuity.

2.5 Personal Injury Awards

2.5.1 Background

Gross income does not include compensation for injuries or sickness under Section 104, including:

1. Amounts received under workers' compensation acts for personal injuries or sickness
2. Amounts received on damages (other than punitive damages) arising from personal physical injuries or physical sickness
3. Amounts received through accident or health insurance for personal injuries or sickness, except for amounts received by an employee attributable to employer contributions (separately excludable under Sections 105 and 106)
4. Amounts received as a pension, annuity or similar allowance for personal injuries or sickness resulting from active service in the armed forces, public health service, or foreign service
5. Amounts received by an individual as disability income attributable to injuries incurred as a result of a terrorist attack as an employee of the United States in performance of duties outside the United States [§104(a)]

2.5.2 Physical injury requirement

Before legislation enacted in 1996, Section 104(a)(2) allowed the exclusion of damages received on account of personal injury or sickness, without the additional requirement that the damages be attributable to physical injuries or physical sickness. Accordingly, extensive court litigation occurred as to whether damages attributable to items such as personal reputation, employment discrimination issues, and other nonphysical injuries did or did not meet the income-exclusion definition.

Effective for amounts received after August 20, 1996, the personal injury exclusion is *only* available for damages received on account of personal physical injuries or physical sickness [§104(a)(2)]. A grandfather clause applies old law, however, to amounts received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995 [P.L. 104-188, §1603(d)(2)].

Emotional Distress. Emotional distress is not treated as a physical injury or physical sickness. Accordingly, damages for emotional distress, including the physical symptoms of emotional distress, are not excludable. However, reimbursements for medical care attributable to emotional distress are excludable.

In some cases, the distinction between the personal physical injury portion of a settlement and other elements of an award are unclear. In a Tax Court case, the court found it necessary to determine the portion of a \$200,000 settlement representing a tax-free personal injury claim, where the taxpayer received funds from a sideline altercation with an NBA player. The court determined that \$120,000 of the amount was excludable as a personal injury payment, and the remaining \$80,000 was taxable as consideration for the agreement not to defame the player, not to disclose the existence or the terms of the settlement agreement, nor to publicize the facts related to the incident (*Amos v. Comm.*, TC Memo 2003-329, 12/1/2003).

Punitive Damages. Punitive damages, even if related to a claim for damages from personal physical injuries or physical sickness, are not excludable from income. However, a grandfather clause protects punitive damages awarded in a wrongful death civil action if applicable to state law in effect on September 13, 1995 [§104(c)].

2.5.3 Prejudgment interest deemed taxable

A taxpayer was severely injured while swimming and filed a lawsuit against the State of Louisiana. The taxpayer received damages in excess of \$9 million, with approximately \$4 million of this amount representing prejudgment interest. The taxpayer argued that the entire \$9 million amount was tax-free under IRC Sec. 104. However, a federal District Court originally determined that the prejudgment interest could not be excluded from income as it was not received on account of a personal injury.

The Fifth Circuit has now affirmed the federal District Court decision in finding that the interest amounts received on the payments in the personal injury suit were not excludable under Section 104 and represented taxable income to the recipient (*Chamberlain v. Comm.*, 2005-1 USTC ¶150,109, CA-5, 2/18/2005, aff'g. 2003-2 USTC ¶150,711).

2.5.4 Amounts received for emotional distress deemed taxable

The Eighth Circuit has affirmed a Tax Court decision in determining an entire \$2 million payment received by a taxpayer “in settlement of claims for tortious interference with contracts, and for personal injury including injury to personal and professional reputation and emotional distress, humiliation, and embarrassment resulting from termination” was totally taxable to the taxpayer (*Lindsey v. Comm.*, KTC 2005-212, CA-8, 9/2/2005, aff'g. TC Memo 2004-113).

Observation

At trial, the taxpayer argued that the statutory changes to Section 104 enacted by Congress, effective for amounts received after August 20, 1996, imposed a “fortuitous windfall on some taxpayers while imposing a penalty on others.” The Eighth Circuit simply responded by noting that “such is true of any tax change.”

3. INDIVIDUAL DEDUCTION DEVELOPMENTS

3.1 Hobby Losses

3.1.1 Background

An activity is considered engaged in for profit if it is of the kind that would support a deduction for a business expense, for an expense for the production or collection of income, or the management, conservation, or maintenance of income-producing property [§183(c)].

Relevant Factors. In determining if an activity is carried on for profit, all the relevant facts are taken into account. No one factor alone is decisive [Reg. §1.183-2(b)]. Among the factors to be considered are:

1. If the activity is carried on in a business-like way.
2. If the time and effort put into the activity indicate intention to make it profitable.
3. If the taxpayer is depending on income from the activity for his or her livelihood.
4. If the taxpayer’s losses from the activity are due to circumstances beyond control (or are normal in the start-up phase of the taxpayer’s type of business).
5. If the taxpayer changes methods of operations in an attempt to improve the activity’s profitability.
6. If the taxpayer or advisers have the knowledge needed to carry on the activity as a successful business.
7. If the taxpayer has been successful in making a profit in similar activities in the past.
8. If the activity makes a profit in some years, and how much profit it makes.
9. If the taxpayer can expect to make a future profit from the appreciation of assets used in the activity.

Judicial Determinations

In determining whether a particular activity was conducted with the requisite profit motive, the courts will apply the preceding tests to the facts and circumstances of the particular taxpayer's business activity.

3.1.2 Racecar activity held to be a business

The Tax Court ruled that a banker engaged in a racecar activity with a profit motive. After thoroughly examining the nine factors of Reg. Section 1.183-2, the court found that the taxpayer conducted the activity in a businesslike manner, maintained a separate business checking account, and prepared budgets. Additionally, the taxpayer had a business plan that included sponsorships. Upon concluding that he could not make a profit, the taxpayer terminated the activity. These factors led the court to determine that a profit motive existed and losses were allowable (*Morrissey v. Comm.*, TC Summary Opinion 2005-86, 7/13/2005).

3.1.3 Combining activities when testing hobby loss rules

A strategy that some taxpayers have used to prevent a hobby loss determination is to combine an existing profitable business activity with a new activity incurring losses. The taxpayer argument is generally that the new activity that is incurring losses is simply an extension of an existing for-profit business activity. But if the IRS is successful in segregating the two activities, the new activity, with losses, may be susceptible to a hobby determination.

Example. Marsha, a tobacco farmer in Kentucky, opened a display garden business to sell produce from her farm to passing motorists. She treated the farm and display garden activity as one business on her Form 1040, Schedule F. Upon audit, the IRS separated the farming business from the display garden business, and disallowed losses from the display garden business under the hobby loss rules. However, the Tax Court allowed the aggregation of the farm and display garden businesses as one activity, determining that there was a close organizational and economic relationship between the farm and display garden business. Both activities were conducted at the same location, and both were attempts to make the farm profitable. Additionally, her farmland was used for both activities. She developed the display garden activity in an attempt to replace tobacco as the farm's main cash crop. Both activities involved the planting and harvesting of crops, and the same employees and equipment were used by both activities (*Tobin v. Comm.*, TC Memo 1999-328, 9/30/99).

Observation

Attempts to aggregate businesses to avoid a hobby loss determination are not always successful. In a Ninth Circuit decision, the court agreed with the IRS that a dentist could not combine his dental practice with an apple farming activity. The dentist maintained that he recommended apples to his patients, and that he sold apples from his apple orchard to patients. However, the apple orchard never earned a profit. The taxpayer failed to maintain accurate records and separate banking and financial data, and the court determined that the apple orchard activity lacked a genuine profit motive. Further, the court stated that when a taxpayer engages in several distinct activities, the expenses and income may not be aggregated for Section 183 hobby loss purposes (*Zdun v. Comm.*, 2000-2 USTC ¶150,580, CA-9, 7/5/2000, aff'g. TC Memo 1998-296).

3.2 Passive Loss Developments**3.2.1 Background**

The passive activity rules apply to (1) individuals, (2) estates, (3) trusts (other than grantor trusts), (4) personal service corporations, and (5) closely held corporations [§469(a)]. The intent of the passive loss rules is to prevent the current deductibility of any passive losses or passive activity credits against the other income of a taxpayer. Net passive losses and passive credits are suspended and carry forward to offset future passive income, or eventually to be claimed upon disposition of the passive activity.

In general, passive activities fall into two categories:

- A business activity in which the taxpayer does not materially participate
- Any rental activity [§469(c)]

Special exceptions exist that allow losses from working interests in oil or gas property held directly by the taxpayer or through an entity that does not limit the liability of the taxpayer. Also, limited losses may be claimed on rental real estate activities (although subject to an AGI phaseout) and for real property businesses conducted by real estate professionals.

3.2.2 Material participation

With respect to a business activity, a taxpayer can avoid passive activity status by materially participating in the trade or business. The opportunity to materially participate to avoid passive loss status only applies to

business activities, not rental activities (other than for qualifying real estate professionals). An individual materially participates in an activity if the taxpayer's participation meets *one* of the following tests [Reg. §1.469-5T(a)]. A taxpayer is a material participant if:

1. The taxpayer participates in the activity for over 500 hours during the year (including as a limited partner).
2. The taxpayer's participation in the activity for the taxable year constitutes substantially all the participation in such activity of all individuals (including nonowners) for such year.
3. The taxpayer participates for over 100 hours during the year and no other individual has greater participation.
4. The activity is a significant participation activity (over 100 hours per year) and the sum of the taxpayer's significant participation activities exceeds 500 hours during the year.
5. The taxpayer materially participates in the activity for any five of the immediately preceding 10 taxable years (including as a limited partner).
6. The taxpayer materially participated in a personal service activity (that is, in the fields of law, health, engineering, architecture, accounting, actuarial science, performing arts, or consulting or in any other trade or business where capital is not a material income-producing factor) for any three taxable years (whether or not consecutive) preceding the taxable year (including as a limited partner).
7. Based on all the facts and circumstances, the taxpayer participates in the activity on a regular, continuous and substantial basis. A taxpayer cannot satisfy this "facts and circumstances test" if he or she does not participate for over 100 hours in the year.

Participation includes work done by an owner as an employee (except through a C corporation) in connection with the activity in which he or she owns an interest. But work not customarily done by an owner, one of the principal purposes of which is to avoid a Section 469 disallowance, or work done by an individual in his or her capacity as an investor, is not considered [Reg. §1.469-5T(f)].

Spousal Aggregation. In determining whether a taxpayer materially participates, the participation of the spouse of the taxpayer is taken into account in meeting the tests [§469(h)(5)].

Example. Sam and Sue, husband and wife, are each a 50 percent stockholder in an S corporation conducting an active retail business. However, Sam spends only about 100 hours per year, whereas Sue works full-time, in the retail activity of the S corporation. Sue's material participation will extend to Sam under the spousal rule, and both will be considered material participants for purposes of avoiding the passive loss restrictions.

3.2.3 Rental activities

A rental activity is automatically a passive activity, even if a taxpayer materially participates in that activity (other than the special exception for the rental properties of real estate professionals, discussed below). An activity is a rental activity if tangible property (real or personal) is used by customers or held for use by customers, and the gross income (or expected gross income) from the activity represents amounts paid (or to be paid) mainly for the property's use. It does not matter whether the use is under a lease, a service contract, or some other arrangement.

Exceptions to Rental Status. The taxpayer's activity is not a rental activity if any of the following apply [Reg. §1.469-1T(e)(3)(ii)]:

1. Each customer uses the property for an average of seven days or less (for example, car rental businesses, tuxedo rentals).
2. Each customer uses the property for over seven days but not over 30 days and "significant" personal services are provided by or on behalf of the owner (for example, operating a hotel). Routine services commonly provided in long-term rentals (for example, collecting garbage, routine repairs, or doorman) are not significant services.
3. Extraordinary personal services are provided by individuals by or on behalf of the property's owner in connection with the rental (for example, a hospital).

Note: In PLR 9247003, the IRS held that the management and operation of retirement centers are not rental activities. The residents' monthly payments were more than twice the cost of a luxury apartment, and the IRS concluded that a center's income was principally for the services provided (for example, meals, laundry and maid service, utilities) rather than for the use of the tangible property.

4. Rental of the property is treated as incidental to an investment in the property where (a) the owner seeks gain by increase in value and the gross rent is under 2 percent of the lesser of the property's market value or basis, or (b) the property is used in a trade or business and the rent is under 2 percent of the property's value or basis, or (c) the property is held for sale and is sold during the year, or (d) the property is used as lodging for the taxpayer's employees for the taxpayer's convenience.
5. The property is made available during defined business hours for nonexclusive use by various customers (for example, a public golf course).
6. The property is used in a nonrental activity conducted by a partnership, S corporation, or joint venture in which the taxpayer owns an interest.

Observation

The consequence of most of these exceptions to rental status is that the activity is treated as a business activity (for example, a building with short-term rentals of seven days or less is treated as a hotel-type business activity rather than rental real estate). When an activity is categorized as a business activity, the taxpayer may meet one of the material participation tests to avoid passive status.

Caution

The first of the six exceptions to rental status listed above (that is, average tenant use of seven days or less) has been used aggressively by the IRS to disallow rental losses on vacation properties such as ski condos or waterfront villas, where the average tenant stay is often under one week. The IRS uses the exception in the regulations to reclassify the property from rental status to business status. In rental status, the owner is often able to claim the \$25,000 rental real estate loss privilege. However, when the property is reclassified to business status, the owner normally is unable to meet any of the material participation tests, and all losses are suspended under Section 469 (*Madler*, TC Memo 1998-112; *Pohaski*, TC Memo 1998-17; *Rapp*, TC Memo 1999-249; *Lapid*, TC Memo 2004-222).

3.2.4 Incidental rental treated as a business

Several court cases have allowed a business owner to treat a related rental as incidental where the rental income is less than 2 percent of the smaller of the market value or unadjusted basis of the property. In those cases, the rental activity is considered part of the business activity, and the rental is not subject to passive loss restriction.

The Tax Court has now allowed an attorney to treat net losses from renting equipment to his law practice as part of the active business of the law practice under the incidental rental exception. The court found that the leasing activity met the 2 percent definition, and the equipment leasing activity was treated as incidental to the law firm business in which the taxpayer materially participated (*Misko v. Comm.*, TC Memo 2005-166, 7/6/2005).

Observation

Several other courts have similarly used the incidental exception to remove equipment leasing from passive status. In one case, a proprietor leased equipment to a 50 percent general partnership in which he materially participated. In another case, an individual leased equipment to his 50 percent-owned C corporation in which he materially participated (*Tarakci v. Comm.*, TC Memo 2000-358; *R. W. Blewett*, T.C. Summary Opinion 2001-174, 11/8/2001).

Observation

The taxpayers in the preceding cases also may have been successful arguing an aggregation of the business activity with the rental activity under Reg. Section 1.469-4.

3.2.5 Grouping of self-rentals

While grouping of multiple rental properties is generally permitted under Reg. Section 1.469-4(c), a Tax Court opinion has concluded that a grouping strategy does not prevent application of the self-rental regulation when multiple properties are involved.

The Tax Court supported the IRS by determining that individuals who owned two rental buildings, both of which were rented to S corporations in which the couple materially participated, could not be aggregated as a single passive activity through a grouping election. The taxpayers leased one building to an S corporation, producing \$100,000 of net rental income, while the second building, also leased to an S corporation in which they materially participated, produced a rental loss of \$40,000. These two activities were grouped, allowing the rental loss to offset the rental income. However, the Tax Court determined that the self-rental recharacterization rule applied before any grouping election, and the building with \$100,000 of net rental income was treated as a nonpassive property. As a result, the building with the \$40,000 rental loss produced a suspended passive activity loss (*Tony R. Carlos v. Comm.*, 123 TC No. 16, 9/20/2004).

Observation

As a result of the *Carlos* case, taxpayers will no longer be able to aggregate a self-rental income property with any other passive loss property. The self-rental income property, as a result of *Carlos*, is recharacterized as nonpassive income before any grouping election has effect. As a solution, taxpayers should consider grouping a business activity with a passive rental loss property, if the passive loss rental property meets either the 2 percent incidental rental definition of Reg. Section 1.469-1T, or grouping a rental loss activity with a business activity if there is identical ownership in each, or if the rental activity is insubstantial in relation to the business activity.

3.3 Twelve-Month Deduction Rule for Accrual Method Taxpayers**3.3.1 Background**

The IRS has issued regulations holding that taxpayers are not required to capitalize amounts, including transaction costs, paid to create or

enhance intangible rights or benefits that do not extend beyond the earlier of 12 months after the first date on which the taxpayer realizes the benefit or the end of the tax year following the year in which payment is made [Reg. §1.263(a)-4(f)]. However, this 12-month rule does not permit an accrual method taxpayer to deduct an amount prepaid for goods and services where the amount has not been incurred under the economic performance rules of Reg. Section 1.461-4.

3.3.2 Details of final regulations

These final regulations providing a current deduction for a payment that does not produce a benefit extending beyond 12 months solidified the ability of a cash method taxpayer to claim a deduction for a prepaid expense. However, for accrual method taxpayers, the requirement of meeting the economic performance rules will limit most prepaid expense opportunities because the taxpayer will not have received the goods or services for which prepayment was made. Further, as noted earlier, a payment for the use of property (that is, the payment of rent) only meets the economic performance rules as the taxpayer uses the property. This effectively eliminates any deduction for prepaid rent on the part of an accrual method taxpayer. Similarly, economic performance for interest only occurs as the interest accrues [Reg. §1.461-4(e)].

The following represent possible opportunities for accrual method taxpayers to make a payment near year end, claiming a deduction under the 12-month rule of Reg. Section 1.263(a)-4(f) while also meeting the economic performance rules for the prepaid expenditure:

1. A taxpayer is considered to meet economic performance for services or property provided to the taxpayer as the taxpayer makes payment, if the taxpayer can reasonably expect the services or property to be provided within 3½ months after payment [Reg. §1.461-4(d)(6)(ii)]. Effectively, this shortens the 12-month prepayment rule for accrual method taxpayers to 3½ months after payment.
2. Under Reg. Section 1.461-4(g), certain specified liabilities may meet the economic performance test merely by payment of that liability, assuming the all events test is otherwise met. Liabilities for which payment is considered to meet the economic performance test include:
 - (a) Liabilities arising under a workers' compensation act or out of any tort.
 - (b) Rebates and refunds.
 - (c) Awards, prizes, and jackpots.
 - (d) Insurance, warranty, and similar service contracts.
 - (e) Taxes and licensing fees to a governmental authority.

Example. BK is an accrual method trucking company reporting on the calendar year. In December, BK prepays a variety of state licensing fees for the next calendar year in the amount of \$500,000, and also prepays \$800,000 for insurance on its trucking fleet for the next calendar year. Under Reg. Section 1.263(a)-4(f), the 12-month rule is satisfied because these payments represent expenditures for services or benefits that do not extend beyond either 12 months after the first date on which BK realizes the benefits or services, or beyond the end of the tax year following the year of the payment. Further, under Reg. Section 1.461-4(g), both of these liabilities represent amounts for which economic performance is considered to be met at the time of payment. Accordingly, BK may deduct its December prepayment for both licenses and insurance.

Caution

As an accrual method taxpayer, BK in the preceding example may not have previously been claiming a current deduction for prepaid insurance and licenses. In this case, BK would be required to accomplish an accounting method change. Under Reg. Section 1.263(a)-4(p), taxpayers were permitted to use the automatic consent procedures to accomplish an accounting method change for the first tax year ending on or after December 31, 2003 (see Rev. Proc. 2004-23, IRB No. 2004-16).

Subsequently, the IRS has provided an additional one-year period for making the automatic consent accounting method change to adopt the 12-month prepaid expense privilege (Rev. Proc. 2005-9, IRB No. 2005-2). The automatic consent procedures were extended for tax years ending on December 31, 2004, through November 30, 2005. Rev. Proc. 2005-9 clarified that a separate election should be made for each category of prepaid expense item (for example, insurance and taxes). However, a single election can be made for adopting the 3½ month prepaid expense rule. Also, taxpayers are permitted to adopt the recurring item exception in connection with changes for which a prepaid expense election is made.

For any accounting method change in a subsequent period, the taxpayer must use the more formal nonautomatic accounting method change rules, which require the filing of the Form 3115, "Application for Change in Accounting Method," during the tax year of the change, and require the submission of a user fee (see Rev. Proc. 2005-1).

3.4 Like-kind Exchanges

3.4.1 Background

Like-kind exchanges are a way to avoid (defer) taxable gain (and depreciation recapture) when switching business or investment property.

Though such exchanges are common (as trade-ins) for machinery and vehicles, they are also frequently used for real property. The tax deferral of like-kind exchanges under Section 1031 is mandatory, not elective.

As with other nonrecognition provisions in the Code, the consequence is that the adjusted basis of the traded asset carries over to become the basis of the acquired asset. This carryover basis is increased for any boot paid and for any net increase in debt. On the other hand, to the extent boot is received or net liabilities of the exchanger are decreased, gain recognition occurs. Basis is increased for gain recognized, and decreased for boot received and net debt relief [Reg. §1.1031(d)-1 and -2].

IRS Form 8824, "Like-Kind Exchanges," is used to report like-kind exchanges. This form calculates any recognized gain, as well as the basis of property received.

3.4.2 Determining like-kind product classes

The IRS has issued final regulations replacing the use of the Standard Industrial Classification (SIC) system with the North American Industry Classification System (NAICS) for determining when tangible personalty is within the same product class for purposes of the like-kind exchange rules of Section 1031. Under these regulations, depreciable tangible personal property is considered like-kind in an exchange if it is described in the same six-digit product class within Sectors 31, 32, and 33 of the NAICS codes. These regulations apply to transfers of property after August 12, 2005 [Reg. §1.1031(a)-2(b)(3), T.D. 9202, 5/19/2005].

Example. Linda, who operates a proprietorship business, exchanges a used personal computer (asset class 00.12) for a new printer (asset class 00.12). The properties exchanged are within the same general asset class and therefore qualify as like-kind properties for a Section 1031 exchange.

Example. Glen, who operates a road construction business, exchanges a grader for a scraper. Neither property is within any of the general asset classes, but both properties are within the same product class (NAICS Code 333120). Accordingly, Glen has exchanged like-kind properties within the same product class that are eligible for Section 1031 treatment.

3.4.3 Application of like-kind exchange to principal residence

The IRS has issued guidance regarding the application of the Section 1031 like-kind exchange rules to property that also qualifies for the

Section 121 principal residence gain exclusion (Rev. Proc. 2005-14, IRB No. 2005-7).

Observation

The primary application of this guidance will involve situations where a dwelling has been used as a principal residence and qualifies for the Section 121 gain exclusion but has subsequently been converted to rental status for a period of 36 months or less. Such a property would qualify for like-kind exchange treatment because of current investment status, but also the property continues to qualify for the principal residence gain exclusion under the two-of-five-year lookback test. These procedures will also have application to taxpayers who exchange a principal residence that has partial business use for another principal residence with partial business use.

Rev. Proc. 2005-14 contains the following principles regarding a dwelling that qualifies for both the Section 121 gain exclusion and Section 1031 like-kind exchange status:

- The Section 121 principal residence gain exclusion is applied before the Section 1031 like-kind exchange provision.
- The Section 121 principal residence gain exclusion is not available to the extent of the depreciation of the residence after May 6, 1997, but the Section 1031 like-kind exchange provision may apply to this gain.
- Any boot or non-like-kind property received is taxable in the Section 1031 exchange only to the extent that the boot exceeds the gain excluded under the Section 121 principal residence rule.
- In determining the basis of the replacement property, any gain excluded under the Section 121 principal residence privilege is treated as providing basis to the taxpayer in the replacement property.

Example. Bob, a single taxpayer, bought a house for \$210,000 that was his principal residence from 2000 through 2004. From 2005 until late 2006, Bob rented the house and claimed depreciation of \$20,000. At the end of 2006, Bob exchanges the house, receiving a townhouse with a fair market value of \$460,000 and \$10,000 of cash. Bob will rent the townhouse to tenants.

Bob's former residence qualifies for the principal residence gain exclusion of Section 121 because he owned and occupied this property as his principal residence for at least two years during the five-year period before the disposition (that is, the house was in rental status for 36 months or less). Also, because the house is investment property at the time of the exchange, Bob may also defer gain on this property under Section 1031. Bob defers \$30,000 of gain in the exchange, calculated as follows:

Amount realized (FMV of townhouse of \$460,000 + \$10,000 cash)	\$ 470,000
Less adjusted basis (\$210,000 cost – \$20,000 depreciation)	<u>(190,000)</u>
Realized gain	\$ 280,000
Less maximum Sec. 121 gain exclusion (single)	<u>(250,000)</u>
Gain deferred under Sec. 1031 exchange	<u><u>\$ 30,000</u></u>

Bob's basis in the townhouse replacement property is calculated as follows:

Basis of relinquished residence	\$ 190,000
Plus gain exclusion under Sec. 121	250,000
Less boot received	<u>(10,000)</u>
Adjusted basis of replacement townhouse	<u><u>\$ 430,000</u></u>

3.5 Alimony

3.5.1 Background

Payments properly classified as alimony are deducted above the line on the payor's tax return. For a payment to be classified as alimony and thus deductible by the payor and includable as income by the recipient, it must be made under a written divorce or separation instrument and meet all of the following requirements (§71(b)):

1. The payment must be in cash.
2. The payor's obligation to make payments must be relieved upon the recipient's death.
3. When the payment is made, the payor and payee cannot be members of the same household.
4. The divorce or separation instrument does not designate the payment as not includable in gross income of the recipient and not allowable as a deduction to the taxpayer.
5. The payment cannot be explicit or disguised child support.

3.5.2 No payments after death of recipient

The Third Circuit, affirming the Tax Court, disallowed a taxpayer's treatment of over \$50,000 of payments as alimony. The taxpayer's dissolution document required over \$2,000 of bi-weekly payments to his former spouse, but the document was silent about whether the payments ended at the recipient's death. Because the agreement was silent, the court looked to state law (Pennsylvania in this case) but also found it did not address the issue. Because there was no authority terminating

the payments at the recipient's death, all payments were disallowed as alimony (*Hawley v. Comm.*, 2004-1 USTC ¶150,227, CA-3, 4/16/2004, aff'g. TC Memo 2003-92). Similarly, the Tax Court disallowed alimony treatment for weekly payments that a taxpayer made to his former spouse for a fixed period pursuant to a divorce decree. The decree did not expressly state that payments would terminate upon death, and state law (Tennessee) did not contain this requirement (*Paul and Judy Rogers v. Comm.*, TC Memo 2005-50, 3/17/2005).

3.6 Clean Fuel Vehicle Deduction

3.6.1 Background

A clean fuel vehicle deduction applies to vehicles burning fuels such as natural gas, liquefied natural gas, liquefied petroleum gas, hydrogen, electricity, or any other fuel at least 85 percent of which is methanol, ethanol, or any other alcohol or ether (§179A). The maximum deduction is \$2,000 in the case of any clean burning motor vehicle (other than large trucks or vans, for which a greater deduction is available).

The following criteria apply to gain eligibility for this deduction:

- The original use of the property must commence with the taxpayer (that is, the vehicle is new).
- In the case of a hybrid vehicle propelled by both gasoline and clean-burning fuel, only the incremental cost of the clean-burning fuel component qualifies, to a maximum of \$2,000.
- The deduction is available whether the vehicle is used for business or personally.

3.6.2 2005 Energy Act repeals clean fuel vehicle deduction

The 2005 Energy Act repeals the clean fuel vehicle deduction, effective for property placed in service after December 31, 2005 [§179A(f)]. In lieu of this deduction for hybrid vehicles, Congress has added a tax credit, known as the Alternative Motor Vehicle Credit (see section 6.8, following). This credit is effective for property placed in service after 2005, and applies to hybrid vehicles, but also to other energy-efficient vehicles such as lean burn technology vehicles, fuel cell motor vehicles, and other alternative fuel vehicles.

3.6.3 IRS updates list of qualifying vehicles

The IRS has the responsibility for certifying that a manufactured vehicle meets the clean fuel vehicle definition. The IRS has certified the following hybrid vehicles (a combination of gas and electric propulsion) as eligible for the maximum deduction permitted by law:

Model	Year
Ford Escape	2005
Honda Accord Hybrid	2005
Honda Insight	2000–2005
Honda Civic Hybrid	2003–2005
Lexus RX 400h	2006
Toyota Prius	2001–2005
Toyota Highlander Hybrid	2006

Practice Pointer

The deduction for a clean fuel vehicle is claimed on page 1 of the Form 1040 at line 36 (2005 draft Form 1040), as a write-in adjustment to total AGI subtractions, with the notation “Clean-Fuel.”

3.7 Sales Tax on Schedule A

3.7.1 Background

Taxpayers are allowed to claim an itemized deduction for various taxes, including state and local taxes [§164(a)]. However, state and local sales taxes were not deductible on Schedule A as an itemized deduction; such taxes were deductible only as business expenses or in the case of inventory and depreciable property, as part of the cost of such items.

3.7.2 Deduction for sales taxes allowed on Schedule A

Effective for the 2004 and 2005 tax years, taxpayers are allowed to claim a deduction for state and local general sales taxes in lieu of the itemized deduction for state and local income taxes [Act Sec. 501, amending §164(b)].

Preparation Pointer

Taxpayers make the choice between income taxes or general sales tax by checking a box on line 5 of Schedule A, indicating the type of tax being claimed for the particular year.

3.7.3 IRS guidance

Optional Sales Tax Table. The IRS has issued Publication 600, *Optional State Sales Tax Tables*, to allow taxpayers a convenient method for determining the elective sales tax deduction. Publication 600 takes into account the number of dependents and adjusted gross income, as modified, to determine the allowable sales tax for each state location. The tables in Publication 600 reflect each state’s general sales tax rate.

If the taxpayer resides in a locality that imposes a local general sales tax, Publication 600 contains a worksheet for making the computation to increase the table amount for the additional local sales tax. If the taxpayer has resided in more than one state during the year, Publication 600 directs a pro-rata calculation of the table amount for each state, based on the number of days of residency within the state.

A taxpayer's income, for purposes of using the optional sales tax table, begins with AGI, increased by tax-exempt interest, veterans' benefits, nontaxable combat pay, workers' compensation, nontaxable Social Security and railroad retirement benefits, the nontaxable portion of an IRA distribution, pension and annuity distributions (other than rollovers), and public assistance payments.

Major Purchase Add-ons. If a taxpayer uses the Publication 600 table, the table amount can be increased by sales tax paid with respect to the purchase of motor vehicles, boats and other itemized specified by the Treasury. Publication 600 indicates that the following additional items may be considered: motorcycles, motor homes, recreational vehicles (RVs), sports utility vehicles (SUVs), cars, trucks, vans and off-road vehicles, aircrafts, boats, homes (including mobile or prefabricated), or home building materials, if the tax rate is the same as the general sales tax rate. Also, sales tax paid for a leased motor vehicle may be added to the table amount.

Actual Receipts. In lieu of using the optional sales tax table, taxpayers can deduct the total amount of general state and local sales taxes paid by accumulating receipts showing all general sales taxes paid throughout the year.

Observation

The option of using state sales tax on Schedule A will have the greatest impact on residents of states without an income tax, such as Alaska, Florida, Nevada, South Dakota, Tennessee, Texas, Washington, and Wyoming. Further, retirees and others with modest state income tax deductions may benefit from the sales tax deduction in a year in which a major consumer purchase occurs, such as a vehicle or boat. If it is anticipated that state sales tax will exceed the income tax for a particular year, the taxpayer may benefit by prepaying or deferring state income tax payments to other years.

Additional IRS Guidance. The IRS has issued a notice to provide further guidance to taxpayers who elect to claim state and local general sales taxes in lieu of income taxes (IRS Notice 2005-31, IRB No. 2005-14). This notice includes the following points:

- The election to claim sales tax in lieu of income tax is an annual election and does not affect other tax years.

- A taxpayer may file an amended return within the statute of limitations to change the election between sales tax and income tax.
- Any sales tax claimed must be separately stated and paid by the taxpayer. The taxpayer may deduct sales taxes that are imposed on the seller if the tax is separately stated, such as on a contract or receipt, and is paid by the taxpayer.
- Spouses who file a joint return and reside in different states are directed to calculate the deduction based on separate income and apply those amounts, and an appropriate allocation of exemptions, to each state.
- A married taxpayer filing a separate return who elects to deduct sales tax must use the optional sales tax tables if the taxpayer's spouse also elects to deduct sales tax and use the optional tables.

3.8 Itemized Deductions: Interest Expense

3.8.1 Background

Net capital gain attributable to the disposition of property held for investment is excluded from investment income for purposes of the investment interest limitation. However, noncorporate taxpayers can elect to include as much of their net capital gain as they choose as investment income if they also reduce the amount of net capital gain eligible for capital gains tax rates by the same amount [§163(d)(4)(B); Reg. §1.163(d)-1]. The effect of this election is to trade off the rate savings of a capital gain for immediate deductibility of excess investment interest expense.

3.8.2 Treating dividend income as investment income

The IRS has issued final regulations to assist taxpayers in making the election to treat qualified dividends as investment income to allow deductibility of investment interest expense. A taxpayer may treat any portion of qualified dividends as investment income. As with capital gains, the election is made on Form 4952, "Investment Interest Expense," and must be made on or before the due date, including extensions, of the income tax return for the year in which the net capital gain is recognized or qualified dividend income is received, although an election can be made on an amended return filed within six months of the original due date of the return [Reg. §1.163(d)-1, T.D. 9191, 3/18/2005].

3.9 Itemized Deductions: Charitable Contributions

3.9.1 Background

A charitable deduction for larger contributions made by an individual or partnership will not be allowed unless the donor complies with substantiation requirements.

Contributions of \$250 or more are deductible only if substantiated by a contemporaneous written acknowledgment from the donee charity. The acknowledgment must include the amount of cash and a description of any other property contributed, whether the donee provided any goods or services in consideration of the contribution, and a description and estimate of the value of the goods and services, if any, or a statement that the goods and services consist solely of “intangible religious benefits” (for example, admission or a religious ceremony) [§170(f)(8); Reg. §1.170A-13(f)].

Caution

In two Tax Court Summary opinions, taxpayers were denied deductibility of charitable contributions for failure to retain records substantiating alleged cash contributions made to charities. In one case, the taxpayer had no records to substantiate over \$8,000 of alleged cash contributions to his church over a two-year period, claiming that the records were in the possession of his former spouse. However, the taxpayer gave no explanation about why he was unable to recover the records from his ex-wife (*Ekeh v. Comm.*, TC Summary Opinion 2001-50, 4/5/2001). The other ruling involved a couple unable to substantiate most of their cash contributions allegedly made to a church. Also, additional contributions were disallowed for donations of cash and an automobile directly to the president of a charity, because the gifts had not been made directly to the charitable organization itself (*Barck, et ux. v. Comm.*, TC Summary Opinion 2001-51, 4/5/2001).

3.9.2 Contributions of intellectual property

Effective for contributions made after June 3, 2004, the American Jobs Creation Act of 2004 limits the charitable deduction associated with intellectual property. This new limit applies to contributions of any patent, copyright, trademark, trade name, trade secret, know-how, software (other than software generally available for purchase by the public), and similar property, including applications or registrations of such properties. The legislation limits the taxpayer’s initial deduction to the smaller of the taxpayer’s adjusted tax basis in the property or the property’s fair market value.

However, a subsequent additional charitable contribution may be claimed based on a percentage of the income that the charity receives from the intellectual property. Charitable donees who have received contributions of intellectual property must issue an information report to the donor, identifying the amount of net income allocable to that intellectual property. The donor then applies a statutory percentage to that net income amount, potentially claiming an additional charitable contribution based on that calculation. The statutory percentage is 100 percent of the income amount for the first tax year of the donor ending on or after the date of contribution, with the percentage then declining 10 percent per year, ending with a 10 percent deduction for the 11th and 12th years after the contribution. The additional deductions based on the percentage of the charity's income may not be claimed, however, until they exceed the original charitable deduction claimed for the transfer of the intellectual property at its tax basis [§170(m) and §6050L].

3.9.3 Charitable contributions of vehicles

Before 2005, a contribution of a used nonbusiness vehicle to charity was deducted at fair market value (FMV). In the case of a contribution after December 31, 2004, of a used vehicle, boat, or airplane (other than items held in inventory) for which the claimed charitable deduction exceeds \$500, no deduction is allowed unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment by the charity and includes that acknowledgment with the taxpayer's return for the year which includes the deduction. If the vehicle is sold by the charity without any significant intervening use or material improvement, the amount of the charitable deduction may not exceed the gross proceeds received by the charity from the sale [§170(f)(12)].

Written Acknowledgment by Charity. The taxpayer must substantiate the contribution of a vehicle, boat, or airplane by a contemporaneous written acknowledgment from the charity that is attached to the return. If the vehicle is sold by the charity, the receipt must identify the gross proceeds from the sale and include a statement that the deduction may not exceed those gross proceeds.

There are three exceptions to the rule limiting the charitable deduction to the charity's sale price of the vehicle:

1. The charity has significant intervening use (such as retaining the vehicle for driving required in the charity's exempt purpose).
2. The charity makes material improvements (such as in the case of a technical school that retains the vehicle for training and improvement by students).

3. The charity supplies the vehicle to a needy individual at no cost or at a price significantly below market value, but only if in direct furtherance of the charity's purpose of relieving the poor or underprivileged who are in need of transportation (IRS Notice 2005-44, IRB No. 2005-25).

In these cases, the receipt must identify the intended use or material improvement of the vehicle and the duration of such use, and also contain a certification by the charity that the vehicle will not be transferred for money or other property or service before completion of the use or improvement. In these cases, the charitable deduction is not limited to the gross sales proceeds, but instead can be established by a reasonable method, including the use of an established used car pricing guide. The charity must provide the written acknowledgment to the donor within 30 days of the sale of the vehicle or within 30 days of the contribution if the charity retains the vehicle for its use (§6720).

Example. Bud donates a used vehicle to a charity, which immediately brokers the vehicle through a used car auction market and receives \$4,800. The charity must provide a written acknowledgment to Bud that identifies the sales price and informs Bud that his charitable deduction may not exceed the gross sale price amount of \$4,800. When preparing his tax return claiming the charitable deduction, Bud must attach the written acknowledgment received from the charity. The \$250 receipt rule is not applicable in the case of a vehicle subject to this special written acknowledgment rule.

Example. Assume the same facts as in the preceding example, except that Bud donates the vehicle to a charity that retains the vehicle for use by its staff in the charity's exempt activities. In this case, the written acknowledgment from the charity must identify that it retained the vehicle for its use and the intended duration of such use, along with a certification by the charity that the vehicle would not be transferred for money or other property or services before completion of the use. In this case, the fair market value for calculation of Bud's charitable deduction may be determined by an established used car pricing guide.

Observation

In the case of business donations of depreciable property, the fair market value is generally not a determining factor in the charitable deduction. The fair market value is the starting point for the charitable contribution calculation, but that fair market value must be reduced by the ordinary income depreciation recapture that would have occurred if the asset had been sold for fair market value. The result generally is to limit the charitable contribution to the adjusted tax basis of the property in the case of a business vehicle donated to charity.

IRS Guidance. IRS Notice 2005-44 contains interim guidance regarding the substantiation and information reporting requirements for both the donor of the used vehicle and the charity (IRS Notice 2005-44, IRB No. 2005-25).

Form 1098-C. The IRS has issued Form 1098-C, "Contributions of Motor Vehicles, Boats, and Airplanes," which charities are to use to report to the IRS and to the donor with respect to contributions of motor vehicles, boats, or airplanes having a value of more than \$500. Copy A of the form is to be furnished to the IRS, and the charities are to provide donors with Copies B and C of Form 1098-C. Copy B is to be attached by the donor to the federal tax return, in order to support the donor's deduction for the contribution. The information in box 4 of the Form 1098-C is completed by the charity if the vehicle was sold (that is, contains the date of sale and gross proceeds from the sale), whereas information in box 5 is to be completed by the charity if the charity has retained the vehicle for significant intervening use, made material improvements to the vehicle, or transferred the vehicle to a needy individual for significantly below market value in furtherance of the charity's exempt purpose.

3.10 Itemized Deductions: Education Expenses

3.10.1 Background

To be deductible, education must:

1. Be required by the taxpayer's employer or applicable law or regulations as a condition to the retention by the taxpayer of his or her employment, status, or compensation; or
2. Maintain or improve skills required in the taxpayer's current work (Reg. §1.162-5).

However, even if the taxpayer's education meets one of these requirements, it is not qualifying education if it:

1. Is needed to meet the minimum educational requirements of the taxpayer's present trade or business; or
2. Is part of a program of study that can qualify the taxpayer for a new trade or business, even if the taxpayer has no plans to enter that trade or business.

Degree-related Education. The Tax Court has indicated that this latter rule will generally prevent a deduction for the costs of obtaining an undergraduate college degree. In *Meredith* (TC Memo 1993-250), the court said: ". . . it may be all but impossible for a taxpayer [to prove]

that a bachelor of arts degree program, or a liberal arts bachelor of science degree program, does not qualify the taxpayer in a new trade or business.” The case involved a financial planner who continued to work as such after she received a bachelor of science degree in business management. The court did not say what new trade or business her degree qualified her for.

3.10.2 MBA coursework allowed as a deduction

The Tax Court allowed a taxpayer to deduct tuition to obtain an MBA degree as a job-related education expense. The court determined there was no minimum education requirement by the taxpayer’s employer and that the MBA did not qualify the taxpayer for a new trade or business, given the individual’s substantial work experience directly related to the MBA coursework (*Allemeier v. Comm.*, TC Memo 2005-207, 8/31/2005).

In its opinion, the court analyzed whether the taxpayer was objectively qualified for a new trade or business as a result of the MBA, and in this regard, completed a detailed review of the types of activities the individual was qualified to perform both before acquiring the degree and after acquiring the degree. The court found that the MBA program did not significantly change the basic duties and skills of the taxpayer, and while the MBA improved the taxpayer’s existing skills, it did not necessary qualify him to perform significant additional duties.

3.11 Itemized Deductions: Club Dues

3.11.1 Background

Taxpayers are not allowed any deduction for club dues and fees [§274(a)(3)]. This applies to all clubs organized for business, pleasure, recreation, or other social purposes. Taxpayers can still deduct specific business expenses (such as meals) that they incur at a club if the expenses meet the usual requirements.

IRS regulations have clarified the definition of a “club organized for business, pleasure, recreation, or other social purposes” for purposes of the disallowance of a deduction for club dues. Under the final regulations, the disallowance applies to any membership organization a principal purpose of which is to conduct entertainment activities for members or their guests or to provide them with access to entertainment facilities. Organizations subject to the rule include, but are not limited to, country clubs, golf and athletic clubs, airline clubs, hotel clubs, and clubs operated to provide meals under circumstances generally considered to be conducive to business discussion. The disallowance does not generally

apply to (1) civic or public service organizations, such as Lions or Rotary; (2) professional organizations, such as bar and medical associations; and (3) quasi-professional organizations, such as business leagues, trade associations, chambers of commerce, boards of trade, and real estate boards [Reg. §1.274-2(a)(2)(ii)(iii), (a)(3)(iii); amended Reg. §1.274-5T(c)(6)(iii); T.D. 8601, 7/18/95].

3.11.2 Deductibility of country club dues disallowed to golf coach

The strict nondeductibility of golf and country club dues was emphasized in a Tax Court case disallowing country club dues to a golfing coach. The court noted that “no one, including golf professionals or instructors, may deduct club dues” (*Rodolfo Garcia, Jr. v. Comm.*, TC Summary Opinion 2005-2, 1/3/2005).

4. RETIREMENT PLAN ISSUES

4.1 Qualified Plan Limits

	<u>2003</u>	<u>2004</u>	<u>2005</u>
Maximum annual benefit under defined benefit plan	\$160,000	\$165,000	\$170,000
Maximum contribution to defined contribution plan	\$ 40,000	\$ 41,000	\$ 42,000
Maximum compensation generally taken into account under qualified retirement plan and SEPs	\$200,000	\$205,000	\$210,000
Elective deferral limits for 401(k) plans, SEPs, etc.	\$ 12,000	\$ 13,000	\$ 14,000
—Additional age 50 elective deferral	\$ 2,000	\$ 3,000	\$ 4,000
Compensation requiring SEP coverage	\$ 450	\$ 450	\$ 450
Earnings definition of a highly compensated employee	\$ 90,000	\$ 90,000	\$ 95,000
Maximum deferral under SIMPLE plan	\$ 8,000	\$ 9,000	\$ 10,000
—Additional age 50 deferral	\$ 1,000	\$ 1,500	\$ 2,000

4.2 Bankruptcy Protection

4.2.1 Background

The ability of creditors to reach IRAs and other retirement plans in a bankruptcy filing had been uncertain.

4.2.2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8, enacted 4/20/2005) provides enhanced protection for qualified retirement plan funds for all debtors in bankruptcy. An enhanced exemption is provided for retirement assets in Section 401 qualified defined benefit and defined contribution plans, including Section 401(k) plans, Section 403 annuity plans, including Section 403(b) tax sheltered annuities, Section 408 IRAs, SEP-IRAs and SIMPLE IRAs, Section 408 Roth IRAs, Section 414 governmental plans and Section 457 governmental or tax-exempt deferred plans.

The new exemption is available regardless of whether a debtor chooses federal bankruptcy exemptions under Bankruptcy Code Section 522(d) or state law exemptions under Bankruptcy Code Section 522(b). It applies whether or not the debtor's home state has opted out of the federal exemptions. For assets in a traditional IRA or Roth IRA, the federal exemption cannot exceed \$1 million for an individual debtor, but this cap does not apply to rollover contributions under Sections 402 and 403 [Bankruptcy Code §522(n)]. These new protections in the Bankruptcy Act took effect on October 17, 2005 (180 days after enactment).

Observation

This legislation also excludes Coverdell education savings accounts and qualified tuition programs from the property of the bankruptcy estate if the designated beneficiary of the account is the debtor's child or grandchild.

4.2.3 U.S. Supreme Court previously ruled IRAs protected in bankruptcy

In an opinion released before enactment of the Bankruptcy Act, the U.S. Supreme Court, in reversing an Eighth Circuit decision, ruled that IRAs qualified for the bankruptcy exemption and were not reachable by the claim of creditors (*Rousey v. Jacoway*, 2005-1 USTC ¶150,258, U.S. Sup. Ct., 4/4/2005).

Observation

The Supreme Court decision only addressed the bankruptcy exemption of traditional IRAs. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides a broader exemption, applying to Roth IRAs and all types of qualified retirement plans.

4.3 Roth Elective Deferral Plans

4.3.1 Background

Effective for tax years beginning after 2005, new Section 402A permits employee elective deferral contributions to Section 401(k) plans and Section 403(b) tax-sheltered annuities to be categorized as an after-tax Roth account rather than a traditional pre-tax elective deferral (§402A, added by 2001 P.L. 107-16, effective for tax years beginning after December 31, 2005). In addition, in March of 2005, the IRS issued Proposed Regulations explaining the new Roth elective deferral opportunity (REG-152354-04, 3/2/2005).

4.3.2 Key points of proposed regulations

Key points regarding the new Roth elective deferral accounts include:

1. Each employee has the elective ability to designate their salary-reduction deferral in either a Section 401(k) or Section 403(b) plan as a Roth account, assuming that the employer has modified the plan to accept Roth contributions. A separate account must be maintained by the plan for the Roth contributions, and the plan must keep separate records for each participant's Roth account. Gains, losses, and administrative expenses are to be charged on a reasonable basis between traditional accounts and Roth accounts [Prop. Reg. §1.401(k)-1(f)(2)].
2. An employee electing to designate salary deferrals as a Roth contribution is subject to the normal elective deferral limits. Thus, for 2005, an employee is able to electively defer \$15,000 into a Roth account, plus an additional \$5,000 catch-up contribution if the participant has attained age 50 by year end. Contrary to traditional Roth IRA funding, there is *no income limit* on elective deferrals into Roth accounts.

Observation

As a result of this change, higher income employees, who in the past have never been able to fund a Roth IRA because of the income phase-out eligibility rule, will now be able to move significant funds into a Roth account, if they so choose.

3. Any employer matching contributions must continue to be treated as pretax contributions and are subject to taxation when distributed to a participant at retirement.
4. Unlike the Roth IRA, a participant's Roth 401(k) account is only eligible for tax-free distribution after the account owner attains age 59½, dies, or becomes disabled, and also only after the Roth account has been in existence for more than five years after the year in which the individual first made a designated Roth contribution to that particular retirement plan or another elective deferral retirement plan.
5. A Roth elective deferral account is subject to the normal minimum required distribution rules that start at age 70½ [Prop. Reg. §1.401(k)-1(f)(3)]. However, this minimum required distribution rule can be avoided by simply rolling the Roth 401(k) account into a Roth IRA. A Roth IRA is not subject to minimum required distribution rules [§408A(c)(5)].

Observation

While the Roth elective deferral opportunity represents a significant change by allowing higher income employees to access Roth accounts, it places an additional administrative burden on the retirement plan. All Roth-designated accounts must be maintained separately, and earnings allocations to those Roth accounts must occur. On the other hand, the employer matching contribution remains in pretax status.

5. FRINGE BENEFITS

5.1 Nonqualified Deferred Compensation Plans

5.1.1 Background

The use of deferred compensation arrangements to defer current taxation of income is widely used by many businesses. Congress believed that many nonqualified deferred compensation arrangements allowed improper deferral of income, often providing security of future payment and control by the employee over amounts deferred, but yet resulted in deferral of the recognition of the income.

5.1.2 Comprehensive rules for nonqualified deferred compensation arrangements enacted

The American Jobs Creation Act of 2004 added Section 409A to provide comprehensive rules regarding the inclusion in gross income of

deferred compensation under nonqualified deferred compensation plans. If at any time a nonqualified deferred compensation plan fails to meet any one of three requirements, the compensation plus related earnings must be included in taxable income of the employee, with the tax increased by a 20 percent penalty (calculated as 20 percent of the compensation), and increased by interest (at the IRS underpayment rate plus 1 percent) on the underpayments that would have occurred had the deferred compensation been includable in income for the year in which first deferred. The three requirements that must continuously be met to avoid early taxation plus a penalty and interest are:

1. The distribution rule.
2. The election rule.
3. The acceleration of benefits rule (under which the plan may not permit the acceleration of the time or schedule of any payment, except as provided in regulations).

The Distribution Rule. The plan of deferred compensation must not permit distributions earlier than separation from service, the date the participant becomes disabled, death, a specified time or pursuant to a fixed schedule specified under the plan at the date of the deferral of the compensation, a change in the ownership or effective control of the employer, or the occurrence of an unforeseeable emergency.

Observation

These distribution rules, combined with the prohibition against any acceleration of benefits, will prevent an employee from electively accelerating the receipt of deferred compensation. It will also eliminate “haircut” provisions that allowed participants to receive early distributions at their election, subject to a minimal forfeiture or “haircut.”

Election Rule. The initial election to defer compensation must be made not later than the close of the preceding tax year. However, in the case of the first year in which the participant becomes eligible to participate in a deferred compensation plan, the election may be made with respect to services to be performed subsequent to the election within 30 days after attaining eligibility to participate in the plan. Also, performance based compensation based on performance over a period of at least 12 months may be deferred via election no later than six months before the end of the period.

A change in the time and form of distribution may be made under a subsequent election, but only if the election may not take effect until at least 12 months after the date on which made. Also, unless the election relates to a distribution on account of death, disability or unforeseeable emergency, any deferral must be at least five years from the date on which such payment would otherwise have been made. If

the deferred compensation is to be paid at a specific time or pursuant to a fixed schedule, any subsequent deferral election may not be made less than 12 months before the date of the first scheduled payment.

5.1.3 Definition of a nonqualified deferred compensation plan

A nonqualified deferred compensation plan is any plan that provides for the deferral of compensation other than a qualified employer plan and any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. Qualified employer plans excluded from these deferred compensation rules include Section 401 qualified pension and profit sharing plans, tax-deferred annuities, SEPs, and SIMPLE plans.

Observation

The nonqualified deferred compensation rules do not apply to bonuses and other annual compensation amounts that are paid within 2½ months after the close of the tax year in which the services were performed. Also, the application of these rules is not limited to employees but extends to deferral agreements with directors and other independent contractors.

Employer Reporting Requirements. If a nonqualified deferred compensation arrangement fails the criteria of new Section 409A, the employer must include deferred compensation in income, reporting the amount on either Form W-2 or Form 1099. In addition, the total amount of deferrals for the year under a nonqualified deferred compensation plan must be reported on the Form W-2, even though not includable in income. Per IRS Notice 2005-1 (Q&A 27), a minimal amount of annual deferral of \$600 or less does not require memorandum reporting.

5.1.4 Effective date and transition rules

The new nonqualified deferred compensation rules of Section 409A apply to any compensation deferred after December 31, 2004. Amounts earned and vested before January 1, 2005, are grandfathered. However, amounts deferred before January 1, 2005, are subject to the new rules if a material modification is made to the nonqualified deferred compensation plan after October 3, 2004. The addition or acceleration of any benefit or feature is a material modification, but the reduction of a benefit, right, or feature is not considered a material modification.

Within 60 days of enactment of the legislation, the IRS was directed to provide guidance regarding amendment of plans to conform to the new rules, and a limited period during which existing plans may be amended to either terminate participation in the plan or to conform

to the requirements of Section 409A with regard to amounts deferred after December 31, 2004. This Congressional mandate to provide guidance was subsequently satisfied with IRS Notice 2005-1 (IRS Notice 2005-1, IRB No. 2005-2).

IRS Notice 2005-1 allows a remedial period *through December 31, 2005*, under which existing or new nonqualified deferred compensation plans may be amended in order to comply with the provisions of Section 409A. The plan must be operated in good faith compliance with the provisions of the statute and IRS Notice 2005-1 during calendar year 2005. This remedial period was extended in late September 2005 *through December 31, 2006*, by IRS regulations.

Observation

The addition of Section 409A will require the review of virtually every nonqualified deferred compensation plan. While many plans will need to remove provisions that are not in compliance with Section 409A, other plans will benefit by conforming. An example would be the new ability to accelerate benefits in the event of an unforeseen emergency, which has not been contained in many existing deferred compensation agreements.

5.2 Health Savings Accounts (HSAs)

5.2.1 Background

As part of the Medicare Prescription Drug Act of 2003, Congress enacted a replacement for the Medical Savings Account, known as the Health Savings Account or HSA (§223, P.L. 108-173, 12/8/2003). HSAs became effective in 2004.

Observation

The HSA is significantly more taxpayer friendly than the MSA. The HSA has a lower deductible on the high deductible health insurance policy, allows a greater percentage of the deductible to be funded (that is, 100 percent rather than 65 percent or 75 percent) and allows individuals between ages 55 and 65 to make catch-up contributions to the HSA. Large employers, as well as small employers, can participate in an HSA, while MSAs only are available to smaller businesses. Finally, the HSA legislation is permanent, while MSAs were limited in number and duration.

5.2.2 Eligible individual

An eligible individual is one who is covered under a high deductible health insurance plan and, while covered under the high deductible

plan, is not covered under any other non-high deductible health plan [§223(c)(1)]. However, an individual remains eligible for an HSA if he or she is covered under workers' compensation, insurance for a specified disease or illness, insurance paying a fixed amount per day, or insurance coverage for accidents, disability, dental care, vision, or long-term care.

An individual generally becomes ineligible for an HSA at age 65 when that individual enrolls in Medicare [§223(b)(7)]. The IRS has clarified that mere eligibility for Medicare does not prohibit HSA eligibility; actual Medicare Part A or Part B enrollment must occur to preclude HSA contributions (IRS Notice 2004-50, IRB No. 2004-33).

5.2.3 High deductible health plan

In the case of individual coverage, a high deductible health plan must have an annual deductible of at least \$1,000, and the exposure to annual out-of-pocket expenses may not exceed \$5,100. For family coverage, there must be an annual deductible of at least \$2,000 in total (per family, not per person), and annual out-of-pocket expenses may not exceed \$10,200 (2005 amounts) [§223(c)(2)(A)].

5.2.4 The Health Savings Account

The Health Savings Account or HSA is a trust established exclusively for the purpose of paying the qualified medical expenses of the account beneficiary. It must be governed by a written instrument, all investments must be in cash, and the trustee must be a bank, insurance company or other institution of the type that can sponsor an IRA. No part of the trust assets may be invested in life insurance. The trust may accept rollover contributions from an Archer MSA.

5.2.5 Maximum HSA contribution

The maximum for an individual coverage HSA that can be contributed annually is the smaller of the annual deductible or \$2,650 (2005 amount). With respect to an HSA involving family coverage, the annual contribution is the smaller of the annual deductible or \$5,250 (2005 amount) [§223(b)(2)]. These annual HSA funding limits are converted to monthly amounts, because eligibility for funding hinges on participation in a high deductible health plan. For each month that an individual is an eligible participant in a high deductible health plan, they are entitled to contribute 1/12th of the HSA funding limit.

Age 55 Catch-up Contributions. If an individual has attained age 55 at the end of the tax year, the annual HSA contribution limit is increased by \$600 for 2005. This catch-up limitation increases \$100 annually, until reaching a total of \$1,000 for 2009 and years following.

HSA contributions made by an individual are allowed as a pre-AGI deduction.

5.2.6 Employer contributions

Employers, as well as individuals, are permitted to contribute to HSAs, to the extent the employee is an eligible individual. If an employer makes a contribution to employee HSA accounts, comparable contributions must be made for the year for all comparably participating employees. Employer contributions are a tax-free benefit in the same manner as health insurance, and are also not subject to payroll taxes or income tax withholding.

5.2.7 Withdrawals from the HSA

Funds within the HSA grow free of income tax. The account beneficiary determines when withdrawals occur. Withdrawals taken to pay or reimburse out-of-pocket medical expenses are tax-free, but withdrawals not used for medical costs are taxable and subject to a 10 percent penalty.

Even though a HSA participant may not continue to fund an HSA after age 65 (because of Medicare eligibility), the individual may continue to hold and accumulate HSA funds. A participant age 65 or older can also withdraw HSA funds tax free for use to pay health insurance premiums or Medicare Part B premiums, as well as other medical costs.

Observation

The individual HSA participant determines whether to use his or her HSA account to reimburse any eligible medical costs. Accordingly, HSA participants have the unique flexibility of accumulating the HSA account balance for future post-retirement medical needs, if desired. While an HSA participant cannot contribute to an HSA account after enrolling in Medicare, the HSA account can be maintained and used for reimbursement of medical costs during retirement years by the participant or spouse.

Upon death, a surviving spouse can succeed to an HSA account of the deceased spouse, assuming the surviving spouse was named as the successor beneficiary. To the extent a surviving spouse is not the successor beneficiary, the HSA FMV must be includable in the income of the person or persons who inherit the account, reduced by any medical expenses of the decedent paid from the account within one year after death [§223(f)(8)].

5.2.8 Further IRS guidance

Following the enactment of Section 223, the IRS issued significant guidance to assistance employers and individual taxpayers in establishing HSAs:

General Guidance. Shortly after enactment of Section 223, the IRS issued Notice 2004-2, containing 38 questions and answers covering most aspects of HSAs (IRS Notice 2004-2, IRB No. 2004-2).

A more exhaustive summary of HSAs was provided later in 2004. In Notice 2004-50, the IRS issued an 88 question-and-answer release that covered additional information on eligibility, high deductible health plans, preventive care, contributions, distributions, comparability of employer funding, rollovers, and other matters (IRS Notice 2004-50, IRB No. 2004-33).

The IRS has issued a publication that provides a summary of HSA rules in a form that is suitable for business owners and clients. See IRS Publ. 969, *Health Savings Accounts and Other Tax-Favored Health Plans*. Also, at the U.S. Treasury Web site, the IRS has posted new guidance in the form of “Frequently Asked Questions” regarding the establishment, use, and administration of HSAs. See www.treasury.gov under Health Savings Accounts HSA.

The IRS has issued a ruling clarifying that an individual with a high deductible health insurance plan may contribute to an HSA, even if that individual’s spouse has nonqualifying family coverage, provided that the spouse’s nonqualifying coverage does not cover the individual. Further, an individual with an eligible high deductible health plan for any dependents not covered by a spouse’s ineligible health plan may contribute to an HSA based on family coverage (Rev. Rul. 2005-25, IRB No. 2005-18).

Example. Ken, a self-employed individual, has a high deductible health insurance policy that only covers himself. Ken’s spouse, Barb, has other ineligible health plan family coverage that covers Barb and their two children, but Ken is excluded from Barb’s low deductible health plan coverage. Because Ken is not covered under Barb’s health plan, he is an eligible individual for an HSA.

Example. Assume the same facts as in the preceding example, except that Ken enrolls in a high deductible health insurance plan that provides family coverage for himself and one child. Again, Barb has ineligible low deductible health plan coverage for herself, and one other child is included in Barb’s plan, but Ken is excluded from coverage in her plan. Because Barb’s ineligible health plan coverage does not cover Ken, Ken’s HSA eligibility is not affected. Ken may contribute to the HSA in an amount equal to the lesser of the family health plan deductible or \$5,250.

5.2.9 Guidance on S corporation and partnership contributions

The IRS has provided guidance on an S corporation’s contributions to an HSA for the benefit of a more-than-2 percent S shareholder. Because

of the Section 1372 rules treating a more-than-2 percent S shareholder as a partner for fringe benefit purposes, the contributions by the S corporation must be treated as wages of the S corporation, and are reportable as compensation income to the S shareholder. However, because of the medical nature of the payment, the compensation is not subject to Federal Insurance Contributions Act (FICA) tax. The S corporation shareholder, after reporting the additional wage income, is entitled to claim an offsetting pre-AGI deduction for the HSA funding that was reported as compensation (IRS Notice 2005-8, IRB No. 2005-4).

This guidance also addresses a partnership's contributions to an HSA for the benefit of a partner. The partnership may treat the HSA contribution as a nondeductible distribution to the partner under Section 731. As a distribution, the amount is not included in the partner's income, and the partner may take a deduction for the contribution to the HSA as an adjustment to the partner's Form 1040 income. Alternatively, the partnership's contribution to the HSA may be treated as a guaranteed payment to the partner in exchange for services rendered to the partnership. In this case, the partnership claims a deduction for the guaranteed payment, the partner reports the amount in income subject to SE tax, and the partner claims a corresponding deduction for the HSA payment in arriving at AGI (IRS Notice 2005-8, IRB No. 2005-4).

5.2.10 Comparability rules for employer contributions

In August 2005, the IRS issued proposed regulations providing guidance on the comparable contribution rules that employers must follow if they contribute funds to an employee's HSA. The guidance is in Q&A format and is only effective once promulgated in the form of final regulations (although the IRS indicates that taxpayers may rely on the guidance at this time).

Observation

The proposed rules appear to be designed to encourage interest in establishing HSAs for both providers and employers. The proposed regulations contain a number of good examples, addressing practical situations associated with employer-provided HSAs.

5.3 De Minimis Fringes

5.3.1 Background

A de minimis fringe is a fringe that is so small it would not be practical to account for it [§132(e)]. Examples include (a) an employer-operated

eating facility if (1) the facility is located on or near the business premises, and (2) revenue from the facility equals or exceeds the direct operating cost and it is available on a nondiscriminatory basis; (b) occasional supper money that is not provided on a regular or routine basis; (c) traditional birthday or holiday gifts of property; (d) coffee and doughnuts; (e) occasional tickets to sporting events; (f) employee personal use of office copying machines; and (g) group-term life insurance payable on the death of an employee's spouse or dependent if it is not more than \$2,000 [Reg. §1.132-6(e)(1)].

The following items are examples of items *not* excludable as de minimis fringes: season tickets to sporting or theatrical events; commuting use of employer-provided vehicle more than once a month; membership in a private country club or athletic facility (regardless of how often used by the employee); use of employer-owned or employer-leased apartment; and the use of a hunting lodge, boat, or other facility for a weekend [Reg. §1.132-6(e)(2)].

5.3.2 Holiday gift coupons deemed taxable

The IRS has ruled that an employer's holiday gift coupon given to all employees did not qualify as a de minimis fringe and must be included in employee compensation. The gift coupon had a \$35 face value and could be redeemed at several food stores toward the purchase of grocery products. The coupon could only be used once, and any unused portion was forfeited rather than refunded as cash. Nevertheless, the IRS held that the gift coupon was a cash equivalent fringe, and further that it was administratively practical to include the amount in the compensation of each employee (TAM 200437030).

Observation

If the gift coupon in the preceding ruling had not included a stated dollar amount, and allowed the employee to choose only among several in-kind gifts, it likely would have met the criteria of a de minimis fringe.

6. TAX CALCULATIONS AND TAX CREDITS

6.1 Alternative Minimum Tax

6.1.1 Background

A taxpayer who is liable for the regular tax may also be liable for the alternative minimum tax (AMT). Taxpayers may have to pay this tax if their taxable income for regular tax purposes, plus or minus certain

adjustments and preferences, totals more than an applicable exemption amount.

Adjustments are different from tax preferences in that an adjustment either increases or decreases income subject to the AMT. However, tax preferences always increase income subject to the AMT. In computing alternative minimum taxable income, the following adjustments are used:

- Standard deduction
- Personal exemption
- Medical and dental expense
- Miscellaneous itemized deductions [as defined in §67(b)]
- Taxes
- Interest
- Depreciation of property placed in service after 1986
- Circulation and research and experimental costs paid or incurred after 1986
- Mine exploration and development costs paid or incurred after 1986
- Long-term contracts entered into after February 28, 1986
- Pollution control facilities placed in service after 1986
- Adjusted basis for gain or loss (where regular tax and AMT basis differs)
- Incentive stock options
- Tax shelter farm loss [§58(a)]
- Passive activity loss [§58(b)]
- Distributions from estates and trusts [§59(c)]
- Alternative tax net operating loss deduction

These adjustments require the taxpayer to recompute deductions and deferrals that tend to offset the reduction these items produce in the taxpayer's taxable income. The principal effect of this system is that it permits "netting." That is, these adjustments can *increase* or *decrease* alternative minimum taxable income. The reduction could occur in a year when, for example, the Alternative Depreciation System deduction exceeds the Modified Accelerated Cost Recovery System (MACRS) deduction (in later years of an asset's recovery period when the MACRS deduction is understated since it had been overstated in earlier years). Thus, the "netting process" recognizes that, in general, using tax preferences effects a deferral, rather than a complete reduction, in tax liability.

6.1.2 90 percent limit on foreign tax credit repealed

Previously, the AMT liability was reduced by any AMT foreign tax credit, but the AMT foreign tax credit was limited to 90 percent of the AMT. Effective for tax years beginning after 2004, however, the American Jobs Creation Act of 2004 repeals the 90 percent limit. Accordingly, the AMT foreign tax credit can fully reduce an AMT liability to zero for tax years beginning after 2004 [§59(a)(2)].

6.1.3 Business credits allowed against AMT

While business credits generally do not reduce AMT, two energy credits now serve to reduce both regular tax and AMT. Effective for tax years beginning after 2004, the alcohol fuels credit reduces AMT. Also, the Section 45 electricity production credit reduces AMT, for facilities placed in service after October 22, 2004, during the four year period beginning on the date that the facility was originally placed in service.

6.2 Farm Income Averaging

6.2.1 Background

Individuals engaged in farming are allowed to elect to average farm income over three years. This election applies lower income tax rates from prior years to current taxable income that is attributable to farming [§1301]. Individuals are eligible for this privilege by engaging in a farming business as a proprietor, a partner in a partnership, or as a shareholder in an S corporation, without regard to whether they engaged in a farming business in any prior base year. However, the beneficiary of a trust or an estate is not considered to be engaged in a farming business.

Late Election. Previous regulations did not permit a later amended farm income averaging election unless there was some other change to the taxpayer's income. However, the final regulations are more liberal, permitting a taxpayer to elect income averaging in a late or amended return. Additionally, taxpayers may amend to change the amount of elected farm income in a prior election, or to revoke a previous averaging election. All of these subsequent actions, of course, must be made within the normal three-year statute of limitations [Reg. §1.1301-1(c)].

Negative Base Year. For the first several years of farm income averaging, the IRS forms and publications directed that a negative base year must be entered as zero. But in the 2000 instructions for Schedule J, as well as in IRS Publication 225, *Farmer's Tax Guide*, the IRS changed its position, allowing a negative amount to be used for the base year taxable income. The final regulations issued in 2002 continue that

provision by stating that all allowable deductions, including the full amount of any NOL carryover, are taken into account in determining the taxable income for the base year, even if the deductions exceed income and the result is negative [Reg. §1.1301-1(d)(2)].

Observation

However, the final regulations take this a step further, requiring that any negative amount that provided a benefit in another taxable year must be added back to the base year taxable amount. Thus, NOLs and capital loss deductions that carry to other years cannot be considered in calculating a negative base amount.

6.2.2 Farm income averaging and the AMT

The American Jobs Creation Act of 2004 enacted a change such that in computing AMT, a farmer's regular tax liability is determined without regard to farm income averaging. Accordingly, a farmer receives the full benefit of farm income averaging because it reduces the regular tax while the AMT remains unchanged.

The change applies to taxable years beginning after December 31, 2003 [Act Sec. 314, amending §55(c)(2)].

Example. Jim and Jane Farmer, joint filers, have an opportunity to report increased farm income in 2005. Their tax practitioner notes that their base year taxable income for the years 2002 through 2004 is approximately \$20,000 each year. This indicates a significant capacity to report 2005 income that is taxed under income averaging at the 15 percent marginal bracket available for the three base years. Accordingly, for 2005, Jim and Jane plan their Schedule F to report greater taxable income. Their final taxable income for 2005 is approximately \$114,000, near the top of the 25 percent rate bracket. This taxable income would result in regular federal income tax of about \$22,000, and AMT of about \$18,500.

Through the use of farm income averaging, Jim and Jane are able to reduce their regular income tax from the \$22,000 amount to approximately \$16,000, saving about \$6,000 of regular tax. Previously, the AMT would have represented a floor on the income averaging savings, and they would have been required to pay the \$18,500 of AMT. However, under the new legislation effective for 2005, their AMT is calculated in comparison to regular tax before income averaging, and accordingly AMT does not apply. Thus, Jim and Jane report regular income tax of \$16,000 for 2005, saving approximately \$6,000 through the use of income averaging.

The legislation also extends farm income averaging to fishermen, also effective for tax years beginning after December 31, 2003.

6.3 FICA and FUTA on ISOs

6.3.1 Background

In the past, the IRS National Office has taken the position that the exercise of an initial stock offering (ISO) is subject to FICA on the difference between the fair market value of the stock and the option price (FSA 199926034; *Sun Microsystems v. Comm.*, TC Memo 1995-69). In 2001, the IRS issued both a Notice and proposed regulations emphasizing this position, but stating that payroll taxes would not be imposed on any exercise of an ISO before 2003 (IRS Notice 2001-14, IRB No. 2001-6; REG-1428686-01, 11/14/2001).

However, in mid-2002, the IRS announced that it was creating an indefinite moratorium on the matter of imposing payroll taxes on the exercise of stock options (IRS Notice 2002-47, IRB No. 2002-28).

6.3.2 FICA and FUTA eliminated on ISOs

In the American Jobs Creation Act of 2004, Congress eliminated any possibility of the imposition of FICA, Federal Unemployment Tax Act (FUTA), or federal income tax withholding in connection with either the transfer of stock pursuant to the exercise of an incentive stock option or upon the employee's disposition of that stock by amending the Code to ensure that no payroll taxes could be imposed. This change was effective for stock acquired under options exercised after October 22, 2004 [§§3121(a)(22), 3306(b)(19) and 3231(e)(12)].

In July of 2005, the IRS subsequently announced that it was withdrawing the proposed regulations that it had issued in 2002 that would have required the payment of payroll taxes on incentive stock options.

6.4 Child Tax Credit

6.4.1 Background

Taxpayers with qualifying children under age 17 are entitled to a child tax credit of \$1,000 per child (§24). The credit begins to phase out when "modified AGI" reaches \$110,000 for joint filers, \$75,000 for singles, and \$55,000 for married filing separately. The credit is reduced by \$50 for each \$1,000, or fraction thereof, of modified AGI above these thresholds. Thus, for a taxpayer with one child, the \$1,000 credit is completely phased out when modified AGI exceeds \$129,000 for joint filers and \$94,000 for singles, per the chart below. The income thresholds are not indexed for inflation.

<i>Filing Status</i>	<i>MAGI Phaseout Range</i>	
	<i>One Child</i>	<i>Two Children</i>
Joint	\$110,000–\$129,000	\$110,000–\$149,000
Single	\$ 75,000–\$ 94,000	\$ 75,000–\$114,000
Married Separate	\$ 55,000–\$ 74,000	\$ 55,000–\$ 94,000

“Modified AGI” is AGI without regard to the exclusions for foreign earned income and housing costs (§911), and income of certain foreign residents [§§24(b)(1), 931, 933]. A “qualifying child” is a U.S. citizen for whom the taxpayer can claim a dependency exemption as a child, descendant, stepchild, or eligible foster child, and who is less than 17 years old [§24(c)(1)].

6.4.2 Change to *qualifying child* definition

Beginning in 2005, a qualifying child is one under age 17 who meets the relationship definition to the taxpayer, who has the same principal place of abode as the taxpayer for more than half of the year, and that child does not provide over half of his or her own support [§24(c), with cross-reference to §152(c)].

Observation

As a result of this change, a taxpayer claiming the \$1,000 child tax credit no longer needs to claim that child as a dependent to be eligible for the credit. However, because the child must have the same principal place of abode as the taxpayer for more than half of the year, presumably the child is eligible as a dependent. This definitional change of a qualifying child also eliminates the gross income test, although that again was rarely applicable to a child under age 17.

6.5 Child Dependent Care Credit

6.5.1 General rules

General rules applicable to the child and dependent care credit follow.

6.5.2 Qualifying Individual

1. Taxpayer’s dependent under age 13 for whom taxpayer is entitled to a dependency exemption.
2. Taxpayer’s dependent who is physically or mentally disabled (for example, parent).
3. Taxpayer’s disabled spouse who has the same principal place of abode for over half the year [§21(b)(1)].

6.5.3 Maximum credit allowed

1. A maximum 35 percent credit is allowed, reduced by one percentage point for each \$2,000 of adjusted gross income exceeding \$15,000.
2. A minimum 20 percent credit applies.
3. The maximum amount of employment-related expenses taken into account is \$3,000 for one dependent and \$6,000 for two or more [§21(c)].

6.5.4 Requirement that taxpayer maintain a home eliminated

Effective for 2005, Congress has eliminated the requirement that a taxpayer maintain a home in order to claim the child and dependent care credit. Effective in 2005, a taxpayer may claim the child care credit with respect to a child living more than half of the year with the taxpayer, even if the taxpayer does not provide more than half the cost of maintaining the household [§21(e)(1), as amended].

6.6 Adoption Credit

6.6.1 Background

Before 2002, Section 23 allowed a taxpayer to claim a credit of up to \$5,000 for qualifying adoption expenses, and up to \$6,000 per adoption of a domestic child with special needs. Beginning in 2002, the maximum adoption credit was increased to \$10,000 per adoption of an eligible child. The credit is available until modified AGI reaches \$150,000, with the credit then phased out proportionately as modified AGI moves from \$150,000 to \$190,000, with the same phaseout range applied to all categories of filers (for example, single joint). Both the adoption credit amount and the AGI phaseout amounts are adjusted annually for inflation.

6.6.2 Inflation-adjusted amounts for 2005

The dollar limit on the adoption credit for 2005 was indexed to \$10,630 (Rev. Proc. 2004-71, IRB No. 2004-50). Similarly, the \$40,000 AGI phaseout range for the credit was increased for 2005 from \$159,450 to \$199,450.

Observation

Under Section 26(a)(1), the adoption credit is permanently allowed to offset both regular tax and the alternative minimum tax.

6.7 Hope and Lifetime Learning Credits

6.7.1 Background

The Hope credit is available for a student who has not completed the first two years of post-secondary education as of the beginning of the tax year. It is calculated as 100 percent of the first \$1,000 of qualified tuition and 50 percent of the next \$1,000 of qualified tuition, for a maximum annual credit of \$1,500 per student. For each eligible student, the Hope credit may be claimed for no more than two taxable years.

The Lifetime Learning credit is calculated as 20 percent of up to \$10,000 of qualified tuition, for a maximum nonrefundable credit of \$2,000. This limit applies per taxpayer, regardless of the number of students. Both degree and non-degree courses at a higher education institution are eligible, including those taken to acquire and improve job skills. There is no requirement of enrollment in a degree program and enrollment for at least half of the normal full-time workload, as occurs with the Hope credit.

6.7.2 Inflation-adjusted amounts for 2005

Higher income taxpayers lose the benefit of these educational tax credits at higher AGI levels. The AGI levels are adjusted annually for inflation. The inflation adjustments for the AGI phaseout range for the education tax credits for 2005 are as follows:

- Joint filers lose the educational tax credits as modified AGI increases from \$87,000 to \$107,000 (Rev. Proc. 2004-71, IRB No. 2004-50).
- For single filers, the phaseout range for 2005 is from \$43,000 to \$53,000 of modified AGI.

6.7.3 Pre-AGI deduction for higher education tuition

Beginning in 2002, a new above-the-line deduction became available for qualified tuition and related fees associated with higher education of the taxpayer, taxpayer's spouse, or dependent (§222).

In 2004 and 2005, the allowable deduction is \$4,000, with a lower \$2,000 limit applicable to taxpayers with greater modified AGI. The \$4,000 deduction is permitted for single and head of household filers whose modified AGI does not exceed \$65,000, and for joint filers whose modified AGI does not exceed \$130,000. The lower tier \$2,000 deduction is permitted as modified AGI for single and head of household filers increases from \$65,000 to \$80,000, and as joint modified AGI increases from \$130,000 to \$160,000.

The above-the-line higher education tuition deduction is not allowed to an individual with respect to whom a dependency exemption is allowable to another taxpayer for the year [§222(c)(3)]. A taxpayer is not allowed to claim the above-the-line higher education tuition deduction in the same year as a Hope or Lifetime Learning credit is claimed for the same student.

Example. During 2005, Linda is a freshman-sophomore at New York University. After scholarships and grants, Linda's parents incur \$14,000 of qualified tuition and fees. Her parents' joint AGI is \$108,000. Their AGI is too high to claim either the Hope or the Lifetime Learning credit, but Linda's parents are allowed to claim the \$4,000 qualified tuition deduction.

Alternatively, if the parents' AGI was \$131,000, they would be eligible to claim only the lower \$2,000 qualified tuition deduction amount.

6.8 Alternative Motor Vehicle Credit

6.8.1 New alternative motor vehicle credit added by 2005 Energy Act

As part of the 2005 Energy Act, Congress has added a new alternative motor vehicle credit that applies to four types of new vehicles:

- Qualified fuel cell motor vehicle.
- Advanced lean burn technology motor vehicle.
- Qualified hybrid motor vehicle.
- Qualified alternative fuel motor vehicle (§30B).

The following points are applicable to all versions of this credit:

- The credit is treated as part of the general business credit system for business taxpayers, and is treated as a personal tax credit for individual taxpayers acquiring a vehicle in a nonbusiness or nondepreciable context. However, to the extent of any business use, the credit is not permitted to the extent the deduction is claimed under Section 179 for the vehicle, nor may any double benefit be claimed for both business usage and eligibility for the credit.
- The vehicle must be new rather than used.
- The credits are available for vehicles placed in service after 2005. The various credits expire for years ranging from 2010 to 2015, depending on the particular category of vehicle.
- The credit is available whether the taxpayer purchases or leases the new vehicle.

- In the case of a vehicle purchased (but not leased) by a governmental or tax-exempt entity, the person who sold such vehicle to the exempt entity is treated as the taxpayer that placed the vehicle in service, and is entitled to the credit.

6.8.2 Qualified fuel cell motor vehicle

A credit of \$8,000 is allowed for any qualified fuel cell motor vehicle with a gross vehicle weight rating of not more than 8,500 pounds. This credit escalates to greater amounts for heavier vehicles. In addition, there is an enhancement to the credit ranging from \$1,000 to \$4,000, based on the increased fuel efficiency of the vehicle compared to 2002 city fuel economy standards. A fuel cell vehicle is one propelled by power from one or more cells that convert chemical energy directly into electricity by combining oxygen with hydrogen fuel that is stored onboard the vehicle [§30B(b)].

6.8.3 Advanced lean burn vehicle credit

This version of the Section 30B vehicle credit applies to a passenger auto or light truck with an internal combustion engine that is designed to operate primarily using more air than necessary for complete combustion of the fuel, incorporating direct injection, and achieving at least 125 percent of increased fuel efficiency compared to 2002 model year city fuel economy standards. The credit increases incrementally as the percentage of fuel economy increases, with the credit ranging from \$400 to \$2,400. In addition, there is a conservation credit that ranges from \$250 to \$1,000 based on the lifetime fuel savings that the vehicle is anticipated to realize [§30B(c)].

6.8.4 Hybrid vehicle credit

A hybrid vehicle credit is allowed for vehicles that draw propulsion from both an internal combustion engine and a rechargeable energy storage system or heat engine.

Observation

Previously, hybrid vehicles, categorized as “clean fuel vehicles,” resulted in a \$2,000 deduction. This deduction is repealed for hybrid vehicles placed in service after 2005, and replaced by the alternative vehicle credit.

The qualified hybrid vehicle receives a credit using the same sliding scale that applied to the advanced lean burn vehicles. Accordingly, this credit will range from \$400 to \$2,400, based on the fuel economy, and

an initial conservation credit from \$250 to \$1,000 also would be available, based on the projected gallons of fuel saved over the useful life of the vehicle [§30B(d)].

6.8.5 Alternative fuel vehicle credit

This credit applies to vehicles that burn only natural gas, liquefied petroleum gas (LP), hydrogen, or 85 percent methanol. The credit allowed is based on a percentage of the incremental cost of the energy efficient components of the vehicle. The credit is 50 percent of the incremental cost of the energy enhancement, plus 30 percent if the vehicle receives clean air certification and meets or exceeds specified clean air standards [§30B(e)].

A reduced credit for alternative fuel vehicles is provided for “mixed fuel vehicles.” These are vehicles that burn both alternative fuels and conventional petroleum-based fuels.

6.9 Residential Energy Credits

6.9.1 Background

No credits previously existed for energy improvements to a taxpayer’s principal residence or for energy efficient property expenditures made to residential property.

6.9.2 Residential energy credits added by 2005 Energy Act

Effective for property placed in service 2006 and 2007, Congress has added two residential energy credits:

- \$500 lifetime credit for energy improvements to a taxpayer’s principal residence (§25C).
- 30 percent credit for energy efficient property expenditures made to residential property (§25D).

6.9.3 \$500 lifetime credit

The \$500 lifetime credit has two components:

10 percent qualified energy efficient improvements. Taxpayers are allowed a credit for 10 percent of the amount paid or incurred for qualified energy improvements, defined as energy efficient building envelope components installed as new property on a dwelling unit located in the United States that is the taxpayer’s principal residence. A building envelope component is any insulation material or system

specifically designed to reduce heat loss or gain, exterior windows (including skylights), exterior doors, and any metal roof containing pigmented coatings primarily designed to reduce the heat gain [§25C(c)]. However, only \$200 of the \$500 lifetime credit amount can be attributable to window improvements.

Residential energy property expenditures. The second component of the \$500 lifetime energy credit for a taxpayer is a dollar-for-dollar credit for three items, but each item is subject to a specific dollar cap on the credit:

1. Energy efficient building property (such as heat pumps, efficient central air conditioners, or water heaters), subject to a \$300 cap;
2. Qualified natural gas, propane or oil furnace or hot water boiler, subject to a \$150 cap; or
3. An advanced main air circulating fan, subject to a \$50 credit cap.

These expenditures must be installed in a dwelling unit which is the taxpayer's principal residence, and must be new items rather than used [§25C(d)]. The credit offsets only regular tax, not AMT, and any excess credit is nonrefundable.

6.9.4 30 percent credit for residential energy efficient property

Individuals are allowed a credit in the amount of 30 percent of the following residential energy efficient property expenditures:

- 30 percent of qualified photovoltaic property expenditures (using solar energy to generate electricity in a dwelling), subject to a credit cap of \$2,000 per year;
- 30 percent of the qualified solar water heating property expenditures, subject to a \$2,000 credit cap for any tax year; and
- 30 percent of the qualified fuel cell property expenditures, subject to a \$500 credit cap for each half kilowatt of capacity of qualified fuel cell property [§25D(a) and (b)(1)].

Observation

The qualifying fuel cell property expenditure credit must involve a dwelling unit used as a principal residence by the taxpayer, while the other two credits are available for expenditures in a dwelling unit used as a residence (but not necessarily the principal residence) of the taxpayer. The 30 percent credit offsets regular tax but not AMT. Any excess credit becomes a carryforward to future years [§25D(c)].

The 30 percent credit is effective for property placed in service after 2005 and before 2008 [§25D(g)].

7. FILING AND COMPLIANCE MATTERS

7.1 Estimated Tax Payments

7.1.1 Background

Generally, taxpayers must make estimated tax payments if they determine their total tax liability for the year, reduced by withholding and estimated tax payments, will be \$1,000 or more and they estimate the total amount of tax withholding from their income will not exceed the lesser of:

- 90 percent of the tax to be shown on this year's return; or
- 100 percent of the tax shown on last year's return [§6654(d)(1)(B)].

Note: Individual taxpayers can generally avoid penalties for failure to pay estimated tax by making payments during the year exceeding one of the above amounts, or by making payments on a current basis under an annualized income installment method.

In determining estimated tax liability, the alternative minimum tax must be taken into account.

7.1.2 Higher income taxpayers

For 2005, taxpayers with an adjusted gross income of more than \$150,000 in 2004 (\$75,000 for married persons filing separately) must use 110 percent, rather than 100 percent of their prior year's tax [§6654(d)(1)(C)]. This rule does not apply if at least two-thirds of the gross income for the current and prior years is from farming or fishing.

Example. Fran's adjusted gross income for 2004 was \$180,000 and the tax liability for that year was \$50,000. Fran can avoid an underpayment penalty in 2005 if the total amount withheld and her estimated tax payments exceed \$55,000 (110 percent of \$50,000), because her last year's AGI was more than \$150,000.

Farmers or Fisherman. If at least two-thirds of the taxpayer's gross income for the current and prior years is from farming and fishing, no estimate payments are required if the taxpayer files a return and pays all tax due by March 1 of the following year. Alternatively, a taxpayer can pay in estimates of at least 66⅔ percent of the tax due by January 15 of the following year, with the remainder of the tax due paid by April 15 without penalty [§6654(i)].

Other Exceptions. The IRS has the authority to waive the underpayment of estimated tax in the event of a casualty, disaster, or other unusual circumstance [§6654(e)(3)(A)]. Also, if a taxpayer retires in a

year after attaining age 62 or becomes disabled, the IRS has the authority to waive the penalty for reasonable cause [§6654(e)(3)(B)].

7.2 Impact of Uniform Definition of *Child*

7.2.1 Head of household

A taxpayer's filing status is head of household if he or she is unmarried or considered unmarried on the last day of the year, is not a surviving spouse (eligible for joint rates), and pays more than half the cost of keeping up a home for the taxpayer and a qualifying individual. Before 2005, qualifying individuals included children and their descendants, whether or not a dependent.

Note

Taxpayers are considered unmarried on the last day of the tax year for this purpose if they meet certain tests for married individuals living apart [§§2(c); 7703(b)]. A married taxpayer with a dependent child will qualify for head of household status (rather than less favorable married filing separate status) if these conditions are met:

1. The taxpayer must file a separate return.
2. The taxpayer pays more than half the cost of operating the household for the year.
3. The household was the principal place of abode for more than half of the year of a child with respect to whom the taxpayer is allowed a dependency exemption (or would be allowed an exemption but for a written release of the exemption to the noncustodial parent).
4. The taxpayer's spouse was not a member of the household during the last six months of the tax year.

Effective for 2005 and after, Congress has revised the definition for head of household status. Effective in 2005, a taxpayer must maintain as his or her home a household that is the principal place of abode for more than one-half of the year of:

1. A qualifying child of the individual; or
2. Any other person for whom the taxpayer may claim a dependency exemption.

Observation

The requirement that a qualifying child of the taxpayer must meet the Section 152(c) dependency definitions precludes head of household status for maintaining the home of an adult child who cannot qualify as a dependent.

Example. George, a single individual, provides more than half the cost of his residence that he shares with his unmarried son, Jim, who is age 30. Before 2005, George may have qualified for head of household status by reason of Jim's residency in his home, even if Jim was not a dependent. However, in 2005, because Jim's age exceeds the qualifying child definition, George may not file under head of household status. To meet the age test of a qualifying child under Section 152(c), Jim would need to be under age 19 at the close of the year, or a student who has not attained the age of 24 as of the close of the year, or a permanently and totally disabled individual. George could also meet head of household status if Jim qualified as a dependent under a "qualifying relative" definition, as a child can qualify as a dependent under that test. However, in that case, Jim's gross income for 2005 must be less than the dependency exemption (\$3,200 for 2005).

Example. Mary is single and age 25, maintaining her own household. Her younger sister, age 17, resides with Mary for the entire tax year. Even if Mary's younger sister has gross income over \$3,200, her presence may qualify Mary for head of household status, assuming the sister does not provide over half of her own support for the tax year. A "qualifying child" for purposes of the Section 152(c) definition includes not only a child or descendant of a child, but a sibling and descendants of siblings. Accordingly, because Mary's younger sister is under age 19, resides in Mary's home for over half of the year, and meets the relationship definition, she is a "qualified child" with respect to Mary.

Observation

In the case of a single taxpayer supporting a *parent*, the taxpayer is eligible to file as head of household even if the dependent parent (or parents) does not live with them. The taxpayer must pay more than half the cost of keeping up a household that was the principal place of abode for the entire year of a parent, and must be eligible to claim the parent as a dependent [§2(b)(1)(B)]. Taxpayers are keeping up a principal place of abode if they pay more than half the cost of keeping their parent in a rest home or home for the elderly.

Example. Sue, an Ohio resident who is single, pays more than half the cost of maintaining the household for her mother, Edna. Edna resides in New York, has limited income from Social Security and several investments, and Sue's contribution to her monthly support is more than 50 percent of Edna's living costs. Sue is eligible to claim Edna as a dependent. Even though Edna does not reside with her, Sue may file under head of household status.

7.3 Dependent Definition: 2005 and After

7.3.1 Background

In 2004 legislation, Congress revised the definition of a dependent for purposes of the personal exemption deduction, effective for 2005 and after. As a result, a dependent must be either:

1. A qualifying child; or
2. A qualifying relative [§152(a)].

7.3.2 Qualifying child

A qualifying child is defined in Section 152(c) by four criteria:

1. *Relationship* test, defined as a child of the taxpayer or a descendant of the child, or a sibling of the taxpayer or a descendant of a sibling;
2. *Age* requirement (the individual must be under age 19 as of the close of the calendar year, or a student who has not attained age 24 as of the close of the calendar year, or an individual permanently and totally disabled);
3. The individual has the same *principal place of abode* as the taxpayer for more than half of the tax year; and
4. The individual has not provided over one-half of the individual's own *support* for the calendar year.

Observation

Under this new definition of a qualifying child for dependency exemption purposes, the support test has changed. Previously, the taxpayer must have provided more than half of the support of the claimed dependent. Under the new definition, the dependent cannot have provided more than half of his or her own support.

Example. Tim, age 14, receives one-third of his support from his father, with whom he resides, one-third from a grandparent, and one-third from a trust for Tim's benefit from his deceased mother's estate. Under former law, Tim could not be a dependent of his father because his father did not provide over half of Tim's support. However, under the new definition of a qualifying child, Tim qualifies as his father's dependent because Tim did not provide more than one-half of his own support.

7.3.3 Tie-breaking rules

If an individual is eligible to be claimed a qualifying child by two or more taxpayers for the year, special assumptions are built into the statute to identify the taxpayer who may claim the individual as a dependent [§152(c)(4)]. An example where the tie-breaking rules are required

would be a child residing with a parent and grandparent in the same household. The tie-breaking rules place the dependency exemption first with a parent of the individual. Second, if a parent is not eligible, the taxpayer with the highest adjusted gross income for the year claims the dependency exemption. Finally, if more than one parent qualifies for claiming the child, the child is treated as the dependent of the parent with whom the child resided for the longest period during the year. If the child resided with both parents for the same amount of time, the parent with the highest AGI claims the exemption.

7.3.4 Qualifying relative

A taxpayer may claim a dependency exemption for a qualifying relative [§152(d)]. A qualifying relative must meet four tests:

1. *Relationship or member of household* (a broad definition, including a child, descendant of a child, sibling, parent or other ancestor, niece, nephew, uncle or aunt, son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law or sister-in-law, or an individual who for the taxable year has the same principal place of abode as the taxpayer and is a member of the taxpayer's household).
2. *Gross income* test (gross income must be less than the exemption amount, which is \$3,200 for 2005).
3. *Support* test (the taxpayer must provide over one-half of the individual's support for the calendar year).
4. The individual is *not a qualifying child* of the taxpayer or of any other taxpayer for the year.

Observation

The revised statutory definitions continue the special dependency rules for multiple support agreements [§152(d)(3)] and for children of divorced parents [§152(e)]. The "qualifying relative" definition would allow a dependency exemption for a domestic partner and a domestic partner's children under the member of household definition, provided the relationship was not in violation of local law [§152(f)(3)]. Also, an individual is not eligible as a dependent if the individual has filed a joint return with the individual's spouse [§152(b)(2)].

7.4 Phase-out of Personal Exemptions and Itemized Deductions

7.4.1 Phase-out of personal exemptions

2001 tax legislation (P.L. 107-16) provides for a gradual elimination of the phase-out of personal exemptions. Beginning in 2006, the Act

reduces the phase-out to two-thirds of what it otherwise would be. In 2008, the phase-out is reduced to one-third of its normally calculated amount, and in 2010 the personal exemption phase-out is repealed [§151(d)(3)(E) and (F), effective for tax years beginning after 2005].

