CASH RENT FARM LEASE

Landlord hereby leases to Tenant the following described real estate under the following terms and conditions, to wit:

1. Landlord:	Sam S. Smith and Mary S. Smith, Husband and Wife		
2. Tenant:	XYZ, LLC, a Nebraska Limited Liability Company		
3. Start of Term:	March 1, 2016	4. End of Term:	February 28, 2019

5. Cash Rent: Total rent for each crop year shall be calculated by multiplying:

the yearly average closing price of corn with a minimum of $4.00 and maximum of $7.50 per bushel on the first marketing day of each month of the prior crop year (January through December) at the Aurora Cooperative, Geneva, Nebraska, location

by

9,500 bushel base [152 acres]

plus

2003 Pivot
454 motor and trailer
[$34,000 total divided by 3 years = $11,333.33 per year]

Date	Actual Price	Price Used
January 2, 2015	$3.63	$4.00
February 2, 2015	$3.42	$4.00
March 2, 2015	$3.59	$4.00
April 1, 2015	$3.52	$4.00
May 1, 2015	$3.44	$4.00
June 1, 2015	$3.37	$4.00
July 1, 2015	$3.98	$4.00
August 3, 2015	$3.41	$4.00
September 1, 2015	$3.33	$4.00
October 1, 2015	$3.54	$4.00
November 2, 2015	$3.54	$4.00

	December 1, 2015		$3.41	$4.00
			Average =	$4.00
	9,500 bushel	x	$4.00/bu average =	**$38,000.00**
			Plus Equipment	**$11,333.33**
			Total Rent Due:	**$49,333.33**
	payable in full on March 1 of each lease year.			
6. Leased Premises Legal Description:	**[legal description]**			

7. **EXTENSION OF TERM**: This Lease shall not extend beyond the term set forth above. Holding over or a continuance of possession of the Leased Premises shall not work as an extension of the lease term.

8. **GOVERNMENT PAYMENTS:** Tenant shall receive all government program income arising from the Leased Premises. Tenant shall not violate conditions of government programs.

9. **OPERATING EXPENSES AND CROPS:** Tenant shall pay all operating expenses and, while not in default, Tenant shall receive all crop raised on the Leased Premises.

10. **IRRIGATION EQUIPMENT:** Landlord shall provide, in good working order, the irrigation well, flow meter, check valve irrigation pump, gearhead, motors and pivot irrigation system Landlord presently owns to the exclusive use of Tenant. The expense of all irrigation fuel, the cost of repairs and maintenance, and the cost of all insurance shall be provided by Tenant without charge. Tenant shall be responsible for all costs arising associated with the pivots, generators, motors and associated trailers on the property. Upon the expiration of the term of this lease, such personal property shall be considered property of the tenant.

Tenant shall maintain the irrigation wells, pumps, flow meter, check valve and gearheads at his expense. In the event of a major breakdown of such equipment Landlord shall take all necessary steps, at Landlord's expense to return the irrigation wells, pumps and gearheads to operating condition as soon as possible. For all purposes of this Lease a major breakdown shall be defined as a repair that costs over $1,000.00 for a single incident. Therefore Tenant pays all maintenance except Landlord pays all expense that are a major expense. Landlord shall not be liable for any loss or damage that may result from any delay in repairing such a major breakdown nor shall the Landlord be liable for any loss or damage that may

CASH RENT FARM LEASE

The Landlord hereby leases to the Tenant the following described real estate under the following terms and conditions, to-wit:

1. Landlord:	**Sam S. Smith** and **Mary S. Smith**, Husband and Wife		
2. Tenant:	**Tom M. Johnson**		
3. Start of Term:	**March 1, 2015**	**4.** End of Term:	**February 27, 2023**
5. Cash Rent:	Cash rent of **$25,000.00** per year, **$12,500.00** payable on March 1 and **$12,500.00** payable on September 1. Each of the parties shall pay one-half of the legal fees arising from the negotiation and drafting of this Lease.		
6. Farm Legal Description:	**[legal description]**		

7. **RENT INDEXING:** Rent for 2016, and 2017 crop years shall remain the same. Thereafter, rent shall be adjusted **up or down** as follows:

a. Data to compute the rent index adjustment shall be taken from the Nebraska Farm Real Estate Market Developments Appendix Table "Historical Average Cash Rental Rates of Nebraska Farmland for Different Types of Land by Agricultural Statistics District" for center pivot irrigated crop land in Southeast Nebraska [http://agecon.unl.edu then tab "Research and Publications," then select "NE Ag Real Estate," then select "Farm RE Report," then select "full report"] Landlord shall annually compute the adjustment **up or down** and notify the Tenant thirty (30) days before the March 1 rent is due.

b. The rent shall be adjusted **up or down** the **first** time for the **2018** crop year rent and will be based on the 2016/2017 crop year rent plus the percentage of change of the *Nebraska Farm Real Estate Market Development* for center pivot irrigated crop land in Southeast Nebraska [published by the University of Nebraska Extension Service on or about June, 2017], from 2016 rent to 2017 rent times the adjusted 2016/2017 rent.

i. For example the 2016/2017 rent is $25,000 and as an example, if the pivot irrigated crop land in SE NE is $300 per acre in 2015; $290 per acre in 2016 and $305 per acre in 2017 then the change is $5 up [$305 - $300] or 1.67% [5/300] increasing the rent by $417.50 to $25,417.50 [$25,000 x 1.67%] for 2018.

c. The rent shall be adjusted **up or down** for the **2019** and future crop years rent based on the prior year rent plus the most recent annual percentage of change of the *Nebraska Farm Real Estate Market Development* for center pivot irrigated crop land in Southeast Nebraska times the prior year rent plus the prior year's rent.

i. For example if the 2018 rent is $25,417.50 as an example, and if the pivot irrigated crop land in SE NE average cash rent is $305 per acre in 2017; and $295 per acre in 2018 then the change is $10 down [$295 - $305] or 3.28% [10/305] decreasing the rent by $833.70 [$25,417.50 x 3.28%] for 2018 crop year rent of $24,583.80 [$25,417.50 - $833.70].

8. **LIME**: Landlord will reimburse Tenant for one-fourth (1/4) of the cost of lime applied to the Leased Premises not to exceed the sum of $1,000.00. Tenant shall pay all labor and equipment charges.

9. **GOVERNMENT PAYMENTS:** Tenant shall receive all government program income arising from the Leased Premises. Tenant shall not violate conditions of government programs.

10. **OPERATING EXPENSES AND CROPS:** Tenant shall pay all operating expenses and, while not in default, Tenant shall receive all crop raised on the Leased Premises.

11. **CONDITIONS:** By taking possession of the Leased Premises Tenant acknowledges that Tenant accepts the condition of the premises. If Tenant does not accept the condition, Tenant is to give Landlord notice of the problem before the start of the initial term of this Lease. At Tenant's own expense, Tenant shall care for and maintain the premises in a reasonably good and serviceable condition. Tenant may not at any time, make additions, alterations, improvements, or repairs on the premises without the prior approval of the Landlord. All such repairs and improvements shall remain with the Leased Premises and shall be owned by Landlord at the end of the term of this Lease.

12. **IRRIGATION EQUIPMENT:** Tenant shall provide his own **electric irrigation motor and pivot irrigation system**.

a. Landlord shall provide, in good working order, the irrigation **well and pump**, Landlord presently owns to the exclusive use of Tenant. Landlord shall install, at his expense, the underground wiring for Tenant's electric motor.

b. The expense of all irrigation power and the cost of maintaining the irrigation well and pump in good and proper operating condition shall be provided by Tenant without charge. Tenant shall be expressly liable for any loss arising from Tenant's misuse of the irrigation well and pump or negligence in care and maintenance of the equipment.

CROP SHARE FARM LEASE

Landlord hereby leases to Tenant the following described real estate under the following terms and conditions, to wit:

1. Landlord:	Mark D. Smith and Mary R. Smith as Co-Trustees of the **Mark D. Smith Trust** dated April 25, 2005, and Mary R. Smith and Mark D. Smith as Co-Trustees of the **Mary R. Smith Trust** dated April 25, 2005, and Mark D. Smith and Mary R. Smith, Husband and Wife		
2. Landlord Address:	1603 Jensen Street, PO Box 174, Henderson, NE 68371		
3. Tenant:	**Mason L. Smith,** individually, and any successors, assigns, devisees, or heirs as provided in writing to Landlord		
4. Tenant Address:	1598 ZZ Road, Henderson, NE 68371		
5. Start of Term:	March 1, 2013	6. End of Term:	February 28, 2039
7. Extension of Term:	This Lease shall not extend beyond the term set forth above any holding over or a continuance of possession of the Leased Premises shall not work an extension of the lease term.		
8. Crop Share Rental:	Landlord shall receive Forty percent (40%) of the harvested crop.		
9. Government: payments	Landlord and Tenant shall share in proportion to their share of the harvested crop of all government program income arising from the leased premises. Tenant shall not violate conditions of government programs.		

10. Leased Premises Legal Description:	The Northwest Quarter (NW¼) of Section Ten (10), Township One (1) North, Range Fourteen (14) West of the 6th P.M., York County, Nebraska The South Half of the Northeast Quarter (S½ NE¼) of Section Ten (10), Township One (1) North, Range Fourteen (14) West of the 6th P.M., York County, Nebraska

11. **CROP SHARE RENTAL.** Landlord's crop share rental of all crops raised is listed above. The share of any crop payable to Landlord as rent shall, before delivery to Landlord, be harvested, combined and shelled by Tenant, at Tenant's own costs and expense in accordance with the generally accepted known practices in the farming industry in the county where the Leased Premises is located. If applicable, Landlord's crop share shall immediately after harvest be delivered without charge within 70 miles of the Leased Premises according to Landlord's direction by Tenant as his trucks are available for such delivery; any costs of transport of the crop share by a third party at the sole discretion of the Tenant shall be borne in proportion to their share of the harvested crop. Landlord's share shall be divided by weight. Pending delivery to a commercial grain elevator, Tenant may store and commingle Landlord's crop share in on-farm grain storage with reasonable charge to Landlord. Risk of loss or damage to Landlord's crop share located in on-farm storage shall remain Landlord's risk, except Tenant shall be responsible and pay for his negligence or intentional acts that cause loss of damage to Landlord.