7.4.2 Phase-out of itemized deductions

The 2001 Tax Act has scheduled the repeal of the phase-out of itemized deductions, beginning 2006. In that year, one-third of the phase-out is eliminated. In 2008, two thirds of the phase-out is eliminated, and in 2010 this offset to itemized deductions is repealed [§68(f)].

7.5 Tax Shelter Penalties

7.5.1 Penalty for promoting abusive tax shelters

Any person who organizes or sells any interest in a partnership or other entity or investment with regard to a tax shelter who makes either (1) a statement that the person knows or has reason to know to be false or fraudulent regarding the tax benefits to be available by reason of participating in the investment, or (2) a gross valuation overstatement that overstates the value for a material matter relating to tax benefits involved by more than 200 percent of its correct value, is liable for a civil penalty.

Under Section 6700, the penalty has been the lesser of \$1,000 or 100 percent of the gross income derived from the activity, with the penalty capped per activity. The American Jobs Creation Act of 2004 increases the penalty for making a statement known to be false or fraudulent, effective for actions after October 22, 2004. That penalty now is 50 percent of the gross income derived from the activity [§6700(a)(2)]. The penalty for a gross valuation overstatement is unchanged.

Observation

The elimination of the \$1,000 cap significantly increases this penalty.

7.6 Reportable Transaction Penalties

The American Jobs Creation Act of 2004 added a series of penalties in connection with reportable transactions:

- A new 20 percent penalty is imposed for an understatement in connection with a listed or reportable transaction under Section 6662A. The penalty increases to 30 percent if the reportable transaction was not

properly disclosed. Listed transactions are items identified as such by the IRS (see IRS Notice 2004-67, IRB No. 2004-41 for the most recent summary), and reportable transactions are those (other than listed transactions) where a significant purpose of the transaction is federal income tax avoidance or evasion [§6662A(b)(2)].

- The law adds a new penalty for failure to disclose reportable transactions (§6707A, effective for returns and statements due after October 22, 2004). The penalty is \$10,000 in the case of a natural person, but the penalty increases to \$100,000 in the case of a failure to disclose with respect to a listed transaction. The statute does not define a reportable transaction or a listed transaction, other than directing the IRS to issue regulations under Section 6011. Reportable transactions are those for which information is required to be included with the return because the IRS, under its future regulations, determines the transaction as having a potential for tax avoidance or evasion. A listed transaction is one identified by the IRS as having a tax avoidance purpose.

7.7 Extension to File Individual Tax Return

7.7.1 Background

Previously, an automatic four-month extension of time to file an individual income tax return was obtained by filing Form 4868, "Application for Automatic Extension of Time to File U.S. Individual Income Tax Return." In addition to this automatic extension of time to the following August 15, a taxpayer could request an additional two-month extension, extending the filing date to October 15, using IRS Form 2688 "Application for Additional Extension of Time to File U.S. Individual Income Tax Return." This second extension, however, was not automatic and required statement of a reason for the additional extension request, subject to IRS approval [Reg. §1.6081-4(a)].

7.7.2 Automatic six-month extension allowed

In its release of the draft of the 2005 Form 4868, the IRS has indicated that taxpayers will be able to file for an automatic six-month extension, rather than the previous four-month automatic extension. The IRS has indicated its intent to have this automatic six-month extension procedure available for the 2005 Form 1040, assuming the necessary regulations are approved (IRS Digital Dispatch 2005-19, 8/4/2005).

7.8 Dischargeability of Taxes in Bankruptcy

The discharge of a particular tax obligation depends on the nature of the tax, the priority status granted to tax obligations under the Bankruptcy Code, and the chapter of the Bankruptcy Code under which the case is filed or to which a case may later be converted. 11 U.S.C. Section 523(a) details debts of an individual, including various taxes, that, unless paid, are not discharged in a bankruptcy proceeding under Chapter 7, Chapter 11, Chapter 12, or by a debtor who receives a “hardship” discharge under Chapter 13. [See 11 U.S.C. §1328(b)].

Taxes exempted from discharge include instances when a debtor failed to file a required return, filed a late return within two years of filing the bankruptcy petition, filed a fraudulent return, or willfully attempted to evade such tax. In a case filed under Chapter 13 before October 17, 2005, and upon completion by the debtor of all payments under the plan, the court will grant the debtor discharge of all debts provided for in the plan, including taxes (including those related to unfiled returns or fraud). [See 11 U.S.C. §1328(a)]. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Bankruptcy Act) eliminated the distinction for Chapter 13 cases filed on or after October 17, 2005. Prepetition penalties and interest related to taxes that are not discharged are likewise not discharged.

Priority taxes under 11 U.S.C. Section 507(a)(2) that are exempted from discharge relate to taxes incurred by a debtor in an involuntary proceeding between the date the involuntary petition is filed and the date the Bankruptcy Court enters an order for relief. Priority taxes under 11 U.S.C. Section 507(a)(7) that are exempted from discharge include the following:

- Income taxes due within three years of the filing of the petition, assessed within 240 days of the filing of the petition, or unassessed but assessable as of the filing of the petition. [See 11 U.S.C. §507(a)(7)(A)].
- Property taxes. [See 11 U.S.C. §507(a)(7)(B)].
- Withholding taxes, such as income tax or FICA and “collected” taxes, such as telephone excise tax, airport ticket tax, and windfall profits tax. [See 11 U.S.C. §507(a)(7)(C)].
- Certain employment taxes, such as FICA and federal and state unemployment taxes due on wages earned or paid before the petition is filed. [See 11 U.S.C. §507(a)(7)(D)].
- Excise taxes for a return, if required, that are past due within three years of the filing of the petition. [See 11 U.S.C. §507(a)(7)(E)].
- Certain customs duties. [See 11 U.S.C. §507(a)(7)(F)].

- Penalties that represent compensation for actual pecuniary loss for a governmental unit involving a tax listed in the first six items above. [See 11 U.S.C. §507(a)(7)(G)].

FEDERAL CORPORATE TAX NOTES

1. TAX RELIEF RELATED TO HURRICANE

KATRINA

- 1.1 Introduction
- 1.2 IRS Relief
 - 1.2.1 Additional time to file
 - 1.2.2 Leave donation programs for Katrina victims
 - 1.2.3 IRS expedites charitable applications
 - 1.2.4 Low-income housing credit available for housing Katrina victims
 - 1.2.5 Katrina victims' areas expanded
 - 1.2.6 Removal of aviation fuel
 - 1.2.7 Additional time for tax-exempt bond issuers
 - 1.2.8 AICPA and the IRS to help Katrina victims
- 1.3 Katrina Emergency Tax Relief Act of 2005 (P.L. 109-73)
 - 1.3.1 Special rules for use of retirement funds for relief relating to Hurricane Katrina
 - 1.3.1.1 Penalty-free withdrawals from retirement plans for Katrina relief
 - 1.3.1.2 Recontributions of withdrawals for home purchases cancelled due to Hurricane Katrina
 - 1.3.1.3 Loans from qualified plans relating to Hurricane Katrina
 - 1.3.1.4 Provisions relating to plan amendments
 - 1.3.2 Employment relief
 - 1.3.2.1 Work opportunity tax credit for Katrina employees
 - 1.3.2.2 Employee retention credit for employers affected by Hurricane Katrina
 - 1.3.3 Charitable giving incentives
 - 1.3.3.1 Temporary suspension of limitations on charitable contributions
 - 1.3.3.2 Additional exemption for housing Hurricane Katrina displaced victims
 - 1.3.3.3 Increase in standard mileage rate for charitable use of vehicles
 - 1.3.3.4 Mileage reimbursements to charitable volunteers excluded from gross income
 - 1.3.3.5 Charitable deduction for contributions of food inventory
 - 1.3.3.6 Charitable deduction for contributions of book inventories to public schools

- 1.3.4 Additional tax relief provisions
 - 1.3.4.1 Exclusions of certain cancellations of indebtedness by reason of Hurricane Katrina
 - 1.3.4.2 Suspension of limitations on personal casualty losses
 - 1.3.4.3 Extended tax filing deadlines relating to Hurricane Katrina
 - 1.3.4.4 Extension of replacement period for nonrecognition of gain for property located in Katrina disaster area
 - 1.3.4.5 Special rule for determining earned income
 - 1.3.4.6 IRS authority to make adjustments regarding taxpayer dependency status

2. S CORPORATION DEVELOPMENTS

- 2.1 Members of Family as One Shareholder
- 2.2 Increase in Number of Eligible Shareholders
- 2.3 Grandfathered IRAs Allowed to Hold Bank S Stock
- 2.4 Unexercised Powers of Appointment in Determining Potential Current Beneficiaries of ESBT
- 2.5 Transfer of Suspended S Corporation Losses to Spouse or Former Spouse
- 2.6 Use of Passive Activity Losses and At-Risk Amounts by QSST Beneficiaries
- 2.7 Banks and Passive Investment Income
- 2.8 Relief from Inadvertently Invalid QSub Elections and Terminations
- 2.9 Information Returns for QSubs
- 2.10 Repayment of Loans for Qualifying Employer Securities
- 2.11 Corporate Partner in Partnership With LIFO Inventory
 - 2.11.1 Background
 - 2.11.2 IRS issues final regulations
- 2.12 Bankruptcy Filings With S Corporations
- 2.13 S Election by Noncorporate Entity
 - 2.13.1 Background
 - 2.13.2 IRS simplifies election procedure of noncorporate entities
- 2.14 IRS Announces Compliance Study of S Corporations

3. DEPRECIATION AND AMORTIZATION

- 3.1 Section 179 Expensing
 - 3.1.1 Background
 - 3.1.2 Maximum annual Section 179 deduction
 - 3.1.3 Extension of dollar amounts through 2007

- 3.1.4 Electing Section 179 on an amended return
- 3.2 \$25,000 Vehicle Limit for Section 179
 - 3.2.1 Background
 - 3.2.2 Section 179 limit reduced to \$25,000
- 3.3 Recovery Period for Depreciation of Leasehold Improvements
- 3.4 Recovery Period for Depreciation of Restaurant Building Improvements
- 3.5 Expiration of Bonus Depreciation and Transition Rules
 - 3.5.1 General rule
 - 3.5.2 Noncommercial aircraft transition rule
 - 3.5.3 Large asset transition rule
- 3.6 Corporate Organizational Expenditures
 - 3.6.1 Background
 - 3.6.2 Revised amortization for corporate organizational expenditures
 - 3.6.3 Definition of organizational costs
- 3.7 Business Start-up Costs
 - 3.7.1 Background
 - 3.7.2 Definition of start-up expenditures
 - 3.7.3 Who may deduct
 - 3.7.4 Revised amortization period for start-up costs
 - 3.7.5 Electing to amortize start-up costs
- 3.8 Energy-Efficient Commercial Building Expensing
 - 3.8.1 Background
 - 3.8.2 First-year deduction for energy-efficient building property added
 - 3.8.2.1 Eligible improvements
 - 3.8.2.2 Deduction limits
 - 3.8.2.3 Certification and calculation of energy savings
 - 3.8.2.4 Allocation for governmental property
 - 3.8.2.5 Recapture
- 3.9 Recapture Rules on Disposition of Multiple Section 197 Intangibles
 - 3.9.1 Background
 - 3.9.2 New rules on disposition of multiple amortizable Section 197 intangibles

4. ACCOUNTING METHOD CHANGES

- 4.1 Twelve-Month Prepaid Expense Rule
 - 4.1.1 Background
 - 4.1.1.1 Coordination with economic performance rules
 - 4.1.1.2 Previous guidance on accounting method change request
 - 4.1.2 Extension of automatic accounting method request

- 4.2 Treatment of Environmental Expenditures
 - 4.2.1 Background
 - 4.2.2 IRS issues additional guidance on environmental remediation
- 4.3 UNICAP Simplified Service Cost and Simplified Production Methods
- 4.4 Specified Liability Losses
 - 4.4.1 Background
 - 4.4.2 Additional IRS guidance issued on carryback rules

5. COMPENSATION, RETIREMENT PLAN, AND FRINGE BENEFIT ISSUES

- 5.1 Reasonable Compensation
 - 5.1.1 Background
 - 5.1.1.1 Hypothetical investor test
 - 5.1.2 Tax Court again applies hypothetical investor test
- 5.2 Payroll Tax on Stock Options
 - 5.2.1 Background
 - 5.2.2 Incentive stock options exempt from payroll tax
- 5.3 Bankruptcy Abuse Prevention and Consumer Protection Act
 - 5.3.1 Retirement plan protection
 - 5.3.2 Dischargeability of taxes in bankruptcy
- 5.4 Roth Elective Deferral Plans
 - 5.4.1 Background
 - 5.4.2 IRS guidance on Roth elective deferral plans
- 5.5 Nonqualified Deferred Compensation Plans
 - 5.5.1 Background
 - 5.5.2 Restrictions imposed on nonqualified deferred compensation plans
 - 5.5.2.1 The distribution rule
 - 5.5.2.2 Election rule
 - 5.5.2.3 Definition of a nonqualified deferred compensation plan
 - 5.5.2.4 Employer reporting requirements
 - 5.5.2.5 Effective date and transition rules
- 5.6 Health Savings Accounts
 - 5.6.1 Background
 - 5.6.2 Eligible individual
 - 5.6.3 High deductible health plan
 - 5.6.4 Health Savings Account
 - 5.6.5 Maximum HSA contribution
 - 5.6.5.1 Age 55 catch-up contributions
 - 5.6.6 Employer contributions
 - 5.6.7 Withdrawals from the HSA

- 5.6.8 IRS guidance
 - 5.6.8.1 General guidance
 - 5.6.8.2 Preventive care relief from high deductible rule
 - 5.6.8.3 Transitional relief for prescription drug coverage
 - 5.6.8.4 Interaction of HSAs with other health benefits
 - 5.6.8.5 Relief for state law requirements
- 5.6.9 Additional IRS guidance issued
- 5.6.10 Comparability rules for employer contributions
- 5.7 Cafeteria Plans
 - 5.7.1 Background
 - 5.7.2 Use-it-or-lose-it rule
 - 5.7.3 Two-and-one-half-month grace period allowed
- 5.8 Tool Allowance Not an Accountable Plan

6. OTHER MAJOR DEVELOPMENTS

- 6.1 Repeal of Exclusion for Extraterritorial Income
 - 6.1.1 Background
 - 6.1.2 Repeal of extraterritorial income regime
- 6.2 Deduction for Domestic Production Activities
 - 6.2.1 Background
 - 6.2.2 Calculation of production deduction
 - 6.2.3 Eligible production income
 - 6.2.4 The wage limitation
 - 6.2.4.1 Unmodified box 1 method
 - 6.2.4.2 Modified box 1 method
 - 6.2.4.3 Tracking wages method
 - 6.2.5 Identifying U.S. production
 - 6.2.6 Segregating ineligible net income
 - 6.2.7 Overcoming the 50 percent wage limit
- 6.3 Brother-Sister Controlled Groups
 - 6.3.1 Background
 - 6.3.2 Change in ownership test
- 6.4 Book-Tax Reconciliation for Large Corporations (Schedule M-3)
 - 6.4.1 Background
 - 6.4.2 Contents of Schedule M-3
 - 6.4.3 Draft version of 2005 Schedule M-3 released
- 6.5 Company Aircraft
 - 6.5.1 Background
 - 6.5.2 Statutory limit on deduction for personal use
- 6.6 Club Dues
 - 6.6.1 Background
 - 6.6.2 Tax Court restricts deductibility of country club dues

- 6.7 Shareholder Advances to Corporation Treated as Equity
- 6.8 Charitable Contribution Provisions
 - 6.8.1 Contributions of intellectual property
 - 6.8.2 Reporting and appraisal requirements on property contributions
 - 6.8.2.1 Property contribution over \$500
 - 6.8.2.2 Property contribution over \$5,000
 - 6.8.2.3 Property contributions over \$500,000
 - 6.8.2.4 Exceptions
 - 6.8.3 Charitable contributions of vehicles
 - 6.8.3.1 Written acknowledgment by charity
- 6.9 Like-Kind Exchanges
 - 6.9.1 Background
 - 6.9.2 Related party exchanges
 - 6.9.3 Like-kind or class requirements
- 6.10 Corporate Tax Payments, Credits, and Compliance Matters
 - 6.10.1 Research and development credit
 - 6.10.2 Disabled access credit
 - 6.10.3 Home contractor energy credit
 - 6.10.4 Alternative motor vehicle credit
 - 6.10.4.1 Qualified fuel cell motor vehicle
 - 6.10.4.2 Advanced lean burn vehicle credit
 - 6.10.4.3 Hybrid vehicle credit
 - 6.10.4.4 Alternative fuel vehicle credit
 - 6.10.5 Foreign tax credit
 - 6.10.6 Work opportunity tax credit and welfare-to-work tax credit
 - 6.10.7 Electric vehicle credit
 - 6.10.8 Renewable electricity production credit
 - 6.10.9 Additional business tax credits added
 - 6.10.10 Additional credits allowed without AMT restriction
- 6.11 Accuracy-Related Penalties
 - 6.11.1 Penalty for reportable transaction understatements
 - 6.11.2 Corporate substantial understatement penalty
 - 6.11.3 Substantial authority and disclosure defenses
- 6.12 Deposits on Tax Deficiencies

1. TAX RELIEF RELATED TO HURRICANE KATRINA

1.1 Introduction

Both the IRS and Congress have issued relief provisions aimed at helping the victims of Hurricane Katrina. The IRS has relaxed restrictions dealing with hardship distributions from retirement plans, has extended various filing deadlines, and has issued an exception to the general assignment-of-income principles associated with leave-based donations made to qualified charities.

Meanwhile, both the Congress passed the Katrina Emergency Tax Relief Act of 2005 (H.R. 3768), with the legislation enacted by the President's signature on September 23, 2005. This legislation contains provisions designed to provide immediate relief to individuals and businesses. However, it is expected that Congress will take up a second Relief Act, which will comprise stimulus provisions, including accelerated depreciation and enhanced expensing to encourage rebuilding of the area affected by Katrina.

1.2 IRS Relief

In the wake of the disaster caused by Hurricane Katrina and its aftermath, the IRS has released a number of special rulings designed to ease the tax burden for hurricane victims.

1.2.1 Additional time to file

For any return, tax payment, or tax deposit with an original or extended due date that fell on or after August 29, 2005, taxpayers located in areas designated as federal disaster areas have until January 3, 2006, to complete action (IR-2005-96, 9/8/05). This date was later extended from January 3, 2006, to February 28, 2006 (IR-2005-112, 9/28/05).

1.2.2 Leave donation programs for Katrina victims

Employees can donate their vacation, sick, or personal leave in exchange for employer cash payments made to qualified tax-exempt organizations providing relief for the victims of Hurricane Katrina (IR-2005-97, 9/8/05). Employees do not have to include the donated leave in their income and employers are permitted to deduct the amount of the cash payment.

1.2.3 IRS expedites charitable applications

Those who want to set up tax-exempt organizations to benefit Katrina victims can use a speedy application process (IR-2005-93, 9/6/05). New organizations should apply for tax-exempt status by filing IRS Form 1023, "Application for Recognition of Exemption," and write at the top of the form "Disaster Relief, Hurricane Katrina."

1.2.4 Low-income housing credit available for housing Katrina victims

The IRS will waive the low-income housing tax credit rules that would normally prohibit owners of low-income housing from providing housing to victims of Hurricane Katrina who do not qualify as low-income (IR-2005-92, 9/2/05). The action expands the availability of housing for disaster victims and their families.

1.2.5 Katrina victims' areas expanded

In addition to the 31 Louisiana parishes, 15 Mississippi counties, and 3 Alabama counties originally designated as areas qualifying for tax relief, the IRS has extended the number of areas to include 33 additional parishes in Louisiana, 37 additional counties in Mississippi, 3 additional counties in Alabama, and 3 counties in Florida (IR-2005-91, 9/2/05). See the detailed list of these areas in section 1.3, herein.

1.2.6 Removal of aviation fuel

To alleviate local fuel shortages caused by Hurricane Katrina, the IRS will permit vehicles registered for highway use to remove aviation-grade kerosene (aviation fuel) from certain airports without violating the favorable excise tax treatment to which those airport fueling terminals are currently entitled (IR-2005-95, 9/7/05). This relief applies to Louis Armstrong New Orleans International Airport (T-72-LA-2356); Memphis International Airport (T-62-TN-2212); Dallas Love Field Airport (T-75-TX 2663); Dallas Fort Worth International Airport (T-75-TX-2673); and George Bush Intercontinental Airport, Houston (T-76-TX-2818) beginning September 2, 2005, through November 1, 2005.

1.2.7 Additional time for tax-exempt bond issuers

Issuers affected by Hurricane Katrina who have an original filing or payment deadline between August 29, 2005, and December 31, 2005, have until January 3, 2006, to file the return and make any payment due with the return (IR-2005-98, 9/8/05). Tax-exempt bond issuers entitled to the extension should note in red ink at the top of their

return: "Hurricane Katrina Relief." The details of this relief may be found in Announcement 2005-69.

1.2.8 AICPA and the IRS to help Katrina victims

The IRS announced that it will partner with the AICPA to provide assistance to taxpayers at local disaster recovery centers established by the Federal Emergency Management Agency (FEMA) (IR-2005-94, 9/7/05). CPA volunteers will join IRS employees to staff disaster recovery centers to help victims with their financial recovery.

1.3 Katrina Emergency Tax Relief Act of 2005 (P.L. 109-73)

On September 23, 2005, the President signed the Katrina Emergency Tax Relief Act of 2005. A number of key definitions and designations are important in applying the provisions of this legislation.

Definitions Associated With Katrina Emergency Tax Relief Act of 2005

Hurricane Katrina disaster area. Defined as the area with respect to which a major disaster was declared by the President before September 14, 2005, under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of Hurricane Katrina [Act Sec. 2(1)].

Core disaster area. Defined as that portion of the Hurricane Katrina disaster area determined by the President to warrant individual or individual and public assistance from the federal government [Act Sec. 2(2)].

Observation: The core disaster area does not include those parishes or counties designated as eligible for public assistance only. Practitioners will need to be alert to the fact that the provisions of the legislation affect three categories: 1) taxpayers in the Hurricane Katrina disaster area (all locations listed below), 2) taxpayers in the core disaster area (those parishes and counties designated for individual assistance), and 3) all taxpayers, regardless of location.

According to information on the FEMA Web site and IRS guidance dealing with areas entitled to disaster area filing and payment

relief, the following parishes and counties are treated as the Hurricane Katrina disaster area under the Act:

Louisiana: The 31 parishes designated for individual assistance: Acadia, Ascension, Assumption, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Pointe Coupee, Plaquemines, St. Bernard, St. Charles, St. Helena, St. James, St. John, St. Mary, St. Martin, St. Tammany, Tangipahoa, Terrebonne, Vermilion, Washington, West Baton Rouge and West Feliciana. *The 33 Louisiana parishes designated for public assistance:* Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Caldwell, Catahoula, Claiborne, Concordia, Desoto, East Carroll, Evangeline, Franklin, Grant, Jackson, LaSalle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, St. Landry, Tensas, Union, Vernon, Webster, West Carroll and Winn.

Mississippi: The 47 Mississippi counties designated for individual assistance: Adams, Amite, Attala, Claiborne, Choctaw, Clarke, Copiah, Covington, Franklin, Forrest, George, Greene, Hancock, Harrison, Hinds, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kemper, Lamar, Lauderdale, Lawrence, Leake, Lincoln, Lowndes, Madison, Marion, Neshoba, Newton, Noxubee, Oktibbeha, Pearl River, Perry, Pike, Rankin, Scott, Simpson, Smith, Stone, Waithall, Warren, Wayne, Wilkinson, Winston and Yazoo. *The 35 Mississippi counties designated for public assistance:* Alcorn, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Clay, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Itawamba, Lafayette, Leflore, Lee, Marshall, Monroe, Montgomery, Panola, Pontotoc, Prentiss, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster and Yalobusha.

Alabama: The 10 Alabama counties designated for individual assistance: Baldwin, Choctaw, Clarke, Greene, Hale, Mobile, Pickens, Sumter, Tuscaloosa and Washington. *The 12 Alabama counties designated for public assistance:* Bibb, Colbert, Cullman, Jefferson, Lamar, Lauderdale, Marengo, Marion, Monroe, Perry, Wilcox and Winston.

Florida: There are 11 Florida counties designated for public assistance: Monroe, Broward, Miami-Dade, Bay, Collier, Escambia, Franklin, Gulf, Okaloosa, Santa Rose and Walton.

1.3.1 Special rules for use of retirement funds for relief relating to Hurricane Katrina

1.3.1.1 Penalty-free withdrawals from retirement plans for Katrina relief

The legislation allows up to \$100,000 in “qualified Hurricane Katrina distributions” from retirement plans to be exempt from the 10 percent early withdrawal penalty of IRC Sec. 72(t).

A “qualified Hurricane Katrina distribution” is any distribution:

1. From an “eligible retirement plan” defined as:
 - a) An IRA,
 - b) An IRA annuity, other than an endowment contract,
 - c) A Section 401(a) qualified trust,
 - d) A Section 403(a) qualified annuity plan,
 - e) A Section 457(b) eligible deferred compensation plan maintained by a governmental employer, and
 - f) A Section 403(a) annuity contract.
2. Made on or after August 25, 2005, and before January 1, 2007,
3. To an individual whose principal place of abode on August 28, 2005, was located in the Hurricane Katrina disaster area, and
4. An individual who sustained an economic loss due to Hurricane Katrina.

Taxpayers are allowed to recontribute qualified Hurricane Katrina distributions to eligible retirement plans or IRAs tax-free at any time during the three-year period beginning on the day after the date of the distribution, with the aggregate amount of such recontributions limited to the aggregate amount of the qualified Hurricane Katrina distributions made to the taxpayer.

Taxpayers are also allowed to include qualified Hurricane Katrina distributions in taxable income on a pro-rata basis over the three-taxable-year period beginning with the year the distribution is received. Taxpayers are allowed to elect not to have the three-year income-averaging provision apply.

Example. Linda receives a \$60,000 qualified Hurricane Katrina distribution during 2006 for personal living expenses. Unless Linda elects otherwise, the \$60,000 distribution will result in \$20,000 of income being reported in each of her 2006, 2007, and 2008 Forms 1040.

1.3.1.2 Recontributions of withdrawals for home purchases cancelled due to Hurricane Katrina

The legislation allows specific retirement plan or IRA withdrawals for home purchases that were cancelled due to Katrina to be repaid to a qualified plan or IRA tax-free and without penalty. Examples of such

specific withdrawals include hardship distributions from a qualified plan to purchase a home or IRA withdrawals under the first-time homebuyer rule.

A qualified distribution amount must have been received by the taxpayer after February 28, 2005, and before August 29, 2005, with the distribution intended to be used to purchase or construct a principal residence in the Katrina disaster area, with the purchase or construction not occurring due to the Katrina event.

1.3.1.3 Loans from qualified plans relating to Hurricane Katrina

The legislation allows amounts withdrawn as a loan from a qualified employer plan to be increased to the amount of \$100,000 (normally \$50,000) or the greater of \$10,000 or the present value of the employee's nonforfeitable accrued benefit under the plan (normally the greater of \$10,000 or one-half of the present value) for victims of Katrina. Additionally, a one-year postponement of payments for existing plan loans is allowed.

A qualified individual for purposes of this provision means an individual whose principal place of abode on August 28, 2005, was located in the Katrina disaster area and who sustained an economic loss by reason of Katrina.

1.3.1.4 Provisions relating to plan amendments

The legislation allows a qualified plan or IRA to implement legislative or regulatory changes associated with Katrina relief without first having to amend the qualified plan or IRA itself.

1.3.2 Employment relief

1.3.2.1 Work opportunity tax credit for Katrina employees

A Hurricane Katrina employee is treated as a member of a targeted group for purposes of the work opportunity tax credit. Such an employee is defined as any individual who on August 28, 2005, had a principal place of abode in the Katrina core disaster area and who is hired during the two-year period beginning on August 28, 2005, for a position where the principal place of employment is located in the core disaster area, or an employee who on August 28, 2005, had a principal place of abode in the core disaster area and who was displaced from that abode because of Katrina and who was hired during the period beginning on August 28, 2005, and ending on December 31, 2005.

1.3.2.2 Employee retention credit for employers affected by Hurricane Katrina

A new tax credit is added, computed as 40 percent of the first \$6,000 of qualified wages per employee paid by an eligible employer to an eligible employee.

An eligible employer is one that conducted an active business on August 28, 2005, in a Katrina core disaster area and for whom the business is operable on any day after August 28, 2005, and before January 1, 2006, because of Katrina damage.

Caution

The credit is only allowed for small businesses that employed an average of 200 or fewer employees on business days during the taxable year.

1.3.3 Charitable giving incentives

1.3.3.1 Temporary suspension of limitations on charitable contributions

The percentage limitation on charitable deductions has been temporarily increased for qualified contributions made in cash during a specified period. Additionally, such donations are not subject to the overall phase-out limit on Schedule A itemized deductions.

Individual taxpayers are allowed to deduct qualified contributions up to the amount by which the taxpayer's contribution base (that is, the taxpayer's adjusted gross income (AGI) subject to the normal percentage limitation) exceeds the taxpayer's deduction for other qualified charitable contributions.

Additionally, C corporations are allowed to deduct qualified disaster contributions up to the corporation's entire taxable income, less other contributions; however, contributions by C corporations must specifically be for Katrina relief efforts.

Qualified contributions are cash contributions made during the period beginning on August 28, 2005, and ending on December 31, 2005, to a qualifying charity for which the taxpayer has elected qualified contribution treatment.

Example. Charlie makes \$17,500 of qualified contributions and \$15,000 of other contributions to qualified charities. Charlie's contribution base for 2005 is \$25,000.

Charlie is allowed to deduct \$25,000 for 2005, an amount equal to his contribution base (\$12,500 determined without regard to qualified contributions and \$12,500 of qualified contributions). Charlie's carryover contribution amount of \$7,500 (\$5,000 from unused qualified contributions and \$2,500 from unused regular contributions) carry forward to the next five years, subject to the normal 50 percent of AGI limit.

1.3.3.2 Additional exemption for housing Hurricane Katrina displaced victims

Taxpayers are allowed a \$500 exemption deduction for providing at least 60 days of temporary rent-free housing to a person displaced by Katrina. A specific definition exists within the legislation for an “individual deemed displaced by Katrina.”

The exemption cannot be claimed for the spouse or any dependent of the taxpayer and the ID number of the individual being housed must be included on the tax return of the taxpayer claiming the additional exemption amount.

Observation

The deduction can be claimed in both 2005 and 2006, but cannot be claimed in both years with respect to the same person. The deduction has an overall \$2,000 limit in the aggregate, meaning the exemption can be claimed for no more than four displaced individuals.

1.3.3.3 Increase in standard mileage rate for charitable use of vehicles

The 14¢ per mile standard charitable mileage rate is increased to a rate equal to 70 percent of the business mileage rate for taxpayers using a vehicle in providing donated services to a charity for relief related to Katrina during the period August 25, 2005, to December 31, 2006.

Observation

Accordingly, for the period August 25 through August 31, 2005, the charitable mileage rate for Katrina relief is at 29¢ per mile and for the period September 1 through December 31, 2005, the charitable mileage rate for Katrina relief is at the rate of 34¢ per mile.

1.3.3.4 Mileage reimbursements to charitable volunteers excluded from gross income

Effective for taxable years ending after August 24, 2005, reimbursements to volunteers for the cost of using an automobile in connection with providing donated services for Katrina relief during the period August 25, 2005, through December 31, 2006, are excluded from the volunteer’s gross income to the extent the reimbursement does not exceed the standard business mileage rate and the normal Section 274(d) substantiation requirements are met.

1.3.3.5 Charitable deduction for contributions of food inventory

S corporations, partnerships and sole proprietorships that donate food inventory on or after August 28, 2005, and before January 1, 2006, are

generally allowed the same deduction that applies to food donations by C corporations (that is, the deduction is equal to the lesser of two times the basis of the food or the basis of the food plus one-half of the appreciation in the market value of the food over the basis of the food).

The aggregate amount of the charitable deduction for contributions of food inventory is limited to 10 percent of the taxpayer's aggregate net income for the year, with the net income computed without regard to the charitable deduction itself.

1.3.3.6 Charitable deduction for contributions of book inventories to public schools

C corporations are allowed a charitable contribution deduction for donations of books to K-through-12 public schools made on or after August 28, 2005, and before January 1, 2006, limited to the lesser of two times the basis of the books or the basis of the books plus one-half of the books' appreciation.

Observation

This provision applies to donations to any charity by any taxpayer throughout the country, with no requirement that either the food inventory or book inventory contributions relate to Katrina relief.

1.3.4 Additional tax relief provisions

1.3.4.1 Exclusions of certain cancellations of indebtedness by reason of Hurricane Katrina

Effective for debt discharges on or after August 25, 2005, and before January 1, 2007, any amount that would otherwise be taxable to an individual because a nonbusiness debt is discharged is excluded from the individual's income, in whole or in part. This provision does not apply to any business debt.

To qualify, a taxpayer's principal place of abode on August 25, 2005, must have been located in the core disaster area, or in the Katrina disaster area, with the taxpayer suffering economic loss because of Hurricane Katrina.

Caution

This provision does not apply to any debt discharged to the extent that security for the indebtedness related to real property, which was located outside of the Katrina disaster area.

1.3.4.2 Suspension of limitations on personal casualty losses

The \$100 per casualty or theft loss floor and the 10 percent-of-AGI floor do not apply to a taxpayer's casualty or theft losses arising in the

Katrina disaster area on or after August 25, 2005. However, other casualty losses are still subject to the normal \$100 and 10 percent-of-AGI limitations.

1.3.4.3 Extended tax filing deadlines relating to Hurricane Katrina

Although the IRS had previously taken administrative action to extend deadlines for Katrina victims for filing tax returns and making tax payments until January 3, 2006, the legislation extends this deadline until February 28, 2006. This extended deadline relates to excise, employment, income, estate, and gift taxes for any taxpayer determined by the IRS to be affected by Katrina.

1.3.4.4 Extension of replacement period for nonrecognition of gain for property located in Katrina disaster area

Under the involuntary conversion provisions of Section 1033, the period for which a taxpayer may replace involuntarily converted property is extended from two years to five years for property that is converted on or after August 25, 2005, by reason of Katrina, assuming substantially all of the use of the replacement property is in the Katrina disaster area.

1.3.4.5 Special rule for determining earned income

Qualified individuals are allowed to elect to calculate their earned income credit and refundable child tax credit for their taxable year that includes August 25, 2005, using their earned income from the previous taxable year, if their earned income from the previous year exceeds their earned income for the taxable year that includes August 25, 2005.

To qualify, taxpayers needed to have their principal place of abode on August 25, 2005, in either the core disaster area or the Katrina disaster area, with the taxpayer displaced from the principal place of abode by reason of Katrina.

1.3.4.6 IRS authority to make adjustments regarding taxpayer dependency status

The IRS has been given the authority for taxable years beginning in 2005 or 2006 to make adjustments that may be necessary to ensure taxpayers do not lose any deduction or credit, or experience a change in filing status, because of temporary relocation due to Katrina.

2. S CORPORATION DEVELOPMENTS

2.1 Members of Family as One Shareholder

A family may elect to have all family members treated as one shareholder for purposes of the limit on the number of S corporation shareholders (see section 2.2, herein). The election is available whether the family member holds the stock directly or is treated as a shareholder because the individual is a beneficiary of a qualified subchapter S trust (QSST) or an electing small business trust (ESBT).

Family members include the common ancestor, lineal descendants of the common ancestor, and the spouses (or former spouses) of such lineal descendants or common ancestor. However, an individual is not considered a common ancestor if, as of the later of the date of enactment or the time the election is made, the individual is more than six generations removed from the youngest generation of shareholders who would (but for this limitation) be members of the family. A spouse or former spouse is treated as being of the same generation as the individual to whom the spouse is (or was) married. Additionally, an adopted child or foster child is treated as a natural child if the requirements of Section 152 are satisfied.

The election may be made by any member of the family, except where prohibited by IRS regulations, and remains in effect until terminated in a manner to be prescribed by the IRS via regulations.

As with other inadvertent invalid elections or terminations, the IRS is granted the authority to waive an inadvertently invalid election or an inadvertently invalid termination of such an election.

The provision is effective for taxable years beginning after December 31, 2004, and the inadvertent invalid election or termination relief is available for elections and terminations made after December 31, 2004 [Act Sec. 231, amending §§1361(c) and 1362(f)].

2.2 Increase in Number of Eligible Shareholders

The limit on the number of shareholders in an S corporation is increased from 75 to 100.

The provision is effective for taxable years beginning after December 31, 2004 [Act Sec. 232, amending §1361(b)(1)(A)].

2.3 Grandfathered IRAs Allowed to Hold Bank S Stock

In general, IRAs and Roth IRAs are not permitted as S corporation shareholders. An IRA or Roth IRA is allowed to hold shares of an S corporation that is a bank (per the definition in Section 581) if the shares were held in the IRA or Roth IRA on October 22, 2004. If the IRA or Roth IRA holds the bank S stock, the individual for whose benefit the IRA or Roth IRA was created is treated as the shareholder. Additionally, the Unrelated Business Taxable Income (UBTI) rules applying to other tax-exempt entities (other than employee stock option plans (ESOPs)) apply to IRAs and Roth IRAs holding S corporation stock.

The prohibited transaction rules do not apply to the sale of stock by an IRA or Roth IRA to the individual beneficiary of the trust if:

1. The stock is stock in a bank (per the definition in Section 581).
2. The stock is held by the IRA or Roth IRA as of October 22, 2004.
3. The sale is pursuant to an S election by the bank.
4. The sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to the IRA or Roth IRA as the terms that would apply for a sale to an unrelated party.
5. The IRA or Roth IRA does not pay any commissions, costs, or other expenses in connection with the sale.
6. The stock is sold in a single transaction for cash not later than 120 days after the S election is made.

The provision is effective on October 22, 2004 [Act Sec. 233, amending §§512(e)(1), 1361(c)(2), and 4975(d)].

Observation

Because the provisions of this change only apply to shares held on October 22, 2004, the provision is clearly intended to allow a limited number of banks whose shareholders held their shares in IRAs or Roth IRAs to elect S status.

2.4 Unexercised Powers of Appointment in Determining Potential Current Beneficiaries of ESBT

Under prior law, IRS regulations provided that where a trust had a general power of appointment that allowed an ESBT to make a distribution to an ineligible shareholder, the trust lost its qualification as an

ESBT. Additionally, under prior law, an ESBT had 60 days to dispose of S stock after an ineligible shareholder became a potential current beneficiary to avoid disqualification. Under the Act, any unexercised powers of appointment are disregarded in determining the potential current beneficiaries of an ESBT. Additionally, an ESBT has one year to dispose of the S stock after an ineligible shareholder becomes a potential current beneficiary to avoid disqualification.

These provisions are effective for taxable years beginning after December 31, 2004 [Act Sec. 234, amending §1361(e)(2)].

2.5 Transfer of Suspended S Corporation Losses to Spouse or Former Spouse

Where a tax-free Section 1041(a) transfer of S stock to a spouse or former spouse incident to divorce occurs, any disallowed losses or deductions are carried over to the spouse or former spouse and are treated as incurred by the corporation in the succeeding taxable year with respect to the transferee.

The provision is effective for taxable years beginning after December 31, 2004 [Act Sec. 235, amending §1366(d)(2)].

Observation

Before this change, any loss not deducted by an S shareholder due to the lack of basis in stock and debt was carried forward, but was allowed in subsequent years only “with respect to that shareholder.” The suspended loss did not transfer with the stock (see PLR 9552001).

2.6 Use of Passive Activity Losses and At-Risk Amounts by QSST Beneficiaries

For purposes of the Section 465 at-risk rules and the Section 469 passive activity loss rules, the disposition of S stock by a QSST is treated as a disposition by the QSST beneficiary.

Observation

Accordingly, the QSST beneficiary is allowed to deduct losses previously suspended under the at-risk rules or the passive activity loss rules upon disposition of S stock by the QSST.

The provision is effective for transfers made after December 31, 2004 [Act Sec. 236, amending §1361(d)(1)].

2.7 Banks and Passive Investment Income

For a bank (as defined in Section 581), a bank holding company or a financial holding company, passive investment income (for purposes of the test in determining whether passive investment income exceeds 25 percent of gross receipts for three consecutive taxable years, resulting in involuntary termination of S status and a tax under Section 1375) does not include:

1. Interest income earned by the bank, bank holding company, or financial holding company; or
2. Dividends on assets that must be held by the bank or company, including stock in the Federal Reserve Bank, the Federal Home Loan Bank, or the Federal Agricultural Mortgage Bank, or participation certificates issued by a Federal Intermediate Credit Bank.

The provision applies to taxable years beginning after December 31, 2004 [Act Sec. 237, amending §1362(d)(3)].

2.8 Relief from Inadvertently Invalid QSub Elections and Terminations

The IRS is given the authority to waive inadvertently invalid QSub elections or terminations of such elections. To obtain relief, the QSub and the S corporation parent must:

1. Take steps to qualify the corporation as a QSub within a reasonable period of time after discovering the circumstances causing the invalid election or termination, and
2. Agree to any adjustments proposed by the IRS to treat the corporation as a QSub during the relevant period.

The provision is effective for elections and terminations made after December 31, 2004 [Act Sec. 238, amending §1362(f)].

2.9 Information Returns for QSubs

The IRS is given the authority to require QSubs to file information returns.

The provision is effective for taxable years beginning after December 31, 2004 [Act Sec. 239, amending §1361(b)(3)(A)].

2.10 Repayment of Loans for Qualifying Employer Securities

For an ESOP maintained by an S corporation, a distribution on the S corporation's qualified employer securities can be used to repay the loan of the ESOP incurred to acquire the qualified employer securities, as long as specified requirements are met.

Specifically, an ESOP maintained by an S corporation is not treated as violating the Section 401(k) qualified plan requirements or the Sections 409 and 4975 ESOP requirements, or as engaging in a prohibited transaction, merely because of a distribution with respect to the S corporation stock that is "qualifying employer securities" where the distribution is used to make payments on an ESOP loan and the proceeds of the loan were used to acquire the qualifying employer securities. However, the ESOP provisions must provide for the use of the distribution to repay the ESOP loan for the prohibited transaction relief to apply.

The provision applies to distributions with respect to S stock made after December 31, 1997 [Act Sec. 240, amending §4975(f)].

Observation

Under this provision, the repayment of S corporation ESOP loans with distributions on qualified employer securities achieves the same treatment as C corporation ESOP loans paid with dividends on qualified employer securities.

Example. An ESOP maintained by an S corporation previously purchased qualified employer securities, which were allocated to participant Tom in 2002. In 2002, a distribution on the qualified employer securities was made, and a \$5,000 distribution was allocated to the shares of Tom. The ESOP provisions provide for distributions on qualified employer securities to be used to repay the ESOP loan that financed the acquisition of the securities.

If, under the ESOP provisions, the distribution on the stock allocated to Tom would not have been allocated to him until 2003 and the ESOP applied the distribution on the allocated shares to the repayment of the ESOP loan, then, due to the 2002 distribution, employer securities with a fair market value of \$5,000 must be allocated to Tom in 2003.

2.11 Corporate Partner in Partnership With LIFO Inventory

2.11.1 Background

In a 2000 opinion, the Tax Court determined an S corporation that was a limited partner in each of five partnerships was deemed to own

a pro-rata portion of the inventory of each partnership, and therefore was required to recognize its pro-rata share of all partnership LIFO reserves upon switching from C to S status (*Coggin Automotive Corp. v. Comm.*, 115 TC No. 28, 10/18/2000). However, upon appeal, the Eleventh Circuit reversed the Tax Court, holding that LIFO recapture was not required. The S corporation did not hold any LIFO inventory directly. The appellate court noted that the clear language of the statute requires the corporation converting from C status to S status to have “inventoried goods under the LIFO method,” and thus recapture did not apply (*Coggin Automotive Corp.*, 2002-1 USTC ¶150,448, CA-11, 6/6/2002).

2.11.2 IRS issues final regulations

The IRS has issued final regulations providing that a C corporation must include the lookthrough LIFO recapture amount in income in its last taxable year as a C corporation if it makes an S election and holds a partnership interest in which the partnership owns inventory accounted for under the LIFO method [Reg. §1.1363-2(b), T.D. 9210, 7/12/2005]. This regulation overturns the Eleventh Circuit decision in *Coggin Automotive*, and is effective retroactively, applying to S elections made on or after August 13, 2004. In a concession to practicality, the regulations provide that if the partnership is not otherwise required to determine inventory values on the recapture date (that is, the S election date), the lookthrough LIFO recapture amount may be determined based on the partnership’s opening inventory values for the year that includes the recapture date.

2.12 Bankruptcy Filings With S Corporations

In an important opinion, the Tax Court has determined that a shareholder stock disposition is not considered to occur when an S corporation shareholder files for bankruptcy. Upon bankruptcy filing, the shares of an S corporation held by the individual became the property of the bankruptcy estate. When this occurred, the shareholder claimed a portion of the losses from January 1 until the bankruptcy filing date, at which point the shares of the S corporation became the property of the bankruptcy estate. However, the Tax Court determined that under Section 1398(f)(1) the transfer of stock from the debtor to the bankruptcy estate was not a disposition triggering tax consequences, and accordingly the bankruptcy estate stepped into the shoes of the individual. Accordingly, all losses of the S corporation for the entire year were allocated to the bankruptcy estate as of the last day of the S corporation

year, and a pro-rata portion of the loss was not available for use in the individual's return (*Lawrence G. Williams v. Comm.*, 123 TC No. 8, 7/22/2004).

In a case involving a bankruptcy filing by the S corporation (as opposed to bankruptcy of the S shareholder in the preceding case), both the Tax Court and the First Circuit have held that the bankruptcy filing does not cause termination of the S status of the corporation. Even though the bankruptcy trustee took control of the assets of the business, there was no change in the shareholder ownership and the S status of the entity did not terminate (*Alphonse Mourad v. Comm.*, 121 TC 1, 7/2/2003, aff'd. CA-1, 10/20/2004).

2.13 S Election by Noncorporate Entity

2.13.1 Background

Under the "check-the-box" regulations of Reg. 301.7701-1, an entity with only one owner is disregarded for federal tax purposes and is treated as a sole proprietorship, while an entity with two or more owners is treated as a partnership, unless the owners elect to treat the entity as a corporation. The election to an S corporation is valid only if all persons who are shareholders at the time of the election consent to the election.

The IRS previously released a new procedure providing relief for entities whose default classification is a proprietorship or partnership. The relief applies to entities that intended to elect S status, but failed to properly file both Form 8832, "Entity Classification Election," and Form 2553, "Election by Small Business Corporation" [Temp. Reg. §301.7701-3T(c)(1)(v)(C), T.D. 9139, 7/20/2004; Rev. Proc. 2004-48, IRB No. 2004-32].

2.13.2 IRS simplifies election procedure of noncorporate entities

The IRS has now issued final regulations allowing an eligible entity that makes the timely and valid election to be classified as an S corporation on Form 2553 to be deemed to have elected to be classified as a corporation [Reg. §301.7701-3(c)(1)(v)(C), T.D. 9203, 7/20/2004].

The regulations apply to S elections filed on or after July 20, 2004, but taxpayers who timely filed S elections before this date may also rely on the guidance.

Observation

This procedure eliminates the need for taxpayers to file two elections when a limited liability corporation (LLC) wants to be treated as a

corporation and taxed under S status. As long as a timely and valid Form 2553 is filed, the entity is deemed to have elected to be classified as a corporation.

2.14 IRS Announces Compliance Study of S Corporations

In mid-2005, the IRS announced the launch of a study to assess the reporting compliance of S corporations, indicating that 5,000 randomly selected S corporation returns from the tax years 2003 and 2004 will be audited (IR-2005-76, 7/25/2005). While the announcement of these examinations did not specifically refer to the issue of unreasonably low compensation, the Treasury Inspector General for Tax Administration (TIGTA) testified before the Senate Finance Committee on May 25, 2005, presenting statistics regarding significant potential noncompliance with proper salary reporting from S corporations to employee-shareholders (that is, in tax year 2000, owners of 36,000 sole shareholder S corporations reported zero compensation from their S corporation). This followed an earlier TIGTA report recommending that the IRS launch a national initiative to review and track the results of S corporation officer compensation (TIGTA Audit Report No. 2002-30-125, 7/25/2002).

3. DEPRECIATION AND AMORTIZATION

3.1 Section 179 Expensing

3.1.1 Background

Generally, businesses can elect under Section 179 to deduct all or part of the cost of certain qualifying property in the year the property is placed in service. This is in lieu of taking depreciation deductions over a specified recovery period. However, there are limits on the amount that can be deducted in a tax year. This benefit is not available to estates and trusts. Taxpayers can claim the expensing deduction only on qualifying Section 1245 property bought for use in their trade or business. They cannot claim the deduction on property they hold only for the production of income.

3.1.2 Maximum annual Section 179 deduction

The maximum annual deduction under Section 179 is as follows:

<u>Tax Year Beginning in</u>	<u>Maximum Expense Deduction</u>
2002	\$ 24,000
2003	100,000
2004	102,000
2005	105,000

3.1.3 Extension of dollar amounts through 2007

The Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) increased the maximum dollar amount that may be deducted under Section 179 to \$100,000 for property placed in service in taxable years *beginning* in 2003, 2004, and 2005 [§179(b)(1)]. The American Jobs Creation Act of 2004 subsequently extended this enhanced Section 179 deduction through tax years beginning in 2007. Also, for these same years, the \$100,000 amount is subject to inflation-indexing.

Also, for tax years beginning in 2003 through 2007, the threshold for the phase-out of the eligible Section 179 deductible amount is increased from \$200,000 to \$400,000. For tax years beginning in 2004, the threshold has been inflation-indexed to \$410,000 (Rev. Proc. 2003-85), and for tax years beginning in 2005, it is inflation-indexed to \$420,000 (Rev. Proc. 2004-71).

3.1.4 Electing Section 179 on an amended return

In the Committee Report accompanying the American Jobs Creation Act of 2004, Congress indicated its expectation that the IRS will prescribe regulations to permit a taxpayer to make a Section 179 election on an amended return without IRS consent. This expression of congressional intent was part of the Act Section extending the enhanced \$100,000 Section 179 deduction to tax years beginning before 2008, and presumably indicates congressional intent for the amended election opportunity to also be extended two years to cover property placed in service in tax years beginning before 2008 (Comm. Rpt. P.L. 108-357, Act Sec. 201).

The IRS has now issued final regulations extending the privilege to elect Section 179 expensing on an amended return for two additional years (2006 and 2007), resulting in all current Section 179 provisions being extended through 2007 (Reg. §1.179-5, T.D. 9209, 7/13/2005).

3.2 \$25,000 Vehicle Limit for Section 179

3.2.1 Background

Under Section 280F(a), annual depreciation limits are imposed on deductions for passenger automobiles. The definition of a passenger automobile subject to these limits includes any four-wheeled vehicle rated at 6,000 pounds unloaded gross vehicle weight or less (or for a truck or van, 6,000 pounds gross vehicle weight).

Heavy sports utility vehicles (SUVs), trucks, and vans, which are rated at more than 6,000 pounds gross vehicle weight, are not subject to these luxury vehicle caps due to the fact they fall outside the definition of a passenger automobile. Accordingly, these heavy SUVs, trucks, and vans have their full cost eligible for the \$100,000 (\$105,000 for 2005) Section 179 deduction.

3.2.2 Section 179 limit reduced to \$25,000

The American Jobs Creation Act of 2004 decreased the Section 179 limit from the former \$100,000 level to \$25,000 for vehicles not subject to the luxury vehicle depreciation limits of Section 280F (that is, any four-wheeled vehicle rated at over 6,000 pounds unloaded gross vehicle weight, or any truck or van with a gross vehicle weight rating over 6,000 pounds). This new provision applies to any automobiles, trucks, vans, or SUVs with a weight rating over 6,000 pounds, but not more than 14,000 pounds. The change is effective for vehicles placed in service after October 22, 2004 [§179(b)(6)].

Exceptions. The definition of an over-6,000-pound vehicle subject to the lower \$25,000 Section 179 limit excludes three categories:

- Any vehicle designed to have a seating capacity of more than nine persons behind the driver's seat (for example, hotel shuttle van);
- Any vehicle equipped with a cargo area of at least six feet in interior length that is an open area or is designed for use as an open area but is enclosed by a cap and is not readily accessible directly from the passenger department (for example, a pickup truck); or
- Any vehicle that has an integral enclosure, fully enclosing the driver compartment and load carrying device; does not have seating rearward of the driver's seat; and has no body section protruding more than 30" ahead of the leading edge of the windshield (for example, an electrician's van).

If a vehicle meets one of these three exceptions and exceeds the 6,000 pound gross vehicle weight rating, the vehicle remains eligible for the

full Section 179 deduction (\$105,000 as inflation indexed for tax years beginning in 2005).

3.3 Recovery Period for Depreciation of Leasehold Improvements

Qualified leasehold improvements placed in service after October 22, 2004, and before January 1, 2006, may be depreciated over a 15-year recovery period rather than the former 39-year recovery period. The qualified leasehold improvement property must be depreciated using the straight line method [§168(e)(6)].

A qualified leasehold improvement must be made to an interior portion of a building, and the improvement must be pursuant to a lease (with the improvement made by either the landlord or tenant). The building must be nonresidential real property, and the improvement must be placed in service more than three years after the date the building itself was first placed in service. Expenditures for expansion of a building are ineligible, as are structural components or internal structural framework; also, improvements such as elevators and escalators do not qualify. Finally, leases between related parties are ineligible for this special 15-year amortization period. For this purpose, members of an affiliated group are considered related, as well as those relationships defined in Section 267(b), but using an “80 percent or more” definition rather than “more than 50 percent.”

Example. ABC owns an office building, and has recently had a change in a major tenant within that building. To attract a new tenant, ABC incurs significant leasehold improvements to the interior of the building to modernize the office quarters and public reception area. To the extent that these expenditures are placed in service after October 22, 2004, and before January 1, 2006, ABC may depreciate the improvements over a 15-year recovery period.

3.4 Recovery Period for Depreciation of Restaurant Building Improvements

Qualified restaurant building property placed in service after October 22, 2004, and before January 1, 2006, is subject to a 15-year recovery period using the straight-line method of depreciation. Qualified restaurant property means any Section 1250 improvement to a building if the improvement is placed in service more than three years after the date the building was first placed in service, and more than 50 percent of the building’s square footage is devoted to the preparation of, and

seating for, on-premises consumption of prepared meals [§§168(b)(3)(H) and 168(e)(7)].

This 15-year recovery period opportunity applies to improvements done by a restaurant operator who owns the building, a tenant or a landlord, assuming the use of the building meets the qualified restaurant property definition. There is no related party lease prohibition.

3.5 Expiration of Bonus Depreciation and Transition Rules

3.5.1 General rule

The 50 percent bonus depreciation on new assets expired for property acquired or placed in service after December 31, 2004. Note that this expiration of the bonus depreciation applies based on the date of acquisition and the date placed in service, and is independent of the taxpayer's fiscal or calendar year filing period. Accordingly, a fiscal year corporation with a year running from November 1, 2004, through October 31, 2005, could claim the bonus depreciation on eligible assets acquired and placed in service during November and December of 2004.

3.5.2 Noncommercial aircraft transition rule

In the American Jobs Creation Act of 2004, Congress added a transition rule allowing certain noncommercial aircraft to qualify for an extended placed-in-service date for 50 percent bonus depreciation. The aircraft must be acquired by December 31, 2004, and placed in service before January 1, 2006. The aircraft must not be used in the trade or business of transporting persons or property, but may be used in agricultural or fire-fighting applications. The aircraft must be purchased by a taxpayer who has made a nonrefundable deposit of the lesser of 10 percent of the cost or \$100,000, and the aircraft must have an estimated production period exceeding four months and a cost exceeding \$200,000 [§168(k)(2)(C)].

3.5.3 Large asset transition rule

The "placed in service" test is extended for one year to January 1, 2006, for property having a longer production period, and which has a recovery period of at least 10 years or is commercial transportation property. A longer production period is defined as exceeding two years, or an estimated production period exceeding one year in the case of an asset with a cost exceeding \$1 million. Only progress expenditures

to manufacture, construct, or produce property before January 1, 2005, qualify.

3.6 Corporate Organizational Expenditures

3.6.1 Background

Costs of organizing a corporation, such as legal, accounting and state registration fees, can be amortized if the taxpayer so elects [§248(a)]. The election must be made not later than the due date (including extensions) for filing the corporation's first tax return. The election is made by a statement claiming the election filed with the return.

Caution

Failure to elect to amortize organizational expenditures results in their treatment as permanent capital costs that are only recovered upon dissolution of the corporation.

For organizational expenditures incurred on or before October 22, 2004, the amortization period is 60 months (or longer, if the corporation so chooses).

3.6.2 Revised amortization for corporate organizational expenditures

Effective for organizational expenditures incurred after October 22, 2004, a corporation is allowed to deduct the first \$5,000 of organizational expenditures in the taxable year in which the business begins. However, this initial \$5,000 deduction allowance is reduced, but not below zero, by the amount by which the total organizational expenditures exceed \$50,000. As a result, if organizational expenditures exceed \$55,000, no immediate deduction may be claimed.

Any post October 22, 2004, organizational expenditures that are in excess of the \$5,000 immediate deduction allowance must be amortized over 15 years, beginning with the month in which the corporation begins business [§248(a)].

Example. Omni, a newly formed corporation, incurs \$8,000 of corporate organizational costs during 2005 and commences active business on September 16, 2005. In its initial tax return, Omni may immediately deduct the first \$5,000 of organizational costs. The remaining \$3,000 must be amortized over 15 years, beginning with the month in which the corporation actively began business.

3.6.3 Definition of organizational costs

Corporate organizational costs are those incurred directly for the creation of the corporation. They include the cost of temporary directors, organizational meetings, state incorporation fees, accounting services for setting up the business, and the costs of legal services, such as drafting the charter, bylaws, terms of the original stock certificates, and minutes of organizational meetings. However, taxpayers cannot amortize costs for issuing and selling stock or securities, such as commissions, professional fees, and printing costs, because they are not organizational costs. Costs for the transfer of assets to the corporation cannot be amortized; they must be capitalized.

3.7 Business Start-up Costs

3.7.1 Background

A corporation may elect to amortize business start-up costs [§195(a)]. Start-up expenditures must be capitalized unless the taxpayer specifically elects to amortize them. If the property is disposed of before the end of the amortization period, the deferred expenses not yet amortized can be taken as a loss deduction under Section 165 in that year. Start-up expenses that are allowed as deductions for interest, taxes, and research and experimental expenditures are not deferred.

For start-up expenditures incurred on or before October 22, 2004, a 60-month amortization period applies, beginning with the month the business begins. However, a taxpayer may elect a longer amortization period, if desired.

3.7.2 Definition of start-up expenditures

“Start-up expenditure” means any amount (A) paid or incurred in connection with (i) investigating the creation or acquisition of an active trade or business, (ii) creating an active trade or business, or (iii) any activity engaged in for profit and for the production of income before the day on which the active trade or business begins in anticipation of such activity becoming an active trade or business, and (B) which, if paid or incurred in connection with an existing active trade or business in the same field as in (A) would be allowed as a current business deduction.

Note

The IRS has clarified that expenditures incurred in the course of a general search or investigation to determine whether to enter a new business and which new business to enter qualify as start-up or investigatory costs eligible for amortization under Section 195. However, expenditures incurred in the attempt to acquire a specific business do not

qualify because they are considered capital acquisition costs under Section 263. Thus, as a taxpayer considers entry into a particular industry or type of business activity, the costs are eligible for Section 195 amortization, but upon identifying a target business to acquire, the costs of investigation and due diligence are capital to the acquisition of that particular business (Rev. Rul. 99-23, 1999-1 CB 998; PLR 9825005; Preamble to Reg. §1.263(a)-4, T.D. 9107).

3.7.3 Who may deduct

An amortization deduction is allowed only to the taxpayer who actually incurs the costs and enters the business. Amortization deductions for investigating the acquisition of an existing business are allowed only to a taxpayer who acquires an equity interest in the business and participates actively in its management. Acquisition of a debt instrument, preferred stock, or a limited partnership interest is not a qualifying equity interest, nor is acquisition of common stock unless it is in essence the acquisition of the assets (the corporation acquired is liquidated) or a consolidated return is filed.

3.7.4 Revised amortization period for start-up costs

Effective for start-up expenditures incurred after October 22, 2004, a taxpayer is allowed to deduct up to \$5,000 of start-up expenditures in the taxable year in which the business begins. Any start-up expenditures in excess of the \$5,000 deduction allowance must be amortized over 15 years, commencing with the month in which the business activity begins.

However, the initial \$5,000 deduction allowance is reduced, but not below zero, by the amount by which the cumulative cost of start-up expenditures exceeds \$50,000. As a result, if the start-up expenditures exceed \$55,000 or more, no amount is initially deductible and all costs must be amortized over 15 years.

Example. Loco Corp. is a newly formed entity that is opening a restaurant. Loco Corp. begins the active conduct of its restaurant business on September 1, 2005. Before commencing the active conduct of its business, Loco incurred \$53,000 of preopening costs in the form of training salaries, utilities, advertising, and similar items. In its initial tax return, Loco may immediately deduct \$2,000 of the start-up expenditures (\$5,000 initial allowance reduced by \$3,000 of start-up costs in excess of the \$50,000 threshold). The remaining \$51,000 of start-up costs (total costs of \$53,000 – \$2,000 immediate deduction) must be amortized over 15 years, beginning in September 2005, the month in which Loco began the active conduct of its business.

3.7.5 Electing to amortize start-up costs

The final regulations on how and when to elect to amortize business start-up expenses under Section 195 provide as follows:

1. The election is made by attaching an election statement to the return. The statement can be filed with the return for a tax year before the one in which the trade or business begins, but must be filed no later than the extended return due date for the year in which the business begins.
2. The election statement should (a) describe the business to which it relates with enough detail so the expenses can be identified properly; (b) include the number of months (not fewer than 180 after October 22, 2004) over which the expenses are to be amortized; and (c) include, to the extent known at the time the statement is filed, a description of each start-up expense incurred (whether or not paid) and the month in which the active business began (or was acquired).
3. A revised statement can be filed to include start-up expenses not included in the original election statement, but it cannot include expenses that were inconsistently treated (that is, deducted) on a prior return, whether correctly or incorrectly. The revised statement can be filed with a return filed after the return that claimed the election (Reg. §1.195-1).

Example. Gilland Corp. is considering entering a new business activity, and incurs fees, travel expenses, and other costs of an investigatory nature in pursuing possible entry into that field of business. The corporation overlooks the Section 195 requirement to capitalize and amortize these pre-opening or start-up costs, and they are incorrectly claimed as current deductions against the other business operations of the corporation. One year later, the corporation eventually accomplishes entry into the new business activity, and at that point tax advisers to the corporation identify that a Section 195 preopening status exists with respect to those expenditures. However, because those expenses were deducted in a manner inconsistent with the Section 195 amortization and capitalization requirement, the corporation cannot include those start-up expenses in its Section 195 amortization election. The corporation is required to amend its prior year return and permanently capitalize the preopening costs from that return.

3.8 Energy-Efficient Commercial Building Expensing

3.8.1 Background

No provision previously existed for expensing of energy-efficient commercial building property.

3.8.2 First-year deduction for energy-efficient building property added

The 2005 Energy Tax Act (enacted August 8, 2005) added a new first year deduction for energy-efficient commercial building property. This deduction applies to property placed in service after December 31, 2005, and before January 1, 2008 (Section 179D).

3.8.2.1 Eligible improvements

A deduction under Section 179D can be claimed for energy-efficient commercial building property, defined as:

- Property for which depreciation or amortization is allowable,
- Which is installed on or in a building located in the U.S.,
- Within the scope of Standard 90.1-2001 of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America,
- Which is installed as part of the interior lighting systems, heating, cooling, ventilation, and hot water systems, or the building envelope, and
- Which is certified as installed as part of a plan to reduce the annual energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation, and hot water systems of the building by 50 percent or more in comparison to a referenced building which meets the minimum requirements of Standard 90.1-2001, using methods of calculation to be prescribed by the IRS [§179D(c)(1)].

3.8.2.2 Deduction limits

The deduction for any building for any tax year cannot exceed the product of \$1.80 multiplied by the square footage of the building, reduced by any deductions claimed under this provision for that building for any prior tax years. For example, if a commercial building has a size of 100,000 square feet, the maximum Section 179D energy improvement deduction that can be taken cumulatively for the building is limited to \$180,000.

A lower limit applies if the building fails to meet the 50 percent reduction in energy and power cost target. In this case, if there is a certification that any qualifying energy improvement component (for example, lighting, heating, cooling, ventilation, hot water, or building envelope) satisfies IRS-approved energy saving targets, a deduction is allowed for that component, limited to \$.60 per square foot of building space, again on a cumulative basis.

3.8.2.3 Certification and calculation of energy savings

The certification of a plan of 50 percent energy reduction for a building, or alternatively the certification of a specific component, is to be accomplished in a manner and method as prescribed by future IRS regulations. However, the statute requires the IRS to consult with the Secretary of Energy, and base the standards on the 2005 California Nonresidential Alternative Calculation Method Approval Manual. Further, the calculation under this methodology must be prepared by qualified computer software, for which the software designer has certified that the software meets all procedures and methods for calculating energy and power consumption and costs as required by the IRS, and which provides forms as required by the IRS in connection with the energy efficiency of property. The certification is required under Section 179D, and would provide a notice form that documents the energy-efficient features of the building and its projected annual energy costs [§179D(d)(3)].

3.8.2.4 Allocation for governmental property

If energy-efficient commercial building property is installed in a building owned by a federal, state, or local governmental entity or subdivision, the statute allows the deduction to be allocated to the person primarily responsible for designing the property, rather than to the owner of the property [§179D(d)(4)].

Observation

As a result of this provision, building contractors and design firms that are responsible for designing energy improvements to state, city, county, or school district buildings will qualify for the energy deduction, as if they were the taxpayer that owned the building.

3.8.2.5 Recapture

The Section 179D deduction represents a reduction in the tax basis of the property before any cost recovery or depreciation. Further, for purposes of Section 1245 ordinary income depreciation recapture, any Section 179D commercial building expensing is treated as depreciation subject to recapture [§1245(a)(2)(C)].

3.9 Recapture Rules on Disposition of Multiple Section 197 Intangibles

3.9.1 Background

Gain on the disposition of Section 1245 depreciable property is recaptured as ordinary income to the extent of depreciation or amortization deductions previously allowed or allowable [§1245(a)]. Section 1245

property includes intangible personal property, including Section 197 amortizable intangibles [§197(f)(7) and §124(a)(3)].

3.9.2 New rules on disposition of multiple amortizable Section 197 intangibles

The 2005 Energy Act has modified the Section 1245 depreciation recapture rules relating to the disposition of amortizable intangible assets. Under this legislation, if a taxpayer disposes of multiple Section 197 intangible assets in a single transaction or series of transactions, depreciation recapture must be calculated as if all the Section 197 intangibles were a single asset. This rule is designed to force ordinary income recapture to the extent of prior amortization deductions, and prevent manipulation of the sales price allocation in a manner to minimize the recapture. The change is effective for dispositions of intangibles after August 8, 2005 [§1245(b)(9)].

Example. Fromm, Inc. acquired a business 10 years ago, allocating \$150,000 of the purchase price to a customer list and another \$150,000 to general goodwill. Both assets have been amortized over 15 years as Section 197 intangibles, and each asset currently has an adjusted tax basis of \$50,000. Fromm, Inc. is selling assets that include these two intangibles in the current year, and the agreement designates a sale price as allocated \$200,000 to the customer list and \$100,000 to the general goodwill. If each intangible gain is calculated separately, Fromm, Inc. has a \$150,000 gain (\$200,000 sale price – \$50,000 adjusted tax basis) on the customer list, and only a \$50,000 gain (\$100,000 sale price – \$50,000 adjusted tax basis) on the goodwill. The \$50,000 of goodwill gain is entirely subject to ordinary income recapture, but only \$100,000 of the customer list gain of \$150,000 would have been subject to ordinary income recapture. However, assuming the sale occurs after August 8, 2005, Fromm, Inc. must treat the two intangible assets as a single property. Accordingly, the full \$200,000 gain (\$300,000 total sale price – \$100,000 total basis) is entirely attributable to depreciation, and is recaptured as ordinary income.

4. ACCOUNTING METHOD CHANGES

4.1 Twelve-Month Prepaid Expense Rule

4.1.1 Background

Under the final regulations regarding capitalization of intangibles, taxpayers are not required to capitalize amounts, including transaction costs, paid to create or enhance intangible rights or benefits that do not extend beyond the earlier of 12 months after the first date on which

the taxpayer realizes the benefit or the end of the tax year following the year in which payment is made [Reg. §1.263(a)-4(f)]. However, this 12-month rule does not permit an accrual method taxpayer to deduct an amount prepaid for goods and services where the amount has not been incurred under the Section 461(h) economic performance rules. Also, the 12-month rule is applicable neither to assets that represent Section 197 amortizable intangibles nor to a created financial interest described in Reg. Section 1.263(a)-4(d)(2).

Example. On December 1, 2005, N Corporation pays a \$10,000 insurance premium for a property insurance policy with a one-year term beginning on February 1, 2006. Because the right attributable to the \$10,000 payment extends beyond the end of the taxable year following the taxable year in which the payment is made, the 12-month rule does not apply and N is required to capitalize the \$10,000 payment.

Assume the same facts, except the policy has a term beginning on December 15, 2005. The 12-month rule now applies because the right attributable to the payment extends neither more than 12 months beyond December 15, 2005 (the first date the benefit is realized by the taxpayer), nor beyond the taxable year following the year in which the payment is made. Accordingly, N is not required to capitalize the \$10,000 payment [Reg. §1.263(a)-4(f)(8), Examples 1 and 2].

4.1.1.1 Coordination with economic performance rules

In general, the economic performance rules require that an accrual method taxpayer may not claim a deduction until an expense has met the “all events” test and economic performance has occurred with respect to the liability [§461(h)]. In general, economic performance occurs as the property or services are provided to the taxpayer. A prepayment for goods or services is treated as economic performance, provided the services are rendered or the goods are provided no more than three and one-half months after payment [Reg. §1.461-4(d)]. With respect to an accrual for the rental of property, economic performance is considered to occur ratably over the period covered by the lease or other agreement [Reg. §1.461-4(d)(3)].

Example. U Corp leases office space at a monthly rate of \$2,000. On August 1, 2006, U Corp prepays its office rent for the first six months of 2007 in the amount of \$12,000. If U Corp is an accrual method taxpayer and subject to the economic performance rules, economic performance is not considered to occur until 2007. Accordingly, U Corp may not use the 12-month rule to deduct its prepaid rent because economic performance has not occurred with respect to the rent prepayment.

Alternatively, if U was a cash method taxpayer, the economic performance rules of Reg. Section 1.461-4 do not apply. Accordingly, U Corp’s

prepayment of rent of \$12,000 qualifies under the 12-month rule and may be deducted in 2006.

Observation

The 12-month rule has greatest application for accrual method taxpayers who are now permitted to prepay an expense which does not have a benefit extending beyond 12 months, thereby permitting a current deduction. However, to avoid the disallowance of this prepaid expense under the economic performance rules, the prepaid expenditure will typically need to relate to an item for which payment is considered to be economic performance under Reg. Section 1.461-4. Expenditures where payment is considered to be economic performance and for which an immediate deduction for a prepaid expense will now be allowable to an accrual method taxpayer include insurance, taxes, and licensing fees.

4.1.1.2 Previous guidance on accounting method change request

A taxpayer desiring to change a method of accounting to comply with Reg. Section 1.263(a)-4, such as an accrual method taxpayer seeking to utilize the 12-month rule, must secure the consent of the IRS to accomplish the accounting method change [Reg. §1.263(a)-4(p)]. However, for the taxpayer's first taxable year ending on or after December 31, 2003, a taxpayer was granted permission to use the automatic consent procedures to an accounting method change (Rev. Proc. 2004-23, IRB No. 2004-16). This Revenue Procedure covered tax years ending December 31, 2003 through November 30, 2004.

4.1.2 Extension of automatic accounting method request

The IRS subsequently has provided a one-year extension for making the automatic consent accounting method change to adopt the 12-month prepaid expense rule as an accrual method taxpayer (Rev. Proc. 2005-9, IRB No. 2005-2). This extension of the automatic consent procedures applies to tax years ending December 31, 2004, through November 30, 2005. Rev. Proc. 2005-9 clarified that a separate election must be made for each prepaid category (for example, prepaid insurance and prepaid service contracts), although apparently these elections to adopt the 12-month prepaid rule can all be made on a single Form 3115, "Application for Change in Accounting Method," that is attached to the tax return for the year of the change.

Observation

These automatic consent procedures allowed a taxpayer to accomplish an accounting method change by attaching a Form 3115 to a timely filed return. Unfortunately, for taxpayers who missed the opportunity to make an automatic change for the first or second tax year ending on or after December 31, 2003, a more formal nonautomatic accounting method change must be filed. In these cases, the Form 3115 must be filed during the tax year (rather than with the tax return), and a user fee will be assessed (see Rev. Proc. 2005-1).

4.2 Treatment of Environmental Expenditures

4.2.1 Background

The IRS has previously ruled that the U.S. Supreme Court's Decision in the *INDOPCO* ruling requires the capitalization of environmental cleanup costs (asbestos and PCB removal) but not payments in settlement of civil antitrust litigation. As to the latter, the IRS concluded that the taxpayer's liability related primarily to the daily conduct of its business and that any long-term benefit was merely incidental (PLR 9402002).

The IRS later issued a full Revenue Ruling holding that amounts incurred to clean up land that a taxpayer had contaminated with hazardous waste must be capitalized to inventory under the UNICAP provisions of Section 263A. The contamination had occurred as a result of the operation of a manufacturing plant. The IRS noted that the primary function of the business was to produce inventory, that the contamination had occurred as part of that manufacturing process, and accordingly the expense to remediate the land should be considered a capitalizable inventory item (Rev. Rul. 2004-18, IRB No. 2004-8).

Observation

The IRS has indicated that it will not challenge the treatment of environmental remediation costs claimed as current deductions in any taxable year ending on or before February 6, 2004. Accordingly, capitalization of environmental remediation costs to the inventory account under Section 263A is only required for tax years ending after February 6, 2004. Prior IRS rulings had allowed current deductibility of the cleanup of contaminated ground water in a manufacturing business (Rev. Rul. 94-38, 1994-1 CB 35) and the current deductibility of the costs to replace underground storage tanks containing industrial waste and replacing them with new tanks (Rev. Rul. 98-25, 1998-1 CB 998).

4.2.2 IRS issues additional guidance on environmental remediation

In a ruling issued in 2005, the IRS has expanded on its earlier position in Rev. Rul. 2004-18 that a manufacturer's costs incurred for environmental remediation must be capitalized under Section 263A to inventory costs. The latest ruling relates to environmental costs incurred to clean up land or treat groundwater that was contaminated from production activities, and applies where the expenses are not environmental management policy costs under Reg. Section 1.263A-1(e)(4) or permissible as current deductions under Section 198. This latest IRS position holds that environmental remediation costs of a manufacturer are properly allocated to property produced during the tax year in which the costs are incurred. This ruling addresses five different situations involving environmental clean up costs, and each situation requires capitalization to inventory. These examples included a taxpayer that contaminated while manufacturing one product and currently is manufacturing a different product, a taxpayer no longer using the site on which contamination occurred, and a taxpayer that temporarily ceased its manufacturing activities during the clean-up period (Rev. Rul. 2005-42, IRB No. 2005-28).

Observation

Taxpayers using a method of accounting that is not in compliance with Rev. Rul. 2005-42 must file a Form 3115 under the automatic change in method of accounting provisions. Rev. Rul. 2005-42 provides detailed guidance on the completion of the Form 3115 for this accounting method change.

4.3 UNICAP Simplified Service Cost and Simplified Production Methods

The IRS had previously issued regulatory guidance on what qualifies as "eligible property" for purposes of the simplified production method and simplified service cost method.

The IRS has now released new regulations providing additional guidance on the UNICAP simplified methods when dealing with self-constructed tangible personal property produced on a routine and repetitive basis. Along with the new regulatory guidance, the IRS has also issued a Revenue Ruling providing illustrations of routine and repetitive circumstances (Regs. §§1.263A-1T and 1.263A-2T, T.D. 9217, 8/2/2005; Rev. Rul. 2005-53, IRB No. 2005-35).

The former rules allowed the simplified UNICAP methods to be used when self-constructed asset production had either been routine

or repetitive. The new guidance clarifies that the UNICAP simplified methods are only available when such production is both routine *and* repetitive.

4.4 Specified Liability Losses

4.4.1 Background

Contrary to the general net operating loss carryback rules, specified liability losses may be carried back 10 years [§172(b)(1)]. In general, a specified liability loss is attributable to a product liability or represents a loss arising from a federal or state law. Under Section 172(f), a liability arising under federal or state law must have occurred because of an action or omission at least three years before the beginning of the tax year, and the taxpayer must be under an accrual method of accounting. Federal and state liabilities giving rise to this type of loss include those involving reclamation of land, decommissioning of a nuclear power plant, the dismantlement of a drilling platform, the remediation of environmental contamination, or payments under workers' compensation acts [§172(f)(1)(B)].

Caution

Legislation in 1998 tightened the definition of a specified liability loss arising under a federal or state law, as previously noted. Previously, the statute allowed the 10-year carryback for any federal or state law liability, as well as losses arising from torts. Under this more liberal definition, the Tax Court has held that state income tax liabilities and interest on federal and state taxes constituted specified liability losses (*Internet Corporation and Subsidiaries v. Comm.*, 117 TC No. 13, 10/2/2001; IRS acquiescence IRB No. 2002-6). However, this expansive definition is not available for net operating losses arising in tax years ending after October 21, 1998.

4.4.2 Additional IRS guidance issued on carryback rules

In a private ruling, the IRS has held that a manufacturer's inability to sell an inventory of fasteners because of product defects, resulting in a net operating loss, did not constitute a product liability loss that gave rise to a specified liability 10-year carryback. This ruling contains a detailed analysis of the judicial and legislative history defining the term *product liability loss* (TAM 200341004, 4/10/2003). Also, the IRS has issued more formal guidance on the carryback rules for specified liability losses arising in tax years ending before October 22, 1998 (IRS Notice 2005-20, IRB No. 2005-9).

5. COMPENSATION, RETIREMENT PLAN, AND FRINGE BENEFIT ISSUES

5.1 Reasonable Compensation

5.1.1 Background

The reasonableness of compensation is a question of fact. Case law has provided an extensive list of factors that are relevant in determining the reasonableness of compensation (*Comtec Systems, Inc. v. Comm.*, TC Memo 1995-4; *Acme Construction Co., Inc. v. Comm.*, TC Memo 1995-6). Twelve factors have frequently been used by the Tax Court:

1. The employee's qualifications.
2. The nature, extent, and scope of the employee's work.
3. The size and complexity of the business.
4. A comparison of salaries paid with sales and net income.
5. General economic conditions.
6. Comparison of salaries to distributions to shareholders and retained earnings.
7. The employer's salary policy to all employees.
8. The employer's financial condition.
9. The going rates of compensation for comparable positions in comparable companies.
10. Compensation paid in prior years.
11. Whether the employee and employer dealt at arm's length.
12. Whether the employee guaranteed the employer's debt.

Several Appeals Courts have used a five-factor test to measure the reasonableness of compensation:

1. The employee's role in the company.
2. A comparison of compensation paid to similarly situated employees in similar companies.
3. The character and condition of the company.
4. Whether a conflict of interest exists that might permit a company to disguise dividend payments as deductible compensation.
5. Whether the compensation was paid pursuant to a structured, formal, and consistently applied program [*Elliotts, Inc.*, 83-2 USTC ¶9610, CA-9, 1983].

5.1.1.1 Hypothetical investor test

In a case involving the "hypothetical investor" test, a corporation paid a shareholder a salary of \$1.3 million in 1993 and \$1 million during 1994. The IRS allowed about \$400,000 per year, but upon trial, the

Tax Court allowed reasonable compensation of \$900,000 for 1993 and \$700,000 for 1994. Upon appeal, the Seventh Circuit rejected the seven-factor test used by the Tax Court (such as type and extent of services rendered, qualifications of owner) and instead applied an independent investor analysis. Under such an analysis, the court views the rate of return received by a hypothetical independent investor. The IRS expert estimated that such an investor would expect a 13 percent return on investment; the actual return was approximately 20 percent, justifying the higher salary. The Seventh Circuit determined that all compensation was reasonable (*Exacto Spring Corporation v. Comm.*, 99-2 USTC ¶150,964, CA-7, 11/16/99, reversing TC Memo 1998-220).

In another case that ran afoul of the independent investor test, a concrete construction firm, solely owned by a husband and wife, paid compensation of approximately \$1.1 million to the couple for its fiscal year ended July 31, 1996. This compensation resulted in a net loss to the corporation of approximately \$62,000. After examining each factor in a series of nine tests of reasonable compensation criteria, the court concluded that approximately \$350,000 of the salary should be disallowed and recharacterized as dividends. The corporation failed to provide evidence to support its position that the compensation was paid to adjust for earlier years of undercompensation. Further, an independent shareholder would not have allowed the level of compensation to the officers, in view of the reduction in equity that occurred because of the corporate loss (*B&D Foundations, Inc.*, TC Memo 2001-262, 10/3/2001).

5.1.2 Tax Court again applies hypothetical investor test

A Tax Court decision has used the “hypothetical inactive independent investor” test in its analysis of the five factors typically used by the Appeals Courts in measuring the reasonableness of compensation. Even though the corporation had never paid a dividend, the shareholder return on equity for the two years at issue was 33 percent and 68 percent. The court determined that reasonable compensation to the employee-shareholder of the wholesale distributor corporation was \$907,000 for 1999 and approximately \$1.5 million for the year 2000. This resulted in disallowance of about \$100,000 of compensation drawn by the employee-shareholder for one of the years (*Beiner, Inc. v. Comm.*, TC Memo 2004-219, 9/28/2004).

Similarly, another Tax Court case found that an average 15 percent return on equity over the years at issue would satisfy an independent investor. Accordingly, a family drywall contracting business was allowed to fully deduct compensation to the brothers who were employees and controlling shareholders. The compensation for the years at issue

ranged from \$150,000 to \$440,000 per individual (*Miller & Sons Drywall, Inc. v. Comm.*, TC Memo 2005-114, 5/19/2005).

5.2 Payroll Tax on Stock Options

5.2.1 Background

Early in 2001, the IRS indicated its position that Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes applied to the bargain element upon exercise of incentive stock options and employee stock purchase plans, with the compensatory amount equal to the excess of the fair market value of the stock over the exercise price (IRS Notice 2001-14, 2001-1 CB 516). This notice was followed by proposed regulations that took a similar position, with an anticipated effective date applicable to options exercised after 2002 [Prop. Reg. §31.3401(a)-1, REG-142686-01, 11/14/2001].

In mid-2002, the IRS announced that it was creating an indefinite moratorium on the issue of imposing payroll taxes on the exercise of stock options (IRS Notice 2002-47, IRB No. 2002-28).

5.2.2 Incentive stock options exempt from payroll tax

In the American Jobs Creation Act of 2004, Congress eliminated any possibility of the imposition of FICA, FUTA, or federal income tax withholding in connection with either the transfer of stock pursuant to the exercise of an incentive stock option or upon the employee's disposition of that stock by amending the Code to ensure that no payroll taxes could be imposed. This change was effective for stock acquired under options exercised after October 22, 2004 [§§3121(a)(22), 3306(b)(19) and 3231(e)(12)].

In July of 2005, the IRS subsequently announced that it was withdrawing the proposed regulations that it had issued in 2002 that would have required the payment of payroll taxes on incentive stock options.

5.3 Bankruptcy Abuse Prevention and Consumer Protection Act

5.3.1 Retirement plan protection

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8, enacted 4/20/2005) provides enhanced protection for qualified retirement plan funds for all debtors in bankruptcy. An enhanced exemption is provided for retirement assets in Section 401

qualified defined benefit and defined contribution plans, including Section 401(k) plans, Section 403 annuity plans, including Section 403(b) tax sheltered annuities, Section 408 IRAs, SEP-IRAs and SIMPLE IRAs, Section 408 Roth IRAs, Section 414 governmental plans, and Section 457 governmental or tax-exempt deferred plans.

The new exemption is available regardless of whether a debtor chooses federal bankruptcy exemptions under Bankruptcy Code Section 522(d) or state law exemptions under Bankruptcy Code Section 522(b). It applies whether or not the debtor's home state has opted out of the federal exemptions. For assets in a traditional IRA or Roth IRA, the federal exemption cannot exceed \$1 million for an individual debtor, but this cap does not apply to rollover contributions under Sections 402 and 403 [Bankruptcy Code §522(n)]. These new protections in the Bankruptcy Act take effect on October 17, 2005 (180 days after enactment).

Observation

This legislation also excludes Coverdell education savings accounts and qualified tuition programs from the property of the bankruptcy estate if the designated beneficiary of the account is the debtor's child or grandchild.

5.3.2 Dischargeability of taxes in bankruptcy

In a case filed under Chapter 7, 11 U.S.C. Section 727(a)(1) provides that only an individual can be granted a discharge of tax obligations owed. As such, partnerships and corporations involved in a proceeding under Chapter 7 are not granted a discharge of tax obligations. Therefore, if shareholders keep dormant a corporate shell for later reactivation, the unpaid tax liabilities remain in existence.

In a case filed under Chapter 11, 11 U.S.C. Section 1141(d) provides that upon confirmation of a plan of reorganization—unless otherwise provided for in the plan, in the order confirming the plan, or in that subsection of the statute—a debtor is discharged from any debt that arose before the date of confirmation. The historical notes to 11 U.S.C. Section 1141 clearly indicate that nondischargeable taxes in such reorganizations are priority taxes under 11 U.S.C. Section 507, and postpetition payments are due under agreements reached with the tax authorities before the commencement of the case. In addition, the 2005 Bankruptcy Act provides that confirmation of a Chapter 11 plan does not discharge a debtor that is a corporation from a debt for taxes with respect to which the debtor made a fraudulent return, or if the debtor willfully attempted in any manner to defeat the tax.

In a case filed under Chapter 12, 11 U.S.C. Section 1228(a) provides that after completion by the debtor of all payments under the plan,

the debtor is discharged from all debts provided for by the plan, except any debt (for example, taxes as described above) specified in 11 U.S.C. Section 523(a). Since the “family farmer” debtors eligible to file under Chapter 12 include partnerships and corporations, it would appear that this discharge, which is not as comprehensive as that under Chapter 11, applies to partnerships and corporations that are eligible and choose to file under Chapter 12 instead of Chapter 11.

5.4 Roth Elective Deferral Plans

5.4.1 Background

Effective for tax years beginning after 2005, new Section 402A permits employee elective deferral contributions to Section 401(k) plans and Section 403(b) tax-sheltered annuities to be categorized as an after-tax Roth account rather than a traditional pretax elective deferral (§402A, added by 2001 P.L. 107-16, effective for tax years beginning after December 31, 2005). In addition, in March of 2005, the IRS issued Proposed Regulations explaining the new Roth elective deferral opportunity (REG-152354-04, 3/2/2005).

5.4.2 IRS guidance on Roth elective deferral plans

Key points regarding the new Roth elective deferral accounts include:

1. Each employee has the elective ability to designate his or her salary-reduction deferral in either a Section 401(k) or Section 403(b) plan as a Roth account, assuming that the employer has modified the plan to accept Roth contributions. A separate account must be maintained by the plan for the Roth contributions, and the plan must keep separate records for each participant's Roth account. Gains, losses and administrative expenses are to be charged on a reasonable basis between traditional accounts and Roth accounts [Prop. Reg. §1.401(k)-1(f)(2)].
2. An employee electing to designate salary deferrals as a Roth contribution is subject to the normal elective deferral limits. Thus, for 2005, an employee is able to electively defer \$15,000 into a Roth account, plus an additional \$5,000 catch-up contribution if the participant has attained age 50 by year-end. Contrary to traditional Roth funding, there is *no income limit* on elective deferrals into Roth accounts.

Observation

As a result of this change, higher income employees, who in the past have never been able to fund a Roth IRA because of the income phase-out eligibility rule, will now be able to move significant funds into a Roth account, if they so choose.

3. Any employer matching contributions must continue to be treated as pretax contributions and are subject to taxation when distributed to a participant at retirement.
4. Unlike the Roth IRA, a participant's Roth 401(k) account is only eligible for tax-free distribution after the account owner attains age 59½, dies, or becomes disabled, and also only after the Roth account has been in existence for more than five years after the year in which the individual first made a designated Roth contribution to that particular retirement plan or another elective deferral retirement plan. Further, a Roth elective deferral account is subject to the normal minimum required distribution rules that start at age 70½ [Prop. Reg. §1.401(k)-1(f)(3)]. However, this minimum required distribution rule can be avoided by simply rolling the Roth 401(k) account into a Roth IRA. A Roth IRA is not subject to minimum required distribution rules [§408A(c)(5)].

Observation

While the Roth elective deferral opportunity represents a significant change by allowing higher income employees to access Roth accounts, it places an additional administrative burden on the retirement plan. All Roth-designated accounts must be maintained separately, and earnings allocations to those Roth accounts must occur. On the other hand, the employer matching contribution remains in pretax status.

5.5 Nonqualified Deferred Compensation Plans

5.5.1 Background

The use of deferred compensation arrangements to defer current taxation of income is widely used by many businesses. However, Congress was concerned that many nonqualified deferred compensation arrangements allowed improper deferral of income, often providing security of future payment and control by the employee over amounts deferred, but yet resulted in deferral of the recognition of the income.

5.5.2 Restrictions imposed on nonqualified deferred compensation plans

The American Jobs Creation Act of 2004 added Section 409A to provide comprehensive rules regarding the inclusion in gross income of deferred compensation under nonqualified deferred compensation plans. If at any time a nonqualified deferred compensation plan fails to meet any one of three requirements, the compensation plus related

earnings must be included in taxable income of the employee, with the tax increased by a 20 percent penalty (calculated as 20 percent of the compensation), and increased by interest (at the IRS underpayment rate plus 1 percent) on the underpayments that would have occurred had the deferred compensation been includable in income for the year in which first deferred. The three requirements that must continuously be met to avoid early taxation plus a penalty and interest are:

1. The distribution rule.
2. The election rule.
3. The acceleration of benefits rule (under which the plan may not permit the acceleration of the time or schedule of any payment, except as provided in regulations).

5.5.2.1 The distribution rule

The plan of deferred compensation must not permit distributions earlier than separation from service, the date the participant becomes disabled, death, a specified time or pursuant to a fixed schedule specified under the plan at the date of the deferral of the compensation, a change in the ownership or effective control of the employer, or the occurrence of an unforeseeable emergency.

Observation

These distribution rules, combined with the prohibition against any acceleration of benefits, will prevent an employee from electively accelerating the receipt of deferred compensation. It will also eliminate “haircut” provisions that allowed participants to receive early distributions at their election, subject to a minimal forfeiture or “haircut.”

5.5.2.2 Election rule

The initial election to defer compensation must be made not later than the close of the preceding tax year. However, in the case of the first year in which the participant becomes eligible to participate in a deferred compensation plan, the election may be made with respect to services to be performed subsequent to the election within 30 days after attaining eligibility to participate in the plan. Also, performance-based compensation based on performance over a period of at least 12 months may be deferred via election no later than six months before the end of the period.

A change in the time and form of distribution may be made under a subsequent election, but only if the election may not take effect until at least 12 months after the date on which made. Also, unless the election relates to a distribution on account of death, disability, or unforeseeable emergency, any deferral must be at least five years from

the date on which such payment would otherwise have been made. If the deferred compensation is to be paid at a specific time or pursuant to a fixed schedule, any subsequent deferral election may not be made less than 12 months before the date of the first scheduled payment.

5.5.2.3 Definition of a nonqualified deferred compensation plan

A nonqualified deferred compensation plan is any plan that provides for the deferral of compensation other than a qualified employer plan and any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. Qualified employer plans excluded from these deferred compensation rules include Section 401 qualified pension and profit-sharing plans, tax-deferred annuities, SEPs and SIMPLE plans.

Observation

The nonqualified deferred compensation rules do not apply to bonuses and other annual compensation amounts that are paid within 2½ months after the close of the tax year in which the services were performed. Also, the application of these rules is not limited to employees, but extends to deferral agreements with directors and other independent contractors.

5.5.2.4 Employer reporting requirements

If a nonqualified deferred compensation arrangement fails the criteria of new Section 409A, the employer must include deferred compensation in income, reporting the amount on either Form W-2 or Form 1099. In addition, the total amount of deferrals for the year under a nonqualified deferred compensation plan must be reported on the Form W-2, even though not includable in income. Per IRS Notice 2005-1 (Q&A 27), a minimal amount of annual deferral of \$600 or less does not require memorandum reporting.

5.5.2.5 Effective date and transition rules

The new nonqualified deferred compensation rules of Section 409A apply to any compensation deferred after December 31, 2004. Amounts earned and vested before January 1, 2005, are grandfathered. However, amounts deferred before January 1, 2005, are subject to the new rules if a material modification is made to the nonqualified deferred compensation plan after October 3, 2004. The addition or acceleration of any benefit or feature is a material modification, but the reduction of a benefit, right, or feature is not considered a material modification.