12. **OPERATIONAL EXPENSES.** Tenant is responsible for daily maintenance of all irrigation equipment; and, Tenant will supply all the equipment for planting, cultivating and harvesting of crop. **Tenant shall furnish all labor for the operation of the farm**. Tenant shall be responsible for the costs of applying fertilizer, insecticides and herbicides. The purchase costs of all seed, irrigation fuel, fertilizer, insecticides, herbicides and crop inspection and consulting shall be borne by the parties in the same proportion as their respective crop shares. The parties agree to pay for fuel and/or utility costs to operate the irrigation equipment in the same proportion as their respective crop shares.

In the event of a major breakdown of the irrigation well, pump, gearhead and/or pivot irrigation system not caused by the misuse, lack of maintenance, or neglect of Tenant, and Landlord owns any interest in such irrigation equipment, Landlord shall take all necessary steps, at Landlord's proportional expense in the relation to the ownership of such item to return the equipment to operating condition as soon as possible. For all purposes of this Lease a major breakdown shall be defined as a repair that costs over $500.00 for a single incident. Landlord shall not be liable for any loss or damage that may result from any delay in repairing such a major breakdown nor shall Landlord be liable for any loss or damage that may result from any destruction or defective condition of either land or equipment thereon or failure of the water supply.

FARM LEASE

Landlord hereby leases to Tenant the following described real estate under the following terms and conditions, to wit:

1. Landlord:	Richard V. Johnson and Sarah E. Johnson, Co-Trustees of the Sarah E. Johnson First Trust dated January 10, 1997		
2. Tenant:	Mike, LLC, a Nebraska Limited Liability Company		
3. Start of Term:	March 1, 2011	4. End of Term:	March 1, 2016
5. Cash Rent:	Total rent shall be calculated by multiplying: the average price of corn on the first trading day of each month at the Aurora Cooperative Sedan location from March through December of each lease year by thirty percent (30%) of the total average bushel yield for each type of crop land on the leased premises as calculated by Tenant's GPS records as determined during harvest of the crop on the leased premises for the lease year in which payments are being made. payable semi-annually, during each lease term: First Payment Due: November 15 Last Payment Due: December 15		
6. Leased Premises Legal Description:	The North Three-Fourths of the Northeast Quarter (NE ¼) of Section Ten (10), Township Two (2), Range Nine (9) West of the 6th P.M., Nuckolls County, Nebraska except the East Fifteen (15) acres thereof. Such parcel constitutes 95.92 acres of farmable crop land, of which the average bushel yield for each type of crop land will be computed using 79.10 acres of irrigated, 11.97 acres of dryland, and 4.85 acres of grass banks or waterways.		

7. **EXTENSION OF TERM**: The term of the Lease shall be extended automatically by one (1) year terms unless either party gives the other written notice of their intention to terminate the Lease on or before thirty (30) days prior to expiration of the lease. Rent shall be due on November 15 and December 15 of each annual Lease term.

8. **GOVERNMENT PAYMENTS:** Tenant shall receive all government program income arising from the Leased Premises. Tenant shall not violate conditions of government programs.

CASH RENT FARM LEASE

The Landlord hereby leases to the Tenant the following described real estate under the following terms and conditions, to wit:

1. Landlord:	XYZ, Inc., a Nebraska Corporation		
2. Tenant:	ABC Land, a Nebraska Partnership		
3. Start of Term:	March 1, 2012	4. End of Term:	February 28, 2017
5. Farm Legal Description:	The Southeast Quarter (SE¼) of Section Fourteen (14) Township Six (6) North, Range Ten (10) West of the 6th P.M. in Fillmore County, Nebraska, excluding the home site {Dad's House} The Southeast Quarter (SE¼) of Section Six (6), Township Eight (8) North, Range Ten (10) West of the 6th P.M. in Fillmore County, Nebraska {Marsh} The East Half of the Southwest Quarter (E½ SW¼) of Section Seven (7), Township Four (4) North, Range Ten (10) West of the 6th P.M., Fillmore County, Nebraska {Smith}.		

6. **CASH RENT:** The cash rent will be $10.00 per acre plus the prior year average rent per acre for dryland cropland or for center pivot irrigated cropland, as reported in Table 6, Southeast Sector of Nebraska, in the Nebraska Farm Real Estate Market Developments, published by the Extension Division of the Institute of Agriculture and Natural Resources at the University of Nebraska, Lincoln. The rent amount will be adjusted every year.

For the 2012 crop year, the reported 2011 average dryland rent rate was $142.00 per acre and for center pivot irrigated land the rental rate was $257.00 per acre.

The acres of dryland and pivot irrigated land used to calculate the cash rental will be those as registered with the Farm Service Agency which are currently 37.75 acres of dryland and 331.69 acres of center pivot irrigated cropland. These figures may vary slightly during the length of this lease agreement to match any change in acres reported and registered with the Farm Service Agency. Such change in acres shall be attached to this lease.

2012 Crop Year Dryland Rent:		
($142.00+$10.00) per Acre	**x 37.75 Acres =**	**$5,738.00**
2012 Crop Year Center Pivot Irrigated Land Rent:		
($257.00+$10.00) per Acre	**x 331.69 Acres =**	**$88,561.23**
	Total:	**$94,299.23**

Cash rent shall be payable semi-annually, one-half on March 1, and one-half on September 1, of each year of the Lease term.

7. **EXTENSION OF TERM:** The five (5) year term of the Lease shall be extended automatically by one (1) year terms on March 1 of each year, unless either party gives the other written notice of their intention to terminate the Lease. After notice of termination of the Lease is given, the Lease term shall no longer be automatically extended. By mutual agreement of both parties this Lease may be sooner terminated.

8. **GOVERNMENT PAYMENTS:** Tenant shall receive all government program income arising from the leased premises. Tenant shall not violate conditions of government programs.

9. **POSSESSION**: Tenant accepts the condition of the leased property by signing this lease. Tenant now has possession. Tenant has previously farmed the leased property and has had an adequate opportunity to inspect the premises.

10. **OPERATING EXPENSES AND CROPS:** Tenant shall pay all operating expenses and, while not in default, Tenant shall receive all crop raised on the leased premises.

11. **IRRIGATION EQUIPMENT:** Landlord owns the irrigation well. Tenant owns the irrigation pump, gearhead, motor, fuel tank, pivot irrigation system and accessories. The expense of all irrigation fuel and the cost of maintaining the equipment in good and proper operating condition shall be provided by Tenant without charge. Tenant shall be expressly liable for any loss arising from Tenant's misuse of the irrigation equipment or negligence in care and maintenance of the irrigation well. Tenant shall be responsible at Tenant's cost to repair and maintain Tenant's equipment.

    Landlord shall not be liable for any loss or damage that may result from any delay in repairing such a major breakdown nor shall the Landlord be liable for any loss or damage that may result from any destruction or defective condition of either land or equipment thereon or failure of the water supply.

CASH RENT LEASE

Landlord hereby leases to Tenant the following described real estate under the following terms and conditions, to wit:

1. Landlord:	James S. Anderson and Angela M. Anderson, Husband and Wife		
2. Tenant:	ZYX, Inc., a Nebraska Corporation		
3. Start of Term:	May 1, 2016	4. End of Term:	April 30, 2036
5. Rent:	Cash rent shall be $5.00 per year due and payable on May 1 of each year. Upon the signing of this lease, Landlord acknowledges receipt of $100.00 as payment in full for the rent due for the initial term of the lease.		
6. Extension of Term and Notice of Termination:	The term of the Lease shall be extended automatically by one (1) year terms unless either party gives the other written notice of their intention to terminate the Lease on or before five (5) years prior to expiration of the lease.		
7. Leased Premises Legal Description:	**That part of the North Half of the Southwest Quarter (N½ SW¼) described 1861.42 feet east of the Southwest corner of the Southwest Quarter, such point being the northwest corner of Lot Six (6), CJ2 Subdivision, thence north on the eastern boundary of Lot Six (6), CJ2 Subdivision 385 feet to the point of beginning, thence east along a line parallel to the South line of said quarter 90 feet, thence North on a line parallel to the East line of the eastern boundary of Lot Six (6), CJ2 Subdivision 175 feet, thence West on a line parallel to the South line of said quarter 90 feet, thence South along the eastern boundary of Lot 6, approximately 175 feet to the point of beginning all in Section Twenty (20), Township Three (3) North, Range Ten (10) West of the 6th P.M., Fillmore County, Nebraska**		

8. **END OF TERM:** At the end of the term of this Lease, Tenant shall return to Landlord possession of the Leased Premises.

9. **WAIVER:** The failure or delay of Landlord to exercise any right or privilege under this Lease shall not be held a waiver of any of the terms, covenants, or conditions of this Lease. Any act of Landlord waiving or which may be held to have waived, any specific default of Tenant shall not be construed or held to be a waiver of any future default.

Modern Farm Leases in Nebraska

Frank C. Heinsich &
Christin P. Lovegrove

Heinisch Law Office
Geneva, Nebraska

NSBA Presentation October 21, 2011

Types of Leases

Cash Rent
- Typically assumed to be a straight cash payment
- However, is actually any lease that has a
  - Guaranteed dollar amount, OR
  - Fixed quantity of the crop, OR
  - Guaranteed amount (dollar or crop) & share of the crop proceeds

Crop Share
- Rent based on
  - Amount of crop produced, AND
  - The proceeds derived from the crop

Written or Oral

- Encourage your clients to get all leases in writing. Especially between family members or family corporations.
- Kennedy v. Kennedy (Exhibit #1)
  - "Of course, these contrasting positions demonstrate the shortcomings of oral agreements in that everything works fine—until it does not—at which point a trial court is often called upon to resolve what has often colloquially been referred to as a 'swearing contest.'" page 6.

Termination of the Lease

If the lease is silent as to expiration of the term of the lease, notice of termination must be given by September 1.

- Case law discussion, see Kennedy v. Kennedy (exhibit 1), page 7.

- Automatic Extension
  - "The term of the Lease shall be extended automatically by one (1) year terms unless either party gives the other written notice of their intention to terminate the Lease on or before thirty (30) days prior to expiration of the lease."

- Definitive Expiration
  - "This Lease shall not extend beyond the term set forth above. Holding over or a continuance of possession of the Leased Premises shall not work as an extension of the lease term."