Within 60 days of enactment of the legislation, the IRS was directed to provide guidance regarding amendment of plans to conform to the

new rules, and a limited period during which existing plans may be amended to either terminate participation in the plan or to conform to the requirements of Section 409A with regard to amounts deferred after December 31, 2004. This Congressional mandate to provide guidance was subsequently satisfied with IRS Notice 2005-1 (IRS Notice 2005-1, IRB No. 2005-2).

IRS Notice 2005-1 allows a remedial period *through December 31, 2005*, under which existing or new nonqualified deferred compensation plans may be amended in order to comply with the provisions of Section 409A. The plan must be operated in good faith compliance with the provisions of the statute and IRS Notice 2005-1 during calendar year 2005. This remedial period was extended in late September 2005 *through December 31, 2006*, by IRS regulations.

Observation

The addition of Section 409A will require the review of virtually every nonqualified deferred compensation plan. While many plans will need to remove provisions that are not in compliance with Section 409A, other plans will benefit by conforming. An example would be the new ability to accelerate benefits in the event of an unforeseen emergency, which has not been contained in many existing deferred compensation agreements.

5.6 Health Savings Accounts

5.6.1 Background

As part of the Medicare Prescription Drug Act of 2003, Congress enacted a replacement for the Medical Savings Account, known as the Health Savings Account (HSA) (§223, P.L. 108-173, 12/8/2003). HSAs became available for tax years beginning after 2003.

Observation

The HSA is significantly more taxpayer friendly than the MSA. The HSA has a lower deductible on the high deductible health insurance policy, allows a greater percentage of the deductible to be funded (that is, 100 percent rather than 65 percent or 75 percent), and allows individuals between ages 55 and 65 to make catch-up contributions to the HSA. Large employers, as well as small employers, can participate in an HSA, while MSAs only are available to smaller businesses. Finally, the HSA legislation is permanent, while MSAs were limited in number and duration.

5.6.2 Eligible individual

An eligible individual is one who is covered under a high deductible health insurance plan and, while covered under the high deductible plan, is not covered under any other non-high deductible health plan [§223(c)(1)]. However, an individual remains eligible for an HSA if he or she is covered under workers' compensation, insurance for a specified disease or illness, insurance paying a fixed amount per day, or insurance coverage for accidents, disability, dental care, vision, or long-term care.

An individual becomes ineligible for an HSA upon reaching age 65 and becoming enrolled to receive Medicare benefits [§223(b)(7)].

5.6.3 High deductible health plan

In the case of individual coverage, a high deductible health plan must have an annual deductible of at least \$1,000, and the exposure to annual out-of-pocket expenses may not exceed \$5,100 (2005 amounts). For family coverage, there must be an annual deductible of at least \$2,000 in total (per family, not per person), and annual out-of-pocket expenses may not exceed \$10,200 (2005 amounts) [§223(c)(2)(A)].

5.6.4 Health Savings Account

The HSA is a trust established exclusively for the purpose of paying the qualified medical expenses of the account beneficiary. It must be governed by a written instrument; all investments must be in cash; and the trustee must be a bank, insurance company, or other institution of the type that can sponsor an IRA. No part of the trust assets may be invested in life insurance. The trust may accept rollover contributions from an Archer MSA.

5.6.5 Maximum HSA contribution

The maximum for an individual coverage HSA that can be contributed annually is the smaller of the annual deductible or \$2,650. With respect to an HSA involving family coverage, the annual contribution is the smaller of the annual deductible or \$5,250 (2005 amounts, per IRS Notice 2004-71, IRB No. 2004-50). These annual HSA funding limits are converted to monthly amounts, because eligibility for funding hinges on participation in a high deductible health plan. For each month that an individual is an eligible participant in a high deductible health plan, they are entitled to contribute 1/12th of the HSA funding limit.

5.6.5.1 Age 55 catch-up contributions

If an individual has attained age 55 at the end of the tax year, the annual HSA contribution limit is increased by \$600 for 2005. This catch-up limitation increases \$100 annually, until reaching a total of \$1,000 for 2009 and years following.

5.6.6 Employer contributions

Employers, as well as individuals, are permitted to contribute to HSAs, to the extent the employee is an eligible individual. If an employer makes a contribution to employee HSA accounts, comparable contributions must be made for the year for all comparably participating employees. Employer contributions are a tax-free benefit in the same manner as health insurance, and are also not subject to payroll taxes or income tax withholding.

5.6.7 Withdrawals from the HSA

Funds within the HSA grow free of income tax. The account beneficiary determines when withdrawals occur. Withdrawals taken to pay or reimburse out-of-pocket medical expenses are tax-free, but withdrawals not used for medical costs are taxable and subject to a 10 percent penalty.

Even though an HSA participant may not continue to fund an HSA after age 65 and enrolling in Medicare, the individual may continue to hold and accumulate HSA funds. A participant age 65 or older can also withdraw HSA funds tax free for use to pay health insurance premiums or Medicare Part B premiums, as well as other medical costs.

Upon death, a surviving spouse can succeed to an HSA account of the deceased spouse, assuming the surviving spouse was named as the successor beneficiary. To the extent a surviving spouse is not the successor beneficiary, the fair market value of the HSA must be includable in the income of the person or persons who inherit the account, reduced by any medical expenses of the decedent paid from the account within one year after death [§223(f)(8)].

5.6.8 IRS guidance

Following the enactment of Section 223, the IRS issued significant guidance to assistance employers and individual taxpayers in establishing HSAs.

5.6.8.1 General guidance

Shortly after enactment of Section 223, the IRS issued Notice 2004-2, containing 38 questions and answers covering most aspects of HSAs (IRS Notice 2004-2, IRB No. 2004-2).

A more exhaustive summary of HSAs was provided later in 2004. In Notice 2004-50, the IRS issued an 88 question-and-answer release that covered additional information on eligibility, high deductible health plans, preventive care, contributions, distributions, comparability of employer funding, rollovers, and other matters (IRS Notice 2004-50, IRB No. 2004-33).

5.6.8.2 Preventive care relief from high deductible rule

An HSA can only be established by an individual who is covered by a high deductible health plan. However, this high deductible requirement contains a significant exception for preventive care coverage. The IRS has provided guidance on the types of preventive care benefits, such as annual physicals, immunizations, and screening services, which do not disqualify an individual from participation in an HSA (IRS Notice 2004-23, IRB No. 2004-15).

5.6.8.3 Transitional relief for prescription drug coverage

An individual is not eligible to participate in an HSA if they have both a high deductible health plan and a separate prescription drug plan that does not have a high deductible (Rev. Rul. 2004-38, IRB No. 2004-15). However, the IRS has provided transitional relief until January 1, 2006, holding that a person may participate in an HSA until that date if their only ineligible issue is participation in a separate prescription drug policy (Rev. Proc. 2004-22, IRB No. 2004-15).

5.6.8.4 Interaction of HSAs with other health benefits

In general, an individual must have a high deductible health policy as the only coverage for traditional medical costs. However, the IRS has issued clarification of when limited participation in an employer-sponsored flexible spending account (Section 125 cafeteria plan) or health reimbursement arrangement will not taint HSA eligibility. Employer reimbursement or salary reduction plans that restrict reimbursement to benefits such as vision, dental, or preventive care services do not hinder HSA participation, nor do employer plans that only provide reimbursement after the minimum annual deductible has been satisfied (Rev. Rul. 2004-45, IRB No. 2004-22).

5.6.8.5 Relief for state law requirements

In some states, legislation conforming to HSA eligibility for high deductible health plans has not occurred. Recognizing that in some jurisdictions state law may require lower deductibles than the Section 223 HSA rules, the IRS has provided transitional relief for those facing disqualifying state-mandated coverage. Individuals that face ineligibility for this reason will be treated as eligible HSA participants for all months before January 1, 2006 (IRS Notice 2004-43, IRB No. 2004-27).

5.6.9 Additional IRS guidance issued

The IRS has issued a publication that provides a summary of HSA rules in a form that is suitable for business owners and clients. See IRS Publ. 969, *Health Savings Accounts and Other Tax-Favored Health Plans*. Also, at

the U.S. Treasury Web site, the IRS has posted new guidance in the form of “Frequently Asked Questions” regarding the establishment, use, and administration of HSAs. See www.treasury.gov under Health Savings Accounts HSA.

The IRS has issued a ruling clarifying that an individual with a high deductible health insurance plan may contribute to an HSA, even if that individual’s spouse has nonqualifying family coverage, provided that the spouse’s nonqualifying coverage does not cover the individual. Further, an individual with an eligible high deductible health plan for any dependents not covered by a spouse’s ineligible health plan may contribute to an HSA based on family coverage (Rev. Rul. 2005-25, IRB No. 2005-18).

Example. K Corp. provides a high deductible health for its employee, Ken, who has self-only coverage in this plan. Ken’s spouse, Barb, has other ineligible health plan family coverage that covers Barb and their two children, but Ken is excluded from Barb’s low deductible health plan coverage. Because Ken is not covered under Barb’s health plan, he is an eligible individual for K Corp.’s HSA.

Example. Assume the same facts as in the preceding example, except that Ken enrolls in K Corp.’s high deductible health plan under family coverage for himself and one child. Again, Barb has ineligible low deductible health plan coverage for herself, and one other child is included in Barb’s plan, but Ken is excluded from coverage in her plan. Because the ineligible health plan coverage of Barb does not cover Ken, Ken’s HSA eligibility is not affected. Ken may contribute to the HSA in an amount equal to the lesser of the family health plan deductible or \$5,250.

The IRS has provided guidance on an S corporation’s contributions to an HSA for the benefit of a more-than-2 percent S shareholder. Because of the Section 1372 rules treating a more-than-2 percent S shareholder as a partner for fringe benefit purposes, the contributions by the S corporation must be treated as wages of the S corporation, and are reportable as compensation income to the S shareholder. However, because of the medical nature of the payment, the compensation is not subject to FICA. The S corporation shareholder, after reporting the additional wage income, is entitled to claim an offsetting pre-AGI deduction for the HSA funding that was reported as compensation (IRS Notice 2005-8, IRB No. 2005-4).

5.6.10 Comparability rules for employer contributions

In August of 2005, the IRS issued proposed regulations providing guidance on the comparable contribution rules that employers must follow

if they contribute funds to an employee's HSA. The guidance is in Q&A format and is only effective once promulgated in the form of final regulations (although the IRS indicates that taxpayers may rely on the guidance at this time).

Observation

The proposed rules appear to be designed to encourage interest in establishing HSAs for both providers and employers. The proposed regulations contain a number of good examples, addressing practical situations associated with employer-provided HSAs.

5.7 Cafeteria Plans

5.7.1 Background

A "cafeteria plan" is a written plan under which the only participants are employees and under which the participants may choose among two or more benefits consisting of cash and "qualified benefits" [§125(d)(1)]. The employer contributions to such a plan are excludable from the participant's income.

A cafeteria plan must give employees a choice between one or more benefits and *cash*. Thus, a plan that offers only a choice of benefits (for example, allowing older employees to trade group-term life insurance coverage for equivalent coverage under a supplemental health plan) is not a cafeteria plan required to satisfy requirements applicable to such plans. But, as long as such a plan limits its menu to tax-free benefits, the supplemental health plan benefits may be tax-free if the plan satisfies applicable qualification rules. One employer avoided discrimination in its group-term life insurance coverage by limiting the choice to older employees (PLR 9325011).

5.7.2 Use-it-or-lose-it rule

A cafeteria plan may not provide any deferred compensation benefit [§125(d)(2)(A)]. A cafeteria plan does not qualify if it offers a benefit that defers the receipt of compensation, nor may it permit employees to carry over unused elective contributions or plan benefits from one year to another. A cafeteria plan does not qualify if it permits participants to use contributions for one year to purchase a benefit that will be provided in a subsequent plan year (Prop. Reg. §1.125-2, Q&A-5). This rule is known as the use-it-or-lose-it rule, and essentially forces a participant to consume the elective benefit within the calendar year or face forfeiture of any unclaimed salary reduction amounts.

5.7.3 Two-and-one-half-month grace period allowed

The IRS has modified the use-it-or-lose-it rule by allowing employers to amend cafeteria plans to allow a grace period to participants of up to 2½ months immediately following the end of a plan year in which to pay or reimburse qualified benefits incurred during the 2½-month post-year-end grace period. Effectively, this allows a participant in a cafeteria plan to have as long as 14 months and 15 days to consume the benefits for a plan year before those benefits are forfeited under the use-it-or-lose-it rule. During this 2½-month grace period, any unused benefits may not be cashed out, nor may they be converted to any other nontaxable or taxable benefit. To adopt this change, employers must enact an amendment to the plan document before the end of the plan year (IRS Notice 2005-42, IRB No. 2005-23).

Example. G Corp. amends its cafeteria plan before December 31, 2005, allowing participants with unused benefits to use those benefits during a grace period ending on the 15th day of the third calendar month after the plan year end. Luke, a participant, had elected a salary reduction of \$1,000 for health benefits for the plan year ending December 31, 2005, but as of that date had \$200 remaining unused in his health account. Luke also elected a salary reduction for health benefits of \$1,500 for the plan year ending December 31, 2006. During the grace period from January 1 through March 15, 2006, Luke incurs \$300 of unreimbursed medical expenses. The unused \$200 from his cafeteria plan year ending December 31, 2005, is applied to reimburse a portion of these expenses. The remaining \$100 of medical expenses incurred during the grace period is reimbursed from his cafeteria plan account for the year ending December 31, 2006. As of March 16, 2006, Luke has \$1,400 remaining in his cafeteria plan health account for the year ending December 31, 2006.

5.8 Tool Allowance Not an Accountable Plan

The IRS has ruled that an employer's tool allowance payments to automobile repair technicians were outside of the definition of an accountable plan, and accordingly must be reported as taxable compensation subject to withholding and payment of federal employment taxes.

The employer paid each employee a set amount for each hour worked as a "tool allowance" to cover the costs of the employee for acquiring and maintaining tools. The employer set each employee's tool amounts annually by using a combination of data from a national survey of average tool expenses for auto service technicians, and specific information concerning tool expenses provided by the employee in

response to an annual questionnaire completed by all service technicians who worked for the employer. The employer then used this data to project the employee's total annual tool expenses, and converted that to an hourly tool allowance estimate to be reimbursed throughout the year.

The IRS ruled that the arrangement failed to meet two of the three requirements of an accountable plan. It failed the substantiation test and the return of excess payments test (Rev. Rul. 2005-52, IRB No. 2005-35, 8/3/2005).

6. OTHER MAJOR DEVELOPMENTS

6.1 Repeal of Exclusion for Extraterritorial Income

6.1.1 Background

In response to a decision of the World Trade Organization, Congress repealed the Foreign Sales Corporation (FSC) provisions in former Sections 921 through 927 of the Internal Revenue Code, and substituted a new extraterritorial income exclusion for taxpayers involved in foreign sales activities. The exclusion, enacted in Section 114, applies to extraterritorial income, with the related definitions enacted at Sections 941 through 943 (P.L. 106-519, 11/15/2000).

The income exclusion applies to individuals, as well as other business entities, that have foreign sales activity, and was retroactively available to transactions occurring on or after October 1, 2000. However, existing FSCs could delay implementation until January 1, 2002. In general, the exclusion from income is the greatest of one of the following:

- 1.2 percent of foreign trading gross income.
- 15 percent of foreign trade income.
- 30 percent of foreign sale and leasing income.

Foreign trading gross income is defined as arising from the sale, exchange, or other disposition of qualifying foreign trade property; the lease or rental of qualifying foreign trade property for use by the lessee outside of the United States; services related to a sale, exchange, or other disposition of qualifying foreign trade property by the taxpayer; any lease or rental of qualifying foreign trade property for use by the tenant outside the United States; engineering or architectural services for construction projects outside the United States; or the performance

of managerial services in connection with the production of foreign trading gross receipts. If foreign trading gross receipts for the year exceed \$5 million, the taxpayer must also substantiate that certain economic processes take place outside the United States.

IRS Form 8873, "Extraterritorial Income Exclusion," is used to calculate the amount of exempt income.

Observation

In the past, a small business, and particularly a proprietorship, received no privileges for foreign sales activities. In fact, the costs associated with establishment of a Foreign Sales Corporation often prohibited small businesses from taking advantage of the FSC provisions. However, the extraterritorial income exclusion applies to all businesses that are involved in foreign sales activities, and can simply be claimed by the use of IRS Form 8873, without the need to create any separate business entity or additional compliance obstacles.

6.1.2 Repeal of extraterritorial income regime

The American Jobs Creation Act of 2004 repealed the extraterritorial income (ETI) exclusion, subject to the following transitional rules:

1. For transactions in 2004, taxpayers retain 100 percent of their ETI benefits as computed under IRC Sec. 114.
2. For transactions in 2005, taxpayers retain 80 percent of their ETI benefits as computed under IRC Sec. 114.
3. For transactions in 2006, taxpayers retain 60 percent of their ETI benefits as computed under IRC Sec. 114.

100 percent deductibility is allowed for binding contracts with an unrelated party in effect on September 17, 2003, and at all times thereafter. A binding contract includes a purchase option, renewal option, or replacement option included in the contract that is enforceable against the seller or lessor. The repeal is effective for transactions after December 31, 2004 (Act Sec. 101, repealing IRC Sec. 114).

6.2 Deduction for Domestic Production Activities

6.2.1 Background

Before 2005, the Internal Revenue Code provided no provision to reduce taxable income attributable to U.S. production activities. However, to offset the repeal of the ETI exclusion of Section 114, Congress enacted a new deduction to benefit businesses with U.S. production

activity net income. Even though the repeal of the Section 114 exclusion is phased out gradually over three years (100 percent retained for transactions in 2004, 80 percent applicable to transactions in 2005, and 60 percent applicable to transactions in 2006, before total repeal in 2007), Congress added the new production deduction immediately for tax years beginning in 2005.

6.2.2 Calculation of production deduction

For tax years beginning in 2005, the production deduction is calculated as 3 percent of the smaller of:

1. Taxable income determined without regard to this provision (or modified AGI, in the case of an individual), or
2. The qualified production activities income of the taxpayer for the year [§199(a)].

The production deduction percentage phases in, in three increments, as follows:

<u>Tax Year Beginning In</u>	<u>Deduction Percentage</u>
2005 or 2006	3%
2007, 2008, or 2009	6%
2010 and following	9%

6.2.3 Eligible production income

Qualified production activities income is defined as the taxpayer's domestic production gross receipts for the year reduced by the sum of the cost of goods sold allocable to such receipts, other deductions, expenses, or losses directly allocable to such receipts, and a ratable portion of other deductions and expenses not directly allocable to such receipts or any other class of income. The IRS is directed to prescribe rules for the proper allocation of items of income and deduction for this purpose.

Observation

Effectively, this computation requires the calculation of net income, including an allocation of indirect expenses, attributable to the qualifying production gross receipts.

The following production activities conducted in the United States qualify for the new production deduction:

- Construction, including engineering or architectural services for construction projects in the United States.
- Any lease, rental, license, sale, exchange, or other disposition of tangible personal property, computer software, and sound recordings

that were manufactured, produced, grown, or extracted in whole or in significant part by the taxpayer within the United States.

- Qualified film production, and electricity, natural gas, or potable water production in the United States [§199(c)(4)].

However, the term does not include gross receipts derived from the sale of food and beverages prepared by a taxpayer at a retail establishment, and the transmission or distribution of electricity, natural gas, or potable water.

Observation

Manufacturers, agricultural producers, and construction businesses generally qualify, while retail and wholesale distributors and service activities do not qualify.

6.2.4 The wage limitation

The amount of the deduction for a tax year may not exceed 50 percent of the W-2 wages of the employer for the year [§199(b)(1)].

In guidance issued early in 2005, the IRS provided three alternatives for calculating the wage limit for the production deduction (IRS Notice 2005-14, IRB No. 2005-7). The three alternative methods for calculating Form W-2 wages are as follows.

6.2.4.1 Unmodified box 1 method

This is the lesser of the total entries in box 1 of all Forms W-2 issued by the employer, or the total entries in box 5 of all Forms W-2 filed by the taxpayer.

6.2.4.2 Modified box 1 method

This method takes the total box 1 Form W-2 amounts and subtracts amounts not subject to federal withholding under Section 3401; it also subtracts items treated as wages under Section 3402(o) (that is, supplemental unemployment compensation benefits) and then adds elective deferrals reported in box 12 of Form W-2 with codes D, E, F, G, and S.

6.2.4.3 Tracking wages method

This method calculates the actual wages subject to income tax withholding, subtracts the supplemental unemployment compensation benefits included in the total, and adds specific elective deferrals reported in box 12 of Forms W-2 with Codes D, E, F, G, and S.

Observation

Effectively, these methods all require the calculation of wages that are subject to either FICA or federal income tax withholding.

6.2.5 Identifying U.S. production

In general, distributors are ineligible for the new U.S. production deduction. Packaging, labeling, and minor assembly of foreign-produced goods are nonqualified items. However, IRS Notice 2005-14 contains a safe harbor, indicating that the taxpayer will be considered to have achieved manufacturing or qualified production status if there is “significant U.S. production.” The safe harbor indicates that significant U.S. production occurs if direct labor and related burden of the taxpayer within the United States equals or exceeds 20 percent of the total cost of the property [IRS Notice 2005-14, Sec. 3.04(5)(c)].

Example. James Corp. is a business that imports partially finished leather goods and adds decorative accessories, functional enhancements, and embossed labels to these goods before selling the leather products. Tested on a product-by-product basis, James Corp. will be considered a manufacturer for those goods in which its direct and indirect costs equal or exceed 20 percent of the total cost of the property. If James Corp. finds that some of its product lines involve qualifying production because the James Corp. costs equal or exceed 20 percent of the total cost of the property, but other products do not achieve this threshold, the net income attributable to ineligible products cannot be counted in the production deduction computation.

6.2.6 Segregating ineligible net income

Taxpayers with both qualifying and nonqualifying activities are required to determine the net income from the qualified activities to calculate the production deduction. IRS Notice 2005-14 provides three methods for allocating costs:

1. Apportion costs according to the Section 861 regulations.
2. Use a simplified method applicable to business with under \$25 million of gross receipts, allowing pro-rata allocation of overhead based on gross receipts, with modifications.
3. Use a simplified small taxpayer method for those with under \$5 million of gross receipts, or those with under \$10 million of gross receipts using the cash method under the authority of Rev. Proc. 2002-28. These taxpayers are allowed to use a simplified pro-rata allocation of expenses based on gross receipts.

In addition, there is an important de minimis exception, providing that nonqualifying activities are ignored if total nonqualified gross receipts are under 5 percent of all gross receipts [IRS Notice 2005-14, Sec. 4.03(2)].

Example. Assume that James Corp. in the preceding example has only several products in which its costs do not achieve the 20 percent safe

harbor. Further, assume that the gross receipts attributable to those non-qualifying products represent under 5 percent of all gross receipts of the corporation. In this case, based on the de minimis exception, James Corp. could ignore the nonqualifying gross receipts and treat all net income as eligible for calculation of the production deduction.

6.2.7 Overcoming the 50 percent wage limit

Some small corporations, particularly S corporations, lack sufficient wages to use their full production deduction because of the limitation of 50 percent of wages that serves as a cap for the new production deduction.

Observation

Businesses should test the production deduction computation before year end and determine if the deduction is limited by the 50 percent of wages computation. If so, those businesses should consider increased compensation before year end, to allow full deductibility of the production deduction.

6.3 Brother-Sister Controlled Groups

6.3.1 Background

For tax years beginning *before* October 23, 2004, a brother-sister controlled group includes corporations of which at least 80 percent of the voting stock or value of the shares is owned by five or fewer persons (individuals, estate, or trusts), if the same persons collectively own more than 50 percent of the voting stock or the value of the shares in each corporation [§1563(a)(2)]. The 80 percent and more than 50 percent tests are applied in different ways.

The 80 percent test considers *all* the stock directly or indirectly owned by the persons in question. If each corporation is at least 80 percent owned by the same five or fewer persons, they *may be* part of the same brother-sister group, depending on the outcome of the more-than-50 percent test. For purposes of the 80 percent test, the stockholders of one corporation must be identical to the stockholders of the other.

The more-than-50 percent test looks at the percentage of stock in each corporation owned by persons counted in the five-or-fewer category under the 80 percent test. Only each person's lowest common percentage of stock ownership in each corporation is taken into account for this test. For example, if a person owns 20 percent of one corporation and 45 percent of another, the person is considered for purposes of the more-than-50 percent test as owning 20 percent of each corporation.

The final step involves adding the total percentages taken into account under this rule. If the total percentage exceeds 50 percent, the more than 50 percent test is met. If the total is 50 percent or less, the test is not met and the corporations are not members of the same brother-sister controlled group.

6.3.2 Change in ownership test

For tax years beginning *after* October 22, 2004, the American Jobs Creation Act of 2004 changed the definition of a brother-sister controlled group for purposes of the multiple tax benefits of Section 1561 (that is, for purposes of multiple-tiered tax brackets, the accumulated earnings tax credit, and the AMT exemption). This legislation dropped the Test 1 80 percent definition. Accordingly, a brother-sister controlled group is now simply defined as two or more corporations if five or fewer individuals, estates, or trusts own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of all classes of stock of each corporation, taking into account the stock ownership only to the extent it is identical with respect to each corporation [§1563(a) (2)].

Note

Congress did *not* change the brother-sister controlled group definition for purposes of any other cross-reference to this portion of the code. Section 1563(f) (5) specifically retains the former dual 80 percent and 50 percent tests for “any provision of law which incorporates the definition of controlled group of corporations.” Thus, the broadened brother-sister controlled group definition (that is, the single 50 percent test) applies only for the tax rate tier, accumulated earnings credit, and AMT exemption purposes.

6.4 Book-Tax Reconciliation for Large Corporations (Schedule M-3)

6.4.1 Background

In an effort to better identify differences between financial accounting net income and corporate taxable income, the IRS has issued Schedule M-3, “Net Income (Loss) Reconciliation for Corporations With Total Assets of \$10 Million or More.” This new schedule must be completed and attached to Form 1120, “U.S. Corporation Income Tax Return,” by larger corporations for any tax year ending on or after December 31, 2004.

6.4.2 Contents of Schedule M-3

Part I is a series of questions intended to identify the source of the financial statement income and to identify publicly traded corporations. The form also identifies the net income from nonincludable foreign entities and other entity income that is not part of the corporate filing.

Part II and Part III require a detailed reconciliation of financial statement income to tax return income, with Part II identifying the income (loss) differences and Part III identifying expense/deduction items. Differences must be identified as either temporary or permanent.

6.4.3 Draft version of 2005 Schedule M-3 released

The IRS has released a draft version of the 2005 Schedule M-3, indicating that two new line items have been added to the Part III expense reconciliation: The new domestic production activity deduction and a line for interest expense differences (News Release T.D.NR-JS-2506, 6/24/2005).

6.5 Company Aircraft

6.5.1 Background

Employees generally have taxable compensation income when their employer provides a free nonbusiness flight on a noncommercial aircraft [Reg. §1.61-21(g)]. Typically, the aircraft is owned, leased, or chartered by the employer. The employee's compensation amount is determined under the so-called Standard Industry Fair Level (SIFL) formula, as set forth in Reg. Section 1.61-21(g)(5) and (7). Using the SIFL formula, the employee's income is an imputed amount and is therefore unrelated to the employer's actual costs of providing the flight. When an employer follows through by reporting the SIFL formula amount as taxable wages to the employee, the employer was previously allowed to deduct the actual cost of providing the flight [§274(e)(2)].

The Eighth Circuit upheld a Tax Court decision in holding that there was no direct linkage between the amount of the employee's taxable income and the amount of the employer's deduction when employee income amounts are imputed under the SIFL formula. Accordingly, the corporation was allowed to deduct the full costs associated with corporate aircraft used for vacation trips taken by company executives (for example, about \$300,000), where the income value of the trips (a significantly smaller amount, such as \$30,000) was correctly reported to the executives using the SIFL formula (*Sutherland Lumber-Southwest, Inc. v. Comm.*, 2001-2 USTC 50,503, CA-8, 7/3/2001). In 2002, the IRS acquiesced to this opinion (AOD 2002-02, 2/11/2002).

6.5.2 Statutory limit on deduction for personal use

In the American Jobs Creation Act of 2004, Congress closed the door on the opportunity that had arisen in the *Sutherland Lumber-Southwest* case. Effective for amounts incurred after October 22, 2004, an employer's deduction of an entertainment expense item, such as the use of a company airplane, is limited to the amount treated as compensation and includable in the income of the employee [§274(e)(2)]. This rule applies only in the case of a "covered employee," defined as an officer, director, or 10 percent-or-greater owner. The IRS subsequently provided interim guidance on the implementation of this limitation in Notice 2005-45 (IRB No. 2005-24).

Example. Fastco owns a corporate aircraft that is used partially for business travel and partially for personal travel by the controlling shareholder-employee, Bart. At the end of 2005, Bart's personal use of the plane is tabulated, and under the SIFL formula Bart is considered to have received \$30,000 of value for the personal flights. Accordingly, Fastco makes an adjustment to increase Bart's W-2 for 2005 by \$30,000 for the personal use of the corporate aircraft. If Fastco's expenses related to Bart's personal usage of the plane are \$200,000, Fastco will not be able to deduct this amount. Rather, Fastco's deductions related to Bart's personal use of the airplane will be limited to \$30,000, the amount included in Bart's compensation.

6.6 Club Dues

6.6.1 Background

No deduction is permitted for club dues [§274(a)(3)]. This rule applies to all types of clubs, including business, social, athletic, luncheon, and sporting clubs. Specific business expenses (for example, meals) incurred at a club are deductible, however, only to the extent they otherwise qualify [§274(a)(3)]. The disallowance applies to any membership organization a principal purpose of which is to conduct entertainment activities for members or their guests or to provide them with access to entertainment facilities.

Organizations subject to the rule include, but are not limited to, country clubs, golf and athletic clubs, airline clubs, hotel clubs, and clubs (business luncheon clubs) operated to provide meals under circumstances generally considered to be conducive to business discussion. The disallowance does not generally apply to (1) civic or public service organizations, such as Kiwanis, Lions, Rotary, or Civitan; (2) professional organizations, such as bar and medical associations; and (3) quasi-professional organizations, such as business leagues, trade associations,

chambers of commerce, boards of trade, and real estate boards [Reg. §1.274-2(a)(2)(iii)].

6.6.2 Tax Court restricts deductibility of country club dues

The strict nondeductibility of golf and country club dues was emphasized in a Tax Court case disallowing country club dues to a golfing coach. The court noted that “no one, including golf professionals or instructors, may deduct club dues” (*Rodolfo Garcia, Jr. v. Comm.*, TC Summary Opinion 2005-2, 1/3/2005).

6.7 Shareholder Advances to Corporation Treated as Equity

The Tax Court has held that cash advances made to a corporation by controlling shareholders represented equity or capital infusions rather than debt, and accordingly the corporation was denied interest expense deductions. The court reviewed a number of criteria, noting that the loans were unsecured and initially unwritten, interest was paid at an above-market rate, and repayments were sporadic based on the shareholders’ financial needs rather than predetermined debt due dates (*Indmar Products Co., Inc. v. Comm.*, TC Memo 2005-32, 2/23/2005).

6.8 Charitable Contribution Provisions

6.8.1 Contributions of intellectual property

Effective for contributions made after June 3, 2004, the American Jobs Creation Act of 2004 limits the charitable deduction associated with intellectual property. This new limit applies to contributions of any patent, copyright, trademark, tradename, trade secret, know-how, software (other than software generally available for purchase by the public), and similar property, including applications or registrations of such properties. The legislation limits the taxpayer’s initial deduction to the smaller of the taxpayer’s adjusted tax basis in the property or the property’s fair market value.

However, a subsequent additional charitable contribution may be claimed based on a percentage of the income that the charity receives from the intellectual property. Charitable donees who have received contributions of intellectual property must issue an information report to the donor, identifying the amount of net income allocable to that intellectual property. The donor then applies a statutory percentage to that net income amount, potentially claiming an additional charitable

contribution based on that calculation. The statutory percentage is 100 percent of the income amount for the first tax year of the donor ending on or after the date of contribution, with the percentage then declining 10 percent per year, ending with a 10 percent deduction for the 11th and 12th years after the contribution. The additional deductions based on the percentage of the charity's income may not be claimed, however, until they exceed the original charitable deduction claimed for the transfer of the intellectual property at its tax basis [§170(m) and §6050L].

6.8.2 Reporting and appraisal requirements on property contributions

Effective for contributions after June 3, 2004, a charitable deduction of property made by a corporation, an individual, or partnership is not allowed unless the donor complies with certain substantiation requirements [§170(f)(11)(A)(i)]. These requirements apply to the following.

6.8.2.1 Property contribution over \$500

In the case of a deduction for more than \$500 for a property contribution, the individual, partnership, or corporation must include with its return for the year in which the contribution is made a description of the property and such other information as the IRS may require. This disclosure is normally accomplished through a properly completed IRS Form 8283, "Noncash Charitable Contributions." However, this disclosure requirement does not apply to a C corporation other than a personal service corporation or a closely held C corporation.

6.8.2.2 Property contribution over \$5,000

In the case of a contribution of property for which a deduction of more than \$5,000 is claimed, the corporation, partnership, or individual must obtain a qualified appraisal and attach to its return for the year of the contribution information concerning the appraisal as may be required by the IRS. As of June 4, 2004, this requirement applies to all corporations, not merely closely held or personal service corporations. Again, disclosure information is typically provided on IRS Form 8283.

6.8.2.3 Property contributions over \$500,000

In the case of a deduction for a property contribution of over \$500,000, the qualified appraisal must be attached to the return for the year of the contribution.

6.8.2.4 Exceptions

With respect to the requirement of disclosure of property contributions over \$5,000 and attachment of an appraisal for property contributions over \$500,000, the following donations are exempt:

- Cash
- Patents and other intellectual property subject to a basis limitation
- Inventory or property held primarily for sale to customers
- Publicly traded securities
- Qualified vehicles for which a donee acknowledgment regarding sales price is received

Observation

For purposes of the \$500, \$5,000, and \$500,000 thresholds, all similar items of property donated to one or more donees are treated as one property [§170(f)(11)(F)].

6.8.3 Charitable contributions of vehicles

In the case of a contribution after December 31, 2004, of a used vehicle, boat, or airplane (other than items held in inventory) for which the claimed charitable deduction exceeds \$500, no deduction is allowed unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment by the charity and includes that acknowledgment with the taxpayer's return for the year which includes the deduction. If the vehicle is sold by the charity without any significant intervening use or material improvement, the amount of the charitable deduction may not exceed the gross proceeds received by the charity from the sale [§170(f)(12)].

6.8.3.1 Written acknowledgment by charity

The taxpayer must substantiate the contribution of a vehicle, boat, or airplane by a contemporaneous written acknowledgment from the charity that is attached to the return. If the vehicle is sold by the charity, the receipt must identify the gross proceeds from the sale and include a statement that the deduction may not exceed those gross proceeds.

There are three exceptions to the rule limiting the charitable deduction to the charity's sale price of the vehicle:

1. The charity has significant intervening use (such as retaining the vehicle for driving required in the charity's exempt purpose).
2. The charity makes material improvements (such as in the case of a technical school that retains the vehicle for training and improvement by students).
3. The charity supplies the vehicle to a needy individual at no cost or at a price significantly below market value, but only if in direct furtherance of the charity's purpose of relieving the poor or underprivileged who are in need of transportation (IRS Notice 2005-44, IRB No. 2005-25).

In these cases, the receipt must identify the intended use or material improvement of the vehicle and the duration of such use and also contain a certification by the charity that the vehicle will not be transferred for money or other property or service before completion of the use or improvement. In these cases, the charitable deduction is not limited to the gross sales proceeds but instead can be established by a reasonable method, including the use of an established used car pricing guide. The charity must provide the written acknowledgment to the donor within 30 days of the sale of the vehicle or within 30 days of the contribution if the charity retains the vehicle for its use (Section 6720).

Example. Blue Corp. donates a used vehicle driven by a sales employee to a charity, which immediately brokers the vehicle through a used car auction market and receives \$4,800. The charity must provide a written acknowledgment to Blue Corp. that identifies the sales price and informs Blue Corp. that its charitable deduction may not exceed the gross sale price amount of \$4,800. When preparing its corporate tax return claiming the charitable deduction (which may be reduced to a lower adjusted tax basis because of Section 1245 depreciation recapture), the corporation must attach the written acknowledgment that it received from the charity. The \$250 receipt rule is not applicable in the case of a vehicle subject to this special written acknowledgment rule.

Example. Assume the same facts as in the preceding example, except that Blue donates the vehicle to a charity that retains the vehicle for use by its staff in the charity's exempt activities. In this case, the written acknowledgment from the charity must identify that it retained the vehicle for its use and the intended duration of such use, along with a certification by the charity that the vehicle would not be transferred for money or other property or services before completion of the use. In this case, the fair market value starting point for calculation of Blue's charitable deduction may be determined by an established used car pricing guide.

Observation

In the case of corporate donations of depreciable property, the fair market value is generally not a determining factor in the charitable deduction. The fair market value is the starting point for the charitable contribution calculation, but that fair market value must be reduced by the ordinary income depreciation recapture that would have occurred if the asset had been sold for fair market value. The result generally is to limit the charitable contribution to the adjusted tax basis of the property.

IRS Notice 2005-44 contains interim guidance regarding the substantiation and information reporting requirements for both the donor of the used vehicle and the charity (IRS Notice 2005-44, IRB No. 2005-25).

6.9 Like-Kind Exchanges

6.9.1 Background

Some voluntary exchanges are nontaxable. Property received is treated as a continuation of the old investment. Gain or loss is not recognized until a disposition of the property received in the exchange. To be nontaxable, such a like-kind exchange must meet *all* of the following conditions:

1. The property must be business or investment property [§1031(a)(1)].
2. The property must not be property held for sale.

Note

Inventories, raw materials, accounts receivable, other current assets, and real estate that dealers hold for sale to customers are examples of property that do not qualify.

3. The property must be an exchange of “like-kind” property.

Note

The IRS takes the position that in determining whether an exchange of one asset for another is a like-kind exchange, it will look at the nature of the underlying property rather than only at the nature of the business involved.

4. The property must be tangible property.

Note

Nontaxable exchanges do not apply to exchanges of stocks, bonds, or other securities.

5. If not simultaneous, the exchange must meet an identification requirement and a completed transaction requirement.

6.9.2 Related party exchanges

A Section 1031 exchange is permitted between related parties. However, if property is received in a like-kind exchange between related persons under Section 267(b) or 707(b)(1) [which includes two corporations that are members of the same controlled group or an individual and a more than 50 percent (in value) owned corporation], and the property is disposed of before a date that is less than two years after the date of the last transfer in the exchange, the gain or loss that was not recognized

on the original exchange is recognized as of the date of disposition [§1031(f)].

Under this two-year rule, exceptions exist for a disposition within the two-year period (1) after the earlier of the death of the taxpayer or the related person, (2) in a compulsory or involuntary conversion (under Section 1033) if the exchange occurred before the threat or imminence of such conversion, or (3) where neither the exchange nor disposition had as one of its principal purposes the avoidance of tax. Also, the running of the two-year period is suspended where there is substantial diminution of risk [§1031(g)].

The IRS has issued a ruling indicating that a taxpayer who transfers property to a qualified intermediary in a Section 1031 exchange for replacement property that was formerly owned by a related party does not meet the nonrecognition rules (Rev. Rul. 2002-83, 2002-2 CB 927). The IRS views this as violating the related party exchange rule, noting that Section 1031(f)(4) provides that the like-kind exchange rules do not apply to any exchange that is part of the transaction or series of transactions structured to avoid the related party prohibition.

Example. Black, Inc., a corporation 100 percent owned by Pete and his spouse, owns land with a low basis and market value of \$800,000. A developer approaches the corporation, offering to pay cash for this property.

To accomplish the sale, Black enters into an agreement with a qualified intermediary, transferring this land to that intermediary under an exchange agreement. The intermediary subsequently transfers Black, Inc.'s land to the developer in exchange for \$800,000. One week later, the intermediary purchases land owned by Pete for \$800,000 that has an adjusted tax basis to Pete of \$750,000. The intermediary uses this real estate to complete the exchange with Black, Inc. Under Rev. Rul. 2002-83, this transaction does not qualify for exchange treatment because Pete and Black, Inc. are related parties. Black, Inc. must report a taxable sale.

Observation

In its analysis in Rev. Rul. 2002-83, the IRS noted that the affect of using an intermediary in the preceding example is the same as if Black, Inc. had first exchanged its land with Pete, and then Pete had sold the property to the developer at a nominal gain. The series of transactions accomplished by Black, Inc. with the intermediary in the preceding example would have allowed a related party (Pete) to receive the cash without significant gain recognition, if the related party rule were not imposed by the IRS.

The Tax Court has taken a position similar to Rev. Rul. 2002-83, holding that a corporation could not defer gain under Section 1031 by structuring the transaction through a qualified intermediary, where the qualified intermediary used the sale proceeds from the relinquished

property to invest in replacement property owned by a related corporation. In the court's view, the qualifying intermediary was used in an attempt to circumvent the related party prohibition to Section 1031 like-kind exchanges (*Teruya Brothers, Ltd. and Subsidiaries v. Comm.*, 124 TC No. 4, 2/9/2005).

6.9.3 Like-kind or class requirements

In a private ruling, the IRS has indicated that a passenger car and a SUV (a light truck) are like-kind property for Section 1031 exchange purposes, even though the assets are in different general asset classes under Rev. Proc. 87-56. The IRS noted that SUVs and passenger cars are like-kind property, with the differences representing grade or quality distinctions and not differences in nature or character. The rule allowing Section 1031 like-kind treatment for assets in the same cost recovery general asset class represents a safe harbor and is not the only manner for determining like-kind status (PLR 200450005, 12/15/2004).

The IRS has issued final regulations replacing the use of the Standard Industrial Classification (SIC) system with the North American Industry Classification System (NAICS) for determining when tangible personalty is within the same product class for purposes of the like-kind exchange rules of Section 1031. Under these regulations, depreciable tangible personal property is considered like-kind in an exchange if it is described in the same six-digit product class within Sectors 31, 32, and 33 of the NAICS codes. These regulations apply to transfers of property on or after August 12, 2004 [Reg. §1.1031(a)-2(b)(3), T.D. 9202, 5/19/2005].

Example. Ace Construction, Inc. trades a grader to a vendor in exchange for a new scraper. Neither property is within the general asset classes affecting property, such as computers or automobiles. However, both properties are within the same product class, NAICS code 333120. The grader and scraper are of a like product class and are treated as like-kind exchange property for purposes of Section 1031.

6.10 Corporate Tax Payments, Credits, and Compliance Matters

6.10.1 Research and development credit

The 2005 Energy Act enhanced the research credit in two ways. First, the 65 percent allowance of amounts paid to nonemployees for contract research is increased to 100 percent for amounts paid by the taxpayer for energy research to either an eligible small business, an institution of higher education, or an organization that is a federal laboratory. For

this purpose, an eligible small business is one with an annual average number of employees of 500 or fewer during either of the two preceding calendar years [§41(b)(3)(D)].

In addition, the 2005 Energy Act provides a direct 20 percent credit (without any reference to prior or base year expenditures) for payments during the year to an energy research consortium. An energy research consortium is a Section 501(c)(3) exempt entity organized and operated primarily to conduct energy research in the public interest, that is not a private foundation, and to which at least five unrelated parties paid or contributed amounts for energy research. In addition, an energy research consortium may not have any single person or entity provide more than 50 percent of the amount received by the organization during the calendar year for energy research [§§41(a)(3) and 41(f)(6)].

The IRS has issued temporary regulations to clarify how members of a controlled group calculate the research credit and allocate that credit within the group. The regulations allocate the group credit based on each member's stand-alone credit. The stand-alone credit for a member must be computed using the method that produces the greatest credit for that member, regardless of the method used to compute the controlled group research credit (Temp. Regs. §§1.41-6T and 1.41-8T, T.D. 9205, 5/20/2005).

6.10.2 Disabled access credit

The Tax Court has held that an individual could not claim the disabled access credit for the purchase price of two pay telephones. The expenditure had no relationship to the requirement of allowing a small business to comply with the Americans with Disabilities Act. Further, the "investment" in the telephones lacked the benefits and burdens of ownership, and the taxpayer was also denied depreciation deductions (*Edward R. Arevalo v. Comm.*, 124 TC No. 15, 5/18/2005).

Observation

The IRS has included Section 44 disabled access credit schemes in a list of potentially abusive tax shelter or tax scam arrangements. According to the IRS, promoters claim that by purchasing equipment and services for an inflated price, a taxpayer can claim the disabled access credit to reduce tax or generate a refund. However, the IRS notes that in these schemes, taxpayers participating typically are not required to pay and do not pay the entire price stated in the sales contract (IRS Notice 2005-30, IRB No. 2005-14).

6.10.3 Home contractor energy credit

The 2005 Energy Act created a new business credit for home contractors that construct and sell a dwelling that is acquired by a person from the contractor for use as a residence (Section 45L).

Key points regarding this new tax credit include the following:

- The credit applies to homes whose construction is substantially completed after August 8, 2005, and that are purchased from the contractor after December 31, 2005, and before 2008.
- The home must be acquired from the contractor for use as a residence, but there is no requirement in the statute that the residential use be as the purchaser's principal residence. This suggests that use as a seasonal or vacation dwelling qualifies.
- The credit is available to the contractor for the construction of a qualified new energy-efficient home. The home must be located in the United States, and can be a property that was substantially reconstructed and rehabilitated.
- The credit is calculated per dwelling unit. The credit is \$2,000 per dwelling unit if the property has an annual heating and cooling energy consumption that is at least 50 percent below the annual level of the heating and cooling energy consumption of a comparable dwelling unit based on technical standards to be further refined and issued by the IRS. The credit is \$1,000 per dwelling unit in the case of a manufactured home that meets a threshold of at least 30 percent reduction in energy consumption.
- As a business credit, the new energy efficient home credit reduces regular tax but does not reduce AMT.
- The basis of the residence must be reduced by the energy credit allowed.
- As part of the general business credit system, the home contractor energy credit is eligible for carryback and carryover if it is in excess of the current year tax liability. However, no credit is available to be carried back to any tax year ending on or before the effective date of the energy efficient home credit.

6.10.4 Alternative motor vehicle credit

As part of the 2005 Energy Act, Congress has added a new alternative motor vehicle credit that applies to four types of new vehicles:

- Qualified fuel cell motor vehicle.
- Advanced lean burn technology motor vehicle.
- Qualified hybrid motor vehicle.
- Qualified alternative fuel motor vehicle (Section 30B).

The following points are applicable to all versions of this credit:

- The credit is treated as part of the general business credit system for business taxpayers and is treated as a personal tax credit for individual taxpayers acquiring a vehicle in a nonbusiness or nondepreciable context. However, to the extent of any business use, the credit is not permitted to the extent the deduction is claimed under Section 179 for the vehicle, nor may any double benefit be claimed for both business usage and eligibility for the credit.
- The vehicle must be new rather than used.
- The credits are available for vehicles placed in service after 2005. The various credits expire for years ranging from 2010 to 2015, depending on the particular category of vehicle.
- The credit is available whether the taxpayer purchases or leases the new vehicle.
- In the case of a vehicle purchased (but not leased) by a governmental or tax-exempt entity, the person who sold such vehicle to the exempt entity is treated as the taxpayer that placed the vehicle in service, and is entitled to the credit.

6.10.4.1 Qualified fuel cell motor vehicle

A credit of \$8,000 is allowed for any qualified fuel cell motor vehicle with a gross vehicle weight rating of not more than 8,500 pounds. This credit escalates to greater amounts for heavier vehicles. In addition, there is an enhancement to the credit ranging from \$1,000 to \$4,000, based on the increased fuel efficiency of the vehicle compared to 2002 city fuel economy standards. A fuel cell vehicle is one propelled by power from one or more cells that convert chemical energy directly into electricity by combining oxygen with hydrogen fuel that is stored onboard the vehicle [§30B(b)].

6.10.4.2 Advanced lean burn vehicle credit

This version of the Section 30B vehicle credit applies to a passenger auto or light truck with an internal combustion engine that is designed to operate primarily using more air than necessary for complete combustion of the fuel, incorporating direct injection, and achieving at least 125 percent of increased fuel efficiency compared to 2002 model year city fuel economy standards. The credit increases incrementally as the percentage of fuel economy increases, with the credit ranging from \$400 to \$2,400. In addition, there is a conservation credit that ranges from \$250 to \$1,000 based on the lifetime fuel savings that the vehicle is anticipated to realize.

6.10.4.3 Hybrid vehicle credit

A hybrid vehicle credit is allowed for vehicles that draw propulsion from both an internal combustion engine and a rechargeable energy storage system or heat engine.

Observation

Previously, hybrid vehicles, categorized as “clean fuel vehicles,” resulted in a \$2,000 deduction. This deduction is repealed for hybrid vehicles placed in service after 2005, and replaced by the alternative vehicle credit.

The qualified hybrid vehicle receives a credit using the same sliding scale that applied to the advanced lean burn vehicles. Accordingly, this credit will range from \$400 to \$2,400, based on the fuel economy, and an initial conservation credit from \$250 to \$1,000 also would be available, based on the projected gallons of fuel saved over the useful life of the vehicle.

6.10.4.4 Alternative fuel vehicle credit

This credit applies to vehicles that burn only natural gas, liquefied petroleum gas (LP), hydrogen, or 85 percent methanol. The credit allowed is based on a percentage of the incremental cost of the energy efficient components of the vehicle. The credit is 50 percent of the incremental cost of the energy enhancement, plus 30 percent if the vehicle receives clean air certification and meets or exceeds specified clean air standards.

A reduced credit for alternative fuel vehicles is provided for “mixed fuel vehicles.” These are vehicles that burn both alternative fuels and conventional petroleum-based fuels.

6.10.5 Foreign tax credit

The American Jobs Creation Act of 2004 changes the nine separate limitation categories or “baskets” to two categories. The two categories will be passive category income and general category income. However, this change is not effective until tax years beginning after 2006 [Act Sec. 404(a), amending §904(d)(1), effective for tax years beginning after 12/31/2006].

Passive category income will include passive income and also dividends from DISCs, taxable income attributable to foreign trade income, and distributions from a FSC or former FSC. General category income will include all income other than passive category income. The change will not affect the separate computation of foreign tax credit limitations relating to foreign tax treaty sourcing rules or specified country provisions under Section 901(j).

Previously, the AMT liability was reduced by any AMT foreign tax credit, but the AMT foreign tax credit was limited to 90 percent of the AMT. Effective for tax years beginning after 2004, however, the American Jobs Creation Act of 2004 repeals the 90 percent limit. Accordingly, the AMT foreign tax credit can fully reduce a corporate tax liability to zero for tax years beginning after 2004 [§59(a)(2)].

6.10.6 Work opportunity tax credit and welfare-to-work tax credit

The work opportunity tax credit and welfare-to-work credit are part of recurring “extender” legislation that typically renews these credits for a one- or two-year period. The Working Families Tax Relief Act of 2004 (P.L. 108-311) extended these credits for wages paid to qualified individuals who *began work* for an employer before January 1, 2006.

6.10.7 Electric vehicle credit

The 10 percent electric vehicle credit was scheduled to be phased-down beginning in 2002, but 2004 legislation extended the credit to include vehicles placed in service through December 31, 2006 [P.L. 107-147, amending §30(e)]. The credit is available whether the vehicle is depreciable property used in a business or held for nondepreciable personal use. If the electric vehicle is a depreciable business asset, the annual depreciation limit that normally applies to the vehicle is tripled for a qualified electric vehicle [§280F(a)(1)(C)]. This provision is extended to apply to any electric vehicle placed in service before January 1, 2007. IRS Form 8834, “Qualified Electric Vehicle Credit,” is used to claim this credit.

6.10.8 Renewable electricity production credit

The electricity production credit was initially set to expire at the end of 2003 but was extended by the 2004 Working Families Tax Relief Act to apply to qualified facilities placed in service before January 1, 2006 [§45(c)(3)]. The credit is allowed for the production of electricity from either qualified wind energy, qualified “closed-loop” biomass, or qualified poultry waste facilities. The credit is 1.9 cents per kilowatt hour (2005 amount per IRS Notice 2005-37) of electrical production, applicable to wind and closed-loop biomass facilities placed in service before 2006, and to qualified poultry waste facilities placed in service before 2004. A reduced 50 percent credit (or .9 cents per kilowatt hour) applies to electricity produced from open-loop biomass, small irrigation power, or municipal solid waste after October 22, 2004 [§45(b)(4)]. The credit is allowable for production during the 10-year period after

a qualified facility is placed in service. Closed-loop biomass refers to plant matter grown solely to generate electricity.

6.10.9 Additional business tax credits added

The 2004 American Jobs Creation Act, enacted October 22, 2004, added several additional business credits:

1. Railroad track maintenance credit (Section 45G—effective after 2004)
2. Biodiesel fuels credit (Section 40A—effective after 2004)
3. Production of low sulfur diesel fuel (Section 45H—effective after 2002)
4. Production of oil and gas from marginal wells (Section 45I—effective for production in tax years beginning after 2004)

The 2005 Energy Act, enacted August 8, 2005, added several additional business credits:

1. Distilled spirits wholesaler excise tax carrying credit (Section 5011, effective for tax years beginning after September 20, 2005)
2. Electricity production from advanced nuclear power facility (Section 45J, effective for production in tax years beginning after August 8, 2005)
3. Nonconventional fuels production credit (Section 45K, redesignating Section 29 effective for tax years ending after 2005)
4. Contractor credit for construction of energy efficient home (Section 45L, effective for homes acquired after 2005 and tax years ending after 2005, where construction is substantially completed after August 8, 2005)
5. Manufacturer's credit for energy efficient appliances (Section 45M, effective for production after 2005)
6. Alternative motor vehicle credit attributable to depreciable vehicles (Section 30B, effective for property placed in service after 2005)
7. Alternative fuel vehicle refueling property attributable to depreciable property (Section 30C, effective for property placed in service after 2005)

6.10.10 Additional credits allowed without AMT restriction

The American Jobs Creation Act of 2004 modified two existing energy credits, allowing those credits to be used against regular tax without any AMT restriction. As a result, the following two business credits are able to offset both regular tax and AMT:

- The Section 40 alcohol fuels credit, such as for ethanol production, effective for tax years beginning after 2004, and

- The Section 45 credit for electricity production, such as from a wind power facility, to the extent the facility is originally placed in service after October 22, 2004, and for the four-year period beginning on the date the facility is originally placed in service [§38(c)(4)].

Observation

These two energy credits join two other existing business credits that can offset AMT as well as regular tax. The empowerment zone employment credit of Section 1396 is allowed to offset 25 percent of AMT [§38(c)(2)] and the New York Liberty Zone Business Employee credit of Sections 51 and 1400L are allowed to fully offset AMT [§38(c)(3)].

6.11 Accuracy-Related Penalties

6.11.1 Penalty for reportable transaction understatements

The American Jobs Creation Act of 2004 added a new 20 percent penalty for *reportable transaction* understatements, effective for tax years ending after October 22, 2004. This penalty applies to deficiencies arising from either listed transaction or a reportable transaction (defined as having a significant purpose of avoidance or evasion of federal income tax). This penalty escalates to 30 percent if the transaction was not adequately disclosed in the return (Section 6662A).

This new penalty is not subject to the substantial authority and adequate disclosure defenses. Rather, a new “reasonable cause” exception applies under which the reportable transaction penalty is not imposed if the transaction was adequately disclosed, there was substantial authority, and the taxpayer reasonably believed that the treatment was more likely than not the proper treatment [§6664(d)(2)].

6.11.2 Corporate substantial understatement penalty

Effective for tax years ending after October 22, 2004, a corporation (other than an S corporation or a personal holding company) incurs a substantial understatement penalty if the deficiency and income tax for any year exceeds the lesser of:

1. 10 percent of the tax required to be shown on the return for the year (or, if greater, \$10,000); or
2. \$10 million [§6662(d)(1)(B)].

6.11.3 Substantial authority and disclosure defenses

Substantial authority and disclosure defenses do not avoid the penalty for a tax shelter. Thus, if a corporation has a substantial understatement

that is attributable to a tax shelter item, the penalty cannot be avoided unless the reasonable cause exception of Section 6664(c) applies [§6662(d)(2)(C)]. This rule regarding tax shelters previously applied only to corporations, but for tax years ending after October 22, 2004, it applies to all taxpayers.

6.12 Deposits on Tax Deficiencies

In the American Jobs Creation Act of 2004, Congress liberalized the rules regarding tax deposits made against potential deficiencies. Previously, a tax deposit stopped the running of interest on a potential deficiency, but any deposit in excess of the ultimate tax liability did not earn interest. The deposit rules have been codified in new Section 6603, effective for deposits made after October 22, 2004. Under the rules of this new statute:

- The deposit stops the running of interest on an underpayment of tax from the date of the deposit.
- The IRS must return the amount of a deposit if the taxpayer requests a return of the deposit in writing, unless the IRS determines that collection of a tax is in jeopardy.
- Any deposit returned to a taxpayer bears interest at the federal short-term rate under Section 6621(b).
- The deposit rules apply to any income tax, estate, gift, and generation-skipping tax (Section 6603, effective October 22, 2004).

CASH MANAGEMENT

1. INTRODUCTION

- 1.1 Cash Management
- 1.2 Cash Flow Projections

2. DEFINITION AND OBJECTIVES

- 2.1 Benefits of Cash Management
- 2.2 Overview of Cash Management Techniques
- 2.3 Overview of Analytical Techniques
- 2.4 Overview of Cash Management Decisions

3. ACCELERATING CASH INFLOWS

- 3.1 Billing and Invoicing
- 3.2 Credit and Collections
 - 3.2.1 Electronic funds transfer
 - 3.2.2 Analytical techniques
- 3.3 Inventory Control
 - 3.3.1 Inventory control techniques
- 3.4 Wire Transfers
- 3.5 Lockboxes
- 3.6 Depository Transfer Checks
- 3.7 PACs, PADs, and ACHs

4. DECELERATING CASH OUTFLOWS

- 4.1 Payment Control Techniques
 - 4.1.1 Average age of payables
- 4.2 Management of Accounts Payable
 - 4.2.1 Purchase discounts

5. USE OF BANKS

- 5.1 Float
- 5.2 Choice of Banks
- 5.3 Sweep Accounts
- 5.4 Cash Concentration Systems
- 5.5 Funds Availability
- 5.6 Account Analysis
- 5.7 Banking Relationships
- 5.8 Investment of Excess Cash
- 5.9 Lines of Credit

6. CASH MANAGEMENT REPORTS

- 6.1 Available Cash Reports
- 6.2 Aged Accounts Receivable
- 6.3 Cash Requirements Report
- 6.4 Accounts Payable Aging

7. CASH PLANNING TECHNIQUES

- 7.1 Approach to Cash Projections
- 7.2 Presentation Format
 - 7.2.1 Planning without a computer
 - 7.2.2 Planning with a computer
- 7.3 Detail Required and Model Accuracy
- 7.4 Uses of the Cash Plan
- 7.5 Decision Making Using Multiple Scenarios
- 7.6 Nine Steps to Cash Planning
- 7.7 Cash Management Warning Signs

8. INTEREST RATE RISK

- 8.1 Definitions and Symptoms
- 8.2 Simulation Analysis
- 8.3 Formulation of Solutions
- 8.4 Protecting Profits and Cash

9. FRAUD AND RISK MANAGEMENT

- 9.1 Guarding Against the Threat of Fraud
 - 9.1.1 Determining acceptable risk levels
 - 9.1.2 Developing and implementing internal controls
 - 9.1.3 Developing and promoting an ethical environment
 - 9.1.4 Establishing appropriate insurance levels
- 9.2 Opportunity to Commit Fraud and Likelihood of Discovery
 - 9.2.1 Opportunity to misappropriate cash
 - 9.2.2 Likelihood of discovery
 - 9.2.3 Minimizing the opportunity
- 9.3 Internal Controls and Fraudproofing
 - 9.3.1 Establishing internal control objectives
 - 9.3.2 Fundamental internal controls
 - 9.3.3 Employee supervision
- 9.4 Cash Misappropriation
 - 9.4.1 Petty cash theft
 - 9.4.2 Cash and bank deposit theft
 - 9.4.3 Summary

SUGGESTED REFERENCES

1. INTRODUCTION

Adequate cash flow is the single most important element in the ongoing success of an enterprise. The management and projection of cash balances eclipse all other guides to fiscal well-being, because without sufficient cash to fund operations and expansion plans, an enterprise cannot survive. Correspondingly, cash is very expensive to keep. Excess cash indicates that a firm's resources are not being used to the best advantage.

This chapter will discuss the three major concerns about cash resources:

- Cash management
- Projection of cash flow
- Profit erosion due to interest rate movements resulting from a firm's capital structure

1.1 Cash Management

The objective of an effective cash management technique is to have the exact amount of money in the checking account the moment funds are to be withdrawn—not before and definitely not after. In today's environment of electronic funds transfers, the timing of receipts and disbursements is even more critical.

As interest rates fluctuate, so does the emphasis on cash management. Rising interest rates will place demands on businesses and require more effective use of cash.

Cash management is also important to firms encountering liquidity problems along with profit compression. With new computer technology, managers are better able to make informed cash decisions to get maximum use from this expensive asset.

1.2 Cash Flow Projections

Mismatched timing of cash inflows and outflows, or the failure to predict cash requirements, can be fatal to any size business. One of the most effective cash management tools developed by modern business is the cash flow projection. Such projections touch on all aspects of the company and include not only current issues, such as the aging of accounts receivable and payable, but also prospective events, such as new product introductions, anticipated market penetration, and movements in interest rates.

New or expanding businesses will find cash flow projections to be of the utmost importance. This is especially true for capital-intensive enterprises that are required to pay for ever-increasing goods and services well before collections may be made. It is management's responsibility to implement procedures to accelerate the collection of funds while making the best use of trade payables.

Cash is projected in many ways using various key management indicators (such as financial ratios) and techniques (including automated simulation analysis). Emphasis on different aspects of a firm's cash projection will change as the company evolves through its life cycle.

The objective of a cash flow projection is to provide

- An accurate prediction of cash sources and uses.
- Useful feedback on how cash management decisions are working to achieve management's objectives.
- Timely information that helps management anticipate and head off cash problems as well as assist in making decisions affecting profit margins, production levels, and sales activity.

2. DEFINITION AND OBJECTIVES

Cash management is the art of maximizing a business's cash resources by

- Hastening cash inflow.
- Delaying cash outflow.

Cash inflow can be accelerated so that the time lag between revenue generation and the arrival of usable funds in the firm's checking account is reduced to an absolute minimum. Likewise, the time between the purchase of goods and services required for operations and the time that the firm's payment check clears the bank can be maximized.

Accelerating cash inflows should not damage customer relationships or render the firm noncompetitive in the marketplace. Slowing the cash outflow should not impugn the firm's credit reputation or give rise to negative rumors about the firm's financial viability.

Effective cash management is an art rather than an exact science. Its success often depends on management's ability to negotiate effectively with creditors, bankers, and the firm's customers.

2.1 Benefits of Cash Management

Modern cash management techniques will benefit businesses in many ways. Generally, such benefits are more efficient use of corporate resources, lower interest costs, and tighter management control. Specifically, effective cash management will allow for the following:

- *Management foresight.* Because an effective cash control program identifies the timing of cash inflows and outflows, management is afforded a look into the business's future cash position. Having reliable cash flow information available, managers can expect few surprises resulting from emergency cash requirements or underemployed cash receipts. Managers can also measure business development against projected goals and receive signals about necessary policy and procedure changes.
- *Financing alternatives.* Because the cash control system identifies future cash requirements on a routine basis, financing needs are known well in advance, and management has time to effectively negotiate the most advantageous credit facilities available. Also, since both the amount and the timing of cash needs are known, funding draws can be negotiated to occur when needed, not before.
- *Untapped resources.* Aggressive managers are constantly looking for ways to reduce working capital requirements. When cash is made available, it can be used to reduce borrowings, to reinvest in the business, or to fund an outside investment.
- *Reduced interest expense.* Like any other asset, cash has a holding cost. Usually this cost is the business's aggregate borrowing rate. Firms that maximize cash utility rigorously control unnecessary borrowing. Working capital reductions are often achieved by such measures as accelerating collection of accounts receivable.

2.2 Overview of Cash Management Techniques

Cash management techniques generally emphasize efficient use of the firm's cash resources. Cash is allocated to areas that require it and removed from areas that can get along without it. The inflow of cash is accelerated using a variety of techniques both inside and outside the firm—generally with its customers and banking relations.

Working capital reduction and cash inflow acceleration techniques implemented inside the firm focus on areas that tend to accumulate working capital:

- *Billing*. Slow billing increases working capital requirements.
- *Collections*. Slow collections increase receivables and working capital requirements.
- *Receivables*. Rising receivables increase working capital requirements.

2.3 Overview of Analytical Techniques

The analytical techniques used to control cash range from very simple accounts receivable aging analyses to more complex automated financing simulation models.

Simple financial ratios can quickly tell management where too much cash is needlessly accumulating or where the firm is bleeding cash. Such ratios are generally in the areas of liquidity, activity, and profitability.

Computers play a key role in more sophisticated cash management techniques. Automated systems are used to obtain available cash balances from the company's bank accounts. Such treasury systems provide the ability to quickly transfer funds from numerous ancillary accounts to a single cash-concentration account and then invest the funds not required that day.

With microcomputer systems and user-friendly modeling software, prospective cash positions can be simulated to quickly identify cash excesses and shortfalls for even the smallest of businesses.

2.4 Overview of Cash Management Decisions

Decisions regarding the company's cash management can be among the most important determinations made. For this reason, senior management is almost always closely involved. Areas of cash management decisions include

- Customer credit policies.
- Billing and collection policies.
- Banking relationships.
- Financing and capital structure.
- Long-term corporate strategies.

3. ACCELERATING CASH INFLOWS

Modern cash acceleration techniques employ an overall concept termed *cash concentration*. A *cash concentration system* encompasses all the various

areas of the business that obtain cash and funnel it into a single usable account, called the *cash concentration account*.

Throughout the company, various opportunities exist to increase the velocity at which sales are converted to useful cash in the bank account. The first such opportunity exists in the billing and invoicing departments.

3.1 Billing and Invoicing

The first step in identifying the extent of opportunity in the billing area is to assess the length of time it takes from sale to issuance of a bill to the customer or client. For example, if a business waits until the beginning of the new month to render invoices for goods sold or services performed in the prior month, there is a time lag of between one and thirty days between sales and invoice dates. This increases working capital requirements and gives customers additional time to pay.

A useful method of computing the time lag between sale and invoice is to take a representative sample of sales occurring for each day in a given month. This is compared with the day an invoice for each sale was mailed. A simple analysis of just such a time lag appears as follows:

ABC CORPORATION
Analysis of Sales and Billing Time Lag
Month of July 199X

<i>Customer</i>	<i>Sale Amount</i>	<i>Sale Date</i>	<i>Billing Date</i>	<i># of Days</i>	<i>Weighted Av. # of Days</i>
1	\$ 10,000	7-1-9X	8-5-9X	35	.63
2	100,000	7-2-9X	8-5-9X	34	6.07
3	50,000	7-4-9X	8-5-9X	32	2.86
4	75,000	7-7-9X	8-5-9X	29	3.88
5	90,000	7-15-9X	8-5-9X	21	3.38
6	30,000	7-17-9X	8-5-9X	19	1.02
7	10,000	7-20-9X	8-5-9X	16	0.29
8	110,000	7-25-9X	8-5-9X	11	2.16
9	25,000	7-26-9X	8-5-9X	10	0.45
10	60,000	7-31-9X	8-5-9X	5	0.54
	<u>\$560,000</u>				<u>21.28</u>

The weighted average billing time lag for the ABC Corporation is about 21 days. This means that its receivables have aged 21 days before the customers are even billed. This translates into an interest cost of approximately \$3,300 $[(\$560,000 \times 10\% \text{ interest rate}) / 360 \text{ days}] \times 21 \text{ days} = \$3,267$.

The obvious solution would be to decrease the time lag as much as possible. Invoices should be rendered, if not on the day a sale is made, then on a semi-monthly or even a weekly cycle. Although the interest saving, \$3,300 in this example, is not a fortune, attention to such details becomes worthwhile if enough such holes in the cash management system can be filled. For particularly large sales, it often makes economic sense to send an invoice via overnight messenger or wire.

Cash management quickly gets executive attention when the numbers a firm is dealing with are large. Interest savings in the above example would be \$33,000 if the sales were \$5.6 million instead of \$560,000.

3.2 Credit and Collections

The collections area can be an accumulator of working capital if it is allowed to get out of control. In the receivables and collections area, speed is management's major goal. There is a much higher probability of successfully collecting a receivable 30 days old amounting to only \$10,000 than there is for one 180 days old that has been allowed to grow to \$60,000.

Terms are frequently a part of the sales agreement on large transactions. Often businesses unwittingly give away part of their profit margin by not negotiating the form of payment (check, wire transfer of funds, bank check, or cashier's check), the time of payment, or the interest assessment on late payments. Such details are significant negotiating points with a firm's customers.

An effective collections system actually begins with management's credit policy decisions regarding the type of customers on which the firm is willing to bear credit risk. Overly stringent credit policies may discourage customers who might then turn to competitors. Liberal policies, on the other hand, may cause a rise in bad-debt expense, an increase in collection costs, and a greater concentration of working capital in accounts receivable.

Proper balancing of credit policies should consider collection costs and whether increased interest expense will be reflected in product-pricing decisions. Many firms, large and small, employ automated simulation models to assist in projecting profit margins resulting from these and other factors that are influenced by various credit policies.

Collection techniques used by many small businesses include the following:

- *Dunning letters and phone calls.* These serve to remind the delinquent customer that the firm is serious in its collection efforts and will pursue all remedies available to successfully collect its receivables.

- *Credit manager.* Many firms employ a credit manager whose responsibility includes establishing credit policies, approving credit terms to customers, and overseeing collection efforts.
- *Law firms.* A letter from the creditor's law firm explaining the consequences of not paying a bill is often enough to collect a receivable. This, however, is expensive and tends to offend valued customers. Legal remedies should be used as a last resort.
- *Credit insurance.* There are insurance firms that will insure a specified percentage of accounts receivable.
- *Factoring.* Businesses that cannot afford the working capital required to carry receivables can factor (or sell) their receivables at a discount to a factoring firm. This technique is expensive, however, since it amounts to a discount on sales.

3.2.1 Electronic funds transfer

To achieve virtually immediate collection on accounts, more businesses are implementing electronic funds transfers (EFTs). Funds are required to be electronically transferred on receipt of the product. This virtually eliminates the time from sale to collection.

3.2.2 Analytical techniques

Because many businesses may find it impractical to implement EFT and other such techniques, it will be extremely important to monitor their accounts receivable balances. The area of receivables and collections has a variety of analytical tools for management to survey performance, including the following:

- *Aging analyses.* Aging reports usually include a complete listing of accounts receivable by customer, showing balances that are current or thirty, sixty, or ninety days and older. The aging report totals should tie to the total accounts receivable balance (see section 6.2 herein).

The aging report is used to identify those customers that are delinquent in their payment habits. Such information can be used to allocate collections resources more effectively. Most automated accounting systems allow for a variety of sort routines in the receivables aging module. One such sort routine that is particularly effective is the sort by geographic region and by salesperson. Using such information, management can quickly see trends developing in geographic areas or the payment habits of customers sought by particular salespeople. Using such data, the firm may wish to reallocate its sales and marketing resources to other regions or adjust its

commission payment policy to one that pays only on the *collected* sale. Some companies adopt a policy of requiring a customer to advance funds that are held on deposit and drawn against as sales are made. Future sales may be suspended until the customer replenishes the account.

- *Roll rate analysis.* Roll rates are simply another aging technique. The rate at which receivables are “rolling” from one aging bucket to another is analyzed. Information resulting from roll rate analyses indicates what percentage of receivables roll from the current to the thirty-day, sixty-day, and ninety-day aging buckets. Such information is useful to determine the effectiveness of a business’s collection effort. For example, say that a firm has an average of 10 percent of all sales rolling to the ninety-day bucket before collection. The most current roll rate analysis indicates, however, two things:

Over the past two months, the percentage of sales rolling to the ninety-day bucket before collection has steadily escalated from a 10 percent rate to 15 percent.

The roll rate from the thirty-day bucket to the sixty-day bucket has jumped from its normal 5 percent to 15 percent.

From this information, management knows that a collection problem exists; it can project the increased interest cost and bad debt expense due to the problem, and it can identify which aging bucket is responsible. Armed with such information, corrective steps can be taken in time to control the damage.

- *Average collection period.* Average collection periods represent the amount of time sales are tied up in receivables. It is determined by dividing sales by 360 (days). This result is then divided into accounts receivable. The higher the period, the more attention should be provided to collections.
- *Receivables to sales ratios.* This ratio is determined by dividing total sales by accounts receivable. A high turnover indicates a quick collection period and liquid receivables.
- *Order-entry controls.* Most modern automated order-entry systems connect with the accounts receivable system. Such connection is useful to the order taker in providing on-line real-time information regarding

Current receivable balance information.

Credit limits placed on particular customers.

Payment history of particular customers.

With these data, the order taker may implement management's credit policies immediately at the point of order for particular customers.

3.3 Inventory Control

Inventory is another accumulator of working capital. Most nonservice businesses have a substantial amount of working capital tied up in inventory. Since inventory levels must be kept at a minimum and are influenced to a large extent by market demand and availability, inventory is one of the most difficult components of the working capital equation to balance. Management's objective related to inventory and cash management is to have an appropriate amount of the *right inventory* on hand. Roughly translated, the right inventory means those products that can be quickly sold and converted to usable cash.

3.3.1 Inventory control techniques

The subject of inventory control is a topic separate from cash management. However, as related to cash, there are several simple techniques that management can employ to ensure that

- Inventory levels are not inappropriately high, thus causing an unacceptable amount of cash to accumulate.
- Inventory turnover is sufficient, demonstrating that management is purchasing salable products that can be converted to cash.

Techniques that cash managers employ to quickly determine whether the working capital required by the inventory operation is an efficient use of cash include the following:

- *Inventory turnover.* The frequency with which inventory turns over indicates to the manager whether cash is tied up in inventory that cannot be readily sold. A low turnover rate indicates that cash is trapped in low-demand inventory. Inventory turnover is computed as follows:

$$\text{Inventory turnover} = \frac{\text{cost of goods sold}}{\text{average inventory}}$$

As with any ratio analysis, careful attention must be given to the particular type of business being analyzed. If a firm's inventory turnover is highly seasonal, the ratio could be misinterpreted unless some adjustment is made for peak demands.

- *Days of inventory on hand.* If a firm has an inappropriately high number of days of an inventory item on hand, yet is still ordering more, management may want to know the reason. An easy way to determine the number of days of inventory on hand is the following:

$$\text{Days of inventory on hand} = \frac{\text{total inventory}}{\text{daily demand}}$$

- *Inventory concentration reports.* The amount of cash invested in inventory segregated by frequency of sale illustrates to the cash manager how effectively working capital invested in inventory is employed. Inventory concentration reports include the following information:

Inventory item by number and description.

Number of items on hand.

Unit cost and extended cost.

Report segregated by the top ten best sellers and the bottom ten worst sellers.

- *Overstock reports.* Cash is not effectively employed when the firm is carrying overstocked inventory. Many modern automated inventory-control systems allow for a maximum stock level to be entered for each inventory item. The overstock report indicates those items for which the quantity on hand exceeds the maximum stock level determined by management.

- *Economic order quantity (EOQ).* The optimum size of an inventory order defines the EOQ. The EOQ is useful in determining management's control over its inventory purchasing procedures. EOQ is computed as follows:

$$\text{EOQ} = \text{square root of } [(2ap) \div s]$$

where:

a is the annual quantity of the item used in units.

p is the purchase order cost.

s is the annual cost of carrying a unit in stock for one year.

The carrying cost of inventory includes such costs as allocated warehouse expenses and interest costs.

- *Safety stock.* The cash manager is concerned that inventory levels do not exceed requirements plus a *safety stock*. Computation of safety stock considers such variables as the probability and cost of being short an inventory item, the orders placed per year (from the EOQ), and the cost-to-carry inventory. The lowest carrying cost of inventory at varying safety stock levels is computed as follows:

Probability of stock-out at a given level of safety stock \times Stock-out cost \times Number of orders per year (Demand/EOQ) =
Expected stock-out cost

Expected stock-out + Carrying cost of safety stock =
Total inventory cost

An example of safety stock computation is as follows:

Units of Safety Stock	Probability of Stock-Out	Cost of Stock-Out	No. of Orders Per Year	Expected Stock-Out Cost (A)	Safety Stock Carrying Cost (B)	Total Cost (C)
20	60%	\$200	10	\$1,200	\$200	\$1,400
30	40%	\$200	10	\$ 800	\$300	\$1,100
40	30%	\$200	10	\$ 600	\$400	\$1,000
50	28%	\$200	10	\$ 560	\$500	\$1,060

(A) Stock-out cost is computed as the probability of stock-out \times stock-out cost \times number of orders per year (EOQ).

(B) Carrying cost is computed as the carrying cost of one unit per year (assumed to be \$10) \times safety stock.

(C) Total cost is computed as expected stock-out cost + carrying cost of safety stock.

The objective is to compute the level of safety stock that has the lowest inventory carrying cost. In this example, the optimum safety stock is forty units. To the cash manager, such control of inventory helps to ensure that purchases are well managed and that excessive inventory is not accumulated in the name of safety stock (masking poor inventory control procedures). These two objectives help ensure that working capital is not being unnecessarily stockpiled.

3.4 Wire Transfers

A wire transfer is the electronic conveyance of funds from one bank account to another. Wire transfers are moved through the Federal Reserve system using its Fedwire mechanism. Funds received via wire transfer are termed to be *good funds* (that is, the funds may be used immediately and require no further clearing procedures). Because of the speed with which wire transfers move throughout the banking system and the fact that they convey usable funds, receipt of a payment via wire is desirable from a cash management standpoint.

Wire transfer payments received by a business reduce the following time lags that affect cash management.

— *Mail float.* This is the float that the payor enjoys from the time a payment check is written and mailed to the time it arrives at the

payee's business. Mail float may be anywhere from a single day to a week or more. The mail is also a convenient scapegoat to account for late payments.

- *Internal float.* Once the payment check arrives at the payee's office, it must go through the mail room, be distributed to the proper individual, recorded, listed for deposit, and finally taken to the bank for deposit. Depending on how fast this process is, the internal time lag may be anywhere from a matter of hours to several days. One method to reduce this internal float is to use a special colored return address envelope sent with the invoice and addressed to the particular individual who deposits cash. Internal float may be eliminated entirely by having the checks sent to a bank lockbox. The bank is made responsible for opening the mail and depositing the checks into the company's bank account.
- *Bank float.* This is the float that the payor enjoys from the time the payment check is deposited in the payee's bank to the time it clears and the funds become usable. Depending on whether the payor's bank is a member of the Federal Reserve system, bank float can be anywhere from a single day to more than a week for remotely located institutions.

Since the wire transfer goes directly into the payee's bank account in the form of usable funds, all of the above floats are circumvented. However, as advantageous as the wire transfer is for the payee, it is an equal disadvantage to the payor. For this reason, the form of payment must be negotiated as part of the terms of purchase. Often such negotiations may be worked so that both parties win. In return for the accelerated cash flow, a certain type of payment provides the payee a price discount or some other concession that may be extended to the payor.

3.5 Lockboxes

Another common method of accelerating cash inflow is the lockbox. The lockbox is simply a central collection location that receives payment checks. Generally, the most efficient collection location is the bank in which a business's central checking account is situated. For businesses with a widely distributed customer base, a network of lockboxes is often implemented to cut down on mail float. Funds from each lockbox in the network then flow daily to the firm's central bank.

Based on the level of checks coming into the firm's lockbox, and the average float on payments clearing the bank, a negotiated percentage of usable (termed *available*) funds from each day's deposits will be determined. This percentage, when multiplied by the deposits received,

provides the cash manager with the amount of funds available for use. With this information, the cash manager can more precisely evaluate the firm's daily borrowing requirements or funds available for investment.

3.6 Depository Transfer Checks

Depository transfer checks (DTCs) are generally used in conjunction with a network of lockboxes. The DTC is a particular type of check that the network lockbox bank draws to transfer funds collected from its lockbox to the client's central bank.

Banks charge for both lockbox and DTC services. This cost can be at least partially offset by the float credit a bank customer receives by allowing the network bank to draft a DTC (and thereby itself enjoy the bank system float) rather than wire the funds, thus eliminating any float.

3.7 PACs, PADs, and ACHs

These three tools allow the cash manager to further refine the speed at which cash flows into the firm.

- *Preauthorized Checks (PACs)*. The PAC is simply a preauthorized check. The preauthorized check allows a vendor that regularly provides goods or services to write itself a payment check on the customer's checking account. The time lag between the time of invoice receipt and payment is eliminated. PACs are limited to a maximum amount and require specific backup documentation to be forwarded to the customer.

Another form of preauthorized check is a preauthorized debit. This is frequently used by such businesses as insurance companies to withdraw the premium automatically from a customer's checking account.

- *Preauthorized Electronic Deposit (PADs)*. The PAD is similar to a PAC except that instead of a check, it employs a wire transfer, further reducing bank float. For this reason, the PAD is used mostly for larger payments whose purchase terms provide for such a device.
- *Automated Clearing House (ACH)*. The ACH clears PADs. The national automated clearing house is actually a collection of thirty-two regional ACHs located throughout the United States. Each ACH member bank submits its PADs daily for electronic debit or credit to its account. The ACH then routes these debits and credits

throughout its system to the proper member bank. It is even becoming possible to access the ACH system directly from your business in connection with your local bank.

An additional service provided by the ACH is called *electronic trade payments*. This was developed for use along with PADs and the ACH to provide nonbanking-payment-related information, such as invoice and purchase order numbers necessary for proper identification of electronic payments.

4. DECELERATING CASH OUTFLOWS

The cash manager is responsible for preserving cash once it has been captured by the firm. To do this, cash outflow is slowed as much as possible by leveraging accounts payable. Trade accounts often do not carry an interest charge if paid within a certain time period. This does not imply that a firm should stop paying its bills or pass up early payment discounts. However, there is a difference between paying bills when customarily due and not taking advantage of the working capital costs the vendor has likely included in the product price anyway. The firm does not want to slow cash outflow to the point where its ability to obtain credit is reduced, unfounded rumors regarding financial stability begin to circulate, or suppliers refuse to deal with it.

There are two major areas where most businesses have an opportunity to improve cash utility by decreasing the rate at which funds flow out of the firm. These two areas revolve around the firm's payment function and include controlling payments and managing accounts payable.

4.1 Payment Control Techniques

Controlling the speed with which a business pays its liabilities can have a dramatic impact on cash requirements and allow the cash manager to preserve this expensive asset. The faster bills are paid, the greater is the requirement for working capital and the greater will be the demand on the line of credit. One easy analytical method to determine the speed with which a business pays its bills is the *average age of payables analysis*.

4.1.1 Average age of payables

Computing the average age of payables tells the cash manager how long an invoice is retained before it is paid, thus indicating whether

an opportunity exists to stretch the average payment times to more appropriately conform to customary industry standards without negatively reflecting on the firm's reputation or vendor relationships. For example, if a firm's average payable is aged only fifteen days before payment, whereas the industry standard is forty-five days, an opportunity exists to retain cash equivalent to thirty days of the payables requirements. If a business is paying \$1 million per month, stretching the payables by thirty days will reduce the borrowing requirement by \$1 million (at a borrowing rate of 10 percent, this translates to an annual interest savings of \$100,000).

ABC CORPORATION
Analysis of Payables Aging
Month of July 199X

<i>Vendor</i>	<i>Invoice Amt.</i>	<i>Inv. Date</i>	<i>Pymt. Date</i>	<i>Weighted Av. # of Days</i>
1	\$ 50,000	7-1-9X	7-15-9X	.40
2	75,000	7-2-9X	7-15-9X	.56
3	25,000	7-5-9X	7-15-9X	.14
4	10,000	7-7-9X	7-15-9X	.05
5	150,000	7-8-9X	7-22-9X	1.21
6	5,000	7-8-9X	7-22-9X	.04
7	90,000	7-12-9X	7-22-9X	.52
8	1,000,000	7-15-9X	7-29-9X	8.07
9	250,000	7-21-9X	7-29-9X	1.15
10	80,000	7-29-9X	7-29-9X	0.00
	<u>\$1,735,000</u>			<u>12.14</u>

The weighted average number of days is found by multiplying the percentage of total July invoices that each invoice represents by the number of days between an invoice and its payment date, then adding the weighted days. Thus, the weighted average number of days is a little over twelve days. For most businesses, such a payment policy, while promoting a certain amount of goodwill among its vendors, exceeds what is customary. Were ABC to stretch its payable policy to thirty-five days before payment, the annual interest savings would be approximately \$129,000, computed as follows:

Average monthly payables:	\$1,735,000
Number of days payables are stretched:	23
Daily payables cash requirement: $\$1,735,000 \div 31 =$	\$ 55,968
Cash retained by stretching payables 23 days:	
$\$55,968 \times 23 \text{ days} =$	\$1,287,264
Interest savings:	
Cash retained of $\$1,287,264 \times 10\% \text{ interest} =$	<u>128,726</u>

Many businesses set up payment dates that are on a regular basis, such as every week, regardless of when the invoice hits the accounts payable system. Such rote management of payables is not unusual, but it can be costly. Most modern accounts payable systems allow management to request a listing of invoices that are a designated number of days old for payment. Using this technique, obtaining control of accounts payable payment terms is relatively easy.

Also see section 6.4 herein for a sample accounts payable aging report.

4.2 Management of Accounts Payable

In addition to managing the timing of accounts payable payments, overall management of a firm's payables is a good way to slow the speed with which cash flows out of the firm. This should begin with negotiating the terms of large purchases. Points eligible for negotiation to better manage accounts payable include

- Type of payment, such as wire transfer, check, DTC, and so forth.
- Date of payment.
- Progress or partial payments.
- Discounts if paid prior to due date.

Each of the above payment terms, if ignored during negotiations, will increase the overall cost of purchase. If aggressively pursued by the negotiating team, the overall purchase cost will decline.

4.2.1 Purchase discounts

Purchase discounts are a reward to the payee for promptly paying invoices. In essence, the vendor is compensating customers for the interest costs they incur by paying bills early.

Generally, if cash is available, it is good policy to take advantage of discounts whenever they are offered.

When formulating discount payment policy, one criterion that should be considered is the discount offered cut-off point. This means the point where the cost to pay early (in terms of interest expense) equals the benefit derived by early payment.

Computation of the business's point of indifference with respect to purchase discounts is as follows:

$[\text{Discount percent} + (\text{due date} - \text{discount date})] \times 360 \text{ days} = \text{Annualized interest income from taking advantage of the discount.}$

For payment terms of 1% / 10 days, net / 30, the interest rate is computed as follows:

$$[.01 + (30 - 10)] \times 360 = 18\%$$

This is compared against the firm's aggregate borrowing costs. If the interest rate as computed above is greater than the borrowing rate (and the cash is available), taking advantage of the purchase discount is advised. In terms of dollars and cents, this is computed as follows:

Invoice amount:	\$10,000
Terms:	1% / 10, Net / 30
Aggregate borrowing rate:	10%
Interest earned by taking discount: $\$10,000 \times .01 =$	\$ 100
Interest cost by taking discount: $[(\$10,000 \times 10\%) + 360] \times (30 \text{ days} - 10 \text{ days}) =$	<u>\$ 57</u>
Net interest profit by taking discount:	<u><u>\$ 43</u></u>

5. USE OF BANKS

The banking system itself can assist the cash manager in achieving both goals of accelerating cash inflow and slowing cash outflow without undue cost or management effort. This section will discuss some of the common uses of bank float, remote disbursement techniques, sweep accounts, and banking relationships.

5.1 Float

Float is the time it takes funds to move through the banking system. When a business is collecting funds, the objective is to minimize bank float. When disbursing funds, management wants to stretch the time between check disbursement and check clearing.

A cash manager's objective is to take advantage of the benefits inherent in the banking system without abusing it.

To minimize the time required to clear receipts through the banking system, a cash manager employs some or all of the following float techniques:

- Lockbox system, which minimizes the time it takes to move funds from the point of receipt to the firm's central bank depository
- Depository transfer checks
- Wire transfer of large receipts to the cash concentration account

To maximize the time required to clear payment checks through the banking system, the following float techniques are employed:

- Remote disbursement banks (see section 5.2, below)
- Use of disbursement banks that are not members of the Federal Reserve system (see section 5.2, below)
- Payment via check whenever possible rather than wire transfer funds

5.2 Choice of Banks

The choice of banking institutions can make a difference in how long it takes to have a firm's payment checks clear through the banking system. For example, if a firm pays vendors primarily concentrated on both the west coast and east coast, the west coast vendors should receive a check drawn on an east coast bank and vice versa. Using remote disbursement banks increases the mail float in the payables system.

An extension of the remote disbursement concept is to choose a bank that is not only geographically separated from the payee, but is also as far off the beaten path as possible. Certain small towns in Texas and South Carolina have served many treasurers as remote disbursement centers. If the chosen bank is not a member of the Federal Reserve system, so much the better since this will further increase the time required for check clearing.

5.3 Sweep Accounts

Sweep accounts are very popular with those businesses that cannot earn interest on checking accounts. A sweep account allows the cash manager to keep only the amount of money required for check clearing that day in the non-interest-bearing demand deposit account (DDA). All other balances are "swept" into an interest-bearing account. Such accounts relieve the manager of the need for precise calculation of how much money will be required to fund daily check clearings plus a small cushion. This technique may also be used in connection with firms that have branch locations. Funds may be swept from the branch bank account to the home office bank account (see section 5.4, below).

A close cousin of a sweep account is the zero-balance checking account. Such an account maintains a zero balance, drawing just the amount of funds required for checks clearing into it from an interest-bearing account.

Sweep account drawbacks are high cost per transaction and a lower yield on the interest-bearing account than could be obtained on excess

funds placed independently. Still, the sweep account provides an alternative to leaving idle funds in a non-interest-bearing checking account over the amount required for compensating balance purposes.

5.4 Cash Concentration Systems

A cash concentration system automatically channels funds from every source of the business into a single usable account. Such a system allows the cash manager to quickly identify available funds each day, move them to accounts that will have funding requirements that day, and invest the remainder in overnight repurchase agreements, short-term commercial paper, or other interest-bearing instruments until needed.

The mechanism of the cash concentration system was discussed under depository transfer checks (DTCs), the preauthorized electronic deposits, and the sweep account. The objective of the concentration system is to automatically transfer daily all funds from outlying checking accounts into the single concentration account.

A reliable cash concentration system reduces the cash balances left in accounts or other vehicles that underemploy, or worse, do not employ, funds that would otherwise be available for the cash manager's use. An additional spinoff of the concentration system is that often the utility of ancillary accounts begins to be questioned, and the number of bank accounts can be dramatically reduced. The fewer the accounts, (1) the less likely available funds will remain idle, (2) the less effort is exerted in monthly account reconciliation, (3) the more remote the possibility of unauthorized check writing on a seldom used account, and (4) the lower overall bank charges.

A final note on the concentration system is that it should work every day the bank or the post office is open. Many post offices provide mail service on Saturdays. Even if the bank is not open for check processing on Saturdays, the firm's staff should collect and process checks received and prepare them for deposit on the next business day. If Saturday check receipts are high enough, the interest savings will justify the additional staff cost.

5.5 Funds Availability

Availability of funds refers to the amount of funds in an account that have cleared through the banking system. Funds are said to be available when they are collected by the cash manager's bank (in which the checks were deposited) from the payor's bank. Funds availability can be negotiated.

Most businesses receive monthly checks from the same or similar customers. Using a historical period, the cash manager and banker can compute how long it takes the average check to clear through the banking system. From this analysis, the banking agreement can provide for availability of a specified percentage of daily deposits the same day, the next day, in two days, and so forth.

A business might improve availability of funds from three days on 100 percent of deposited funds to the following tiered system:

- Same day availability: 20% of deposited funds
- Next day availability: 75% of deposited funds
- Two-day availability: 5% of deposited funds

The following cash is thus freed from the banking system:

Daily cash deposits:	\$1,000,000
Under the old system of availability, interest cost on idle funds was	
$[(\$1,000,000 \times 10\%) + 360] \times 3 \text{ days} =$	<u><u>\$ 833</u></u>
Under the new system, interest cost on idle funds was	
$[(\$1,000,000 \times 75\% \times 10\%) + 360] \times 1 \text{ day} =$	\$ 208
Plus $[(\$1,000,000 \times 5\% \times 10\%) + 360] \times 2 \text{ days} =$	28
Total interest cost on idle funds per deposit =	<u><u>\$ 236</u></u>

By negotiating funds availability with the bank, the above example saved \$597 ($\$833 - \236) in foregone interest income on idle funds for each deposit. Assuming that deposits are made five days per week, fifty-two weeks per year, this amounts to \$155,220 per year.

Funds availability is a point many bankers are willing to negotiate, particularly if it means the difference in obtaining a new blue chip customer or keeping a valued customer. It is the cash manager's responsibility to specify the funds availability that meets his or her cash management requirements.

5.6 Account Analysis

Banks often send out account analysis statements to their corporate customers. Such statements indicate a variety of things related to average collected balances, year-to-date balances, loan covenants as related to compensating balance, and bank service credit for outstanding balances.

Cash managers should monitor closely the account analysis statement to determine just how much the firm is paying for banking services. The objective is to honor the terms of the banking agreement, but not to overcompensate the bank.