Improvement Language

- "Tenant shall have the exclusive use of all buildings and improvements on the Leased Premises, except Tenant shall receive possession of the grain storage facilities, if any, on or before September 1, of the first year of this Lease. By taking possession of the Leased Premises Tenant acknowledges that Tenant accepts the condition of the premises. If Tenant does not accept the condition, Tenant is to give Landlord notice of the problem before the start of the initial term of this Lease. At Tenant's own expense, Tenant shall care for and maintain the premises in a reasonably good and serviceable condition. Tenant may at any time, make additions, alterations, improvements, or repairs on the premises without the prior approval of Landlord, provided, however, Tenant must seek the consent of Landlord to remove or demolish any of the buildings or improvements located on the Leased Premises. All such repairs and improvements shall remain with the Leased Premises and shall be owned by Landlord at the end of the term of this Lease."
- "After the final year of this Lease, Tenant may continue to use the grain storage facilities under the terms of this Lease without additional charges until the September 1 following the end of the lease term."
- "If there are any buildings located on the Leased Premises which are destroyed by fire or other hazard, Landlord shall have no obligation of replacing the building or buildings destroyed."

Irrigation Equipment Language

- First: Who Owns the Equipment???
- "Landlord shall provide, in good working order, the irrigation pump, gearhead, and pivot irrigation system Landlord presently owns to the exclusive use of Tenant. The expense of all irrigation fuel and the cost of maintaining the equipment in good and proper operating condition shall be provided by Tenant without charge. Tenant shall be expressly liable for any loss arising from Tenant's misuse of the irrigation equipment or negligence in care and maintenance of the equipment."
- "In the event of a major breakdown of irrigation equipment not caused by the misuse, lack of maintenance, or neglect of Tenant, Landlord shall take all necessary steps, at Landlord's expense to return the equipment to operating condition as soon as possible. For all purposes of this Lease a major breakdown shall be defined as a repair that costs over $500.00 for a single incident. Landlord shall not be liable for any loss or damage that may result from any delay in repairing such a major breakdown nor shall Landlord be liable for any loss or damage that may result from any destruction or defective condition of either land or equipment thereon or failure of the water supply."

Miscellaneous Provisions

- **SECURITY AGREEMENT.**
"Landlord shall have first lien on all planted and unplanted crops on the Leased Premises to secure the payment of the rent as state above and Tenant further agrees that this lease shall constitute a financing statement and security agreement in favor of Landlord on all agricultural inputs on the Leased Premises and also on all crops planted or now growing or standing and shall extend to and shall cover such crops after they have matured, whether the same are in the field, in cribs, or bins, in elevators, in the stack, barns, or any other place on said Leased Premises as security for the payment of the rent.

  In addition, to secure the performance of the terms and conditions of this lease, Tenant shall give to Landlord, upon demand, a separate financing statement and security agreement upon all or any part of the crops growing or gathered on said land during the term of this lease. If Tenant shall refuse or neglect to give such instruments on demand, or if Tenant shall give or attempt to give any other person any lien upon said crops, or any portion thereof, then at Landlord's option, this lease shall terminate and Landlord may at once recover possession of the Leased Premises. The security interest created herein shall attach to the proceeds of the sale of crops by Tenant."

Miscellaneous Provisions

- **GOVERNMENT PROGRAMS.**
Tenant shall comply with all government programs to which the farm may be subject during the term of this lease. Upon modification of any such program, Tenant shall plan and perform according to such modification so as not to jeopardize the rights of Landlord and the farm to further participation in government programs. The farm shall not be combined with any other tract operated by Tenant for government program purposes without the prior written consent of Landlord. Any price support payments or diversion payments paid shall be shared by Landlord and Tenant in the same proportion as the above stated crop shares. Tenant further agrees to maintain the current corn base measurement, if any, upon the above described real Leased Premises, and such corn base measurement shall not be reduced without the prior written consent of Landlord.

- **HUNTING RIGHTS.**
Landlord reserves all hunting rights and privileges. Tenant may not hunt on or permit others to hunt on the Leased Premises without the written permission of Landlord. Landlord or any person who has obtained written permission to hunt from Landlord shall have access to the Leased Premises for hunting purposes.

- **LIABILITY INSURANCE.** Tenant shall procure and maintain at his own expense, casualty and liability insurance in amounts presently carried by Tenant to protect both Landlord and Tenant against claims for damages, costs or expenses on account of injury to any person or persons or any Leased Premises belonging to any person or persons by any casualty, accident or other happening on or about the leased premises during the term of this Lease. Tenant shall hold Landlord harmless from any personal injury or Leased Premises damage incurred as a result of Tenant's use of the above premises. Tenant shall provide Landlord a copy of such insurance policy upon Landlord's written request for same.

Situation #1

Your landlord has never been active in the farming business, and has no idea what is a fair rental rate. Landlord is leery about listening to their neighbors – he has heard everything from $150/acre to $300/acre.

Solution #1

- Nebraska Farm Real Estate Market Highlights
- Published yearly by UNL Dept. of Ag Econ
  - See Exhibit #2
  - www.agecon.unl.edu/realestate.html

Situation #2

Landlord wants to take advantage of rising rental rates on farmland.

On the other hand, Tenant needs to lock in a multi-year lease in order to effectively plan for their operation and apply longer-term fertilizers.

Solution #2

Rent Indexing

- Rent for 2012 and 2013 crop years shall remain the same. Rent for 2014, 2015, and 2016 shall be adjusted as follows:
  - Data to compute the rent index adjustment shall be taken from the Nebraska Farm Real Estate Market Developments Appendix Table "Historical Average Cash Rental rates of Nebraska Farmland for Different Types of Land by Agricultural Statistics District" for center pivot irrigated crop land in Southeast Nebraska. Landlord shall compute the adjustment and notify Tenant thirty days before the March 1 rent is due.
  - The rent adjustment for 2014 will be based on the change from 2012 to 2013 in accordance with the *Nebraska Farm Real Estate Market Development* published by the University of Nebraska Extension Service published on or about June, 2013.
  - The rent shall be adjusted a second time for 2015 and will be based on the adjusted 2014 rent plus the change from 2013 to 2014 times the adjusted 2014 rent in accordance with the *Nebraska Farm Real Estate Market Development* published by the University of Nebraska Extension Service published on or about June, 2014.
  - For example, the reported rental rate for Center Pivot Irrigated Cropland Southeast District in 2011 is $257.00 and for 2010 is $214.00 which would result in a 20.1% adjustment [($257 - $214)/$214] according to the *Nebraska Farm Real Estate Market Development* published by the University of Nebraska Extension Service published on or about June, 2011. In this example the $30,000 rent would increase by $6,030 [$30,000 x 20.1%] to $36,030.

Situation #3

Landlord has grain storage capability and enjoys marketing his grain. He wants to take advantage of the market.

Solution #3

Crop Share

- 30%, no expenses split
- Other splits with shares of income & expenses

Consideration should be given to:

- Tenant's responsibility for trucking grain – Landlord will need to contract with tenant
- Does Landlord bear a cost for transport of grain?
- Should landlord procure crop insurance?
- What about condition of stored grain? Risk of loss?

Situation #4

Landlord wants to take advantage of the higher yields and prices in the current agriculture sector. However, Landlord is entirely dependent on the cash flow and is very risk averse.

Solution #4

- Agree on a guaranteed minimum:
  - Landlord shall receive 30% of gross crop value as of harvest date based on [insert local elevator cash price] with a guaranteed minimum yield of 175 bushels of corn per acre.

Example:

- Tenant harvests 160 acre field averaging 215 bushels/acre on Oct. 13, 2011, where ending cash price at Aurora Co-op, Geneva Location was $6.06/bushel.
- The guaranteed payment is $50,904. [175 x 160 x $6.06 x 30%]
- However, the total rent for that field is $62,539.20. [215 x 160 x $6.06 x 30%]

Solution #4 Considerations

Is this crop share or cash rent?

- Considered cash rent by FSA due to the guaranteed minimum
- See Exhibit #3 – Handbook of Procedural References used by FSA offices and boards written to guidelines of the federal regulations.

Tenant should be able to provide landlord with written report of yield from third party system (precision agriculture systems)

Situation #5

Landlord wants to take advantage of higher yields and market variations. He is not risk averse. Landlord is aware that lowest prices for crops are during harvest; however, Landlord has no ability to truck, store or market the grain. Further, Landlord is prepared to procure crop insurance.

Solution #5

- Crop share lease based on a percentage of yield and an average of local cash prices.
- Example:
  - Total rent shall be calculated by multiplying:
    - the average price of the commodity grown on the parcel in the current lease year on the first trading day of each month at the [insert local elevator] location from March through December of each lease year

      by
    - thirty percent (30%) of the total average bushel yield for each type of crop land on the leased premises as calculated by Tenant's GPS records as determined during harvest of the crop on the leased premises for the lease year in which payments are being made.

Situation #6

Father, 70, is retired from farming and is working on his estate plan. Father is leaving land to his two children: Son and Daughter. He wants to make sure that Son, 45, has ability to farm the land until Son is 65. Father is concerned that non-farming Daughter will charge extremely high rental rates or rent to a third party.

Solution #6

- Record a written lease against the land
- Make sure to include all relevant terms of the lease
- Key source for information: Agricultural Law Manual by Neal Harl

More Options for Planning

OPTION TO PURCHASE:

Landlord hereby grants to Tenant the exclusive option to purchase Leased Premises for the consideration and upon the terms and conditions hereinafter set forth:

- Tenant may elect to purchase all or any portion of the Leased Premises on or before the expiration date of this Lease the last day of February 2012, provided however, Tenant's purchase is limited to not less than approximately 40 acre units or multiples thereof. This option may be exercised at one or more times during the lease period.
- The election of Tenant to exercise the option shall be evidence by a written notice directed to Landlord, plus a down payment of 10% of the purchase price.
- The purchase price to be paid by Tenant to Landlord for the purchase of the Leased Premises shall be the sum of Six Thousand Dollars ($6,000.00) per acre.
- Up to one-half of the purchase price shall be reduced by the accumulated cash rent paid. ($60 per acre). The credit for cash rent paid shall accumulate from year to year, but may not be used more than once. The credit for the cash rent may be applied against any parcel, such credit application is not limited to the purchase of the parcel for which the rent is paid.
- Upon Landlord's receipt of Tenant's notice to exercise the option, Landlord shall deliver within twenty days (20) to Tenant, an abstract of title or tile insurance duly certified to the date of the option election.
- It is understood that the documentary revenue stamps and abstracting expense or title insurance shall be paid by Landlord.
- Closing shall be within sixty (60)) days after notice of election of the option is delivered to Landlord.
- Upon payment in full of the purchase price, less the credit for cash rental, marketable title to the Leased Premises shall be conveyed by Landlord to Tenant by Warranty Deed free and clear of any mortgage or other encumbrance, lien or charge of any kind whatsoever.
- The right to exercise this option is conditioned upon the faithful performance by Tenant of all the covenants, conditions and agreements required to be performed as Tenant under this Lease including the payment by Tenant of all rent and charges as required in this Lease to the date of the closing of the purchase of the Leased Premises by Tenant.
- This option shall be a covenant and running with the Leased Premises, and no conveyance, transfer or encumbrance of such shall defeat or adversely affect this option.
- If Tenant does not exercise this option as provided herein, this option shall be null and void and have no further legal effect.