Many businesses have an opportunity to free cash from compensating balances that are overfunded. The account analysis statement shows the average and year-to-date balance in the compensating balance account(s). The cash manager should first compare these numbers with his or her own year-to-date balances in these accounts to be sure the bank did not make a computational error. Secondly, the agreement that produced the compensating balance (usually a loan agreement) should be reviewed to determine if the bank is appropriately compensated. If the bank has been overcompensated, steps should be taken to correct this problem.

5.7 Banking Relationships

The banking relationship can be among the most valuable associations maintained by a business. The banker should be treated as a valued investor. The cash manager/treasurer is responsible for maintaining the banking relationship. To help to maintain that relationship:

- Send the banker quarterly and annual financial statements without being asked. Usually, such statements are part of any loan covenant.
- Keep the bank informed of all major developments in the business.
- The board of directors or owners should meet with the banker several times each year to maintain a close personal relationship.

Finally, even though the relationship with a firm's present banking institution may be excellent, management should continue to cultivate associations with other banking executives. Some firms go so far as to draft stand-by lending agreements with other banking institutions. These agreements are specifically designed to provide credit facilities in the event the business turns downward and normal credit facilities are withdrawn by the present bank.

5.8 Investment of Excess Cash

Investment of excess cash involves the three watchwords of cash management: safety, liquidity, and yield. Above all, whatever the instrument of excess cash investment, it must provide a risk factor acceptable to the business. Second, the investment must be available for conversion back into cash at the required time. Last, the investment must yield an acceptable return. These three concepts tie in with the saying that "There is a rate for every risk." In other words, the higher the interest rate given, the higher will be the risk factor.

The most commonly used short-term investment instruments for excess cash include:

- *Repurchase agreement (repo)*. A repo is a contract with a bank or brokerage firm whereby the investor loans excess cash, taking acceptable collateral as security (usually a government security). The bank or brokerage firm is contractually obligated to repurchase the loan at a specified time. The terms of repos range anywhere from overnight (the most common) to thirty days or more.
- *Commercial paper*. Most firms offering short-term commercial paper are rated by Moody's and/or Standard & Poor's, thus providing an index of risk.
- *Money market funds*. Some firms use their money market funds as a short-term method of employing excess cash.

See also the chapter on Investment Vehicles for a discussion of other investment instruments.

5.9 Lines of Credit

Lines of credit (LOCs) are now almost a necessity for doing business. LOCs range anywhere from tens of thousands to hundreds of millions of dollars. Terms of LOCs are negotiable with the banker. Most terms include:

- A maximum draw of the LOC, in effect, the credit limit.
- An interest rate charged, usually a fixed amount above an interest rate index, such as the prime interest rate.
- A commitment fee, which is a charge for the unused portion of the LOC, usually a percentage (one-quarter or one-eighth of a point) of the undrawn line.
- A clean-up clause. Many banks require the entire line to be repaid for a specified period of time during a twelve-month period.
- Loan covenants. Some LOCs specify that certain financial milestones be met (often stated as sales or financial ratios). Failure to meet such covenants places the firm in default.

6. CASH MANAGEMENT REPORTS

Four cash management reports are indispensable to most managers. These reports are

- Available cash report.
- Aged accounts receivable.

- Cash requirements report.
- Accounts payable aging.

Examples of each of these reports are shown on the following pages.

6.1 Available Cash Reports

From the available cash report, managers have knowledge of cash that may be available in the next few days. This report could be projected for a longer period or periods such as weekly or monthly.

ABC CORPORATION					
Analysis of Available Cash					
As of July 25, 199X					
	<i>Day 1</i>	<i>Day 2</i>	<i>Day 3</i>	<i>Day 4</i>	<i>Day 5</i>
Beginning cash balance	<u>\$500,000</u>	<u>\$677,500</u>	<u>\$930,000</u>	<u>\$1,066,250</u>	<u>\$1,306,250</u>
Anticipated cash receipts	<u>250,000</u>	<u>300,000</u>	<u>200,000</u>	<u>400,000</u>	<u>100,000</u>
% Available from day 1 (75%)	187,500	225,000	150,000	300,000	75,000
% Available from day 2 (20%)	0	50,000	60,000	40,000	80,000
% Available from day 3 (5%)	<u>0</u>	<u>0</u>	<u>12,500</u>	<u>15,000</u>	<u>10,000</u>
Total available receipts	<u>\$187,500</u>	<u>\$275,000</u>	<u>\$222,500</u>	<u>\$355,000</u>	<u>\$165,000</u>
Scheduled disbursements	<u>(100,000)</u>	<u>(75,000)</u>	<u>(250,000)</u>	<u>(200,000)</u>	<u>(50,000)</u>
% Clearing day 1 (10%)	(10,000)	(7,500)	(25,000)	(20,000)	(5,000)
% Clearing day 2 (15%)	0	(15,000)	(11,250)	(37,500)	(30,000)
% Clearing day 3 (50%)	0	0	(50,000)	(37,500)	(125,000)
% Clearing day 4 (20%)	0	0	0	(20,000)	(15,000)
% Clearing day 5 (5%)	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>(5,000)</u>
Total cleared disbursements	<u>(\$10,000)</u>	<u>(\$22,500)</u>	<u>(\$86,250)</u>	<u>(\$115,000)</u>	<u>(\$180,000)</u>
Ending available cash balance	<u>\$677,500</u>	<u>\$930,000</u>	<u>\$1,066,250</u>	<u>\$1,306,250</u>	<u>\$1,291,250</u>

Note the following:

- All deposits are available for use within three days. The percentages used tie in with the guaranteed funds availability specified in the banking agreement.
- All disbursements are scheduled to clear within five days. The percentages are derived from experience.
- The ending balance of one day becomes the beginning balance for the next day.

6.2 Aged Accounts Receivable

The following is a sample of an aged accounts receivable report as discussed in section 3.2.2 herein.

ABC CORPORATION
Accounts Receivable Aging
July 199X

<i>Cust. No.</i>	<i>Customer Name</i>	<i>Current</i>	<i>30-60 Days</i>	<i>60-90 Days</i>	<i>Over 90 Days</i>	<i>Total</i>
1	333 Bush Street	\$ 0.00	\$ 0.00	\$0.00	\$ 315.00	\$ 315.00
2	Asian American Theatre Co.	236.36	236.25	0.00	708.75	1,181.36
3	AT&T	0.00	3,207.05	0.00	60.00	3,267.05
4	BAR/BRI	0.00	0.00	0.00	250.00	250.00
5	Carnevale	0.00	0.00	0.00	525.00	525.00
6	Chinese Hospital	0.00	0.00	0.00	0.00	0.00
7	City Cycle	0.00	0.00	0.00	150.00	150.00
8	Columbia Pictures	0.00	0.00	0.00	0.00	0.00
9	Disney's World on Ice	0.01-	0.00	0.00	0.00	0.01-
10	Egghead Software	0.00	0.00	0.00	8,896.00	8,896.00
11	El Dorado	1,181.70	1,181.70	0.00	0.00	2,363.40
12	Elite Modeling	340.00	0.00	0.00	149.62	489.62
13	The Equitable	190.00	190.00	0.00	341.50	721.50
14	Fong & Associates	0.00	346.50	0.00	1,323.00	1,669.50
15	Foot Locker	0.00	0.00	0.00	315.00	315.00
16	French Hospital	548.62	548.62	0.00	0.00	1,097.24
17	Futon Shop	0.00	0.00	0.00	0.00	0.00
18	Gaylord India Restaurant	0.00	0.00	0.00	75.00	75.00
19	Harbor View Holiday Inn	0.00	0.00	0.00	1,050.00	1,050.00
20	Harbor View/Tsui Hang Village	0.00	0.00	0.00	1,050.00	1,050.00
Accounts Receivable		\$2,496.67	\$5,710.12	\$0.00	\$15,208.87	\$23,415.66
		10.66%	24.39%	0.00%	64.95%	

6.3 Cash Requirements Report

The cash requirements report illustrates payables that must be paid within the time frames shown in each column to keep from becoming delinquent. This report is used to determine how much cash is required to honor the firm's payables commitment (see page 28).

6.4 Accounts Payable Aging

The accounts payable aging report illustrates how old the firm's payables are for each vendor owed. Note, in the example on page 29, approximately 46 percent of the payables are aged over sixty days. See also section 4.1.1 herein for a discussion of the average age of payables.

7. CASH PLANNING TECHNIQUES

Modern cash managers use projections in much the same way a pilot uses the airplane's compass and map: to determine in which direction they are going and to make mid-course corrections.

Planning and the resultant projections fall into two major categories: strategic plans, which are long range and encompass the whole firm, and tactical plans, which are of shorter range and deal with specific segments of the business. Of the two categories, cash flow is usually included in the tactical plan. Cash flow projections provide a blueprint of how the cash and financing part of the business plan will be executed.

Most cash plans identify certain specific items critical to the treasury function. These include

- Cash inflows and scheduled cash outflows, such as loan repayments and cash dividends to stockholders, bond interest payments, and so forth.
- Financing requirements and excess cash balances that may be used to repay existing financing.
- Projected ending cash balance.
- Compliance with loan covenants and restrictions. Such covenants are often in the form of balance sheet ratios. Therefore, the treasurer must produce not only a cash plan, but balance sheet and income statement projections as well.

**ABC CORPORATION
Cash Requirements Report**

Vendor Number	Vendor Name	Invoice Number	Discount/ Due Date	Current	10 to 20 Days	20 to 30 Days	Over 30 Days	Total
1	Alhambra National Water Co.			\$ 12.80	0.00	0.00	0.00	\$ 12.80
4	Alphabetics			2,926.00	0.00	0.00	0.00	2,926.00
8	Cine Kerska Productions			8.52	0.00	0.00	0.00	8.52
9	Colonsplendor			4,742.00	0.00	0.00	0.00	4,742.00
10	CSC			758.83	0.00	0.00	0.00	758.83
12	Federal Express, Inc.			67.25	39.00	0.00	0.00	106.25
14	Graphic Sportswear			134.19	0.00	0.00	0.00	134.19
15	JLA Credit Corp.			0.00	176.18	0.00	0.00	176.18
18	City of Los Angeles			1,347.96	0.00	0.00	0.00	1,347.96
20	L'Image Photographic Lab, Inc.			464.86	0.00	0.00	0.00	464.86
				<u>\$10,462.41</u>	<u>215.18</u>	<u>0.00</u>	<u>0.00</u>	<u>\$10,677.59</u>
				97.98%	2.02%	0.00%	0.00%	0.00%

ABC CORPORATION
Accounts Payable Aging

Vendor Number	Vendor Name/ Invoice Number	Due Date	Current	0 to 30 Days	30 to 60 Days	Over 60 Days	Total Overdue	Total Payables
1	Alhambra National Water Co.		\$ 0.00	\$ 12.80	\$ 0.00	\$ 0.00	\$ 12.80	\$ 12.80
4	Alphabeticus		0.00	1,426.00	0.00	1,500.00	2,926.00	2,926.00
8	Cine Kerska Productions		0.00	0.00	0.00	8.52	8.52	8.52
9	Colorsplendor		0.00	0.00	3,339.00	1,403.00	4,742.00	4,742.00
10	CSC		0.00	758.83	0.00	0.00	758.83	758.83
12	Federal Express, Inc.		70.25	22.00	0.00	14.00	96.00	106.25
14	Graphic Sportswear		0.00	0.00	0.00	134.19	134.19	134.19
15	JLA Credit Corp.		176.18	0.00	0.00	0.00	0.00	176.18
18	City of Los Angeles		0.00	0.00	0.00	0.00	0.00	0.00
	On hold:		0.00	0.00	0.00	1,347.96	1,347.96	1,347.96
20	L'Image Photographic Lab, Inc.		0.00	0.00	0.00	464.86	464.86	464.86
	Subtotal:		246.43	2,219.63	3,339.00	3,524.57	9,083.20	9,329.63
	Total on hold:		0.00	0.00	0.00	1,347.96	1,347.96	1,347.96
	Report total:		\$246.43	\$2,219.63	\$3,339.00	\$4,872.53	\$10,431.16	\$10,677.59
			2.31%	20.79%	31.27%	45.63%	97.69%	

7.1 Approach to Cash Projections

The approach used to produce an accurate cash projection varies from business to business and according to the audience and uses of the end product.

Cash planning involves most areas of the business. Management's approach to formulating a cash plan should be one that considers all relevant input about the firm. A good example of this would be the start-up costs of implementing a new manufacturing technique. The manager would need to know how much capital investment is required for plant and equipment and when payment must be made. Other costs and benefits such as labor, insurance, repairs, utilities, and sales are also considered. Additionally, the timing of each cost and benefit should be included in the cash plan.

In summary, cash forecasts involve the following steps:

- Project cash receipts (often as a percentage of sales)
- Project cash disbursements
- Compute net cash inflows and outflows
- Compute projected cash balance or shortfall

Formulating a cash plan should include these four goals:

- *Predictive accuracy.* The plan must reliably project ending cash balances, financing requirements, and compliance with loan restrictions. Accuracy is achieved only through the underlying assumptions and mathematical relationships, so the plan's credibility depends largely on the information obtained from within the business.
- *Feedback value.* The cash plan should provide a source of feedback on execution of the original plan, so that adjustments can be made if actual performance goes astray. Thus, elements of actual performance and planned performance should be comparable, and deviations should be readily apparent.
- *Relevance.* The cash plan must be kept current and should reflect developments occurring throughout the enterprise. Not only relevance but credibility is impugned if an underlying assumption that affects cash is changed without recognition in the most current plan.
- *Timeliness.* To provide predictive value and relevance, the cash flow projection must provide timely information for decision making.

7.2 Presentation Format

Formatting the presentation of a cash flow plan is the first step in its creation. The manager should have a detailed idea of what schedules are to be included in the plan and how best to present the key performance and decision indicators. The format should also consider ease of entry for actual performance data to be compared with the plan. Finally, the plan should be formatted in such a way as to allow for quick updating of the plan and assumption changes for asking “what if” questions.

7.2.1 Planning without a computer

Most of the planning exercise is the same regardless of whether an automated planning system is used. Data are obtained in the same manner; assumptions are used in the same ways. The only difference is in the computational labor involved. Planning without the aid of a computer requires the computation of many resulting impacts to the business that are caused by assumption changes. For example, sales are usually a key assumption. However, as sales change, so will accounts receivable, accounts payable, advertising expenses, sales commissions, and inventory costs, to list only a few. Each of these changes would be manually computed.

The turnaround time involved in making assumption changes or creating several scenarios in the plan will be longer when planning without a computer.

7.2.2 Planning with a computer

Generally, cash projections use automated models that can be readily changed as circumstances dictate. This is true for even the smallest of businesses using only a microcomputer and spreadsheet software. Use of automated cash models allows the simulation and assessment of new ideas without the time and effort required to manually calculate the results.

Today, many spreadsheet programs are available at a reasonable cost and can be very easy for anyone to operate or adapt to. In addition, more sophisticated modeling software is available for large applications.

If the decision is made to use “user friendly” software, which can be programmed by the financial management staff and run on a microcomputer, there are a variety of programs available, many of which accept data “downloaded” (electronically transmitted) from the firm’s host computer to the microcomputer.

7.3 Detail Required and Model Accuracy

The level of detail included in the cash plan should be the minimum required to fulfill all design requirements of the system. By making the cash planning system as simple as possible, less can go wrong with it, it is easier to understand, the cost of development and operation is lower, and it generally has a higher degree of reliability. Most experienced planners, given a choice, would rather have too little detail than too much. More detail can always be obtained. However, if too much detail is presented without enhancing the final work product, the cost of developing that detail was wasted effort because the same conclusions could be reached without incurring additional development costs.

Model precision can be related to the reliability of the least accurate material assumption. For many systems, this is the interest rate forecast used to project interest expense. The model, by definition, can be no more accurate than the least reliable assumption contained therein. Understand, however, that some assumptions have a larger allowable error tolerance because a minor misstatement would not change the conclusions reached.

7.4 Uses of the Cash Plan

The most obvious use, and the one for which the plan was originally developed, is to project cash requirements. However, since the plan crosses over most departmental lines of the business, and since it has the ability to identify actual performance that deviates from the plan, there are a variety of other uses. Some uses that may not be readily apparent at first include:

- *Inventory.* Accounts payable levels and movement is a component of most cash plans. If payables begin to deviate from the plan, one area that may be causing the change could be inventory. There may be a variety of reasons, such as increased wastage, adverse material price variance, or changes in payment terms to vendors.
- *Receivables.* If receivables begin to increase, the cash plan will indicate an adverse deviation. This may point, for example, to a need for adjustment of geographic marketing concentration away from depressed areas. Additionally, if management has recently adjusted the firm's sales commission policy to include collection of receivables rather than solely sales, careful monitoring of the cash position impact of receivables will indicate the effectiveness of this decision.

- *Capital expenditures.* The cash plan can be used to help determine when capital expenditures can be made, when the most likely favorable financing can be obtained, and when the business will be able to repay the expenditure.

7.5 Decision Making Using Multiple Scenarios

Computing the plan under a variety of different assumptions will simulate a range of contingencies under which the business can successfully operate. It is recommended that the cash plan be executed at least three times, showing a best case, worst case, and most likely case. The required financing and ability to repay debt is then projected as a range rather than as absolute figures. Such a presentation will indicate that, as long as the assumptions specified in each of the three scenarios fall within the range, cash flow will be sufficient to maintain operations.

Additional decisions for which the cash planning system can be used under varying simulations include the following:

- *Sales price.* As discussed before, payment terms help to determine the overall price received for a sale. Terms can be analyzed using the cash plan to determine the impact on cash position under various options. It may be discovered that a smaller price increase than the competition's can be made in exchange for less lenient payment terms without damaging the overall profit to the business.
- *Financing vehicles.* In terms of the business's cash flow, the optimum financing vehicle can be derived by simulating the various options available.
- *Performance of receivables and payables.* An assumption included in most cash plans is the time to collect an average receivable and the time an average payable is held. When formulating the firm's policies toward these two critical components of cash flow, multiple simulations may be run to determine the acceptable range for the policy. Again, it is possible that the firm can gain a competitive advantage in either its buying of goods and services, or selling its product by adjusting these policies, without endangering cash flow beyond the benefit created by the policy change.

7.6 Nine Steps to Cash Planning

There are nine key steps to producing a useful cash plan. These are summarized as follows:

- Describe exactly how the plan will be used.
- Identify the users of the plan, including who will create the plan, update it, and make decisions from its output.
- Identify the time period over which the plan will be used.
- Define the content of the finished product including schematics of all reports, graphics, and sensitivity analyses.
- Define the degree of precision required of the plan, and work toward achieving that level.
- Identify the key causal relationships in the plan (termed *driver assumptions*) and the secondary assumptions that depend on the driver assumptions.
- Create the plan, preferably using an automated planning program.
- Validate the plan by entering historical data with a known result, compute the plan, and verify that the computed cash balances equal the already known results.
- Monitor actual performance against that which was planned and make adjustments in the plan to conform to changes that have taken place since the plan was developed.

7.7 Cash Management Warning Signs

There are nine warning signs in identifying potential cash flow problems or opportunities to improve a firm's cash position.

- Poor cash-related ratios, such as the current ratio, quick ratio, inventory turnover, receivables turnover, asset turnover, and profit margin.
- Excessive balances in non-interest-bearing accounts.
- A large number of bank accounts.
- Emergency borrowings resulting from surprise cash shortfalls.
- Lower-than-normal short-term investment returns resulting from surprise cash inflows.
- Unreconciled bank accounts.
- Slow collections and fast payments.
- Poor banking relationships.
- Poor availability of deposited funds resulting from a lack of float information.

No single sign indicates a problem; however, when taken as a whole and combined with a reliable cash plan, the analyst will get a good indication of the state of a firm's cash management effort.

8. INTEREST RATE RISK

The cash position and profits of many firms are unnecessarily eroded by movements in interest rates. Sensitivity to interest rate movements varies by industry. However, it is most pronounced in financial institutions and insurance companies, which rely on achieving a spread between interest income and interest expense. Cash managers need to be aware of their firm's exposure to interest rate risk and understand how to insulate their cash position and profits from unfavorable swings in interest rates.

This section will define interest rate risk and illustrate some commonly used financial tools for its management, concluding with a sample case study of a firm facing exposure to movements in interest rates.

8.1 Definitions and Symptoms

Interest rate risk occurs when a business has assets and liabilities for which the market value, earning power, and cost vary in relation to movements in interest rates. For example, consider the following selected balance sheet and income statement items of a hypothetical manufacturing company:

Total assets	\$18.0 million
Adjustable rate loans	10.0 million
Interest expense on adjustable loans	1.1 million
Gross revenue	5.0 million
Expenses	<u>4.5 million</u>
Net income	<u><u>\$.5 million</u></u>

From the above items, it can be seen that if rates rise by just one hundred basis points (or one percent), net income will fall by \$100,000 (total adjustable rate loans of \$10 million \times 1% = \$100,000), a movement of 20 percent ($\$100,000/\$500,000 = 20\%$). As profits fluctuate, so do the firm's cash position, its requirement for outside financing, its earnings capacity, and its ability to attract additional investors and credit facilities. The range over which profits and cash balances move as rates change defines the boundaries of a firm's interest rate risk.

The objective of interest rate risk management is to minimize downside risk if rates go against the firm, while leaving the upside potential intact if rates stay the same or move in a positive manner. These seemingly are mutually exclusive goals. However, through a computerized process called *simulation analysis*, management is able to develop rate risk-control strategies.

8.2 Simulation Analysis

Automated simulation analysis is the most effective technique to identify interest rate risk and formulate possible strategies for its control. Simulation uses a mathematical computer model of the rate-sensitive portion of the business to simulate the effect on earnings and the resulting changes in cash position caused by different risk-control strategies. The objective of simulation analysis is to find the best solution or combination of solutions to solve a firm's interest-rate-risk problem.

A typical simulation would perform the following two analyses:

- *Embedded risk.* This is the interest rate risk present in the balance sheet prior to attempting any control strategies. It is computed by assuming that the balance sheet remains constant while an earnings simulation is run through varying interest rate scenarios. Embedded interest rate risk defines the starting point for implementing the control strategies. The boundaries defined by embedded risk are illustrated by the graph in exhibit 1 on page 38. The lines labeled *embedded potential* and *embedded downside* form the limits of embedded risk shown as the shaded region in the graph. The goal of risk-control strategies is to reduce the size of this risk-embedded risk wedge.
- *Identifying possible strategies.* Once embedded risk is identified, the effect of specific corrective strategies—such as swaps, floors, and restructuring of the balance sheet—is simulated (see exhibit 2 on page 39 for a glossary of terms). During this phase, the utility of a computer model becomes apparent, allowing for the quick and efficient evaluation of various strategies. Once the embedded risk and possible alternative strategies are identified, management can begin to formulate a specific solution to its interest-rate-risk problem.

8.3 Formulation of Solutions

Controlling interest rate risk centers on creating an “insurance policy” against the effects of rate movement. Like a life insurance policy, one

hopes it is never used. Most businesses coordinate their strategies to relieve rate risk immediately while restructuring their asset/liability portfolios and policies to achieve long-term control.

The following case study illustrates how one company with an interest-rate-risk problem was able to identify a series of possible solutions using a simple automated simulation model.

8.4 Protecting Profits and Cash

The objective of interest-rate-risk management is not to accurately predict where rates will go to take advantage of them. Rather, rate risk management seeks to insulate profitability and cash balances from changes in interest rates by combining short-term financial transactions, which take effect immediately, with longer-term strategies, which seek to implement overall risk-control policy over time.

9. FRAUD AND RISK MANAGEMENT

As cash flows through a business, the chance of theft and fraudulent misappropriation always exists. It is imperative that businesses guard against and minimize the opportunity for cash misappropriation. Strong internal controls are critical in minimizing the misappropriation of cash and increasing the likelihood of detecting misappropriation.

This section discusses techniques to reduce the threat of fraud and cash misappropriation and to establish sufficient internal controls to safeguard against fraudulent extractions of cash.

9.1 Guarding Against the Threat of Fraud

Businesses must develop appropriate strategies and implement policies to minimize the threat of fraud and misappropriation of cash. Several elements are involved in developing the appropriate strategies and policies:

- Determining acceptable risk levels
- Developing and implementing internal controls
- Developing and promoting an ethical environment
- Establishing appropriate insurance levels

9.1.1 Determining acceptable risk levels

A complete elimination of fraud and cash misappropriation can never be achieved, due both to prohibitive costs and to controls which would

be so tight as to effectively shut down the efficiency of the organization. Accordingly, businesses must establish an acceptable level of risk and design controls associated with this level. In determining acceptable risk levels, the assessment of various risk factors needs to be completed. As an example, a business should assess the types of opportunities that might exist within the organization for individuals to misappropriate cash. Businesses then need to determine the risk tolerance for each factor and agree on the acceptable risk level associated with each individual risk.

9.1.2 Developing and implementing internal controls

To minimize the chance of fraud and cash misappropriation, establishment of effective internal controls is paramount. Internal controls must be designed and implemented in all cases, even if the risk of fraud or cash misappropriation is minimal. At the same time, a system of internal controls should never ignore the risk of fraud or cash misappropriation, as this could result in a far too tempting environment for individuals who handle cash. Internal controls are discussed further in section 9.3.

9.1.3 Developing and promoting an ethical environment

A cash misappropriation prevention strategy needs to be centered around the existence of an ethical environment. Businesses need to establish and implement a formal code of business conduct and business ethics. Such a code of ethics and business conduct establishes the tone under which all employees are expected to operate.

9.1.4 Establishing appropriate insurance levels

Because some risk of fraud will always exist, businesses may need to “finance” this risk either through the purchase of insurance or internally through self-insurance.

9.2 Opportunity to Commit Fraud and Likelihood of Discovery

The opportunity to commit fraud or misappropriate cash refers to the ability of an individual to access the cash of the organization. As indicated in Section 9.1, no business can completely eliminate the opportunity for cash misappropriation; such opportunity will always exist in an organization.

9.2.1 Opportunity to misappropriate cash

Organizations need to assure that the opportunity risk for cash misappropriation is appropriately minimized. For example, different levels of employees within the organization could be assigned different opportunity levels, with lower level employees limited to handing cash of a relatively low (e.g., \$500 or less) amount, while more senior and trusted employees have access to higher cash levels.

Additionally, organizations should enact safeguards to prohibit catastrophic misappropriation opportunity levels, with access to large amounts of cash limited to only the most senior and trusted employees.

9.2.2 Likelihood of discovery

Increasing the likelihood of discovery also can reduce the risk of fraud and cash misappropriation. This is true even when only the *perception* of discovery is deemed to be high by employees, as such a perception can provide a serious deterrent to cash misappropriation. Additionally, discovery can result in the recovery of at least some of the misappropriated cash if a fraud does in fact occur.

An adequate system of internal controls is the strongest tool in the discovery process. Again, although such controls can never be tight enough to assure fraud never occurs, the system of internal controls needs to provide sufficient assurance that most material frauds are prevented, or at the very least do not go undetected for any length of time.

Ongoing ethics training for employees and continuous training and encouragement of employees to report suspected fraud can significantly increase the chance of discovery. Employee education on the costs of employee theft and the potential impact on company profitability, along with the indirect impact on future salary increases and profit-sharing contributions, can also enhance the discovery process. In a nutshell, effective employee monitoring and the recording of possible instances of fraud can act as a serious deterrent to employee theft and cash misappropriation by others.

Finally, organizations that want to minimize the likelihood of fraud and cash misappropriation should establish clear policies associated with the consequences of getting caught. Such consequences might include immediate dismissal from the company and/or immediate reporting to the proper authorities, along with the filing of charges.

9.2.3 Minimizing the opportunity

Companies can be proactive in minimizing the opportunity for employee theft and cash misappropriation in several ways. As previously

discussed, establishing an ethical environment is paramount. Additionally, establishing an Employee Assistance Program may be beneficial, as employees with personal, financial, alcohol, drug, or other problems that may create the temptation for misappropriation can be provided with free counseling and other assistance. Some companies also complete random employee drug testing and screening, although this may be controversial in some industries.

Finally, businesses just need to use common sense in terms of observing and monitoring the work environment. Employees with financial, alcohol, or drug problems often speak freely of these problems with others. Companies should always be alert for employees whose personal spending habits (e.g., large, new house, or fancy sportscar) exceed their income capabilities.

9.3 Internal Controls and Fraudproofing

Companies must not only develop an understanding of the factors that contribute to the risk of fraud, but also must implement policies that reduce such risk. The establishment of a strong and effective system of internal controls is critical in any fraud prevention system.

9.3.1 Establishing internal control objectives

No system of internal controls can ever totally eliminate the risk of fraud. Rather, such a system of internal controls should be designed to reduce the risk of fraud *to an acceptable level*.

An effective system of internal controls should not only be designed to minimize the risk of fraud, but should also provide management information and sufficient management reports for supervisory personnel to monitor results and compare actual results to budget.

9.3.2 Fundamental internal controls

The most fundamental of internal controls can be grouped into the following three categories:

- *Physical access.* Measures to control employee physical access to cash include the basics of physically locking doors, desks, and file cabinets so that unauthorized personnel cannot gain access. Additionally, companies should consider depositing all cash amounts with the bank on a daily basis, and at the very least, physically securing additional cash amounts received after the bank is closed. Additional measures might include employees' IDs and passwords, computerized security systems, and electronic surveillance systems.

Physical access should generally be restricted only to those employees who require it as a part of their job function. Although control of physical access to cash will not completely eliminate the risk of fraud, such a limitation will significantly reduce the risk.

- *Job descriptions.* Formal, specific job descriptions, spelling out the exact duties of each employee, can be an effective tool in minimizing fraud. Employees should be prevented from completing job duties outside their job description, as job descriptions should clearly reflect the division of duties of company employees. Clearly, employees with physical control over cash should not also keep detailed records associated with cash, allowing them the ease of covering up cash misappropriation.

Employees handling cash should also be subject to a formal policy of required vacation, often expressed in a minimum number of vacation days required to be taken during at least one period during the year. Occasional rotation of duties can also be beneficial, as cash misappropriation schemes often surface during the absence of an employee or when functions are completed by others.

- *Account reconciliations and analyses.* In addition to access controls and job descriptions, account reconciliations and analyses is an important tool in effective internal controls. Account reconciliations and analyses performed on a regular and ongoing basis often make concealment of cash misappropriation difficult or impossible.

Examples of account reconciliations that should be regularly performed include:

- Petty cash reconciliations
- Bank reconciliations for all accounts
- Accounts receivable and accounts payable reconciliations

9.3.3 Employee supervision

Employee supervision is also an important element of internal controls. Strong supervision is essential to minimize fraud, particularly in small organizations in which the segregation of duties is impossible. Strong supervision consists of both fraud awareness and the approval, review, double-checking, and possible reworking of cash handling.

Specifically, supervisors need to be alert to the possibility of fraud whenever an unusual or exceptional situation occurs, such as comments or complaints from suppliers or customers, discrepancies that simply do not make sense, and accounting reconciliations that do not balance.

Additionally, supervisors must actually supervise employees, which goes beyond the typical approval process of initialing invoices or performing other supervisory functions. A thorough review, double-checking, and possible reworking of selected tasks of employees may be

necessary to establish effective controls. As an example, a supervisor may want to double check the monthly bank reconciliation by comparing amounts on the bank reconciliations to those on the bank statement, and then comparing the same to the general ledger. Simply initialing or approving bank reconciliations out of habit without actually reviewing such reconciliations not only increases the possibility of cash misappropriation, but may actually invite it.

9.4 Cash Misappropriation

Most companies divide their cash into two major categories, namely, petty cash and demand deposits. Petty cash consists of cash on hand that is accounted for separately, with reimbursements occurring periodically and expenditures booked to various accounts. Demand deposits consist of checking, saving, and other interest-bearing accounts, along with certificates of deposit and other liquid investments that can be easily converted to cash.

9.4.1 Petty cash theft

Theft from petty cash often occurs through the preparation of fictitious vouchers for reimbursement or unauthorized borrowing from the petty cash account.

The frequent reconciliation of the petty cash account is critical, and must include tracing expenditure vouchers and tracking reimbursement of payments. The propriety of authorizations for petty cash payments should be reviewed, and an analysis of unusual petty cash expenditures (e.g., high postage costs) should be completed for personal items.

9.4.2 Cash and bank deposit theft

A frequent misappropriation of cash occurs when employees steal cash prepared for deposit by changing the amounts reflected on the deposit slips. If internal controls are weak, the employees may actually make no attempt to conceal the theft. Theft of blank checks can also occur, so, clearly, access to blank check stock should be controlled. (See section 9.3.2, herein.)

Cash should be counted frequently within an organization, by comparing the cash in the bank to reported cash on hand. Bank reconciliations completed by individuals not responsible for handling cash may reveal discrepancies. Proper check endorsements and dating should be reconciled, with selected checks referenced to invoices, purchase orders, and other relevant documentation.

9.4.3 Summary

The risk of cash misappropriation can be substantially minimized by establishing an effective system of internal controls and regular and thorough analysis of accounts. Other techniques discussed in this section, such as limitations on the physical access to cash, and forced vacations and rotating duties, also greatly reduce the risk of cash misappropriation. Finally, as mentioned throughout this section, an effective and overall ethical tone starting at the top and cultivated throughout the organization is critical to minimizing the risk of cash misappropriation.

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BUSINESS AND SUCCESSION PLANNING

1. INTRODUCTION

2. WHAT IS A BUSINESS PLAN?

- 2.1 Start-Up Business Plans
- 2.2 Existing Businesses
- 2.3 Summary Benefits of Planning and Goal Setting

3. CONTENTS OF A BUSINESS PLAN

- 3.1 Cover Sheet and Table of Contents
- 3.2 Executive Summary
- 3.3 Organization, Management, and Human Resources
 - 3.3.1 Organization
 - 3.3.2 Management and human resources
- 3.4 Objectives and Action Plan
 - 3.4.1 Strategies and objectives
 - 3.4.2 Action plan
- 3.5 Marketing
 - 3.5.1 Product or service
 - 3.5.2 Market analysis
 - 3.5.3 Industry analysis
 - 3.5.4 Marketing strategy
- 3.6 Production and Operations
- 3.7 Financial Presentations and Data
 - 3.7.1 Feasibility studies
 - 3.7.2 Different scenarios and time periods
 - 3.7.3 Assumptions
 - 3.7.4 Detail and financial statement presentation
 - 3.7.5 Use of spreadsheets and other business planning software
 - 3.7.6 Sales forecasts
 - 3.7.7 Cash flow statements
 - 3.7.8 Other financial analyses
- 3.8 Supporting Documents and Exhibits

4. FINANCING

- 4.1 Debt Versus Equity
- 4.2 Venture Capital
 - 4.2.1 Characteristics of venture capital
 - 4.2.2 Pricing of venture capital deals

5. THE ACCOUNTANT'S ROLE

- 5.1 Business Planning Engagements and Clients
 - 5.1.1 Undertaking a planning engagement
- 5.2 Professional Standards for Business Plans
 - 5.2.1 Business plans as management consulting services
 - 5.2.2 Historical financial statements and SSARS No. 1
 - 5.2.3 Financial Forecasts and Projections
 - 5.2.4 Guide for Prospective Financial Statements

6. SUCCESSION PLANNING

- 6.1 Situations Requiring Succession Planning
- 6.2 Understanding the Business Environment
 - 6.2.1 Business valuation
 - 6.2.2 Business profitability
 - 6.2.3 Goals of the owner, family and key employees
- 6.3 Individual Goals and Concerns
 - 6.3.1 The owner
 - 6.3.2 The family
- 6.4 Family Succession Strategies
 - 6.4.1 Asset transfers
 - 6.4.2 Gifts to family members
 - 6.4.3 Self-canceling installment note
 - 6.4.4 Trusts and family limited partnerships
 - 6.4.5 Incorporated businesses
- 6.5 Selling to Key Employees
 - 6.5.1 Leveraged buy-out
 - 6.5.2 Employee stock ownership plan
- 6.6 Retaining Ownership With Outside Management
- 6.7 Develop a Written Plan

SUGGESTED REFERENCES

APPENDIX 1: Sample Business Plan Outline

APPENDIX 2: Sample Format for Financial Statement Projections
(also see *Toolkit CD-ROM*)

APPENDIX 3: Business Planning Software

APPENDIX 4: Sample Cash Flow Statement Format (also see *Toolkit CD-ROM*)

APPENDIX 5: Sample Business Plan

APPENDIX 6: Small Business Administration (SBA) 8(a) Business Plan (see *Toolkit CD-ROM*)

APPENDIX 7: Succession Planning Checklist (see *Toolkit CD-ROM*)

1. INTRODUCTION

Business planning should be a continuing and central activity in every business. The greatest misconception about business plans is that they are nothing but sales documents used by start-up businesses. A business plan that is nothing more than a showpiece for raising money—for a start-up venture or for an existing business—probably will not succeed even at that.

For a business plan to be of real use, it must serve as a working document that owners and managers use to plan, control, evaluate, and manage their business. Any business, regardless of size, is more likely to be successful and profitable if it plans for the future, anticipates change, and carefully weighs its responses to an ever-changing environment. A business plan helps entrepreneurs, owners, and managers do the following:

- Define the objectives of a business and reach a consensus on how to reach those objectives.
- Allocate scarce resources—cash in particular.
- Obtain financing by gaining the confidence of creditors and investors.

Surveys show that many small (and many not-so-small) businesses consider accountants their most trusted business advisers. As such, accountants need to know how business plans are used to obtain debt financing or equity capital. They must also be able to show clients how to use business plans to help manage and control their businesses.

Accountants in industry have no less a need to understand how to do business planning. Their companies also frequently require outside financing, so they must be able to prepare formal presentations on the company's business, its financial goals and objectives, and how it intends to achieve those goals and objectives.

Even if an existing business does not seek debt or equity financing, a business plan is a way to ensure that owners and managers formally agree about the company's goals and objectives (which means extended discussion and reconciliation of conflicting views) and that all work cooperatively to make them happen. This type of long-range planning forces a business to rank opportunities according to priority and provides the framework on which a true management team can be built. In effect, therefore, a business plan is a budget written in general terms. It is an organized and systematic attempt to project all of a company's resources and influences, including finances, workforce, and market factors. The financial statements (or back end) of the business plan may be the heart and soul of the plan, but they do not exist in isolation.

Like a budget, an updated business plan is needed each year to tie the company's finances and short-term projections explicitly to its goals, objectives, strategy, and tactics in every important area, including marketing, production, operations, sales, and human resources. This will enable a company to remain both focused and flexible.

2. WHAT IS A BUSINESS PLAN?

A business plan is simply an attempt to be prepared for what is expected to happen in the future, to take control of those things that can be influenced and therefore to achieve the goals and objectives that have been set for the enterprise.

A business plan should be two things: a sales document to be used to obtain financing and also an overall operating plan for starting and running a business. It is important to remember that *it should be both*. The cash flow projections submitted to a bank by a long-time patron may be all that is required to demonstrate the need for an equipment loan that will help the company increase sales and profits. These projections, however, do not meet the criteria of being an overall operating plan.

In substance, business plans all share the same goal: to maximize the chances of success. In form, however, business plans vary considerably. The business plan for a start-up business and the plan for an existing business ordinarily would look substantially different, though they usually follow much the same outline. For example, while a well-established business may concentrate the presentation of its plan in the financial (cash flow) area, a start-up business will need to expend more effort in the marketing, production, and operations areas.

No two business plans look alike simply because no two businesses are alike. What ultimately determine how a business plan looks and what it includes are its *audience* and *purpose*. A plan for obtaining financing covers in detail what the business is (including its marketing and operating strategy and tactics) and how much capital the business needs to raise (including for what purpose), as well as projected financial statements and related analyses. But a business plan intended mainly to help owners and managers plan, control, and manage a business may look very different.

2.1 Start-Up Business Plans

Economic viability is what start-up business plans are about. New businesses fail at an appalling rate. The usual statistic cited in the press, by

academics, and in popular books about entrepreneurship is that four out of five start-up companies fail within the first five years (though studies suggest that the failure rate is lower).¹

The elements usually cited in most business failures are:

- Management (lack of experience, education, sales ability, or just sheer incompetence).
- Inadequate capital (whether start-up or subsequent cash flow because of, for example, poor credit-granting practices).
- No planning beyond how to survive from one day to the next.
- Poor choice of business.
- Unfavorable location.
- Unplanned growth.
- Inadequate recordkeeping.
- Excessive inventory or fixed assets.

This list of reasons for business failures should make it clear that business planning for a start-up business is an attempt to recognize and deal in advance with the myriad obstacles and issues that a new business faces.

Start-up business plans are usually the most comprehensive and detailed. Business plans for existing businesses (particularly if the plans will not be used to raise capital from outsiders) are usually adaptations of the form and content of start-up plans, but may eliminate some of the detail in an effort to focus on overall objectives and more exact financial data.

2.2 Existing Businesses

Like start-ups, existing businesses need business plans for two basic reasons:

- To plan, manage, and control the business
- To raise capital

In many ways, plans for existing businesses should be much easier than business plans for start-ups. For example, projecting pro forma financial statements can begin with actual data, so the process has a stronger starting point. A company with several years' experience can (by considering historical data) better examine its operating policies and assumptions about the future, which is one of the most important aspects of planning.

¹Buck Brown, "Business Failure Rates Aren't So Bad After All," *Wall Street Journal* (Friday, 20 May 1988), p. 27.

2.3 Summary Benefits of Planning and Goal Setting

The value of carefully conceived and continually revisited business plans cannot be overemphasized. In summary, they provide the following benefits:

Improved resource utilization—Goal setting and planning require management to evaluate the business's resources and thereby better determine capabilities and limitations.

Increased employee motivation—The unified company direction established by goal setting and planning underscores a "corporate culture," emphasizes mutuality and cooperation, and reduces employee anomie and frustration.

Improved understanding of opportunities, problems, and weaknesses—Planning involves programs and activities geared to assessing the business's environment—internal and external—and reacting positively to challenges and problems and taking advantage of opportunities.

Greater organizational control—Planning encourages and in some cases enforces adherence to project completion dates and performance standards essential to maintaining control.

Information for third parties—Written plans and objectives are useful in seeking financing, in planning mergers and acquisitions, and in a host of situations involving third parties.

3. CONTENTS OF A BUSINESS PLAN

Plans vary according to the type and complexity of the business, the stage of the business in its economic life cycle, and the intended purpose of the plan and its audience.

There are certain generally accepted formats for business plans. Usually, the narrative sections (descriptions of the business and the product) go up front, while the prospective financial statements—which are by far the most important component for most readers—usually go in the back.

Appendix 1, "Sample Business Plan Outline," provides a comprehensive overview of what a business plan might include.

Not all the information discussed in this section belongs in every business plan. The sample outline in Appendix 1 tries to cover all possible considerations, which makes it useful more as a checklist than as a model to follow for each and every business plan.

A business plan should not be cluttered with unnecessary detail. It should include objectives, major assumptions, concerns, and projected

results of the business, but should omit information and data that might obscure the main outlines of what must be communicated.

The following sections provide additional information about each major heading of the outline shown in Appendix 1.

3.1 Cover Sheet and Table of Contents

Cover sheets of business plans provide:

- The name and address of the business.
- The names, addresses, and phone numbers of the contacts (the lead entrepreneurs, ordinarily).

A cover sheet might also include a disclaimer about the projections, such as the following example, which has been adapted from the AICPA's Statements on Standards for Attestation Engagements, *Financial Forecasts and Projections*, and the AICPA Audit and Accounting Guide *Guide for Prospective Financial Information*:

The projections in this business plan reflect our best judgment of the company's future operating results at the time this plan was prepared. The numbers used are based on expected conditions and our expected course of action. Since there will usually be differences between projected and actual results, because events and circumstances frequently do not occur as expected, and those differences may be material, the planned results may not be achieved.

This paragraph, of course, contains the essential written representations that accountants must obtain from the client for a compilation.

If a plan contains important proprietary information, it might be advisable to include a paragraph, such as the one shown below, to restrict further distribution of the plan or disclosures of its contents:

This business plan is being submitted confidentially. It contains proprietary information. You should not disclose the contents of the plan or distribute this or other copies of the plan to others without our authorization. By accepting this copy of the plan, you agree to these conditions and agree to return this copy upon our request.

When such a paragraph is to be included, it is generally advisable to obtain receipt signatures acknowledging the terms specified.

Although many business plans do not contain a table of contents, it makes sense to include one as a means by which readers can identify important elements in the plan and readily locate data.

3.2 Executive Summary

A typical venture capital firm probably receives numerous business plans every day, which means the time and attention devoted to any one plan is scant. Unless the executive summary can command the interest of potential creditors or investors, the remainder of the plan may never be read.

Whether a business plan is intended for outsiders or as an internal working document, the executive summary should be short and succinct—probably no longer than one page. A longer summary suggests the plan preparer is unable to see the “big picture” or focus on particular challenges. The summary should be prepared after the rest of the business plan is complete.

An executive summary must cause its reader to want more information. It should explain in broad terms what the company intends to do and how it intends to do it. These goals and objectives should be followed by a brief explanation of the resources that will be used in obtaining them.

The executive summary should briefly:

- Explain what the company’s products or services are.
- Give an overview of the present market conditions and expected fluctuations.
- Review the industry.
- Explain the company’s projected financial performance, discussing profitability and projected return on investment.

The executive summary briefly explains the company’s critical success factors by setting forth its objectives, strategies, and tactics, and the internal and external influences affecting them.

3.3 Organization, Management, and Human Resources

This section should help provide answers to five questions:

- What business is the enterprise in?
- What management, key personnel, and employees are in place or available to make the venture succeed?
- What are the company’s strengths and weaknesses, and what problems does it face?
- How much capital (and whether debt or equity) does the business need?
- How will the funds be used?

3.3.1 Organization

This section presents the basic facts about the business, such as:

- A brief history of the business, including when the business began and (if applicable) the date and state of incorporation.
- The legal form of business (for example, partnership, limited partnership, corporation) and its tax status (S corporation, C corporation, partnership).
- The location of headquarters and principal offices.
- Major successes or achievements to date.
- Major problems or obstacles facing the company.
- Risks and potential liabilities (insurability and coverage, potentially dangerous products, unasserted claims).
- Funding required, specifying percentage of debt versus equity.
- How funds will be used.
- Current and proposed capital structure (common and preferred stock issued and outstanding, with descriptions of rights; major shareholders; long-term debt or bonds, with descriptions of each type; relationships with major banks; discussions of leverage and the pricing of additional equity interests).

3.3.2 Management and human resources

When asked what venture capitalists look for in a business plan, the response of one major venture capitalist was: “Three things—people, people, and then people.”² Because events never turn out exactly as projected, a skilled and experienced management team is the best insurance a creditor or lender can have that a business can adapt to change. Such a team should be able to direct and focus a company toward the achievement of its objectives.

A business plan intended for outside use should explain relevant education and skill, business experience (including knowledge of the industry), and applicable technical knowledge. Depth of management is also important. Brief biographies are frequently presented, and detailed resumes are sometimes included in the exhibits section (see section 3.8 following).

Management alone cannot make a business successful. Other human resource issues should be covered, including:

- Special technicians that are needed and their availability.

²Lawrence M. Alleva and Steven W. Barnes, “Marrying for Money: The Venture into Venture Capital,” *Price Waterhouse Review*, 1988, no. 2:47.

- Current and proposed number of employees, with a breakdown of functional areas (for example, 55 manufacturing personnel, 12 supervisors, 3 managers, 4 administrative personnel).
- Availability of personnel in this geographic region or nationwide (and any special ability to attract personnel).
- Compensation and benefits policies (especially incentive performance programs).
- Union affiliations (current or foreseen).

3.4 Objectives and Action Plan

The section that explains the company's objectives and action plan draws all areas of an enterprise together—finance, marketing, and operations. It explains what the company wants to accomplish and by what means. Both short- and long-term objectives should be covered, which means also covering specific actions needed to meet both types of objectives.

3.4.1 Strategies and objectives

Business planning is projecting:

- What the entity will do with its resources.
- When it will do it.
- How it proposes to do it.

Objectives must be stated in terms that are measurable and based on specified intervals of time (for example, "by July 200X, sales will reach . . ."). A goal such as "obtain financing" or "reach our market" is of no value because achievement cannot be measured or gauged. Examples of objectives that are specific enough to include in a business plan are these:

- "Attain a return on equity of 40 percent by the fourth year of operation."
- "Increase sales by 50 percent per year for the first two years, then by 25 percent for the next three years."
- "Install 100 systems by the end of 200Y."
- "Capture a 15 percent share of the market by 200X."

3.4.2 Action plan

The action plan must explain how the objectives will be accomplished, relating them in terms of dates and priorities. It should tie together

management's or the owner's objectives (for example, to go public in five years after expanding sales by a factor of five), overall financial objectives (for example, specific return on equity and growth in sales amounts), marketing objectives (such as attaining a 10 percent share of the market by 200X), and the operating and production objectives (such as opening two new retail outlets on the West Coast, three in the Southeast, and four in the Northeast by 200Y).

This section also itemizes the specific and detailed steps that explain how these objectives will be accomplished: *who*, in other words, is responsible for doing precisely *what*, and by *when*.

3.5 Marketing

The marketing section of business plans should include:

- A discussion of the product or service.
- A market and industry analysis.
- Marketing objectives and strategies.

3.5.1 Product or service

The section that explains the company's product or service is especially important for start-ups as well as for going concerns that wish to add or expand a line of business. A company must be able to predict customers' needs and wants, because these define the business. The emphasis, therefore, should be not on what the company has to sell, but on what it offers that *people want or need to buy*.

The section on the product or service must make clear:

- What customers will be buying when they choose what the company sells.
- Why customers will buy the product or service from the company.
- Who in the market will make the buying decision.

If the company hopes to garner venture capital, it must usually have a proprietary product or a service that no one else can offer or that no one else can offer in the same way. The company's product or service must be explained in detail; often it is even appropriate to include illustrations, drawings, or photographs (either in this section or as one of the exhibits; see section 3.8 herein).

Brand names, if applicable, and prices should also be discussed and the product or service must be compared to the competition, which means discussing competitive strengths and weaknesses (such as price,

serviceability, distribution networks, warranties, timeliness, convenience, and prestige).

Results of relevant market research (whether primary research, like focus groups and surveys, or secondary research) can also be presented. Patents, trademarks, copyrights, franchises, and licensing agreements (owned, obtainable, and competing) should be covered.

The section on products or services must also take a broader view of what the company has to offer. Specifically, what are the implications of the company's product or services to customers or consumers?

The owners and managers of the business should identify such underlying assumptions so they can be evaluated objectively both within the company and by potential outside creditors or investors.

3.5.2 Market analysis

Offering a product or service that a company *thinks* customers need and want does not necessarily mean that a viable market already exists.

The market analysis covers:

- Who will buy the product or service.
- The size of the market.
- Projected sales.
- The projected growth of the industry and market.

A company whose “top line” (sales) is not big enough has no chance of having a satisfactory bottom line. Particularly with start-ups, the business plan must generally demonstrate the prospect of dramatic and sustainable growths in sales; otherwise, there's no use in starting up. To attract venture capital, in particular, growth must be emphasized. These matters are addressed first by analyzing the current status of the product or service. More specifically, the market analysis discusses:

- Customer preferences and needs (for example, whether preferences have changed or trends or events will influence preferences).
- Customers versus end users (for example, mothers who buy children's cereal).
- Demographics and segments of the market (age, gender, location, income, ethnic background, “lifestyle,” values, and so forth) and how the company can reach them.
- Size, history, and trends in the market.
- The target market segments, including apparent market opportunities (geographical expansion, niches to exploit, new uses of the product).

- Market threats (new products, new technology, changing customer preferences).

3.5.3 Industry analysis

The industry analysis further considers the product or service in terms of the competition:

- Critical success factors in the market
- Important risks (for example, cheaper, knock-off imports or technological obsolescence)
- Barriers to or ease of entry into the market
- Stage and maturity of the market (take-off, growing, stable, or declining)
- Seasonality
- Sensitivity to business cycles
- Government regulation
- Normal credit policies
- Advertising and promotion
- Trends, fads, and the importance of innovations and technological changes (including possible obsolescence)
- Price sensitivity and possible product or service substitutions
- Major competitors, including their strengths and weaknesses, market shares, and prospects
- Location of competitors
- Varying methods and levels of distribution
- Important trade associations
- Varying sales methodologies (for example, salaried sales staff versus commission-only sales, direct marketing trade shows, and so forth)

3.5.4 Marketing strategy

The marketing strategy explains the company's marketing goals and objectives and tells how the desired results will be achieved. The strategy must follow logically and persuasively from the product or service analysis, the market analysis, and the industry analysis described in the three preceding sections.

The section on marketing strategy should answer questions about:

- Product or market attributes.
- Pricing policies.

- Development or evolutionary plans (spin-offs, organizational changes, mergers, acquisitions).
- Research and development efforts.
- Competitive responses.
- Distribution channels.
- Service or warranty policies.
- Credit policies.
- Advertising and promotion.
- Service and customer support.
- Sales personnel or direct marketing staffing and the compensation policies.

3.6 Production and Operations

The production and operations section covers how products will be manufactured or brought to market or, in the case of a service, how the service will be delivered.

The elements this section addresses include:

- Processes or equipment used.
- Facilities requirements.
- Sources of supplies, equipment, raw materials, purchased components, and direct labor (including plans for purchasing operations and hiring).
- Major components of operating expenses (labor versus direct materials) and the resulting cash flow implications.
- Inspections and quality control.
- Logistics (notably, how products or services will actually be delivered to customers, dealers, and brokers).

More specifically, the production and operations sections should include items such as these:

- A brief description of the manufacturing operations, purchasing operations (especially, for example, in the case of retail operations), or method of delivering services.
- Location and description of plants, warehouses, headquarters, and any other significant offices.
- Capacity and utilization.
- Expansion plans.

- Major fixed assets (current and planned).
- Make-versus-buy considerations.
- Quality control.
- Changes in production technology and threats from imports.
- Shelf life and potential obsolescence of inventory.
- Current and expected inventory turnover.
- Major suppliers (including their financial services, benefits, credit policies, locations, and risks of inadequate or subnormal supplies or availability).
- Major cost components (such as direct labor versus specific direct material costs).

3.7 Financial Presentations and Data

The heart of a business plan is the projected financial statements. They provide answers to the most fundamental questions about any business:

- What is the business worth now?
- What will the business be worth in the future?

Because value is a function of cash flows, including the initial investment and residual values, the cash flow statement is the first place to which a banker, venture capitalist, or any other sophisticated reader of a business plan usually turns.

The information that should be provided in this section about the company's future includes:

- The company's cash position.
- The company's projected financial performance.
- The company's financial position.
- The significant assumptions that underlie the projections.

Specific items included in this section include:

- Audited financial statements, including notes and audit opinions (existing companies).
- Detailed description of accounting principles and practices (new companies).
- Projected balance sheets, income statements, and cash flow statements for five years (usually monthly for the first year or two, then quarterly for the second or third year, and yearly thereafter).

- A statement of significant assumptions used in preparing the projected financial statements (such as interest rates, profit margins, inflation, turnover ratios, and expansion rates).
- Key financial ratios (past, if available, and projected).
- Cost/volume analysis (break-even).
- Sensitivity analyses.

3.7.1 Feasibility studies

Especially for start-ups, financial feasibility studies, which may consist of little more than projected cash flow statements, should be a first step. An entrepreneur who does not do a cash flow projection (or hire an accountant to do one) cannot truly understand the financial considerations with which the person is dealing.

A minimum of detail is needed in the initial figures to determine whether a proposed venture is worth pursuing at all. If the preliminary numbers look promising, a full-blown business plan with complete financial statements should be prepared, and detailed projections (particularly for all material sources and uses of cash) should be accumulated.

3.7.2 Different scenarios and time periods

Ordinarily, three different financial scenarios are covered in the prospective financial statements: the best case, the most likely case, and the worst case. Whether prospective financial information is considered a forecast or projection depends on the company's objectives. A *forecast* is defined by the AICPA Statement on Standards *Financial Forecasts and Projections* as prospective financial statements that present information that reflects conditions as they are expected to exist. A *projection* answers the question, What would happen if . . . ? Generally, in a business plan, the most likely scenario would be considered a forecast, whereas the best and worst case scenarios would be projections (see section 5.2.4 in this chapter).

Sales are usually the only variable changed in this type of sensitivity analysis, though other variables or assumptions could also be tested. See section 3.7.5 in this chapter for a discussion of "what if" analyses using computer spreadsheets and specialized software for projections.

The time horizon for presenting projected financial statements depends on the intended audience and their use of the business plan, as well as on how meaningful the projections will be. For example, trying to project more than five years into the future is probably a vain undertaking. But, whatever the time horizon in years, the periods for the first year, at least, should be months. Thereafter, quarters may be

used. Statements should, for the final year or two, show only yearly projections.

3.7.3 Assumptions

Unless the assumptions are documented and can be changed (for example, “40 percent growth in sales over seven years”), the projected financial statements and data are suspect, however well presented and mathematically correct they may be.

Among the assumptions that need to be discussed, analyzed, and documented are the following:

- Beginning and ending dates of the plan
- Appropriate time periods (months, quarters, years)
- Interest rates used on debt
- Interest rates used on short-term investments of excess cash
- Effective income tax rates (federal, state, and local)
- Growth in sales (for example, by a constant percentage, by product, in specific units sold, or in dollar increments)
- Capital expenditures
- Inventory levels maintained (turnover rates)
- Inflation
- Seasonality
- Business cycles
- Wage and salary growth
- Incentive compensation to be paid
- Service, replacement, and warranty costs
- Sales returns
- Accounts receivables collection periods
- Accounts receivables discounts taken
- Accounts receivables write-off rates
- Accounts payable payment periods
- Accounts payable discounts taken
- Aggregate gross margin for all products and gross margin by product line
- Dividend (or withdrawal) policy
- Accounting policies (for example, useful lives of assets, depreciation, and amortization methods)

- Tax policies (such as use of an accelerated depreciation method or the availability of the research credit)
- Beginning financial statement amounts (including assumptions about capital structure) for start-ups
- Debt or equity financing anticipated

See section 5.2 for a discussion of the reporting requirements imposed by professional standards regarding assumptions used in a business plan.

3.7.4 Detail and financial statement presentation

If historical financial statements (preferably audited) exist, they should be provided for the past three years. (See section 5.2 on professional standards when historical financial statements are included in a business plan.) Especially for start-up businesses, however, cash is most important, so this section focuses on cash flow statements from which the projected balance sheets and income statements can be derived.

The projected cash flow statements identify and provide for all possible cash inflows and outflows. A detailed buildup of budgets and schedules for all significant line items on the balance sheet and income statement is equally important.

Although all appropriate subsidiary budgets and schedules should be prepared, they should *not* all be included in the business plan. Many banks prefer specific formats, with many using Robert Morris Associates forms (www.rmahq.com). See Appendix 2, “Sample Format for Financial Statement Projections,” also available on the *Accountant’s Business Manual Toolkit CD-ROM*, for a sample projection form. Because many bankers receive their credit training using this form, and many former bankers are venture capitalists, using a familiar presentation is helpful.

Even if an original form is not used, its format (as reproduced on a spreadsheet) can be used to demonstrate the interrelationships between the financial statements and to show the effect that various decisions have on all three statements. The same data would be available from financial statements on separate pages, but seeing the offsetting effects all at once on all three statements often helps in understanding the important variables.

3.7.5 Use of spreadsheets and other business planning software

Most accountants are adept enough with spreadsheets to prepare templates for integrated financial statement projections. The template should be as general as possible so changing assumptions and facts will not invalidate prior programming. A general model can be used for

many business plans. For ease in updating, make a separate assumptions screen for every parameter that could conceivably change (for example, interest rates, returned sales, and day's sales outstanding). See section 3.7.3 for a list of assumptions used in a business plan and section 5.2 for a discussion of professional standards regarding assumptions.

Several commercial business planning packages are available. Appendix 3 lists many of them, provides a brief explanation of what they do, and includes Web addresses for further details.

3.7.6 Sales forecasts

The first step in preparing a cash flow statement is to project sales, after which other significant line items to be shown must be determined. Sales should be based on the market analysis (see section 3.5.2) done for the product or service. The sales forecast largely determines what must be accomplished by the various functions (such as manufacturing, marketing, personnel) of the business.

Existing businesses can usually predict sales figures with relative confidence; their main interest may instead be in controlling or reducing costs. For start-ups, however, estimating sales is the most important step, because if actual sales prove to be higher or lower than expected, the company's cash needs can increase or decrease significantly.

Forecasting sales can be especially difficult for high-growth start-ups, because their whole operating strategy depends on enormous and rapid increases in sales.

3.7.7 Cash flow statements

In its most basic terms, a cash flow statement is just three things: cash in, cash out, and timing—the familiar sources and uses of cash.

Unlike cash flow statements prepared in accordance with generally accepted accounting principles (GAAP), cash flow projections in business plans often begin with sales in units. Showing units and unit prices adds another dimension to a cash flow analysis: The figures for units sold tie in to the projected production schedule (see section 3.6), while the figures for price per unit and volume in units tie in to the break-even analysis (see section 3.7.8). Often only net cash sales are shown, though sometimes the presentation of gross sales and returns (or deductions) and of the resulting net sales may be justified. A sample projected cash flow presentation is shown in Appendix 4. (Also, see the *Accountant's Business Manual Toolkit CD-ROM*.) Note that the periods can be months, quarters, or years.

Preparing cash flow projections usually requires many iterations. Among the important variables or assumptions to test are varying levels of inventory (a notorious cash drain), short-term debt (which increases

the company's risk and vulnerability to recession), and accounts receivable (because bad debt or slow-paying customers can ruin the company). Iterated cash flow projections help determine the ultimate appearance of the other financial statements, the appropriate debt/equity decision for the business, and the percentage of ownership that outsiders should get for their investments.

3.7.8 Other financial analyses

Many business plans include a break-even (or cost/volume) analysis, usually in graph form. Even if break-even figures or graphs are not included in plans intended for outside use, they can be very useful for internal management purposes because they underscore the fact that there are only three possible ways to increase profitability: increase prices, increase volume, and decrease costs (whether fixed or variable). Either break-even sales revenue or break-even unit sales could be provided. Both analyses require assumptions regarding sales volume and prices.

Key financial ratios are sometimes also presented, especially for bank loans. The ratios usually included are:

- Current ratio
- Debt-to-net-worth ratio
- Return on equity
- Gross margin percentage

These ratios are discussed in the chapter on Obtaining Financing.

3.8 Supporting Documents and Exhibits

The supporting documents section of most business plans is somewhat general. It includes any information relevant to the business plan that is not segregated elsewhere. Occasionally, historical financial statements are also put in this section. Organizational charts are sometimes provided, and some business plans place biographies of the lead entrepreneurs or of important owners and managers here. Articles from trade magazines about the industry, product, or service may be relevant to substantiate or corroborate positions presented in the plan. Finally, copies of significant contracts or agreements might also be shown (for example, leases, union agreements, line-of-credit agreements, patents, and licensing agreements). Appendix 5, "Sample Business Plan" illustrates what a completed business plan includes. Appendix 6, "8(a) Business Plan" (see the *Accountant's Business Manual Toolkit CD-ROM*) is a form from the Small Business Administration (SBA) that will assist accountants in helping clients address their business planning needs.

4. FINANCING

This section discusses financing considerations, especially venture capital. The chapter on Obtaining Financing provides an overview of the various sources of debt and equity financing available.

4.1 Debt Versus Equity

The reward an entrepreneur reaps from a business varies tremendously depending on whether debt or equity financing is used. Using all debt is seldom feasible. It is also very risky, because as leverage increases, risk escalates from the ever-increasing drain of cash caused by servicing the debt. If the business fails (the probability of which increases as leverage increases), the entrepreneur often faces personal as well as professional disaster because, typically, the entrepreneur is forced to guarantee the business debt personally.

Alternatively, using all equity is usually equally repugnant to entrepreneurs, because doing so means having to relinquish a significant share of the business—sometimes even majority control.

Leverage affects risk, as do the type and stage of a business venture; all, therefore, affect whether debt or equity financing should be used. In the early stages of a venture, equity financing is often the only choice. As the business grows, establishes a record, and thus appears less risky, debt financing becomes more available and more attractive. The newer and the more untested the company, the greater the risk presented by debt financing.

4.2 Venture Capital

Large growth potential and large capital needs, together with potentially large payoffs (and big risks), are the signs that point to seeking venture capital as a source of funds.³ Venture capitalists have to see significant potential before they will be interested in a company.

4.2.1 Characteristics of venture capital

Depending on the risk, venture capitalists may require an annual return on investment of from 30 percent to 80 percent. In return for their investment, they usually obtain a significant share of the business—often majority control and always significant influence over decision

³This section draws on the excellent discussion of venture capital found in Alleva and Barnes, *Price Waterhouse Review*, 1988, no. 2:42–51.

making. If the business begins to collapse, they may take over daily control or replace management. Finally, although venture capitalists provide long-term capital and are willing to wait from 3 to 10 years for a return on their investment, they want to be able to bail out. Venture capitalists want to be able to liquidate their investments by a sale or merger of the company or else by taking it public through an initial public offering.

Although venture capitalists expect a high return, the degree of risk of the businesses funded by venture capital should always be kept in mind. Even if an entrepreneur must relinquish a major share of the business, it is better to own part of a well-capitalized company that stands a good chance of success than to own 100 percent of a company that will fail or never even get off the ground for lack of capital.

Many venture capital firms specialize in certain industries—for example, computer hardware or software, genetic engineering, or publishing. Some fund only companies in the conceptual stage by providing “seed money,” whereas others will not even consider funding a business until it has a track record of a few years.

4.2.2 Pricing of venture capital deals

There are many ways to value a business (see the chapter on Business Valuations herein). A typical venture capital pricing, however, involves the use of price/earnings (P/E) ratios (earnings multiples) and discounted cash flow techniques.

To illustrate, assume that a venture capitalist agrees to invest \$1 million in a privately held manufacturing company that expects \$3 million net earnings five years from now. The company has 1,000,000 shares of stock outstanding. Similar public companies have P/E ratios of 10, and the same earnings multiples are expected to hold true for the next five years. The venture capitalist requires a 50 percent return on its investment and plans to cash out at the end of the fifth year by taking the company public.

The calculation of the share of the business that goes to the venture capitalist is as follows:

Projected Earnings Per Share (EPS):

$$\frac{\$3 \text{ million projected net earnings in fifth year}}{1 \text{ million shares outstanding}} = \$3 \text{ EPS}$$

Projected Stock Price When Company Goes Public:

$$\$3 \text{ EPS} \times 10 \text{ P/E ratio} = \$30 \text{ per share}$$

Projected Value of Company When Company Goes Public:

$$\$30 \text{ per share} \times 1 \text{ million shares} = \$30 \text{ million}$$

Present Value of Business:

$$\begin{array}{r} \$30 \text{ million future value of company} \\ \hline (1 + 0.50\%) \quad \text{Discount factor (50\% return for 5 years)} \\ = \$3,950,617 \quad \text{Present value of business} \end{array}$$

Percentage Ownership Venture Capitalist Gets for \$1 Million Invested:

$$\begin{array}{r} \$1 \text{ million invested} \\ \hline = \frac{\$3,950,617 \text{ present value of business}}{25\% \text{ ownership interest}} \end{array}$$

5. THE ACCOUNTANT'S ROLE

An accountant's training and experience provide an overall business sense that few other professionals can match. Financial projections and the related financial analyses make up the inner workings of a business plan. Accountants (whether practicing CPAs or part of financial management in industry) should, therefore, be closely involved in all aspects of business planning.

Especially with start-ups, the immediate concern is raising capital and, based on projected financial statements, showing some evidence that the business will ultimately be able to generate enough operating income to repay creditors and provide a return on investment commensurate with the risk of the venture.

Although most accountants should be able to help project financial statements, many businesses—especially start-ups—need extensive help in targeting how much debt or equity to seek, which creditors or investors to approach, and how to minimize the usually lengthy delay from business-plan completion to obtainment of suitable financing. In part, this means maintaining close relationships with banks, other commercial lenders, large private investors, and a range of venture capital firms.

5.1 Business Planning Engagements and Clients

Business planning clients must usually be sought out. Perhaps the best way to build a business planning practice is to build on existing client relationships: Many of an accountant's existing write-up, audit, and tax clients need business plans, even if they don't know it.

The following situations all suggest the need for formal business planning help that accountants can provide:

- Additional capital for needed growth
- Cash flow difficulties (for example, trouble in paying suppliers, meeting payrolls, or servicing debt)
- Impending bankruptcy
- New competition or changed technology in the industry
- Changes in management
- Calls for help with specific problems that may be symptomatic of bigger problems (for example, chaotic recordkeeping suggests underlying management problems)
- Mergers and acquisitions

Of course, many companies do some sort of budgeting, but few take the added step of formally tying a budget to the company's overall strategic plan for marketing, production and operations, and logistics. For those clients who do budget already, accountants should help them make the leap to incorporating the yearly budget into an annual business plan. For those clients who do not even have a formal budgeting system, the accountant can urge beginning with a formal business plan (which is simply a far more comprehensive budget document) or can suggest that the client start with a one- or two-year budget, then later integrate the budgeting system into a continually updated business plan. A company's tactics—and often even its goals and objectives—need to change. The important thing is to regularly compare actual results with projections and to update and adapt plans accordingly. Sometimes clients can do this themselves, but often accountants can gain valuable ongoing planning engagements by simply being alert to opportunities.

5.1.1 Undertaking a planning engagement

A client may request a consulting engagement for assistance in establishing business goals and developing plans, or the practitioner may recommend it, based on knowledge of the client's operations and need for planning. When a client requests assistance, the practitioner may want to determine whether there are any underlying reasons or special purposes for the request. The practitioner needs to know the pertinent facts to help the client develop goals and plans that are appropriate and well matched to the needs of the organization.

In deciding whether to accept the engagement, the practitioner considers the nature of the client's business and the specific request for service in light of the practitioner's own standards, policies, and capabilities. If the request for services is from a prospective client, the practitioner might ask the following pertinent questions:

- Who referred the prospective client?
- Has the prospective client previously engaged another accountant, and if so, why is a new one being sought?
- Is the prospective client seeking to establish a continuing relationship with the practitioner or asking for one-time-only assistance?
- How long has the client been in business?
- Who are the owners/partners?
- What is the nature of the client's current business?
- What is the financial history of the client's current business?
- Were there any earlier business ventures, and what resulted from them?
- With whom does the client bank?
- What law firm does the client use?

The practitioner may conduct a brief preliminary fact-finding survey to develop an understanding of the client. The most critical factors are the benefits the client anticipates and what the practitioner needs to do to accomplish the engagement objectives. The time devoted to a preliminary survey may be less for an existing client because of the practitioner's familiarity with the client's operations, personnel, and other key factors.

From the information obtained during discussions with the client and from the preliminary fact-finding survey, the practitioner might prepare notes for reaching an oral understanding with the client or might develop a written engagement proposal. If the client accepts the proposal, the practitioner develops an engagement schedule, which establishes target dates or time allocations and the responsibilities of persons involved in the engagement work phases and activities.

5.2 Professional Standards for Business Plans

The close relationship of business planning to other types of professional engagements provided by CPAs makes determining the scope of service important. Understanding the requirements is especially so, because the procedures and reports required by the various professional standards and the resulting fees that must be charged have to be explained to the client in advance. The client must understand and agree to both the ultimate scope and the cost of the engagement.

The preparation or submission of historical financial statements or information in conjunction with business planning engagements

may be subject to the applicable standards from the Public Company Accounting Oversight Board and AICPA. In addition, the *Guide for Prospective Financial Information* applies to all financial forecasts or projections intended for third-party use.

The applicable professional guidance and standards for business planning engagements are discussed in the sections that follow.

5.2.1 Business plans as management consulting services

Developing business plans is a form of management consulting service. The authoritative professional literature on management consulting services is contained in the Statement on Standards for Consulting Services (SSCS) issued by the Management Consulting Services Executive Committee of the AICPA.

Statement on Standards for Consulting Services No. 1, *Definitions and Standards*, requires that MCS consultants be professionally competent and that they exercise due professional care. MCS engagements must be adequately planned and supervised, and sufficient relevant data must be obtained to afford a reasonable basis for conclusions or recommendations.

Among other requirements, SSCS No. 1 requires a CPA who performs a business plan engagement to *reach an understanding with the client*. Although either oral or written understandings are permitted, reducing the understanding to a clear, unequivocal written agreement signed by both parties is the preferable approach.

SSCS No. 1 states that agreements with clients should address:

- Nature of the services
- Scope of engagement, including limitations or constraints
- Roles, responsibilities, and relationships of all parties involved

The following issues may also be made explicit in the agreement for this type of engagement (although not specified in the SSCS):

- Overall approach to the engagement, including major tasks, activities, and methods
- Form and timing of both status reports and the final report
- Work schedule
- Fee arrangement
- Whether historical financial statements will be included in the business plan
- How the client intends to use the business plan (that is, strictly for internal use or for the use of certain contemplated third parties, such as prospective lenders or creditors)

- Whether the accountant's name will be associated with any of the financial information presented (whether historical or prospective)
- Whether specialists will be used (for example, marketing experts)

In discussing fee arrangements, the CPA must take into account all the professional standards that must be met for the engagement and make sure that the client understands the required work, time commitments, and resulting fees.

After completing the engagement, the CPA should provide a report (oral or written, though, again, a written document should virtually always be prepared) on all significant results, assumptions made (see section 3.7.3 herein for a discussion of financial assumptions used in business plans), and any qualifications or reservations the CPA may have.

5.2.2 Historical financial statements and SSARS No. 1

If a business plan includes unaudited historical financial statements of a nonpublic company, SSARS No. 1, *Compilation and Review of Financial Statements*, as amended, sets forth the accountant's responsibility as such:

An accountant should not consent to the use of his or her name in a document or written communication containing unaudited financial statements of a nonpublic entity unless (a) the accountant has compiled or reviewed the financial statements in compliance with the provisions of this Statement or (b) the financial statements are accompanied by an indication that the accountant has not compiled or reviewed the financial statements and that the accountant assumes no responsibility for them.

SSARS No. 1 makes no exception according to the intended use of the statements—that is, business plans that will be used only internally versus those that will be distributed to certain contemplated third parties. The conclusion to be reached, therefore, is that accountants must always indicate their responsibility for historical financial statements included in a business plan.

One exception that SSARS No. 1 does make applies if only *selected* financial information is included in a business plan. Examples include specified elements of financial statements (such as sales figures) or certain accounts. However, a CPA may attest to such specified elements under the Statement on Standards for Attestation Engagements *Attestation Standards*.

5.2.3 Financial Forecasts and Projections

Chapter 3, "Financial Forecasts and Projections," of Statement on Standards for Attestation Engagements No. 10, *Attestation Standards: Revision*

and Recodification (AT sec. 301), applies only to complete presentations; essentially, this means full basic financial statements of prospective financial information that is intended for use by third parties.

SSAE No. 10 defines *financial forecasts* as the expected, or best, estimate of future financial results. *Financial projection* is a broader term that includes financial forecasts. Projections are “what if . . .” results that assume certain specified hypothetical circumstances or courses of action.

CPAs may be engaged to examine or at least compile financial statements that are intended for third parties (or reasonably expected to be used by third parties). SSAE No. 10 covers situations where the accountant performs agreed-upon procedures on the prospective financial information. The procedures and reports required depend, of course, on the type of engagement: an examination, compilation, or agreed-upon procedures.

5.2.4 Guide for Prospective Financial Statements

Although the AICPA Audit and Accounting Guide *Guide for Prospective Financial Information* does not have the authority of pronouncements enforceable under Rule 202 of the AICPA Code of Professional Conduct, it provides suggestions and recommendations on the preparation and presentation of prospective financial information. A CPA who fails to follow what the guide recommends should be prepared to justify departures from the recommended practice.

Among the many topics covered in the guide are:

- Definitions, types, and uses of prospective financial statements.
- Responsibility for prospective financial statements.
- Preparation and presentation guidelines.
- Types of accountants’ services.
- Appropriate procedures, representation letters, engagement letters, and reports for compilations, examinations, and agreed-upon procedures.
- Partial presentations.

6. SUCCESSION PLANNING

Management succession for closely held businesses is a significant challenge for many business owners because it must be planned far well in advance of the owner’s retirement. Unless the owner is planning a sale or merger, developing and grooming a suitable successor must begin

years before the owner's retirement. Some owners fail to address the issue because they are so immersed in operating the business that they neglect even such a vital question as who will take over in the event of disability, retirement, or death.

Succession plans often involve a family member, and owners who fail to deal with this issue in a forthright and timely manner can upset the harmony of family and business relationships. Sometimes owners assume that a child or other relative will step right in, even if they have never discussed this possibility with the individual concerned. In planning for succession, some owners may need to consider the interests of key employees who, though not family members, have contributed to the success of the business and expect a managerial role. Other owners may choose a successor but overlook training him or her to operate the business effectively.

6.1 Situations Requiring Succession Planning

The most appropriate strategy to follow in succession planning depends upon the current business situation and the amount of time available before retirement.

- An owner plans to retire but has no successor.
- A designated successor is no longer interested or available.
- A designated successor needs further training to operate the business effectively.
- An owner's retirement plans have changed, creating a need for a new plan.
- A designated successor lacks the financial resources required by the owner and therefore a new plan is needed.

6.2 Understanding the Business Environment

The goals of the owner, the owner's family, key employees, and the business should be clearly understood before developing a succession plan. Particularly in family businesses, the goals of each generation may never be discussed and the owner may simply assume that a son or daughter wants to become a full participant in the business and is capable of doing so. Open communication is critical in family businesses as there are often psychological and emotional issues involved in families working together.

6.2.1 Business valuation

To reach a decision about succession alternatives, the owner may need a valuation of the business. Often business owners have unrealistic expectations for the value of their business. For more information see the chapter on Business Valuations.

6.2.2 Business profitability

During the period of transition the business may need to support two families. Understanding the current profitability of the business and discussing this with the planned successor is essential. Depending on the period the owner continues actively in the business, changes may need to be made in the business structure to make it sufficiently profitable to support two families. The successor may need to supplement the business income with other earnings during the transition to provide adequate cash flow.

6.2.3 Goals of the owner, family, and key employees

The owner should identify the advantages and disadvantages of any specific ideas about succession. The owner should also understand how co-owners or involved family members feel about such ideas. The business may have operated under a formal business plan or buy-sell agreement with co-owners that may specify the buy-out terms. The owner should also consider the timetable for succession and whether management can manage the change.

Family members involved in the business should be evaluated to assess their personal and financial qualifications. The younger family members sometimes lack the experience and training needed to continue the business successfully. If this situation exists, the owner may consider installing a new CEO to provide the needed skills until the designated family member can properly manage and control the business.

Key employees should be interviewed to determine their opinions regarding the current performance and future potential of the company and their outlook on a potential sale or transfer and its impact on them.

6.3 Individual Goals and Concerns

6.3.1 The owner

After many years of focusing a career toward the business, the owner faces many unknown challenges and possibly fears in transitioning leadership of the business he or she might have spent a lifetime developing. Those issues include:

- A loss of business identity, which might include the reputation built up in the industry or community as an expert in a specialized field of knowledge.
- A reluctance to let go of the leadership reins, under the belief that a new CEO is too inexperienced or indecisive to make proper business decisions.
- Fear of retirement boredom, caused from not developing personal interests in hobbies, family, or civic functions during the owner's lifetime.

The owner will also be concerned about financial security and ongoing cash needs during retirement years. The closely held business may be the most significant asset of the owner and its value directly affects the financial lifestyle available in retirement. For that reason, early succession planning helps to maximize business value by developing management and operational systems that can increasingly function independently of the owner as retirement nears. A plan needs to consider that withdrawing the owner's equity at the least income tax cost is essential for maximizing post-retirement cash flow.

6.3.2 The family

The owner of a closely held business typically has children who will not succeed in management of the business. In many cases, one child may be groomed for succession while other children pursue other livelihoods. Dividing the wealth between active and inactive children is a significant concern for both owner and children. An equitable sharing of the owner's wealth does not necessarily result in equal sharing among the children. Operating a family business often involves long hours and other sacrifices that might be rewarded by a greater percentage of the wealth going to the business successor. Communicating this reality with each family member is essential to maintaining harmony.

The family may be plagued by issues that the owner is reluctant to confront, such as addictions or mental illness, that inhibit the owner's willingness to discuss business transition issues. In fact, sibling competition or conflict may make it impossible to select a suitable family member to succeed the owner. An intermediary can assist in opening up communication to resolve such issues. In some families, there are simply no qualified or interested children to step into the business.

6.4 Family Succession Strategies

The most effective method of transferring ownership to a designated family member is to involve all family members in developing and

implementing a definite plan. Any such plan must integrate into the overall estate plan. The plan needs to specify whether the transfer is a sale, gift, or bequest. This is particularly important when the owner wishes to take advantage of the transfer's tax consequences or obtain compensation from the successor. The plan also needs to define the time frame for the transfer, the responsibilities of the parties involved, and the mechanics of the ownership change (for example, stock or title transfers).

6.4.1 Asset transfers

In many cases the uninvolved children may receive non-business assets, such as investments, real estate, or life insurance, so the entire business unit can be transferred to the successor. Quasi-business assets, such as the real estate used by the business, may be transferred to uninvolved children. This allows them to keep a vital connection to the business by leasing property to the active sibling. In such cases, the owner should consider creating long-term leases that prevent disagreements between siblings. Where the business assets are best kept together, life insurance can be used to equalize distributions among the heirs of the owner's estate.

6.4.2 Gifts to family members

Transfers to family members may occur in annual gifts or all at once. To avoid taxable gifts that would reduce the \$1 million lifetime annual gift exclusion, gifts must be restricted in value to \$11,000 per year. However, spouses may also give consent to gifts and gifts may be made to a son and daughter-in-law to obtain multiple gift tax exclusions in one year. To qualify for the annual exclusion, the gift must be a present interest in the property (such as a remainder interest).

6.4.3 Self-canceling installment note

A self-canceling installment note (SCIN) is a note established at the time the business is sold to family members in which the terms of the note call for its cancellation upon the death of the seller. Provided the business is sold for fair value, the value of the SCIN is not included in the seller's estate for federal estate tax purposes. The seller's life expectancy must exceed the note's term at the time of sale and a premium must be paid, either in terms of a higher interest rate or above-market selling price, in order to meet the estate tax exclusion. A SCIN allows the owner to transfer assets to a greater extent than the gift tax exclusions allow.

6.4.4 Trusts and family limited partnerships

Trusts and partnerships may be used to transfer fractional interests in property. A family limited partnership (FLP) can be used to transfer gifts of larger potential value by claiming valuation discounts for minority ownership and control interests. The FLP terms cannot be so restrictive, however, that the gift exclusion is challenged by the IRS because the limited partners are so severely restricted from enjoying any current benefits of ownership.

6.4.5 Incorporated businesses

For an incorporated business, all children may share in the stock ownership of the business. To retain voting control while gifts are occurring, the owner needs to retain greater than 50 percent of the voting stock. Multiple classes of stock may be used; however, an S corporation may have only one class of stock with respect to distribution and liquidation rights. S corporations may use both voting and nonvoting common stock to accomplish this objective. The owner may redeem his or her majority stock ownership at retirement by selling stock back to the corporation in exchange for cash or notes extending over several years. The redemption qualifies for capital gain reporting on the installment method providing favorable tax consequences.

6.5 Selling to Key Employees

6.5.1 Leveraged buyout

Selling the business to employees who are not family members is similar to selling it to members of the family, except that many of the interpersonal problems unique to family relationships are absent. The employees need to have the financial resources to acquire the business as well as management capabilities. In a leveraged buyout (LBO) the company is sold to employees or others in a transaction financed by debt that is secured by the business assets or stock. Often the buyers are already active in the business and have the same motivations for the business to succeed as the selling owner. Future cash flow of the business is used to service the debt in an LBO.

6.5.2 Employee stock ownership plan

The owner may transfer ownership of the company by adopting an employee stock ownership plan (ESOP). Under this plan, the company each year contributes a portion of earnings to the ESOP to enable it to buy a percentage of the company stock. Issues to consider if contemplating an ESOP include:

- A longer time frame is required to transfer ownership.
- The company's assets and earning power are at risk for repayment of the ESOP debt; default could place the company in bankruptcy.
- Employees generally have the right to sell their stock to the company at its current market value. This could place a strain on the company with aging employees who wish to sell their stock upon retirement.
- An annual appraisal of the fair market value is required.

6.6 Retaining Ownership With Outside Management

As an alternative to ownership transfer, the owner may look to install a new CEO to run the business while the owner keeps rights of ownership. The owner may also wish to create a board of directors to provide leadership and vision for the company. This approach can be particularly useful where a suitable successor is not found or where the owner believes that the value of the company will significantly increase.

An owner may determine that none of the alternatives discussed above is likely to succeed. In that event, two other alternatives are viable: (1) a sale or merger with an outsider, or (2) liquidation. These alternatives are outside the scope of this chapter.

6.7 Develop a Written Plan

An essential part of the succession plan is communication. This is best accomplished through a detailed written plan with milestone dates. The plan should contain specific measurable actions each year until the owner's retirement. A succession plan should contain the following elements:

- The goals and objectives should be reiterated.
- The planning decisions should be communicated.
- An action plan should detail required steps at defined points.
- A contingency plan should be considered to outline the alternative courses of action if the intended succession cannot occur.
- Dates should be established to review, evaluate, and adjust the plan.

The plan should be reevaluated, reviewed and revised annually by all parties to keep everyone informed and working toward the same objectives.

Even the best-laid plans can fail to materialize if unforeseen events occur. The premature death or disability of the owner could unwind a

succession plan before the successor is in place to take over. A major business catastrophe such as a fire, lawsuit, or product safety recall require an immediate reassessment of the plan. Contingency plans may be made to control some of these risks. For example, the untimely death or disability of the owner can be mitigated by life or disability insurance. Contingency plans should also address the best alternative course of action if the identified successor fails to materialize.

Because succession plans have unique tax consequences to each party, it is important that a tax adviser be closely involved in developing this plan. As importantly, an adviser can act as a liaison between the parties (including bankers, attorneys, employees and family members) to monitor the progress toward the ultimate succession and challenge the parties when necessary to meet the milestones of the plan. Appendix 7 is a checklist that takes the business through the process of planning for retirement and business succession (see the *Toolkit CD-ROM*).

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Web Resources:

Bplans.com. Operated by Palo Alto Software, Inc., this Web site contains a large collection of free, sample business plans and information, as well as business planning software. See www.bplans.com.

Business Plan Archive. Operated by the Robert H. Smith School of Business at the University of Maryland, this Web site collects business plans and other documents from the 1990's dot-com era as a learning tool for researchers, business planners, and entrepreneurs. See www.businessplanarchive.org.

Center for Business Planning. This Web site operated by Business Resource Software, Inc., has sample business plans, resource links, and software products for business planning. See www.businessplans.org/index.asp.

Small Business Administration (SBA). This Web site contains topical areas devoted to the small business owner and general business planning concepts, including "Starting Your Business," "Financing Your Business," and "Managing Your Business." The "Library" section contains electronic publications devoted to business planning. See www.sba.gov/library/pubs.html

APPENDIX 1: Sample Business Plan Outline

- I. COVER SHEET**
- II. TABLE OF CONTENTS**
- III. EXECUTIVE SUMMARY**
 - A. Product or service
 - B. Market
 - C. Objectives, strategies, and critical success factors
 - D. Funding needed and purpose
 - E. Projected financial performance
- IV. ORGANIZATION, MANAGEMENT, AND HUMAN RESOURCES**
 - A. Organization
 - 1. Description and history
 - 2. Legal form and tax status
 - 3. Locations of headquarters, plants, offices
 - 4. Achievements and problems (both past and foreseen)
 - 5. Capital (debt or equity) sought and uses planned
 - 6. Current and planned capital structure
 - B. Management and human resources
 - 1. Short biographies or resumes of key managers and other personnel
 - 2. Current and proposed number of employees
 - 3. Compensation and benefits policies
 - 4. Union affiliations (present or foreseen)
 - 5. Management and human resources budget
- V. OBJECTIVES**
 - A. Projected returns, plans to go public
 - B. Expected use of resources
 - C. Timing of expected use
 - D. Methods planned
- VI. ACTION PLAN**
 - A. Detailed, specific, and coordinated steps to be taken to meet objectives specified
- VII. MARKETING**
 - A. Product or service
 - 1. Description (plus broader implications of product or service sold)
 - 2. Brand names, if applicable, and prices
 - 3. Patents, trademarks, copyrights, franchises, or licensing agreements
 - 4. Budget
 - B. Market analysis
 - 1. Target market
 - 2. Customer preferences and needs

3. Customers versus end users
 4. Size, history, and trends market
 5. Demographics
 6. Market research
 - C. Industry analysis
 1. Critical success factors
 2. Projected growth of industry, market, and company
 3. Important risks
 4. Ease of entry into market
 5. Industry patents, trademarks, copyrights, franchises, and licensing agreements
 6. Stage and maturity of the market
 7. Seasonality
 8. Sensitivity to business cycles
 9. Government regulation
 10. Normal credit policies
 11. Advertising and promotion
 12. Trends, fads, and importance of innovations and technological changes
 13. Price sensitivity analyses and possible substitutions
 14. Major competitors
 15. Distribution
 16. Prevailing sales methods
 - D. Marketing strategy
 1. Attributes of the product or service to be emphasized
 2. Pricing policies
 3. Distribution channels
 4. Service and warranties
 5. Credit policies
 6. Advertising and promotion
 7. Sales personnel or direct-marketing staffing and compensation
- VIII. PRODUCTION AND OPERATIONS
- A. Description of manufacturing, purchasing (retail), or delivery of services
 - B. Location, description of plants or offices
 - C. Capacity and utilization
 - D. Major cost components (e.g., direct labor versus specific direct material costs)
 - E. Expansion plans
 - F. Major fixed assets (current and planned)
 - G. Make-versus-buy considerations
 - H. Quality control
 - I. Changes in production technology and threats from imports

- J. Shelf-life, potential obsolescence of inventory
 - K. Current and expected inventory turnover
 - L. Discussion of major suppliers
 - M. Budget
- IX. FINANCIAL PRESENTATION AND DATA**
- A. Feasibility studies
 - B. Scenarios and time horizons
 - C. Assumptions
 - D. Historical financial statements
 - E. Prospective sales forecasts, cash flow statements, balance sheets, and income statements
 - F. Other financial analyses (e.g., break-even analyses, financial ratios)
- X. SUPPORTING DOCUMENTS AND EXHIBITS**
- A. Management biographies or resumes (optional)
 - B. Organizational charts
 - C. Pictures of product
 - D. Historical financial statements (optional)
 - E. Significant contracts or agreements
 - F. Articles from trade magazines

APPENDIX 2: Sample Format for Financial Statement Projections

BUSINESS PLANS				
APPENDIX 2: Sample Format for Financial Statement Projections				
Projection of Financial Statements				
Submitted By:				

		Actual		Projections	
		6/30/99	6/30/00	6/30/01	6/30/02
		1	2	3	4
		Date		Date	
		Period		Period	
		Spreadsheet in Hundreds <input type="checkbox"/>		Spreadsheet in Thousands <input type="checkbox"/>	
1		NET SALES			
2	P	COST OF GOODS SOLD			
3	R	GROSS PROFIT			
4	O	Less: Sales Expense			
5	F	General & Administrative Expense			
6	I	Depreciation			
7	T	OPERATING PROFIT			
8	and	Less: Other Expense			
9	L	Add: Other Income			
10	O	Gain/(Loss) on Sale of Fixed Assets			
11	S	PRE TAX PROFIT			
12	S	Less: Income Tax Provision			
13		NET PROFIT			
14	MEMO	Inventory Purchases			
15		CASH BALANCE (Opening)			
16	C	Add: Cash Sales Plus Receivable Collections			
17	A	Other Income			
18	S	Bank Loan Proceeds			
19	H	Other Loan Proceeds			
20		Proceeds from Fixed Asset Sales			
21	P	TOTAL CASH AND RECEIPTS			
22	R	Less Disbursements: Trade Payables			
23	O	Other Expense			
24	J	Operating Expenses			
25	E	Capital Expenditures			
26	C	Income Taxes			
27	T	Dividends or Withdrawals			
28	I	Bank Loan Repayments			
29	O	Other Loan Repayments			
30	N	Payment on LTD			
31	S	TOTAL CASH DISBURSEMENTS			
32		CASH BALANCE (Closing)			
33		ASSETS Cash & Cash Equivalents			
34		Receivables			
35	B	Inventory (Net)			
36	A	CURRENT ASSETS			
37	L	Fixed Assets (Net)			
38	A	TOTAL ASSETS			
39	N	LIABILITIES Notes Payable Banks			
40	C	Notes Payable Others			
41	E	Trade Payables			
42		Income Tax Payable			
43	S	Current Portion LTD			
44	H	CURRENT LIABILITIES			
45	E	Long Term Liabilities			
46	E	TOTAL LIABILITIES			
47	T	NET WORTH Capital Stock			
48		Retained Earnings			
49		TOTAL LIABILITIES AND NET WORTH			

BUSINESS PLANS App. 2

HOW TO USE THE FINANCIAL STATEMENT PROJECTION TEMPLATE

The Financial Statements projection is presented as an interactive template and may be completed by the banker, the customer, or both working together. It is designed to be flexible and may be used as a

- 1) Projection tool to provide a picture of the customer's present and future financial condition. Actual and estimated financial data form the basis of the calculations.
- 2) Tool for Analysis of the customer's borrowing needs and debt repayment ability.
- 3) Budget to aid in planning for the customer's financial requirements and repaying the banker's credit accommodation.

INSTRUCTIONS In the first column, enter the actual PROFIT AND LOSS STATEMENT and BALANCE SHEET of the date immediately prior to projection period. Then, in each subsequent column, covering a projection period (e.g. month, quarter, annual).

- Enter on the "date" line, the ending date of each projection period (e.g. 1/31, 3/31, 10____).
- Then follow the line-by-line instructions below.