More Options for Planning

RIGHT OF FIRST REFUSAL:

Landlord hereby grants Tenant a first right of refusal to buy the real estate that shall extend for as long as Tenant is actively farming and/or managing a farming operation. The purchase price for the real estate shall be 95% of its determined value. The value will be determined as follows.

- The value can always be agreed to by the Landlord and Tenant.
- However, if the parties do not agree to the value, the parties are to agree upon an appraiser that is licensed to appraise real estate in Nebraska and split the fees associated with any such. If the parties cannot agree on a licensed real estate appraiser, the Landlord will retain its own licensed real estate appraiser licensed to appraise real estate in Nebraska and the Tenant will retain its own licensed real estate appraiser licensed to appraise real estate in Nebraska to conduct an appraisal of the aforementioned real estate.
- If the parties have agreed to an appraiser as contemplated in subpart __ and the appraised value is not acceptable, the Landlord or Tenant that does not favor the appraised value shall retain its own licensed real estate appraiser. If there is more than one Landlord, all of the Landlord must agree to a single licensed real estate appraiser. If there is more than one Tenant, all of the Tenants must agree to a single licensed real estate appraiser.
- If the difference between the Landlord' appraisal and the Tenant's appraisal is equal to or less than 20% of the value of the lesser-appraised amount, the parties agree the two appraised values shall be averaged and will be the agreed value for purposes of determining the land's purchase price.
- If the difference between the Tenant's appraisal and the Landlord' appraisal is not equal to or less than 20% of the value of the lesser-appraised amount, the parties respective appraisers will choose a third independent licensed real estate appraiser who will conduct a third appraisal without any foreknowledge of the results of the prior appraisals. Thereafter, the two closest of the three appraised values shall be averaged and will be the agreed value for purposes of determining the land's purchase price.
- Tenant may choose not to purchase all or any portion of the property.
- **NOTICE**. Landlord must provide notice to Tenant of Landlord's intention to sell the subject real estate in person or by certified mail to Tenant's last know address. Within thirty (30) days or less after Landlord provides notice of Landlord's intention to sell, Tenant must give Landlord notice of Tenant's intention to exercise the right of first refusal. Tenant will deliver to Landlord payment for the purchase price as described herein within sixty (60) days after notifying Landlord of Tenant's intention to exercise the right of first refusal. Provided Tenant may assign this Right of First Refusal to an entity controlled and owned by Tenant and Tenant's spouse and issue.
- **ASSIGNMENT**. Tenant shall not encumber, assign, or otherwise transfer this right of first refusal, or any right or interest to the property without Landlord' approval, except Tenant may assign his interest in this First Right of Refusal to an entity which he owns and/or controls provided such entity agrees to the terms of this agreement. Any encumbrances, assignment, or transfer without the prior written consent of Landlord, whether it be voluntary or involuntary, by operation of law or otherwise, is void, and shall at Landlord' option, terminate this right of first refusal.
- **CONSIDERATION**. Tenant will pay Landlord a total of $50.00 as consideration for the right of first refusal. By signing hereunder Landlord acknowledges receipt of the consideration and agrees that it is adequate.

Contact Information

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* * * *

Issue Contents

Agricultural Law Digest

Volume 26, No. 16 August 14, 2015 ISSN 1051-2780

Leasing to a Family Entity: Watch the Level of Rent Closely

-by Neil E. Harl*

The pronounced move to multiple entities in farm operations in recent years (typically one entity owning the land and the other entity carrying on the farming operation but can involve additional entities) has come under the scrutiny of the Internal Revenue Service with challenges that self-employment tax[1] is due on the rents paid under the I.R.S. interpretation of the statute.[2] Recent audits (and Tax Court filings) indicate that IRS has not given up in the long-running battle. A case decided in 2000 by the Eighth Circuit Court of Appeals[3] was hailed as a win for taxpayers but IRS proceeded to issue a non-acquiescence to that decision in 2003[4] which meant that taxpayers in the Eighth Circuit Court of Appeals area had a modicum of protection but taxpayers in the other Court of Appeal areas were placed on notice that IRS was not giving up the fight to establish its view that self-employment tax would be due on rents paid if the combined effort as lessor of the land and as .partner in a partnership, employee of a corporation or member of an LLC or LLP reached the level of material participation required by the statute.[5]

The IRS position

The position of the Internal Revenue Service is based on the passage in I.R.C. § 1402[6] that excludes some rentals from self-employment income tax but states that the exclusions do not apply to ". . . any income derived under an arrangement, between the owner or tenant and another individual, which provides that such other individual shall produce agricultural or horticultural commodities . . .on such land , and that there shall be material participation by the owner or tenant . . . ."[7] The key is the meaning of "under an arrangement." IRS takes the position that it means anything an individual does whether as lessor of the land or as an active member of the operating entity or both. Obviously, a member of the operating entity who is working full time in that entity would be subject to self-employment tax on the rentals paid even if there was zero involvement in the capacity of owner. That interpretation runs counter to what was considered settled law for several decades.

The Eighth Circuit Court of Appeals decision

The decision in 2000 by the Eighth Circuit Court of Appeals,[8] focused on the "nexus" between the lease and the farming operation and stated that "the mere existence of an arrangement requiring and resulting in material participation . . . does not automatically transform rents received. . . " into self-employment income. The Court pointed out that

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Agricultural Law Digest is published by the Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 (ph 360-200-5666), bimonthly except June and December. Annual subscription $90 by e-mail. http://www.agrilawpress.com Printed on recycled paper.

pointed out that rents consistent with market rates "very strongly suggest" that the rental arrangement should stand on its own as an independent transaction without self-employment tax being due. That has been the guiding authority in the Eighth Circuit since that decision was announced --fair market rentals should not be subject to self-employment tax unless there is material participation under the lease.

Under that approach, only excessive rents (above prevailing market rental rates) should be subject to self-employment tax. Arguably, for excessive rentals only the excess should be subject to SE tax inasmuch as a lessor is always entitled to receive a reasonable rental on the land involved, free of SE tax, unless there is material participation. The cases subsequent to the Eighth Circuit case have imposed SE tax on the entire rental amount where the rentals exceeded a reasonable rental.[9]

As noted, IRS in October of 2003 entered a non-acquiescence in the Eighth Circuit Court decision[10] which served notice that, while the Eighth Circuit decision was good authority in that circuit court area, it was not viewed as authority elsewhere.

IRS appears to be proceeding to litigate, if necessary, to establish its position as the law of the land by winning a case in another court of appeals area followed by an appeal to the United States Supreme Court. A case in Upstate New York, which would have been appealable to the Second Circuit Court, was settled out of court. Another case is developing in a situation in the Seventh Circuit Court area (Illinois, Indiana and Wisconsin) with a trial set for later this year.

So what's our advice?

Follow the lead of the Eighth Circuit decision and be prepared to prove that the rental paid is a reasonable rental. Also, if the situation presents itself, be prepared to argue that, even for rentals failing the "fair market rental" test, only the excess above what would have been a reasonable fair market rental should be subject to self-employment tax. Litigating to a court of appeals level is costly with the burden of resisting the IRS position falling unevenly on those selected to test the IRS position. Strive to develop the best possible defense against an IRS challenge.

ENDNOTES

[1] I.R.C. § 1402(a).

[2] I.R.C. § 1402. See. e.g., Mizell v. Comm'r, T.C. Memo. 1995-571; McNamara v. Comm'r, 236 F.3d 410 (8th Cir. 2000), *rev'g*, T.C.Memo. 1999-333, *non-acq.*, I.R.B. 2004-42. See generally 2 Harl, *Farm Income Tax Manual* § 8.05[5] (2015 Ed.); 5 Harl *Agricultural Law* § 37.03[a][i] (2015); Harl, *Agricultural Law Manual* § 4.06[3] (2015). Seee also Harl, "Renting Land to a Family Partnership, Corporation or LLC," 7 *Agric. L. Dig.* 49 (1996); Harl, "Renting Land to a Family Entity," 7 *Agric. L. Dig.* 157 (1996); Harl, "More on Mizell," 12 *Agric. L. Dig.* 9 (2001); Harl, "The Latest on Mizell," 13 *Agric. L. Dig.* 137 (2002).

[3] McNamara v. Comm'r, 236 F. 3d 410 (8th Cir. 2000).

[4] AOD CC-2003-3, October 20, 2003, I.R.B. 2003-42.

[5] I.R.C. § 1402.

[6] I.R.C. § 1402(a)(1) (". . . under an arrangement. . . .").

[7] I.R.C. § 1402(a)(1).

[8] McNamara v. Comm'r, 236 F.3d 410 (8th Cir. 2000).

[9] Solvie v. Comm'r, T.C.Memo. 2004-55 (rental on hog barn (calculated at $21 per hog per rotation) was above a fair market rental and entirely subject to SE tax).

[10] AOD CC-2003-3, Oct. 20, 2003, I.R.B. 2003-42.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

NO ITEMS.