<u>Line No</u>	<u>Title</u>	<u>Instructions</u>
PROFIT AND LOSS STATEMENT		
1	NET SALES	Enter the actual or beginning net sales figure in the first vertical column. We suggest you project future net sales based upon a % sales increase or decrease. Estimate acceptable % figure and record here ____%. (This % is generally calculated based on historical changes in net sales. However, consideration must also be given to factors, such as general business conditions, net products and services, and competition.)
2	COST OF GOODS SOLD	Enter all relevant components of customer's cost of goods sold calculation. Project future cost of goods sold based upon % increase or decrease. Estimate acceptable percentage figure and insert here ____%. (This figure is generally based on an increase or decrease. Estimate acceptable percentage.)
3	GROSS PROFIT	Line 1 minus line 2. This field is automatically calculated and protected from overwrite.
4 through 6	Sales Expense, Other Expense, General and Administrative Expense.	Enter all items. Project future expenses based on an increase or decrease. Estimate acceptable percentage figure and insert here ____%. (This figure is generally estimated as a percentage of sales based on prior years. Anticipated increases in major expenses, such as lease, officers' salaries, etc. should also be considered).
7	OPERATING PROFIT	Line 2 minus the sum of lines 4 through 6 (calculated).
8 through 10	Various adjustments to Operating Profit	Enter all items and estimate future adjustments (e.g. rents received, interest earned, gain (loss) on asset disposals, and miscellaneous income).
11	PRE-TAX PROFIT	Line 3 minus the sum of lines 8 through 10 (calculated).
12	Income Tax Provision	Common methods used for calculating Income Tax Provision include the most current year's tax as a % of the Pre-Tax Profit.
13	NET PROFIT	Line 7 minus the sum of lines 8 through 15 (calculated).

MEMORANDUM ENTRY

14 Inventory Purchases

This input is necessary for calculation of inventory and trade payables (line 35 and line 41) in the balance sheet section. If inventory purchase figure is not available, calculate balances based on historic turnover ratios.

CASH PROJECTION CALCULATION

15 CASH BALANCE

Enter opening cash balance. For subsequent periods, the closing cash balance (Line 32) from previous period is automatically carried forward in the template. Or, enter an adjusted amount to reflect a desired cash balance.

16 Receipts

Enter total cash sales plus receivables collection. Receivable collections must be calculated separately. This requires an analysis of the customer's sale and collection patterns.

- (1) Estimate the portion of each month's sales collected in that month and subsequent months.
- (2) From the sale's figure last month and the previous month(s), calculate how much of the existing receivable figure will be collected in the current month.
- (3) Deduct the collected receivables balance calculated in (2) above from the month-end balance of accounts receivables.
- (4) Add this month's sales figure to the remainder of receivable calculated in (3) above. This figure is the new accounts receivable figure for the end of the current month.

EXAMPLE

Assumptions: Projection calculation - monthly

Monthly net sales 9/30 - \$250M
 10/30 - \$300M
 11/30 - \$150M

Accounts Receivable
 Balance 9/30 - \$250M
 10/30 - \$367M

The average collection period is 45 days. This means that 66.7% (30 days:45 days) of each month's sales will be collected the following month and the remaining 33.3% in the second month.

To determine receivable collections for November

Accounts Receivable		
Balance	10/30	\$367M
Deduct 66% of 10/31 sales	200M	
33% of 9/30 sales	<u>83M</u>	<u>283M</u>
		84M
Add 11/30 sales		<u>150M</u>
Accounts Receivable		
Balance, 11/30		\$234M

17 Other income
 18 Bank Loan Proceeds
 19 Other Loan Proceeds
 20 Fixed Asset Proceeds

Automatically transfers from entry on line 9.
 Enter actual or projected bank loan proceeds on line 18.
 Enter any other loan proceeds on line 19.
 Enter cash amount received for sale of assets during the period on line 20.

21	TOTAL CASH AND RECEIPTS	Sum of line 15 through 20 (calculated).
22 through 30	Disbursements	Enter actual or estimated cash disbursements on these lines. Except, note line 23 and 24, other and operating expenses automatically transfer from the Profit and Loss section - lines 4, 5, and 8.
31	TOTAL DISBURSEMENTS	Sum of lines 22 through 30 (calculated).
32	CASH BALANCE (Closing)	Line 21 minus line 31 (calculated). Note: The closing cash balance on line 32 is automatically entered on line 15 in the next column. However, if the closing cash balance is negative or below the desired opening cash balance, then bank loans (line 18 and 19) may be needed to raise the closing cash balance to zero, or to the desired opening cash balance. The bank loan necessitates planning for repayment (line 28 and 29) in subsequent columns.
<u>BALANCE SHEET</u>		
(33 through 37)		
	ASSETS	
33	Cash and Equivalents	The closing cash balance (line 32) automatically transfers for all periods.
34	Receivables	Enter actual receivables in the first column, only. Spreadsheet automatically projects subsequent amounts using previous receivables figure plus projected net sales (line 1), minus projected cash sales and receivables collections (line 19).
35	Inventory	Enter actual inventory in the first column, only. Spreadsheet projects subsequent periods by adding purchases (line 14) to beginning inventory. Then subtracting materials used (line 2) to calculate the ending inventory amount.
36	Current Assets	Sum of line 33 through 35 (calculated).
37	Fixed Assets (Net)	Enter fixed assets in first column. Spreadsheet projects subsequent periods by, adding previous year's fixed asset balance to fixed asset additions (line 25) and loss on sale of fixed assets (line 10). Then, deduct amount received from sale of asset (line 20), any gain on fixed asset sale (line 10) and depreciation expense (line 6).
38	TOTAL ASSETS	Sum of lines 33 through 37 (calculated).
(39 through 48)	LIABILITIES	
39	Notes Payable-Banks	Enter first column, only. Spreadsheet projects subsequent periods using prior period balance plus loan proceeds (line 18), less repayments (line 28).
40	Notes Payable-Others	Enter first column, only. Spreadsheet projects subsequent periods using prior period balance plus note proceeds (line 19), less repayments (line 29).
41	Trade Payables	Enter first column, only. Spreadsheet projects subsequent periods using prior period balance plus purchases (line 14) less payments (line 22).
42	Income Tax Payable	Enter first column, only. Spreadsheet projects subsequent periods by adding prior period balance to income tax provision (line 12) and deducting income taxes paid (line 26).

43	Current Portion Long-Term Debt	Enter first column, only. Spreadsheet projects subsequent periods current maturities equal to the first column payments. Changes will need to be made to subsequent periods current portion of long term debt, if this assumption is not true.
44	CURRENT LIABILITIES	Sum of lines 46 through 51 (calculated).
45	Long-Term Liabilities	Enter long-term liabilities in first column, only. Spreadsheet projects subsequent periods by addition of the previous period long-term debt (line 45) to current portion (line 43) less loan payments (line 30). Note: Additions to long-term debt have been assumed to be zero, if additions occur adjustments to the template will be necessary.
46	TOTAL LIABILITIES	Sum of lines 39 through 45 (calculated).
(47 through 48)	NET WORTH	
47	Capital Stock	Enter current capital stock figure in first column, only. An increase will occur if capital stock is sold, a decrease will occur if existing stock is repurchased or retired. Spreadsheet assumes no changes to capital stock for subsequent periods.
48	Retained Earnings	Enter first column, only. Spreadsheet will calculate subsequent periods by adding prior period retained earnings to projected net profit (line 13), and deducting dividends or withdrawals (line 27).
49	TOTAL LIABILITIES AND NET WORTH	Sum of lines 46 through 48 (calculated).

NOTE: Additional rows may need to be inserted in the appropriate section of the template to allow for items not included in the example due to space limitations (e.g. other current or non-current assets, stockholder receivables, intangibles, current or long term liabilities, equities, etc.). If rows are inserted in the template, formulas may be affected, therefore, adjustments to formulas within the template will also be necessary.

APPENDIX 3: Business Planning Software

This exhibit lists software that can be used to help assemble business plans.

Adarus® Business Plan, Adarus Software, LLC. Develop a professional business plan quickly and easily with the help of four easy-to-use step-by-step wizards (sales, expense, asset/loan, business plan). The Microsoft Excel add-in and template create financial reports needed for a business plan, such as the cash flow, income, balance sheet, break-even, and financial ratios. A formatted business plan outline (title page, table of contents) is created in Microsoft Word. \$65. www.adarus.com/.

Automate Your Business Plan, Linda Pinson. Designed for novices, this is a standalone software program, rather than a set of templates that depends on third-party software for compatibility and support. This software presents a step-by-step planning process that enables the user to organize industry expertise into a working business plan that will attract capital and ensure success. Automate Your Business Plan is now being used in every SBA Business Information Center, Women's Business Development Center, and 1-Stop Capital Shop in the United States. \$80. www.business-plan.com/.

BizPlanBuilder, JIAN. This package includes spreadsheet and word-processing documents covering the entire spectrum of business plans. The software uses spreadsheet-based tools, including standalone financial model templates (for start-ups or established companies), investor tracking, proceeds from sale of business, space requirements worksheet, and stock option tracking. Word documents include Application for Business Credit, Articles of Incorporation, Commercial Lease Agreement, Core Practices, Core Values, Due Diligence Checklist, General Partnership Agreement, Independent Contractor Agreement, Invitations to Join Board of Directors/Advisors, Loan Proposal Summary Letter, Trademark Application, Press Release to Announce Your New Company, and Private Offering Cover Disclaimer. \$99. www.jian.com/.

Business Plan Manual/Your Plan, My Business Analyst.com. This software package includes professionally written templates already formatted in Word and Excel documents. The narrative description is organized into more than 90 pages of consciously scripted text: compelling headlines, sentences, whole paragraphs, tables, and lists. Sections include Executive Summary, Vision and Mission, Present Situation, Goals, Objectives, Company Overview, Legal Business Description, Management Team, Board of Directors, Strategic Alliances, Product Strategy, Current Product, Research and Development, Production and

Delivery, Market Analysis, Market Definition, Customer Profile, Competition, Risk, Marketing Plan, Sales Strategy, Distribution Channels, Advertising and Promotion, Public Relations, Financial Plan, Assumptions, Financial Statements, Capital Requirements, Exit/Payback Strategy, Conclusion, Supporting Documents, Integrated Financial Spreadsheets and Basic Financials. \$189. www.mybusinessanalyst.com/.

Business Plan Master, Versatile Software Solutions, Inc. Available in both standard and professional versions, the software includes template files for Lotus, Excel, Word, WordPerfect, and Works for Windows with online documentation. Also included are some very useful “bonus” files, such as amortization schedules, graphs for charting business growth, personal financial statement, and a nondisclosure form, among others. \$44. www.vssi.net/.

Business Plan Pro, Palo Alto Software, Inc. This business plan software package integrates with Marketing Plan Pro and Web Strategy Pro software, without overlap, to create a business plan and a corresponding Internet strategy. Demo available. \$99. www.paloalto.com/.

Business Plan Writer, Nova Development Corporation. This package enables entrepreneurs to create high-quality business plans for the purposes of obtaining financing or charting a course for their enterprises. There is no new software to learn with this product because preformatted model text and spreadsheet documents work directly with users’ existing word processor and spreadsheet programs. Users replace the existing text in the model text templates with their own words and replace the existing sample data in the prebuilt spreadsheets with their business numbers by following the guidelines embedded in the model business plan and appendices. A comprehensive User’s Guide provides further mentoring. \$99. www.novadevelopment.com/.

Exl-Plan, Invest-Tech Limited. Included are a range of powerful, easy-to-use shareware packages for preparing, for example, comprehensive financial projections, budgets, and business plans for six months and one, three, five, or seven years ahead. They can also be used as a tool for strategic and corporate planning, business restructuring, financial appraisals, and performance monitoring within almost any size business. Packages incorporate comprehensive facilities and features and are suitable for managers and business people with minimal previous experience of financial or business planning, as well as for experienced planners, accountants, consultants and model builders. Exl-Plan is distributed as shareware and freeware (\$0–\$289 to register). www.planware.org/.

PlanMagic Business, PlanMagic Corporation. This package features an easy-to-use browser interface, which guides the user through the planning process, product line analysis, detailed marketing, and sales and cash-flow forecasts. All the financial sheets are in an easy-to-use Finance Pro module, which offers automatic calculations, automatic ratios, automated charts, and much more. \$84.95. planmagic.com/.

PLANMaker, POWERSolutions for Business. This standalone business planning software features a unique tutorial system to go step-by-step through the entire business planning process. Users can cut and paste from any of the three professionally written sample business plans that are included. These sample business plans can assist in the start-up business planning stages by fine-tuning business concepts and business strategy. Formatting, pagination, and projected fiscal layout are automatic business planning tools incorporated into PLANMaker's business plan software. \$129. www.planmaker.com/.

Plan Write for Business, Business Resource Software, Inc. Software contains the knowledge and the tools to help users document a plan including Internet, traditional, product, or service business plans. Not only can users print a polished and complete business plan, the software also allows users to create easily a document ready to be published to the Internet. Plan Write for Business creates the HTML and graphic files as well as a Table of Contents hyper-linked to the business plan. Once the files have been created, the business plan may be placed on a secure Web site. \$119. www.businessplansoftware.org/.

Quick Plan 2000, Demand Creation, Inc. A complete industry-specific business plan, this software is available for these industries: Restaurant (full service, limited service, fast food, bakeries, caterers, night clubs, themed, expansions, and franchised), Pizzeria, Specialty Coffee, Salon and Day Spa, Bed and Breakfast, Hotel, Internet Start Up, and other businesses. It provides detailed assumptions about the latest industry trends. \$195-\$295. www.quickplan.com/.

APPENDIX 4: Sample Cash Flow Statement Format

(All figures except units are in dollars.)

	<u>Period 1</u>	<u>Period 2</u>	<u>Period 3</u>	<u>Period 4</u>	<u>Period 5</u>	<u>Period 6</u>	<u>Period 7</u>	<u>Period 8</u>	<u>Total</u>
Sources of cash									
Units sold									
Price/unit									
Net sales									
Cash collections on sales									
Stock issued									
Short-term borrowings									
Long-term borrowings									
Other									
Net sources of cash									
Uses of cash									
Units purchased									
Cost/unit									
Cash paid for purchases									
Labor									
Management									
Marketing/sales									
Administration									
Rent and utilities									
Taxes and fees									
Interest expense									
Fixed assets purchased									
Short-term debt repaid									
Long-term debt repaid									
Dividends									
Net uses of cash									
Net cash flow/period									
Cumulative cash flow									

	Period 1	Period 2	Period 3	Period 4	Period 5	Period 6	Period 7	Period 8	Total
Selected balance sheet accounts									
<i>Beginning balance</i>									
Cash									
Accounts receivable									
Inventory									
Fixed assets									
Total assets									
Accounts payable									
Short-term debt									
Long-term debt									
Equity									
Total liabilities & equity									

Additional data:

- Average days in receivables
- Average days in payables
- Average rate on loans

Also, see *Toolkit CD-ROM* for an Excel worksheet of this form.

APPENDIX 5: Sample Business Plan

MERRILL ENTERPRISES, INC.: New Business Proposal

Table of Contents

	Statement of Purpose
Part I.	The Business
	Business Strategy
	Key Objectives, Policies, and Plans
	Key Skills and Resources
	Management and Personnel
	Personal Objectives of Mr. David Merrill
	Relevant Industry Trends
Part II.	Financial Data
	Sources and Applications of Funds
	Balance Sheet, P&Ls, and Cash Flow
	Breakeven Analysis
	Risk Analysis
Part III.	Supporting Documents
	Personal Resume*
	"The Nature of American Broadcasting"*
	"FMs Continue to Show Strength in Latest Arbitron Sweep"*
	"Cox Study Sees Big FM Growth at AM's Expense"*
	"Arbitron Radio Sweep Shows Listening Habits Diversifying"*
	Doherty Memo: "Radio and TV Station"
	Revenue Trends"*

*These supporting documents have been omitted.

Statement of Purpose

Merrill Enterprises, Inc., is seeking capital of approximately \$400,000 to purchase an existing Class B or Class C FM radio station in the United States.

The acquired FM station will have tangible and intangible assets whose market value will be approximately \$1 million. Merrill Enterprises will make an equity investment of \$10,000, which together with other

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equity and debt financing, will be sufficient cash reserves, and provide adequate working capital to expand an existing market share in listeners and advertising revenues. These funds will finance the transition through an expansion phase which will allow the station to operate as an ongoing, highly profitable business entity.

PART I: THE BUSINESS

Business Strategy

The overall strategy of Merrill Enterprises is to identify and acquire an FM station that has the potential to be a first-class technical facility and does not compete directly with one or more stations owned by the large conglomerates that control a dominant share of the market.

Only stations that satisfy these two conditions will be possible acquisition candidates.¹ The rationale for this acquisition policy is that billings (and ultimately profitability) are a function of listenership and ratings which, in turn, are functions partly of coverage and the ability of a station to be heard relative to its competitors. Consequently, a powerful technical facility is a necessary condition of future growth in any given market.

For various reasons, an acquisition candidate may not have realized its full technical and marketing capability. Merrill Enterprises will identify such stations and the changes required to realize full potential. Upon successful acquisition, Merrill Enterprises will implement these changes.

The market needed to sustain a technically powerful station must be a relatively large one in order to achieve high profitability. However, the particular market cannot be dominated by one (or a few) station(s) with access to substantial capital and managerial resources. Capturing market share from such a competitor will prove to be both difficult and risky as a long-term strategy.

Key Objectives, Policies, and Plans

The key corporate objectives are to acquire and operate an FM station in the second 50's market² which has the potential to produce:

- 1) Sales of approximately \$2 million in five years (15 percent growth rate);

¹The acquisition candidates may also include: 1) stations that have both AM/FM licenses and are being sold as a package; 2) AM stations that have a Construction Permit to establish an FM station.

²Market size is determined by ratings of the American Research Bureau, on the basis of net weekly circulation for the most recent year. The selling prices of FM stations in the first 50's markets will be beyond our purchase capability.

- 2) Operating profits of 50 percent of net revenues within five years of acquisition;
- 3) Profit before taxes of 15 percent of net revenues within five years of acquisition.

The principal policies are:

1. Acquisition Policy

Only stations with upside potential from technical and marketing changes will be considered. Given available financial resources and future objectives, FM stations with annual billings of approximately \$400,000 to \$500,000 will be possible candidates. At an industry multiple of 2 to 2½ times sales, the price range will be approximately \$800,000 to \$1,250,000 for an FM station with these billings.

2. Marketing Policy

Our marketing policy is to identify the market segments and programming which provide the optimum coverage given the geographic scope of our radio signal.

This policy may seem overly general to individuals who are unfamiliar with the radio broadcasting business. Nevertheless, the general nature of this policy is its strength in that it recognizes the unique situations of most radio stations. It is flexible in spirit and recognizes that pat marketing formulas generally do not work when applied "across the board."

3. Technical Facility Policy

Our policy is to create and maintain the best technical FM facility in terms of coverage and ability to be heard relative to local competition. This policy requires the acquisition of a Class B or Class C station.

NOTE: The FCC grants commercial licenses to three types of FM stations. Class A stations are licensed throughout the United States. However, they are low powered with a maximum of 3 Kw of power. Both Class B and Class C stations are licensed in noncompeting sections of the United States and have considerably higher power capabilities which provide them with a competitive edge.

4. Financial Policy

Our principal financial policy is to limit debt financing within acceptable boundaries to provide:

- 1) Adequate cash flow for operations.
- 2) Above-average returns for equity investors.

The present market for FM stations is one which requires a buyer to have established lines of equity capital *before* entering negotiations for a specific site. FM stations with potential do not remain long enough on the market; consequently, prospective buyers must be capable of entering meaningful negotiations quickly and from a position of financial strength when an opportunity presents itself.

Key Skills and Resources

A quality broadcasting property is a scarce commodity. One reason they are scarce is because the FCC limits the supply of all broadcasting stations. But within the existing supply of stations, the acquisition of a station with a high-quality potential is also affected by the ability of potential owners to:

- 1) Find and identify a property with upside potential.
- 2) Negotiate a sale at a favorable price and terms.
- 3) Seek FCC licensing approval in an efficient and effective manner.
- 4) Identify and implement the steps needed to realize the station's full potential.

Merrill Enterprises has the expertise to successfully realize the above requirements. The principal skills possessed by Merrill Enterprises are the skills, capabilities, and experience embodied in its president, Mr. David Merrill.

The track record of Mr. Merrill speaks for itself (see Personal Resume in Section III³). He has demonstrated a strong management capability with the special ability to turn marginal FM stations into much improved performers. While he has had numerous successes in his 20-year career in the radio business, his current position as General Manager of one of the top hundred stations in the United States has demonstrated particularly that he can handle even the bleakest of situations and is capable of taking proper and decisive action when required.

Overall, Mr. Merrill brings together several skills not usually found in a single person in the radio broadcast business. He has above-average knowledge of the technical aspects of broadcasting. He is one of the best FM marketing managers in the United States. He has numerous contacts throughout the industry, which will provide a source of acquisition candidates and management technical personnel. He has a working knowledge of FCC regulations and an established relationship with them. He has strong sales and sales management capability. Finally, he has developed the skills needed for general management.

³Omitted from this sample plan.

Furthermore, Mr. Merrill is willing to relocate anywhere in the United States where a high-potential FM radio station is discovered and acquired.

Management and Personnel

Mr. Merrill will be president and general manager of the acquired station. Prior to takeover, he will staff the station with the best available personnel.

Personal Objectives of Mr. David Merrill

Mr. Merrill's personal objectives are:

- 1) To apply his management experience and expertise in the FM radio business.
- 2) To obtain a majority equity position in an FM radio station in order to fully exercise his capabilities.

Relevant Industry Trends

A number of industry trends are emerging which are relevant to this investment proposal.

These trends include the following:

- 1) Several sources indicate that:
 - a) FM stations have performed well above average as a group, especially those stations employing a "beautiful music" format (see "FMs Continue to Show Strength in Latest Arbitron Sweep." Section III*);
 - b) FM stations have achieved their growth at the expense of AM radio stations (see "Cox Study." Section III*);
 - c) FM stations have achieved a position of strong positive cash flow which is expected to improve even further by 200X ("Cox Study." Section III*).
- 2) Market surveys indicate that radio listening habits are becoming more diverse. This trend suggests that creative marketing, including program definition, will become even more critical in the future. (See "Arbitron Sweep Shows Listening Habits Diversifying." Section III*).
- 3) The expectation is that independent FM stations in the top 125 markets will experience a sales growth of 25% to 30% in 200X. (See "Doherty Memo." Section III*).

Excerpts from an FCC publication, "The Nature of American Broadcasting," present other trends relevant to this proposal. It is included in Section III*.

PART II: FINANCIAL DATA

Sources and Applications of Funds

The likelihood is that the search process for an FM station will uncover two kinds of potential acquisitions.

One kind is the FM station that has a facility with appropriate technical capability in place. The second kind is a station that does not have the appropriate facility but, for example, possesses a construction permit to establish the required plant and equipment. Our assumption is that the asking price for the former facility will be considerably higher than the station requiring incremental capital investment. Consequently, the application of funds will differ for the two different kinds of acquisitions.

Exhibit 1 shows a sources and applications statement assuming no incremental investment in plant and equipment.

Exhibit 2 presents a similar statement assuming additional plant and equipment are required to achieve FM Class B or C status.

Professional and ethical considerations will require Mr. Merrill to inform his present employers that he intends to actively seek an FM station for purchase. He will probably have to relinquish his present position at the time he announces his intentions.

However, Mr. Merrill estimates that it will require between six to twelve months locating, negotiating a purchase, and obtaining FCC approval for the transfer of ownership. During this interim period, Mr. Merrill requires a salary that will allow him to meet his existing financial commitments. This salary is figured at an annual rate of \$45,000.

Balance Sheet, P&Ls, and Cash Flow

The following exhibits demonstrate the potential of Merrill Enterprises to generate cash and profits.

Exhibit 3 shows a simple, opening balance sheet.

Exhibits 4 and 5 present a balance sheet and income statement for a potential acquisition XYZ, which is an “average” operation according to industry statistics.

Exhibit 6 shows the effect of acquiring XYZ on the balance sheet of Merrill Enterprises.

Exhibit 7 presents the consequences of retiring XYZ’s debt immediately after acquisition.

Exhibits 8–12 provide income statements, cash flows, and balance sheets for Merrill Enterprises after one year of operations.

Exhibit 13 provides a five-year projection of income. One major assumption is that the company attains its five-year goal of reducing operating expenses to 50 percent of sales. A second assumption is that a 25 percent growth in sales is realized in year three from marketing changes instituted by Mr. Merrill during the previous two years.

Exhibit 1
Sources and Applications of Cash
 (No Incremental P&E)

Sources		
Mr. David Merrill		\$ 10,000
Venture Capital		400,000
Bank Loan		800,000
Total		<u>\$1,210,000</u>
Applications		
Purchase Stock of Station		\$1,050,000
Working Capital		100,000
Reserve for Contingencies		15,000
Pre-purchase salary for Mr. Merrill		45,000
Total		<u>\$1,210,000</u>

Exhibit 2
Sources and Applications of Cash
 (Incremental P&E Investment)

Sources		
Mr. David Merrill		\$ 10,000
Venture Capital		400,000
Bank Loan		800,000
Total		<u>\$1,210,000</u>
Applications		
Purchase Stock of Station		\$ 800,000
Plant, Equipment & Renovations		250,000
Working Capital		100,000
Reserve for Contingencies		15,000
Pre-purchase salary for Mr. Merrill		45,000
Total		<u>\$1,210,000</u>

Exhibit 3
Balance Sheet for September 1, 20X1

Assets		Liabilities and Equity	
Cash (Equity)	\$ 410,000	Long-Term Debt	\$ 800,000
Cash (Bank loan)	800,000	Equity	410,000
Total Assets	<u>\$1,210,000</u>	Total Liabilities and Equity	<u>\$1,210,000</u>

Exhibit 4
Balance Sheet for December 31, 20X1
of Acquisition Company XYZ

Assets		Liabilities	
Cash	\$ 6,889	Accounts Payable	\$ 41,667
Accounts Receivable	76,444	Notes Payable	13,050
Prepays	2,640	Accrued Expense	14,711
Deferred Reciprocal Expense	<u>9,775</u>	Deferred Reciprocal Revenue	<u>17,322</u>
Total Current	\$ 95,748	Total Current	\$ 86,750
Net P&E	200,000	Net Long-Term Debt	86,286
Intangible Assets	<u>103,527</u>	Total Equity	<u>226,239</u>
Total Assets	<u><u>\$399,275</u></u>	Total Liabilities and Equity	<u><u>\$399,275</u></u>

Notes for Exhibit 4

The figures in Exhibit 4 are derived from the operations of an actual station that is considered a representative example.

Cash—Cash balances are traditionally low in the radio business. The equivalent of about 5.7 days is assumed in this example.

A/R—Projected at about 63 days. $435,000/360 \times 63 = 76,444$.

Deferred—Reciprocal Expenses and Revenues are trade accounts where radio advertising time is exchanged for goods and services. They are projected conservatively to show a net liability.

P&E—Plant and equipment. Estimated by Mr. Merrill.

Intangible Assets—Estimated from private source.

Accounts Payable—Projected at 35 days based on sales since information was not available for “purchases” nor “cost of goods sold.”

Notes Payable—The current portion of long-term debt.

Exhibit 5
Income Statement for December 31, 20X1
of Acquisition Company XYZ

Sales	\$435,000	100%
Agency Commissions	52,519	-12
Net Sales	382,481	88
Operating Expenses (includes Depreciation)	304,994	-70
Operating Income	77,487	18
Other Expenses (interest, amortization)	12,487	- 3
Profit before Taxes	65,000	15
Taxes	<u>19,700</u>	- 5
Net Profit	45,300	10
Depreciation	<u>12,900</u>	+ 3
Approximate Cash Flow	<u><u>58,200</u></u>	13

Notes for Exhibit 5

Agency commissions, operating expenses, other expenses, taxes, and depreciation in Exhibit 5 are derived from the operations of an actual station that is considered a representative example.

These calculations are supported by the National Association of Broadcasters (NAB) data which show that the average pre-tax profit of FM stations with sales in the \$500,000 range is 14–15 percent of sales.

Exhibit 6
Balance Sheet for January 20X2
Merrill Enterprises, Inc.

(Buys Station XYZ for \$1,050,000 with net tangible assets of \$122,712.)

Cash	\$ 160,000	A/P	\$ 41,667
Cash	6,889	N/P	13,050
Accounts Receivable	76,444	Accrued Expense	14,711
Prepays	2,640	Deferred Reciprocal	
Deferred Reciprocal		Revenue	<u>17,322</u>
Revenue	<u>9,775</u>	Total Current	86,750
Total Current	255,748		
P&E	200,000	Long-Term Debt	86,286
		Long-Term Debt	<u>800,000</u>
Intangible Assets	927,288	Total Liabilities	973,036
		Equity	410,000
Total Assets	<u><u>\$1,383,036</u></u>		<u><u>\$1,383,036</u></u>

Notes for Exhibit 6

Net tangible assets = 122,712 = (from Exhibit 4)
 (95,748 + 200,000) - (86,750 + 86,286)

Cash = 160,000 = (1,210,000 - 1,050,000) + 6,889 from cash account of acquired company.

All other current assets and liabilities from acquisition company.

P&E = Plant and equipment subtracted from Exhibit 4

Intangible assets = difference between selling price (1,050,000) and net tangible assets (122,712) allocated to specific intangible with fixed life.

Exhibit 7
Balance Sheet for January 2, 20X2
Merrill Enterprises, Inc.

Given excess working capital position, assume Note Payable and respective long-term debts are retired immediately.

Cash	\$	67,553	A/P	\$	41,667
A/R		76,444	Accrued Expense		14,711
Prepays		2,640			
Deferred Reciprocal Expense		9,775	Deferred Reciprocal Revenue		17,322
Total Current		156,412	Total Current		73,700
P&E		200,000	Long-Term Debt		800,000
Intangible Assets		927,288	Equity		410,000
Total Assets		\$1,283,700			\$1,283,700

Notes for Exhibit 7

Cash balance of \$166,889 reduced by 13,050 + 86,286 to \$67,553.

Exhibit 8
Income Statement for December 31, 20X2
Merrill Enterprises

Sales (15% growth assumed)	\$500	100%
Agency Commissions	60	12
Net Sales	440	88
Depreciation	20	4
Operating Expenses	305	61
Operating Income	115	23
Interest	45	9
Amortization	45	9
Pre-Tax Profit	25	5
Tax	4	1
Profit After Tax	<u>21</u>	<u>4</u>
Depreciation & Amortization	65	13
Cash Flow	86	17

Notes for Exhibit 8

This pro forma is actually quite conservative since it reflects no significant reduction of costs which Mr. Merrill states is usually possible when taking over most FM properties. For instance, it is not unusual to find a station that is overstaffed. Still, we have projected operating expenses plus depreciation at 65 percent of sales. At the pre-acquisition sales level of \$435,000, this is equivalent to 75 percent of sales. (\$325,000/435,000). Even under these conservative conditions, a profit after tax is realized plus a cash flow equivalent roughly to a 20 percent return on equity.

Exhibit 9
Cash Flow for 12 Months Ending December 31, 20X2
Merrill Enterprises

Sales	<u>\$500,000</u>
Cash Inflows:	
Collection of January 1, 20X2 A/R	76,444
Cash Receipts from 20X2 sales (45-day lag)	<u>437,500</u>
Total Cash Inflows	<u>513,944</u>
Cash Outflows:	
Operating Expenses	305,000
Debt Service (interest only required)	45,000
Commissions (12 percent of sales)	60,000
Income Tax Estimates	<u>4,000</u>
Total Cash Outflows	<u>414,000</u>
Net Cash Flow	<u><u>\$ 99,944</u></u>

Exhibit 10
Changes in Balance Sheet Derived from 12 Months
P&L and Cash Flow Statements

Cash	+	\$99,944	Acct's Pay. plug — 1956
Acc'ts Rec.	-	13,944	Accrued + 1956 held at 12 days
Plant & Equip.	-	20,000	Deferred Reciprocal Revenue —no change
Intangible Assets	-	45,000	Long-Term Debt & Equity — no change
Prepays & Deferred Reciprocal Expense		0	Retained Earnings + \$21,000
Total		\$21,000	Total
			+\$21,000

Notes for Exhibit 10

Cash is derived from net cash flow of Exhibit 9 which is slightly higher but more accurate than rough cash flow shown in Exhibit 8.

Accounts Receivable is also derived from Exhibit 9 (sales \$500,000 – cash receipts of \$437,500 – \$76,444 January 1, 20X2 A/R).

Plant and equipment is depreciated straight-line over ten years (\$200,000/10) – \$20,000.

Intangible Assets are amortized over 20 years. Actual figure is \$46,364, but this was rounded to \$45,000.

No change was assumed for prepaids, deferred reciprocal expenses and revenues, long-term debt, equity.

For conservatism, accrued expenses were held at a rate equivalent to 12 days of sales over 360-day year.

Exhibit 11
Balance Sheet for December 31, 20X2
Merrill Enterprises

Cash	\$	167,497 ¹	Accounts Payable	\$	39,711
Accounts Receivable		62,500	Accrued Expense		16,667
Prepays		2,640			
Deferred Reciprocal Expense		9,775	Deferred Reciprocal Revenue		17,322
Total Current		242,412	Total Current		73,700
Plant & Equipment		180,000	Long-Term Debt		800,000
Intangible Assets		882,288	Equity		410,000
		\$1,304,700	Retained Earnings		21,000
					\$1,304,700

Exhibit 12
Balance Sheet for January 1, 20X3
Merrill Enterprises

Cash Position Reduced to Retire 1/8th of Long-Term Debt and Make Dividend Payment to Preferred Stockholders

Cash	\$	48,497	Accounts Payable	\$	39,711
Accounts Receivable		62,500	Accrued Expense		16,667
Prepays		2,640			
Deferred Reciprocal Expense		9,775	Deferred Reciprocal Revenue		17,322
Total Current		123,412	Total Current		73,700
Plant & Equipment		180,000	Long-Term Debt		700,000
Intangible Assets		882,288	Equity		412,000
Total Assets		\$1,185,700			\$1,185,700

Notes for Exhibit 12

Cash accounts reduced to adjust for principal payment of long-term debt (\$100,000) and dividend payment (\$19,000). Acid test or liquidity ratio still about 1:0.

Exhibit 13
Five-Year Income Projection

Growth Rate:	15%	15%	25%	15%	15%
End of Year:	1	2	3	4	5
Sales	500	575	719	827	951
Agency Commissions	60	69	86	99	114
Net Sales	440	506	633	728	837
Expenses					
Depreciation	20	20	20	20	20
Other Operating*	305	334	395	430	475
Operating Income	115	152	218	278	342
Other Expenses					
Interest	45	45	45	45	45
Amortization	45	45	45	45	45
Profit Pre-Tax	25	62	128	188	252
Taxes	6	18	50	79	109
Net Profit	19	44	78	109	143
Depre. & Amort.	65	65	65	65	65
Cash Flow	84	109	143	174	208
*As a % of Sales	61%	58%	55%	52%	50%

Breakeven Analysis

Radio broadcasting is a relatively high fixed-cost business. The only variable cost element that changes month-to-month with sales is commissions. These commissions include payments to agency and internal sales personnel.

Consequently, the basic cost structure of the business is:

Sales	=	100%
Variable Costs	=	<u>27%</u>
Contribution		73%

Using a contribution margin of 73 percent, we can calculate the sales (profit) breakeven and the cash breakeven.

As noted in Exhibit 8, the percentage of agency commissions to total sales is 12 percent. The difference between 12 percent and 27 percent (total variable costs) represents commissions paid to representatives and manager overrides. This 15 percent amounts to \$75,000, which is included in operating expenses of Exhibit 8. Once removed, total fixed costs are:

$$\$340,000 = (\$305,000 - 75,000) + 20,000 + 45,000 + 45,000$$

Consequently, "profit" breakeven is:

$$\$466,000 = \frac{\$340,000}{.73}$$

By removing non-cash expenses (depreciation and amortization of intangible assets), a "cash" breakeven can be calculated as:

$$\$377,000 = \frac{\$340,000 - 20,000 - 45,000}{.73}$$

These breakevens represent, respectively, 93 percent and 75 percent of gross sales.

Risk Analysis

Compared to most new venture investments, the risks associated with the proposed venture are considerably lower.

One reason for this lower risk is that the product (FM broadcasting) is a known and successful medium. Also, FM and FM/AM combinations appear to be entering the growth phase of their product life cycles and supplanting the more mature AM radio broadcasting.

A second reason for lower risk is that the entrepreneur in question is deeply familiar with the proposed business. He has direct management experience with the product, as opposed to someone with a new product but no experience managing a business built around the product.

A third reason is that the proposal calls for the acquisition of an ongoing business, as opposed to a startup. This will maximize Mr. Merrill's strengths as quickly as possible.

Fourth, a minimum amount of capital will be exposed before an FCC licensing decision is reached. The sum in question is approximately \$20,000 to \$25,000 for Mr. Merrill's salary during this interim period. Also, the estimated probability of denial is extremely low given the FCC's goals.

IRS PRACTICE AND PROCEDURE

- 1. MISSION AND ORGANIZATION OF THE INTERNAL REVENUE SERVICE**
- 2. PRACTICE BEFORE THE IRS**
 - 2.1 Persons Authorized to Practice Before the IRS**
 - 2.1.1 Attorneys
 - 2.1.2 CPAs
 - 2.1.3 Enrolled agents
 - 2.1.4 Enrolled actuaries
 - 2.1.5 Limited practice
 - 2.1.6 Authorizations and powers of attorney
 - 2.1.7 Privileged communications
 - 2.2 Persons Who May Not Practice Before the IRS**
 - 2.3 Rules Governing Conduct**
 - 2.3.1 Circular 230
 - 2.3.2 AICPA tax standards
 - 2.3.3 AICPA Code of Professional Conduct
 - 2.3.4 Conduct of IRS employees
 - 2.4 Tax Preparer's Liability**
 - 2.4.1 Definition of "tax return preparer"
 - 2.4.2 Substantial preparation
 - 2.4.3 What constitutes an income tax return
 - 2.4.4 Potential penalties facing preparers
 - 2.4.5 Recordkeeping
 - 2.4.6 Procedures for assessing penalties
 - 2.4.7 Injunctions against preparers
 - 2.5 Understatement Penalties**
 - 2.5.1 Effect of understatement of tax liability
 - 2.5.2 Multiple penalties
 - 2.5.3 Negligent disregard for rules and regulations
 - 2.5.4 Normal business practices
 - 2.5.5 Substantial authority
- 3. IRS PROCEDURE FOR EXAMINING RETURNS**
 - 3.1 Initial Review and Screening**
 - 3.2 Selection for Audit**
 - 3.2.1 Discriminant Function System (DIF)
 - 3.2.2 Manual identification
 - 3.2.3 National Research Program (NRP)
 - 3.2.4 IRS instructions to classifiers and auditors
 - 3.3 Chances of Selection**

- 3.4 Items That May Trigger an Audit
- 3.5 How to Reduce the Likelihood of an Audit
- 3.6 Safeguards During an Audit (IRC Sec. 7520)
- 3.7 Advance Warning of an Audit

4. TYPES OF EXAMINATIONS

- 4.1 Examinations In or From an IRS Office
 - 4.1.1 Correspondence examination
 - 4.1.2 Office examination
- 4.2 Field Examinations
- 4.3 Team Examinations
- 4.4 Select Employee Plans Return Examination (SEPRE)
- 4.5 Repetitive Examinations
- 4.6 Audits of Partnerships
 - 4.6.1 Consistency of treatment of partnership items
 - 4.6.2 Partnership audit procedures
 - 4.6.3 Notices to partners
 - 4.6.4 Participation by a partner in an administrative proceeding
 - 4.6.5 Agreements binding on partners
 - 4.6.6 Provision of judicial review
 - 4.6.7 Computational adjustments
 - 4.6.8 Credits or refunds
 - 4.6.9 Limitation periods for assessments and refund claims
- 4.7 Audits of S Corporations
- 4.8 Alternative Dispute Resolution

5. HOW TO PREPARE FOR AN EXAMINATION

- 5.1 Preparing for Office or Field Examinations
 - 5.1.1 Obtaining a copy of a tax return
- 5.2 Burden of Proof: Documenting the Taxpayer's Position
- 5.3 Beginning the Examination
 - 5.3.1 Tips for conduct
 - 5.3.2 Negotiation and settlement
- 5.4 Market Segment Specialization Program

6. CRIMINAL AND CIVIL TAX FRAUD

- 6.1 How Fraud Investigations Are Initiated
- 6.2 How to Detect That a Fraud Referral Has Been Made
- 6.3 Cash Reporting Requirements

7. RESULTS OF THE EXAMINATION

- 7.1 Consent to Assessment: Form 870
- 7.2 Extending the Statute
- 7.3 IRS Review of Agreed Cases

8. ASSESSMENT AND COLLECTION OF TAX

- 8.1 Assessment
- 8.2 What the IRS May Assess
 - 8.2.1 Deficiency
 - 8.2.2 Exceptions to the regular deficiency notice procedure
 - 8.2.3 Statute of limitations on assessment
 - 8.2.4 Individual master file
- 8.3 Collection
- 8.4 Safeguards Against IRS Seizure
- 8.5 Compromise
- 8.6 Installment Payment (IRC Sec. 6159)
- 8.7 Dischargeability of Taxes in Bankruptcy
 - 8.7.1 Individuals
 - 8.7.2 Partnerships and corporations

9. APPEALS PROCESS

- 9.1 The Thirty-Day Letter
 - 9.1.1 The appeals office
 - 9.1.2 The appeals officer
 - 9.1.3 Alternative dispute resolution
- 9.2 The Ninety-Day Letter
- 9.3 Appeals Before the Courts
 - 9.3.1 The U.S. Tax Court
 - 9.3.2 The U.S. District Court and the U.S. Court of Federal Claims

10. OBTAINING A REFUND

- 10.1 Claims Procedures
- 10.2 Speedy or Quick Refund Procedures
- 10.3 Interest on Refunds and Underpayments
- 10.4 Protective Refund Claim

11. RULINGS, DETERMINATIONS, TECHNICAL ADVICE

- 11.1 Private Letter Rulings
- 11.2 Determination Letters
- 11.3 Technical Advice Memoranda (TAM)
- 11.4 Freedom of Information Act
- 11.5 User Fees for IRS Services
- 11.6 Closing Agreements
- 11.7 Correspondence

12. PROBLEM RESOLUTION: NATIONAL TAXPAYER ADVOCATE

13. TAX SHELTER DISCLOSURE REGULATIONS

- 13.1 Disclosure Requirements
 - 13.1.1 Listed transactions
 - 13.1.2 Confidential transactions
 - 13.1.3 Transactions with contractual protection
 - 13.1.4 Loss transactions
 - 13.1.5 Transactions with a significant book-tax differential
 - 13.1.6 Transactions involving a brief asset holding period
- 13.2 Registration Requirements
- 13.3 List Maintenance Requirements
 - 13.3.1 Material advisors
 - 13.3.2 Potentially abusive tax shelters
 - 13.3.3 List maintenance and disclosure requirements
- 13.4 Additional Penalties and Sanctions

14. ALTERNATIVE DISPUTE RESOLUTION

- 14.1 Pre-Filing Agreements (PFA)
- 14.2 Alternative Resolution at Examination
 - 14.2.1 Fast Track Settlement (FTS)
 - 14.2.2 Fast Track Mediation (FTM)
 - 14.2.3 Tax Exempt Bond mediation (TEB)
- 14.3 Alternative Resolution at Appeals
 - 14.3.1 Early referral to Appeals
 - 14.3.2 Nonbinding mediation
 - 14.3.3 Binding arbitration
- 14.4 Binding Arbitration in Tax Court Cases

15. CIRCULAR 230

- 15.1 Background
- 15.2 Best Practices for Tax Advisors
- 15.3 Definition of Covered Opinions
 - 15.3.1 Listed transactions
 - 15.3.2 Principal purpose transactions
 - 15.3.3 Significant purpose transactions
 - 15.3.3.1 Reliance opinions
 - 15.3.3.2 Marketed opinions
 - 15.3.3.3 Conditions of confidentiality
 - 15.3.3.4 Contractual protection
 - 15.3.4 Exclusions
- 15.4 Requirements for Covered Opinions
 - 15.4.1 Requirements regarding factual matters
 - 15.4.2 Requirements regarding relation of law to facts

- 15.4.3 Requirements regarding evaluation of significant federal tax issues
 - 15.4.3.1 Additional requirements for marketed opinions
 - 15.4.3.2 Exception for limited scope opinions
- 15.4.4 Requirements regarding overall conclusions
- 15.4.5 Required disclosures
 - 15.4.5.1 Relationship with promoter
 - 15.4.5.2 Marketed opinions
 - 15.4.5.3 Limited scope opinions
 - 15.4.5.4 Opinions that do not reach a more-likely-than-not conclusion
- 15.5 Procedures to Ensure Compliance
- 15.6 Requirements for Other Written Advice
- 15.7 Conclusion

SUGGESTED REFERENCES

RESOURCE: Where to Obtain Out-of-State Tax Forms (*see Toolkit CD-ROM*)

APPENDIX 1: Recognition and Authorization Requirements for Persons Appearing Before the IRS (*see Toolkit CD-ROM*)

APPENDIX 2: Record Retention (*see Toolkit CD-ROM*)

APPENDIX 3: Sample Circular 230 Disclosure Statements (*see Toolkit CD-ROM*)

APPENDIX 4: Covered Opinions (*see Toolkit CD-ROM*)

1. MISSION AND ORGANIZATION OF THE INTERNAL REVENUE SERVICE

The Internal Revenue Service (IRS) is a branch of the Treasury Department. The commissioner of the IRS is the top official. From the national office in Washington, D.C., the commissioner oversees operations and sets policy.

The IRS Restructuring and Reform Act of 1998 (the 1998 Act) revised the three-tier structure of national, regional, and district offices. The new focus is on four operating divisions, namely, (1) Wage and Investment (W&I); (2) Small Business/Self Employed (SB/SE); (3) Large and Mid-Size Business (LMSB); and (4) Tax Exempt and Government Entities (TE/GE). Other divisions include appeals, communications, and criminal investigation. The most significant part of the 1998 Act, however, was twofold. First, it created an IRS Oversight Board with nine members, six of whom are referred to as “private life” members who are otherwise neither federal officers nor employees. This nine-member board will oversee the IRS, particularly its law enforcement and collection procedures—two IRS activities that the U.S. Senate found to be problem-prone. Second, steps have been taken to reinforce the independence of the appeals function within the IRS, particularly by placing limitations on communications between appeals officers and other IRS employees during the pendency of an appeal.

The office of the chief counsel of the IRS is a division of the Treasury Department. Legal counsel are located in each region. Many district offices also have legal counsel. One of the tasks of the counsel’s office is to resolve the taxpayer’s administrative appeals.

Tax examiners, also called office auditors, conduct their examinations within the IRS office, by correspondence, or by office appointment. Revenue agents handle field examinations at a tax practitioner’s or taxpayer’s place of business. Revenue officers are agents of the collection division. Special agents handle criminal investigations.

2. PRACTICE BEFORE THE IRS

Treasury Department Circular 230, Practice Before the Internal Revenue Service, covers all matters connected with a presentation to the IRS or any of its officers or employees relating to a client’s rights, privileges, or liabilities under laws or regulations administered by the IRS. Such presentations include preparing and filing necessary documents, corresponding and communicating with the IRS, and representing a client at conferences, hearings, and meetings. A return includes an amended return and a claim for refund.

This means that any person may prepare a tax return for himself or herself or for any other person. If that return is audited, the preparer, without further credentials or qualification, may appear to explain the return and represent the taxpayer before tax examiners, revenue agents, or other examining officers of the district audit division. Authorization from the taxpayer is required. Authorization should be indicated on Form 2848. Tax return preparers who are not CPAs, attorneys, enrolled agents, or actuaries cannot represent the taxpayer at any level of proceedings beyond the examination level, even if they hold the taxpayer's power of attorney. They cannot, for example, appear before the appeals division. They cannot execute documents that limit or bind the taxpayer's rights of action, such as waivers of time limits, consents to immediate assessment of tax, or closing agreements assenting to a deficiency.

The IRS assigns a centralized authorization file number (CAF) to each person granted "representative authority." The centralized file indicates the extent of a representative's authority. A tax preparer who is assigned more than one CAF should choose one of the numbers to use exclusively in subsequent communications with the IRS.

Tax return preparers are assigned a unique number that must be indicated on every return or correspondence (IRC Sec. 6109 and Treas. Reg. Sec. 1.6109-2).

Appendix 1, "Recognition and Authorization Requirements for Persons Appearing Before the IRS," on *The Accountant's Business Manual Toolkit CD-ROM*, summarizes requirements for appearing before the IRS.

2.1 Persons Authorized to Practice Before the IRS

Corporations may be represented by their officers, partnerships by their partners, and estates or trusts by their fiduciaries.

Treasury Department Circular 230 (hereafter called Circular 230) explains who has the right to practice before the IRS and specifies standards of conduct. This circular is available at most local IRS offices or through the toll-free "forms" number listed in most telephone directories and can be downloaded from the IRS Web site (www.irs.gov).

2.1.1 Attorneys

Any attorney not currently under suspension or disbarment may practice before the IRS provided that a written document, stating that the attorney is currently admitted as an attorney, and a power of attorney (Form 2848), signed by the taxpayer and the attorney, are filed with the IRS.

This written document should fully specify the addresses and identification numbers of the attorney and the taxpayer. In addition, attorneys can gain limited authority to receive and inspect tax information from the IRS by filing an authorization and declaration (Form 8821) that has been signed by the client and the attorney. Attorneys must, however, apply to the Tax Court and other federal courts and be admitted to them before representing clients in those courts.

2.1.2 CPAs

Certified public accountants not currently under suspension may practice before the IRS provided that Form 2848 has been filed with the IRS. CPAs may not, however, perform any activity that constitutes the practice of law, including most aspects of tax litigation such as the filing of a petition or pleading with any court. A CPA may be admitted to practice before the Tax Court, as may any person, by passing an examination on court procedures.

2.1.3 Enrolled agents

Any person, even though he or she is not an attorney or CPA, may seek to pass an IRS examination on technical aspects of taxation, thus gaining the right to be designated an enrolled agent or person. Enrolled agents may represent taxpayers to the same extent as CPAs. They may not practice law, nor may they practice before the Tax Court. The examination for enrollment is given in September. Application for the September exam must be made on Form 2587 by August 15. A sample examination is in IRS Publication 693.

Former IRS employees who were engaged in applying and interpreting tax matters for a minimum of five years may apply to become enrolled agents by filing a Form 23 within three years of leaving the IRS (no examination is necessary).

Regulations require enrolled agents to complete continuing education courses prior to renewal of their enrollment. (Bar associations and state licensing boards now require continuing education of CPAs and attorneys.)

2.1.4 Enrolled actuaries

Actuaries enrolled by the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. 1242 are limited to issues involving, in general, aspects of retirement plans.

2.1.5 Limited practice

Any person whose presence is determined to be necessary to explain facts may appear before the IRS as a witness.

2.1.6 Authorizations and powers of attorney

IRS employees are required to verify the authority of any person who seeks access to a taxpayer's records or who wishes in any manner to represent a taxpayer. The extent of this authority should be indicated by the taxpayer on IRS Form 2848, which may be filed by FAX. IRS Form 8821 can be used to authorize disclosure of information. If the taxpayer's authorization is on file, IRS employees are told to extend the "courtesy of having all arrangements in furtherance of the matter" made through the representative. Additionally, the representative has a right to be present when the client is interviewed and to receive copies of all written communication from the IRS (Internal Revenue Manual Sec. 4055). The taxpayer must also be present at an IRS interview if required to do so by an IRS summons.

Form 8821 authorizes another person to inspect in an IRS office or to receive by mail all tax information, notices, or other written communication related to a specifically identified tax matter. No authority to represent the taxpayer is granted. A newly filed information authorization revokes one previously filed concerning the same tax matters.

IRS Form 2848 (power of attorney and declaration of representative) can be used to grant to a representative the power to

- Inspect and receive tax information, notices, and communications.
- Receive (but not negotiate) the taxpayer's refund check.
- Sign a tax return, in certain cases, on behalf of the taxpayer (Regs. Sec. 1.6012-1(a)(5)).
- Execute waivers and offers of waivers of restrictions on assessment or collection of deficiencies in tax, or waivers of notice of disallowance of a claim for refund or credit.
- Execute consents extending the statute of limitations.
- Execute a closing argument (IRC Sec. 7121).
- Delegate authority or substitute another representative, if expressly authorized to do so by the taxpayer.

Form 2848 may be executed on behalf of the taxpayer by an attorney-in-fact designated as such in a non-IRS document such as a general, limited, or durable power of attorney.

According to a report by the Cincinnati IRS Service Center, the most common reasons for IRS rejection of a power of attorney are

- Lack of signature of representative or failure to indicate status, such as CPA, attorney, or enrolled agent.
- Failure to provide all necessary information required by Form 2848.

- Failure to include the title of a person signing for a business.
- Tax period not clearly identified.
- Omitting EIN or SSN for the taxpayer.

2.1.7 Privileged communications

The attorney-client privilege is extended to provide confidentiality between a taxpayer-client and any individual authorized to practice before the IRS. The privilege applies in noncriminal proceedings before the IRS and in federal courts if the IRS is a party. Certain communications relating to tax shelters are not included in this privilege.

2.2 Persons Who May Not Practice Before the IRS

According to Circular 230, officers and employees of the United States in the executive, legislative, or judicial branch of the government may practice before the IRS only to represent a member of the person's immediate family or any other person or estate for which the person serves as guardian, executor, administrator, trustee, or other personal fiduciary (18 U.S.C. 205). No member of Congress or resident commissioner (elect or serving) may practice in connection with any matter for which he or she directly or indirectly receives, agrees to receive, or seeks any compensation. Officers and employees of any state or subdivision whose jobs entail passing upon, investigation of, or dealing with tax matters of their state or subdivision may not practice if their employment may disclose facts or information applicable to federal tax matters.

2.3 Rules Governing Conduct

2.3.1 Circular 230

Rules of practice before the IRS are spelled out in Circular 230. Disreputable acts or violations of regulations may lead to suspension or disbarment. Such acts include but are not limited to the following:

- Conviction of any criminal offense
- Giving false or misleading information
- False advertising or other impermissible forms of solicitation of clients
- Unreasonably delaying the prompt disposition of any matter before the IRS

- Willfully failing to make a federal tax return
- Misappropriation of, or failure to properly and promptly remit funds received from a client for the purpose of payment of taxes or other obligations due the United States
- Disbarment or suspension of his or her professional license
- Aiding or abetting another person to practice before the IRS who is not properly qualified to do so
- Contemptuous conduct in connection with practice before the IRS (Circular 230; Subpart C)
- Conviction of any offense involving dishonesty or breach of trust
- Charging an unconscionable fee
- Charging a contingent fee for preparing an original return

Circular 230 and the Treasury regulations issued in connection with Circular 230 were substantially revised in December 2004 and January 2005 to provide additional rules governing opinion letters written by tax practitioners. In addition, Section 822(a)(1) of the American Jobs Creation Act of 2004 provides for censure and monetary penalties for tax practitioners who fail to comply with the provisions of Circular 230. See Section 15 of this chapter.

2.3.2 AICPA tax standards

Statements on Standards for Tax Services (SSTs) No. 1 through 8 and Interpretation No. 1-1, “Realistic Possibility Standard,” of SSTs No. 1, reflect the AICPA’s standards of tax practice and delineate members’ responsibilities to taxpayers, the public, the government, and the profession. The Statements are intended to be part of an ongoing process that may require changes to and interpretations of current SSTs in recognition of the accelerating rate of change in tax laws and the continued importance of tax practice to members.

The Tax Executive Committee interprets AICPA general professional standards and promulgates technical standards in the tax area, by authority of the AICPA Council. Enforcement of these rules is undertaken as part of the AICPA’s Code of Professional Conduct Rule 201, *General Standards*, and Rule 202, *Compliance with Standards*. Members are expected to comply with them.

SSTs Nos. 1 through 8 and Interpretation No. 1-1 can be downloaded from www.aicpa.org as a portable document format (PDF) file (*Note: The Adobe Acrobat Reader is needed to view a file in PDF format*). The SSTs can be downloaded at www.aicpa.org/download/tax/SSTsfinal.pdf and are current as of August 2000.

The SSTs are also available for purchase in pamphlet form at www.CPA2Biz.com.

2.3.3 AICPA Code of Professional Conduct

Contingent Fees. Rule 302 of the Code of Professional Conduct of the AICPA states that

A member in public practice shall not prepare an original or amended tax return or claim for a tax refund for a contingent fee for any client.

(Text continued on page 11)

Contingent fees are fees established for the performance of any service within an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service.

Fees are not regarded as contingent if they are fixed by courts or other public authorities, or, in tax matters, if the fees are determined based on the result of judicial proceedings or on the findings of governmental agencies.

A fee is considered to be “determined based on the findings of governmental agencies” if the member can demonstrate a reasonable expectation at the time of a fee arrangement of substantive consideration by an agency with respect to the member’s client. Such an expectation is not reasonable in the case of preparation of original tax returns.

Examples of Contingent-Fee Situations. The following are examples, not all-inclusive, of circumstances where a contingent fee would be permitted.

- Representing a client in an examination by a revenue agent of the client’s federal or state income tax return.
- Filing an amended federal or state income tax return claiming a tax refund based on a tax issue that is either the subject of a test case (involving a different taxpayer) or with respect to which the taxing authority is developing a position.
- Filing an amended federal or state income tax return (or refund claim) claiming a tax refund in an amount greater than the threshold for review by the Joint Committee on Internal Revenue Taxation (currently \$2,000,000) or state taxing authority.
- Requesting a refund of either overpayments of interest or penalties charged to a client’s account or deposits of taxes improperly accounted for by the federal or state taxing authority in circumstances where the taxing authority has established procedures for the substantive review of such refund requests.
- Requesting, by means of “protest” or similar document, consideration by the state or local taxing authority of a reduction in the “assessed value” of property under an established taxing authority review process for hearing all taxpayer arguments relating to assessed value.
- Representing a client in connection with obtaining a private letter ruling or influencing the drafting of a regulation or statute.

The following is an example of a circumstance where a contingent fee would not be permitted:

- Preparing an amended federal or state income tax return for a client claiming a refund of taxes because a deduction was inadvertently omitted from the return originally filed. There is no question as to the propriety of the deduction; rather the claim is filed to correct an omission.

Discreditable Acts. Rule 501 of the AICPA's Code of Professional Conduct states that a member shall not commit an act discreditable to the profession. Disciplinary actions under this rule have been taken against AICPA members in connection with income tax violations. For example, a practitioner was given a ninety-day membership suspension for assisting a client in preparing a return that included an improper depreciation deduction related to a tax shelter.

Disciplinary Actions by the AICPA, State Boards of Accountancy, and State CPA Societies. The Bylaws of the AICPA provide for a professional ethics division and for a trial board to hear charges of violations of the bylaws or of the Code of Professional Conduct. Disciplinary actions against members are reported in the *CPA Letter*, the semimonthly newsletter of the AICPA. A membership can be suspended without a hearing, and then terminated upon final conviction, for any of these offenses:

- A crime punishable by imprisonment for more than one year
- The willful failure to file any income tax return that the member, as an individual taxpayer, is required by law to file
- The filing of a false or fraudulent income tax return on the member's or a client's behalf
- The willful aiding in the preparation and presentation of a false and fraudulent income tax return of a client (AICPA Bylaws 7.3.1)

2.3.4 Conduct of IRS employees

The IRS must terminate an employee (absent direct intervention by the IRS Commissioner as explained below) if there is a final administrative or judicial determination that, in the course of his or her official duties, the employee committed any of the following acts:

1. Willfully failed to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets
2. Provided a false statement under oath with respect to a material matter involving a taxpayer or a taxpayer representative
3. Violated the rights of a taxpayer, taxpayer representative, or other employee of the IRS under the U.S. Constitution or under specified civil rights acts

4. Falsified or destroyed documents to conceal mistakes made by any employee with regard to a matter involving a taxpayer or taxpayer representative
5. Assaulted or battered a taxpayer, taxpayer representative, or other employee of the IRS, but only if there is a criminal conviction or a final civil judgment to that effect
6. Violated the 1986 IRC, Treasury regulations, or IRS policies (including the IRS Manual) for the purpose of retaliating against or harassing a taxpayer or other employee of the IRS
7. Willfully misused the provisions of IRC Sec. 6103 (regarding confidentiality of returns and return information) for the purpose of concealing information from congressional inquiry
8. Willfully failed to file any tax return required under the IRC on or before the required date, unless the failure is due to reasonable cause and not willful neglect
9. Willfully understated federal tax liability, unless such understatement is due to reasonable cause and not willful neglect
10. Threatened to audit a taxpayer for the purpose of extracting personal gain or benefit

2.4 Tax Preparer's Liability

2.4.1 Definition of "tax return preparer"

The term *tax return preparer* (TRP) applies to any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax or claim for refund of tax. Income tax return preparers must manually sign the returns they prepare and must include their name and identification number. To be classified as a TRP a person must prepare all or a substantial portion of the return, but the person does not have to be the one physically to enter the figures on the form or schedule, nor does entering these figures automatically make a person a TRP (IRC Sec. 7701). Anyone may be held to be a TRP (even if he or she does not sign the return) who

- Provides advice that reduces filling out a return to a mere clerical task.
- Provides tax advice about completed transactions directly relating to a specific entry on a return.
- Recommends substantial changes in a draft of a return (even if the draft was prepared by the taxpayer) and the taxpayer follows the recommendations.
- Reviews the return, concludes no changes are required, and mails in the return under the taxpayer's instructions.

- Makes entries on one return—for example, a partnership return—that constitute a substantial portion of a partner's return, thus becoming a TRP with regard to both the partnership and the partner's return.

Example: An attorney who prepared Forms 1065 for three limited partnerships was held also to be a preparer of the tax returns of the limited partners themselves. (*Randall S. Goulding v. U.S.*, 92-1 USTC 50,174 (7th Cir., 1992), *aff'g* D.C. 89-1 USTC 9309.)

On the other hand, merely typing or photocopying the return does not make one a preparer, and neither does preparing a return

- For an employer, officer of the employer, or for a fellow employee, or for one or more general partners in a partnership in which the preparer is a general partner or an employee.
- As a fiduciary.
- For a friend, relative, or neighbor with no agreement for compensation (either stated or implicit), even though a favor or gift is received in return.

If more than one person worked on a return (or claim for refund), a determination of who is the preparer will be made according to rules of substantial preparation.

2.4.2 Substantial preparation

Each schedule, entry, or portion of a return or claim for refund is reviewed separately to determine who is the preparer. One who renders advice concerning the existence, characterization, or amount of a schedule or entry is subject to IRS regulation as an income tax preparer for that return, including the penalties to which preparers are subject, if the item is a substantial portion of the return. It is not necessary that the person signed the return.

There is a quantitative test to determine when a schedule, entry, or portion of a return is substantial: An item is not substantial if it is less than \$2,000, or is less than \$100,000 while also less than 20 percent of adjusted gross income (Treas. Reg. 301.7701-15).

2.4.3 What constitutes an income tax return

Preparer penalties relate only to the preparation of certain specified forms that constitute tax returns (Treas. Reg. 301.7701-15(c)):

- Individual or corporate income tax return
- Fiduciary income tax return for an estate or trust

- Undistributed capital gains tax return for a regulated investment company
- Charitable remainder trust return
- Return for a transferor of stock or securities to a foreign entity
- S corporation return
- Partnership return for a Domestic International Sales Corporation (DISC)
- Refund claim for a credit against any income tax
- Information return on behalf of a person or entity that is not a taxable entity but reports information that may be reported on the return of a taxpayer.

On the other hand, these are not “tax returns” for purposes of determining preparer penalties:

- Gift or estate tax return
- Returns for excise tax or tax collected at the source on wages
- Individual or corporate declaration of estimated tax
- Application for an extension of time to file an individual or corporate return
- An informational statement on Form 990, Form 1099, or a similar form

2.4.4 Potential penalties facing preparers

Penalties on preparers of \$50 per instance (\$25,000 maximum per year) may be assessed under various subsections of IRC Sec. 6695 for failure to

- Furnish a copy of the return or refund claim to the taxpayer.
- Sign a return or claim when required to do so.
- Include the preparer’s identifying number.
- Retain for three years copies of all returns and refund claims or a list of taxpayers, identification numbers, and type of filing.
- File an annual information return reporting names of employees who prepare returns for other than the employer.

Certain offenses carry significantly larger penalties:

- Negotiating or endorsing taxpayer refund checks: \$500 (IRC 6695(f))

- Assisting in organizing a tax shelter, or making a false or fraudulent or a gross valuation overstatement: \$1,000 (IRC 6700)
- Aiding and abetting an understatement of tax liability in connection with a corporation: \$10,000; other returns or claims: \$1,000 (IRC Sec. 6701)
- An understatement of tax liability due to a position (of which the preparer knew or should have known), for which there was not a realistic possibility of being sustained on its merits and not disclosed as provided in IRC Sec. 6662(d) or the position was frivolous: \$250 (IRC 6694(a)) (Discussed more fully in section 2.5)
- An understatement of tax liability due to a willful attempt to understate liability by a preparer or a reckless or intentional disregard of rules or regulations: \$1,000 (IRC Sec. 6694(b))
- Disclosing or using information received in connection with the preparation of a return: \$250 (IRC Sec. 6713)
- Willfully failing, while acting as a “responsible person,” to collect or pay over any tax: penalty is the amount of the tax (IRC Sec. 6672)

In addition to the items on this list, a preparer might be charged with a related crime, for which a jail sentence could be imposed, for example, disclosure or use of tax return information: \$1,000 fine or imprisonment not more than one year (IRC Sec. 7216).

Generally, a TRP may rely on information supplied by the taxpayer client. Only when the information appears incorrect, inconsistent, or incomplete must inquiries be made. In one instance a preparer had to pay a penalty when he knew that in a prior year a similar deduction had been attempted but denied upon audit, even though that prior return had been prepared by another.

If the law requires specific conditions in order for a deduction to be properly claimed, a TRP must inquire about the conditions. For example, if travel and entertainment expenses, or business use of a listed asset, are claimed, the TRP should ask if the taxpayer has the records to substantiate the deduction. The preparer may accept the taxpayer’s affirmative answer and need not examine the records. Neither is it necessary, under law, for the preparer to examine information returns the taxpayer has received, such as Forms 1099, but many preparers feel it is prudent to do so.

TRPs paid penalties in the following instances:

- The alternative minimum tax was overlooked by a TRP who admitted no knowledge of its existence.

- Through negligence, the amount of a net operating loss was overstated when carried back to prior years. Penalties were paid for each prior year.
- A net operating loss carryforward was mistakenly and negligently overstated, causing penalties to the TRP involved in the calculation.
- The TRP allowed a client to claim five dependents while knowing the client had only two.
- The TRP ignored a bookkeeper's comment that shareholders' personal expenses had been paid from corporate funds.

2.4.5 Recordkeeping

Preparers, or their employers, must retain for a three-year period following the close of the return period a record of the name, Social Security number, and place of work of each employed preparer. (The return period is defined as a twelve-month period beginning on July 1 of each year.) These records must be made available for inspection by the district director. The penalty is \$50 for each failure to retain and make available a record, plus a \$50 penalty for each missing but required item. The maximum penalty for any return period is \$25,000 (IRC Sec. 6695). Appendix 2, "Record Retention," of this chapter, on *The Accountant's Business Manual Toolkit CD-ROM* includes guidelines on recordkeeping for clients.

2.4.6 Procedures for assessing penalties

The IRS must assess a penalty within three years after the improperly handled return. There are no limitations if willful understatement of tax liability has occurred. Computer-generated account information called PINEX (Penalty and Interest Notice Explanation) is available from IRS service centers and district offices.

The IRS issues a thirty-day letter as notification of a proposed penalty. The burden of proof is on the preparer as to whether he or she intentionally or willfully disregarded rules or regulations. The IRS bears the burden of proof concerning the preparer's willful attempt to understate tax liability.

If a penalty for understatement of tax is assessed (and the preparer either does not pursue an administrative remedy or receives an adverse administrative determination), the preparer has two alternatives:

- Pay the amount assessed and file a claim for refund.
- Pay 15 percent of the amount assessed within thirty days of the demand for payment and file a claim for refund of the amount paid within the same thirty-day period.

2.4.7 Injunctions against preparers

Injunctions are sometimes sought by the IRS in federal district court to prohibit improper conduct by a preparer. Penalties may or may not have already been assessed. Violations related to the following activities may be the basis for the injunction:

- Conduct subject to disclosure requirement penalties
- Conduct subject to the understatement of tax liability penalties
- Conduct subject to criminal penalties under the Internal Revenue Code
- Misrepresentation of eligibility to practice before the IRS
- Misrepresentation of experience or education as a tax preparer
- Guaranteeing payment of a tax refund or allowance of a credit
- Engaging in other fraudulent or deceptive conduct that interferes with administration of the tax laws

2.5 Understatement Penalties

IRC Sec. 6694 penalizes a preparer if there is an understatement of liability due to a tax position if there was no realistic possibility of the position being sustained on its merits *and* the position was not properly disclosed *or* if the position was properly disclosed but was frivolous. (Circular 230 defines *frivolous* as patently improper.) According to Circular 230 a preparer may not advise a client to take a tax position, nor himself or herself prepare the portion of the return on which the position is taken unless

- The preparer determines that the position satisfies the realistic possibility standard; or
- The position is not frivolous and the preparer advises the client of (1) any opportunity to avoid the accuracy-related penalty of IRC Sec. 6662 by adequately disclosing the position and (2) the requirements for adequate disclosure.

Example 1: A new statute is unclear on whether a transaction that a taxpayer has engaged in will result in favorable tax treatment. Prior law, however, supported the taxpayer's position. There are no Treasury regulations under the new statute and no authority other than the statutory language and the committee reports. The committee reports state that the intent was not to adversely affect transactions similar to the taxpayer's transaction.
Result: The taxpayer's position satisfies the realistic possibility standard.

Example 2: A taxpayer has engaged in a transaction that is adversely affected by a new statutory provision. The preparer believes that the new law is inequitable as applied to the taxpayer's situation. The statutory language is unambiguous as it applies to the transaction (for example, it applies to all manufacturers and the taxpayer is a manufacturer). The committee reports do not specifically address the taxpayer's situation. *Result:* A position contrary to the statute does not satisfy the realistic possibility standard.

The section 6694(a) penalty will not be imposed on a preparer if the position taken is not frivolous and is adequately disclosed. (Reg. Sec. 1.6694-2(c)) A "frivolous" position is one that is patently improper. Further, the penalty will not be imposed if, considering all the facts and circumstances, it's determined that the understatement was due to reasonable cause and that the preparer acted in good faith. (Reg. Sec. 1.6694-2(d))

A preparer also must advise his or her client of penalties reasonably likely to apply to a tax position that has been advised, prepared, or reported by the preparer. The preparer must inform the client of opportunities of avoiding these penalties by disclosure and of the means for disclosure. The advice recommended in this paragraph must be given even if the preparer is not subject to a penalty as a consequence of the tax position.

The following are situations in which no additional disclosure need be made.

1. Schedule A, Itemized Deductions:
 - a. Medical and Dental Expenses, lines 1-4.
 - b. Taxes, lines 5-9. Line 8 must list each type of tax and the amount paid.
 - c. Interest Expense, lines 10-14. Not applicable to (i) disallowed investment interest unless Form 4952 is completed, or (ii) amounts disallowed under IRC Sec. 265 (i.e., interest related to tax-exempt income).
 - d. Contributions, lines 15-18. Not applicable to (i) donations where the taxpayer receives a substantial benefit, (ii) noncash contributions in excess of \$500 unless Form 8283 is attached, or (iii) any contribution of \$250 or more unless contemporaneous written substantiation is obtained.
 - e. Casualty and Theft Losses, line 19. Form 4684 listing each item for which a loss is claimed must be attached to the return.
2. Certain Trade or Business Expenses:
 - a. Casualty and Theft Losses. Same as item 1(e) above.
 - b. Legal Expenses. Amount must be stated and cannot be a capital, personal, or nondeductible lobbying or political expenditure.

- c. Specific Bad Debt Charge-off. Amount written off must be stated.
 - d. Repair Expenses. Amount claimed must be stated and cannot be characterized as a capital or personal expenditure.
 - e. Taxes (other than foreign taxes). Amount claimed must be stated.
3. Other Items:
- a. Moving Expenses. Form 3903 or 3903-F must be attached to the return.
 - b. Sale or Exchange of Main Home. Form 2119 must be attached to the return.
 - c. Employee Business Expenses. Form 2106 or 2106 EZ must be attached to the return. Does not apply to club dues or travel expenses for any non-employee accompanying the taxpayer.
 - d. Fuels Credit. Form 4136 must be attached to the return.
 - e. Investment Credit. Form 3468 must be attached to the return.

An employer (or partnership) can be assessed penalties for *participation* in the negligent, intentional, willful conduct of the person who is technically considered to be the preparer (Regs. Sec. 1.6694-1(a)(1)). A penalty connected with understatement of a taxpayer's liability is not imposed on an employer solely because he or she employs a preparer who becomes subject to penalty. The penalty applies to an employer who knows the employee is understating tax and does not attempt to prevent it (IRC Sec. 6701(c)). Congressional comments suggest negligence might be attributed to a supervisor or reviewer who had responsibility for determining that rules and regulations were being followed but failed to do so. (S. Rep. No. 938, Pt. 1, 94th Cong., 2d Sess. 355 (1976).)

If any part of the understatement of tax liability (or overstatement of a claim for refund) is due to a willful attempt by a tax preparer to understate liability or to the preparer's willful or intentional disregard of tax provisions, the penalty is \$1,000 for each return or claim (IRC Sec. 6694(b)(1),(2)). A preparer who received but then ignored information furnished by the taxpayer or by others might be held liable for this penalty.

2.5.1 Effect of understatement of tax liability

If there is no understatement, there can be no penalty. The IRS does not attempt to assert a penalty if there is no more than a relatively immaterial understatement (Revenue Procedure 80-40, 1980 CB 774). No penalty for understatement applies if a final determination of the tax indicates there is no understatement, and any penalties that have been collected will be refunded.

2.5.2 Multiple penalties

In certain cases a preparer may create multiple opportunities for penalty. A negligent claim of a net operating loss in one year may create an understatement of tax liability in each of the carryover years. An understatement on a partnership return that flowed through to be a substantial portion of many limited partners' returns could subject the preparer of the partnership returns to understatement penalties on each of the limited partners' returns.

2.5.3 Negligent disregard for rules and regulations

Guidelines have been issued by the IRS as to what constitutes "negligence" in the context of the former version of IRC Sec. 6694(a). Congressional committee reports indicate that conduct previously considered to be negligent should continue to be penalized after 1989. The relevant definition is this: *Negligence* refers to a lack of due care or a failure to do what a reasonable and prudent person would do under the circumstances (Rev. Proc. 80-4 1980-2 CB 774); (*Brockhouse v. U. S.*, 749 F.2d 1248 (7th Cir. 1984)). The revenue procedure cited states the IRS considers the nature, frequency, and materiality of errors when determining if negligence has occurred. These factors need to be considered by preparers seeking to avoid negligence penalties:

- Negligence does not result where the code section is so complex or highly technical that a competent TRP might misapply it.
- Isolated clerical or mathematical errors are not negligence, but the failure to detect conspicuous examples of these does constitute negligence.
- Ignorance or oversight of a rule or regulation does constitute negligence.
- Information supplied by the taxpayer may be relied upon by a preparer unless it appears incorrect, incomplete, or contradictory.

2.5.4 Normal business practices

The IRS does not assert a negligence penalty if the preparer's *normal business practices* indicate the error would rarely occur and these practices were followed in preparing the faulty return (Treas. Reg. 1.6694-1(a)(5)). Repeated errors of the same type, or a pattern of errors, indicate negligence. Revenue Procedure 80-40 (1980-2 CB 774, 775) cites the following as desirable office practices:

- Worksheets to accumulate data from the taxpayer

- Checklists to indicate returns and schedules suggested by the information
- Review of prior two years' returns
- Supervision of preparation by experienced persons and establishment of means for researching difficult questions
- Review procedures for completed returns
- Sign-off sheets to indicate compliance with prescribed office procedures

2.5.5 Substantial authority

Tax return positions for which the taxpayer has substantial authority are treated as if properly shown on the return, and no substantial understatement penalty is asserted against a preparer. The Omnibus Budget Reconciliation Act of 1989 expanded upon the list of authorities in Regs. Sec. 1.6661-3(b)(2) upon which a taxpayer may rely. The complete list of authorities includes

- Internal Revenue Code and other statutory provisions.
- Temporary and final regulations.
- Court cases.
- Administrative pronouncements (including revenue rulings and revenue procedures).
- Tax treaties and regulations thereunder and Treasury Department explanations of treaties.
- Congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of the bill's managers.
- Proposed regulations.
- Private letter rulings.
- Technical advice memoranda.
- Actions on decisions.
- General counsel memoranda.
- Information releases or press releases, notices, and any other similar documents published by the IRS in the Internal Revenue Bulletin.
- General explanations of tax legislation prepared by the Joint Committee on Taxation (called the "Blue Book").

Additionally, the 1989 Omnibus Budget Reconciliation Act required the IRS to publish, not less frequently than annually, a list of tax return positions for which the IRS believes there is no substantial authority and which affect a significant number of taxpayers. The purpose of this list is to assist taxpayers in determining whether a position should be disclosed to avoid the penalties for substantial understatement provided in IRC Sec. 6662(d). Thus, a taxpayer might choose to disclose having taken a position enumerated on the list in order to avoid imposition of the substantial understatement penalty. Disclosure of a tax return position should be on Form 8275-R.

Note that many of the penalty provisions of the Code were modified by the American Jobs Creation Act of 2004 with respect to tax shelters (see section 13.4).

3. IRS PROCEDURE FOR EXAMINING RETURNS

3.1 Initial Review and Screening

The review process begins with routine checks for obvious errors, such as mathematical mistakes and omissions of signatures and Social Security numbers, for all returns filed. These procedures constitute only a cursory review and fall far short of an audit. An audit, also referred to as an examination, may require the taxpayer to respond to questions or to provide supporting data or documentation for elements of his or her tax return. Because of the large volume of returns filed each year, the IRS cannot possibly audit every return filed; less than 1 percent of all returns are audited (but the IRS is working to increase this number). To ensure that IRS audit time is expended productively, the IRS uses several techniques for selecting which returns to audit.

Economic reality audits, also called financial status audits, are permitted only if there exists a prior, reasonable indication of likelihood of unreported income. IRC Sec. 7602(e). Such audits proceeded through the use of questions probing the taxpayer's lifestyle, such as, "Where do you go on vacation?" and "What cars do you own?"

3.2 Selection for Audit

3.2.1 Discriminant Function System (DIF)

After the initial checks, information about individual returns is stored on magnetic tape and sent to the national computer center in Martinsburg, West Virginia. Here the information is processed by computers

and rated for potential errors by a selection program known as the Discriminate Function System (DIF). DIF is a statistical system that assigns numerical values to various items on the return and then produces a composite score for each return. The formulas for developing the DIF score are kept secret from the public. The standards used in developing these formulas are based on the results of examinations from previous years, particularly the results of the TCMP program (see section 3.2.3, which follows). If the composite score indicates that a reasonable chance for error exists in a return, the return can usually be treated by correspondence from an IRS service center. Returns with scores indicating a greater possibility of error are considered for possible office or field examinations.

3.2.2 Manual identification

If a return is singled out by DIF or by other means, experienced IRS auditors apply what can be called a “sniff” test. Various aspects of the return are considered, including the taxpayer’s occupation and amounts and types of deductions claimed.

3.2.3 National Research Program (NRP)

The Taxpayer Compliance Measurement Program (TCMP) has been replaced by a National Research Program (NRP). Under this program, the IRS will perform a series of examinations to measure reporting compliance and identify compliance issues. The NRP will focus on the following areas of tax administration compliance:

- Filing
- Payment
- Reporting

3.2.4 IRS instructions to classifiers and auditors

IRS instructions are contained in the *Internal Revenue Manual (IRM)*. The Internal Revenue Manual is available on the IRS Web site at: www.irs.gov/irm/index.html. Excerpts from the manual are also available from commercial publishers. Reviewers and auditors are told to consider

- Comparative size of an item in relation to income and other expenses.
- Evidence of intent to mislead, such as missing or incomplete information.
- Beneficial effect of the manner of reporting—for example, expenses are recorded on a business schedule rather than treated as an itemized deduction.

- Relationships such as lack of dividend income while there are sales of securities.
- Characteristics of the business as revealed in the IRS's Market Segments Specialization Program (see section 5.4).

3.3 Chances of Selection

The chance that a return will be selected for audit is determined by several factors, among which is total positive income (TPI). TPI is the sum of all positive income values appearing on a return. Higher amounts of TPI increase a taxpayer's chance of being selected for audit. In recent years, the probability of audit has ranged from 1 to 4 percent for Form 1040 filers, depending on the level of TPI.

Corporations having assets of \$1 million or less face a 3 percent or less chance of selections. For corporations with assets over \$100 million, the audit percentage is greater than 50 percent.

3.4 Items That May Trigger an Audit

While the actual items that may cause the computer or an examiner to flag a return for audit are not in the public record, there is general agreement among accountants that the following situations tend to increase the chance of audit:

- Deduction for items not clearly authorized by law
- Medical and insurance deductions with, however, no insurance reimbursements
- Large casualty-loss deductions
- Large noncash contributions, particularly when out of proportion with the taxpayer's income
- Large deductions for travel and entertainment expenses not consistent with the nature of the taxpayer's business
- Large interest expense in relation to amount of income reported
- Standard deduction used with high gross and low net income
- Occupations normally more lucrative than indicated by the return
- Return on an investment significantly lower than expected
- Taxpayer's occupation known for its opportunity for receiving income in cash
- Taxpayer under investigation by the Bureau of Narcotics
- Amended returns claiming large refunds in connection with tax shelters.

3.5 How to Reduce the Likelihood of an Audit

The following may reduce the likelihood of an audit:

- Attach all correct W-2 forms. Your client should be instructed to check W-2s as closely as possible and immediately request a corrected W-2 if an error appears.
- Report as a separate identifiable item every Form 1099, even if several come from the same payor.
- If the client requests a replacement for an incorrect Form 1099, but it has not been received by the filing date, report the incorrect amount, then deduct it, report the proper amount and state that a corrected Form 1099 has been requested. Use the same procedure for a Form 1099 for which the payor reports income in the wrong year.
- Be sure the payor's name on the return is identical to the name on the Form 1099.
- Show detail of computations of significant items that might be questioned, such as calculation of basis of an asset.
- Explain allocations between personal and business use such as might appear between Schedule C and Schedule A.

3.6 Safeguards During an Audit (IRC Sec. 7520)

Either before or at the initial interview with the taxpayer, the IRS must provide an explanation of the audit process and the taxpayer's rights, and an explanation of the collection process and the taxpayer's rights, if the interview relates to collection.

At any time during an interview (other than an interview initiated by an administrative summons), the taxpayer can terminate the interview by clearly stating to the IRS a desire to consult with an attorney, CPA, enrolled agent, enrolled actuary, or other authorized representative. The IRS has reaffirmed that taxpayers do not have to answer "economic reality" questions such as types of automobiles owned and the frequency and cost of vacations.

An authorized representative with a written Power of Attorney executed by a taxpayer can represent the taxpayer at an audit. The taxpayer is not required to accompany the representative, unless an administrative summons has been issued to the taxpayer. The IRS can

notify the taxpayer that the representative is responsible for unreasonable delay or hindrance of the IRS examination.

If requested to do so in advance, the IRS must allow the taxpayer to make an audio recording of an in-person interview. The audio recording must be made at the taxpayer's own expense and with the taxpayer's own equipment.

The IRS itself may record an in-person interview if

- The taxpayer is informed prior to the interview.
- The IRS provides the taxpayer with a transcript or copy of the recording upon the request (and cost) of the taxpayer.

Regulations are to provide that it is generally not reasonable for the IRS to require a taxpayer to attend an examination at an IRS office other than the office located closest to the taxpayer's home. Regulations also are to be written to specify that it is generally not reasonable for the IRS to audit a taxpayer at his or her place of business if the business is so small that doing so essentially requires the taxpayer to close the business. The IRS would still be able to go to the place of business to establish facts that require a direct visit, such as inventory and asset verification.

3.7 Advance Warning of an Audit

An entry labeled "examination indicator" in the taxpayer's individual master file sometimes can give warning of an impending audit. See also section 8.2.4 of this chapter.

4. TYPES OF EXAMINATIONS

4.1 Examinations In or From an IRS Office

4.1.1 Correspondence examination

Examination is by correspondence when information concerning questionable items can be readily furnished by mail. Examples of items a taxpayer might be asked to verify by mail include

- Interest.
- Taxes.
- Charitable contributions.
- Medical and dental expenses.

From the taxpayer's point of view, drawbacks to a correspondence audit are said to be that the IRS examiner cannot hear oral arguments and cannot judge the sincerity of the taxpayer. Also, the examiner has the opportunity to review documents at his or her convenience, thus providing time to formulate other questions. On the other hand, in a face-to-face meeting, the agent can initiate a new line of questioning if it appears warranted.

Taxpayers believing the matter cannot be settled satisfactorily by correspondence can request an appointment. If a notice setting up an appointment for an office interview is received, a written request— together with documents supporting the taxpayer's position—can be made that the audit be handled by correspondence.

4.1.2 Office examination

The IRS may request that the taxpayer appear in an IRS office to discuss and provide documentation for matters such as the following:

- Income from tips, pensions, annuities, rents, royalties
- Determination of gain or loss as capital or ordinary income
- Deductions for employee business expenses
- Determination of the basis of property
- Bad-debt deductions
- Questions regarding low income in comparison to exemptions and deductions

The scope of an office examination is normally limited to the items listed on the appointment letter. If necessary to do so, the examiner can be reminded that the taxpayer came prepared to support only those matters listed in the letter.

4.2 Field Examinations

For the majority of business returns, and for some large and complex individual returns, the predominant type of audit is the field audit. The examination usually takes place at the taxpayer's place of business. The revenue agent has full license to examine all books, records, and documents necessary to determine the accuracy of the return. No items on the return are shielded from inquiry. Federal payroll returns and excise tax returns may be examined at the same time. Often all open (unaudited) years of corporation returns as well as the personal returns of officers are audited. Field audits can take several days or weeks. In some cases, it may be possible, by written request, to change the audit

location to the office of the taxpayer's authorized representative, if books and records are maintained there or are transferred there for purposes of the audit.

4.3 Team Examinations

In the case of large corporations, a team of revenue agents may be permanently assigned to examine the tax returns and supporting documentation.

4.4 Select Employee Plans Return Examination (SEPRE)

SEPRE is an investigation for determining if problems exist in the returns of tax-exempt organizations. Tax-exempt organizations are supervised by the employee plans and exempt organization division of the district office to make sure that organizations adhere to the conditions of their tax-exempt status.

4.5 Repetitive Examinations

It has been policy in recent years for the IRS to reduce the incidence of repetitive examinations. This policy is now codified in the Taxpayer Bill of Rights. The IRS will not conduct an examination on an item if there were no changes involving the item during the examinations of the two preceding years, it is unlikely that a change will be made for the year in question, and no significant issues were overlooked during previous years. The agent responsible for the examination may not have access to the returns of the two preceding years, in which case the taxpayer should bring the facts to the agent's attention.

4.6 Audits of Partnerships

4.6.1 Consistency of treatment of partnership items

The tax treatment of partnership items is determined at the partnership level in a unified partnership proceeding. Special rules provide for notice and other types of participation by the individual partners. All entities required to file returns as partnerships are handled under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) rules, with the exception of partnerships with

- Ten or fewer partners who are either natural persons (but not nonresident aliens) or estates (husband and wife are considered one partner for this purpose).
- Each partner's share of any partnership item being the same as his or her distributive share of every other partnership item.

If one of these small partnerships so desires, it can elect to be governed by the TEFRA provisions. TEFRA requires that all partners treat partnership items as they were treated on the partnership return. In an attempt to reduce inconsistencies, the IRS requires that a copy of the information in the partnership return be given to each partner. A partner who decides to treat a partnership item in a way inconsistent with the partnership return must disclose the inconsistency to the IRS on Form 8082. A partner's return should also make a disclosure if the partnership (1) fails to file a return or (2) provides the partner with incorrect information. If an inconsistency in reporting—for example, attempting to expense the partner's share of an item that was capitalized on the partnership return without the partner's filing a notice of inconsistent treatment—leads to a deficiency in tax payment, the IRS makes an adjustment to the partner's return so that it is in conformance with the treatment on the partnership return. Any additional tax resulting from this adjustment is immediately assessed and collected as though it were a mathematical error—that is, without the issuance of a notice of deficiency to the partner. At that point the partner's recourse is to file a claim for refund and sue in U.S. Claims Court. Any underpayment due to inconsistency in reporting, coupled with the taxpayer's failure to file Form 8082, will be treated as intentional or negligent disregard of the rules and regulations and therefore will be subject to penalty.

4.6.2 Partnership audit procedures

To commence an audit of a partnership, the IRS issues a notice of commencement of an administrative proceeding. This notice is sent to every partner. Audits of partnerships impact all partners, but one specific partner, called the tax matters partner (TMP), should be designated by the partnership to be its primary representative. If a TMP is not selected by the partnership, the IRS will choose the partner with the largest profit interest in the tax year in question (in case two or more partners have the same profit interest, the TMP will be chosen alphabetically). Within thirty days of selecting a TMP the IRS must notify all partners entitled to receive notice under IRC Sec. 6223(a) of the selected TMP's name and address. Partners entitled to receive notice are those whose names appear on the partnership returns as well as those whose names and addresses have been timely furnished to the

IRS. The TMP is responsible for keeping all partners informed of the proceedings of the audit and has sole authority to seek judicial review of an audit adjustment. IRC Section 6231(a)(7) defines a tax matters partner.

Any partner entitled to notice is known as a notice partner. No partner can be a notice partner unless the IRS has received name, address, and indication of interest in profits at least thirty days before it mails a notice to the TMP. The term “notice partner” does not include partners with less than a 1 percent interest in partnerships consisting of more than 100 partners. In these partnerships, notice to the TMP is considered to be notice to each partner. Any group of partners having together a 5 percent or greater interest in profits, however, may designate one of their group as a notice partner.

4.6.3 Notices to partners

The IRS must mail notices to every notice partner as well as to the TMP when it begins the audit proceedings. At the conclusion of the audit, a notice of final partnership administrative adjustments (FPAA) is mailed to the notice partners. The notice of the start of the proceeding must be mailed to the other partners no later than 120 days before the notice of the final adjustment is mailed to the TMP. In other words, there must be a lapse of 120 days between these two events. Notice of the FPAA may be mailed to the other partners no later than sixty days after this notice is mailed to the TMP. If, when any notice is mailed, it is too late for a notice partner to join in any judicial proceeding, this partner, while not joining in the proceeding, may still elect to have any decision or agreement apply to him or her and the group the partner represents. Otherwise, partnership items affected in the proceeding are, to that partner, treated as nonpartnership items. If an item is treated as a nonpartnership item, determination of its treatment at the partnership level is not applicable. Nonpartnership items may not be brought into issue by the IRS or by the partner in a partnership proceeding, and partnership items may not be raised in a nonpartnership-item proceeding. Items become nonpartnership items on the date

- The IRS enters into a settlement agreement with the partner.
- The IRS fails to make a timely mailing to a partner concerning a partnership proceeding.
- The partner files suit after the IRS has denied his or her request.
- The IRS notifies a partner that a partnership item is to be treated as a nonpartnership item.

4.6.4 Participation by a partner in an administrative proceeding

Any partner may choose to participate in a proceeding relating to the tax treatment of a partnership item. A settlement agreement between the IRS and one or more partners is binding on the parties to that agreement for the taxable year. Any other partner may obtain the same treatment by requesting it before the expiration of 150 days after the day the FPAA is mailed to the TMP.

4.6.5 Agreements binding on partners

If the TMP enters into a settlement agreement, all partners except notice partners (and members of a 5 percent group who have designated from their group a notice partner) are bound by the agreement. Any partner not wishing to be bound may file a statement with the IRS stating that the TMP does not have authority to enter into such a settlement agreement in this partner's behalf. The time for filing this statement is to be determined by the commissioner.

4.6.6 Provision of judicial review

Once notice of an FPAA is mailed to the TMP, ninety days are allowed to petition for a redetermination. The petition may be addressed to the Tax Court, the U.S. district court, or the U.S. Claims Court. Except for the Tax Court, petitions require that the additional tax due be paid to the commissioner. Any notice partner, upon failure of the TMP to do so within the prescribed ninety-day period, may file the petition and has sixty additional days to do so. The first petition filed takes precedence over all such petitions, and the later ones will be dismissed.

4.6.7 Computational adjustments

Adjustments of mathematical or clerical errors can be corrected by the IRS as partnership items, thus affecting the partners, without applying the usual deficiency procedures. Within sixty days after such a correction notice is mailed to him or her, however, a partner may request that the IRS not make the correction.

4.6.8 Credits or refunds

A partner may not file suit for a credit or refund arising out of a partnership item without first filing a request for administrative adjustment (RAA). The RAA must be filed within three years after the later of the date of actual filing of the partnership return or the last day prescribed for filing the return without regard to extensions. The RAA

must be filed before IRS notice of an FPAA. If the RAA is not fully allowed, the TMP may file a petition for adjustment of the disallowance with the tax, district, or claims court. This petition must be filed after expiration of six months from the filing of the RAA but within two years of the filing. See IRC Section 6227(c) for rules regarding filings of RAA by partners on their own behalf.