FEDERAL FARM PROGRAMS

CONSERVATION RESERVE PROGRAM. The CCC and FSA have issued interim regulations which amend the Conservation Reserve Program (CRP) regulations to implement provisions of the Agricultural Act of 2014 (the 2014 Farm Bill). The new rule specifies eligibility requirements for enrollment of grassland in CRP and adds references to veteran farmers and ranchers to the provisions for Transition Incentives Program contracts, among other changes. The provisions in this rule for eligible land primarily apply to new CRP offers and contracts. For existing contracts, this rule provides additional voluntary options for permissive uses, early terminations, conservation and land improvements, and incentive payments for tree thinning. **80 Fed. Reg. 41987 (July 16, 2015).**

ORGANIC FOOD. The AMS has issued a proposed rule addressing recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board (NOSB) following their October 2014 meeting. These recommendations pertain to the 2015 Sunset Review of substances on the USDA's National List of Allowed and Prohibited Substances (National List). Consistent with the recommendations from the NOSB, the proposed rule would remove two non-organic agricultural substances from the National List for use in organic handling, fortified cooking wines--marsala wine and sherry wine. The proposed rule would also remove two listings for synthetic substances allowed for use in organic crop production on the National List, streptomycin and tetracycline, as their use exemptions expired on October 21, 2014. **80 Fed. Reg. 45449 (July 30, 2015).**

OPTION AGREEMENT

In consideration of the mutual covenants and agreements herein contained, in which time is of the essence in the performance of all obligations hereunder and time of payment shall be an essential part of this Agreement, and other good and valuable consideration in hand paid by each party, as more fully set forth below, the receipt and sufficiency of which is hereby acknowledged by each Party, it is hereby agreed as follows:

1.	Seller:	**Jane Doe,** remainderman Address, City, State, Zip Code		
2.	Buyer:	**James Street** Address, City, State, Zip Code		
3.	Option Price:	$3,000.00 and other significant consideration paid contemporaneously with the execution of this option agreement		
4.	Purchase Price	$300,000.00	5. Down Payment	$10,000.00 paid to Seller concurrently with notice of election as defined below
6.	Closing Balance	$290,000.00	7. Option Term:	September _____, 2012, to the earlier of 6 months after the date of death of Mary Kate or December 31, 2032 or as explained below
8.	Closing Date:	Within 60 days of notice of election at: Law Office, PC LLO Address, City, State, Zip Code		
9.	"Property" Legal Description:			

10. **EXCLUSIVE OPTION:** Seller hereby grants to the Buyer the exclusive right and option ("option") to be exercised on or before the end of the option term to purchase the above described real estate together with all buildings and improvements situated thereon, and together also with all hereditaments and appurtenances there unto belonging or in any way appertaining (hereinafter collectively called the "real property").

11. **OPTION PAYMENT:** The Sellers hereby acknowledge the receipt of the sum of Three Thousand Dollars ($3,000.00) and other good and valuable consideration paid by Buyer to continue the option until the end of the option term. The option payment is not part of the purchase price and shall not be refunded if the Option is not exercised.

12. **GOOD FUNDS:** Payment shall be made in "good funds" as required by Nebraska law, *Neb. Rev. Stat.* Section 76-2,122. "Good funds" are defined as cash, wired funds or cashier's check. See *Neb. Rev. Stat.* Section 76-2,121 for additional definitions of "good funds". Payments under $500.00 need not be paid in "good funds". All good funds must be payable to and deposited in the Law Office, PC LLO Escrow Account.

13. **PURCHASE PRICE:** If the option is exercised, the purchase price for the optioned property and payment thereof shall be as follows:

13.1 Buyer shall pay in good funds the sum of Ten Thousand Dollars ($10,000.00) concurrently with Buyer's notice of election (defined below); and

13.2 Buyer shall pay in good funds the sum of Two Hundred Ninety Thousand Dollars ($290,000.00) at the time of closing.

14. **EXERCISE OF OPTION:** The option shall be deemed fully exercised if written notice of election of purchase ("notice of election") is given by the Buyer to the Seller, along with good funds in the amount of Ten Thousand Dollars ($10,000.00) as provided above, by depositing the notice in the United States mail, registered or certified, addressed to the Seller as provided below, with postage prepaid, on or before 5:00 p.m. of the last day of the option term (defined below) or by personal delivery to Seller at any time during the option term:

Jane Doe Address, City, State, Zip Code

15. **NOTICE:** Notice to any one of the Sellers shall be considered as Notice to all of the Sellers and the option shall be deemed fully exercised.

16. **OPTION TERM:** The Buyer may only exercise the option during the option term described above in paragraph seven (7), unless otherwise agreed in writing between the parties.

17. **CONVEYANCE BY WARRANTY DEED:** Seller agrees that upon receiving the full purchase price and all other sums which may become due by virtue of this Agreement, Seller shall convey the real property to Buyer by Warranty Deed free and clear of all liens, encumbrances, special taxes or assessments, or security interest or other burdens of every kind, subject to easements, reservations, covenants and restrictions of record. Seller warrants that Seller has good right and lawful authority to transfer the same.

18. **TITLE INSURANCE:** Seller, further agrees that within ten (10) days from the receipt of notice to exercise the option, Seller will deliver to the Buyer or Buyer's attorney, a standard **owner's** preliminary title insurance commitment confirming marketable title, and after closing of this Agreement, a standard **owner's** title insurance policy which will insure Buyer against loss or damage to the extent of the allocated total purchase price for the land and improvements by reason of defects in the title to the real estate. Upon delivery of preliminary owner's title insurance commitment, Buyer shall have ten (10) days to examine and return the same to Seller with written objections concerning the marketability of the title or all objections to the title insurance shall be deemed waived. The cost of such owner's title insurance policy shall be paid one-half (½) by the Buyer and one-half (½) by the Seller.

19. **INSPECTION SALE "AS IS":** Buyer has had available adequate access to the subject property and has inspected the same to Buyer's satisfaction and Buyer does not require further inspection. The subject property is purchased "AS IS", based solely upon Buyer's inspection and not upon any representation or warranties of Seller or Seller's agents or employees.

20. **ENVIRONMENTAL ASSESSMENT:** Buyer has been entitled to make an environmental assessment by complete inspection and investigation of the premises, either individually or by utilizing a third party. Buyer has determined the premises to be free of hazardous substances and Seller makes no representations or warranties as to environmental matters.

21. **TAXES:** Seller as a fee simple owners, will continue to pay all real estate taxes until the Closing Date of the option is exercised. The real estate taxes due in the year of the Closing Date shall be paid by the landowner receiving the benefits of the ownership in such year, such as receipt of rental payments or crop. Buyer shall pay all real estate and property taxes arising thereafter. Seller shall pay the documentary stamp tax.

22. **NO PARTNERSHIP OR JOINT VENTURE:** Nothing contained in this agreement shall be interpreted as creating a partnership or joint venture between Buyer and Seller relative to the property.

23. **NO MERGER:** The terms, covenants, and conditions to be performed, or which may be performed, subsequent to the date of the closing shall survive the closing and thereafter continue in full effect and shall not merge with the deed.

24. **BINDING EFFECT; MODIFICATIONS; ENTIRE AGREEMENT:** The benefits and obligations of the covenants herein contained shall inure to and bind the respective heirs, legal representatives, successors, and assigns of the parties hereto. Whenever used, singular references shall include the plural and the singular, and

use of any gender shall include all genders. All modifications of this Agreement to be binding must be in writing and executed by the parties. This Agreement, as signed by the parties hereto, constitutes the sole and entire Agreement between the parties; any prior agreements or understandings between the parties are hereby declared null and void.

25. **TRANSFER OF OPTION:** The benefits and obligations of the covenants herein contained shall inure to and bind the respective heirs, legal representatives, successors, and assigns of both Buyer and Sellers. Such option may be assigned, distributed, sold, gifted, or otherwise transferred to a spouse or lineal descendent of any of the parties or a trust created by a Seller or Buyer with the primary beneficiaries the spouse or lineal descendants of the grantor of such trust, or an entity with a majority ownership of a Seller or Buyer's immediate family, or a combination thereof. Transfer to any individual that is not a lineal descendant or a spouse of a lineal descedant of Mary Kate or to an entity with a majority ownership that is not a lineal descendant or a spouse of a lineal descendant of Mary Kate, must be approved in writing by three of the four children of Mary Kate.

26. **FEDERAL IDENTIFICATION NUMBER:** Buyer and Seller each hereby certify that their respective Federal Identification number is accurate as shown on this Option Agreement.

27. **SEVERANCE AND EXECUTION PROVISIONS:** Each provision, sentence, clause, phrase, and word of this agreement is intended to be severable. If any provision, sentence, clause, phrase, and word hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this agreement. This Agreement is executed in multiple counterparts, each of which shall for all purposes constitute an original. The covenants and agreements herein contained shall survive the closing of this Agreement which shall be governed by the laws of the State of Nebraska.

28. **CONSTRUCTION:** The parties hereto acknowledge and agree that each party has participated in the drafting of this Agreement and that this document has been reviewed by the respective legal counsel for the parties hereto and that the normal rule of construction to the effect that any ambiguity is to be resolved against the drafting party shall not apply to the interpretation of this Agreement. No inference in favor of, or against, any party shall be drawn by the fact that one party has drafted any portion hereof.

29. **ATTORNEY FEES:** Buyer shall pay all of document preparation, closing, and escrow fees associated with this transaction. Both Buyer and Seller acknowledge that Law Office and/or Law Office, PC LLO, has represented them in the past, that Law Office is now Law Office, PC LLO, and they directed Law Office, PC LLO, to draft this agreement on their behalf after agreement had been reached and the

negotiations completed. Both Buyer and Seller acknowledge and waive any potential conflict of interest. Both Buyer and Seller acknowledge that independent judgment was maintained on each of their behalf by Law Office, PC LLO. The Agreements between the parties were reached completely independent of counsel from Law Office, PC LLO, who acted as a scrivener for the parties. If there develops a conflict between the parties, Law Office, PC LLO will represent neither party. The parties each consent that Law Office, PC LLO may represent them in this transaction. Both parties reserve their right to seek additional counsel.

Dated: July _____, 2016.

_____
Jane Doe, Seller
SSN:

_____
John Doe, Seller
SSN:

_____
James Street, Buyer
SSN:

State of _____, County of _____ -- ss.

The foregoing Option Agreement was acknowledged before me on July _____, 2016, by Jane Doe and John Doe, Wife and Husband, as their voluntary act and deed.

_____
Notary Public

State of _____, County of _____ -- ss.

The foregoing Option Agreement was acknowledged before me on July _____, 2016, by James Street, as his voluntary act and deed.

_____
Notary Public

ACKNOWLEDGMENT OF LIFE ESTATE HOLDER

I am the life estate holder to the subject property. All Sellers and Buyer hold an interest in the remainder interest of the subject property only and consist of all of the remaindermen in the subject property. This Option Agreement is for any and all interest held now or later vested in the Sellers, including by not limited to a remainder interest that may vest in fee simple title to the subject real estate. This option may be exercised at any point during the option term regardless of whether I am alive. I hereby acknowledge that I am aware of this agreement.

Dated: July _____, 2016.

_____
Mary Kate, life estate holder

FIRST RIGHT OF REFUSAL

John Doe for good and valuable consideration, hereby grants Happy Day, Inc., a Nebraska Corporation the first right of refusal to buy the subject property described below from John Doe at a value equal to a bonafide offer from an unrelated third party to purchase the property from John Doe. Such right of first refusal shall be in existence only for the natural life of John Doe. Happy Day, Inc., a Nebraska Corporation may record this Agreement or notice thereof to give notice of the First Right of Refusal which shall bind John Doe, his assigns and successors in interest, to the following described property, to wit:

The benefits and obligations of the covenants herein contained shall inure to and bind the respective heirs, legal representatives, successors, and assigns of John Doe. Should the subject property be assigned, distributed, sold, gifted, or otherwise transferred to a spouse or lineal descendent of John Doe or a trust created by John Doe with the primary beneficiaries as John Doe or the spouse or lineal descendants John Doe, or an entity with a majority ownership of John Doe's immediate family, this First Right of Refusal shall not apply to the transaction; however, any transfer outside of such shall be subject to this First Right of Refusal.

Dated: July ___, 2016.

Happy Day, Inc., a Nebraska Corporation,
Buyer

_____
John Doe

By:_____
James Daily, President

State of Nebraska, County of Fillmore -- ss.

The foregoing **First Right of Refusal** was acknowledged before me on July ___, 2016, by John Doe, as his voluntary act and deed.

_____
Notary Public

State of Nebraska, County of Fillmore -- ss.

The foregoing **First Right of Refusal** was acknowledged before me on July ___, 2016, by James Daily, President of Happy Day, Inc., a Nebraska Corporation, on behalf of the Corporation.

_____
Notary Public

ENTITY SELECTION AND USE OF ENTITIES IN ESTATE PLANNING FOR FARMERS & RANCHERS

Timothy L. Moll
Rembolt Ludtke LLP
Lincoln, Nebraska
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I. General Choice of Entity Considerations

A. Ownership Structure
B. Management Structure
C. Share of Profits/Losses
D. Personal Liability
E. Sources of Financing
F. Taxation (Sole Proprietor, Partnership, S Corporation, C Corporation)
G. Formation/Maintenance Costs
H. Plans for Future Growth/Changes in Ownership
I. Constitutional Restrictions - Article XII, Section 8 (Initiative 300)
NOTE: Declared unconstitutional by the 8th Circuit

II. Major Developments in Nebraska Entity Choice

A. IRS "Check the Box" Regulations: Treas. Reg. § 301.7701; Form 8832.

B. Expanded S-Corporation Eligibility: IRC §§ 1361 et seq.

C. Model Business Corporation Act: Neb. Rev. Stat. §§ 21-2001 et seq. (Effective 1/1/96)

D. Limited Liability Partnerships: Neb. Rev. Stat. §§ 67-454 et seq. (Effective 1/01)

E. Uniform Limited Liability Company Act: Neb. Rev. Stat. §§ 21-101 et seq. (Effective 1/1/2011)

F. Revised Uniform Partnership Act: Neb. Rev. Stat. §§ 67-401 et seq. (Effective 1/1/01)

III. Basic Entity Choices in Nebraska

A. Sole Proprietorship.

1. *Nebraska Statutes:* No specific provisions.

2. *Ownership:* Single Owner, often using a "d/b/a" or trade name. Assets are owned in the name of the individual.

3. *Management:* Owner makes all business decisions or may delegate to employee(s).

4. *Personal Liability:* Owner has full personal liability for business debts, torts and other claims.

5. *Taxation:* Assuming business is a "trade or business" for tax purposes, net business income is reported on the owner's Schedule C and is treated as self-employment income.

6. *Transferability of Ownership:* Assets and goodwill may be sold or transferred, but difficult to transfer interest in the business by Will.

7. *Formation:* Simply begin operation; obtain employer tax identification number if have employees.

8. *Formalities:* No ongoing formalities other than necessity of maintaining separate business records for tax purposes.

9. *Duration:* Until the owner quits or dies.

10. *Legal Actions:* Legal actions by or against the business are brought by or against the owner as an individual.

11. *Signature:* Owner signs as an individual (e.g. "John Smith" or "John Smith d/b/a Smith Farms").

B. General Partnership.

1. *Nebraska Statutes:* Neb. Rev. Stat. § 67-401 et seq.

2. *Ownership:* Two or more partners.

3. *Management:* Partners generally have equal vote in making management decisions for the partnership.

4. *Personal Liability:* Partners have full personal liability for business debts, torts and other claims against the partnership; individual

partners generally have the ability to bind the partnership and other partners by their actions.

5. *Taxation:* Partnership income/loss passes through to the partners. The partnership files only an information return. A single tax is paid at the partner level.

6. *Transferability of Ownership:* Partnership interests are transferable and assignable and the assignee has the right to share in profits, but, unless the other partners consent, the assignee is not permitted to vote on partnership matters. Assignment does not release the original partner from his/her obligations.

7. *Formation:* Partners enter into partnership agreement (written or oral).

8. *Formalities:* No ongoing formalities other than what may be imposed by the partnership agreement.

9. *Duration:* Until dissolved by agreement of the parties or upon the death, withdrawal, or bankruptcy of a partner.

10. *Legal Actions:* Partnership may be sued as a separate legal entity. Partners may be sued for their liability for partnership obligations.

11. *Signature:* A partner must sign as partner to bind the partnership (e.g. "John Smith, Partner" or "John Smith, Managing Partner"). For large transactions, signature of all partners or resolution of all partners is preferred.

C. Limited Partnership.

1. *Nebraska Statutes:* Neb. Rev. Stat. §§ 67-233 et seq.

2. *Ownership:* One or more general partners and one or more limited partners.

3. *Management:* General partners manage and control the partnership. Limited partners may play only a very limited role in controlling the affairs of the partnership.

4. *Personal Liability:* As in a general partnership, general partners have full personal liability for business debts, torts and other claims against the partnership. Provided they have not improperly participated in control of the partnership, limited partners' liability is limited to their investment in the partnership.

5. *Taxation:* Partnership income/loss passes through to the partners. The partnership files only an information return. A single tax is paid at the partner level.

6. *Transferability of Ownership:* Limited Partnership interests are assignable, but, unless the other partners consent, the assignee is not formally admitted as a limited partner.

7. *Formation:* File certificate of limited partnership with Secretary of State listing at least the name of the limited partnership, the address of its office, the name and address of its agent for service of process, and the name and address of each general partner.

8. *Formalities:* Name of partnership must include "L.P.," "Ltd.," or "Limited Partnership."

9. *Duration:* Until dissolved by agreement of the partners or upon withdrawal of the sole general partner.

10. *Legal Actions:* Limited Partnership may be sued as a separate legal entity. General Partners may be sued individually for their liability for partnership obligations.

11. *Signature:* The general partner must sign as partner to bind the partnership (e.g. "John Smith, General Partner"). For large transactions, signature of all general partners and review of partnership agreement is preferred.

D. Limited Liability Partnership (LLP).

1. *Nebraska Statutes:* Neb. Rev. Stat. §§ 67-454 et seq.

2. *Ownership:* Two or more partners.

3. *Management:* Partners generally have equal vote in making management decisions for the partnership.

4. *Personal Liability:* Under the new Act, partners have no personal liability solely as a result of their status as a partner. Under old Act, partners retained personal liability for the business debts of the partnership, for their own acts and omissions and for those of persons under their direct supervision and control.

5. *Taxation:* Partnership income/loss passes through to the partners. The partnership files only an information return. A single tax is paid at the partner level.

6. *Transferability of Ownership:* Partnership interests are transferable and assignable, but, unless the other partners consent, the assignee of a partnership interest has the right to share in profits, but is not permitted to vote on partnership matters. Assignment does not release the original partner from his/her obligations.

7. *Formation:* Partners enter into partnership agreement (written or oral). To gain limited liability, the partnership must also file a qualification statement with the Secretary of State setting forth the name and address of the partnership, the address of its registered office, the name and address of its registered agent, and a brief description of the business in which the partnership is engaged.

8. *Formalities:* No ongoing formalities other than what may be imposed by the partnership agreement.

9. *Duration:* Until dissolved by agreement of the parties or upon the death, withdrawal, or bankruptcy of a partner.

10. *Legal Actions:* Partnership may be sued as a separate legal entity. Individual partners may be sued to the extent their liability for partnership obligations is not limited.

11. *Signature:* A partner must sign as partner to bind the partnership (e.g. "John Smith, Partner" or "John Smith, Managing Partner"). For large transactions, signature of all partners or resolution of all partners is preferred.

E. Limited Liability Company (LLC).

1. *Nebraska Statutes:* Neb. Rev. Stat. §§ 21-101 et seq.

2. *Ownership:* One or more members

3. *Management:* May be "manager-managed" or "member-managed." If member-managed, management powers are vested in the members based on their respective capital interests. If manager-managed, the articles of organization and operating agreement set forth how the company will be managed. Some LLCs are also set up with officers.

4. *Personal Liability:* Individual members do not have personal liability.

5. *Taxation:* An LLC is treated like a partnership for tax purposes (unless it elects otherwise) and profit and loss pass through to the members. The LLC files only an information return and a single tax is paid at the member level. A single-member LLC is ignored for income tax purposes.

6. *Transferability of Ownership:* A member's interest may not be transferred to a nonmember without the consent of the other members.

7. *Formation:* File a certificate of organization with Secretary of State listing at least: a) the name of the LLC; b) the address of the LLC's principal place of business; c) the name and address of the registered agent. An operating agreement is also necessary to set forth in detail the obligations/rights of the members.

8. *Formalities:* Name must include "L.L.C.," or "Limited Liability Company."

9. *Duration:* For the term designated in the articles of organization or for a perpetual term.

10. *Legal Actions:* LLC may be sued as a separate legal entity. Individual members are not subject to suit for LLC obligations.

11. *Signature:* For member-managed LLCs, a member must sign as member to bind the membership (e.g. "John Smith, Member"). For manager-managed LLCs, the manager must sign. For large transactions, a resolution of the company authorizing a member or manager to sign is preferred. Some LLCs are also set up with officers.

F. Corporation.

1. *Nebraska Statutes:* Neb. Rev. Stat. §§ 21-2001 et seq.

2. *Ownership:* One or more stockholders.