4.6.9 Limitation periods for assessments and refund claims

Assessments relating to a partnership item

- May not be filed before close of the 150th day after mailing to the TMP notice of an FPAA.
- May not be filed until completion of proceedings in Tax Court (if begun within the 150-day period).
- Must be made within three years following the later of the date of actual filing or the last day prescribed for filing of a partnership return (unless extended by the commissioner).
- May be made within six years if a false return has been filed.
- May be made within six years if partnership income that exceeded 25 percent of stated gross income was omitted.

For refund claims or claims for credit, the time limitations are generally the same as for assessments. When an RAA is timely filed, however, the period with respect to such a request does not expire until the period has expired for filing suit.

4.7 Audits of S Corporations

New audit procedures were created by the Subchapter S Revision Act of 1982. The intent is to follow the partnership model (see section 4.6) in a unified corporate proceeding. Each shareholder must be given notice and an opportunity to participate in administrative or judicial proceedings. Shareholders must treat corporate items consistently with their treatment on the S corporation's return. Rules relating to assessments, limitation periods, and appeals follow the partnership rules (see IRC Sections 6241, 6242, and 6243).

4.8 Alternative Dispute Resolution

See Section 13.2 for a discussion of alternative means of dispute resolution available to taxpayers under audit, including Fast Track Settlement (FTS) and Fast Track Mediation (FTM).

5. HOW TO PREPARE FOR AN EXAMINATION

The IRS' audit procedures handbook can be ordered from Commerce Clearing House in three volumes entitled *Internal Revenue Manual: Audit*.

5.1 Preparing for Office or Field Examinations

In many office examinations and in most field examinations, the taxpayer is wise to have an accountant or other authorized representative present in place of the taxpayer. Note, however, that IRC Section 7602(a)(2) allows the IRS to summon the taxpayer to appear. This potential use of the administrative summons continues in force despite the Taxpayer Bill of Rights.

If an audit has begun without the presence of the taxpayer's professional adviser, the taxpayer can terminate the interview and request a new appointment at which the adviser will be present. The advantages to a taxpayer of professional representation center around the professional's

- Knowledge of tax law and interpretation.
- Familiarity with the audit process and the rules of disclosure.
- Ability to exhibit professional behavior toward the IRS agent.

Tax professionals should make clear to their clients, at the time a return is prepared, whether representation in an examination is included in the fee for preparing the return or will be extra. Normally, because of the difficulty in forecasting the amount of time required to represent a client in an audit, this service is billed separately when needed. Even if not appearing at the examination, the professional tax adviser may provide valuable assistance by putting together the documentation that will be needed at the interview.

5.1.1 Obtaining a copy of a tax return

Use IRS Form 4506 to request a copy of a tax return together with W-2 Forms. Form 4506 should be mailed to the office of the IRS where the return was originally filed. There is a small charge. An abbreviated version of a return, called a transcript, is available at no cost.

5.2 Burden of Proof: Documenting the Taxpayer's Position

The burden of proof for items in the return is on the taxpayer. Evidence, such as receipts and canceled checks, should be organized for presentation to the examiner. Important items of documentation should be photocopied in advance since examiners frequently request them. Original documents should be retained in case they will be needed in litigation.

Items about which doubt exists should be thoroughly traced to source documents. Ordinarily, inadvertent omissions or mistakes that are clearly minor in their effect can safely be admitted to the agent unless their total impact suggests a pattern of disregard of the rules. On the other hand, if the taxpayer provides the IRS with a voluntary admission of *fraud* plus the documentation to back it up, the taxpayer is in a precarious position. If a taxpayer has been dishonest in any but the most trivial matters, he or she should consult a criminal tax lawyer prior to attending an IRS audit.

In court proceedings, provided the taxpayer has met certain conditions, the burden of proof is on the IRS. For further reference, see 26 USC 60501, IRS Announcement 90-142 (1990-53 IRB 1), and IRS Publication 1544, "Rules for Reporting Large Cash Payments."

5.3 Beginning the Examination

Reassurance should be sought from the IRS examiner that a *civil* examination is in progress. If more than one examiner is present, each should be asked to identify his or her position in the IRS. There have been instances in which IRS special agents investigating fraud have apparently failed to identify themselves adequately or to give the IRS' modified form of the Miranda warning before the taxpayer made damaging admissions. The taxpayer's experienced tax lawyer will ordinarily be able to get this evidence suppressed in court. In most cases, however, the special agent will identify himself or herself properly. Upon any suspicion or suggestion that the IRS is considering a fraud investigation, the taxpayer should answer no questions and provide no documents until he or she has consulted a criminal tax attorney.

5.3.1 Tips for conduct

Experienced tax practitioners agree on the following tips for behavior during an examination:

- Contact the IRS agent before the audit to try to see the case with his or her eyes.

- Review the facts and the law relevant to the case well in advance of the audit date; know facts and the law better than the IRS agent.
- Organize documentation for presentation to the auditor.
- Advise the client on proper, respectful behavior or suggest that he or she not be present.
- Establish a courteous yet businesslike rapport with the agent.

Some practitioners advise allowing the agent to direct the audit; others try to lead the agent. The best approach is probably dependent on the personalities of the participants. Answer questions briefly, completely, and substantiate them by evidence.

Present only evidence asked for by the agent; do not give open access to the taxpayer's files or records.

5.3.2 Negotiation and settlement

Settlement with the examining revenue agent is usually advisable in order to resolve a case at the lowest level of inquiry. Revenue agents technically have no authority to make settlements with the taxpayer. They do, however, have discretion in determining the adequacy of documentation of factual issues. Negotiation may be entered into regarding items for which the agent proposes an adjustment.

If the issue in question is solely legal, rather than factual, the agent will take the IRS' stated position. Once this stance has been taken, any attempt at a different settlement will lead to an impasse.

In an effort to assist IRS personnel in settling cases, the national office can provide technical advice memorandums (TAMs), either during the examination or during an appeal. The revenue agents have instructions on how to obtain a technical advice memorandum. A request for a TAM may be made by the agent or the taxpayer.

5.4 Market Segments Specialization Program

The IRS Examination Division is preparing a series of industry-specific audit guides. This ongoing program, called the Market Segments Specialization Program (MSSP), is intended to tell revenue agents and tax auditors how certain industries operate. The following are *Market Segment Specialization Papers* and *Understanding Papers* issued through March 6, 2002.

Alaska Commercial Fishing
Industry

Alternative Minimum Tax
Architects

Artists and Art Galleries	Laundromats
Attorneys	Lawsuit Awards and Settlements
Auto Body and Repair Industry	Low Income Housing
Automobile Dealerships	Manufacturing Industry
Automobile Industry	Masonry and Concrete Industry
Aviation	Ministers
Bail Bond Industry	Mobile Food Vendors
Bars and Restaurants	Mortuaries
Beauty and Barber Shops	Moving Industry—Classification of Workers
Bed & Breakfasts	Music Industry
Business Consultants	Net Operating Losses for Individuals
Car Wash	Oil & Gas Industry
Carpentry and Framing	Partnerships
Child Care Providers	Passive Activity Losses
Coal	Pizza Industry
Commercial Banking Industry	Placer Mining
Commercial Printing Industry	The Port Project
Computers, Electronics, and High Technology	Poultry Industry
Construction Industry	Reforestation Industry
Drywallers	Rehabilitation Tax Credit
Entertainment Industry	Retail Gift Shops
Farming	Retail Liquor Industry
Furniture Manufacturing	Scrap Metal Industry
Garden Supplies	Shareholder Loans
Garment Contractors	Sports Franchises
Garment Manufacturers	Swine Farm Industry
Gasoline Retailer Industry	Taxicabs
General Livestock, such as horses, swine, ostrich, and others	Tobacco Industry
Grain Farmers	Tour Bus Industry
Hardwood Timber Industry	Trucking Industry
Independent Used Car Dealers	Veterinary Medicine
	Wine Industry

Many of MSSP Papers are available on the IRS Web site at www.irs.gov and can be purchased from the Superintendent of Documents at bookstore.gpo.gov/irs.

6. CRIMINAL AND CIVIL TAX FRAUD

Civil tax fraud differs from *criminal* tax fraud in that the latter is punishable by *imprisonment*, by fines, or by both. Civil tax fraud, on the other

hand, is punishable exclusively by a monetary penalty. An example is the 75 percent civil penalty provided in IRC Sec. 6663 for underpayments of tax that are due to fraud.

IRS special agents—members of the Criminal Investigation Division (CID)—seek first of all to discover and build a case for the prosecution of criminal fraud. According to the Internal Revenue Manual, CID is responsible for recommending and supporting with evidence whatever civil penalties may also be appropriate. If the criminal case fails, the IRS may propose civil fraud penalties. Acquittal of the criminal charges does *not* bar further pursuit of the taxpayer for civil fraud penalties. (*Helvering v. Mitchell*, 303 U.S. 391 (1938); *Spear v. Commissioner*, 91 T.C. 63 (1988)).

Criminal investigation's conviction rate is one of the highest in federal law enforcement. Not only do the courts hand down substantial prison sentences but those convicted must also pay fines, civil taxes, and penalties. Some federal tax crimes are felonies, carrying possible incarceration for longer than one year. Assisting in the preparation of a false tax return (IRC Sec. 7206(2)), for example, is a felony. It carries a maximum three-year jail sentence.

Certain other federal tax crimes are misdemeanors, punishable by imprisonment for one year or less. Failure to file a return, IRC Sec. 7203, is an example of a misdemeanor, carrying a possible maximum jail term of one year.

The standard of persuasion (also called the standard of proof) for any criminal conviction is that of proof of guilt *beyond a reasonable doubt*. In a civil case, ordinarily, proof need be only by a *preponderance of the evidence*. (That phrase is interpreted to mean that the great weight and merit of the evidence (over half) is against the defendant.) In U. S. Tax Court, however, Rule 142 requires that the government sustain its burden of proof of fraud by *clear and convincing evidence*, a more demanding standard than *preponderance* but less than *reasonable doubt*. (For further discussion of the Tax Court's standard see *Amos v. Commissioner*, 43 T.C. 50 (1964), *aff'd*, 360 F.2d 358 (4th Cir. 1965)).

Whenever fraud is an element of the offense, the government has the burden of proof. Because the standard of criminal proof, once achieved by the government, is higher than that for civil proof, the IRS will ordinarily recommend the 75 percent civil fraud penalty of IRC Sec. 6663 whenever a taxpayer is found guilty of a tax crime (or pleads no contest).

"Willfulness," an element of all of the major Internal Revenue Code tax crimes (and also an element in those statutes that prescribe civil penalties for fraud), refers to an intent to perform the illegal act—a voluntary, intentional violation of a known duty. An act done

inadvertently or by mistake, on the other hand, is not a crime. For example:

A tax practitioner who for training purposes directed an employee to prepare a refund claim for a hypothetical client would not be guilty of a crime if a different employee inadvertently filed the claim with the IRS.

Some IRC sections specify civil penalties only, and the element of willfulness or intent to evade taxes is not pertinent. An example is IRC Sec. 6698 concerning failure to file a partnership return. In the case of a violation of these and similar statutes, penalties against a taxpayer or tax practitioner may be assessed by the IRS in a manner similar to the assessment of taxes. If the IRS cannot be convinced to remove the penalty administratively, the burden of proof in court is on the person against whom the penalty was assessed.

The 1998 act shifts the burden of proof in any court proceeding to the IRS on issues of fact if the taxpayer

- Introduces creditable evidence.
- Complies with any required substantiation requirements.
- Maintains adequate records.
- Cooperates with the IRS' reasonable requests for witnesses, documents, and meetings.

6.1 How Fraud Investigations Are Initiated

Most fraud investigations arise by referral from an IRS agent who is examining a tax return, but they may also be prompted by a tip from a taxpayer's spouse, neighbor, employee, or from a lead supplied by another government program, such as drug enforcement. A referral is a transfer to IRS special agents working from the criminal investigation division (CID) of an IRS district office. CID special agents conduct fraud examinations.

6.2 How to Detect That a Fraud Referral Has Been Made

Criminal division referral should be suspected if the revenue agent abruptly postpones or suspends the examination while being vague about the reason, particularly if preceding this action by

- Discovering false statements made by the taxpayer during interviews concerning income, deposits, or lifestyle.

- Interviewing the taxpayer's customers, employees, suppliers, bankers, and stockbrokers.
- Showing interest in beginning-of-the-year cash balances and asking probing questions about cash expenditures.
- Requesting cash-related documentation such as deposit slips, bank and brokerage statements, and canceled checks.
- Asking for permission to go through the taxpayer's files.
- Requesting photocopies of income-related items such as sales and accounts receivable records, shipping records, and bank statements.
- Asking for written statements of net worth, sources of cash, or expenditures of cash.

If a fraud referral is suspected, the taxpayer should immediately consult an experienced criminal tax attorney prior to making any statements or providing any documents to the IRS.

6.3 Cash Reporting Requirements

Any person in a trade or business who receives more than \$10,000 in cash, either in a single transaction or in related transactions, must report these transactions to the IRS on Form 8300. Financial institutions and casinos report on Forms 4789 and 8362. A "person" is an individual, company, corporation, partnership, association, or estate.

"Cash" consists of coins and currency, whether of U.S. or foreign issue, cashier's checks (by whatever name, including bank checks and treasurer's checks), bank drafts, traveller's checks, or money orders.

"Related transactions" are those that occur within a twenty-four-hour period. If more than twenty-four hours pass between receipts of cash, and the total is greater than \$10,000, the transactions must be reported if the recipient knows or has reason to know that each is one of a series of connected transactions.

Form 8300 must be filed within fifteen days of receipt of a payment. After filing, a new count of cash receipts begins. Additional receipts of over \$10,000 must also be reported.

Persons reporting cash receipts must give a written statement to each payer named on any Form 8300, showing the name and address of the person reporting and the amount reported. This statement must be sent by January 31 of the year following the year in which the cash that triggered the IRS filing was received. A copy of Form 8300 must be retained for five years.

Civil and criminal penalties for intentional or willful disregard are provided in the amount of \$25,000 (\$100,000 for corporations) or the

amount of cash received in the transaction or related transactions (but no more than \$100,000), and sentencing up to five years in prison, or both. Civil penalties apply for any failure to

- File a correct Form 8300.
- Provide the required statement to those named in the form.
- Comply with other information reporting requirements.

Criminal penalties apply in any instance of willful or intentional

- Failure to file a report.
- Filing a false or fraudulent report.
- Stopping or trying to stop a report from being filed.
- Structuring a transaction to make it appear unnecessary to file a report.

Voluntary filings may be made of cash transactions under \$10,000 if the transaction appears suspect. Questionable cases may be discussed with the local IRS Criminal Investigation Division or by phoning 1-800-272-2877. A transaction is suspect if

- It provides an indication of possible illegal activity.
- It indicates an attempt by the payer to convince the recipient not to file Form 8300, or to file a false or incomplete form.
- The payer's appearance, demeanor, statements, or any other facts or circumstances arouse the suspicion of the recipient.

For further reference, see 26 USC 60501, IRS Announcement 90-142 (1990-53 IRB 1), and IRS Publication 1544, "Rules for Reporting Large Cash Payments."

Caution:

If an issue occurs, it is important that an attorney experienced in these matters be consulted.

7. RESULTS OF THE EXAMINATION

7.1 Consent to Assessment: Form 870

When the IRS revenue agent has completed the examination, the taxpayer or authorized representative has an opportunity to discuss the proposed adjustments and to argue, for example, that the taxpayer's substantial compliance justifies acceptance of inadequately substantiated amounts. Experienced tax practitioners believe they can do a better

job here than the taxpayer can. The IRS agent may act in a more conciliatory fashion when dealing with a fellow professional who may be perceived as a peer seeking a common goal, that of reaching a mutually agreeable and prompt resolution.

If the taxpayer and the agent reach an agreement as to liability, the agent will ask the taxpayer to sign a waiver, Form 870. Form 870 sets forth the taxpayer's name, taxable year, amount of tax due (including any penalties incurred) or amount of refund due to the taxpayer. This agreement at the district office level is not binding on either the taxpayer or the IRS, but the agent's recommendations will normally be accepted. The taxpayer who subsequently wishes to change position must pay the assessment and file a claim for a refund.

Taxpayers ordinarily sign the waiver if the assessment is based on obvious errors that they made in the return. Small assessments are best not disputed under the guise of standing up for a principle. (Interest charges stop running thirty days after signing of the waiver.) On the other hand, no taxpayer who feels the assessment is seriously overstated should sign the waiver.

If the taxpayer and the agent cannot agree on all the issues in question, they may still be able to reach a partial agreement and execute a waiver. A partial agreement allows computation of dollar amounts for at least some previously unresolved issues, calculation of the additional tax, and cessation of interest. The taxpayer must decide whether to yield on uncertain issues and save money on interest payments or take a chance that a better agreement can be reached on all issues at the appeals level.

Signing Form 870 does not prevent later filing for a claim for refund for any concessions the taxpayer agreed to but then decided were erroneous. Form 870-AD is an agreement form used in the appeals division. It specifies the taxpayer's agreement that "no claim for refund or credit shall be filed or prosecuted for the year(s) [covered by the agreement] other than for amounts attributed to carrybacks provided by law." Although there have been court decisions to the contrary, signing Form 870-AD makes it very unlikely that a taxpayer will be able to recover on a concession that is subsequently viewed as unwise.

Form 4549, *Income Tax Examination Changes*, is a similar agreement used in the audit division. If this agreement is signed, the taxpayer consents to immediate assessment and loses the right to challenge the liability in the Tax Court.

7.2 Extending the Statute

If negotiations at the examination stage (or later) continue until the statute of limitations approaches, the IRS agent may ask the taxpayer

to extend the statute. Form 872 extends the statute for assessment of taxes under examination to a time specified in the form. Form 872-A, Special Consent to Extend the Time to Assess Tax, extends the statute for an indefinite period. The taxpayer's consent to an indefinite extension on Form 872-A can be terminated *only* by use of the specific procedures stated in the form. Termination occurs ninety days after the date on which Form 872-T is mailed or 150 days after the date on which the IRS mails a notice of deficiency. (Form 872-T terminates the consent given on Form 872-A.)

Extending the statute extends the period during which negotiation or compromise can take place. Extension for a period of time different from that requested by the IRS can be requested and could possibly be of value to the taxpayer. If the taxpayer refuses to agree to extend the statute, the IRS normally issues a notice of deficiency requiring payment or the filing of a petition to the Tax Court within ninety days.

7.3 IRS Review of Agreed Cases

Although most agreed cases are not changed later, returns for these cases are subject to review by the district office. This provides the IRS with a safety valve to guard against improper agreements by inexperienced agents. A district examination case that has been closed will not be reopened except in the case of fraud, collusion, concealment, or misrepresentation of a material fact, or if there has been an error in the agreement based on the IRS position at the time of the agreement.

8. ASSESSMENT AND COLLECTION OF TAX

8.1 Assessment

The first step in the collection process is the assessment of the tax owed to the government. To assess means to create an account receivable on the government's books. Any tax, interest, or penalty the taxpayer owes to the government becomes an account receivable.

Regional service centers have assessment officers who sign summary records of assessment for each taxpayer for every taxable period. The date the summary assessment is signed is considered the date of the assessment. Taxpayers who wish to receive a copy of their assessments may do so upon request.

8.2 What the IRS May Assess

The IRS has the authority to assess the amount of tax shown on the return, with adjustments made for any mathematical or clerical errors appearing on the return. Additional tax may be assessed if there is a deficiency. (Also, certain penalties are assessable.)

8.2.1 Deficiency

A deficiency is defined as the portion of an income tax liability (including estate, gift, and other tax liabilities) for a taxable period that exceeds the tax previously paid with respect to the taxpayer's return for that particular period. If the IRS determines that a deficiency is present, the IRS must mail a notice of deficiency to the taxpayer by either certified or registered mail. Once the notice has been received, the taxpayer has the right to file a petition with the Tax Court asking that the deficiency be redetermined. If the taxpayer chooses to file such a petition, the IRS cannot assess the deficiency until the Tax Court issues a ruling on the case. If the taxpayer fails to file such a petition within ninety days of having received a notice of deficiency (150 days if the notice was addressed to a taxpayer outside the United States) or if the taxpayer waives the right to formal notice of the determination of a deficiency, the IRS may assess the deficiency.

8.2.2 Exceptions to the regular deficiency notice procedure

In several situations the IRS can follow a procedure other than the deficiency notice procedure described in section 8.2.1:

- *Mathematical and clerical errors.* If the IRS discovers mathematical or clerical errors on a return made after 1976, it must mail the taxpayer notice of assessment of the additional tax and allow the taxpayer sixty days after receipt of the notice to file a request for abatement of the assessment. During the sixty-day period, the IRS can make no efforts to collect the assessment. If the taxpayer chooses to file a request for abatement of the assessment, the IRS must abate the assessment and make any reassessments using the regular notice of deficiency procedure.
- *Voluntary payments before assessment.* The taxpayer may make a voluntary payment to prevent the accumulation of interest. Once the IRS receives the payment, it may assess the tax for the purpose of balancing its books. If the taxpayer wishes to take the case to the Tax Court, he or she must wait until after the IRS issues a notice of deficiency before submitting the payment, because making the

payment before the notice is received would eliminate the deficiency and cause the Tax Court to lose its jurisdiction over the case.

- *Appeals of Tax Court decisions.* If a deficiency in tax is found by the Tax Court, the tax will be assessed and collection efforts will begin even if the Tax Court's decision is not yet final. Collection may be deferred if the taxpayer posts a bond.
- *Bankruptcies and receiverships.* In the case of bankruptcies and receiverships, assessments are made immediately.
- *Waiver of restrictions.* The taxpayer who chooses to waive the restrictions on assessment may do so by filing Form 870 (Form 4549 if the matter is in the audit division, or Form 870-AD if the matter is at the appeals office). Filing a waiver of restriction allows the IRS to assess the deficiency immediately and terminates interest charges beginning thirty days after the effective date of the waiver. (See section 7.1.)

8.2.3 Statute of limitations on assessment

The general statute of limitations on assessments is three years after the later of the date the return was filed or the date the return was due. Before expiration of the three-year period, the taxpayer may consent to extend the period of assessment (except for estate taxes). Extensions may benefit taxpayers who expect that they can eventually negotiate a favorable settlement with the IRS. If a taxpayer refuses to consent to the extension, the IRS will issue a ninety-day letter (notice of deficiency) to protect itself against expiration of the assessment period. Taxpayer consent is indicated on Form 872. In the following situations, the statute is extended to six years:

- Omission of more than 25 percent of gross income
- Failure to report foreign personal holding company income
- Failure to provide the information requested on Schedule 1120 PH by a domestic personal holding company

In addition, deficiencies that result from the deduction of a carryback of a net operating loss can be assessed within the time period applicable to the year in which the net operating loss originated. If a false or fraudulent return has been filed with the intent to evade tax, or if no return is filed, there is no limitation on the period for assessment. Subsequent, voluntary filing of an amended return showing correct information does not limit the open-ended assessment period if the original return was false.

8.2.4 Individual master file

The IRS maintains an accounting for each taxpayer, showing debit and credit activity. An entry in this file, labeled “examination indicator,” may signal that an audit is likely.

8.3 Collection

If the taxpayer fails to take advantage of opportunities to appeal an IRS decision to assess additional tax (see section 9), the IRS will use its powers of levy to collect the tax (IRC Section 6331(b)). The power of levy gives the government the right to seize and sell an asset.

Within sixty days after the expiration of the period begun with the mailing of a ninety-day deficiency letter, the IRS issues a notice and demand for payment. Collection cannot be enjoined by the taxpayer if the assessment itself is valid. At this point, the taxpayer can pay the tax and file a claim for refund with the IRS. If the claim is disallowed, the taxpayer can file an action in U.S. district court or in U.S. Claims Court. Alternatively, the taxpayer may file a petition with the U. S. Tax Court prior to making payment.

If the taxpayer fails to pay, the additional tax plus penalties and interest become a lien on property owned by the taxpayer or acquired after the lien is effective. The IRS has ten years to collect. The lien is not valid against certain claims, such as mortgages and other recorded liens, until a notice of tax lien (Form 668) is filed. The taxpayer has thirty days after the mailing of the notice of lien in which to demand a hearing before an appeals officer who has had no prior involvement in the case.

A notice of levy (Form 668-A) must be either (1) given to the taxpayer in person, (2) left at the taxpayer’s home or usual place of business, or (3) sent to the taxpayer by registered or certified mail. The notice must be provided at least thirty days prior to seizure of the asset and must describe the procedures for sale and the appeals process available to the taxpayer, including that of a pre-levy hearing (IRC Sec. 6331(a)).

Levies against personal property are valid when notice is given to the holder of the property, such as a bank that holds the taxpayer’s checking or savings account. Notice to the taxpayer may be made afterward. The effect of a levy is to transfer “constructive possession” of the property to the government, and any subsequent attempted assignment of the property by the taxpayer is invalid. A levy covers property owned by the taxpayer at the date of the levy or later acquired. A levy on salary or wages continues in effect until the liability is satisfied or the statutory period (usually six years) expires. Once the property has been levied

upon, the taxpayer may redeem it by purchase from the IRS (satisfying the tax deficiency) prior to public sale. Real property may be redeemed by the former owner within 180 days after its public sale by payment of the sale price plus 20 percent per annum to the purchaser (IRC Sec. 6337(b)). Certain property is exempt from IRS seizure, including

- Clothing, food, fuel, and schoolbooks
- Furniture and personal effects (limit of \$6,890)
- Books and tools used in a trade, business, or profession (limit of \$3,440)
- Salary, wages, or other income to the extent ordered by a court to support minor children
- Payments for disabilities in connection with military service
- Certain federal or state public assistance payments, such as supplemental income for the aged or blind
- Other items specified in IRC Sec. 6334(a) and Treas. Reg. Sections 301.6334-1 through 301.6334-7

Ordinarily, the taxpayer's principal residence is exempt from levy unless the Secretary of the Treasury finds that collection is in jeopardy (IRC Sec. 6334). A federal judge or magistrate also must approve the levy in writing.

According to IRS policy, levies are not made against qualified pension plan benefits or IRAs, or against Social Security, Medicare, or welfare payments. This IRS policy is subject to change.

Exemptions provided by state law are not effective to prevent levy for the collection of any federal tax.

The American Jobs Creation Act of 2004 authorizes the IRS to use private debt collection agencies (PDCs) to collect outstanding federal tax liabilities. The use of PDCs is anticipated to increase collection efforts against taxpayers.

8.4 Safeguards Against IRS Seizure

- No levy can be made on property if the estimated amount of expenses to be incurred during sale exceeds the fair market value of the property (IRC Sec. 6331).
- A levy must not be made on a day when the owner of the property is required by summons to appear before the IRS, unless collection of the tax is in jeopardy (IRC Sec. 6331).
- After receiving official notice of levy, banks and other financial institutions cannot release garnished accounts for twenty-one days (IRC Sec. 6332).

- Levies must be released if the liability is satisfied, release facilitates collection, an installment agreement has been signed, economic hardship results, or the fair market value of the property exceeds the liability. Determination of economic hardship must be expedited in the case of tangible personal property essential to the taxpayer's trade or business (IRC Sec. 6343).
- The taxpayer's residence cannot be seized for a liability of \$5,000 or less. Generally, a taxpayer's primary residence cannot be seized without the approval of a federal judge or magistrate.
- The IRS cannot seize the taxpayer's business unless other assets are not sufficient to cover the liability.
- At the taxpayer's request, seized property must be sold within sixty days (IRC Sec. 6335).
- Jeopardy assessments or jeopardy levies must be explained in writing and reviewed by the IRS within thirty days if the taxpayer requests (IRC Sec. 7429).
- Civil actions to review the reasonableness of jeopardy assessments and levies may be brought in federal district court or, in certain circumstances, in Tax Court (IRC Sec. 7429).
- A taxpayer who receives a Notice of Tax Lien is entitled to a Collection Due Process (CDP) hearing.

8.5 Compromise

After assessment, but before payment (or levy), one additional recourse may be available. It may be to the taxpayer's advantage to attempt a compromise with the IRS. In exchange for a speedy and relatively certain settlement, the IRS may be willing to accept less than the full amount of liability. Acceptance of an offer in compromise (Form 656) is discretionary with the IRS.

A compromise must have as its basis doubt about either liability or collectibility. A compromise offer based on doubt about liability will be rejected by the IRS if the liability has been determined by the Tax Court or by the IRS appeals office. An offer to compromise based on collectibility must be accompanied by a statement on Form 433-A of the taxpayer's assets, liabilities, income, and living expenses, since the taxpayer's argument is that he or she will be unable to pay the amount of tax that was assessed. (Form 433-B is used for businesses.) No compromise is accepted unless the taxpayer agrees to extend the period of limitation on collection for the time the offer is under consideration, plus one year (Treas. Reg. Sec. 301.7122-1(f)).

Taxpayers who owe \$10,000 or more are subject to new collection and budget rules. If there are no readily available assets to sell or borrow against, the taxpayer's monthly gross income less necessary living expenses is calculated to yield a minimum acceptable installment payment. The housing and transportation component of necessary living expenses is dependent upon local conditions. National standard expenses have been calculated to cover other necessary expenses such as housekeeping supplies, clothing and clothing services, personal care products and services, food and miscellaneous. Dollar amounts are derived from the Bureau of Labor Statistics Consumer Expenditure Survey and are updated periodically (see Internal Revenue Manual, Sec. 5323). The Survey can be obtained from the Bureau of Labor Statistics, 2 Massachusetts Avenue, Room 3985, Washington, D.C. 20212, (202) 606-6900.

The taxpayer will be expected to offer to pay the net realizable value of his or her equity in the assets. This value is equal to the quick-sale value of all assets minus debts that have priority over the IRS. For nonliquid assets, such as real estate or closely held business interests, quick-sale value is 80 percent of fair market value. Additionally, the taxpayer will be expected to pay the present value of five years of future income less certain necessary expenses. Recent guidance regarding offers in compromise can be found in Rev. Proc. 2003-71, I.R.B. 2003-36.

8.6 Installment Payment (IRC Sec. 6159)

The IRS is authorized to enter into a written agreement with any taxpayer allowing satisfaction of a tax liability through payments under an installment plan, if it facilitates the collection of the liability.

IRS Divisions of Appeals, Employee Plans and Exempt Organizations, Examination, Problem Resolution, Returns Processing (in service centers), and Taxpayer Service are authorized to make installment agreements up to \$10,000. Their authority extends over individual, corporate accounts involving Form 1120, and out-of-business sole proprietor accounts. Larger amounts are addressed by the Collection Division. If the aggregate liability does not exceed \$10,000, the taxpayer has filed all returns for the past five years, the taxpayer is financially unable to pay, and the agreement requires full payment within three years, the IRS is required to enter into an installment agreement.

It is not necessary for a taxpayer to be assessed a deficiency before opening the possibility of installment payment. On IRS Form 9465, Installment Agreement Request, the taxpayer proposes a monthly payment at any time he or she is unable to satisfy the tax liability. A small fee is imposed by the IRS for such an agreement. The IRS will respond

within thirty days, approving or denying the request or asking for more information.

Interest and penalties continue to accrue until the liability is satisfied. (Financial sources other than the Treasury may provide the taxpayer with lower rates of interest.)

Generally, an agreement entered into will remain in effect for the term of the agreement. On thirty days' notice, however, the government may alter or terminate the agreement if it finds the following:

- The taxpayer provided information prior to the date of the agreement which was inaccurate or incomplete.
- The collection of the tax is in jeopardy.
- The financial condition of the taxpayer has significantly changed.

Note: The American Jobs Creation Act of 2004 authorizes the IRS to enter into an installment agreement that provides for payment of less than the entire tax liability owed (a "part payment agreement"). Previously, the IRS was only permitted to enter into an installment agreement providing for payment of 100% of the tax liability due. A part payment agreement combines the benefits of an offer in compromise with the benefits of an installment agreement.

8.7 Dischargeability of Taxes in Bankruptcy

8.7.1 Individuals

The discharge of a particular tax obligation depends on the nature of the tax, the priority status granted to tax obligations under the Bankruptcy Code, and the chapter of the Bankruptcy Code under which the case is filed or to which a case may later be converted. 11 U.S.C. §523(a) details debts of an individual, including various taxes, that, unless paid, are not discharged in a bankruptcy proceeding under Chapter 7, Chapter 11, Chapter 12, or by a debtor who receives a "hardship" discharge under Chapter 13. See 11 U.S.C. §1328(b).

Taxes exempted from discharge include instances when a debtor failed to file a required return, filed a late return within two years of filing the bankruptcy petition, filed a fraudulent return, or willfully attempted to evade such tax. In a case filed under Chapter 13 prior to October 17, 2005, and upon completion by the debtor of all payments under the plan, the court will grant the debtor discharge of all debts provided for in the plan, including taxes (including those related to unfiled returns or fraud) (See 11 U.S.C. §1328(a)). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Bankruptcy Act) eliminated the distinction for Chapter 13 cases filed

on or after October 17, 2005. Prepetition penalties and interest related to taxes that are not discharged are likewise not discharged.

Priority taxes under 11 U.S.C. §507(a)(2) that are exempted from discharge relate to taxes incurred by a debtor in an involuntary proceeding between the date the involuntary petition is filed and the date the Bankruptcy Court enters an order for relief. Priority taxes under 11 U.S.C. §507(a)(7) that are exempted from discharge include the following:

- Income taxes due within three years of the filing of the petition, assessed within 240 days of the filing of the petition, or unassessed but assessable as of the filing of the petition. See 11 U.S.C. §507(a)(7)(A).
- Property taxes. See 11 U.S.C. §507(a)(7)(B).
- Withholding taxes, such as income tax or FICA and “collected” taxes, such as telephone excise tax, airport ticket tax, and windfall profits tax. See 11 U.S.C. §507(a)(7)(C).
- Certain employment taxes, such as FICA and federal and state unemployment taxes due on wages earned or paid before the petition is filed. See 11 U.S.C. §507(a)(7)(D).
- Excise taxes for a return, if required, that are past due within three years of the filing of the petition. See 11 U.S.C. §507(a)(7)(E).
- Certain customs duties. See 11 U.S.C. §507(a)(7)(F).
- Penalties that represent compensation for actual pecuniary loss for a governmental unit involving a tax listed in items A through F above. See 11 U.S.C. §507(a)(7)(G).

8.7.2 Partnerships and corporations

In a case filed under Chapter 7, 11 U.S.C. §727(a)(1) provides that only an individual can be granted a discharge. As such, partnerships and corporations involved in a proceeding under Chapter 7 are not granted a discharge. Therefore, if shareholders keep dormant a corporate shell for later reactivation, the unpaid tax liabilities remain in existence.

In a case filed under Chapter 11, 11 U.S.C. §1141(d) provides that upon confirmation of a plan of reorganization—unless otherwise provided for in the plan, in the order confirming the plan, or in that subsection of the statute—a debtor is discharged from any debt that arose before the date of confirmation. The historical notes to 11 U.S.C. §1141 clearly indicate that nondischargeable taxes in such reorganizations are priority taxes under 11 U.S.C. §507, and postpetition payments are due under agreements reached with the tax authorities before

the commencement of the case. In addition, the 2005 Bankruptcy Act provides that confirmation of a Chapter 11 plan does not discharge a debtor that is a corporation from a debt for taxes with respect to which the debtor made a fraudulent return, or if the debtor willfully attempted in any manner to defeat the tax.

In a case filed under Chapter 12, 11 U.S.C. §1228(a) provides that after completion by the debtor of all payments under the plan, the debtor is discharged from all debts provided for by the plan, except any debt (e.g., taxes as described above) specified in 11 U.S.C. §523(a). Since the “family farmer” debtors eligible to file under Chapter 12 include partnerships and corporations, it would appear that this discharge, which is not as comprehensive as that under Chapter 11, applies to partnerships and corporations that are eligible and choose to file under Chapter 12 instead of Chapter 11.

Practice Note. A number of provisions of the 2005 Bankruptcy Act have implications for tax practitioners. See the chapter on Bankruptcy/Insolvency for a detailed discussion of the 2005 Bankruptcy Act.

9. APPEALS PROCESS

Upon a taxpayer’s disagreement with a revenue agent’s determination of deficiency, a review and appeals process begins. When the taxpayer declines to sign Form 870 or Form 4549, the agent prepares a report that is reviewed by a supervisor and then sent to a technical branch of the district office examination division. (See section 7.1.) In most cases, the technical reviewer approves the findings of the agent and the taxpayer is sent a “thirty-day letter.”

9.1 The Thirty-Day Letter

The thirty-day letter informs the taxpayer of proposed changes in tax liability. In addition, the thirty-day letter invites the taxpayer to a hearing before the appeals office, which is separate from and independent of the IRS office that proposed the adjustment to taxpayer’s tax returns.

Tax practitioners who are on record as the taxpayer’s representative receive the letter instead of the taxpayer if a power of attorney (Form 2848) or information authorization form (Form 8821) is on file. As the name implies, the taxpayer has thirty days to respond to a thirty-day letter.

Upon receipt of a thirty-day letter that proposes a deficiency, the taxpayer may request a conference with the appeals office. An oral

request is sufficient if the deficiency resulted from a field examination in which the proposed deficiency is \$2,500 or less or from an office or correspondence examination. If the deficiency resulted from a field examination in which the proposed amount exceeded \$2,500 but did not exceed \$10,000, a simple recitation of disputed issues to the appeals office is sufficient to get consideration. The dollar limits are calculated to include proposed additional tax, including penalties, proposed over-assessment, and claimed refund (or, in an offer in compromise, the total amount of assessed tax, penalty, and interest sought to be compromised) (Code of Federal Regulations [CFR], 601.106(a)(iii)).

If the proposed amount arising from a field examination is over \$10,000, a formal written "protest" must be filed. Additionally, a written protest is required in cases involving all employee plan and exempt organization cases and all partnership and S corporation cases. When a formal protest is required, it must contain

- A statement that the taxpayer wishes to appeal the findings of the IRS agent.
- The taxpayer's name, address, and identification number.
- Identification of the years or periods involved.
- An itemized schedule of the proposed adjustment with which the taxpayer disagrees.
- A statement of facts that support the taxpayer's position, declared to be true under penalties of perjury.
- A statement of the law or other authority relied upon by the taxpayer.

(Text continued on page 53)

If an authorized tax representative submits the protest, it must state whether he or she knows personally that the statement of facts is true and correct. Guidance regarding protests is given in IRS Publication 5, *Appeals Rights and Preparation of Protests*.

IRS field examiners must inform taxpayers of the IRS's rebuttal position in protested cases, according to the executive director of the IRS Office of Coordinated Examination Programs. In cases where unagreed issues are being forwarded to the IRS Appeals Division, the Examination Division will provide taxpayers with the IRS's rebuttal position on the issues in question. Taxpayers wishing early referral to the Office of Appeals should consult Rev. Proc. 99-28.

9.1.1 The appeals office

The appeals office normally receives a case within thirty days of filing of a protest. It is policy to acknowledge receipt of the case within twenty-five days. A conference at the appeals office will then be offered within ninety days of receipt. Conferences are scheduled for both docketed and undocketed Tax Court cases. Approximately 85 to 90 percent of cases it receives are agreed and resolved by the appeals office, about 80 to 90 percent of them within one year.

Hearings at the appeals office are informal sessions in which no sworn testimony is taken. In matters in which facts are being alleged, however, affidavits may be required or it may be required that facts be declared to be true under the penalties of perjury. Practitioners who attend hearings without the taxpayer must have a power of attorney.

9.1.2 The appeals officer

Nationally, there are about 1,500 appeals officers. Many of them are CPAs or attorneys. They have the job of settling legal and factual issues raised by agents without resorting to litigation. They will not reopen issues that have been agreed upon by the taxpayer and the agent. They may, however, raise new issues if they feel there is a substantial reason for doing so—a possibility to be weighed when considering an appeal.

Appeals officers can request technical advice from the national office if either they or the taxpayer desires. The appeals officer is obligated to follow technical advice that is favorable to the taxpayer but may still negotiate if the advice is unfavorable to the taxpayer. If the taxpayer reaches an agreement with the appeals officer, the taxpayer signs Form 870-AD. If no agreement can be reached, a notice of deficiency (ninety-day letter) is issued and the taxpayer is invited to start proceedings in Tax Court. Even if an appeals officer reaches an agreement with a taxpayer, the agreement is not binding on the IRS

unless approved by the associate chief or chief of the appeals branch office.

9.1.3 Alternative dispute resolution

See Section 13.3 for a discussion of the alternative means of dispute resolution now offered by Appeals, including mediation and arbitration.

9.2 The Ninety-Day Letter

The ninety-day letter is the notice of deficiency received by a taxpayer who makes no response to a thirty-day letter, who requests immediate assessment in order to go to court, or who has reached no settlement in the appeals office. A taxpayer receiving a ninety-day letter has ninety days to file a petition with the Tax Court (150 days if it was addressed to a taxpayer outside the United States). The taxpayer who chooses to appear before the Tax Court does not first have to pay the proposed deficiency. If the taxpayer fails to respond in time to the ninety-day letter, the deficiency is assessed and the taxpayer loses the right to have his or her case reviewed by the Tax Court. A taxpayer who chooses to have the case reviewed by the U.S. district court or the U.S. Claims Court must pay the tax and then file for a refund.

9.3 Appeals Before the Courts

9.3.1 The U.S. Tax Court

Ordinarily, the Tax Court presents the taxpayer's only opportunity for entry into court without first paying the alleged deficiency. Timing is critical when petitioning the Tax Court. The petition must be received by the court no more than ninety days from the date the deficiency notice was mailed to the taxpayer.

If the case had been to the appeals office before the ninety-day letter was issued, IRS regional counsel has jurisdiction from the time the taxpayer files a petition in Tax Court. If the case had not been to the appeals office, regional counsel will refer it there. If the appeals office sees no prospect for settlement, and the deficiency is more than \$10,000, the case will promptly be returned to regional counsel for trial preparation. If the deficiency is \$10,000 or less, the appeals office will retain jurisdiction for at least six months, which period may be extended if there appears to be likelihood of settlement. In most cases it will be to the taxpayer's benefit to achieve settlement as rapidly as possible.

When jurisdiction of a case passes to IRS counsel, all relevant facts and legal positions will be pieced together to develop the case for trial.

Once the case is developed, regional counsel may attempt settlement with the taxpayer, regardless of prior settlement attempts by the IRS appeals division.

In contrast to other U.S. courts, representation before the U.S. Tax Court is not limited to attorneys. A taxpayer can represent himself or herself before the Tax Court or may be represented by anyone authorized to practice before the Tax Court (see section 2.1). Only tax cases are heard in Tax Court, and the court is accustomed to the complexities of the Internal Revenue Code. Cases heard by the Tax Court can be appealed to the U.S. Court of Appeals and may be heard in some instances by the U.S. Supreme Court.

For cases involving disputes of \$10,000 or less for a taxable year, the taxpayer has the option of choosing to use the Small Tax Case Procedure. This procedure uses special trial judges whose decisions cannot be appealed. Results cannot be used as a precedent for any other case. Overall, the Small Tax Case Procedure is quicker, less expensive, and less formal; however, there can be no appeal. Recent statistics indicate that the IRS achieves a clear victory in 45 to 60 percent of the cases, regardless of the forum (Tax Court, district court, or Court of Federal Claims), although “split decisions” carrying some benefit to the taxpayer are more common in Tax Court. (The booklet *Election of Small Tax Case Procedure and Preparation of Petitions* is available from the Clerk of the Tax Court, 400 Second Street, N.W., Washington, D.C. 20217.) Once a taxpayer has filed a petition to the Tax Court it cannot be withdrawn, except with IRS counsel’s agreement.

The Tax Court recently announced that a major revision of the Tax Court Rules of Practice and Procedure will be published in the near future.

9.3.2 The U.S. District Court and the U.S. Court of Federal Claims

If a taxpayer has paid the assessed tax and has filed a claim for a refund, but the claim either has been denied with a notice of disallowance or has not been acted upon within six months from the date it was filed, the case may be taken to a U.S. district court or the U.S. Court of Federal Claims. In almost all district courts and the Court of Federal Claims, the government is represented by attorneys from the tax division of the Department of Justice.

District courts provide a taxpayer with the opportunity to have the case decided upon by a jury. In addition, since the district court is a local court, its members are likely to be familiar with local conditions and circumstances that may have a bearing on the outcome of the case. The U.S. Court of Federal Claims is not a local court, but the trial may

be held in or near the taxpayer's home city. Since the judge in a Court of Federal Claims case will hear evidence at several locations for the convenience of parties involved, the Court of Federal Claims can often ease problems created by having witnesses residing in widely scattered locations.

Decisions made by a district court can be appealed to the respective courts of appeal and ultimately, under the proper circumstances, to the Supreme Court. Decisions made by the Court of Federal Claims can be appealed to the U.S. Court of Appeals for the federal circuit and to the Supreme Court. Experienced tax attorneys choose a court based upon their experience with the court and subjective judgments about what is best for the taxpayer.

10. OBTAINING A REFUND

10.1 Claims Procedures

A taxpayer who has made an overpayment of taxes to the IRS is eligible for a refund. Overpayments exist when the taxpayer makes a tax payment exceeding his or her correct tax liability and include payments of taxes assessed or collected after the expiration of the period of limitations on assessment. If the IRS learns of an overpayment, either through notification by the taxpayer or through an audit, it will credit or refund the overpayment provided that the statute of limitations for filing claims (IRC Sec. 6511) has not expired.

Filing a refund claim puts the IRS on notice that there may be an overpayment. No lawsuit for a refund may be brought unless a timely and valid refund claim is filed. Although the IRS has issued denials, many tax practitioners believe filing a refund claim can sometimes trigger an audit, particularly if the refund is large or is made in connection with a tax shelter. A claim for refund may be made by

- Form 1040X or 1120X, Amended Returns, in the case of individual or corporate income tax.
- A regular tax form marked *Amended* and showing overpayment of income taxes.
- A letter to the appropriate IRS official stating all information necessary for the IRS to determine the nature of the claim.
- Form 870 showing an overpayment, solicited by a revenue agent and signed by the taxpayer.
- A Tax Court petition, or protest, containing allegations that a refund is due, partially mitigating a proposed deficiency and stating the reasons therefor.

10.2 Speedy or Quick Refund Procedures

Taxpayers may avail themselves of an expedited refund procedure referred to as “speedy” or “quick” because the IRS must either pay the refund or deny the application within ninety days from the later of either the date the application was filed or the last day of the month the return was due (considering extensions). If the IRS later audits the tax year, the refund may be denied retroactively, and the taxpayer may have to return the refund.

The forms to be filed are Form 1045, for an individual, or Form 1139, for a corporation. Technically, these forms constitute applications for a tentative carryback adjustment when a prior taxable year has been affected by

- A net operating loss carryback.
- An investment credit carryback.
- A work-incentive program carryback.
- A capital loss carryback.

10.3 Interest on Refunds and Underpayments

For refunds originating in the current-year tax return, there is a forty-five-day interest-free period starting with the due date or the filing date, whichever is later. For refunds based on a claim—the usual case—interest is payable to the taxpayer from the date of the overpayment to a date as much as forty-five days prior to the refund check date.

For an overpayment arising from a carryback, interest is payable to the taxpayer from the due date for filing the loss-year return (without regard to extensions) to a date not more than thirty days preceding the date of the refund check (IRC Sec. 6611(a), (b)(2), and (f)).

For periods beginning after July 22, 1998, the interest rate on overpayments and underpayments is equalized. For the same amount of tax due and owed the interest rate for the taxpayer is effectively zero.

10.4 Protective Refund Claim

A claim for refund must be filed within three years from the time the return was filed or two years from the time of payment of the tax. The claim must set forth in detail the basis for the refund (Treas. Reg. Sec. 301.6402-2). However, facts necessary to detail the claim may be unavailable to the taxpayer before the expiration of the limitation

period, such as the exact amount, or the effect of pending litigation. A claim for refund may be filed as a protective measure, however, even without complete detail. A general counsel memorandum acknowledges that the claim will be valid if it apprises the IRS of the essential nature of the claim (GCM 38786).

11. RULINGS, DETERMINATIONS, TECHNICAL ADVICE

11.1 Private Letter Rulings

A private letter ruling or, simply, a letter ruling is a written statement from the national office of the IRS specifying the tax treatment to be accorded a transaction or proposed transaction prior to its inclusion in a tax return. To the practitioner, a letter ruling is a planning tool, enabling taxpayers to obtain definitive guidance in structuring transactions. This guidance is particularly important if substantial amounts are involved and the transaction can be structured in different ways, depending on the IRS view as expressed in the letter ruling. The ruling may also motivate the taxpayer to avoid an as-yet-uncompleted transaction.

Rulings may not be cited as authority for another taxpayer's situation nor, technically, are they binding on the IRS. Only in rare instances, however, do examining agents attempt not to follow the ruling, in which case the ruling should be called to their attention. Rulings, with identifying characteristics removed, are available for public scrutiny and appear in tax publications. A ruling has no value, even to the taxpayer who received it, if the facts of the transaction are not in agreement with those supplied when the ruling was requested.

A conference at the national office may be requested to sound out the government's position, particularly if the transaction is complex or unique, without fully exposing the taxpayer's proposed situation. Taxpayers or authorized representatives should go to a conference with a draft of their request. Nothing said at the pre-submission conference is binding on either party.

The taxpayer must sign a statement attesting to the accuracy of the facts submitted in the filing. A thirty-day period will be allowed for submission of missing information. A request may be withdrawn by a taxpayer prior to the time the ruling is signed by the IRS. Rulings normally require several months for the IRS to process.

Although it is normal procedure to file the request and then to receive one conference as a matter of right, a phone call to the deputy

associate chief counsel for technical matters in the national office may prove useful in sounding out, before filing, whether the IRS is likely to issue a favorable ruling. No ruling will be made orally. The telephone call can also be used to straighten out procedural questions regarding the form of the submission. The telephone conference will proceed on a “time available” basis at the discretion of the deputy counsel.

If a formal ruling is sought, the request must be in writing and should be accompanied by copies of financial statements, minutes of meetings, and other pertinent documents. These will not be returned if the ruling is denied, but will become part of the taxpayer’s file at the district level. Tax returns reflecting transactions carried out despite a prior unfavorable ruling are likely to be audited. Each year guidelines for securing letter rulings are detailed in a Revenue Procedure, for instance Rev. Proc. 2005-1, including such matters as the following:

- Submit in duplicate if more than one issue is requested, or if a closing agreement is requested.
- Do not submit alternative plans as backup in case your ruling is denied.
- Include complete facts, names, addresses, and identification numbers of all interested parties; copies of all pertinent documents should have an attestation that they are the same as the originals.
- Include a balance sheet nearest the date of the transaction.
- Include analyses that tie together the business reasons for the transaction.
- Give appropriate grounds and authority for the ruling.
- State the outcome of any previous request for rulings on similar issues for the taxpayer.
- State whether the same issue is in the taxpayer’s return that (1) is under examination or appeal and without a closing agreement, or (2) is in litigation.

The areas in which the IRS will not issue letter rulings are set forth in a revenue procedure issued by the IRS each year.

11.2 Determination Letters

A determination letter, issued by a district director at the taxpayer’s request, is a written response to a set of facts regarding a completed transaction. The determination is made only if it can be based on precedents and policies previously expressed by the national office. Procedures for requesting determinations are the same as for a letter

ruling, but the request should be directed to the district director. Forms are available for determining the tax qualified status of tax-exempt organizations (Form 1023), or pension, profit-sharing, or retirement plans and the trust or custodial arrangements associated with them (forms in the 5300 series). The procedures for requesting determination letters are set forth in Rev. Proc. 95-4 and in a revenue procedure issued by the IRS each year.

11.3 Technical Advice Memoranda (TAM)

These memos are statements written by the national office to provide instruction to a district or appeals office regarding the national office view of the treatment of a technical matter on a return under examination. These memos have other uses; for example, a district director might request technical advice concerning a taxpayer's request for a determination letter. Although the formal request to the national office must come from the district office, a taxpayer may request that this be done. Practitioners usually encounter TAMs when they are requested by a revenue agent. Taxpayers may submit their arguments either in writing or orally before the national office writes its memo.

A TAM may be particularly useful for the taxpayer who believes that lack of uniformity exists in treatment of an issue or that the issue is unusual enough to justify national office attention, while at the same time believing the national office will endorse the taxpayer's point of view, even if the examining agent does not.

An agent who has received a TAM is bound to follow its guidance. The legal issue involved may not be negotiated at the examination nor at the conference level, although a factual or monetary compromise may still be possible. The taxpayer's only other recourse is to go to court.

If the taxpayer asks for a TAM but the agent declines to request it from the national office, the taxpayer, within ten calendar days, should appeal in writing to the Chief, Examinations Office, or the Chief, Appeals Office. If another denial is received, the taxpayer has ten days in which to request that all data regarding the request be submitted to the national office. Details may be found in Statement of Procedural Rules 601.105(b)(5). Procedures for obtaining TAMs are set forth in a revenue procedure issued by the IRS each year.

11.4 Freedom of Information Act

The Freedom of Information Act (5 USC 552) requires the IRS to make available a variety of information if it has not already been published in the Federal Register, including

- Final opinions and other orders made in the adjudication of cases.
- Statements of policy and interpretations adopted by the IRS.
- Administrative staff manuals and instructions to staff that affect a member of the public.

Public reading rooms where these and other materials are available for inspection are maintained in the national office and in each regional office. Subject to exceptions set out in Statement of Procedural Rules 601.701(b)(1), a taxpayer may request that the IRS make available its “reasonably described records” concerning the taxpayer. (Exceptions relate primarily to IRS personnel rules and to enforcement tactics, including criteria for selection of returns for audit.) A request for records and files must be made in writing, stating it is made pursuant to the Freedom of Information Act and sent to the IRS official responsible for the records. Addresses for the responsible district officers, as well as details for making the requests, may be found in Statement of Procedural Rules 601.702. IRS Publication 876 gives information about the nature and possible use of IRS data banks.

11.5 User Fees for IRS Services

The IRS is required by statute to collect fees for certain services, such as processing a request for change in accounting period or in accounting method. The fee must be paid in advance and varies in amount depending on the time required or the complexity of the response to the taxpayer’s request. Fee amounts are set in a revenue procedure issued early each year and vary, depending upon the service, between \$100 and \$7,000. Effective August 1, 2003, the IRS will no longer issue “supplemental” private letter rulings when the facts of a previously issued private letter ruling change. Rather, the taxpayer will be required to submit a new private letter ruling request.

11.6 Closing Agreements

IRC Section 7121 authorizes the IRS to enter into agreements in writing that “shall be final and conclusive” regarding a person’s tax liability. Shareholders desiring to sell a closely held corporation might seek a closing agreement to definitely establish the amount of the corporation’s tax liability. An individual might seek a closing agreement to present to other creditors to help prove his or her financial position. Closing agreements might be used to

- Determine the amount of deficiency dividend to be paid to avoid personal holding company tax.

- Release the executor of an estate from tax liability.
- Determine the amount of a final distribution from a trust or estate.

According to Statement of Procedural Rules 601.202 (26 CFR 601.202), a taxpayer request for a closing agreement should be submitted to one of the following:

- District director with whom the return was filed
- Appeals division, if the matter is under appeal
- Commissioner of Internal Revenue, if the matter relates only to a subsequent period

Form 866, “Agreement of Final Determination of Tax Liability,” is used to close out the total tax liability of the taxpayer—for example, by a fiduciary seeking to close an estate or by a corporation being liquidated. Form 906 is for a closing agreement covering specific issues. It might be used for matters having a continuing relevance to future tax years, such as to settle the basis of property or method of depreciation.

11.7 Correspondence

The IRS has provided an explanation of the notice routine and time frames for accounts with outstanding balances and accounts where no tax return has been filed. The first notice a taxpayer receives indicating a balance due is called an *adjustment/error notice*. There are several different adjustment/error “CP” notices that are used to alert the taxpayer of an outstanding balance.

Time Frames for IRS Notices

Balance Due Accounts

Individual Tax Accounts: Adjustment/Error Notice:

- 5 weeks - 1st Notice, CP501
- 5 weeks - 2nd Notice, CP502
- 5 weeks - 3rd Notice, CP503
- 5 weeks - 4th Notice, CP504

Business Tax Accounts: Adjustment/Error Notice:

- 5 weeks - 1st Notice, CP503
- 4 weeks - Final Notice, CP504

Return Delinquency

Individual Tax Accounts: 1st Notice, CP515

- 8 weeks - 2nd Notice, CP516
- 6 weeks - 3rd Notice, CP517
- 6 weeks - 4th Notice, CP518

Business Tax Accounts: 1st Notice, CP515
-10 weeks - 2nd Notice, CP517
-6 weeks - 3rd Notice, CP518

12. PROBLEM RESOLUTION: NATIONAL TAXPAYER ADVOCATE

The Office of the National Taxpayer Advocate is an independent organization that is responsible for representing the taxpayer's point of view within the Service. Taxpayers feeling that their problems are not resolved through normal IRS channels may request an Advocate's help by filing Form 911, Application for Taxpayer Assistance Order (TAO). The form is available by phone (800-829-1040) or at a local IRS office.

Each state and service center has at least one Local Taxpayer Advocate, who is independent of the local IRS office and reports directly to the National Tax Advocate. Taxpayers can also contact the national Taxpayer Advocate Service at (877) 777-4778 or visit its Web site at www.irs.gov/advocate.

The Advocate must be satisfied that the taxpayer has been unable to get relief through usual IRS channels. If, as determined by the Advocate, the taxpayer is suffering or about to suffer a significant hardship as a result of IRS administration of laws, a TAO will be issued. A TAO may require the IRS to take any action permitted by law.

The TAO suspends the statute of limitations related to the subject of the order (for example, under IRC Section 6501 relating to the assessment or collection of tax) and immediately stops an IRS action or proposed action (such as a levy on the taxpayer's property). The period of suspension begins on the date of the taxpayer's application for a TAO and ends on the date of the Advocate's decision. Additionally, the Advocate can specify in the TAO any further suspension period.

Once a TAO has been issued, it is binding on the IRS unless revoked by the Secretary of the Treasury.

Form 911 is used to request the TAO, but the IRS says that a written statement will serve as well if the form is not available. The "significant hardship" described in the statute is defined as "more than an inconvenience to the taxpayer or a financial hardship, as such, but rather as a hardship from which the resultant disruption caused or to be caused to the taxpayer by the Internal Revenue Service's action or proposed action is such that it would offend the sense of fairness of taxpayers in general were they aware of all the surrounding facts and circumstances."

The Taxpayer Advocate must consider, among other things, the following four specific factors when determining whether there is a "significant hardship" and whether a TAO should be issued:

1. Whether there is an immediate threat of adverse action
2. Whether there has been a delay of more than thirty days in resolving the taxpayer's account problems
3. Whether the taxpayer will have to pay significant costs (including fees for professional representation) if relief is not granted
4. Whether the taxpayer will suffer irreparable injury, or a long-term adverse impact, if relief is not granted (IRC Sec. 7811(a)(2), as amended by the 1998 Act)

Significant hardships sometimes occur during IRS action to collect tax. Specific examples of hardships are

- Threat of a poor credit rating caused by erroneous enforcement action.
- Possible loss of employment.
- Pending eviction.
- Refusal of the IRS to rescind an erroneous statutory notice (ninety-day letter).
- Significant personal emergency, such as payment for medical treatment.
- Imminent bankruptcy.
- Inability to meet payroll.

The national Office of Taxpayer Advocate submits two reports to Congress annually. One lists goals for the coming year, and the second report lists the twenty most serious problems encountered by taxpayers and suggests ways for solving these problems.

13. TAX SHELTER DISCLOSURE REGULATIONS

On February 28, 2003, the IRS issued final regulations relating to tax shelters. Those regulations were substantially revised by the American Jobs Creation Act of 2004.

13.1 Disclosure Requirements

The rules governing disclosure are set forth in Treasury Regulation Section 1.6011-4, which generally apply with respect to transactions entered into on or after February 28, 2003. Under those rules, a taxpayer who "participates" in a "reportable transaction" is required to file a

disclosure statement on IRS Form 8886 with respect to the transaction. A taxpayer is generally deemed to “participate” in a transaction if the taxpayer’s federal income tax return reflects the tax treatment described in a category of “reportable transaction.” The following are the six categories of *reportable transactions*:

13.1.1 Listed transactions

A *listed transaction* is a transaction that is the same or substantially similar to a transaction that the IRS has determined to be a tax avoidance transaction and that the IRS has identified as a listed transaction by notice, regulation or other form of published guidance. For example, see Notice 2004-67.

The American Jobs Creation Act of 2004 extended the statute of limitations for assessment of any tax liability arising from a listed transaction until one year after the earlier of (1) the date on which the taxpayer makes the required disclosures, or (2) the date a material advisor satisfies the list maintenance requirements with respect to the transaction (see section 13.3).

13.1.2 Confidential transactions

A transaction is a *confidential transaction* if the taxpayer paid a minimum fee to an advisor of \$250,000 in the case of a corporation, and \$500,000 for most other taxpayers, if the taxpayer’s ability to disclose the tax treatment or tax structure of the transaction is limited by any express or implied understanding or agreement, whether or not such understanding or agreement is legally binding.

13.1.3 Transactions with contractual protection

A transaction is a *transaction with contractual protection* if the taxpayer or a related party is entitled to receive a full or partial refund of fees if some or all of the intended tax consequences of the transaction are not sustained, or if the fees paid by the taxpayer are contingent on the taxpayer’s realization of tax benefits from the transaction.

Additional rules regarding transactions with contractual protection are set forth in Rev. Proc. 2004-65.

13.1.4 Loss transactions

A transaction is a *loss transaction* if it results in the taxpayer claiming a loss under Code Section 165 in excess of the following thresholds:

- \$10 million in any single year, or \$20 million in any combination of taxable years, for C corporations and partnerships that have only C corporations as partners

- \$2 million in any single year, or \$4 million in any combination of taxable years for individuals, S corporations, trusts, and partnerships that do not have only C corporations as partners
- \$50,000 in any single year for individuals or trusts if the loss arises in a Section 988 transaction (relating to losses from sales or exchanges of foreign currency), regardless of whether the loss flows through to such individual or trust from an S corporation or partnership

Additional rules regarding loss transactions are set forth in Rev. Proc. 2004-66.

13.1.5 Transactions with a significant book-tax differential

A transaction with a *significant book-tax differential* is a transaction in which the amount for tax purposes of any item or items of income, gain, expense, or loss from the transaction differs by more than \$10 million on a gross basis from the amount of the item or items for book purposes in any taxable year. The rules regarding transactions with a significant book-tax differential only apply to:

- Taxpayers that are reporting companies under the Securities Exchange Act of 1934, and related business entities
- Business entities with gross assets of \$250 million or more for book purposes at the end of any financial period that ends with or within the entity's taxable year in which the transaction occurs

Additional rules regarding transactions with a significant book-tax differential are set forth in Rev. Proc. 2004-67.

13.1.6 Transactions involving a brief asset holding period

A transaction *involving a brief asset holding period* is any transaction resulting in the taxpayer claiming a credit exceeding \$250,000 (including foreign tax credits), if the underlying asset giving rise to the credit is held by the taxpayer for 45 days or less.

Additional rules regarding transactions involving brief asset holding periods are set forth in Rev. Proc. 2004-68.

13.2 Registration Requirements

Prior to the American Jobs Creation Act of 2004, Treasury Regulation Section 301.6111-2 required registration of certain confidential corporate tax shelters. The American Jobs Creation Act of 2004 replaced the

registration requirements with additional rules regulating tax shelters, as discussed below.

13.3 List Maintenance Requirements

The rules governing list maintenance requirements are set forth in Treasury Regulation Section 301.6112-1, which generally applies to any transaction that is a “potentially abusive tax shelter” entered into, or in which an interest was acquired, on or after February 28, 2003. Under those rules, a material advisor with respect to a transaction that is a “potentially abusive tax shelter” must comply with the list maintenance and disclosure requirements described below.

13.3.1 Material advisors

A person is a *material advisor* with respect to a potentially abusive tax shelter if the person is required to register the transaction (see section 13.2 above); or if the person receives or expects to receive a minimum fee with respect to the transaction (as described below) and the person makes a tax statement for the benefit of the taxpayer who is required to disclose the transaction (see section 13.1 above) and certain other persons.

The minimum fee referred to in the preceding paragraph is:

- \$250,000 if every person to whom or for whose benefit the advisor makes a tax statement is a C corporation (or a partnership or trust of which all the owners are C corporations)
- \$50,000 for all other transactions

The \$250,000 and \$50,000 minimum fees described above are reduced to \$25,000 and \$10,000, respectively, if the transaction is a listed transaction (see section 13.1.1 above).

A *tax statement* is any statement, oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction (see section 13.1 above) or a confidential corporate tax shelter (see section 13.2 above).

13.3.2 Potentially abusive tax shelters

A transaction is a *potentially abusive tax shelter* if the transaction is required to be registered under Code Section 6111 (see section 13.2 above), regardless of whether or not it is properly registered, if the transaction is a listed transaction (see section 13.1.1 above), or if a potential material advisor knows or reasonably expects that the transaction will be a reportable transaction under any of the other five categories of reportable transactions discussed in section 13.1 above.

13.3.3 List maintenance and disclosure requirements

If a material advisor is required to maintain a list with respect to any potentially abusive tax shelter transaction, the list must include:

- The name of the transaction that is a potentially abusive tax shelter and the registration number, if any, obtained under Code Section 6111
- The taxpayer identification number (TIN), if any, for the transaction
- The name, address, and TIN of each person to whom (or for whose benefit) the material advisor makes or provides a tax statement
- The date on which each such person entered into the transaction, if known by the material advisor
- The amount invested by such person in the transaction, if known by the material advisor
- A detailed description of the tax treatment that such person is intended or expected to derive from participation in the transaction, if known to the material advisor
- A summary schedule of the tax treatment that such person is intended or expected to derive from participation in the transaction, if known to the material advisor
- Copies of any additional written materials, including tax analyses or opinions, relating to the transaction that are material to understanding of the purported tax treatment or tax structure of the transaction
- If the interest in the transaction was not acquired from the material advisor required to maintain the list, the name of the person from whom the list was acquired

The material advisor is required to maintain the list for seven years after the earlier of the date on which the material advisor last made a tax statement relating to the transaction, or the date on which the transaction was entered into. In addition, the material advisor is required to furnish the list to the IRS within 20 days after the IRS requests the list from the material advisor.

13.4 Additional Penalties and Sanctions

The American Jobs Creation Act of 2004 added a number of new sanctions and penalties that apply to tax shelter transactions including:

- A separate penalty for failing to disclose a reportable transaction (Code Section 6707A).

- An accuracy-related penalty that applies to understatements arising from listed and reportable transactions (Code Section 6662A).
- The denial of a deduction for interest on underpayments attributable to nondisclosed reportable transactions (Code Section 163(m)).
- A penalty for failing to provide tax shelter information required by Code Section 6111 (Code Section 6707).
- A revised penalty for failing to maintain investor lists (Code Section 6708(a)(1)).
- An increased penalty on promoters of abusive tax shelters (Code Section 6700(a)).

14. ALTERNATIVE DISPUTE RESOLUTION

Among the most promising methods for resolving disputes with the IRS are the many alternative dispute resolution (ADR) programs now offered by the IRS. The goal of the ADR programs is to resolve issues quickly. Based on early indications, ADR programs have been successful. As of May 31, 2003, 104 large and mid-sized business taxpayers successfully resolved issues through the Fast Track Settlement (FTS) program (see section 14.2.1 below), in an average time of 69 days. During the one-year period beginning June 2002, more than 200 cases have been mediated through the Fast Track Mediation (FTM) program (see section 14.2.2 below), with the parties resolving 100 percent of all open issues in more than half of those cases.

14.1 Pre-Filing Agreements (PFA)

The PFA program was established by the IRS as a pilot program pursuant to Notice 2000-12, and was made permanent by Rev. Proc. 2001-22. Rev. Proc. 2001-22 was superseded by Rev. Proc. 2005-12, which expanded the PFA program to include resolution of issues for future tax years. The PFA program allows large and mid-sized businesses under the jurisdiction of the Large and Mid-Size Business Division of the IRS (LMSB) to resolve issues involving factual questions under well-settled principles of law prior to filing the taxpayer's return with respect to such issues. A taxpayer under the jurisdiction of the LMSB may request to participate in the PFA program with respect to the current taxable year or any prior taxable year for which the return is not yet due (including extensions) and has not yet been filed, and for the four succeeding taxable years.

Rev. Proc. 2005-12 sets forth a nonexclusive list of issues that are likely to be suitable for resolution through the PFA program, including:

- Issues that require either a determination of facts or the application of well-established legal principles to the facts.
- Issues regarding a methodology used by a taxpayer to determine the appropriate amount of an item of income, allowance, deduction or credit.

Rev. Proc. 2005-12 also sets forth an exclusive list of international issues that are likely to be suitable for resolution through the PFA program, and a nonexclusive list of issues that are not eligible for resolution through the PFS program, including:

- Transfer pricing issues
- Issues of reasonable cause, due diligence, good faith, clear and convincing evidence, or any other similar standard
- Issues involving the application of any penalty or criminal sanction
- Issues that have been designated for litigation by the IRS, or that are the subject of litigation between the IRS and the taxpayer for a prior taxable year
- Issues involving tax shelters

A taxpayer desiring to participate in the PFA program must submit a written request in accordance with the requirements described in Rev. Proc. 2005-12. The LMSB Industry Director with jurisdiction over the taxpayer will determine whether to accept the taxpayer's request based on certain criteria, including:

- The suitability of the issue presented for resolution through the PFA program
- The potential impact of a PFA resolution on other years or other issues of the taxpayer
- The time remaining until the due date of the taxpayer's return
- The likelihood of completing the PFA process prior to the due date of the taxpayer's return

If the taxpayer's request to participate in the PFA program is accepted by the LMSB Industry Director, the taxpayer must pay a user fee ranging from \$1,000 for taxpayers having assets valued at less than \$50 million, to \$10,000 for taxpayers having assets valued \$250 million or more. The taxpayer will then have one or more meetings with a representative from the LMSB at which the parties will work to resolve the issue. If the taxpayer and the LMSB representative are able to resolve the issue in a timely manner, they will enter into a Pre-Filing Agreement that has the effect of a closing agreement under Code Section 7121.

The taxpayer may withdraw its request to participate in the PFA program at any time (although the user fee will generally not be refunded). If the taxpayer and the LMSB representative are unable to resolve any issue, the taxpayer will retain all of its rights with respect to the issue, including the right to attempt to resolve the issue through the post-filing resolution procedures described below.

14.2 Alternative Resolution at Examination

14.2.1 Fast Track Settlement (FTS)

The FTS program was established by the IRS as a pilot program pursuant to Notice 2001-67 and, based on the initial success of the program, was made permanent by Rev. Proc. 2003-40. FTS allows for mediation of examination issues facing large corporations under the jurisdiction of the Large and Mid-Size Business Division of the IRS (LMSB), with a goal of resolving such issues within 120 days after the issue is accepted into the FTS program. Under certain circumstances, other IRS divisions and taxpayers may participate in the FTS program.

Participation in the FTS program is voluntary. LMSB and the taxpayer may submit an issue to the FTS program after LMSB has issued a Form 5701 (Notice of Proposed Adjustment) with respect to the issue, and the taxpayer has responded to the issue in writing, but before LMSB has issued a Notice of Proposed Deficiency (i.e., a 30-Day Letter) with respect to the issue. The issue will be accepted into the FTS program only if the FTS program managers determine that the issue is sufficiently developed to permit resolution within the framework of the FTS program.

There are certain issues that are not eligible for inclusion in the FTS program, including:

- Issues designated for litigation
- Issues for which the taxpayer has requested competent authority assistance
- Issues that might result in inconsistent treatment for a party that is not participating in the matter, i.e., “whipsaw” issues
- Issues governed by closing agreements, *res judicata* or controlling precedent
- Issues that have been identified in a Chief Counsel Notice or equivalent publication as being excluded from the FTS program

If an issue is accepted into the FTS program, an Appeals Official will be assigned to act as a neutral-party mediator. The Appeals Official may also recommend a settlement based on his or her analysis of the

issues. The taxpayer may withdraw the issue from the FTS program at any time, and is not bound to accept any settlement recommended by the Appeals Official. Participation in the FTS program does not eliminate the taxpayer's right to have an Appeals conference with respect to the issue, or any other rights of the taxpayer with respect to the issue.

14.2.2 Fast Track Mediation (FTM)

The FTM program, which was formally established by the IRS pursuant to Rev. Proc. 2003-41, provides a procedure similar to FTS for taxpayers under the jurisdiction of the Small Business/Self-Employed Compliance Division of the IRS (SB/SE). FTM is generally available for all non-docketed cases and collection matters under the jurisdiction of SB/SE, including offers in compromise, trust fund recovery penalty and collection due process cases. The goal of the FTM program is to resolve issues within 30 to 40 days after the initial mediation conference.

Participation in the FTM program is voluntary and may only be initiated at the conclusion of an examination/collection determination. There are certain issues and cases that are not eligible for inclusion in the FTM program, including issues that are not eligible for the FTS program (as discussed in section 14.2.1 above), and the following issues and cases:

- Issues for which there is an absence of legal precedent
- Issues for which there are conflicts between circuit courts of appeal
- Issues included in the Technical Advisor Program, the Appeals Technical Guidance Program, or the Collection Appeals Program
- Automated Collection System cases
- Frivolous issues
- Cases in which the taxpayer has failed to respond to IRS communications
- Certain issues involving methods of accounting

Similar to FTS, an Appeals Officer is assigned to act as a neutral-party mediator for FTM issues, and the Appeals Officer may recommend a settlement based on his or her evaluation of the issues. The taxpayer or the IRS may withdraw an issue from the FTM program at any time, and the Appeals Officer may terminate FTM consideration of an issue if he or she concludes that the parties are not making meaningful progress toward resolving the issue. Participation in the FTM program does not eliminate the taxpayer's right to have an Appeals conference with respect to the issue, or any other rights of the taxpayer with respect to the issue.

14.2.3 Tax Exempt Bond mediation (TEB)

The IRS recently announced the launch of the Tax Exempt Bond Mediation Dispute Resolution Pilot Program. Similar to FTS and FTM, the TEB mediation program is designed to resolve cases under examination in the IRS Tax Exempt Bond organization in 60 days or less through the use of Appeals Officers acting as neutral-party mediators. The specifics of the TEB mediation program, and the procedure for initiating a request for mediation, are set forth in IRS Announcement 2003-36.

14.3 Alternative Resolution at Appeals

Code Section 7123, which was added to the Code by the Internal Revenue Service Restructuring and Reform Act of 1998, provides three alternative methods of resolving issues at the Appeals level.

14.3.1 Early referral to Appeals

Under Code Section 7123(a), the IRS is required to establish procedures by which any taxpayer can request that one or more issues under consideration by the examination or collection division of the IRS be referred to Appeals while other issues remain under consideration by the examination or collection division.

The procedures established by the IRS are set forth in Rev. Proc. 99-28, which provides that a taxpayer may request early referral to Appeals of any developed, disputed issue arising from audit under the jurisdiction of the District Director. The following issues, however, are excluded from the early referral program:

- Issues with respect to which a 30-day letter has been issued
- Issues that are not fully developed
- Issues arising during an audit if the remaining issues are expected to be resolved before Appeals can resolve the early referral issues
- Issues designated for litigation by the Office of Chief Counsel
- Issues for which the taxpayer has requested Competent Authority assistance, or intends to request Competent Authority assistance
- Issues that might result in inconsistent treatment for a party that is not participating in the matter, i.e., “whipsaw” issues

In order to request early referral of an issue, the IRS must first issue a Form 5701 (Notice of Proposed Adjustment) with respect to the issue. The taxpayer must respond to the Form 5701 in writing. The taxpayer’s written response serves the same function as a “Protest” for purposes of consideration by Appeals.

If the taxpayer is able to resolve an early referral issue at Appeals, the parties will enter into a closing agreement pursuant to Code Section 7121 with respect to the issue. If the taxpayer is unable to resolve an early referral issue, the taxpayer may request mediation or arbitration with respect to the issue (see sections 14.3.2 and 14.3.3 below), but Appeals will not otherwise reconsider the issue.

Rev. Proc. 99-28 also sets forth special procedures for early referral of issues involving IRS initiated changes in accounting methods, employment taxes, collections matters, and employee plans and exempt organizations.

14.3.2 Nonbinding mediation

Under Code Section 7123(b)(2), the IRS is required to establish procedures by which either the taxpayer or the Appeals Officer may request nonbinding mediation of any issue that remains unresolved following the conclusion of Appeals procedures, or in the event of an unsuccessful attempt to enter into a closing agreement.

The procedures established by the IRS were initially set forth in Announcements 98-99 and 2001-9, which limited mediation to certain issues involving adjustments of \$1 million or more. The Appeals mediation procedures were formally established by Rev. Proc. 2002-44, which expanded the issues eligible for mediation, and removed the \$1 million limitation.

Under Rev. Proc. 2002-44, mediation is generally available for all legal and factual issues at issue before an Appeals Officer, except that mediation is not available for:

- Issues designated for litigation or docketed in any court
- Collections cases
- Issues governed by closing agreements, *res judicata*, or controlling Supreme Court precedent
- Frivolous issues (including the issues listed in Rev. Proc. 2001-41)
- Cases in which the taxpayer did not act in good faith during settlement negotiations

If a matter is accepted for mediation, the mediator will be an Appeals employee who is trained as a mediator. The taxpayer may also elect to have a non-IRS employee serve as a comediator, at the taxpayer's expense. Either the taxpayer or the Appeals Officer may terminate the mediation at any time. If the parties reach an agreement on some or all of the issues submitted to arbitration, the parties will enter into a closing agreement with respect to those issues. If the parties are unable to resolve any issue submitted to arbitration, the parties may submit

the issue for binding arbitration (if available, as discussed in section 14.3.3 below). Otherwise, the IRS will issue a statutory notice of deficiency (i.e., a 90-day letter).

14.3.3 Binding arbitration

Under Code Section 7123(b)(2), the IRS is required to establish a pilot program under which the taxpayer and the Appeals Officer may jointly request binding arbitration of any issue that remains unresolved following the conclusion of Appeals procedures, or in the event of an unsuccessful attempt to enter into a closing agreement.

The procedures for the pilot program initially established by the IRS are set forth in Announcement 2000-4, which was effective for arbitration requests submitted during the two-year period beginning on January 18, 2000. In Announcement 2002-60, the IRS extended the test program for an additional one-year period beginning on July 1, 2002.

Arbitration must be requested jointly by the taxpayer and Appeals, after the taxpayer and Appeals have attempted to negotiate a settlement, and is available only for exclusively factual issues. Arbitration is not available for:

- Issues designated for litigation or docketed in any court
- Industry Specialization Program (ISP) issues or Appeals Coordinated Issues (ACI)
- Collection cases
- Issues governed by closing agreements, *res judicata*, or controlling Supreme Court precedent
- Frivolous issues
- Issues arising in cases where the taxpayer did not act in good faith during settlement negotiations

To participate in the binding arbitration program, the taxpayer must enter into an Agreement to Arbitrate (a model agreement is included in Announcement 2000-4). The arbitrator may be an Appeals representative, in which case the IRS pays all of the expenses associated with the arbitrator, or may be a non-IRS arbitrator, in which case the IRS and the taxpayer share the expenses of the arbitrator. The decision of the arbitrator is binding upon the IRS and the taxpayer.

Practice Note. To date, the binding arbitration pilot program has not been extended beyond June 30, 2003.

14.4 Binding Arbitration in Tax Court Cases

Tax Court Rule 124 provides that the parties to a Tax Court Case may move for binding arbitration of any factual issue in controversy at any time after the case is at issue and before the Tax Court trial. If the parties file a timely motion for voluntary binding arbitration, the Chief Judge of the Tax Court will assign the case to a Judge or Special Trial Judge for disposition of the motion and supervision of any subsequent arbitration in the case.

15. CIRCULAR 230

15.1 Background

As discussed in Section 2.3 of this chapter, Circular 230 sets forth rules governing practice before the Internal Revenue Service. The rules of Circular 230 generally apply to attorneys, accountants, enrolled agents and enrolled actuaries (referred to as “practitioners”). Section 822(a)(1) of the American Jobs Creation Act of 2004, which was enacted into law in October 2004, provides for censure and monetary penalties for practitioners who fail to comply with the provisions of Circular 230. As part of the IRS effort to combat abusive tax shelters, Circular 230 was substantially revised in December 2004 to provide a statement of best practices for tax advisors, rules governing the rendering of “covered opinions” by practitioners and rules governing other written advice provided by practitioners. Those rules, which have been a source of controversy and concern for practitioners, became effective on June 20, 2005.

15.2 Best Practices for Tax Advisors

Circular 230 provides a statement of best practices that practitioners should follow when advising clients and in preparing or assisting in the preparation of submissions to the IRS. The statement of best practices is aspirational, and there are no penalties imposed for violating the best practices. Best practices include:

- Communicating clearly with the client regarding the terms of engagement.
- Establishing the facts and determining which facts are relevant.

- Evaluating the reasonableness of any assumptions or representations.
- Relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts.
- Arriving at a conclusion supported by the law and facts.
- Advising the client of the conclusions reached and the significance of the conclusions (for example, whether the client can avoid accuracy-related penalties by relying on the advice).
- Acting fairly and with integrity in practice before the Internal Revenue Service.

Tax advisors who are responsible for overseeing a firm's practice are required to take reasonable steps to ensure that a firm's procedures for all members, associates and employees are consistent with the "best practices."

15.3 Definition of Covered Opinions

The most significant provision introduced by the revisions to Circular 230 are new requirements for "covered opinions" issued by practitioners. A covered opinion is written advice (including e-mail) issued by a practitioner concerning one or more federal tax issues and relating to a transaction described in one or more of the following categories (each of which is discussed below):

- Listed transactions
- Principal purpose transactions
- Significant purpose transactions

A "federal tax issue" is a question concerning the federal tax treatment of an item of income, gain, loss, deduction or credit, the existence or absence of a taxable transfer of property, or the value of property for federal tax purposes.

15.3.1 Listed transactions

A "listed transaction" is a transaction that is the same or substantially similar to a transaction that the IRS has determined to be a tax avoidance transaction and that the IRS has identified as a listed transaction by notice, regulation or other form of guidance. See, *e.g.*, Notice 2004-67. See also Section 13.1.1 of this chapter.

15.3.2 Principal purpose transactions

A transaction is a "principal purpose transaction" if it involves any partnership or other entity, any investment plan or arrangement, or

any other plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code. The “principal purpose” of an entity, plan or arrangement is the avoidance or evasion of tax if that purpose exceeds any other purpose.

15.3.3 Significant purpose transactions

A transaction is a “significant purpose transaction” if it involves any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code. Written tax advice relating to a significant purpose transaction is a covered opinion only if the written advice is:

- a “reliance opinion”;
- a “marketed opinion”;
- subject to “conditions of confidentiality”; or
- subject to “contractual protection.”

15.3.3.1 Reliance opinions

A “reliance opinion” is written advice that concludes at a confidence level of more likely than not (*i.e.*, a greater than 50% likelihood) that one or more “significant tax issues” would be resolved in the taxpayer’s favor. A federal tax issue is “significant” if the IRS has a reasonable basis for a successful challenge and its resolution could have a significant impact, whether beneficial or adverse and under any reasonably foreseeable circumstance, on the overall federal tax treatment of the transactions or matters addressed in the written advice.

Practice Tip. The requirement that written advice must address a “significant tax issue” in order to be a covered opinion should prevent written advice on routine tax issues from being considered a reliance opinion.

Written advice will not be treated as a reliance opinion if the practitioner prominently discloses in the written advice that it was not written to be used, and cannot be used, for the purpose of avoiding penalties. An item is “prominently disclosed” if it is readily apparent to the reader which, at a minimum, means that the item set forth in a separate section (not in a footnote) in a typeface that is the same size or larger than the typeface of any discussion of facts or law in the written advice. This “disclosure exception” has led practitioners to routinely include disclosures on all written advice issued to clients. For example, many practitioners have set up their e-mail to automatically include a

“Circular 230 disclaimer statement” on every e-mail. Appendix 3 contains samples of Circular 230 disclaimer statements currently used by practitioners (see *Accountant’s Business Manual Toolkit CD-ROM*).

15.3.3.2 Marketed opinions

A “marketed opinion” is written advice that the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person affiliated with the practitioner) in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. Written advice that does not address a listed transaction or a principal purpose transaction will not be treated as a marketed opinion if the practitioner prominently discloses in the written advice that

- the advice was not intended or written by the practitioner to be used, and cannot be used, for the purpose of avoiding penalties;
- the advice was written to support the promotion or marketing of the transaction or matter addressed in the written advice; and
- the taxpayer should seek advice based on the taxpayer’s particular circumstances from an independent tax advisor.

15.3.3.3 Conditions of confidentiality

Written advice is subject to “conditions of confidentiality” if the practitioner imposes on one or more recipients of the written advice a limitation on disclosure of the tax treatment or tax structure of the transaction, regardless of whether the limitation on disclosure is legally binding.

15.3.3.4 Contractual protection

Written advice is subject to “contractual protection” if the taxpayer has the right to a full or partial refund of fees paid to the practitioner (or paid to a person associated with the practitioner) if all or part of the intended tax consequences from the matters addressed in the written advice are not sustained, or if the fees paid to the practitioner are contingent on the taxpayer’s realization of tax benefits from the transaction.

15.3.4 Exclusions

The following are not covered opinions:

- oral advice;
- written advice that does not resolve a federal tax issue in the taxpayer’s favor (*i.e.*, negative tax advice), but not if the practitioner reaches a

conclusion favorable to the taxpayer at any confidence level (*e.g.*, not frivolous, realistic possibility of success, reasonable basis or substantial authority) with respect to that issue;

- written advice provided to a client during the course of an engagement if the practitioner is reasonably expected to provide subsequent written advice to the client that satisfies the requirements for a covered opinion;
- written advice (other than in connection with a listed transaction or a principal purpose transaction) that
 - concerns the qualification of a qualified plan;
 - is a state or local bond opinion; or
 - is included in documents required to be filed with the U.S. Securities and Exchange Commission;
- written advice prepared and provided after a taxpayer has filed a return with respect to an item on the return (but not if the practitioner knows the advice will be relied upon to take a position on a tax return—*i.e.*, an amended return); and
- written advice provided to an employer by a practitioner in that practitioner's capacity as an employee of the employer solely for purposes of determining the tax liability of the employer.

15.4 Requirements for Covered Opinions

A practitioner providing a covered opinion must comply with the requirements of Circular 230 with respect to

- factual matters;
- relation of law to facts;
- evaluation of significant federal tax issues;
- overall conclusion; and
- required disclosures.

15.4.1 Requirements regarding factual matters

To comply with the requirements of Circular 230 regarding factual matters, a practitioner must

- use reasonable efforts to identify and ascertain the facts, and to determine which facts are relevant;
- not base the opinion on any unreasonable factual assumption;
- not base the opinion on any unreasonable factual representations, statements or findings of the taxpayer or any other person.

The requirements regarding factual matters potentially pose the greatest challenge to a practitioner who wants to issue a covered opinion by essentially imposing a due diligence obligation on the practitioner with respect to the underlying facts of the client's transaction.

15.4.2 Requirements regarding relation of law to facts

To comply with the requirements of Circular 230 regarding relation of law to facts, a practitioner must

- relate the applicable law (including potentially applicable judicial doctrines, such as substance over form, step transaction, etc.) to the relevant facts;
- not assume the favorable resolution of any significant federal tax issue or otherwise base the opinion on any unreasonable legal assumptions, representations or conclusions; and
- avoid internally inconsistent legal analyses or conclusions.

15.4.3 Requirements regarding evaluation of significant federal tax issues

To comply with the requirements of Circular 230 regarding evaluation of significant federal tax issues, a practitioner must

- consider all significant federal tax issues;
- provide the practitioner's conclusion as to the likelihood that the taxpayer will prevail on the merits with respect to each significant federal tax issue considered in the opinion; and
- not take into consideration the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.

15.4.3.1 Additional requirements for marketed opinions

In the case of a marketed opinion, the practitioner must conclude, at a level of confidence of at least "more likely than not," that the taxpayer will prevail on the merits. If the practitioner is unable to reach that conclusion, the practitioner may not issue the opinion without the disclaimer language described in Section 15.3.3.2 above.

15.4.3.2 Exception for limited scope opinions

A practitioner may issue an opinion that considers less than all of the significant federal tax issues raised by a transaction if

- the practitioner and the client agree that the scope of the opinion, and the client's ability to rely on the opinion to avoid penalties, will be limited to the matters addressed in the opinion;
- the opinion is not a marketed opinion and does not relate to a listed transaction or a principal purpose transaction; and
- the opinion contains the required disclosures discussed in Section 15.4.5.3 below.

15.4.4 Requirements regarding overall conclusions

To comply with the requirements of Circular 230 regarding overall conclusions, a practitioner must provide the practitioner's overall conclusion as to the likelihood that the federal tax treatment of the transaction or matter described in the opinion is the proper treatment, and the reasons for that conclusion.

15.4.5 Required disclosures

A covered opinion must contain all of the following disclosures that are applicable to such opinion.

15.4.5.1 Relationship with promoter

The opinion must prominently disclose the existence of any compensation, referral fee or fee-sharing arrangement between the practitioner and any person promoting or marketing the entity plan or arrangement that is the subject of the opinion.

15.4.5.2 Marketed opinions

In the case of a marketed opinion, the opinion must prominently disclose that

- the opinion was written to support the promotion or marketing of the transaction or matter that is the subject of the opinion; and
- the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

15.4.5.3 Limited scope opinions

In the case of a limited scope opinion (as discussed in Section 15.4.3.2 above), the opinion must prominently disclose that

- the opinion is limited to the one or more federal tax issues addressed in the opinion;
- additional issues may exist that could effect the federal tax treatment of the transaction or matter that is the subject of the opinion; and

- the opinion was not written, and cannot be used, to avoid any penalties that may be imposed on the taxpayer with respect to any significant tax issue that is outside the scope of the opinion.

15.4.5.4 Opinions that do not reach a more-likely-than-not conclusion

If the practitioner does not reach a conclusion of more-likely-than-not with respect to a significant federal tax issue, the opinion must disclose that

- the opinion does not reach a conclusion of more-likely-than-not with respect to one or more significant federal tax issues; and
- the opinion was not written, and cannot be used, to avoid any penalties that may be imposed on the taxpayer with respect to such issues.

See Appendix 4 for a chart of categories, descriptions, and exceptions for adequate disclosures with regard to covered opinions (see *Accountant's Business Manual Toolkit CD-ROM*).

15.5 Procedures to Ensure Compliance

Practitioners who have principal responsibility for overseeing a firm's practice of providing tax advice must take reasonable steps to ensure that the firm has adequate procedures in place so that written tax advice rendered by the firm will comply with the rules applicable to covered opinions. A practitioner who fails to establish such procedures may be subject to discipline if individuals who are members of or associated with such firms engage in a pattern or practice that does not comply with the rules applicable to covered opinions.

15.6 Requirements for Other Written Advice

A practitioner must not give written tax advice (including e-mails), regardless of whether such written advice constitutes a covered opinion, if the practitioner

- bases the written advice on an unreasonable factual or legal assumptions;
- unreasonably relies on representations, statements or agreements of the taxpayer or any other person;
- fails to consider all relevant facts; or
- takes into account the possibility that a tax return will not be audited, or that an issue will be settled.

15.7 Conclusion

The rules of Circular 230 governing covered opinions have been in effect only since June 20, 2005, so it is too early to assess their impact. One early impact is the routine use of disclaimer language on all written correspondence issued by practitioners, with the result that, except in the rare occasion that a client specifically requests (and agrees to pay for) a covered opinion, clients can no longer rely on written advice from tax professionals to avoid penalties. The IRS is aware of this issue and has promised additional guidance in the near future to limit the broad scope of the covered opinion rules.

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BUSINESS PERFORMANCE MEASURES

1. PERFORMANCE MEASUREMENT DEFINED

- 1.1 Definition
- 1.2 Dynamic Forces Affecting a Business's Value

2. EVALUATING THE NEED FOR PERFORMANCE MEASURES

- 2.1 Critical Success Factors
- 2.2 Entrenchment in the Status Quo
- 2.3 Management Self-evaluation
- 2.4 Commitment to Change
- 2.5 Building on Previous Strategic Plans

3. HISTORICAL ASSESSMENT

- 3.1 Establishing a Baseline
- 3.2 Vision Statements
- 3.3 Mission Statements
- 3.4 Strengths, Weaknesses, Opportunities, and Threats Analysis
- 3.5 Life Cycle Analysis
- 3.6 External Assessments
- 3.7 Employee Reward Structure

4. CRITICAL SUCCESS FACTORS

- 4.1 Attributes
- 4.2 Selecting Appropriate CSFs for the Organization
- 4.3 Developing a "Short List" of CSFs
- 4.4 Relevance to Vision and Mission Statements

5. KEY PERFORMANCE INDICATORS

- 5.1 Quantifying Specific Changes in Performance
- 5.2 Giving Feedback
- 5.3 Relating Key Performance Indicators to CSFs
- 5.4 Predictive and Leading Factors
- 5.5 Benchmarking to Industry Measures
- 5.6 Data Gathering and Reporting

6. FINANCIAL RATIOS

7. PERFORMANCE TARGETS

- 7.1 Range of Desired Outcomes
- 7.2 Selecting Achievable and Appropriate Targets
- 7.3 Defining Performance Standards

8. ACTION PLANS

- 8.1 Setting Accountability
- 8.2 Team-based Accountability
- 8.3 Developing and Integrating Action Plans
- 8.4 Failure to Implement Action Plans

9. MONITORING AND REPORTING SYSTEMS

- 9.1 Types of Reporting and Monitoring Systems
- 9.2 System Security
- 9.3 Evaluation

10. PERIODIC REALIGNMENT OF TARGETS

- 10.1 Structured Review Process
- 10.2 Periodic Evaluation

REFERENCES

APPENDIX 1: Client Readiness Questionnaire

APPENDIX 2: Checklist for Planning Documents and Existing or Prior Consulting Relationships

APPENDIX 3: Value Chain Illustration

APPENDIX 4: Key Performance Indicator Work Plan

APPENDIX 5: Financial Ratios

APPENDIX 6: Realignment Questionnaire

1. PERFORMANCE MEASUREMENT DEFINED

1.1 Definition

Performance measurement is a consistent long-term process used to create wealth and return on investment in a business. It is an organized process of linking desired future performance with current information that is predictive of logical and consequential results. Key to performance measurement is the identification of critical success factors that lead to measures that can be tracked over time. The process includes evaluation of progress made in achieving specific targets linked to a business's strategic goals.