3. *Management:* Stockholders elect board of directors, which in turn elects officers who manage the day-to-day operations. Directors and shareholders participate in major decisions.

4. *Personal Liability:* Individual stockholders do not have personal liability.

5. *Taxation:* A corporation is taxed at the entity level. The corporation itself files a tax return and pays tax on income. Distributions to stockholders are treated as income to stockholders and are taxed again at the stockholder level. Certain corporations can avoid the double tax by electing to be taxed pursuant to subchapter S of the Internal Revenue Code. Corporations are eligible to elect Sub-S status if they meet a number of criteria including: a) the corporation may have no more than 100 shareholders; b) all shareholders must be

individuals, certain trusts, or estates; c) the corporation may have only one class of stock; and d) no shareholder may be a nonresident alien.

6. *Transferability of Ownership:* Shares of stock are freely transferable unless restricted by agreement among the stockholders.

7. *Formation:* File articles of incorporation with Secretary of State listing at least: a) the name of the corporation; b) the number of shares to be issued and their par value; c) the name and address of registered agent and registered office. Bylaws are necessary to set forth in detail the rights/obligations of the stockholders.

8. *Formalities:* Name of corporation must include the following words or an abbreviation of the same: corporation, company, incorporation, or limited. Annual meetings of shareholders and directors are required.

9. *Duration:* For the term designated in the articles or perpetual.

10. *Legal Actions:* Corporation may be sued as a separate legal entity. Individual stockholders are not subject to suit for corporate obligations.

11. *Signature:* An officer must sign as officer to bind the corporation (e.g. "John Smith, President"). For large transactions, a resolution of the corporation authorizing the corporation to sign is preferred.

IV. Entity Planning for Asset Protection and Operations

A. Asset Protection. As clients build wealth, it is wise to take some basic steps to protect assets from unanticipated liabilities. In the farm context, this generally means isolating farm real estate and liquid investment assets from the farming or ranching operation. This can be accomplished by conducting the agricultural operations inside an entity, typically an LLC or an S corporation. The operating entity will own the machinery, equipment, grain and livestock and rent the land from the owners. If the entity is properly operated as a separate entity, the land and personal investment assets will be shielded from a catastrophic liability event.

B. Captured Built-in Gains. As a general rule, the operating entity should NOT be funded with land or other assets that have appreciated in value or have the potential to significantly appreciate in value. First, this defeats the asset protection element of the operational entity. Second, if the operating entity is a corporation, gains are captured in the entity. If land or other appreciated assets are distributed from a corporation, the distribution is treated as a deemed sale of the asset which triggers gain. IRC § 311.

C. Annual Tax Planning.

1. *Employment Taxes:* The operating entity is often structured to be an S corporation. An S corporation allows the owners to pay themselves a reasonable wage and take the remaining earnings of the corporation as a distribution subject to a single tax for income tax purposes. Though the wages will be subject to income tax, the distribution of additional profits is not subject to employment tax. Also, to the extent the operating entity rents the land under a lease that does not call for material participation by the Landlord, the rental amounts may be excluded from self-employment income. *See* IRC § 1402; *McNamara v. Commissioner*, 236 F.3d 410 (8th Cir. 2000).

2. *Allocating Income:* If and to the extent the owners desire to allocate income differently between owners from year to year based on each owner's efforts or other factors, an LLC taxed as a partnership offers the most flexibility.

3. *Cash Method:* The operating entity should be structured to allow the owners to take advantage of the cash method of accounting. Grain sales can be deferred and expenses prepaid to manage annual taxable income.

D. Typical Entity Models.

1. *Single Member Operating LLC only:* Simple disregarded entity for asset protection with no change in tax reporting. LLC owns operating assets with land and investment assets owned individually.

2. *Multiple-Member LLC only:* LLC taxed as a partnership with multiple owners. LLC owns operating assets with land and investment assets owned individually. Provides asset protection and some alternative tax reporting options.

3. *S Corporation only:* Corporation taxed as an S corporation with single or multiple owners. S corporation owns operating assets with land and investment assets owned individually. Provides asset protection and some ability to reduce employment tax.

4. *Primary operating entity with subsidiary LLCs:* Sometimes it makes sense to add single member LLC's as subsidiaries of the primary operating entity to provide additional liability protection. For instance, it is often advisable to isolate trucking operations in a separate LLC.

5. *One of the above paired with a real estate LLC:* A real estate LLC allows the owners to deal with the land separately in terms of succession planning and estate planning. An LLC taxed as a partnership facilitates transfers without creating significant income tax issues.

E. Cautions & Tax Issues

1. *Tax on Formation:* When forming a corporation, income tax is triggered if the liabilities assumed by the corporation exceed the basis of the assets transferred to the corporation. IRC § 357. Since farm machinery and equipment is typically depreciated aggressively and grain inventory generally has no basis, it is easy to run afoul of this rule. Similarly, in forming an LLC taxed as a partnership, gain can be recognized if the deemed debt relief between members exceeds the basis of a contributing partner. IRC §§ 731, 752.

2. *Loss Limitations:* The owner of an S corporation can only recognize losses to the extent of his or her basis with no basis credit for debt. IRC § 1366. The owner of an LLC can recognize losses to the extent of basis with credit for his/her share of debt, but is subject to the "at-risk" and "passive loss" limitations. IRC §§ 465, 469.

3. *Corporate Distributions:* As noted above, a distribution by a corporation of appreciated assets results in gain recognition by the corporation, even if it is an S corporation. IRC § 311.

4. *Partnership Hot Assets:* Gain on the sale of a partnership interest is generally capital gain. If the partnership owns certain "hot assets" like receivables or appreciated inventory, the portion of the sales price attributable to those assets is ordinary income.

V. Entity Planning for Lifetime Transfers and Transfers at Death

A. Separating Control from Value and/or Income. Owning assets in an entity provides a means to separate control of the assets from value and income. An entity with voting and nonvoting units allows the owner to give away value and income while maintaining control. It also provides a method to transfer control of assets to certain individuals while making a more equitable overall split of the assets themselves. This can be accomplished with an LLC (through voting and nonvoting units) or through a corporation (with voting and nonvoting shares). An S corporation can have both voting and nonvoting

shares without violating the "one-class-of-stock" restrictions as long as the voting and nonvoting shares are identical except for voting rights.

1. *Lifetime Gifts:* During lifetime, creating an entity can facilitate gifts to family members without transferring control or gifts to transfer control while retaining income. For example, establishing an LLC to own farm real estate can facilitate transfers to family members as gifts without giving up control. Buy-sell provisions in the operating agreement can restrict further transfers to keep ownership within the immediate family. These types of gifts are appropriate if the primary owner's estate value exceeds available estate tax exemptions. Establishing an LLC for operations can facilitate an orderly transfer of control to the next generation of active farmers.

2. *Gifts at Death:* Gifts of entity interests at death facilitate transfers among family members with a built-in governance structure and restrictions on further transfers. Post-death control can be concentrated in certain family members who are active in farming while still treating non-farm members equitably. Transfers of interests taxed as partnerships generally will provide for a step-up in basis in the underlying assets.

3. *Purchases During Lifetime or at Death:* Entities facilitate the purchase of a controlling interest in the entity during lifetime or at death. For example, entity interests could be transferred to all family members, but with a purchase option granted to actively farming members or a put option granted to non-active family members. Life insurance owned by the entity or by active family members can facilitate these purchases.

B. Profits Interests. The use of profits interests in an entity taxed as a partnership is a means to give a family member an immediate interest in the entity's future profits without creating an immediate taxable event. For no capital contribution, a new partner can be granted an interest in all future profits, but not an interest in the current assets of the entity (such as machinery and equipment). *See* Rev. Proc. Procedures 93-27 and 2001-43. As future earnings are used to buy new assets to replace existing capital assets, the new partner can build ownership of capital.

C. Discounts.

1. *Minority Interest and Marketability:* Entities typically are structured with limits on transferability of the interest. Value for estate and gift tax purposes is determined on the basis of "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the

latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." Rev. Rul. 59-60. A willing buyer will pay less for an interest in an entity that is not readily marketable. Likewise, a willing buyer will pay less for an entity that represents a minority interest. Without control of the entity, there are limits on what the buyer can do with his interest and he/she has limited control over the return the interest will generate. Though there are numerous disputes regarding the appropriate level of discount, the concept of the discounts is well accepted. *See, e.g., Estate of Richmond v. Commissioner*, T.C. Memo 2014-26 (applying a 7.5% lack of control discount and a 32.1% lack of marketability discount).

2. *Nonvoting Discount/Voting Premium:* Using the same willing buyer and willing seller analysis, it makes sense that there is some discount associated with owning nonvoting stock. It may be the same discount as that for minority interest or it may be different depending on the circumstances. In the same way, it makes sense that voting units may carry some level of premium over nonvoting units.

3. *Built-In Capital Gains:* For C corporations, it is recognized that some discount is appropriate to reflect the level of built-in gains trapped in the Corporation. The Service often disputes the level of discount, but the courts have recently been willing to accept discounts equal to as much as the tax on the entire built-in gain. *See Estate of Jensen v. Commissioner*, T.C. Memo 2010-182.

D. Cautions & Tax Issues.

1. *Estate Inclusion:* In addition to challenging the level of discount allowed, the Service often seeks to include the value of the entire entity under IRC § 2036 which deals with retained interests. It has been successful in a number of cases where there was no valid business purpose for the entity, the formalities of the entity were not followed, and there was an implied agreement that all the assets would remain available to the transferor. Some examples of these cases are included below:

Family Limited Partnership Assets Excluded as Bona Fide Sale. *Estate of Black v. Commissioner,* 133 T.C. No. 15 (2009). In 1993, the Decedent, his son, and trusts for two grandsons contributed stock to a family limited partnership and received FLP interests proportionate to the value of the stock transferred. The Decedent's advisers had explained the potential tax advantages of this approach, but the Decedent's primary stated motivation was implementing his buy and hold philosophy. The Decedent was concerned about his son's marriage and financial stability and concerned that his grandsons would simply sell the stock. The Decedent retained assets and income

from other sources that were more than sufficient to provide for his needs. The Service sought to include the stock as a retained interest under Section 2036. DECISION: The Tax Court found that the FLP was formed for a significant legitimate non-tax purpose and that the transfer was for adequate compensation.