The measures track aspects of the entire business—both financial and nonfinancial (for example, customer satisfaction, product quality, sales calls, and proposals delivered). By focusing on key performance indicators, management will be able to stay on course with the business's strategy and more easily determine its overall performance.

Performance measurement is as pertinent to a small business as it is to a large business. In larger businesses, performance measurement involves leadership, operational managers, department supervisors, and rank and file workers. It communicates the business's goals and strategies to employees at all levels of the organization. The use of performance measures also allows companies to provide a clear link between compensation and performance and can be used as a means to motivate employees.

Performance measures have a direct correlation to company goals and serve as leading (future-oriented) indicators rather than the usual lagging-indicators (for example, last quarter's income or revenues).

1.2 Dynamic Forces Affecting a Business's Value

Particularly in small businesses, the value of the business is often tied more directly to the personal services of the owner than the intrinsic value of the business processes. Engrossed in constantly doing the work of the business, such proprietors rarely succeed in building businesses that can function independent of them in a completely predictable manner. Most lack the systems and performance measures that build a business's value.

The ultimate value of a business typically will be directly proportional to the owner's success in developing a business built on systematized processes. Where systems are in place for all processes, owners

do not have to do each process personally because they can rely on others less skilled. A business where everything is systematized becomes a “franchise prototype” which, if desired, could be duplicated time after time with completely predictable and reliable results. Of course, franchising their business would not fit the mission statement of most business owners. Yet, every small business owner should approach his or her business with the end in mind and approach each decision with the goal of creating wealth through a business of value that can be sold or transitioned to a successor without the continuing involvement of the owner.

Increasing the value of a business can generally occur only when management addresses the four most common ways in which profitability is created: (1) increasing the number of customers, (2) increasing the frequency of sales to those customers, (3) increasing the average value of each sale, and (4) increasing the effectiveness of each business process. Business performance measures assist the owner in managing the effectiveness of each system, and ultimately the total value of the business.

2. EVALUATING THE NEED FOR PERFORMANCE MEASURES

2.1 Critical Success Factors

The success of each business is built upon the strength of those factors that it must do perfectly, time after time. The performance measurement process helps businesses determine those factors and build a process for measuring and evaluating the effectiveness of each business process. Many, if not most, small businesses fail to achieve their potential profitability because they lack a structured process for measuring, testing, and evaluating the aspects of their business that they must get absolutely right.

2.2 Entrenchment in the Status Quo

Businesses generally cannot become successful by predetermining what the marketplace wanted. The statement “Build it and they will come” might apply to baseball diamonds in cornfields but not to entrepreneurship. Every aspect of a successful business must be constantly measured and tested against the marketplace. This applies to all areas of the business, including advertising campaigns, guarantees, product packaging, and pricing.

2.3 Management Self-evaluation

For a business to successfully implement a performance measurement process, the leadership must be fully behind the process. Embarking on this initiative requires a significant level of time, energy, and resources reallocated to the process. Management should evaluate its own commitment to the performance measurement process by considering the following issues:

- What aspects of the business does management worry about?
- Is there pressure to improve cash flow or net income?
- Are owners or creditors discontented with recent results?
- How committed is the leadership to embracing change?
- What type and level of leadership are leading this initiative? Do they work?
- Which level of management has participated in planning similar changes in the past?
- How have past efforts at enacting change succeeded?
- Where will the resistance to change most likely erupt?
- Will upper management show outward and ongoing support for the initiative?
- Who are the identifiable champions?
- Is there evidence of adopting new measurement tools in the past?
- Has previous strategic planning been done?
- What level of support exists among the board of directors?

2.4 Commitment to Change

Getting commitment from the rank and file employees for the business performance measurement process cannot happen without the leadership making a strong statement of purpose. Commitment can crumble as daily workloads direct attention away from the process. Such a statement of purpose should be repeated often to continue motivating team members toward the common goals. A business embarking on a new initiative for performance measurement should appoint a “champion” or “sustainer,” one who will ensure managers and employees implement the changes and new systems required by this reengineering. See section 8.4 of this chapter for more information.

2.5 Building on Previous Strategic Plans

A business that has previously invested in developing a strategic plan should review and evaluate where the company stands in relation to the goals and objectives of that plan. The review should occur at least annually. Consistent, steady progress toward those strategic goals should be noted. A new strategic planning session is appropriate either when the company has achieved the majority of those previously set goals or when the efforts have stalemated. Refer to the chapter “Business Plans” for more information on long-range planning.

CPA Performance View Services: A Practitioner’s Guide to Providing Performance Measurement Engagements (New York: AICPA, 2000) is a set of tools to assist an independent consultant in implementing a business performance measurement system for small business clients. Appendix 1 of this chapter contains a questionnaire suitable for businesses or their consultants to assess their readiness to embark on the performance measurement process.

3. HISTORICAL ASSESSMENT

3.1 Establishing a Baseline

Assessment of a company’s current truths is an essential element in establishing performance measures. An honest assessment of performance, quality, customer loyalty, competitive market share, inventory turnover, and business valuation is critical for a solid basis for later decisions. Staff with skills in data acquisition, research, analysis, engineering, and human resources should be part of the assessment team. All aspects of the business’s past performance should be included in the evaluation, including financial, operations, human resources, customers, and vendors.

Previous planning documents are very helpful in establishing a baseline. These would include long-range strategic plans, cyclical reviews of facilities needs and capital investment, annual budget and operating plans, staffing and human resource plans, and business succession plans. Other documents useful in establishing baseline information include employment history of key employees, past audit findings, system documentation and the employee handbook. Appendix 2, which contains a checklist for planning documents and existing or prior consulting relationships, can assist a business in assembling this information.

3.2 Vision Statements

An organization's vision statement consists of its core values and beliefs, a statement of purpose, and a statement of mission. A well-drafted vision statement does not significantly change over time and should convey what the business will look like several years in the future.

In addition, the vision needs to be realistic and attainable and appeal to the long-term interests of owners, employees, and customers. It should be focused enough to guide decisions, yet be flexible to allow individual interpretation and initiative. It needs to be clear enough that it can be explained and understood by every person in the business, from CEO to custodian. Finally, the vision must make strategic sense and be measurable in its key elements.

In creating a new vision statement, leadership should picture the company five years hence. The business should be described in terms of its potential structure and key people. Describe the customer base in terms of the number, type, and location of customers. Estimate the level of future revenue and profitability desired in five years. What major products or services are envisioned? What type of facilities and technology would be needed to support the organization? What human resources are needed?

3.3 Mission Statements

A mission statement flows from the vision statement by describing in the present tense why a business exists, whom it serves, and how it intends to accomplish its purpose. A mission statement should indicate the major products or services offered and the company's market position. The business philosophy and core values should be clearly and concisely stated. Mission statements should be updated on a regular basis as the company's products and markets evolve.

3.4 Strengths, Weaknesses, Opportunities, and Threats Analysis

A strengths, weaknesses, opportunities, and threats (SWOT) analysis can be used in preparing the company's mission statement, by assisting in developing its underlying support. SWOT looks at a business through its strengths and opportunities, which are helpful in achieving the overall objectives, and weaknesses and threats, which are harmful to achieving those objectives. Strengths and weaknesses are internal attributes of an organization. Management has control over each and every

strength and weakness. Opportunities and threats, however, are external conditions not readily controllable by management.

For example, opportunities include such issues as new markets opening up for the company or access to new products or services. Threats would be competitors or government legislation that can adversely affect industries.

A SWOT analysis may be conducted for individual aspects of the business, such as financial, operations, human resources, customers, and vendors. Information for SWOT analyses can come from many internal and external sources. Consider the sales history, customer surveys, market surveys, feasibility studies, trade associations, government publications, employee surveys, and competition studies.

An issue may appear as both a strength and a weakness, in different points of a company's life cycle. Door-to-door sales may have been a strength in the past because of the customer convenience. However, technological advances could turn this into a weakness as more customers engage in electronic commerce (e-commerce). In this instance, the business is being viewed from the past or the future rather than the present. A SWOT analysis should focus strictly on what it is today.

The following chart contains listings of various strengths, weaknesses, opportunities, and threats that should be considered in a typical SWOT analysis. They are categorized to assist in defining attributes into categories that are within or outside management's control.

3.5 Life Cycle Analysis

Life cycle analysis looks at the company's maturity through the classic bell curve. In every organization, some aspects of the operation, product or market are moving through start-up, growth, maturity or declining stages. Characteristics that are in the declining stages may need to undergo reengineering to revitalize, bringing them back to a start-up stage. Information from a life cycle analysis is helpful in conducting the SWOT analysis.

3.6 External Assessments

Some valuable information is typically available only outside the organization. Convening a customer advisory board can provide objective feedback on how others perceive the organization's effectiveness in delivering customer relations, service support, product guarantees, and the relative value of its products or services in relation to competitors.

Customer advisory boards may consist of focus groups or ad hoc panels, meeting with an independent facilitator to elicit honest feedback.

Strengths and weaknesses*Revenue and sales*

Product and services pricing
 Customer satisfaction
 Excess sales capacity
 Growth prospects
 Competitive market share
 Profitability
 Marketing plan

Personnel

Experience and expertise
 Continuing education and job training
 Utilization of workforce
 Employee motivation and morale
 Frequency of staff meetings
 Outside management consultants

Facilities

Efficiency of facilities
 Productivity of equipment

Availability of capital

Inventory and purchasing management
 Working capital
 Cash flow
 Availability of credit
 Timeliness, reliability and availability of financial information
 Present measurement of key performance indicators
 Accounts receivable collections

Opportunities and threats*National and local economy*

Economic growth forecasts
 Incremental borrowing rate
 Consumer disposable income

Competition

Quality of products and services
 Pricing policies
 Customer satisfaction
 Market share

Technology

Obsolescence due to new technology

Population trends

Demographics of population
 Amount of leisure time available
 Standard of living

Environmental/legal issues

Environmental preservation
 New legislation
 Legal case law
 Natural disasters

3.7 Employee Reward Structure

Employees will do more of the things for which they are rewarded. A study of the current compensation structure can give insight into the behaviors that are currently being rewarded. For example, management can stress at great length the need for new, creative ideas from employees. But this behavior may not occur to any extent if employees are rewarded for completing low level, routine tasks (and perhaps penalized for diverting attention toward other activities). Employee compensation and benefits should be structured around the performance measures designed to achieve the overall business objectives.

4. CRITICAL SUCCESS FACTORS

4.1 Attributes

Critical success factors (CSFs) are those things that a business must get absolutely right to be successful. They are essential elements for accomplishing what the organization has stated in its vision and mission statements.

4.2 Selecting Appropriate CSFs for the Organization

Critical success factors should come from each of the key performance areas of an organization: Financial, operations, human resources, customers, and vendors. In selecting CSFs, consider the differences between outputs and outcomes. Outcomes are generally closer to the end results that are being measured, such as “increased customer loyalty.” Outputs, on the other hand, are components of a value chain that integrate into subsequent activities, such as “100 percent on-time delivery.” Appendix 3 contains a flowchart describing the relationship between inputs, processing systems, outputs, outcomes, and goals.

CSFs should consider the performance attributes that the organization’s customers monitor. Customers often have clear and explicit requirements of their vendors. A survey or client advisory board can help determine the variables that other companies monitor.

Examples of typical critical success factors include:

- Management succession plan
- High customer satisfaction rating
- Timely accounts receivable collection
- Increased inventory turnover
- Debt to equity ratio under 2:1
- Increased revenue per salesperson

4.3 Developing a “Short List” of CSFs

An organization should work with a manageable number of CSFs (perhaps six to twelve). The CSFs need to be intuitively understood by the rank and file employees to gain acceptance, particularly if a factor is within an employee’s sphere of influence.

Critical success factors should address both short- and long-term aspects of the organization. Selecting CSFs with a short-term focus will

enable the company to achieve some early gains in its reengineering process, thus sustaining the momentum and enthusiasm of the team. Restructuring some aspects of the organization will certainly encompass multiple years.

Attention should be focused on those factors that will most positively affect the organization's results. A long list of possible CSFs can be narrowed down by having the planning team members each rate the CSFs in order of their significance. A paired comparison exercise (deciding the most important of any two items) can quickly reduce a large number of CSFs to a manageable short list.

4.4 Relevance to Vision and Mission Statements

The critical success factors chosen by management should relate directly to the vision and mission statements. The CSFs should build on the strengths identified in the SWOT analysis, leveraging those strengths to take advantage of the competitive landscape. Where the SWOT analysis has identified weaknesses that could be exploited by competitors, a CSF should address this.

5. KEY PERFORMANCE INDICATORS

5.1 Quantifying Specific Changes in Performance

Specific changes in performance can be quantified through key performance indicators (KPIs). KPIs may be either financial or nonfinancial. KPIs must be easily understandable to inspire team members to work toward a specific target or attribute. KPIs should have little or no chance of producing an erroneous reading and should give the same reading consistently given the same operating conditions. The selected KPIs should be timely and frequently reported and be easily obtained from the reporting systems currently in place. Last, they should be measurable against a benchmark.

Following are examples of KPIs typically monitored in a professional services business:

- Work-in-process (WIP) aging
- Accounts receivable aging
- Write-offs as a percentage of WIP added

- Average hourly billing rate realized
- Actual versus budgeted charge hours by employee on a monthly basis
- Actual versus budgeted charge hours for the firm as a whole on a monthly basis
- Utilization ratio of hours billed divided by total available hours
- Average fees per client, actual versus budget
- Ratio of fees from top 20 percent of clients to total fees
- Fees from one-time engagements as a percentage of total fees collected
- Fees from each service area as a percentage of total fees and comparison to budget
- Ratio of fees billed to employee salary and benefits (individual and whole firm)
- Average annual fees from new clients
- Average annual fees from clients lost
- Ratio of fees won to fees lost
- Conversion ratio of new clients gained to proposals prepared
- New client referral sources

It is important to measure the activity that produces the result, not simply the result. While increased sales levels may be a result, the activity leading up to sales consists of number of contacts made with customers, rates of conversion of contacts into sales, frequency of sales with a particular customer, and the average dollar amount of each sale. Appendix 4 contains a sample work plan for establishing KPIs in a local public accounting firm.

5.2 Giving Feedback

Different people within an organization require different levels of feedback. The performance measurement reporting system design should give different user groups the information that is useful to their department. From inquiries of these users, an organization can determine if the KPIs will be used in decision making, compliance, work direction, process controls, or resource management.

5.3 Relating Key Performance Indicators to CSFs

Grouping CSFs into performance areas provides a balanced approach to performance measurement. Performance areas might include employee

satisfaction, supplier performance, operational performance, products and services, customer satisfaction, and financial performance.

Not all CSFs require immediate measurement because some will be integrated into meaningful measurements at a step later in the value chain. To simplify the information required, organizations should begin with narrow, company-specific measures to monitor intermediate steps in the value chain. As the organization gains experience in performance measurement, external measures can be added, such as monitoring the level of product endorsements or outside recognition.

5.4 Predictive and Leading Factors

Traditional accounting systems are rooted in historical information on where an organization has been. Nonfinancial factors can lead toward meaningful predictions of where a company's performance is headed in the foreseeable future. Nonfinancial factors that predict future profitability can include:

- Conversion rates of proposals into sales orders
- Market share and strength of market position
- Customer loyalty
- New product development
- Quality of management team

Focusing on leading indicators, rather than historical results, allows an organization to anticipate and correct negative results by observing its early warning signs. Leading indicators tell management what will happen downstream in the value creation process.

5.5 Benchmarking to Industry Measures

Benchmarking is the process of evaluating key performance indicators against an internal or external target. Industry-wide benchmarks give the organization an indication of how its efficiency and results compare to those of its competitors.

In many industries, data warehouses provide a pool of information shared by a group of companies. Within the pool, individual identification is lost, thus preserving confidentiality and anonymity. These targets allow an organization to set high performance targets, such as achieving performance in the top quartile of industry competitors. Industries that have many manufacturers of generic commodities, such as agricultural production, have led the way in establishing data pools for industry-wide benchmarking.

Industry trade associations often provide useful industry benchmarks. The Risk Management Association (RMA) publishes standards of financial performance compiled from statistically reliable samples of companies in the United States. Internet search engines can also be used to locate and access the wealth of information available online.

In certain circumstances, it may be more appropriate to use internal benchmarks because of the unique position of the company within its industry. However, internally set benchmarks might not stretch the company to achieve high standards of excellence. Many times, looking to another industry for relevant benchmarks is preferable to internal benchmarks.

5.6 Data Gathering and Reporting

The process of gathering data for performance measurement includes identifying the individual owners of the measures. Depending on the measurement factor, this could be an individual, team, or department. One should consider the desired frequency of measurement and develop templates for gathering and reporting that integrate with other measures.

Several software packages exist for performance measurement analysis. *CPA Views*, software developed by the American Institute of Certified Public Accountants in partnership with PerformanceSoft™, was designed specifically to help CPAs address management needs for establishing new standards, systematically measuring progress, and monitoring an organization's results compared with earlier performance.

It provides templates for planning input and outcomes. The software includes easy-to-understand measurement tools that can be customized precisely to an organization's needs. The software also features wizards and a graphic display package and allows users to drill down through the performance measurement system in progressive levels of detail. The software captures information at varying levels of detail for key functional or performance areas of the organization. More information is available at www.aicpa.org.

6. FINANCIAL RATIOS

Ratio analysis, in particular, may be undertaken to help a client evaluate past, current, and future performance. A ratio is by itself meaningless until it is compared to prior years, projections, and industry averages, as well as to other ratios. The benefit of ratio analysis is that it provides

a benchmark for measuring performance, targeting future goals, and helping identify potential problem areas.

The financial ratios presented in Appendix 5 may be useful in many different types of client engagements. Those ratios selected for presentation in this section represent only those commonly used in credit or comparative analysis. The term *comparative* is used to refer to the financial data of similar entities or to industry data. Such data may be obtained from a variety of sources. See the chapter “Business Valuation” for a comprehensive list of industry sources.

7. PERFORMANCE TARGETS

7.1 Range of Desired Outcomes

Most performance targets are best defined as a range, rather than a specific amount, for the desired outcome. In setting ranges for outcomes, use logical measures. An independently owned franchise should certainly set targets within the franchiser’s requirements for continued product licensing. However, companies that have historically operated far below their peer groups should not set performance targets in the top quartile.

Time-sensitive measures will assist in driving improved value and performance where they anticipate and predict future outcomes. Measures should be linked to the organization’s annual plan for planning and periodic review. Seasonal variances need to be considered so that ranges of acceptable outcomes are appropriate for that time of year. This is especially important where mid-year reviews are customary. Year-end reviews can be helpful in providing a springboard for the next year’s annual planning activities.

Progress points need to be placed early enough to allow time to address substandard performance. For example, if high absenteeism leads to poor workmanship, high levels of rework, and poor billing realization, the time for measures must be early enough to build in response times. Measurements should be placed far enough apart to allow performance improvements to be apparent in the production process.

7.2 Selecting Achievable and Appropriate Targets

Organizations need to see early gains to maintain momentum and across-the-board acceptance of reengineering initiatives. If targets are

set too high, failure to achieve the initial targets can translate into resentment and resistance. On the other hand, targets set too low provide little motivation to improve performance areas. Rank and file employees should have a strong voice in selecting targets so they assume ownership and responsibility for achieving targets.

Moving in gradual steps away from the historical performance of the recent past lessens the likelihood of internal resistance resulting from early failures where targets are set too high.

7.3 Defining Performance Standards

As standards for performance are established, they need to be defined in terms that employees or vendors can easily understand. Each work group or team in the company should establish its own performance standards. Performance standards cover all aspects of a business, not just financial or production control.

For example, in customer relations the performance standards may address such things as:

- How will telephones be answered? Are calls screened? When can a customer expect a return phone call?
- How are customers greeted? What language is acceptable and how formally are customers addressed?
- How will customers be assisted? Will they be escorted to a requested area rather than pointing?
- How will complaints be handled? Do employees who receive complaints “own” them and are they responsible for the customer’s satisfaction even if it is outside of their area?

Even such intangible areas as customer relations can establish performance measures to assess the effectiveness in carrying out the team’s performance standards.

8. ACTION PLANS

8.1 Setting Accountability

Action plans ensure that priorities are set in every area of your business, from marketing and operations to management, personnel, and finance. They focus management’s attention on the long-term objectives of the business rather than just the urgent day-to-day crises. The plan

defines the specific short-term objectives that will lead the business to that long-term future.

For each action, the plan should identify the:

- Activity
- Responsible party
- Key performance indicator
- Timetable
- Resources needed and budget

For an action plan to succeed, ultimate responsibility for each task should rest on just one person. While more than one person may actually complete a task, sharing the responsibility for its completion increases the likelihood of miscommunication and inaction. An effective rule of thumb is that if more than one person is responsible, no one is responsible.

8.2 Team-based Accountability

Team-based accountability is a powerful motivator in shaping behavior to achieve desired outcomes. Teams produce more predictable, consistent performance than individual workers because the team establishes the norms that all members are expected to attain.

8.3 Developing and Integrating Action Plans

Each work unit should be involved in developing its own action plans so members take ownership in achieving the goals of improving business performance. When each team has developed a draft action plan, the planning team should evaluate and compare the plans to ensure they are compatible and address the right performance measures. Systems need to be implemented to allow reporting of new measures and relationships as identified on the action plans.

8.4 Failure to Implement Action Plans

A common occurrence among small businesses is receiving an action plan from a business consultant as the result of an in-depth systems consulting engagement and then failing to implement the recommendations. The early excitement from the potential for change gives way to the day-to-day crises and emergencies. From the top down, employees put off the action plan and become consumed by the urgent yet unimportant matters of the day.

Appoint a champion within the organization whose task it is to ensure implementation of the plan. Accordingly, this needs to be a very disciplined person who is held in high respect by the employees. The champion needs to keep the pressure on the team to prevent people from reverting to their comfort zone of old methods. The champion should report directly to the CEO and should be the primary point person when important decisions need to be made. The champion should be a conduit for the flow of information among the various parties involved in the process.

9. MONITORING AND REPORTING SYSTEMS

9.1 Types of Reporting and Monitoring Systems

Reporting and monitoring systems must provide reliable information on a timely, consistent basis. For performance measurement, all who need it to do their jobs must be able to easily access the information. Without this feedback, the success of action plans cannot be evaluated and modified on a timely basis.

The most common reporting system may be computer spreadsheets or existing management software. Depending on the work group, however, the reporting system might be as simple as handwritten notes on whiteboards on the shop wall, or other signs posted in break rooms or elsewhere in the office. The information might also be communicated through e-mail, private Web pages, or company newsletters.

Information may also be obtained from performance measurement software applications. See section 5.6 for a discussion of the AICPA's *CPA Views* software.

9.2 System Security

As new information users access reports from the company's computer network, password protection is necessary to ensure the accessing rights to enter data, modify data, or read data are set based on each user's needs. Sensitive information should be security-controlled from a single point for the entire network. Some information may be accessible to the entire organization, while other data need high levels of security clearance. Unique login and password controls should be assigned to each user that accesses information within the network. User groups

might include system administrators, measure owners, owner assistants, data-entry users, commentary-entry users, or users with read-only access.

See the chapter “E-Business” for more information on information technology security systems.

9.3 Evaluation

As the performance measurement reporting system is implemented, the planning team will need to evaluate how well performance measures are actually modifying employee behavior and affecting the overall performance of the company. Planning teams should determine how often each measure is updated and reviewed and reassess the desired frequency of each.

The planning team should assess how well measurement-based decisions and action plans are communicated throughout the company. This may be seen in how the company allocates resources of working capital and labor, develops compensation plans, focuses on initiatives, and expands on existing action plans.

10. PERIODIC REALIGNMENT OF TARGETS

10.1 Structured Review Process

It is important to recognize that the planning team is not an ad hoc committee whose task is completed upon deployment of a performance measurement system. It should be a standing committee charged with ongoing evaluation. The planning team should, ideally, consist of individuals who understand the strategic direction of the company, are motivated for change, communicate effectively, and come from multiple disciplines within the company.

10.2 Periodic Evaluation

At least twice annually, the planning team should meet to discuss the success of implementing and sustaining the performance measurement process. More frequent meetings may be required where significant changes or rapid improvements have occurred.

The committee’s ongoing purpose is to assess if the right things are being measured and whether the performance being measured is in alignment with the company’s vision and mission statements. Basic

changes in the economy and marketplace may change the selected critical success factors. The committee should also evaluate if the targets or ranges are still reasonable or in need of redefinition. Appendix 6 contains a questionnaire to assist in evaluating and realigning targets and measures.

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APPENDIX 1: Client Readiness Questionnaire*

Have your client complete this questionnaire to assess its readiness to engage in a CPA Performance View initiative.

1. Are there organizational issues that keep you awake at night?
 Yes No
 What are some of these issues? _____
2. Does your organization need to become more competitive in the marketplace? Yes No
 In what ways are you not competitive? _____
3. Is your organization growing, and does it have a need for improved leadership and management effectiveness? Yes No
4. Does your organization have clearly stated goals and objectives? Yes No
5. Are people willing to change when new organizational strategies require it? Yes No
6. Do you have a regular process for planning on a periodic basis? Yes No
7. How often do you gauge yourselves against the plans you created? Daily Weekly Monthly
 Semi-Annually Annually Almost never
 Other, specify _____
8. Is there pressure on the organization to make more money?
 Yes No
9. Are shareholders unhappy with recent financial performance?
 Yes No
10. How serious is leadership about making changes?
 Very interested Interested
 Somewhat Interested Not interested
 Extremely interested
11. What type and level of leadership is leading this initiative?
 Type Level
12. Are there leaders within the organization that have participated in planning similar changes in the past? Yes No
13. Have previous efforts been made to adopt new procedures?
 Yes No
14. Where are the stress points in the organization? _____
15. Are there visible potential roadblocks for engaging in a change-oriented initiative? Yes No
 What are they? _____

*See *CPA Performance View Services: A Practitioner's Guide to Providing Performance Measurement Engagements*, by Stephen H. Coleman and Thomas G. Wagner (New York: AICPA, 2000). All rights reserved.

16. Will top leadership give visible, sustained support for the initiative? Yes No
17. Are there identifiable champions within the organization that will assist with implementation of CPA Performance View services?
 Yes No

APPENDIX 2: Checklist for Planning Documents and Existing or Prior Consulting Relationships*

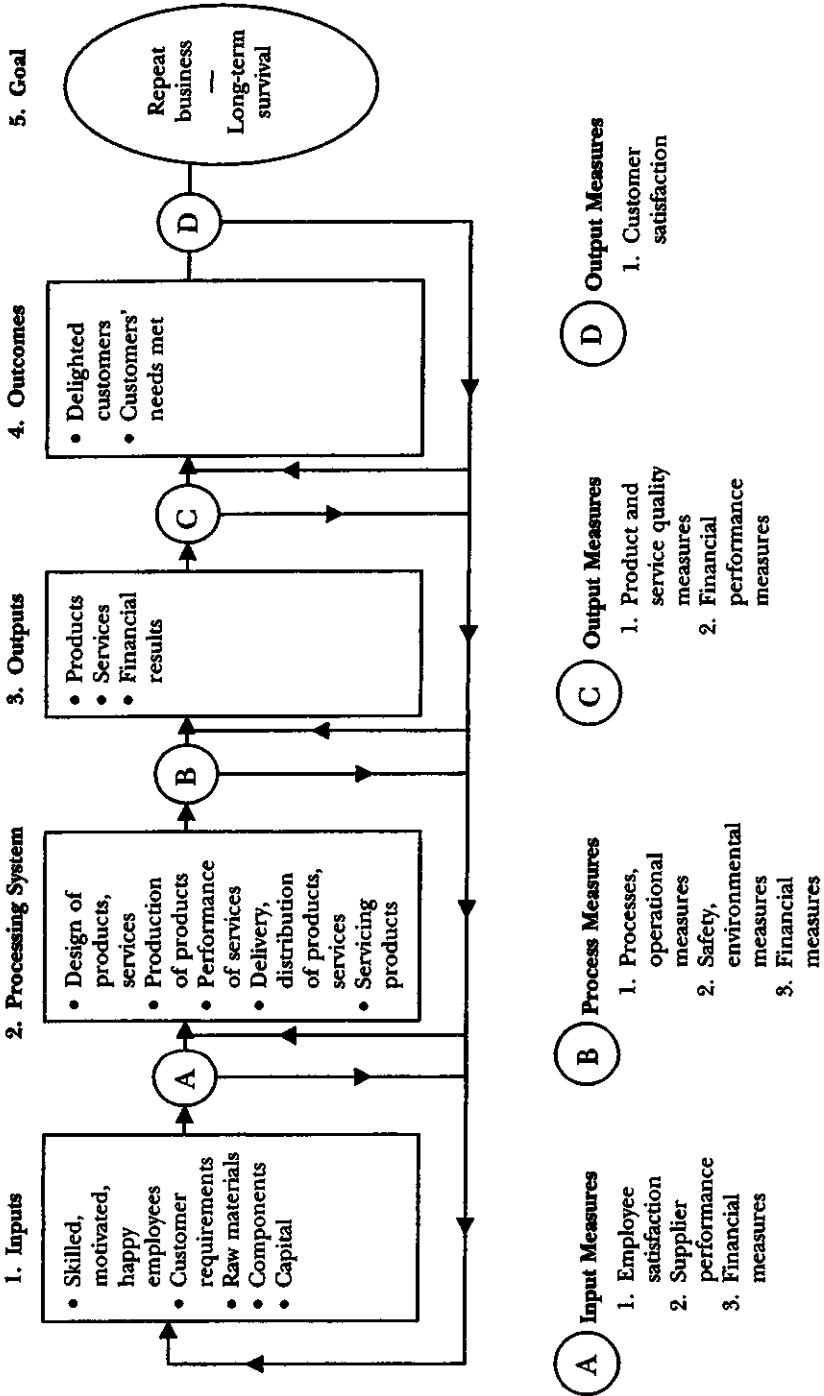
This checklist is not meant to be exhaustive. Use this checklist as a guide to obtaining and reading the pertinent prior performance and planning initiatives the organization has undertaken. This can also be used in engagements in which no prior planning has been done, as a guide for what types of statements and information will be useful to generate throughout the process.

Planning Documents

Mission statement	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Vision statement	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Written strategic plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Audited financial statements with footnotes	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Divisional financial statements	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Ratio analysis or other financial analysis	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Budgets or financial forecasts	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Benchmarking activities	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Organizational goals and objectives	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Organizational chart	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Business plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Sales plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Customer services questionnaires and results	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Customer satisfaction surveys	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Business growth plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Facility expansion plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Employee relations plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Employee training and development plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Capital budgeting and investment plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Process-improvement plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
ISO 9000 plans	Yes <input type="checkbox"/>	No <input type="checkbox"/>
SPC reports	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Continuous quality improvement reports	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Minutes from the board of directors and committees meetings	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Other:	Yes <input type="checkbox"/>	No <input type="checkbox"/>

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APPENDIX 3: Value Chain Illustration*



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APPENDIX 4: Key Performance Indicator Work Plan

<u>Function/Goal</u>	<u>Key Performance Indicators</u>	<u>By Whom</u>	<u>Frequency</u>	<u>To Whom</u>	<u>Purpose</u>	<u>Corrective Action/ Enforcement</u>
<p>1. <i>The revenue cycle</i></p> <p>a. Creating work-in-process (WIP)</p> <ul style="list-style-type: none"> • Charge hours • Compare actual hours charged to budget for each accountant (period and YTD) • Utilization rate 			Monthly	Accountants Managing partner	To ensure revenue projections are met	Performance review Compensation
			Quarterly	Exceptions to managing partner	To measure staff productivity	Assess whether shortfall due to unproductive time Discuss with team
			Monthly	Exceptions to managing partner	To measure timeliness of billing	Firm administrators meet with accountant
<p>b. Turning WIP into AR</p> <ul style="list-style-type: none"> • WIP aging by primary and firm (current vs. prior year or target) • WIP over \$400 and 90 days by primary accountant 			Monthly	Managing partner	To ensure progress billing occurs	Supervisor discusses with accountant Supervisor bills for account

<ul style="list-style-type: none"> • Realization % by accountant (YTD vs. target) 	Monthly	Administrator Managing partner	To evaluate billing rate and efficiency	Supervisor discusses Performance review
<ul style="list-style-type: none"> • Average age of AR to prior year or target 	Monthly	Administrator	To evaluate collection efforts	Compensation
<ul style="list-style-type: none"> • AR over 90 days by client 	Semiannually	Primary administrator Managing partner	To identify problem clients and develop workout	Suspend future work
<ul style="list-style-type: none"> • Review prior year budget to year-end financials 	Annually	Managing partner Managing partner	To target profitability	Explore negative variances
<ul style="list-style-type: none"> • Cash, WIP, AR, LOC, receipts 	Weekly	Managing partner Board	Flash report	Step up billing meetings
<ul style="list-style-type: none"> • Accrual basis financial statement • Compare period and YTD total revenue, expenses, and NI to budget 	Monthly	Board	To monitor profitability	To monitor profitability
c. Collecting AR	Monthly	Board	To monitor profitability	To monitor profitability
2. <i>Financial statement</i>				

BUSINESS PERFORMANCE MEASURES

<u>Function/Goal</u>	<u>Key Performance Indicators</u>	<u>By Whom</u>	<u>Frequency</u>	<u>To Whom</u>	<u>Purpose</u>	<u>Corrective Action/Enforcement</u>
3. <i>Client service</i>	<ul style="list-style-type: none"> • Client fees divided by number of clients to determine amount of service provided to each client • Clients won/lost 	Annually	Managing partner	To measure cross-selling of services	Increase marketing of services to existing clients	
	CPA Software report of files opened and closed	Annually	Administrator Managing partner	To measure growth	Use in conjunction with average client fees to determine staffing	
	<ul style="list-style-type: none"> • Total revenue and average rate billed for new service areas 	Annually	Administrator Managing partner	Assess penetration of new client services	Marketing	

Critical Success Factors

<p>1. Timely service</p>	<ul style="list-style-type: none"> • % of tax returns completed within one month of interview by primary accountant • % of audits and reviews out within 75 days of year end 	<p>Annually</p>	<p>Administrator</p>	<p>To meet client expectations for timeliness</p> <p>Meeting with accountants who have slowest turnaround</p>
<p>2. Substantive advice</p>	<ul style="list-style-type: none"> • Random review of 5 TR memos per client for content 	<p>Annually</p>	<p>Managing partner</p> <p>Feedback to each accountant</p>	<p>To meet client expectations for timeliness</p> <p>To provide additional training</p>
<p>3. Skilled personnel</p>	<ul style="list-style-type: none"> • Review of CPE content and hours for each accountant 	<p>Annually</p>	<p>Administrator</p>	<p>To ensure staff has proper skill set</p> <p>Performance evaluation and career counseling</p>

APPENDIX 5: Financial Ratios

Ratio	Formula	Interpretation
Current Ratio	$= \frac{\text{Current Assets}}{\text{Current Liabilities}}$	Indicates the extent to which current assets cover current liabilities. Attention should be paid to trends.
Quick Ratio	$= \frac{\text{Cash + Cash Equivalents + Net Receivables}}{\text{Current Liabilities}}$	A conservative view of creditors' protection, since inventory and prepaid items may not always be liquid. A company is usually in good liquid position when quick assets exceed current liabilities.
Working Capital	$= \text{Current Assets} - \text{Current Liabilities}$	Working capital is a direct indicator of the company's ability to grow.
Inventory to Working Capital	$= \frac{\text{Inventory}}{\text{Working Capital}}$	Indicates the percentage of working capital supporting inventory. A high percentage indicates operating problems.
Current Assets Turnover	$= \frac{\text{Cost of Goods Sold + Operating Expenses + Tax} - \text{Noncash Expenses}}{\text{Current Assets}}$	Indicates the number of times current assets must turn over to cover expenditures. Measures control of current assets.
Inventory to Current Liabilities	$= \frac{\text{Inventory}}{\text{Current Liabilities}}$	Shows the degree to which the company relies on inventory to meet its current obligations.

LIQUIDITY RATIOS

~ PROFITABILITY RATIOS

Ratio	Formula	Interpretation
Gross Profit Percentage	= $\frac{\text{Gross Profit}}{\text{Net Revenues}}$	Reflects control over cost of sales and pricing policies. The ratio must be viewed in relation to the client's past performance and the industry average.
Operating Profit Percentages	= $\frac{\text{Operating Profit}}{\text{Net Revenues}}$	Indicates the company's ability to control operating expenses. The ratio should be viewed in relation to increased sales and changes in gross profit.
Net Income Before Taxes Percentage (NIBT)	= $\frac{\text{Income Before Taxes + Extraordinary Items}}{\text{Net Revenues}}$	Provides a more consistent basis for comparisons. It is also used in the calculation of other ratios.
Net Income After Taxes Percentage (NIAT)	= $\frac{\text{Net Income After Taxes}}{\text{Net Revenues}}$	Reflects the tax effect on profitability and represents the profit per dollar of sales.
Return on Equity*	= $\frac{\text{NIAT}}{\text{Stockholders' Equity}^{**}}$	Measures the return to stockholders and represents their measure of profitability. When compared to the return on assets, this ratio indicates degree of financial leverage.
Return on Assets*	= $\frac{\text{NIAT}}{\text{Total Assets}^{**} \text{ or } \frac{\text{NIAT Percentage}}{\text{x Assets Turnover}}}$	Reflects the earning power and effective use of all the resources of the company.

*Can be calculated by using operating income, NIBT, or earnings before interest and taxes (EBIT).

**When material transactions affecting the balance have occurred, an average balance should be used in the calculations.

EFFICIENCY RATIOS

<i>Ratio</i>	<i>Formula</i>	<i>Interpretation</i>
Accounts Receivable Turnover	$= \frac{\text{Credit Sales}}{\text{Average Accounts Receivable}}$	Indicates the number of times it takes receivables to turn into cash per year. Attention should be paid to credit terms, billing procedures, trends, and industry average.
Accounts Receivable Collection Period	$= \frac{360 \text{ or } 365 \text{ Days}}{\text{Accounts Receivable Turnover}}$	Reflects average length of time from sale to cash collection.
Inventory Turnover	$= \frac{\text{Cost of Goods Sold}}{\text{Average Inventory}}$	Indicates the number of times the business liquidates its inventory over a period and whether too little or too much inventory is carried.
Inventory—Days in Inventory	$= \frac{360 \text{ or } 365 \text{ Days}}{\text{Inventory Turnover}}$	Reflects the number of days it takes to sell the inventory. Used in conjunction with accounts receivable collection period to determine operating cycle.
Operating Cycle	$= \text{Accounts Receivable Collection Period} + \text{Days in Inventory}$	Indicates the length of time it takes to convert inventory to cash. If the cycle increases, more permanent working capital is needed.
Accounts Payable Turnover	$= \frac{(\text{Cost of Goods Sold} - \text{Beginning Inventory}) + \text{Ending Inventory}}{\text{Average Accounts Payable}}$	Indicates the number of turns per period of time it takes for the company to pay its trade payable. Should be compared to credit terms.
Accounts Payable—Days Outstanding	$= \frac{360 \text{ or } 365 \text{ Days}}{\text{Accounts Payable Turnover}}$	Same as above but expressed in number of days rather than number of turns.
Assets Turnover	$= \frac{\text{Net Revenue}}{\text{Total Assets}^*}$	Indicates the turnover rate of total assets to achieve net revenue. When viewed historically, ratio indicates the effectiveness of generating sales from assets expansion.
Net Revenue to Working Capital Turnover	$= \frac{\text{Net Revenue}}{\text{Working Capital}}$	An indication of the amount of working capital required to support sales. An increasing ratio may, for example, indicate insufficient working capital to support sales growth.
Net Fixed Assets to Stockholders' Equity	$= \frac{\text{Net Fixed Assets}}{\text{Stockholders' Equity}^*}$	Indicates the proportion of stockholders' equity that is committed to fixed assets and is not available for operating funds. A low percentage would indicate a favorable liquid position.

EFFICIENCY RATIOS

Altman Z Score = The Altman Z Score, developed by Edward I. Altman, is a composite formula that is widely used to measure the financial "health" of a company. The formula takes financial ratios and multiplies each by a specific constant. The amounts so computed are added together to obtain an overall score. This score is then compared to scores from other companies to rate relative financial health. These scores could be helpful in evaluating a "going concern." The formulae are as follows:

For Corporations: (five variables)	$\frac{\text{Working Capital}}{\text{Total Assets}}$	x	.012
	$\frac{\text{Retained Earnings}}{\text{Total Assets}}$	x	.014
	$\frac{\text{Earnings Before Interest and Taxes}}{\text{Total Assets}}$	x	.033
	$\frac{\text{Market Value Equity}}{\text{Book Value of Total Liabilities}}$	x	.006
	$\frac{\text{Sales}}{\text{Total Assets}}$	x	.999
For Private Companies: (five variables)	$\frac{\text{Working Capital}}{\text{Total Assets}}$	x	.717
	$\frac{\text{Retained Earnings}}{\text{Total Assets}}$	x	.847
	$\frac{\text{Earnings Before Interest and Taxes}}{\text{Total Assets}}$	x	3.107

(continued)

*When material transactions affecting the balance have occurred, an average balance should be used in the calculations.

EFFICIENCY RATIOS (continued)

Ratio	Formula	Interpretation
	$\frac{\text{Net Worth (Book Value)}}{\text{Total Liabilities}} \times .420$	
	$\frac{\text{Sales}}{\text{Total Assets}} \times .998$	
For Private Companies: (four variables)	$\frac{\text{Working Capital}}{\text{Total Assets}} \times 6.56$	
	$\frac{\text{Retained Earnings}}{\text{Total Assets}} \times 3.26$	
	$\frac{\text{Income Before Interest and Taxes}}{\text{Total Assets}} \times 6.72$	
	$\frac{\text{Net Worth}}{\text{Total Liabilities}} \times 1.05$	

Score
 1.8 or less..... Very high
 1.81 to 2.7..... High
 2.8 to 2.9..... Possible
 3.0 or higher..... Very low

Probability of Failure
 Very high
 High
 Possible
 Very low

CAPITAL STRUCTURE RATIOS

Ratio	Formula	Interpretation
debt to equity =	$\frac{\text{total debt}}{\text{stockholders' equity}^*}$	Indicates the relation of the owners' and creditors' positions. This ratio should be viewed in the light of industry averages.
current debt to equity =	$\frac{\text{current liabilities}}{\text{equity}}$	Indicates the proportion of debt to total equity that is current in maturity. A high ratio may indicate the need to restructure debt.
operating fund to current portion of long-term debt =	$\frac{\text{NIAT} + \text{noncash expenses}}{\text{current portion of long-term debt}}$	Shows the ability of the company to meet its current payments.
times interest earned =	$\frac{\text{NIIBT} + \text{interest}}{\text{interest}}$	Shows how well the company is able to cover interest from earnings. Measures the level of earnings decline to meet interest payments.
long-term debt to equity =	$\frac{\text{long-term debt}}{\text{stockholders' equity}^*}$	Measures the relationship of long-term debt to equity.

*When material transactions affecting the balance have occurred, an average balance should be used in the calculations.

APPENDIX 6: Realignment Questionnaire*

Before meeting with the client's performance measurement teams, the following questions and other possible questions should be reviewed to make the realignment process as effective as possible.

Questions

Have the strategic objectives and goals of the organization changed?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Are the mission and vision of the organization still relevant?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Are there new market factors that need to be taken into account when realigning measures, critical success factors or targets?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Do we experience new competition in our marketplace that needs to be addressed?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Do we have additional information or data available that was unavailable before?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
How long has the performance measurement system been in place?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Has it been in place long enough to evaluate its effectiveness?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Are we measuring the right things?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the performance being measured line up with the organization's vision and mission?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Are the selected critical success factors still critical?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Are the targets or ranges reasonable?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Are the targets too easy and not stretch targets?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Do the targets need to be redefined?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Should anything else be changed?	Yes <input type="checkbox"/>	No <input type="checkbox"/>

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INDEX

All references in this index are to the chapter title and chapter section numbers. The following is a key to abbreviated references used in the index.

Chapter	Index Abbreviation
Bankruptcy/Insolvency	BANK
Business Performance Measures (Volume 2)	BPM
Business and Succession Planning (Volume 2)	BP
Cash Management (Volume 2)	CM
Corporations	CORP
Federal Corporate Tax Notes (Volume 2)	CORPTAX
E-Business (Volume 2)	E-BIZ
Employment Regulations	EMP
Estate Planning	EST
Obtaining Financing	FIN
Hiring Foreign Nationals	HFN
Human Resources (Volume 2)	HR
Federal Individual Tax Notes (Volume 2)	INDTAX
Insurance	INS
Investment Vehicles	INV
IRS Practice and Procedure (Volume 2)	IRS
Limited Liability Companies	LLC
Partnerships	PART
Sole Proprietorships	PROP
Employee Retirement & Deferred Compensation Plans	RET
S Corporations	S CORP
Social Security and Other Issues Facing Elderly or Disabled Clients (Volume 2)	SS
Trusts	TRUSTS
Unemployment Insurance	UI
Business Valuation	VAL
Workers' Compensation	WORK
ACCOUNTING METHOD CHANGES	
Automatic accounting method request, extension of, CORPTAX 4.1.2	Specified liability losses, CORPTAX 4.4 Background, CORPTAX 4.4.1 Carryback rules, IRS guidance, CORPTAX 4.4.2
Previous guidance on, CORPTAX 4.1.1.2	Twelve-month prepaid expense rule, CORPTAX 4.1 Background, CORPTAX 4.1.1.1 Economic performance rules, coordi- nation with, CORPTAX 4.1.12
Environmental expenditures, treat- ment of, CORPTAX 4.2 Background, CORPTAX 4.2.1 Remediation, CORPTAX 4.2.2	UNICAP, CORPTAX 4.3

INDEX

- ACCOUNTS RECEIVABLE**
 Business valuation, VAL 9.2
- ADOPTION CREDIT**
 Background, IND TAX 6.6.1
 Inflation adjusted amounts, IND TAX 6.6.2
- AGE DISCRIMINATION EMPLOYMENT ACT (ADEA)**
 Generally, EMP 5.3
- AGRICULTURAL EMPLOYMENT**
 FICA, EMP 7.1.1
- ALIMONY**
 Background, IND TAX 3.5.1
 Payments, after death, IND TAX 3.5.2
- ALTERNATIVE DISPUTE RESOLUTION:** *see* INTERNAL REVENUE SERVICE
- ALTERNATIVE MINIMUM TAX**
 Background, IND TAX 6.1.1
 Business credits, allowed against, IND TAX 6.1.3
 Farm income averaging, and, IND TAX 6.2.2
 90-percent limit on foreign tax credits, repeal IND TAX 6.1.2
- ALTERNATIVE MOTOR VEHICLE CREDIT**
 Tax calculations and credits
 Advanced lean burn vehicle credit, CORPTAX 6.10.4.2, IND TAX 6.8.3
 Alternative motor vehicle credit, CORPTAX 6.10.4.4, IND TAX 6.8.1
 Alternative fuel vehicle credit, IND TAX 6.8.5
 Clean fuel vehicle deduction, IND TAX 3.6.1–3.6.3
 Electric vehicle credit, CORPTAX 6.10.7
 Generally, CORPTAX 6.10.4
 Hybrid vehicle credit, CORPTAX 6.10.4.3, IND TAX 6.8.4
 Qualified fuel cell motor vehicle, CORPTAX 6.10.4.1, IND TAX 6.8.2
- AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (AICPA)**
 Rules governing conduct before the IRS
 Code of Professional Conduct, IRS 2.3.3
 Tax standards, IRS 2.3.2
- Valuation guidelines
 Ethics Interpretation 101–3, VAL 11.5
 Guide for Prospective Financial Valuation, VAL 11.2
 MCS Small Business Consulting Services Practice Aid No. 93-3, *Conducting a Valuation of a Closely Held Business*, VAL 11.4
 Statement on Standards for Attestation Engagements (SSAE) 10, VAL 11.3
 Statement on Standards for Consulting Services (SSCS) 1, VAL 11.1
- AMERICAN JOBS CREATION ACT OF 2004**
 Tax shelter disclosure regulations, and, IRS 13.1–13.2
 Additional penalties and sanctions, IRS 13.4
- AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)**
 Discrimination, and, EMP 5.4
- AMERICAN SOCIETY OF APPRAISERS (ASA)**
 Valuation guidelines
Business Valuation Standards (ASA), VAL 12.3
Principles of Appraisal Practice and Code of Ethics (ASA), VAL 12.2
- AMORTIZATION:** *see* DEPRECIATION AND AMORTIZATION
- ANNUITIES**
 Investment vehicle, as, INV 12.1
 Retirement CDs, INV 12.1.1
See also SMALL BUSINESS JOB PROTECTION ACT OF 1996
- APPRAISAL:** *see* BUSINESS VALUATION
- THE APPRAISAL FOUNDATION**
Uniform Standards of Professional Appraisal Practice (USPAP), VAL 12.1
- ATTORNEYS**
 Estate planning and, EST 1.7.1
- AUDITS:** *see* INTERNAL REVENUE SERVICE, Examinations; TAX RETURNS, Procedure for examining
- AWARDS, PERSONAL INJURY**
 Background, IND TAX 2.5.1

INDEX

- Emotional distress amounts, taxable, IND TAX 2.5.4
- Physical injury requirement, IND TAX 2.5.2
- Prejudgment interest, taxable, IND TAX 2.5.3
- BANK INVESTMENTS**
 - Banker's acceptances, INV 3.3
 - Certificates of deposit, INV 3.1
 - Jumbo certificates of deposit, INV 3.2
 - Repurchase agreements, INV 3.4
- BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**
 - Background, IND TAX 4.2.2
 - Dischargeability of taxes in bankruptcy, CORPTAX 5.3.2
 - Retirement plan protection, CORPTAX 5.3.1
 - See also* BANKRUPTCY/INSOLVENCY
- BANKRUPTCY/INSOLVENCY**
 - Accountants' roles
 - Chapter 11, BANK 4.2, *see* REORGANIZATION AFTER BANKRUPTCY
 - Help clients prepare for, or avoid, bankruptcy, BANK 4.3
 - Limited, chapter 7, 12, and 13 BANK 4.1
 - Alternatives to
 - Asset, liability, and company maneuvers
 - Asset maneuvers, BANK 3.6.1
 - Company maneuvers, BANK 3.6.2
 - Liability maneuvers, BANK 3.6.3
 - Bulk transfer
 - Advantages and disadvantages, BANK 3.2.2
 - Requirements, BANK 3.2.1
 - Composition and extension agreements, BANK 3.5
 - Requirements, BANK 3.5.1
 - Mediation, BANK 3.4
 - Receiverships, BANK 3.3
 - Voluntary liquidation
 - Assignments for the benefits of creditors, BANK 3.1.1
 - Bankruptcy/insolvency, comparison of old and new law, BANK Appendix 1 (*see Toolkit CD-ROM*)
 - Bankruptcy/insolvency, federal bankruptcy exemptions, BANK Appendix 2 (*see Toolkit CD-ROM*)
 - See also* BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005
 - Chapter 7: *see* LIQUIDATION
 - Chapter 12: *see* FARMERS (FAMILY) OR FISHERMEN WITH REGULAR INCOME; ADJUSTMENT OF DEBTS
 - Chapter 13: *see* DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME
 - Conversion of cases, BANK 13
 - Creditors' rights and protections
 - Disallowance of claims
 - Estimating contingent and unliquidated claims, BANK 16.4.2
 - Reconsideration, BANK 16.4.1
 - Filing requirements, BANK 16.2
 - Involuntary petitions
 - Filing, BANK 16.7.1
 - Grounds for relief, BANK 16.7.3
 - Interim trustee, appointment of, BANK 16.7.5
 - Involuntary gap period, BANK 16.7.4
 - Prerequisites to filing, BANK 16.7.2
 - Resolving, BANK 16.7.6
 - Objections to a claim, BANK 16.3
 - Priorities
 - First, BANK 16.5.1
 - Second, BANK 16.5.2
 - Third, BANK 16.5.3
 - Fourth, BANK 16.5.4
 - Fifth, BANK 16.5.5
 - Sixth, BANK 16.5.6
 - Seventh, BANK 16.5.7
 - Eighth, BANK 16.5.8
 - Proof of claims and interests, BANK 16.1
 - Superpriorities
 - Debts incurred by trustee, BANK 16.6.3
 - To secured creditors, BANK 16.6.1
 - When there is conversion, BANK 16.6.2

BANKRUPTCY/INSOLVENCY

(continued)

Dismissal of cases, BANK 14.1–14.4

Exemptions

Claiming, BANK 12.2

Federal

Avoiding liens on exempt property, BANK 12.5

Grubstake exemption, BANK 12.4.2

Homestead exemption, BANK 12.4.1

“Right to receive,” BANK 12.4.4

Specific property, exemptions specific to, BANK 12.4.3

Tracing property, BANK 12.4.4

Federal vs. state (debtor’s choice), BANK 12.3

Income tax implications, BANK 17

And bankruptcy, BANK 17.1

And insolvency, BANK 17.2

Overview, BANK 2

And bankruptcy code, BANK 2.2

And means test, BANK 2.1

And U.S. trustee, BANK 2.3

Proprietorship, of, PROP 13.2

System, organization of

Bankruptcy code (1984) amendments, BANK 6.3

Court hierarchy, BANK 6.1

Courts and jurisdiction, BANK 6.2

Trial by jury, BANK 6.4

Tax discharge

Individuals, IRS 8.7.1

Partnerships and corporations, IRS 8.7.2

Terminology and definitions, BANK 7

Transfers of property

Generally, BANK 15.1

Postpetition transfers, BANK 15.3

Prebankruptcy transfers

Fraudulent conveyances, BANK 15.2.2

Preferences, BANK 15.2.1

Statutory liens, BANK 15.2.5

Transfers avoidable under state law, BANK 15.2.4

Unrecorded transfers, BANK 15.2.3

Trustee’s avoiding powers, limitations, BANK 15.4

Working in

Cautionary advice on work performed

Court approval, without, BANK 5.2.1

Narrate and itemize work performed, BANK 5.2.3

Verify the benefit to the estate, BANK 5.2.2

Counsel, obtain your own, BANK 5.3

CPA, retention and payment of, BANK 5.1

Fee application, BANK 5.4

Finding opportunities, BANK 5.6

Payment, BANK 5.1, 5.5

See also NATIONAL BANKRUPTCY REVIEW COMMISSION

BENEFIT PROGRAMS

Affordability of, HR 9.2

Cafeteria plans, HR 9.3

Objectives of, HR 9.1

Unemployment insurance, UI 1.3

BONDS

Agency bonds, INV 4.6

Federal sponsored agencies, INV 4.6.2

Government sponsored agencies, INV 4.6.1

Corporate: *see* CORPORATE BONDS

Estate planning, federal, EST 4.1.3

Junk bonds

Ratings, INV 4.9.1

Mortgage-backed securities

Collateralized mortgage obligations, INV 4.8.3

FHLMC and FNMA securities, INV 4.8.2

GNMA securities, INV 4.8.1

Reverse mortgages, INV 4.8.4

Online accessibility, INV 4.5.5

PIK (Payment-in-Kind), INV 4.11

Ratings, INV 4.9

Junk bonds, INV 4.9.1

Separate Trading of Registered Interest and Principal of Securities (STRIPS), INV 4.4.1

Series EE Patriot, INV 4.5.1

Series HH, INV 4.5.2

Series I, INV 4.5.3

State and municipal: *see subhead* Tax-exempt

Tax-exempt

Alternative resolution, at examination, IRS 14.2.3

- Assessment, INV 4.7.3
- Characteristics, INV 4.7.4
- General obligation, INV 4.7.2
- Revenue, INV 4.7.1
- Treasury bills (T-bills), INV 4.1
- Treasury bonds, INV 4.3
- Treasury notes, INV 4.2
- U.S. savings bonds, INV 4.5–4.5.2
- Zero coupon treasury securities
 - Certificates of Accrual on Treasury Securities (CATs), INV 4.4.2
 - Generally, INV 4.10.10
 - Treasury Investment Growth Receipts (TIGRs), INV 4.4.3
- BUSINESS PERFORMANCE MEASURES**
- Action plans
 - Accountability, BPM 8.1
 - Team-based, BPM 8.2
 - Developing and integrating, BPM 8.3
 - Failure to implement, BPM 8.4
- Client readiness questionnaire, BPM Appendix 1
- Consulting relationships (existing/prior); checklist for planning documents, BPM Appendix 2
- Critical success factors (CSFs)
 - Attributes of, BPM 4.1
 - Performance indicators and, BPM 5.3
 - Relevance to Vision/Mission statements, BPM 4.4
 - Selection of appropriate CSFs, BPM 4.2
 - “Short list”, BPM 4.3
- Defining, BPM 1–1.2
- Financial ratios, BPM 6
- Forces affecting value of business, BPM 1.2
- Historical assessment
 - Base-line established, BPM 3.1
 - Employee reward structure, BPM 3.7
 - External assessments, BPM 3.6
 - Life-cycle analysis, BPM 3.5
 - Mission statements, BPM 3.3
 - SWOT analysis (strengths, weaknesses, opportunities, threats), BPM 3.4
 - Vision statements, BPM 3.2
- Key indicators
 - CSFs and, BPM 5.3
 - Data gathering/reporting, BPM 5.6
 - Feedback, BPM 5.2
 - Industry measures, benchmarking to, BPM 5.5
 - Predictive and leading factors, BPM 5.4
 - Quantifying specific changes in performance, BPM 5.1
- Key performance indicator work plan; sample, BPM Appendix 4
- Monitoring
 - Reporting systems
 - Evaluation, BPM 9.3
 - Security, BPM 9.2
 - Types of, BPM 9.1
- Need for
 - Commitment to change, BPM 2.4
 - Self-evaluation, BPM 2.3
 - Status quo, BPM 2.2
 - Strategic plans, pre-existing, BPM 2.5
 - Success factors, BPM 2.1
- Realignment questionnaire, BPM Appendix 6
- Targets
 - Outcomes, range of desired, BPM 7.1
 - Realigning, BPM 10–10.2
 - Evaluation, periodic, BPM 10.2
 - Questionnaire, BPM Appendix 6
 - Review process, BPM 10.1
 - Selection of, BPM 7.2
 - Standards, BPM 7.3
- Value chain illustration, BPM Appendix 3
- BUSINESS AND SUCCESSION PLANNING**
- Benefits of, BP 2.3
- Cash flow statement (sample), BP Appendix 4 (*Also see Toolkit CD-ROM*)
- Contents
 - Action plan, BP 3.4.2
 - Cover sheet, BP 3.1
 - Executive summary, BP 3.2
 - Financial presentations
 - Assumptions, BP 3.7.3
 - Cash flow statements, BP 3.7.7, BP Appendix 4
 - Detail and financial statement presentation, BP 3.7.4
 - Feasibility studies, BP 3.7.1
 - Financial statements, BP 3.7.4, BP Appendix 2
 - Other analyses, BP 3.7.8

**BUSINESS AND SUCCESSION PLAN-
NING** (*continued*)

- Sales forecasts, BP 3.7.6
- Scenarios and time periods, BP 3.7.2
- Spreadsheets, BP 3.7.5
- Defined, BP 2
- Engagements and clients, accountant's role in, BP 5.1
- Human resources, BP 3.3.2
- Management, BP 3.3.2
- Marketing
 - Industry analysis, BP 3.5.3
 - Market analysis, BP 3.5.2
 - Product or service, BP 3.5.1
 - Strategy, BP 3.5.4
- Objectives, BP 3.4.1
- Organization, BP 3.3.1
- Production and operations, BP 3.6
- Sample outline, BP Appendix 1
- Sample plan, BP Appendix 5
- Supporting documents, BP 3.8
- Table of contents, BP 3.1
- Undertaking a planning engagement, BP 5.1.1
- Existing businesses, BP 2.2
- Financial statement projections (sample format), BP Appendix 2 (*Also see Toolkit CD-ROM*)
- Financing
 - Debt vs. equity, BP 4.1
 - Generally, BP 1
 - Outline (sample), BP Appendix 1
 - Professional standards
 - Financial forecasts and projections, BP 5.2.3
 - Guide for prospective financial statements, BP 5.2.4
 - Historical financial statements and SSARS No. 1, BP 5.2.2
 - Management consulting services, BP 5.2.1
 - Small business administration (SBA) 8(a) business plan, BP Appendix 6 (*see Toolkit CD-ROM*)
- Software, BP Appendix 3
- Start-up, BP 2.1
- Succession Planning
 - Business environment, and BP 6.2
 - Goals, owner, BP 6.2.3
 - Profitability, BP 6.2.2
 - Valuation, BP 6.2.1

Family succession strategies, BP 6.4

- Asset transfers, BP 6.4.1
 - Businesses incorporated, BP 6.4.5
 - Family limited partnerships, and trusts, BP 6.4.4
 - Gifts, family, BP 6.4.2
 - Self-canceling installment note, BP 6.4.3
 - Goals
 - Family only, BP 6.3.2
 - Owner only, BP 6.3.1
 - Owner, family and key employees, BP 6.2.3
 - Key employees, selling to, BP 6.5
 - ESOP, BP 6.5.2
 - Leveraged buy-out, BP 6.5.1
 - Ownership, retaining with outside management, 6.6
 - Planning checklist, BP Appendix 7 (*see Toolkit CD-ROM*)
 - Situations, requiring plan, BP 6.1
 - Written plan, developing BP 6.7
 - Venture capital
 - Characteristics, BP 4.2.1
 - Pricing of deal, BP 4.2.2
- BUSINESS VALUATION**
- Accreditation, VAL 11.6
 - AICPA guidance: *see* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
 - Appraiser's role, VAL 1.2
 - Checklist, VAL Appendix 2 (*Also see Toolkit CD-ROM*)
 - Concepts
 - Book value versus market value, VAL 4.4
 - Corporate life cycle, VAL 4.1
 - Discount rate versus capitalization rate, VAL 4.5–4.5.2
 - Liquidation value versus going concern value, VAL 4.3
 - Management, VAL 4.2
 - Definitions, VAL 2
 - Discounts
 - Key person, VAL 6.1.3
 - Marketability, lack of, VAL 6.1.2
 - Minority interest, VAL 6.1.1
 - Successive, VAL 6.1.4
 - IRS approach
 - Revenue procedure 66–49 (Donated property), VAL 8.2

INDEX

- Revenue ruling 59–60 (Business valuation principles; closely held stock), VAL 8.1
- Revenue ruling 65–192 (Intangible assets), VAL 8.3
- Revenue ruling 68–609 (“Formula” method), VAL 8.4
- Letters, illustrative, VAL Appendix 1
(Also see *Toolkit CD-ROM*)
- Methods
 - Adjusted net asset method, VAL 5.5
 - Tax effect, VAL 5.5.1
 - Capitalization of earnings method, VAL 5.2
 - Excess earnings, VAL 5.3
 - Discounted future earnings method, VAL 5.6
 - Earnings forecast, VAL 5.6.1
 - Dividend capacity method, VAL 5.4
 - Guideline company valuation method, VAL 5.1, VAL 5.1.2
 - Selecting guideline companies, VAL 5.1.1
 - Matching business to, VAL 7.3
- Professional guidance
 - Business Valuation Standards* (ASA), VAL 12.3
 - Canadian publications, VAL 12.5
 - Principles of Appraisal Practice and Code of Ethics* (ASA), VAL 12.2
 - Standards of Business Appraisal Practice* (IBA), VAL 12.4
 - Uniform Standards of Professional Appraisal Practice* (USPAP), VAL 12.1
- Purposes, VAL 1, VAL 3–3.5
 - Divorce, VAL 3.3
 - Gift and estate taxes, VAL 3.2
 - Litigation, VAL 3.5
 - Expert witnesses, VAL 3.5.1
 - Minority interests, VAL 3.4
 - Sales and purchases, VAL 3.1
- Report writing, VAL 14.1–14.6
 - Calculation of report; sample, VAL Appendix 6 (see *Toolkit CD-ROM*)
 - Informal report; sample, VAL Appendix 5 (see *Toolkit CD-ROM*)
 - Valuation software tools, VAL 14.6
- Research sources
 - Checklist and sources, VAL Appendix 3
 - Companies in the industry, VAL 13.3.4
 - Data sources, VAL 13.1
 - Economy (national/local), VAL 13.2
 - Financial data, VAL 13.3.3
 - Industry-specific information, VAL Appendix 3
 - Merger and acquisition data, VAL 13.3.5
 - NAICS code, VAL 13.3.1
 - Researching guideline companies, VAL 13.4
 - Surveying the industry, VAL 13.3.2
 - Results of
 - Examining, VAL 7.1
 - Weighting, VAL 7.2
 - Rules of thumb, VAL Appendix 7 (see *Toolkit CD-ROM*)
 - Sample, VAL Appendix 4 (see *Toolkit CD-ROM*)
 - Selected items
 - Accounts receivable, VAL 9.2
 - Cash, VAL 9.1
 - Equipment, VAL 9.8
 - Insurance, VAL 9.5
 - Intangibles, VAL 9.10
 - Measuring goodwill/impairment, VAL 9.10.1
 - Inventory, VAL 9.3
 - Investment securities, VAL 9.4
 - Leases, VAL 9.11
 - Liabilities, VAL 9.12
 - Liens, VAL 9.13
 - Life insurance policies, VAL 9.6
 - Prepaid expenses, VAL 9.7
 - Real estate, VAL 9.9
 - Special considerations
 - ESOPs, VAL 10.1
 - Professional practices, VAL 10.2
 - Succession planning, and, BP 6.2.1
 - Summary of IRS revenue rulings, cited in chapter, VAL Appendix 8 (see *Toolkit CD-ROM*)

CANADIAN INSTITUTE OF CHARTERED BUSINESS VALUATORS

Publications, VAL 12.6
 CAPITAL GAINS, AMT and, IND TAX 7.1.3

CASH MANAGEMENT

Accelerating cash inflow
 Aging analyses, CM 3.2.1

INDEX

CASH MANAGEMENT (*continued*)

- Automated Clearing House (ACH), CM 3.7
- Billing and invoicing, CM 3.1
- Cash concentration, CM 3
- Credit and collections
 - Analytical techniques, CM 3.2.2
 - Electronic funds transfer (EFT), CM 3.2.1
- Depository Transfer Checks (DTCs), CM 3.6
- Economic Order Quantity (EOQ), CM 3.3.1
- Accounts payable
 - Aging, CM 6.4
 - Decelerating cash outflows, CM 4.2–4.2.1
 - Purchase discounts, CM 4.1.1
- Banking system, proper use of
 - Account analysis, CM 5.6
 - Availability of funds, CM 5.5
 - Cash concentration systems, CM 5.4
 - Choice of banks, CM 5.2
 - Investment of excess cash, CM 5.8
 - Lines of credit (LOCs), CM 5.9
 - Relationships, CM 5.7
 - Sweep accounts, CM 5.3
- Benefits, CM 2.1
- Cash flow
 - Accelerating inflow, CM 3
 - Decelerating outflows, CM 4
 - Projections, CM 1.2
 - See also subheads* Accelerating cash inflow, Decelerating cash outflows
- Cash planning techniques
 - Approach to cash projections, CM 7.1
 - Computerized planning, CM 7.2
 - Detail required and model accuracy, CM 7.3
 - Goals, CM 7.1
 - Multiple projection scenarios, CM 7.5
 - Presentation format, CM 7.2
 - Summary of nine key steps, CM 7.6
 - Uses of cash plan, CM 7.4
- Computerization, CM 2.3
- Decelerating cash outflows
 - Accounts payable, CM 4.2–4.2.1
 - Payment control techniques, CM 4.1–4.1.1
- Decisions, CM 2.4

- Defined, CM 2
- Electronic funds transfer (EFT), CM 3.2.1
- Float, CM 3.4, CM 5.1
- Inventory control and techniques, CM 3.2–3.2.1
- Order-entry controls, CM 3.2.2
- Overstock reports, CM 3.3.1
- Preauthorized checks (PACs), CM 3.7
- Receivable to sales ratio, CM 3.2.2
- Roll rate analysis, CM 3.2.1
- Safety stock, CM 3.3.1
- Wire transfers, CM 3.4
- Fraud/opportunities and likelihood of discovery, CM 9.2–9.2.3
- Discovery, likelihood of, CM 9.2.2
- Misappropriation of cash, CM 9.2.1
- Safeguards, CM 9.2.3
- Fraud/risk management
 - Guarding against threat of fraud, CM 9.1–9.1.4
 - Acceptable risk levels, CM 9.1.1
 - Environment, ethical, CM 9.1.3
 - Insurance, CM 9.1.4
 - Internal controls, CM 9.1.2
- Interest rate risk
 - Definitions, CM 8.1
 - Embedded risk, CM 8.2
 - Protecting profits and cash, CM 8.4
 - Reduction strategies, instruments used in, CM 8.5
 - Simulation analysis, CM 8.2
 - Solutions, formulation of, CM 8.3
 - Symptoms, CM 8.1
- Interest rate risk control, CM 1.3
- Internal controls/fraudproofing, CM 9.3–9.3.3
 - Establishing objectives, CM 9.3.1
 - Fundamental controls, CM 9.3.2
 - Supervision of employees, CM 9.3.3
- Misappropriation of cash, CM 9.4–9.4.3
 - Bank deposit theft, CM 9.4.2
 - Petty theft, CM 9.4.1
 - Summary, CM 9.4.3
- Objective, CM 1.1, CM 2
- Payment control techniques
 - Payables, average age of, CM 4.1.1.1
- Reports, types of
 - Accounts payable aging, CM 6.4
 - Aged accounts receivable, CM 6.2

- Available cash reports, CM 6.1
- Cash requirements report, CM 6.3
- Techniques, CM 2.2
 - Analytical, CM 2.3, CM 3.2.1
- Warning signs, CM 7.7
- C CORPORATIONS**
 - Comparison of entity attributes, PART Appendix 3 (*Also see Toolkit CD-ROM*)
 - LLCs and
 - Conversion to LLC; tax aspects, LLC 6.2
- CERTIFIED PUBLIC ACCOUNTANTS**
 - Estate planning and, EST 1.7.1
 - Planning and assistance for public offerings, CORP 12.8.7.4
 - Roles in bankruptcy, BANK 4.1–4.3
- CHAPTER 11: see REORGANIZATION AFTER BANKRUPTCY**
- CHARITABLE CONTRIBUTIONS**
 - Charitable lead trusts, TRUSTS 3.6
 - Deductions, itemized, IND TAX 3.9.1–3.9.3
 - Estate transfers, EST 8.3.1–8.3.2
 - Deduction for, EST 4.2.4
 - Incentives, Hurricane Katrina, CORPTAX 1.3.3–1.3.3.6, IND TAX 1.3.3–1.3.3.6
 - Provisions
 - Intellectual property, CORPTAX 6.8.1
 - Property contributions, reporting and appraisal requirements, CORPTAX 6.8.2–6.8.2.4
 - Vehicles, CORPTAX 6.8.3
 - Acknowledgement of, CORPTAX 6.8.3.1
- CHARITABLE REMAINDER ANNUITY TRUST (CRAT), EST 8.3.1**
- CHARITABLE REMAINDER NET-INCOME UNITRUST (NICRUT), EST 8.3.1**
- CHARITABLE REMAINDER NET-INCOME WITH MAKE-UP UNITRUST (NIMCRUT), EST 8.3.1**
- CHARITABLE REMAINDER UNITRUST (Standard CRUT), EST 8.3.1**
- CHILDREN**
 - Child dependent care credit
 - General rules, IND TAX 6.5.1
 - Maintain a Home requirement, eliminated, IND TAX 6.5.4
 - Maximum credit, IND TAX 6.5.3
 - Qualifying individual, IND TAX 6.5.2
 - Child tax credit
 - Background, IND TAX 6.4.1
 - Qualifying child definition, change to, IND TAX 6.4.2
 - Impact of uniform definition of child, IND TAX 7.2
 - Head of household, IND TAX 7.2.1
 - Retirement plan contribution, sole proprietorship, PROP 10.1
 - See also* ADOPTION
- CIRCULAR 230**
 - Background, IRS 15.1
 - Best practices for tax advisers, IRS 15.3
 - Conclusion, IRS 15.7
 - Covered opinions
 - Definition of, IRS 15.3.1–15.3.3.4
 - Requirements and disclosures, IRS 15.4.1–15.4.4, IRS 15.4.5–15.4.5.4
 - Sample, IRS Appendix 2 (*see Toolkit CD-ROM*)
 - Disclosure statements, sample, IRS Appendix 1 (*see Toolkit CD-ROM*)
 - Procedures to ensure compliance, IRS 15.5
 - Requirements for other written advice, IRS 15.6
 - Rules governing conduct, IRS 2.3.1
- COLLEGE FINANCIAL AID**
 - Application for, FIN 12.5
 - Expected Family Contribution (EFC), FIN 12.6
 - Federal grant programs, FIN 12.1
 - Perkins loans, FIN 12.2
 - PLUS loans (parent loans for undergraduate students), FIN 12.4
 - Stafford loans, FIN 12.3
- COMMODITIES**
 - Cash markets, INV 9.1
 - Futures markets, INV 9.2
 - Hedgers, INV 9.6
 - Information sources, INV 9.9
 - Long positions, INV 9.7
 - Margins, INV 9.4–9.5
 - Short positions, INV 9.7
 - Speculators, INV 9.3
 - Spread transactions, INV 9.8
 - Types, INV 9.10

COMPENSATION

- Cafeteria plans, CORPTAX 5.7
 - Background, CORPTAX 5.7.1
 - Grace period allowed, CORPTAX 5.7.2
 - Use-it-or-lose-it rule, CORPTAX 5.7.3
- Deferral of, RET 11.1
- Fringe benefits
 - De Minimis fringes, INDTAX 5.3.1-5.3.2
- Health savings accounts, *See* HEALTH SAVINGS ACCOUNTS
- Merit guides and, HR 8.6
- Nonqualified deferred compensation plans
 - Background, CORPTAX 5.5.1, INDTAX 5.1.1
 - Comprehensive rules, INDTAX 5.1.2
 - Definition, INDTAX 5.1.3
 - Effective date and transition rules, INDTAX 5.1.4
 - Restrictions imposed, CORPTAX 5.5.2
 - Definition, CORPTAX 5.5.2.3
 - Distribution rule, CORPTAX 5.5.2.1
 - Effective date and transition rules, CORPTAX 5.5.2.5
 - Election rule, CORPTAX 5.5.2.2
 - Employer reporting requirements, CORPTAX 5.5.2.4
- Objectives of Salary Administration Plan, HR 8.1
- Payroll tax on stock options
 - Background, CORPTAX 5.2.1
 - Incentive stock option, exempt, CORPTAX 5.2.2
- Reasonable
 - Background, CORPTAX 5.1.1
 - Hypothetical investor test, CORPTAX 5.1.1.1
- Roles in bankruptcy, BANK 4.1-4.3
- Roth elective deferral plans
 - Background, CORPTAX 5.3.1
 - Dischargeability of taxes, bankruptcy, CORPTAX 5.3.2
- Salary ranges, HR 8.4
- Tool allowance not an accountable plan, CORPTAX 5.8
- See also* HEALTH SAVINGS ACCOUNTS, RETIREMENT PLANS

See also under DEDUCTIONS AND LOSSES

COMPUTERS AND COMPUTERIZATION

- Cash management, use in, CM 2.3
- Cash planning techniques, CM 7.2
- See also* SOFTWARE FOR ACCOUNTANTS

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT (COBRA)

- Insurance continuation, EMP 8.3, INS 4.4.2
 - Employers covered, EMP 8.3.1
 - Period of coverage, EMP 8.3.3
 - Right to, EMP 8.3.2

CORPORATE BONDS

- Call feature, INV 4.10.4
- Debentures, INV 4.10.6
- Income bonds, INV 4.10.8
- Indentures, INV 4.10.1
- Interest on, INV 4.10.7
- Ratings and services, INV 4.10.9
- Serials, INV 4.10.5
- Short-term versus long-term, INV 4.10.3
- Value and denomination, INV 4.10.2

CORPORATIONS

- Articles of incorporation, CORP 2.2.2
 - Amendment of
 - Filing amended articles, CORP 9.1.3
 - Procedure, CORP 9.1.2
 - Right to amend, CORP 9.1.1
 - Minutes, CORP 4.1
 - Sample, CORP Appendix 3 (*see Toolkit CD-ROM*)
- Bylaws; sample, CORP Appendix 4 (*see Toolkit CD-ROM*)
- Closely held, CORP 8.3.2
 - Charitable contributions: *see* CHARITABLE CONTRIBUTIONS
 - Deduction for qualified production activities income, CORP 10.6
 - Fiscal year, choice of, CORP 10.4
 - How to calculate the deduction for qualified production activities income, CORP Appendix 11 (*see Toolkit CD-ROM*)
 - Keeping real estate out of operating corporation, CORP 10.1
 - Penalty taxes (special), avoidance of, CORP 10.3

- Publicly held corporations versus, CORP 8.3
- Tax interview checklist, CORP 10.5, CORP Appendix 2
- Voting stock given to family members, CORP 10.2
- Committee meetings, CORP 4.2.2
- Corporate seal, CORP 4.3
- Defined, CORP 1.1
- Directors
 - Meetings, CORP 3.1.1, CORP 4.2.2
 - Minutes of first meeting; sample, CORP Appendix 5 (*Toolkit CD-ROM*)
 - Policy on conflicts and disclosure of certain interests, CORP Appendix 9 (*see Toolkit CD-ROM*)
 - Right of dissent, CORP 3.1.2
- Disadvantages of operating as, CORP 1.5
- Dissolution
 - Involuntary, CORP 9.4
 - Voluntary, CORP 9.3
- Distributions
 - Defined, CORP 8.1
- Dividends
 - Shareholders' rights to, CORP 8.2
 - Strategies: publicly held versus closely held, CORP 8.3
 - Stock redemptions, CORP 8.4
- Domestic, CORP 1.2
- Estate planning, EST 8.1.2
- Foreign, CORP 2.6
- Formalities, necessary, CORP 4.5
- Going public, and
 - Advantages and disadvantages
 - Advantages, CORP 12.8.4.1
 - Disadvantages, CORP 12.8.4.2
 - Costs, CORP 12.8.5
 - Deciding, CORP 12.8.6
 - Registration statement, CORP 12.8.1
 - Selling securities without registration, CORP 12.8.2
 - State securities laws, CORP 12.8.3
- Planning and assistance, CORP 12.8.7
 - Certified public accountants, CORP 12.8.7.4
 - Financial public relations firms, CORP 12.8.7.3
 - Law firms, CORP 12.8.7.2
 - Underwriters, investment bankers, CORP 12.8.7
- Incorporation procedures
 - Checklist, CORP Appendix 1 (*Also see Toolkit CD-ROM*)
 - Corporate bylaws, CORP 2.4
 - Documents needed
 - Articles of incorporation: *see sub-head* Articles of incorporation
 - Name reservation, CORP 2.2.1
 - Fictitious name, doing business under, CORP 2.5
 - Organization expenses, deduction of, CORP 2.7
 - Preincorporation, reasons for, CORP 2.3
 - Reasons to begin, CORP 1.4
 - State of, selection of, CORP 2.1
- Mergers, CORP 9.2
- Minutes, CORP 4.1
 - Worksheet for annual minutes, CORP Appendix 10 (*see Toolkit CD-ROM*)
- Officers, CORP 3.2
- Piercing the corporate veil, CORP 3.3
- Proprietorship changed to: *see PROPRIETORSHIP*
- Publicly held
 - Defined, CORP 1.3
 - Versus closely held, CORP 8.3
- Sarbanes-Oxley Act of 2002, and
 - Audit committees, CORP 11.4
 - Auditor independence, requirement, CORP 11.3
 - Bonuses and profits, potential forfeiture, CORP 11.6
 - Certification requirements, CORP 11.5
 - Company stock, disclosure of certain transactions, CORP 11.10
 - Disclosure requirements, CORP 11.8
 - Insider trading, blackout periods, CORP 11.7
 - Introduction, CORP 11.1
 - Loans to executives, prohibition, CORP 11.9
 - Public company oversight board, establishment of, 11.2
- Securities act of 1933, and
 - Registration under
 - Exemptions, CORP 12.4.5
 - Process, CORP 12.4.2

INDEX

CORPORATIONS (*continued*)

Purpose of, CORP 12.4.1
 Prospectus, contents, CORP 12.4.4
 Registration, simplified, CORP 12.4.7
 Registration statement, contents, CORP 12.4.3
 Secondary transactions, rule 144, CORP 12.4.6
 Securities and exchange act of 1934, and
 Brokers and exchanges, registration, 12.5.3
 Overview, CORP 12.5.1
 Securities and Exchange Commission (SEC), CORP 12.5.2
 Securities, registration of, General issues, CORP 12.5.4
 Securities regulation, and
 Federal overview of, CORP 12.3
 Federal securities-related acts, other, CORP 12.6
 Foreign Corrupt Practices Act of 1977, CORP 12.6.1
 Introduction to, CORP 12.1
 Investment Advisers Act of 1940, CORP 12.6.2
 Investment Company Act of 1940, CORP 12.6.3
 Trust Indenture Act of 1939, CORP 12.6.4
 Public Utility Holding Company Act of 1935, CORP 12.6.5
 Scope, CORP 12.2
 Securities Investor Protection Act of 1970, CORP 12.6.6
 Small Business Incentive Act of 1980, CORP 12.6.7
 Shareholders: *see* SHAREHOLDERS
 Agreement, CORP Appendix 7 (*see Toolkit CD-ROM*)
 Shares: *see* SHARES
 State regulation, CORP 12.7
 Tax dischargeability in bankruptcy, IRS 8.7.2
 Tax interview checklist, CORP Appendix 2 (*Also see Toolkit CD-ROM*)
 Tax notes, other major developments
 Accuracy related penalties, CORPTAX 6.11.1–6.11.3
 Book-tax reconciliation for large corporations (schedule M-3), CORPTAX 6.4.1–6.4.3

Brother-sister controlled groups, CORPTAX 6.3.1–6.3.2
 Club dues, CORPTAX 6.6.1–6.6.2
 Company aircraft, CORPTAX 6.5.1–6.5.2
 Deduction for domestic production activities, CORPTAX 6.2.1–6.2.7
 Deposits on tax deficiencies, CORPTAX 6.12
 Like-kind exchanges, CORPTAX 6.9.1–6.9.3
 Repeal of exclusion for extraterritorial income, CORPTAX 6.1.1–6.1.2
 Shareholder advances to corporation treated as equity, CORPTAX 6.7
See ALTERNATIVE MOTOR VEHICLE CREDIT, CHARITABLE CONTRIBUTIONS, CREDITS
 Voting Trust Agreement, CORP Appendix 8 (*see Toolkit CD-ROM*)
See also S CORPORATIONS
CREDITS
 Adoption, IND TAX 6.6.1–6.6.2
 Child dependent care credit
 General, IND TAX 6.5.1
 Maintain a Home requirement, eliminated, IND TAX 6.5.4
 Maximum credit, IND TAX 6.5.3
 Qualifying individual, IND TAX 6.5.2
 Child tax credit
 Background, IND TAX 6.4.1
 Head of household, IND TAX 7.2.1
 Qualifying child definition, change to, IND TAX 6.4.2
 Corporate tax payments, credits, and compliance matters
 Additional business tax credits added, CORPTAX 6.10.9
 Additional credits allowed without AMT restriction, CORPTAX 6.10.10
 Disabled access credit, CORPTAX 6.10.2
 Electric vehicle credit, CORPTAX 6.10.7
 Foreign tax credit, CORPTAX 6.10.5

- Home contractor energy credit, CORPTAX 6.10.3
- Renewable electricity production credit, CORPTAX 6.10.8
- Research and development credit, CORPTAX 6.10.1
- Work opportunity tax credit, CORPTAX 6.10.6
- See also* ALTERNATIVE MOTOR VEHICLE CREDIT
- DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME (CHAPTER 13)**
 - Commencement, BANK 9.3
 - Confirmation
 - Confirmation hearing, BANK 9.6.2
 - Creditors' Section 341 meeting, BANK 9.6.1
 - Objections, BANK 9.6.3
 - Conversion of cases, BANK 13
 - Discharge
 - Effect of, BANK 9.7.4
 - Full or expanded, BANK 9.7.1
 - Hardship or partial, BANK 9.7.2
 - Nondischargeable debts, BANK 9.7.3
 - Revocation, BANK 9.7.5
 - Dismissal of cases, BANK 14.2
 - Generally, BANK 9.1
 - Limitations
 - Eligibility for relief, BANK 9.2.1
 - Monetary limitations, BANK 9.2.2
 - Prior bankruptcies of debtor, BANK 9.2.3
 - Statement and plan
 - Payment period, BANK 9.5.3
 - Permissive provisions, BANK 9.5.2
 - Required provisions, BANK 9.5.1
 - Trustee, appointment of, BANK 9.4
- DEDUCTIONS AND LOSSES**
 - Individual deduction developments
 - Alimony, IND TAX 3.5.1–3.5.2
 - Clean fuel vehicle deduction, IND TAX 3.6.1–3.6.3
 - Hobby losses, IND TAX 3.1.1–3.1.3
 - Itemized deductions
 - Charitable contributions, IND TAX 3.9.1–3.9.3
 - Club dues, IND TAX 3.11.1–3.11.2
 - Education expenses, IND TAX 3.10.1–3.10.2
 - Interest expense, IND TAX 3.8.1–3.8.2
 - Like-kind exchanges, IND TAX 3.4.1–3.4.3
 - Passive loss developments, IND TAX 3.2.1–3.2.5
 - Sales tax on schedule A, IND TAX 3.7.1–3.7.3
 - Twelve-month deduction rule for accrual method taxpayers, IND TAX 3.3.1–3.3.2
- DEPARTMENT OF HOMELAND SECURITY (DHS)**
 - Generally, HFN 1.2.1
- DEPARTMENT OF LABOR (DOL)**
 - Generally, HFN 1.2.3
 - Regional offices, HFN Appendix 1
- DEPARTMENT OF STATE (DOS)**
 - Generally, HFN 1.2.2
- DEPRECIATION AND AMORTIZATION**
 - Business start-up costs, CORPTAX 3.7.1–3.7.5
 - Corporate organizational expenditures, CORPTAX 3.6.1–3.6.3
 - Energy efficient commercial building expensing, CORPTAX 3.8.1–3.8.2.5
 - Expiration of bonus depreciation and transition rules, CORPTAX 3.5.1–3.5.3
 - Section 179 expensing, CORPTAX 3.1–3.1.4
 - Recapture rules on disposition of multiple section 197 intangibles, CORPTAX 3.9.1–3.9.2
 - Recovery period
 - Depreciation of leasehold improvements, CORPTAX 3.3
 - Depreciation of restaurant building, CORPTAX 3.4
 - Vehicle limit for section 179, CORPTAX 3.2.1–3.2.2
- DISABILITY**
 - Benefits: *see* HEALTH INSURANCE; SOCIAL SECURITY; WELFARE
- DISCRIMINATION**
 - Affirmative action, EMP 5.7
 - Age Discrimination Employment Act (ADEA), EMP 5.3
 - Americans With Disabilities Act of 1990 (ADA), EMP 5.4

DISCRIMINATION (*continued*)

- Comparable worth, EMP 5.6
- Defined, EMP 5.1
- Employer's obligations, EMP 5.2.3
- Federal legislation, EMP 5.2–5.2.2
- Prohibited actions, EMP 5.2.1
- Sexual harassment, EMP 5.2.2
- State laws against, EMP 5.5
 - Enforcement agencies, EMP Appendix 2

DIVORCE

- Business valuations, VAL 3.3
- See ALIMONY

E-BUSINESS

- Decision making
 - Data, primary, E-BIZ 2.2.3
 - Data, secondary
 - Privately generated information, E-BIZ 2.2.2.2
 - Public information, E-BIZ 2.2.2.1
 - Quality of information, E-BIZ 2.2.2.3
 - Intelligence, E-BIZ 2.2
 - Records, internal, E-BIZ 2.2.1
 - Tools, E-BIZ 2.2
- Implementation
 - Identifying gaps in current process and systems, E-BIZ 2.3
 - See also subheads, e.g., Marketplace issues

Marketplace issues

- Communications, online, E-BIZ, 3.2–3.2.3
 - Advertising, E-BIZ 3.2.1–3.2.1.3
 - Public relations, E-BIZ 3.2.2
 - Sales promotions, E-BIZ 3.2.3
- Customer relationship management, E-BIZ 3.3–3.3.6.1
 - Capital relationship, E-BIZ 3.3.1
 - Defined, E-BIZ 3.3.3
 - Implementation issues, E-BIZ 3.3.5
 - Process, E-BIZ 3.3.4–3.3.4.3
 - Strategies, relationship, E-BIZ 3.3.2

Models

- Aggregator/portal, E-BIZ 3.3.6
- Content sponsorship, E-BIZ 3.3.1
- Direct selling, E-BIZ 3.3.2
- Infomediary, E-BIZ 3.3.4
- Intermediary, E-BIZ 3.3.5
- Online retailing, E-BIZ 3.3.3
- Privacy, E-BIZ 3.3.6–3.3.6.1

- Planning, E-BIZ 2.1
- Stages, E-BIZ 1.1
- Technologies, E-BIZ 1.1
- Web presence issues
 - Benefits of, E-BIZ 5
 - Checklist of features/tips/tricks, E-BIZ Appendix 1
 - Costs, E-BIZ Appendix 4
 - Designers, selection tips, E-BIZ Appendix 5
 - Hosts; selection tips, E-BIZ Appendix 5
 - Security, E-BIZ 4.2–4.2.4
 - Physical devices, E-BIZ 4.2.4
 - Secure server, E-BIZ 4.2.2
 - Software certificates, E-BIZ 4.2.3
 - Username/password, E-BIZ 4.2.1
 - Site development process, E-BIZ Appendix 3
 - Terminology, E-BIZ Appendix 2
 - Trends, E-BIZ 4.1

EDUCATIONAL ASSISTANCE

- Tax incentives
 - Lifetime Hope and lifetime learning credits, IND TAX 6.7–6.7.3
 - Qualified state tuition programs, EST 5.2

ELECTRONIC FUNDS TRANSFER (EFT)

- To accelerate cash inflow, CM 3.2.1

EMPLOYEE BONDING

- Combination crime policies, INS 8.2
- Fidelity bonds
 - Blanket, INS 8.1.2
 - Bonding coverage, INS 8.1.3
 - Exclusions, INS 8.1.4
 - Individual, INS 8.1.1

EMPLOYEE(S)

- Covered and exempt, EMP 4.2
- Defined, EMP 3.1
- Development/Promotion
 - Continuing education, Course evaluation, HR Appendix 17 (*see Toolkit CD-ROM*)
 - Education, continuing, HR 7.3, 7.3.2
 - Employee code of conduct, HR Appendix 25 (*see Toolkit CD-ROM*)
 - Performance reviews, HR 7.4
 - Systems design, HR 7.1
 - Training, on-the-job, HR 7.3.1
 - Work plans, individual, HR 7.2

INDEX

- Handbook, sample, HR Appendix 24
(*see Toolkit CD-ROM*)
- Job performance, reasonable accommodations related to; types of, EMP Appendix 5 (*Toolkit CD-ROM*)
- New employee prospect referral form, HR Appendix 27 (*see Toolkit CD-ROM*)
- Personal information update, HR Appendix 12 (*Toolkit CD-ROM*)
- Request for travel arrangement, HR Appendix 30 (*see Toolkit CD-ROM*)
- Sample employment agreement, HR Appendix 28 (*see Toolkit CD-ROM*)
- Sample severance agreement, HR Appendix 29 (*see Toolkit CD-ROM*)
- Social Security funding, SS 2.2.1
See also WAGE AND HOUR REGULATIONS (FEDERAL), EMP 4
- EMPLOYEE RETIREMENT & DEFERRED COMPENSATION PLANS: *see* RETIREMENT PLANS
- EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)
 - Estate tax considerations, RET 3.10.4
 - As financing tool: *see* FINANCING
 - Key employees, selling to, BP 6.5.2
 - Retirement plans; deduction limits, RET 4.5
 - Valuation, VAL 10.1
- EMPLOYMENT REGULATIONS
See also FAMILY AND MEDICAL LEAVE ACT; FEDERAL UNEMPLOYMENT TAX ACT; PAYROLL REQUIREMENTS; UNEMPLOYMENT INSURANCE
- Collective bargaining agreements, EMP 2.4
- Common law, EMP 2.3
- Covenants not to compete, EMP 8.1
- Discharge
 - Constructive, EMP 8.2.1
 - Wrongful, EMP 8.2
- Employees: *see* EMPLOYEE(S)
- Federal statutes and regulations, EMP 2.1
See also WAGE AND HOUR REGULATIONS (FEDERAL)
- “Independent contractor” defined, EMP 3.1
- “Pay period” defined, EMP 3.5
- Payroll requirements: *see* PAYROLL REQUIREMENTS
- Insurance continuation
 - Coverage period, EMP 8.3.3
 - Employers covered by COBRA, EMP 8.3.1
 - Right to, EMP 8.3.2
- Local regulations, EMP 2.2
- Pending developments, EMP 9
- Postemployment issues, EMP 8.1–8.3.3
- Purpose, EMP 1.2
- State regulations, EMP 2.2, EMP 7.4.3
 - Civil rights agencies, EMP Appendix 2
 - Equal employment opportunity agencies, EMP Appendix 3
 - Labor agencies, EMP Appendix 1
- Wage and hour regulations (federal): *see* WAGE AND HOUR REGULATIONS (FEDERAL)
- Work environment, productive; sample policy, EMP Appendix 4 (*Toolkit CD-ROM*)
- “Workweek” defined, EMP 3.3
- Written employment agreement, EMP 2.5
- ERISA
 - Selected reporting and disclosure requirements for pension plans, RET Appendix
- ESTATE PLANNING
 - Federal
 - Computation of
 - Previous estate tax, credit for, EST 4.3.5
 - State death taxes, credit for, EST 4.3.5
 - Taxable estate, EST 4.3.1
 - Tentative estate tax, EST 4.3.2
 - Unified credit, EST 4.3.3
 - Deductions (allowable)
 - Charitable deduction, EST 4.2.4
 - Debts, mortgages, liens, EST 4.2.2
 - Funeral expenses, EST 4.2.1
 - Marital, EST 4.2.3.1–4.2.3.2
 - Deferred payment rules, EST 4.4
 - Federal estate tax
 - Gross estate
 - Alternate valuation date, EST 4.1.9

INDEX

- ESTATE PLANNING** (*continued*)
- Community property, EST 4.1.7
 - Insurance, EST 4.1.5
 - Jointly owned property, EST 4.1.6
 - Miscellaneous property, EST 4.1.8
 - Mortgages, notes, cash, EST 4.1.4
 - Real estate, EST 4.1.2
 - Stocks and bonds, EST 4.1.3
 - Tangible personal property, EST 4.1.1
- Fundamental concepts**
- Cash flow analysis, EST 1.6
 - Estate value, EST 1.2
 - Family, EST 1.1
 - Maximizing the estate, EST 1.4
 - Planning objectives, EST 1.3
 - Team
 - Attorney, EST 1.7.2
 - CPA, EST 1.7.1
 - Investment counselor, EST 1.7.4
 - Life insurance underwriter, EST 1.7.3
 - Trust officer, EST 1.7.5
- Generation-skipping transfers (GST), tax on, EST 6**
- Gift tax: see GIFT AND ESTATE TAX**
- Postmortem**
- Administrations expenses, EST 9.3
 - Qualified disclaimer, EST 9.1
 - Timing distributions, EST 9.2
- Practice aids, EST Appendix: see Toolkit CD-ROM**
- Proprietorship and, PROP 15.6**
- Special situations**
- Charitable transfers
 - Planning, EST 8.3.1
 - Types of, EST 8.3.2
 - Estate freeze
 - Buy-sell agreements, EST 8.1.4
 - Corporations and partnerships, EST 8.1.2
 - Recapitalizations, EST 8.1.1
 - Trusts, EST 8.1.3.1–8.1.3.4
 - Family Limited Partnerships (FLPs), EST 8.2
 - Testamentary gifts, EST 8.3.1
 - Trusts, taxation of: *see* TRUSTS
 - Wills: *see* WILLS
- ESTATE TAX: see GIFT AND ESTATE TAX**
- FAIR LABOR STANDARDS ACT (FLSA)**
- Covered enterprises, EMP 4.1
- FAMILY AND MEDICAL LEAVE ACT (FMLA)**
- Generally, EMP 4.15.5, INS 4.7.2
 - Group health benefits under, INS 4.4.7
- FAMILY LIMITED PARTNERSHIPS (FLPs)**
- Generally, EST 8.2
 - Succession planning, Trusts and, BP 6.4.4
- FARMERS (FAMILY) OR FISHERMEN WITH REGULAR INCOME; ADJUSTMENT OF DEBTS (CHAPTER 12)**
- Conversion of cases, BANK 13
 - Creditor protections, BANK 11.5
 - Discharge, BANK 11.7
 - Dismissal of cases, BANK 14.4
 - Eligibility, BANK 11.2
 - Generally, BANK 11.1
 - Operation of farm, appointment of a trustee, BANK 11.3
 - Plan
 - Approval, BANK 11.6
 - Filing, BANK 11.4
- FEDERAL BOND INTEREST: see BONDS**
- FEDERAL EMPLOYER IDENTIFICATION NUMBER (FEIN)**
- Sole proprietorship, and, PROP 6.5
- FEDERAL INSURANCE CONTRIBUTION ACT (FICA)**
- Payroll requirements, EMP 7.1–7.1.2, EMP 7.4.1
- FEDERAL RESERVE BOARD**
- Index of Industrial Production, INV 13.1.2
- FEDERAL UNEMPLOYMENT TAX ACT (FUTA)**
- Common paymaster, UI 3.6
 - Corporations entitled to use, UI 3.7
 - Compliance, lack of
 - Interest charged, UI 3.11.1
 - Levies, UI 3.11.2
 - Penalties charged, UI 3.11.1
 - Covered earnings, UI 3.10
 - Covered employment, UI 3.2
 - Deposit requirements
 - Due dates, UI 3.12.3
 - Rules, UI 3.12.1
 - Where and how, UI 3.12.2
 - Due dates, UI 4.2
 - Exemptions, UI 3.8

- Purpose, UI 3.1
- Reporting requirements
 - Form 940, UI 4.3–4.4
 - Who must file, UI 4.1
- Statutory merger, UI 3.4
- Successor employer, UI 3.3
 - Credit for, UI 3.5
- Tax rate, UI 3.9
- FINANCIAL RATIOS**
 - As performance measure, BPM 6
 - See also* OBTAINING FINANCING
- FINANCIAL STATEMENTS**
 - Business plans, BP 3.7.4
 - Sample format, BP Appendix 2
 - Creditor analysis
 - Financial ratios
 - Cost-of-sales-to-payables, FIN 9.2.9
 - Current, FIN 9.2.1
 - Debt-to-equity, FIN 9.2.3
 - Debt-to-net-worth, FIN 9.2.10
 - Debt-to-total assets, FIN 9.2.2
 - Inventory-turnover, FIN 9.2.6
 - Net income-to-sales, FIN 9.2.8
 - Quick ratio or acid-test, FIN 9.2.5
 - Return on assets, FIN 9.2.7
 - Times interest earned, FIN 9.2.4
 - Procedure, FIN 9.1
 - Projections, Sample format, BP Appendix 2 (*Also see Toolkit CD-ROM*)
 - Ratio analysis, creditors' use of, FIN 9.3
- FINANCING**
 - Business plans
 - Debt vs. equity, BP 4.1
 - Venture capital, BP 4.2.1, BP 4.2.2
 - Deciding to borrow
 - Client information, FIN 2.4
 - Client's needs analysis, FIN 2.1
 - Effects of borrowing, FIN 2.2
 - Effect of debt on tax basis, FIN 2.5
 - Matching financing to needs, FIN 2.4
 - See also* COLLEGE FINANCIAL AID
 - Employee Stock Ownership Plan (ESOP)
 - Leveraged, FIN 6.2
 - Nonleveraged ESOPs, FIN 6.1
 - Financial statements: *see* FINANCIAL STATEMENTS
 - Interest rate swaps, FIN 11
 - Intermediate-term
 - Business development corporations, FIN 4.5
 - Community development companies, FIN 4.6
 - Government lending programs, FIN 4.4
 - Industrial revenue bonds, FIN 4.4.4
 - Personal financial statement form, FIN Appendix 1 (*see Toolkit CD-ROM*)
 - SBICs and MESBICs, FIN 4.4.2
 - Small Business Administration (SBA), FIN 4.4.1
 - Statement of personal history form, FIN Appendix 2 (*see Toolkit CD-ROM*)
 - State and local, FIN 4.4.5
 - VA and USDA, FIN 4.4.3
 - 8(a) business plan, BP Appendix 6 (*see Toolkit CD-ROM*)
 - Installment equipment, FIN 4.2
 - Lease
 - Accounting rules (FASB-13), FIN 4.3.1
 - Cost analysis, FIN 4.3.2
 - Term loans, FIN 4.1
 - Long-term debt financing
 - Common and preferred stock, FIN 5.1.3
 - Initial Public Offerings (IPOs), FIN 5.1.3.1
 - Instruments of
 - Bonds, FIN 5.1.1
 - Mortgages
 - Adjustable rate mortgages (ARMs), FIN 5.1.2.2
 - Points, FIN 5.1.2.1
 - Projections and client information, FIN 2.4
 - Cash flow projections, FIN 2.4.3
 - Evaluating management, FIN 2.4.1
 - Peer group, comparing to, FIN 2.4.2
 - Proposal, funding (sample), FIN 10
 - Proposal package, FIN 10
 - Purpose, FIN 1
 - Refinancing, economics of, FIN 8
 - Scope, FIN 1
 - Short-term
 - Character loans, FIN 3.2.4
 - Commercial banks
 - Advantages and disadvantages, FIN 3.2.6
 - Characteristics, FIN 3.2.1
 - Choosing a lender, FIN 3.2.5

FINANCING (*continued*)

- Co-signers, FIN 3.2.1.2
- Credit cards, FIN 3.2.2
- Credit, line of, FIN 3.2.3
- Security agreements, FIN 3.2.1.1
- Commercial finance companies
 - Advantages and disadvantages, FIN 3.4.5
 - Collection, FIN 3.4.3
 - Factoring accounts receivable, FIN 3.4.2
 - Financing accounts receivable, FIN 3.4.1
 - Security interest, FIN 3.4.4
- Commercial paper, FIN 3.3
- Inventory financing
 - Advantages and disadvantages, FIN 3.5.4
 - Chattel mortgage security, FIN 3.5.3
 - Field warehouse, FIN 3.5.1
 - Trust receipt, FIN 3.5.2
- Trade credit
 - Advantages and disadvantages, FIN 3.1.4
 - Drafts (Sight/Time), FIN 3.1.2
 - Letters of credit, FIN 3.1.3
 - Terms, FIN 3.1.1
- Venture capitalists, FIN 7

FLEXIBLE WORK ARRANGEMENTS

- Compressed workweeks, HR 10.3
- Flextime, HR 10.2
- Job sharing, HR 10.4
- Leaves and sabbaticals, HR 10.6
- Telecommuting, HR 10.5
- Types of, HR 10.1

FLIP UNITRUST, EST 8.3.1

FOREIGN CORRUPT PRACTICES ACT OF 1977, CORP 12.6.5

FOREIGN NATIONALS: *see* **HIRING FOREIGN NATIONALS; IMMIGRATION**

FREEDOM OF INFORMATION ACT and the IRS, IRS 11.4

GENERATION-SKIPPING TRANSFERS (GST), tax on, EST 6

GIFT AND ESTATE TAX

- Adequate disclosure of gifts, EST 5.5
- Annual exclusion, EST 5.1
- ESOP considerations, RET 3.10.4
- Income tax
 - Basis for property transferred by gift, EST 7.1

Gifts to decedent within one year of death, EST 7.3

Marital deduction, EST 5.3

Medical educational expenses, transfers for, EST 5.2

Splitting gifts, EST 5.4

Trusts: *see* **TRUSTS**

See also: **TAX ACT OF 2001**

GROSS NATIONAL PRODUCT (GNP)

Economic analysis, as tool for, INV 13.1.1

HEALTH CARE SURROGATE

Generally, SS 6.3

HEALTH INSURANCE

Coverage, typical

Basic expense, INS 4.3.1

Comprehensive, INS 4.3.3

Major medical, INS 4.3.2

Special, INS 4.3.4

Disability

Benefits, INS 4.5.3

Obtaining coverage, INS 4.5.5

Partial, INS 4.5.2

Renewable and non-cancelable, INS 4.5.4

Total, INS 4.5.1

Waiting period, INS 4.5.3

Group plans

Benefits and services, INS 4.4.3

Franchise, INS 4.4.6

Health Insurance Portability and Accountability Act of 1996, INS 4.4-4.6

Health maintenance organizations (HMOs), INS 4.4.4

Health savings accounts, INS 4.4.9

Preferred provider organizations (PPOs), INS 4.4.5

Reimbursement arrangements, INS 4.4.8

Special provisions, INS 4.4.2

Underwriting, INS 4.4.1

Individual medical expense insurance, INS 4.1

Self-employed individuals

Costs for, PROP 4.7

Trade-displaced workers, costs of Underwriting factors, INS 4.2

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT, INS 4.7.1

HEALTH REFORM ACT, CORP 1.4

HEALTH SAVINGS ACCOUNTS

(HSAs)

- Benefits of, INS 4.4.9.1
- Compensation, retirement plan, and fringe benefit issues
 - Additional IRS guidance issued, CORPTAX 5.6.9
- Comparability rules for employer contributions, CORPTAX 5.6.10
- Generally, CORPTAX 5.6.1–5.6.7, INDTAX 5.2.1–5.2.10
- IRS guidance on, CORPTAX 5.6.8–5.6.8.5

Self-employed individuals
Costs for, PROP 4.7

HIRING: *see* RECRUITMENT

HIRING FOREIGN NATIONALS

- Basic premises, HFN 1–1.2.3
- Citizenship, applying for
 - Procedure, HFN 6.2
 - Requirements, HFN 6.1
- Employer responsibilities
 - Discrimination, prohibition of, HFN 7.2
 - Employment verification system, HFN 7.1
 - Penalties, HFN 8.1
- Government agencies, HFN 1.2–1.2.3
- Labor certification
 - Administrative review, HFN 4.3–4.3.3
 - Application, HFN 4.2–4.2.6
 - Basic process, HFN 4.2.3
 - Schedule A, HFN 4.2.4–4.2.4.1
 - Schedule B, HFN 4.2.5–4.2.5.2
 - What, HFN 4.2.2
 - Where to file, HFN 4.2.6
 - Who, HFN 4.2.1
- Decision, HFN 4.3–4.3.3
- Employment classification, HFN 4.1–4.1.4
- Refiling after denial, HFN 4.4
- Validity of, HFN 4.5
- Residence; lawful and permanent
 - Employment, HFN 3.4–3.4.3
 - Categories, HFN 3.4.1
 - Labor certification, HFN 3.4.2
 - Petitioning procedure, HFN 3.4.3
 - Family preferences, HFN 3.3–3.3.1
 - Final application, HFN 3.5–3.5.1
 - Immediate release, HFN 3.1–3.1.2
 - Special status, HFN 3.2

See also DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF LABOR; DEPARTMENT OF STATE; IMMIGRATION; IMMIGRATION AND NATIONALITY ACT; NONIMMIGRANT VISAS; VISAS

HOBBIES

- Determining whether activity is a business or hobby, PROP Appendix 6 (*see Toolkit CD-ROM*)
- Hobby losses, INDTAX 3.1.1–3.1.3

HOME OFFICE

- Checklist, HR Appendix 20 (*see Toolkit CD-ROM*)
- Proprietorship, PROP 11.5

HOME-BASED BUSINESSES

- Business plan, PROP 21.2
- Determining whether activity is a business or hobby, PROP Appendix 6 (*see Toolkit CD-ROM*)
- Profit motive, PROP 21.5
- Required discipline, PROP 21.3
- Virtual office, PROP 21.1
- Zoning and licensing issues, PROP 21.4

HOUSEHOLD EMPLOYMENT

FICA, EMP 7.1.2

HUMAN RELATIONS

- Job descriptions
 - How to develop, HR 1.3
 - Outline for, HR Appendix 11
 - Sample, HR Appendix 3

HUMAN RESOURCES

- Benefit programs: *see* BENEFIT PROGRAMS
- Employee code of conduct, HR Appendix 25 (*see Toolkit CD-ROM*)
- Employee development and promotion: *see* EMPLOYEE(S), Development/Promotion
- Employee Handbook, sample, HR Appendix 24 (*see Toolkit CD-ROM*)
- Firing: *see* TERMINATION
- Flexible work arrangements: *see* FLEXIBLE WORK ARRANGEMENTS
- Hiring: *see* RECRUITMENT
- Interviewing: *see* INTERVIEWING

HUMAN RESOURCES (*continued*)

- Job descriptions, HR 8.2–8.2.1; Appendices 4, 14 (*see Toolkit CD-ROM*)
- Job evaluation, HR 8.3
 - External competitiveness, HR 8.3.2
 - Internal equity, HR 8.3.1
- Job justifications, HR Appendix 14
- Orientation for new employees, HR 6
 - Checklist, HR Appendix 13 (*see Toolkit CD-ROM*)
- Performance evaluations, HR 7.4, 8.5
 - Process chart, HR Appendix 19 (*see Toolkit CD-ROM*)
- Professional development appraisal, HR Appendix 18 (*Toolkit CD-ROM*)
- Results vs. goals, HR 8.5.2
- Setting goals with subordinates, HR 8.5.1
- Responsibility planning, HR 8.2.2
- Staffing Needs Request Form, sample, HR Appendix 2 (*see Toolkit CD-ROM*)
- Testing, HR 4.2
- Work Plan, Annual, HR Appendix 16 (*see Toolkit CD-ROM*)

IMMIGRATION

- Bureau of Citizenship and Immigration Services offices, HFN Appendix 1
- Federal power to regulate, HFN 1.1
- Form I-9, HFN Appendix 3
- Hiring foreign nationals: *see* **HIRING FOREIGN NATIONALS**
- Visas: *see* **NONIMMIGRANT VISAS; VISAS**

INCOME PLANS

- Tax-deferred
 - Annuities, INV 12.1
 - Tax shelter limited partnerships, INV 12.2–12.2.1

INCOME TAX

- Death, basis for property transferred by, EST 7.2
- Estate planning: *see* **ESTATE PLANNING**
- Gift, basis for property transferred by, EST 7.1
- Gifts to decedent within one year of death, EST 7.3

Implications

- Bankruptcy, BANK 17.1
- Insolvency, BANK 17.2
- Proprietorships, PROP 6.10
- Individual income developments
 - Carryover basis for annuity contracts, IND TAX 2.4.1–2.4.3
 - Gross vs. net reporting on taxable legal awards, IND TAX 2.3.1–2.3.5
 - Personal injury awards, IND TAX 2.5.1–2.5.4
 - Principal residence gain exclusion, IND TAX 2.1.1–2.1.3
 - Recapture of prior section 179 amortization of intangibles, IND TAX 2.2.1–2.2.2
- Proprietorship, rates for, PROP 5.5
- State, EMP 7.4.3
- Survivor's community property tax basis, EST 7.4
- Trusts, of: *see* **TRUSTS**
- See also* main entries, i.e., **DEDUCTIONS AND LOSSES**

INDIVIDUAL RETIREMENT ACCOUNT (IRA)

- Annual contribution limits, INV Appendix
- Child's contribution, sole proprietorship, PROP 10.1
- Contributions
 - Investment vehicle, as, INV 11.1
 - Planning concepts for, RET 5.7
 - Spousal contribution, sole proprietorship, PROP 10.2
- Taxation of distributions
 - Distributions from a Roth IRA, RET 5.7.4
 - Excess distribution penalties, RET 5.7.2
 - Insufficient distribution, penalties for, RET 5.7.3
 - Premature distribution penalties, RET 5.7.1
- See also* **ROTH IRA**

INFORMATION RETURNS PROJECT (IRP)

- Audits, IRS 3.2.5
- INSOLVENCY**
 - Income tax implications, BANK 17.2
- INSTITUTE OF BUSINESS APPRAISERS**
 - Publications, VAL 12.4

INSURANCE

- Agents
 - Authority, INS 3.1.1
 - Exclusive and independent, INS 3.1.3
 - General and local, INS 3.1.2
- Background, INS 1.1–1.3
- Brokers, INS 3.2
- Business valuation, VAL 9.5
- Continuation of
 - Coverage period, EMP 8.3.3
 - Employers covered by COBRA, EMP 8.3.3
 - Health Insurance Portability and Accountability Act, INS 4.7.1
 - Right to, EMP 8.3.2
- Continuation of under FMLA, INS 4.7.2
- Disability: *see* HEALTH INSURANCE
- Employee bonding: *see* EMPLOYEE BONDING
- Estate planning, federal, EST 4.1.5
- Health: *see* HEALTH INSURANCE, HEALTH SAVINGS ACCOUNTS
- Law of large numbers, INS 1.2
- Liability
 - Claims-made policies, INS 7.2
 - Excess-liability policies, INS 7.4
 - General coverage, INS 7.3
 - Occurrence policies, INS 7.1
- Life: *see* LIFE INSURANCE
- Long-term care, INS 4.6–4.6.2
 - Choosing a policy, INS 4.6.2
 - Statutory employees, INS 3.1.4
 - Types of policies, INS 4.6.1
- Marketing methods, miscellaneous, INS 3.3
- Property: *see* PROPERTY INSURANCE
- SIPC, INV 8.5
- Social Security, INS 9
- Spreading risk, INS 1.1
- See also:* INSURANCE COMPANIES
- INSURANCE COMPANIES
 - Regulation of
 - Rate control, INS 1.3.1
 - Stability and solvency of insurer, protection of, INS 1.3.3
 - Unfair practices, prevention of, INS 1.3.2
 - Types of
 - Primary or direct
 - Assessment insurers, INS 2.1.2.1

- Demutualization, INS 2.1.3
- Fraternal, INS 2.1.2.2
- Government insurers, INS 2.1.7
- Lloyd's associations, INS 2.1.5
- Reciprocal, INS 2.1.4
- Service insurers, INS 2.1.6
- Stock companies, INS 2.1.1
- Reinsurance, INS 2.2

INTANGIBLES

- Business valuation, VAL 9.10

INTERNAL REVENUE SERVICE (IRS)

- Alternative dispute resolution
- Alternative resolution, at appeals, IRS 14.3–14.3.3
 - Arbitration, binding, IRS 14.3.3
 - Mediation, nonbinding, IRS 14.3.2
 - Referral, early, IRS 14.3.1
- Alternative resolution, at examination, IRS 14.2–14.2.3
- Bond, tax exempt, IRS 14.2.3
- Mediation, fast track, IRS 14.2.1
- Settlement, fast track, IRS 14.2.2
- Pre-filing agreements, 14.1

Appeals process

- Dispute resolution, IRS 9.1.3
 - Ninety-day letter, IRS 9.2
 - Thirty-day letter, IRS 9.1.1–9.1.2
 - U.S. Court of Federal Claims, IRS 11.4
 - U.S. District Court, IRS 9.3.2
 - U.S. Tax Court, IRS 9.3.1

Arbitration, binding: *see* INTERNAL REVENUE SERVICE; Alternative dispute resolution

Authorization to practice before

- Attorney, authorizations and powers of, IRS 2.1.6
- Attorneys, IRS 2.1.1
- CPAs, IRS 2.1.2
- Enrolled actuaries, IRS 2.1.4
- Enrolled agents, IRS 2.1.3
- Denied, IRS 2.2.1, 2.2.2
- Limited practice, IRS 2.1.5
- Powers of attorney and, IRS 2.1.5
- Privileged communications, IRS 2.1.7
- Requirements, summary of, IRS Appendix 1 (*see Toolkit CD-ROM*)

Bankruptcy, implications of, BANK 12.1

Binding arbitration, in tax court cases, IRS 14.4

Closing agreements, IRS 11.6

Conduct of employees, IRS 2.3.4

INTERNAL REVENUE SERVICE (IRS)

(continued)

- Correspondence, IRS 11.7
- Determination letters, IRS 11.2
- Dispute resolution, alternative, IRS 4.8; IRS 9.1.3; IRS 14
- Examinations, preparation for
 - Burden of proof (documentation), IRS 5.2
 - Market Segments Specialization Program (MSSP), IRS 5.4
 - Mediation: *see* INTERNAL REVENUE SERVICE; Alternative dispute resolution
 - Negotiation and settlement, IRS 5.3.2
 - Obtaining a copy of tax return, IRS 5.1.1
 - Office or field exam, IRS 5.1
 - Tips for conduct, IRS 5.3.1
- Examinations, procedure: *see* TAX RETURNS, Procedure for examining
- Examinations, results of
 - Consent to assessment (Form 870), IRS 7.1
 - Extending the statute, IRS 7.2
 - Review of agreed cases, IRS 7.3
- Examinations, types of
 - Audits of partnerships
 - Administrative proceedings, partner's participation in, IRS 4.6.4
 - Agreements binding on partners, IRS 4.6.5
 - Assessment and refund claims, limitation periods for, IRS 4.6.9
 - Computational adjustments, IRS 4.6.7
 - Consistency of treatment, IRS 4.6.1
 - Credits or refunds, IRS 4.6.8
 - Dispute resolution, IRS 4.8
 - Judicial review, provision of, IRS 4.6.6
 - Notices to partners, IRS 4.6.3
 - Procedures, IRS 4.6.2
 - Audits of S corporations, IRS 4.7
 - Correspondence, IRS 4.1.1
 - Field, IRS 4.2
 - Office, IRS 4.1.2
 - Repetitive, IRS 4.5

- Select Employee Plans Return Examination (SEPRE), IRS 4.4
- Fees (user) for IRS services, IRS 11.5
- Freedom of Information Act, IRS 11.4
- Health savings accounts
 - IRS guidance, CORPTAX 5.6.8, IND TAX 5.2
- Mission of, IRS 1
- Notices, time frames for, IRS 11.7
- Organization, IRS 1
- Problem resolution; taxpayer advocate, IRS 12
- Refunds
 - Claims procedures, IRS 10.1
 - Interest on refunds and underpayments, IRS 10.3
 - Speedy ("quick") refund procedures, IRS 10.2
- Retirement plans, procedures for seeking approval of, RET 4.1-4.4
- Rules governing conduct
 - Circular 230, *see* CIRCULAR 230
 - Code of professional conduct, IRS 2.3.3
 - Statements on responsibility in tax practice, IRS 2.3.2
- Rulings, private letters, IRS 11.1
- Tax fraud: *see* TAX FRAUD
- Tax preparer: *see* TAX PREPARER
- Tax returns: *see* TAX RETURNS
- Tax shelter disclosure regulations
 - Additional penalties and sanctions, IRS 13.4
 - Disclosure requirements, IRS 13.1.2
 - Listed transactions, IRS 13.1.1
 - Loss transactions, IRS 13.1.4
 - Transactions, brief asset holding period, IRS 13.1.6
 - Transactions, contractual protection, IRS 13.1.3
 - Transactions, book-tax differential, IRS 13.1.5
- List maintenance requirements
 - Disclosure requirements, IRS 13.3.3
 - Material advisors, IRS 13.3.1
 - Potentially abusive tax shelters, IRS 13.3.2
 - Registration requirements, IRS 13.2
- Technical advice memoranda (TAM), IRS 11.3

- User fees for IRS services, IRS 11.5
- See also* IRS RESTRUCTURING AND REFORM ACT (1998)
- INTERNET: *see* E-BUSINESS
- INTERVIEWING
 - Elimination, process of
 - Application, HR 3.1.6
 - Education, HR 3.1.4
 - Experience, HR 3.1.3
 - Personal characteristics, HR 3.1.5
 - Qualifications, HR 3.1.2
 - Questionnaire; sample, HR Appendix 13 (*Toolkit CD-ROM*)
 - Skills, HR 3.1.1
 - Interview contact control, HR Appendix 26 (*see Toolkit CD-ROM*)
 - Preparing for
 - Applicant, learning about, HR 3.2.4
 - Format, planning, HR 3.2.3
 - Job, familiarity with, HR 3.2.1
 - Objective, determining, HR 3.2.2
 - Privacy, need for, HR 3.2.5
 - Questions; sample, HR Appendix 6 (*see Toolkit CD-ROM*); HR Appendix 7 (*Toolkit CD-ROM*)
 - Inappropriate questions; sample, HR Appendix 8 (*Toolkit CD-ROM*)
 - Rating reports, HR Appendix 9 (*see Toolkit CD-ROM*)
- INVENTORY
 - Business valuation, VAL 9.3
- INVESTMENT ADVISER ACT OF 1940, CORP 12.6.2
- INVESTMENT COMPANY ACT, CORP 12.6.2
- INVESTMENT VEHICLES
 - “Adjusted rate of return” defined, INV 2
 - Administration and strategies, INV 13.1–13.2.6
 - Bank investments: *see* BANK INVESTMENTS
 - Bonds: *see* BONDS
 - Business valuation, VAL 9.4
 - Commodities: *see* COMMODITIES
 - “Coupon rate” defined, INV 2
 - “Current yield” defined, INV 2
 - Debt instruments, INV 1.1
 - Economic analysis
 - Federal Reserve Board Index of Industrial Production, INV 13.1.2
 - Government and private studies, INV 13.1.3
 - Gross National Product (GNP), INV 13.1.1
 - Equity instruments, INV 1.1
 - “Government-backed securities” defined, INV 2
 - “Holding period return” defined, INV 2
 - Inflation-indexed debt instruments, INV 4.5.4
 - “Insured investments” defined, INV 2
 - “Internal rate of return” defined, INV 2
 - Investment allocations, INV 1.2
 - Investment considerations, INV 1.3
 - “Net future value (NFV)” defined, INV 2
 - “Net present value (NPV)” defined, INV 2
 - Options: *see* OPTIONS AND WARRANTS
 - Retirement plan annual contribution limits, INV Appendix
 - Risk and return, INV 1.2
 - Stocks: *see* STOCKS
 - Warrants: *see* OPTIONS AND WARRANTS
 - “Yield on investments” defined, INV 2
 - “Yield to maturity” defined, INV 2
- IRS PRACTICE AND PROCEDURE: *see* INTERNAL REVENUE SERVICE
- IRS RESTRUCTURING AND REFORM ACT (1998)
 - Corporation, disadvantages of operating as, CORP 1.5
- JOBS AND GROWTH TAX RELIEF RECONCILIATION ACT OF 2003, CORP 8.4
- KATRINA EMERGENCY TAX RELIEF ACT OF 2005
 - Generally, CORPTAX 1.3, IND TAX 1.3
 - Special rules, CORPTAX 1.3.1.1–1.3.1.4, IND TAX 1.3.1.1–1.3.1.4
 - See also* TAX RELIEF RELATED TO HURRICANE KATRINA
- KEOGH PLANS
 - Investment vehicle, as, INV 11.2

- LAW FIRMS
 - Planning and assistance for public offerings, SEC 9.7.2
- LEASES
 - Business valuation, VAL 9.11
- LIABILITIES
 - Business valuation, VAL 9.12
- LIENS
 - Business valuation, VAL 9.13
- LIFE INSURANCE
 - Business valuation, VAL 9.6
 - Group term plans, INS 5.5.1
 - Amount of coverage, INS 5.5.5
 - Contributory plan, INS 5.5.4
 - Noncontributing plan, INS 5.5.3
 - Permanent life, INS 5.5.2
 - Single-premium policies, INS 5.6
 - Investment vehicle, as
 - Retirement annuities, INV 10.3
 - Universal life, INV 10.2
 - Whole life, INV 10.1
 - Key person, INS 5.4
 - Living benefits, INS 5.9
 - Term
 - Death benefits, INS 5.1.2
 - Policy features, INS 5.1.3
 - Second-to-die, INS 5.8
 - Select and ultimate pricing, INS 5.1.1
 - Split dollar/Life insurance arrangements, INS 5.7
 - Trusts
 - Irrevocable funded, TRUSTS 3.4.3
 - Irrevocable unfunded, TRUSTS 3.4.2
 - Problems with, INS 3.4.4
 - Revocable unfunded, TRUSTS 3.4.1
 - Universal
 - Basic features, INS 5.3.1
 - Options, INS 5.3.2
 - Unique features, INS 5.3.3
 - Variable, INS 5.3.4
 - Whole
 - Cash value, INS 5.2.2
 - Dividends, INS 5.2.3
 - Premiums, INS 5.2.1
 - Tax benefits, INS 5.2.4
- LIMITED LIABILITY COMPANIES (LLCs)
 - Advantages, LLC 2.1
 - Check-the-box election; sample, LLC Appendix 8 (*see Toolkit CD-ROM*)
 - Comparison of entity attributes, PART Appendix 3
 - Creation checklist LLC Appendix 4 (*see Toolkit CD-ROM*)
 - Defining, LLC 2-2.2
 - Dissolution, LLC 3.5
 - EIN, application for, LLC Appendix 6 (*see Toolkit CD-ROM*)
 - Eligible businesses, LLC 3.1
 - Formation and governing documents, LLC 3.2
 - Generally, LLC 1, LLC 7
 - In community property states, IND TAX 4.8-4.8.2
 - Liability of LLC members, LLC 3.6
 - Management, LLC 3.3
 - Operating agreements; samples
 - Checklist LLC Appendix 3 (*see Toolkit CD-ROM*)
 - Manager managed, LLC Appendix 1 (*see Toolkit CD-ROM*)
 - Member managed, LLC Appendix 2 (*see Toolkit CD-ROM*)
 - Operations and management, LLC 3-3.7
 - Ownership interests, LLC 3.4
 - Partnership converted to, PART 13.10
 - S election, LLC Appendix 7 (*see Toolkit CD-ROM*)
 - Single-member LLCs, LLC 3.7, PROP 18
 - State laws, variations in, LLC 2.2
 - Taxation (multi-member LLCs), LLC 5-5.4
 - Compared to S corporation, LLC 5.2-3
 - Partnership conversions, LLC 6.1
 - S and C corporations, LLC 6.2
 - State and local considerations, LLC 5.4
 - Tax classification, LLC 4.1-4.3
 - Check the Box regulations, LLC 4.2
 - Affirmative election, LLC 4.3
 - Importance of, LLC 4.1
 - Why it's an issue, LLC 4.1
 - Termination checklist, LLC Appendix 5 (*see Toolkit CD-ROM*)
 - See also* UNIFORM LIMITED LIABILITY COMPANY ACT
- LIMITED LIABILITY PARTNERSHIPS (LLPs)
 - Partnership converted to, PART 13.10

- LIQUIDATION (CHAPTER 7)**
 Accountants' roles, BANK 4.1
 Collection of all debtor assets
 Creditors' Section 341 meeting,
 BANK 8.3.2
 Debtor's estate, BANK 8.3.3
 Trustee, appointment of, BANK 8.3.1
 Commencement
 Effects of filing, BANK 8.2.3
 How to file, BANK 8.2.1
 Who may file, BANK 8.2.2
 Conversion of cases, BANK 13
 Discharge of debtor's debts
 Effects of, BANK 8.6.2
 Nondischargeable, BANK, 8.6.1
 Dismissal of cases, BANK 14.1
 Sale of assets and distribution of proceeds, BANK 8.4–8.5
- LOANS, Stockholder, INDTAX 4.4.2**
- LOSSES: see CAPITAL LOSSES; DEDUCTIONS AND LOSSES**
- MARKET SEGMENTS SPECIALIZATION PROGRAM (MSSP), IRS 5.4**
- MEDICAID**
 Benefits, SS 5.3
 Eligibility, SS 5.2
 Categorically needy, SS 5.2.1
 Optional, SS 5.2.2
 Medically needy, SS 5.2.2
 Generally, SS 5.1
 Resource requirements
 Excess resources, transferring, SS 5.4.3
 Excluded resources, SS 5.4.1
 Spousal resources, SS 5.4.2
 Trusts, TRUSTS 3.8
- MEDICAL SAVINGS ACCOUNTS (MSAs), PROP 4.7**
 Medicare + Choice MSA plan, SS 4.7
- MEDICARE**
 Appeals
 HMO/competitive medical plan decisions, SS 4.5.4
 Hospital insurance (Part A) decisions, SS 4.5.2
 Medical insurance (Part B) claims, SS 4.5.3
 Peer review organization decisions, SS 4.5.1
 Choice MSA (Medical Savings Accounts) plan, SS 4.7
 Generally, SS 4.1
 Hospital insurance (Part A)
 Coverage, SS 4.2.2
 Eligibility, SS 4.2.1
 Items not covered, SS 4.4
 Medical insurance (Part B)
 Coverage, SS 4.3.2
 Eligibility, SS 4.3.1
 Prescription drug benefits (Part D), SS 4.8
 Drugs excluded from part D plans, SS 4.8.3
 Individuals with limited income, assistance for, SS 4.8.2
 Medicare prescription drug coverage, SS 4.8.1
 Supplemental health insurance, SS 4.6
- MERGERS AND ACQUISITIONS**
 Buy-sell agreements, VAL 15.2
 Perspective, buyer vs. seller, VAL 15.1
 Stock for stock exchanges, VAL 15.3
- MORTGAGES**
 Adjustable rate (ARMs), FIN 5.1.2.2
 Estate planning, federal, EST 4.1.4
 FHLMC and FNMA securities, INV 4.8.2
 Points, FIN 5.1.2.1
 Reverse, INV 4.8.4
- MUTUAL FUNDS**
 Closed-end, INV 8.1
 SPDRs (S&P Depository Receipts), INV 8.1.1
 World Equity Benchmark Series, INV 8.1.2
 Investment objectives, INV 8.3
 Open-end, INV 8.2
 Real Estate Investment Trusts (REITs), INV 8.4
 SIPC insurance, INV 8.5
- NATIONAL ASSOCIATION OF CERTIFIED VALUATION ANALYSTS, VAL 12.5**
- NATIONAL BANKRUPTCY REVIEW COMMISSION (NBRC), BANK 2**
- NATIONAL LABOR RELATIONS BOARD (NLRB)**
 Generally, EMP 6.1
 Penalties, EMP 6.3
 Prohibited practices, EMP 6.2.1–6.2.2
- NICRUT: see CHARITABLE REMAINDER NET-INCOME UNITRUST**

INDEX

- NIMCRUT: *see* CHARITABLE REMAINDER NET-INCOME WITH MAKE-UP UNITRUST
- NONIMMIGRANT VISAS
- Categories
 - Athletes, HFN 2.3.16
 - Business, HFN 2.3.1
 - Exchange visitors, HFN 2.3.12; HFN 2.3.17
 - Nurses, HFN 2.3.9
 - Performing artists, HFN 2.3.16
 - Pleasure, HFN 2.3.2
 - Religious workers, HFN 2.3.18
 - Specialty occupations, HFN 2.3.7
 - Students, HFN 2.3.7; HFN 2.3.14
 - Temporary workers, HFN 2.3.15; HFN 2.3.10
 - Trade NAFTA professionals, HFN 2.3.19
 - Trainees, HFN 2.3.11
 - Transferees (intracompany), HFN 2.3.13
 - Treaty investors, HFN 2.3.5
 - Treaty traders, HFN 2.3.4
 - Waiver program, HFN 2.3.3
 - Classification symbols, HFN Appendix 2
 - Departure, evidence of intent, HFN 2.2
 - Immigrant intent, HFN 2.1
- OCCUPATIONAL SAFETY
- Enforcement
 - State agencies and addresses, WORK 5
- OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)
- Background, WORK 4.1
 - Compliance with, WORK 4.3
 - Scope, WORK 4.2
 - State laws, relation to, WORK 4.4
- OMNIBUS BUDGET RECONCILIATION ACT OF 1993
- Medicaid trusts, TRUSTS 3.8
- OPTIONS AND WARRANTS
- Calls, INV 6.2
 - Other options, INV 6.3
 - Premiums, INV 6.4
 - Puts, INV 6.1
 - Trading options, INV 6.5
 - Warrants, INV 6.6
- ORGANIZATIONS: *see* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS; AMERICAN SOCIETY OF APPRAISERS
- PARTNERSHIPS
- Accounting, cash method of; eligibility, PART Appendix 7 (*see* *Toolkit CD-ROM*)
 - Accounting systems and accounts
 - Accounts, PART 11.3
 - Consistency, PART 11.1
 - Minimum requirements, PART 11.2
 - Advantages, PART 8.1
 - Agreement checklist, PART Appendix 1 (*Also see* *Toolkit CD-ROM*)
 - Buy-sell agreement; sample, PART Appendix 4 (*Toolkit CD-ROM*)
 - Comparison of entity attributes, PART Appendix 3
 - Creation of
 - Amending required filings, PART 9.10
 - Certificate of assumed name, PART 9.2
 - Checklist, PART Appendix 2 (*Also see* *Toolkit CD-ROM*)
 - Creditor of new business form; sample notification, PART Appendix 5 (*Toolkit CD-ROM*)
 - Documents
 - Advantages and disadvantages, PART 9.1.3
 - General partnership, PART 9.1.1
 - Limited partnership, PART 9.1.2
 - Employment regulations, PART 9.9
 - Federal employer identification number, PART 9.3
 - Licensing and permits, PART 9.4
 - Sales tax permits, PART 9.5
 - Taxation
 - In bankruptcy, IRS 8.7.2
 - Unemployment, PART 9.7
 - Withholding taxes, PART 9.8
 - Workers' compensation, PART 9.6
 - Definitions, PART 2
 - Disadvantages, PART 8.2
 - Distribution
 - Death, PART 12.2
 - Good-faith withdrawal, PART 12.2
 - Liquidating, PART 12.3
 - Ongoing, PART 12.1
 - Retirement, PART 12.2
 - Duration, PART 3.2.1
 - Duties of partners to each other
 - Breach of, remedies for
 - Court action, PART 6.2.1

- Dissolution or withdrawal, PART 6.2.2
- Capital, contributions of, PART 6.1.3
- Delegation of, PART 5
- Fiduciary duty, PART 6.1.1
- Losses and liabilities, sharing, PART 6.1.4
- Management duty, PART 6.1.5
- Sharing profits, PART 6.1.2
- Family Limited Partnerships (FLPs), EST 8.2
- “Family partnership” defined, PART 2.4
- Funding
 - Basis in partnership interest
 - Exchange of personal services, interest in, PART 10.2.2
 - Liabilities assumed by other partners, PART 10.2.3
 - Sale of property, PART 10.2.1
 - Contributions of partners, PART 10.1
- “General partnership” defined, PART 2.3
- “Joint venture” defined, PART 2.2
- Laws governing
 - Agreements
 - Buy-sell, PART 4.3.1
 - Checklist, PART Appendix 1
 - Applicable statutes and laws, PART 4.1
 - Who can be a partner, PART 4.2
- Limited
 - Defined, PART 2.3
 - Limited liability companies (LLC), PART 2.8
 - Conversion to; tax aspects, LLC 6.1
 - Limited liability partnerships (LLPs), PART 2.9
 - Liability of limited partner, INV 12.2.1
 - Limited partner’s share in gain or loss, INV 12.2.2
 - Master (MLP), PART 2.7
 - S corporations and, S CORP 1.4
 - Tax shelters, PART 2.6
 - See also* LIMITED LIABILITY COMPANIES
- Nature of, PART 3.1
- Ownership issues
 - Miscellaneous, PART 3.2.3
- Professional corporations, PART 2.5
- Profit sharing, PART 3.2.4
- Profits and losses, distribution of: *see subhead* Distribution
- Property, jointly owned, PART 3.2.2
- Proprietorship, changed to: *see* PROPRIETORSHIP
- Taxation
 - Conduit nature of partnership, PART 13.1
 - Advantages of, PART 13.1.1
 - Simplified pass-through election, PART 13.1.2
 - Corporation, conversion to, PART 13.11
 - Death of a partner, PART 13.13
 - Distributions, PART 13.6
 - Election to adjust basis of partnership property, PART 13.8.1
 - Sample of, PART Appendix 8 (*see Toolkit CD-ROM*)
 - Examination procedures, PART 13.15
 - Health insurance deduction for self-employed, PART 13.17
 - Interest expense to carry partnership interests, PART 13.4
 - Liquidating distributions, PART 13.6
 - Losses to amount at risk, limitations on, PART 13.3
 - Mergers, PART 13.12
 - Passive activities, limitations on, PART 13.2
 - Retirement plans, PART 13.18
 - Sale of partnership interest, PART 13.7
 - Self-employment tax, PART 13.16
 - Tax year, PART 13.14
 - Termination of a partnership, PART 13.9
 - Conversion to LLC or LLP, PART 13.10
 - Transfers to partnership, PART 13.5
- Terminating
 - Assets and liabilities, disposition of, PART 14.4
 - Checklist, PART Appendix 6 (*see Toolkit CD-ROM*)
 - Dissolution, PART 14.1
 - Business continues, PART 14.5
 - Termination, PART 14.2
 - Liability to third parties, PART 14.3
- Third parties, duties to
 - Express authority
 - Binding contracts, PART 7.1.1

- PARTNERSHIPS** (*continued*)
- Conveyance of real estate, PART 7.1.3
 - Wrongful acts or omissions, liability for, PART 7.1.2
 - Implied or apparent authority
 - Private holding out, PART 7.2.2
 - Public holding out, PART 7.2.1
 - Notice
 - From third parties, PART 7.4
 - To third parties, PART 7.3
 - See also* LIMITED LIABILITY PARTNERSHIPS (LLPs)
- PAYROLL REQUIREMENTS**
- Federal statutes and regulations
 - Deductions, payroll, EMP 4.12
 - Deposit of payroll taxes, EMP 7.4.1–7.4.2
 - Federal Insurance Contribution Act (FICA), EMP 7.1–7.1.2, EMP 7.4.1
 - Magnetic media reporting and electronic filing, EMP 7.5
 - Unemployment tax, EMP 7.3
 - “Pay period” defined, EMP 3.5
 - See also* PAYROLL TAX DEPOSIT RULES
- PAYROLL TAX DEPOSIT RULES**
- FICA and federal income tax, EMP 7.4.1
 - “Lookback” rule, EMP 7.4.2
 - Monthly depositor, EMP 7.4.2
 - One-day rule, EMP 7.4.2
 - Semiweekly depositor, EMP 7.4.2
- PENSION PLANS:** *see* RETIREMENT PLANS
- PERSONAL SERVICE CORPORATIONS (PSCs), CORP 1.3**
- POWER OF ATTORNEY, DURABLE**
- Generally, SS 6.1
- PROPERTY INSURANCE**
- Amount of
 - Actual cash value, INS 6.2.1
 - Agreed value endorsement, INS 6.2.4
 - Co-insurance, INS 6.2.3
 - Inflation guard coverage, INS 6.2.5
 - Replacement cost, INS 6.2.2
 - Deductibles, INS 6.3
 - Increase in risk, INS 6.5
 - Insurable interest, INS 6.4
 - Perils/property commonly insured
 - Automobile liability coverage, INS 6.1.4
 - Automobile liability, nonowned and hired cars, INS 6.1.5
 - Broad-form, INS 6.1.2
 - Commercial inland marine, INS 6.1.7
 - Commercial package policy, INS 6.1.3
 - Comprehensive perils, INS 6.1.3
 - Drive other car (DOC) endorsement, INS 6.1.6
 - Named-peril policies, INS 6.1.1
- PROPRIETORSHIP**
- Accounting
 - Methods, PROP 8.1
 - Periods, PROP 8.3
 - Systems, PROP 8.2
 - Advantages of
 - Assets/income/deductions, commingling of, PROP 4.3
 - Converting to another entity, ease of, PROP 4.5
 - Health insurance costs, PROP 4.7
 - No double taxation, PROP 4.4
 - Owner control, PROP 4.2
 - Simplicity, PROP 4.1
 - Spouse/children employed by, PROP 4.6
 - Authority of, unlimited, PROP 13.1
 - Bankruptcy obligations, PROP 13.2
 - Characteristics of
 - Control and independence, PROP 3.4
 - Liability, unlimited, PROP 3.1
 - Personal/business assets, commingling of, PROP 3.2
 - Term of existence, PROP 3.3
 - Comparison of entity attributes, PART Appendix 3
 - Corporation, change to
 - Checklists and examples, PROP Appendix 2 (*Also see Toolkit CD-ROM*)
 - Filings, PROP 17.4
 - Items for transfer (checklist), PROP 17.3
 - Liabilities in excess of basis, PROP 17.7
 - Reasons for, PROP 17.1
 - Stock and securities, issuance of, PROP 17.5
 - Tax consequences, PROP 17.6
 - Valuation, PROP 17.2

INDEX

- Creation of (checklist), PROP
 - Appendix 1 (*Also see Toolkit CD-ROM*)
- Death of proprietor
 - Intestate, PROP 19.1
 - Preservation of business, strategies for, PROP 19.2
- Disadvantages of
 - Continuity, lack of, PROP 5.2
 - Employee benefits and ownership programs, limitations on, PROP 5.3
 - Income tax rates, PROP 5.5
 - Liability, individual, PROP 5.1
 - Social Security taxes, PROP 5.4
- Dissolution
 - Bankruptcy, PROP 20.1
 - Noncompete agreements, PROP 20.4
 - Sale of business, PROP 20.2
 - Sale of individual assets, PROP 20.3
 - Termination, complete, PROP 20.5
- Estate planning, PROP 15.6
- Filing and compliance regulations
 - Certificate of assumed name, PROP 6.1
 - Federal Employer Identification Number (FEIN), PROP 6.5
 - Income tax reporting, PROP 6.10
 - Licensing, PROP 6.2–6.3
 - Sales tax permits, PROP 6.4
 - Taxes, withholding, PROP 6.8
 - TELE-TIN, PROP 6.5
 - Unemployment compensation, PROP 6.7
 - Worker compensation, PROP 6.6
- Home-based businesses: *see* HOME-BASED BUSINESSES
- Husband and wife as co-proprietors, PROP 9.1
 - Divorce, *effect of*, PROP 9.2
- Legal nature of
 - Business purposes, PROP 2.3
 - Duration, PROP 2.2
 - Formalities, PROP 2.1
 - Size, PROP 2.4
- Liability insurance, PROP 14.2
- Name of, PROP 7
- Partnership, change to
 - Agreement, PROP 2.4, PROP 16.2
 - Contribution of partner, PROP 16.1
 - Creditors/debtors, notice to, PROP 16.4
 - Tax consequences, PROP 16.3
- Personal guarantees, PROP 14.1
- Protection of proprietary portions of business
 - Goodwill, PROP 15.3
 - Intellectual property, PROP 15.5
 - Name, PROP 15.2
 - Personal property, PROP 15.4
 - Unique knowledge, PROP 15.1
- Real estate used in
 - Documentation, PROP 11.3
 - Held in proprietor's name, PROP 11.1
 - Held in spouse's name, PROP 11.2
 - Home office considerations, PROP 11.5
 - Personal and business use, PROP 11.4
- Spouse/children employed by
 - Benefit plans, PROP 10.7
 - Child care credit, PROP 10.4
 - Child's IRA contribution, PROP 10.1
 - Earned income credit and business loss, PROP 10.6
 - Estate planning, PROP 10.3
 - Salary to children, tax bracket of, PROP 10.8
 - Social Security tax, PROP 10.5
 - Spousal retirement plan contribution, PROP 10.2
- See also:* SOLE PROPRIETORSHIP
- PUBLIC RELATIONS FIRMS
 - Planning and assistance for public offerings, CORP 12.8.7.3
- PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, CORP 12.6.5
- REAL ESTATE
 - Business valuation, VAL 9.9
 - Estate planning, federal, EST 4.1.2
 - Land trusts, TRUSTS 3.9
 - In proprietorship, PROP 11.1–11.4
 - Rentals: *see* RENTAL PROPERTIES
- REAL ESTATE INVESTMENT TRUSTS (REITs), INV 8.4
- RECORDS RETENTION
 - Reference list, IRS Appendix 2
- RECRUITMENT
 - Advertisements (print), HR 2.2
 - Applications for employment, HR 3.1.6
 - Responding to, HR 5.3
 - Sample, HR Appendix 5
 - Unsolicited, HR 2.1

INDEX

RECRUITMENT (*continued*)

- Campus, HR 2.5
- Communicating with applicants
 - Job offers, HR 5.1
 - Sample letter, HR Appendix 11
(*Also see Toolkit CD-ROM*)
 - Rejected applicants, informing, HR 5.2
 - Sample letter, HR Appendix 11
- Employment agencies, HR 2.6
- Hiring policy (sample), HR Appendix 1
(*see Toolkit CD-ROM*)
- Job fairs, HR 2.4
- Needs, determining, HR 1.2
- Open houses, HR 2.3
- Policy and objectives, HR 1.1
- References, HR 4.1
 - Telephone reference check form,
HR Appendix 10 (*see Toolkit CD-ROM*)
- Sources of, HR 2.1–2.6

REORGANIZATION AFTER BANKRUPTCY (CHAPTER 11)

- Accountants' roles
 - As an examiner, BANK 4.2.2
 - Controls, improvement of, BANK 4.2.5
 - For reconstruction, BANK 4.2.3.3
 - Restate financial statements,
BANK 4.2.4
- As an expert witness, BANK 4.2.7
- Trustee
 - Becoming a trustee, BANK 4.2.1.2
 - Court appointment, BANK 4.2.1.1
- Value, determination of, BANK 4.2.6

Commencement, BANK 10.2

Confirmation

- Cramdown, BANK 10.6.2
- Effect of, BANK 10.6.3
- Requirements, BANK 10.6.1

Conversion of cases, BANK 13

Creditor acceptance of plan

- By impaired classes, BANK 10.5.1
- By unimpaired classes, BANK 10.5.2

Dismissal of cases, BANK 14.3

Generally, BANK 10.1

Operating the business

- Debtor in possession, BANK 10.3.1
- Trustee, appointment of, BANK 10.3.2

Plan formulation

- Impaired classes, BANK 10.4.2
- Required provisions, BANK 10.4.1
- Who may file plan, BANK 10.4.3

REPORT WRITING (BUSINESS VALUATION)

- Components of written report, VAL 14.2–14.2.13
- Copies, distribution of, VAL 14.4
- Examples, VAL 14.5
- Presentation, VAL 14.3
- Quality of writing, VAL 14.3.1
- When necessary, VAL 14.1

RESEARCH SOURCES FOR BUSINESS VALUATION

- Checklist and sources, VAL Appendix 3
- Companies in the industry, VAL 13.3.4
- Data sources, VAL 13.1
- Economy, VAL 13.2
- Financial data, VAL 13.3.3
- Merger and acquisition data, VAL 13.3.5
- Researching guideline companies,
VAL 13.4
- SIC codes, VAL 13.3.1
- Surveying the industry, VAL 13.3.2

RETIREMENT PLANS

Accounting for

- Accumulated versus projected benefit obligation, RET 10.5
- Amortization of transition amounts and of prior service costs, RET 10.4
- Calculation of pension expense, RET 10.1
- Financial statement presentation and disclosures required, RET 10.3
- Minimum liability, RET 10.2
- Regulatory development, RET 10.6–10.6.2

Annual reporting, RET 7.2

Audit guidelines, RET 7.3; RET 10.6.1

Cash or deferred arrangements (CODA), planning concepts for, RET 5.5

Combined plan limits, RET 3.7.3

Deductions, RET 4.3

Contributions and benefits

Annual contribution limits, INV Appendix

Combined plan limits, RET 3.7.3

Defined benefit

Accruals, RET 3.3.5

INDEX

- Funding, RET 3.6.1
- Plan accruals, RET 3.3.5
- Plan limitations, RET 3.7.1
- Social Security and, RET 3.4.2
- Defined contribution
 - Plan limitations, RET 3.7.2
 - Social Security and, RET 3.4.1
- Discriminatory, RET 3.3.1–3.3.5
- Employee or matching contributions, RET 3.3.2
- Limitations, RET 3.7–3.7.2
- Safe harbor 401(k) plans, RET 3.3.2.2
- Special allocation formulas, RET 3.3.1
- Testing under benefit and contribution rules, RET 3.3.4
- Cost of living adjustments, limitations
RET Appendix 2
- Deduction limits
 - Combined plan deduction limits, RET 4.3
 - Contribution withdrawals, RET 4.7
 - Employee stock ownership plans, RET 4.5
 - Pension plans, RET 4.1–4.1.2
 - Profit-sharing or stock bonus plans, RET 4.2
 - Self-employed persons, plans for, RET 4.4
 - Start-up costs (small employer credits), RET 4.8
 - Timing and form, RET 4.6
- Defined benefit
 - Calculation of pension expense, RET 10.1
 - Cash balance plans
 - Crediting interest in the hypothetical account, RET 2.2.1.3
 - General test applied to non-safe harbor plans, RET 2.2.1.2
 - Uniform hypothetical allocation, RET 2.2.1.1
 - Deduction limits, RET 4.1.1
 - Funding, RET 3.6.1
 - Limits on, RET 3.7.1
- Defined contribution plans
 - Deduction plans, RET 4.1.2
 - Limits, RET 3.7.2
- Distributions, taxation of
 - Large distributions, RET 5.5
 - Lump sum, RET 5.1–5.1.2
 - Premature distributions, RET 5.4
 - Recovery of basis, RET 5.3
- Required distributions, RET 5.6
 - At death
 - pre 2001, RET 5.6.2
 - post 2001, RET 5.6.3
 - Lifetime, RET 5.6.1
- Rollovers, RET 5.2
- Eligibility to participate
 - Age and service requirements, RET 3.2.1
 - Compensation limits, RET 3.2.7
 - Entry dates, RET 3.2.3
 - Highly compensated, RET 3.2.6
 - Minimum coverage, RET 3.2.5–3.2.5.4
 - Minimum participation, RET 3.2.4
 - Workforce requirement, RET 3.2.2
- Employee stock ownership plans
 - Deduction limits, RET 4.5
 - Diversification and distributions, RET 3.10.2
 - Employee incentives, RET 3.10.1
 - Seller incentives, RET 3.10.3
- ERISA reporting and disclosure requirements, RET Appendix 1
- Fiduciary responsibilities
 - Obligations, RET 6.1
 - Plan investments, RET 6.3–6.3.3
 - Prohibited transactions, RET 6.2–6.2.2
- Funding obligations, RET 3.6–3.6.1
- IRS approval, procedures for seeking
 - Advantages of master, prototype, or uniform plans, RET 7.1.1
 - Determination letters, RET 7.1.2
 - GUST Amendments, RET 7.1.3
- Loans
 - Treated as distributions, RET 5.8
- Money purchase plans, RET 9.3
- Nondiscrimination testing, RET 3.2.5.4
- Nonqualified plans
 - Compensation deferral, RET 11.1
 - Department of Labor considerations, RET 11.2
 - New requirements, RET 11.5
 - Accumulation of benefits, RET 11.5.4
 - Definition, RET 11.5.1
 - Distribution, RET 11.5.2
 - Election, RET 11.5.3
 - Guidance, RET 11.5.5
- Securing deferred compensation, RET 11.3
- Taxation of, RET 11.4

RETIREMENT PLANS (*continued*)

- Overview, RET 1.1
- Partnerships, PART 13.17
- Planning concepts for selected plans, RET 5.3–5.7
- Qualification requirements, RET 3.1–3.1.2
- Qualified
 - Defined benefit plans, RET 2.2
 - Defined contribution plans, RET 2.1
 - Nonqualified versus, RET 1.1
 - Seller incentives, RET 3.10.3
- Reporting and disclosure, RET 7.2–7.2.2
- ERISA, RET Appendix 1
- Retirement plan issues
 - Bankruptcy protection, and, IND TAX 4.2.1–4.2.3
 - Qualified plan limits, IND TAX 4.1
 - Roth elective deferral plans, IND TAX 4.3.1–4.3.2
- Section 401(k) cash or deferred arrangements (CODA), RET 3.9
- Credit for elective deferrals, RET 3.9.2
- Hardship distributions, RET 3.9.1–3.9.1.2
- SIMPLE plans**
 - Compensation for SIMPLE purposes, RET 8.5.2
 - Contributions, RET 8.5.1
 - Deferrals, credit for, RET 8.5.4
 - Requirements, INV 11.2; RET 8.5.3
- Simplified Employee Pension plans (SEPs)
 - Contributions, elective, RET 8.4
 - Deduction limits, RET 8.2
 - Distributions, taxation of, RET 8.3
 - Qualification requirements, RET 8.1
- Social Security: *see* SOCIAL SECURITY
- Succession planning, and, *see* BUSINESS and SUCCESSION PLANNING
- Statutory requirements, RET 3.1–3.10
- Stock bonus plans, RET 4.2, 9.2
- Target benefit (hybrid) plans, RET 9.4
- Tax-sheltered, INV 11.1–11.3.4
 - FDIC insurance, INV 11.4
 - Individual Retirement Accounts (IRAs), INV 11.1
 - Keogh plans, INV 11.2

Qualified

- Employee Stock Ownership Plans (ESOPs), INV 11.3.4
- Pension, INV 11.3.3
- Profit-sharing, INV 11.3.1
- Stock bonus, INV 11.3.2
- Thrift or savings plans, RET 9.1
- Top-heavy plans, RET 3.8
- Vesting, RET 3.5–3.5.1

See also INDIVIDUAL RETIREMENT ACCOUNTS; PENSION FUNDING EQUITY ACT OF 2004; SMALL BUSINESS JOB PROTECTION ACT OF 1996

REVENUE RECONCILIATION ACT (1990)

- Cash reporting requirements for Social Security Administration, IRS 6.3

REVENUE RECONCILIATION ACT OF 1993

- S corporation, disadvantages of operating as, S CORP 1.4

ROTH IRA

- Distributions from a Roth IRA, RET 5.7.4
- Roth elective deferral plans, IND TAX 4.3.1–4.3.2

SALES TAX

- Sole proprietorship, permits for, PROP 6.4

SARBANES-OXLEY ACT OF 2002

- Corporations and, CORP 11

S CORPORATIONS

- Advantages of, S CORP 1.2
- Checklist, S CORP Appendix 1 (*Toolkit CD-ROM*)

- Comparison of entity attributes, PART Appendix 3

Corporate-level taxation

- Estimated tax, S CORP 7.4
- General utilities repeal, S CORP 7.1
- Passive income, S CORP 7.3

- Disadvantages of, S CORP 1.3

Distributions

- Compensation to owner-employees, treated by IRS as, S CORP 9.6
- Earnings (accumulated) and profits exist
 - Accumulated adjustment account, S CORP 9.2.2

INDEX

- Order of applying distribution, S CORP 9.2.1
- No accumulated earnings and profits, S CORP 9.1
- Post-termination, S CORP 9.4
- Property, S CORP 9.3
- Elections
 - Beneficiary of qualified trust (QSST), S CORP 3.3
 - Closing books; sample, S CORP Appendix 7 (*see Toolkit CD-ROM*)
 - Distribute earnings and profits first, S CORP Appendix 10 (*see Toolkit CD-ROM*)
 - Fiscal year-end S corporations, S CORP 3.4
 - Five-year waiting period for reelections, S CORP 4.4
 - Flowchart-operation of Rev. Proc. 2003-43, S CORP Appendix 9 (*see Toolkit CD-ROM*)
 - Forego previously taxed income, S CORP Appendix 11 (*see Toolkit CD-ROM*)
 - Form 2553, timely filing of, S CORP 3.1
 - Invalid, S CORP 5.1
 - LIFO recapture, S CORP 3.6
 - Protection of
 - Shareholders' agreements, S CORP 5.3.2
 - Q sub; sample, S CORP Appendix 2 (*see Toolkit CD-ROM*)
 - Transfer of stock to escrow, S CORP 5.3.1
 - Reporting following, S CORP 4.3
 - Revocation, S CORP 4.2
 - Shareholders' consent, S CORP 3.2
 - Subchapter S; sample, S CORP Appendix 3 (*see Toolkit CD-ROM*)
 - Additional shareholders, S CORP Appendix 4 (*see Toolkit CD-ROM*)
 - Taxable years, S CORP 3.4
 - Termination, S CORP 4.1
 - Inadvertent, S CORP 5.2
- Elections by trusts, S CORP Appendix 8 (*see Toolkit CD-ROM*)
- Eligibility requirements
 - Domestic corporations, S CORP 2.1.1
 - Ineligible corporations, S CORP 2.1.2
- Shares and shareholders
 - Classes of stock, S CORP 2.2.3
 - Debt instruments, S CORP 2.2.3.2
 - Nonconforming distributions, S CORP 2.2.3.1
 - Eligible shareholders, S CORP 2.2.2
 - Maximum number, S CORP 2.2.1
 - Qualified Subchapter S subsidiaries (Qsub), S CORP 2.2.4
- ESBT; sample, S CORP Appendix 6 (*see Toolkit CD-ROM*)
- ESOPs: *see* EMPLOYEE STOCK OWNERSHIP PLAN
- History, S CORP 1.1
- IRS audits of, IRS 4.7
- Limited partnerships and; advantages of, S CORP 1.4
- LLCs and
 - Advantages of, S CORP 1.4
 - Conversion to LLC; tax aspects, LLC 6.2
 - Tax restrictions compared to, LLC 5.2-5.3
- Passive income problems, S CORP 6.2.3
 - Gross receipts, S CORP 6.1
 - Preventing
 - Eliminate accumulated earnings and profits, S CORP 6.2.1
 - Increasing gross receipts, S CORP 6.2.2
- QSST; sample, S CORP Appendix 5 (*see Toolkit CD-ROM*)
- Recognition of gain in certain liquidations, S CORP 7.2
- Shareholder-level taxation
 - Death (shareholder), S CORP 8.2.3
 - Debt, basis in, S CORP 8.3.2
 - Fringe benefits, S CORP 8.4
 - Indebtedness income, collection of, S CORP 8.3.4
 - Individual shares, reduction of basis of, S CORP 8.3.3
 - Interest terminated, S CORP 8.2.1
 - Pass-through items, S CORP 8.1
- Stock
 - Basis in, S CORP 8.3.1
 - Substantial disposition of, S CORP 8.3.1

S CORPORATIONS (*continued*)

Tax developments

- Banks and passive investment income, CORPTAX 2.7
- Bankruptcy filings, CORPTAX 2.12
- Compliance study of S corporations, CORPTAX 2.14
- Corporate partner in partnership with LIFO inventory, CORPTAX 2.11.1–2.11.2
- Eligible shareholders, increase in number, CORPTAX 2.2
- Grandfathered IRAs allowed to hold bank S stock, CORPTAX 2.3
- Information returns for QSUBs, CORPTAX 2.9
- Members of family as one shareholder, CORPTAX 2.1
- Passive activity losses and at-risk amounts, use by QSST beneficiaries, CORPTAX 2.6
- Relief from inadvertently invalid QSub elections and termination, CORPTAX 2.8
- Repayment of loans for qualifying employer securities, CORPTAX 2.10
- S election by noncorporate entity, CORPTAX 2.1.31–2.13.2
- Transfer of suspended S corporation losses to spouse or former spouse, CORPTAX 2.5
- Unexercised powers of appointment, and ESBT, CORPTAX 2.4
- Tax rate on dividends, reduction of, S CORP 9.5
- Technical and Miscellaneous Revenue Act of 1988 (TAMRA), S CORP 7.2

SECURITIES ACT OF 1933

- Corporations and,
 - Registration under
 - Exemptions, CORP 12.4.5
 - Process, CORP 12.4.2
 - Purpose of, CORP 12.4.1
 - Prospectus, contents, CORP 12.4.4
 - Registration, simplified, CORP 12.4.7
 - Registration statement, contents, CORP 12.4.3
 - Secondary transactions, rule 144, CORP 12.4.6

SECURITIES AND EXCHANGE COMMISSION (SEC)

- Securities Exchange Act of 1934 and, CORP 12.5.2

SECURITIES EXCHANGE ACT OF 1934

- Corporations and, CORP 12.5.3
- Brokers and exchanges, registration, 12.5.3
- Overview, CORP 12.5.1
- Securities and Exchange Commission (SEC), CORP 12.5.2
- Securities, registration of,
 - General issues, CORP 12.5.4

SECURITIES INVESTOR PROTECTION ACT OF 1970, CORP 12.6.6

SECURITIES INVESTOR PROTECTION CORPORATION (SIPC), INV 8.5

SECURITIES REGULATION

- Corporations and,
 - Federal overview of, CORP 12.3
 - Federal Securities-related acts, other, CORP 12.6
 - Foreign Corrupt Practices Act of 1977, CORP 12.6.1
 - Introduction to, CORP 12.1
 - Investment Advisers Act of 1940, CORP 12.6.2
 - Investment Company Act of 1940, CORP 12.6.3
 - Public Utility Holding Company Act of 1935, CORP 12.6.5
 - Scope, CORP 12.2
 - Securities Act of 1933: *see* SECURITIES ACT OF 1933
 - Securities Exchange Act of 1934: *see* SECURITIES EXCHANGE ACT OF 1934
 - Trust Indenture Act of 1939, CORP 12.6.4
- Securities Investor Protection Act of 1970, CORP 12.6.6
- Small Business Incentive Act of 1980, CORP 12.6.7
- State regulation, CORP 12.7
- See also* CORPORATIONS

SELF-EMPLOYED PEOPLE

- Federal Employer Identification Number (FEIN), PROP 6.5
- Health insurance costs, PROP 4.7

INDEX

- Retirement plans
 - Deduction limits, RET 4.4
 - Social Security, SS 2.2.2
- Taxes: *see* SELF-EMPLOYMENT TAX
- SELF-EMPLOYMENT TAX
 - Health insurance costs, PROP 4.7
 - Partnerships, PART 13.15
 - Health insurance deduction, PART 13.17
- SHAREHOLDERS
 - Agreement, CORP Appendix 7 (*see Toolkit CD-ROM*)
 - Compensation, CORPTAX 3.5
 - Corporate-shareholder transactions, CORPTAX 7.6
 - Dividends, rights to, CORP 8.2
 - Meetings, CORP 4.2.1
 - Minutes of first meeting; sample, CORP Appendix 6 (*Toolkit CD-ROM*)
 - Pooling agreements, CORP 6.1
 - Remedies
 - Defined, CORP 7.1
 - Derivative suits, restrictions governing, CORP 7.2
 - Share transfer restrictions, CORP 6.3
 - Voting trusts, CORP 6.2, CORP Appendix 8 (*see Toolkit CD-ROM*)
 - See also* S CORPORATIONS, Shareholder-level taxation
- SHARES
 - Authorized, CORP 5.2
 - Consideration for, CORP 5.4
 - “Debt securities” defined, CORP 5.1.3
 - “Equity securities” defined, CORP 5.1.1
 - Issued, CORP 5.3
 - “Par value” defined, CORP 5.1.2
 - Preemptive rights, CORP 5.5
 - “Treasury shares” defined, CORP 5.1.4
 - “Watered stock” defined, CORP 5.1.5
- SMALL BUSINESS ADMINISTRATION (SBA)
 - Government lending program, FIN 4.4.1–4.4.1.2
 - 8(a) business plan, BP Appendix 6 (*see Toolkit CD-ROM*)
 - Personal financial statement form, FIN Appendix 1 (*see Toolkit CD-ROM*)
 - Statement of personal history form, FIN Appendix 2 (*see Toolkit CD-ROM*)
- SMALL BUSINESS INCENTIVE ACT OF 1980, CORP 12.6.7
- SMALL BUSINESS JOB PROTECTION ACT OF 1996, RET 5.3; S CORP 1.2
- SOCIAL SECURITY
 - Account statements under Revenue Reconciliation Act (1990), IRS 6.3
 - Benefits, TI 8
 - Cash reporting requirements under Revenue Reconciliation Act (1990), IRS 6.3
 - Dependent coverage
 - Child, SS 2.3.3.3
 - Former spouse, SS 2.3.3.2
 - Spouse, SS 2.3.3.1
 - Disability benefits
 - Benefits, SS 2.5.2
 - Defined, SS 2.5.3
 - Eligibility, SS 2.5.1
 - Funding
 - Employees, SS 2.2.1
 - Self-employed persons, SS 2.2.2
 - Insurance, as, INS 9
 - Medicaid: *see* MEDICAID
 - Proprietorships and, PROP 5.4
 - Retirement benefits
 - Annual earnings limitation, SS 2.3.2
 - Applying for, SS 2.3.5
 - Delayed retirement, SS 2.3.2.2
 - Early retirement, SS 2.3.2.2
 - Maximum family benefit, SS 2.3.2.3
 - Taxation, SS 2.3.4
 - Retirement (Qualified plans) and, RET 3.4–3.4.2
 - Revenue Reconciliation Act (1990), cash reporting requirements for, IRS 6.3
 - SSA mailing, SS 2.3.1
 - Supplemental Security Income: *see* SUPPLEMENTAL SECURITY INCOME
 - Survivors’ benefits
 - Child, SS 2.4.4
 - Lump-sum death benefit, SS 2.4.1
 - Parent, SS 2.4.5
 - Spouse, SS 2.4.2
 - Divorced, SS 2.4.3

SOFTWARE FOR ACCOUNTANTS

Business plans, BP Appendix 3, BP 3.7.5

Valuation software tools, VAL 14.6

SOLE PROPRIETORSHIP

Change of ownership; sample notification, PROP Appendix 3 (*see Toolkit CD-ROM*)

Change to LLC (single-member), PROP 18

Contractual relationships of

Breach of contract, PROP 12.4

Non-binding, PROP 12.1

Verbal, PROP 12.2

Written, PROP 12.3

Federal Employer Identification Number (FEIN), PROP 6.5

Health insurance costs, PROP 4.7

Noncompete agreement; sample, PROP Appendix 5 (*see Toolkit CD-ROM*)

Sale of business; checklist, PROP Appendix 4 (*see Toolkit CD-ROM*)

Uniform Commercial Code, PROP 12.5

See also: HOME-BASED BUSINESSES; PROPRIETORSHIP

SPOUSE

Retirement plan contribution, sole proprietorship, PROP 10.2

Surviving; Social Security benefits, SS 2.4.2

Divorced, SS 2.4.3

STATE EMPLOYMENT REGULATIONS: *see* EMPLOYMENT REGULATIONS, State regulations

STATE TAX FORMS,

Where to obtain, IRS Appendix 1

STOCKS

Common

Advantages, INV 5.10

Brokerage firms, INV 5.11

Cumulative voting, INV 5.4

Disadvantages, INV 5.10

Dividends, INV 5.5–5.8

Cash, INV 5.5

Stock, INV 5.6

Preemptive rights, INV 5.2

Public offerings

Public trading, SEC 9.9

Stock certificate and par value, INV 5.1

Initial public offerings, INV 5.1.1

Stock splits, INV 5.7

Valuing

Book value, INV 5.9.3

Cash flow per share, INV 5.9.2

Earnings per share, INV 5.9.1

Price-earnings (PE) ratio, INV 5.9.4

Voting rights, INV 5.3

Yield, INV 5.9.5

Estate planning, federal, EST 4.1.3

Initial Public Offerings (IPOs), FIN 5.1.3.1

Planning and assistance

Certified public accountants, CORP 12.8.7.4

Law firms, CORP 12.8.7.2

Public relations firms, financial, CORP 12.8.7.3

Underwriters and investment bankers, CORP 12.8.7

Preferred

Advantages, INV 7.9.1

Call feature, INV 7.6

Convertible feature, INV 7.5

Disadvantages, INV 7.9.2

Dividends, INV 7.4

Par value, INV 7.2

Preemptive rights, INV 7.1

Sinking funds, INV 7.7

Valuing

Book value, INV 7.8.3

Earnings per share before preferred dividends, INV 7.8.1

Times dividend earned, INV 7.8.2

Yield, INV 7.8.4

Voting rights, INV 7.3

Public offerings

Advantages, CORP 12.8.4.1

Costs, CORP 12.8.5

Deciding, CORP 12.8.6

Disadvantages, CORP 12.8.4.2

Mergers and, VAL 15.3

Selling without registration, CORP 12.8.2

Stock market analysis

American Stock Exchange, INV 13.2.3

Foreign exchanges and securities, INV 13.2.7

Local and regional exchanges, INV 13.2.5

Major market indexes, INV 13.2.1

NASDAQ, INV 13.2.4

- New York Stock Exchange, INV 13.2.2
- Over-the-counter (OTC) market, INV 13.2.6
- Street name, held in, INV 13.3
- See also* SHAREHOLDERS, Corporate-shareholder transactions
- SUBCHAPTER S REVISION ACT OF 1982
 - S corporations and, S CORP 1.2
- SUPPLEMENTAL SECURITY INCOME
 - Generally, SS 3.1
 - Income, SS 3.3
 - Reporting requirements, SS 3.4
 - Resources, SS 3.2
- TAKEOVERS: *see* MERGERS AND ACQUISITIONS
- TAX ACT OF 2001
 - Estate planning; trusts, effect on, EST 8.1.3.4
 - Generally, TRUSTS 4.4
 - Sunset provisions, EST 10
- TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 (TEFRA)
 - Changes in provisions of, IRS 4.6.1
- TAXES
 - Alternative Minimum Tax (AMT) capital gains, IND TAX 7.1.3
 - see* ALTERNATIVE MINIMUM TAX
 - Assessment, IRS 8.1
 - Deficiency, IRS 8.2.1–8.2.2
 - Individual master file, IRS 8.2.4
 - Statute of limitations, IRS 8.2.3
 - Bankruptcy, dischargeability in
 - Individuals, IRS 8.7.1
 - Partnerships and corporations, IRS 8.7.2
 - Capital gains: *see* CAPITAL GAINS
 - Collection, IRS 8.3
 - Installment payments, IRS 8.6
 - IRS seizure, safeguards against, IRS 8.4
 - Compromise, IRS 8.5
 - Credits: *see* CREDITS
 - Deductions: *see* DEDUCTIONS AND LOSSES
 - Education tax credits: *see* EDUCATIONAL ASSISTANCE
 - Estate (Federal), EST 4.1–4.4
 - Income taxation: *see* INCOME TAX
 - Limited Liability Companies: *see* LIMITED LIABILITY COMPANIES
 - Partnerships, of: *see* PARTNERSHIPS
 - Preparer: *see* TAX PREPARER
 - Proprietorships, of: *see* PROPRIETORSHIPS
 - Record retention, IRS Appendix 2 (*see* *Toolkit CD-ROM*)
 - Regulations: *see* specific topics, i.e., DEPRECIATION
 - Retirement plans
 - Distributions (recovery of basis), RET 5.3
 - IRA: *see* INDIVIDUAL RETIREMENT ACCOUNT
 - Large distributions, RET 5.5
 - Lump-sum distributions, RET 5.1–5.1.2
 - Nonqualified, RET 11.4
 - Premature distributions, RET 5.4
 - Required distributions
 - At death, RET 5.6.2
 - Lifetime, RET 5.6.1
 - Rollovers, RET 5.2
 - SEP (Simplified Employee Pension) plan distributions, RET 8.3
 - Social Security, SS 2.3.4
 - S corporations, of: *see* S CORPORATIONS; INTERNAL REVENUE SERVICE; TRUSTS, Estate taxation; *and* main entries
 - See also* ELECTRONIC FEDERAL TAX PAYMENT SYSTEM (EFTPS); INTERNAL REVENUE SERVICE; S CORPORATIONS, Shareholder-level taxation; TAX ACT OF 2001; TRUSTS, Estate taxation
 - Tax calculations and tax credits
 - Farm income averaging, IND TAX 6.2.1–6.2.2
 - FICA and FUTA on ISOs, IND TAX 6.3.1–6.3.2
 - Hope and lifetime learning credits, IND TAX 6.7.1–6.7.3
 - Residential energy credits, IND TAX 6.9.1–6.9.4
 - See also* ALTERNATIVE MINIMUM TAX, ALTERNATIVE MOTOR VEHICLE, CREDIT, CHILDREN
 - Tax shelters, *see* TAX SHELTERS

INDEX

TAX FRAUD

Cash reporting requirements, IRS 6.3
Referrals

Detection of, IRS 6.2

How initiated, IRS 6.1

TAXPAYER COMPLIANCE MEASUREMENT PROGRAM (TCMP)

Generally, IRS 3.2.3

TAX PREPARER

AICPA Code of Professional Conduct,
IRS 2.3.3

AICPA tax standards, IRS 2.3.2

Defined (TRP), IRS 2.4.1

Fraud, penalties for, IRS 6.3

Liability

Income tax return, what constitutes,
IRS 2.4.3

Injunctions against preparers, IRS
2.4.7

Penalties

Potential, IRS 2.4.4

Procedures for assessing, IRS
2.4.6

Recordkeeping, IRS 2.4.5

Substantial preparation, IRS 2.4.2

Understatement penalties

Disclosure of a tax return position,
IRS 2.5.6

Effect of, IRS 2.5.1

Multiple, IRS 2.5.2

Negligence, IRS 2.5.3

Normal business practice, IRS 2.5.4

Substantial authority, IRS 2.5.5

TAX REFORM ACT OF 1986

Nondiscriminatory requirement contributions or benefits, RET 3.3

TAX RELIEF RELATED TO HURRICANE KATRINA

Additional tax relief provisions,
CORPTAX 1.3.4.1–1.3.4.6,
INDTAX 1.3.4.1–1.3.4.6

Charitable giving incentives,
CORPTAX 1.3.3.1–1.3.3.6,
INDTAX 1.3.3.1–1.3.3.6

Employment relief, CORPTAX 1.3.2–
1.3.2.2, INDTAX 1.3.2–
1.3.2.2

Introduction, CORPTAX 1.1,
INDTAX 1.1

IRS relief, CORPTAX 1.2–12.8,
INDTAX 1.2–12.8

See also KATRINA EMERGENCY TAX
RELIEF ACT OF 2005

TAX RETURNS

Filing and compliance matters

Dependent definition, 2005 and
after, INDTAX 7.3.1–7.3.4

Dischargeability of taxes in bankruptcy, INDTAX 7.8

Estimated tax payments, INDTAX
7.1.1–7.1.2

Extension to file individual tax
return, INDTAX 7.7.1–7.7.2

Impact of uniform definition of
child, head of household,
INDTAX 7.2.1

Phase-out of personal exemptions
and itemized deductions,
INDTAX 7.4.1–7.4.2

Reportable transaction penalties,
INDTAX 7.6

Tax shelter penalties, INDTAX 7.5.1

Forms, out-of-state, IRS Resource (*see*
Toolkit CD-ROM)

Obtaining a copy of, IRS 5.1.1

Procedure for examining

Alternative resolution, at examination, IRS 14.2.3

Economic reality audits, IRS 3.1

Initial review and screening, IRS 3.1

National Research Program (NRP),
IRS 3.2.3

Selection for audit

Advance warning, IRS 3.7

Chances of, IRS 3.3

Discriminant Function System
(DFS), IRS 3.2.1

Information Returns Project

(IRP) audits, IRS 3.2.5

Instructions to classifiers and
auditors, IRS 3.2.4

Items that may trigger, IRS 3.4

Manual identification, IRS 3.2.2

Reducing the likelihood of, IRS
3.5

Safeguards, IRS 3.6

TAX SHELTERS

IRS disclosure regulations, IRS 13

Additional penalties and sanctions,
IRS 13.4

Disclosure requirements

Confidential transactions, IRS
13.1.2

Listed transactions, IRS 13.1.1

Loss transactions, IRS 13.1.4

- Transactions, brief asset holding period, IRS 13.1.6
- Transactions, contractual protection, IRS 13.1.3
- Transactions, book-tax differential, IRS 13.1.5
- List maintenance requirements
 - Disclosure requirements, IRS 13.3.3
 - Material advisors, IRS 13.3.1
 - Potentially abusive tax shelters, IRS 13.3.2
 - Registration requirements, IRS 13.2
- Limited partnerships, INV 12.2, PART 2.6
- Limited partnerships tax considerations, INV 12.2.1
- Retirement plans: *see* RETIREMENT PLANS
- Tax shelter penalties, IND TAX 7.5.1
- TECHNICAL AND MISCELLANEOUS REVENUE ACT OF 1988 (TAMRA)**
- S corporations, S CORP 7.2
- TERMINATION**
 - Checklist, HR Appendix 23 (*see Toolkit CD-ROM*)
 - Finalizing, HR 11.3–11.4
 - Guidelines, HR 11.2
 - Human Resources Dependency Chart, HR Appendix 15 (*see Toolkit CD-ROM*)
 - Interview, HR 11.5–11.6
 - Exit Interview form, HR Appendix 21 (*see Toolkit CD-ROM*)
 - Separation Interview Checklist, HR Appendix 22 (*see Toolkit CD-ROM*)
 - Performance evaluation and documentation, HR 11.1
 - Sample severance agreement, HR Appendix 29 (*see Toolkit CD-ROM*)
- TICKET TO WORK AND WORK INCENTIVES IMPROVEMENT ACT OF 1999, CORP 1.5; S CORP 1.2**
- TRADE AND PROFESSIONAL ORGANIZATIONS: *see Toolkit CD-ROM***
- TRUSTEES**
 - Compensation, TRUSTS 4.1.5
 - Duties, TRUSTS 4.1.1
 - Liability, TRUSTS 4.1.4
 - Powers, TRUSTS 4.1.2
 - Prudent, investing, TRUSTS 4.1.3
- TRUST INDENTURE ACT OF 1939, CORP 12.6.4**
- TRUSTS**
 - Administration, TRUSTS 4
 - Assignment of assets, TRUSTS Appendix 1 (*see Toolkit CD-ROM*)
 - Beneficiary, TRUSTS 4.2
 - Business use, TRUSTS 3.5
 - Charitable, TRUSTS 3.6
 - Charitable lead trusts, TRUSTS 3.6
 - Charitable remainder, EST 8.3.1
 - Children, TRUSTS 3.2
 - Client letter on funding, TRUSTS Appendix 2 (*see Toolkit CD-ROM*)
 - Creation of, reasons for, TRUSTS 1.2
 - Duration, TRUSTS 4.3
 - Dynasty trusts, TRUSTS 4.4
 - Estate planning, EST 5.1.3
 - Estate taxation
 - Beneficiary, TRUSTS 7.2
 - Grantor (Decedent), TRUSTS 7.1
 - Gift taxation
 - Annual exclusion, TRUSTS 6.1
 - Demand (Crummey), TRUSTS 6.3
 - Gifts for benefit of minor, TRUSTS 6.2
 - Grandchildren, TRUSTS 3.2
 - Grantor, for the benefit of the, TRUSTS 3.7
 - Grantor retained unitrust, EST 8.1.3.3
 - Grantor retained unity trust, EST 8.1.3.2
 - Income taxation
 - Beneficiary
 - Distributable net income, TRUSTS 5.2.1
 - Throwback rules, TRUSTS 5.2.2
 - Grantor
 - Administrative powers, TRUSTS 5.1.4
 - Adverse and related parties, TRUSTS 5.1.2
 - Beneficial enjoyment, TRUSTS 5.1.3
 - Creating a defective grantor trust, TRUSTS 5.1.6
 - Retained Income trusts, TRUSTS, 7.3
 - Retained powers, TRUSTS 5.1.5

INDEX

TRUSTS (*continued*)

Reversionary interest, TRUSTS
5.1.1

Inter vivos

Irrevocable, TRUSTS 2.2.2

Reversionary, TRUSTS 2.2.3

Revocable, TRUSTS 2.2.1

Land trusts, TRUSTS 3.9

Life insurance: *see* LIFE INSURANCE

Living, TRUSTS 3.7

Medicaid, TRUSTS 3.8

Minors, TRUSTS 3.1

Officers, and estate planning, EST
1.7.5

Personal, TRUSTS 2.1–2.2

Qualified personal residence, EST
8.1.3.1

REITs, INV 8.4

Spouse, TRUSTS 3.3

Taxation, TRUSTS 5.3

Tax exemptions, TRUSTS 5.1.6

See also subhead: Income taxation

Testamentary, TRUSTS 2.1

Trustees: *see* TRUSTEES

Uses of, TRUSTS 3

UNDERWRITERS

Estate planning and, EST 1.7.1

Planning and assistance for public
offerings, CORP 12.8.7

UNEMPLOYMENT INSURANCE

Employee benefits, UI 1.3

Employer's experience rating, factors
affecting benefit charges for
employees

Base-period

Inverse chronological order, UI
7.1.2

Proportionate wages, UI 7.1.3

Most recent, UI 7.1.1

Noncharging of benefits, UI 7.3

Seasonal workers, UI 7.3

Successor employers, UI 7.2

Voluntary contributions, UI 7.4

Federal–state interaction, UI 1.2, UI
5.1–5.5

Additional credit, UI 5.4

Employer-claimed credits, UI 5.3

Normal (90%) credit, UI 5.1–5.2

State loans and shortages, UI 5.5

Federal Unemployment Tax Act

(FUTA): *see* FEDERAL

UNEMPLOYMENT TAX ACT

State

Benefit-ratio formula, UI 6.4

Benefit-wage-ratio formula, UI 6.5

Experience rating, UI 6.1–6.2

Payroll-decline formula, UI 6.6

Reserve-ratio formula, UI 6.3

Tax agency addresses, phone num-
bers, Internet links, UI

Appendix

UNIFORM LIMITED LIABILITY COM-
PANY ACT (ULLCA), LLC 2.2

VALUATION, BUSINESS: *see* BUSINESS
VALUATION

VANS, Depreciation, CORPTAX 4.4

VEHICLES

See ALTERNATIVE MOTOR VEHI-
CLE CREDIT

VISAS

Ineligibility/inadmissibility

Determination of, HFN 5.1

Grounds for, HFN 5.2

Nonimmigrant: *see* NONIMMIGRANT
VISAS

Symbols for, HFN Appendix 2

WAGE AND HOUR REGULATIONS (FEDERAL)

Agricultural employees; amounts
treated as wages, EMP 4.5

Child labor laws, EMP 4.9

Coffee breaks, EMP 4.8

Covered enterprises, EMP 4.1

Covered and exempt employees

Administrative exemption, EMP 4.2.3

Executive exemption, EMP 4.2.2

Minimum salary test, EMP 4.2.1

Professional exemption, EMP 4.2.4

Outside sales exemption, EMP 4.2.5

Deductions, statement of, EMP 4.10.4

Discrimination: *see* DISCRIMINATION

Employee information, EMP 4.10.1

Employer's records, EMP 4.10

Family employment, EMP 4.16

Form I-9, EMP 4.10.3

Form W-4, EMP 4.10.2

Handicapped workers, EMP 4.13

Leaves of absence, EMP 4.15

Minimum wage requirements, EMP 4.4

Overtime pay, EMP 4.3–4.3.1

Payments, timing of, EMP 4.10.6

Payroll: *see* PAYROLL REQUIRE-
MENTS

WAGE AND HOUR REGULATIONS

(FEDERAL) (*continued*)

Paid time off, EMP 4.7

Penalties, EMP 4.11

Records, form of and retention, EMP 4.10.5

Rest periods, EMP 4.8

Termination, EMP 4.14

Tips, EMP 4.6

WARRANTS: see OPTIONS AND WARRANTS

WILLS

Components

Beneficiaries, identification of, EST 3.5

Common disaster, EST 3.4

Dispositive provisions, EST 3.7

Domicile of estate owner, EST 3.1

Guardianship of minor children, EST 3.6

Marital deduction formulas

Equalization, EST 3.2.4

Fractional, EST 3.2.2

Pecuniary, EST 3.2.1

Pecuniary credit shelter, EST 3.2.3

Powers

Investments, EST 3.8.2

Real estate, EST 3.8.1

Self-dealing, EST 3.8.3

Tax apportionment, EST 3.3

Conventional

Changes

Codicil, EST 2.5.1

Restatement after revocation, EST 2.5.3

Revocation, EST 2.5.2

Defined, EST 2.1

Formalities, EST 2.4

Intestacy, EST 2.3

Living

Advance directive, SS 6.2

Sample, SS Appendix 1 (*Toolkit CD-ROM*)

Purpose, EST 2.1

Who should make a will, EST 2.2

WORKERS' COMPENSATION

Accidental injury, WORK 3.8

Accident reports, WORK 3.12

Benefits, WORK 3.13

Categories, WORK 3.13.1

Death benefits, WORK 3.13.3

Pre-existing disabilities, WORK 3.13.4

Vocational rehabilitation, WORK 3.13.2

Coverage, WORK 3.1

Compulsory, WORK 3.2

Definitions, WORK 2

Employees, regulations concerning, WORK 3.3

Employers, WORK 3.4

Employment

"Arising out of," WORK 3.9

In the course of, WORK 3.10

Federal regulations, WORK 3.1-3.14

Financing, WORK 3.4

Occupational diseases, WORK 3.11

Occupational safety and health: *see*

OCCUPATIONAL SAFETY AND HEALTH ACT

Purpose, WORK 1.2

Rates, WORK 3.6

Recordkeeping, WORK 3.5

Sole proprietor, PROP 6.6

State information and offices, WORK 5

Addresses, WORK Appendix

Tax consequences, WORK 3.14

Wage base, WORK 3.7

ACCOUNTANT'S BUSINESS MANUAL
Supplement 37, May 2006
Volume 2

FILING INSTRUCTIONS

Remove Old Pages

Insert New Pages

Half-title page	Half-title page
iii-iv (Title and Copyright pages)	iii-iv (Title and Copyright pages)
v to x (Table of Contents)	v to x (Table of Contents)

Social Security

35 to 38

35 to 38

Index

25 to 26

25 to 26

Upon completion, insert this page behind the Filing Instructions tab card in Volume 2.

ACCOUNTANT'S BUSINESS MANUAL
Supplement 36, November 2005
Volume 2

FILING INSTRUCTIONS

Remove Old Pages

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Half-title page	Half-title page
iii-iv (Title and Copyright pages)	iii-iv (Title and Copyright pages)
v to x (Table of Contents)	v to x (Table of Contents)

Social Security

1 to 8	1 to 8
13 to 14	13 to 14
21 to 30	21 to 30
33 to 34.2	33 to 34.2
37 to 38	37 to 38

Human Resources

3 to 4	3 to 4
7 to 8	7 to 8
15 to 16	15 to 16.1

Federal Individual Tax Notes

1 to 72	1 to 79
---------	---------

Federal Corporate Tax Notes

1 to 81	1 to 79
---------	---------

Business and Succession Planning

1 to 2	1 to 2
35 to 37	35 to 37

IRS Practice and Procedure

3 to 4	3 to 4.1
9 to 10	9 to 10
49 to 52	49 to 52.1
63 to 66	63 to 66
75 to 77	75 to 85

Index

1 to 40	1 to 41
---------	---------

Upon completion, insert this page behind the Filing Instructions
tab card in Volume 2.