Family Limited Partnership Assets Excluded as Bona Fide Sale. *Estate of Shurtz v. Commissioner*, T.C. Memo 2010-21. In 1993, the Decedent established a family limited partnership to own around 750 acres of timberland in Mississippi and a 16% interest in a timber business owned by the Decedent and her extended family. The Decedent was aware of the estate tax advantages of the approach, but the stated motivation for the creation of the limited partnership was litigation protection. When the Decedent died in 2002, the Service argued all the assets should be included under Section 2036. DECISION: The Court agreed with the Taxpayer. It found the transaction was a bona fide sale and that the FLP was established as the result of legitimate concern about preserving the family business.

Family Limited Partnership Assets Included in Gross Estate; Pre-Death Transfers Were Taxable Gifts. *Estate of Malkin v. Commissioner*, T.C. Memo 2009-212. The Decedent created two family limited partnerships and four trusts. The Decedent transferred stock to one FLP. To the other he transferred stock and his interests in four LLCs. The Decedent was the general partner of each FLP and he and two trusts were limited partners of each. The Service argued that all the underlying assets should be included in the Decedent's estate under Section 2036. DECISION: With regard to the stock transferred to the FLPs, the Tax Court found an implied agreement that the stock would remain available to the Decedent and subject to his control. Accordingly, the value of the stock was included in the Decedent's estate. With regard to the LLC interests transferred to the FLP, the Court found there was no implied agreement for retained control and the LLC interests were not included in the gross estate. However, the Court concluded that the initial gifts of FLP interests were indirect gifts of the LLC interests that should have been reported as such (without discount) for gift tax purposes. The FLP documents and LLC transfer documents were all executed at the same time.

Family Limited Partnership Assets Included in Gross Estate with Adjustment for Overpaid Income Tax. *Estate of Jorgensen v. Commissioner*, T.C. Memo 2009-66. The Decedent formed two family limited partnerships which owned marketable securities. Interests in the FLPs were given to the Decedent's children and grandchildren. The value of the gifts exceeded the annual exclusion,

but gift returns were not filed. Neither FLP operated a business and no formal books or records were maintained. The Decedent had check writing authority on the partnership accounts and used partnership funds to make gifts and to pay personal taxes. After the Decedent's death, the partnership sold some appreciated assets. It did not claim a step-up in basis on the assets as a result of the Decedent's death, but paid income tax on the gains. The Service argued that the entire value of the FLP should be included in the Decedent's estate under Section 2036. DECISION: The Tax Court agreed with the Service. It found that the FLP was not necessary for management reasons because the assets were all passive investments. Further, it found that there were no legitimate non-tax reasons for establishing the partnerships and that there was an implied agreement that the assets would remain available to the Decedent. In a minor victory for the Estate, the Tax Court applied the doctrine of equitable recoupment to allow the Estate to reduce the estate taxes due by the amount of the income taxes the Estate overpaid on the sale of assets since it was not claiming a step-up in basis. The offset was allowed even though the statute of limitations had run on the income taxes at issue.

Family Limited Partnership Assets Included in Gross Estate. *Estate of Hurford v. Commissioner*, T.C. Memo 2008-278. The Decedent entered into an aggressive and poorly conceived estate plan at a time when she had been diagnosed as having stage 3 cancer. Under the plan, all of the Decedent's assets and all the assets in two trusts established by her deceased husband were transferred into three FLPs. The partnership interests were then sold to two of her three children in exchange for private annuities. The Decedent died less than a year later. The reported value of the estate was less than $1 million though her husband's estate had been in excess of $14 million only a few years earlier. The Service argued that all of the Decedent's assets and all the assets in the trusts created by her husband should be included in the gross estate. DECISION: The Tax Court agreed with the Service. The court addressed (1) whether §2036 and §2035 applied to the creation of the FLPs (to bring all of the contributed assets back into the Decedent's estate without a discount) and (2) whether the transfer of partnership interests to the children in return for a private annuity similarly should be disregarded under §§ 2036 or 2038. The court concluded that the bona fide sale for full consideration exception to §§2036 and 2038 did not apply to the creation of the partnership or the private annuity transaction. Section 2036(a)(1) and § 2035 required the inclusion in the Decedent's estate of all the assets that the Decedent contributed to the FLPs because there was an implied agreement that the Decedent would continue to have the use of the assets during her lifetime. In addition, the private annuity transaction was not effective to remove the assets from her

estate under §2036 or §2038. In light of the values used and other factors, the bona fide sale exception did not apply.

Family Limited Liability Company Assets EXCLUDED from Gross Estate. *Estate of Mirowski v. Commissioner*, T.C. Memo 2008-74. The Decedent established an LLC on August 27, 2001 after lengthy family discussions. A few days later, the Decedent was admitted to the hospital for treatment of a foot ulcer. In early September, the Decedent transferred assets to the LLC and transferred 16% interests in the LLC to three trusts established for her children. The Decedent passed away on September 11, 2001, less than a day after her condition unexpectedly became life-threatening. The Estate excluded the LLC interests transferred to the children from the gross estate. The Service argued that the interests should be included under Section 2036(a). DECISION: The Tax Court agreed with the Estate. The Court held that the initial transfers to the LLC were bona fide sales for adequate consideration. With regard to the transfers of LLC interests to the trusts, the Court determined that there was no express or implied agreement that the Decedent would retain the rights to or enjoyment of the transferred assets. The Court here relied upon the fact that the Decedent had significant assets outside the LLC, that the Decedent would continue to receive significant income through the LLC, there were significant non-tax motivations for the LLC, and the fact that the Decedent's death was unexpected. The Court acknowledged that joint investment and family cohesiveness could be a significant non-tax factor.

2. *Indirect Gifts:* When an entity is established, it is important to put some time between the transfer of assets to the entity and the transfer of entity interests. When both transfers occur simultaneously or close in time, the Service has successfully negated the discounts by collapsing the transaction and treating it as a gift of the underlying assets. The following case is an example of the Service's assertion of this argument:

Transfers to LLC Are Indirect Gifts of Assets. *Linton v. United States*, 107 AFTR 2d 2011-275 (9th Cir. 2011), *reversing* 104 AFTR 2d 2009-5176 (D. Wa. 2009). The Taxpayers created an LLC, created trusts for their children, transferred property to the LLC, and transferred LLC interests to the trusts for the children. All the documents were dated the same day. The attorney testified that he discovered after the fact that trust agreements and gift documents were undated and filled in the same date as the other documents. He realized this was a mistake and that the parties had intended for the LLC documents to be dated on the date of signing and the transfer documents to be dated nine days later. The Taxpayers claimed discounts of 47% on the gift tax returns reporting the transfer of the

LLC interests. The Service challenged the gifts, arguing that the gifts were really indirect gifts of the underlying assets and no discount was applicable. The district court agreed with the Service. It rejected the attorney testimony regarding the intended sequence of events and found a simultaneous gift at the time the trusts were created. The court went on to hold that the gift would be an indirect gift even under the proposed sequence under the step transaction doctrine. The court distinguished *Holman* and *Gross* on grounds that, unlike the taxpayers in those cases, the Taxpayers in this case did not make affirmative decisions to delay the gifts of LLC interests for some time after funding the LLC. DECISION: The Ninth Circuit reversed the district court. Since the documents were not dated on the date of the original transfer (the attorney filled the date in later), there was not clear evidence of the Donor's intent on that date so summary judgment was not appropriate. The date of the LLC could have been as late as 90 days or so later.

3. *Ignoring Restrictions:* Under IRC § 2703, restrictions on property can be ignored in determining value unless the restriction: (a) is a bona fide business arrangement; (b) is not a device to transfer such property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and (c) the terms of the overall arrangement are comparable to similar arrangements entered into by persons in an arms' length transaction. This puts some significant limits on the types of restrictions that can be considered in determining a discounted value. The Service has been somewhat more aggressive in this area recently and the Obama administration has indicated it may consider new regulations under this section to try to further limit discounting. An example of the application of the successful application of this argument follows:

Gifts of Partnership Interests Respected; Partnership Restrictions Ignored; Value Increased. *Holman v. Commissioner*, 105 AFTR 2d 2010-721 (8th Cir. 2010), *affirming* 130 T.C. No. 12 (2008). The Taxpayers (husband and wife) established a family limited partnership and transferred Dell stock to the new partnership. They then transferred partnership interests to a custodian for one of their children and into a trust for all their children. They made gifts in 1999, 2000 and 2001, claiming substantial discounts for marketability and minority interests. The Service argued that the initial gifts were really indirect gifts of stock since there was only 6 days separation between the transfer of the stock to the partnership and the transfer of the partnership interests. In addition, the Service challenged the discounts and argued that the transfer restrictions in the partnership agreement should be disregarded under Section 2703. The Tax Court agreed with the Taxpayers that the step transaction doctrine should not apply to the 1999 gifts and that the gifts of

partnership interests should be respected. However, the Tax Court agreed with the Service that Section 2703 applied such that the transfer restrictions in the partnership agreement should be ignored in valuing the partnership interests. The Court then went on to value the interests substantially higher than the reported values. The Taxpayers appealed. DECISION: On appeal, the Eighth Circuit found ample support for the Tax Court's decision. To be respected, the restrictions in the partnership agreement must be a bona fide business arrangement, must not be a device to transfer assets to family for less than full consideration, and the terms must be comparable to arms' length transactions.

VI. Conclusion / Questions & Answers (time permitting)

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Issue Contents

Agricultural Law Digest

Volume 26, No. 18 September 11, 2015 ISSN 1051-2780

The Case for Limiting Entities in Farm and Ranch Operations

-by Neil E. Harl*

For many years, the usual organizational structure for farm and ranch operations was a single entity, often a sole proprietorship, with a few partnerships for the larger operations.[1] However, in recent years, the trend has been toward multiple entity operations with an array of choices for the entities. In some instances, multiple entities are warranted, such as where a high risk operation (such as a spraying operation or a transportation subsidiary) is set up as a separate entity from the core operation. In others, tax advantages are perceived.

This article focuses heavily on the possible drawbacks from using multiple entities, particularly where the perceived advantages are limited or potential tax complications cloud the advantages thought to be achievable with an array of entities.

Problems with hedging

Two recent cases and a Technical Advice Memorandum[2] have focused attention on the potential pitfalls with multiple entities where hedging is carried on in the operation. In *Pine Creek Farms, Ltd v. Commissioner*,[3] a C corporation was originally engaged in the production of corn, soybeans, cattle and hogs but the hog operation (which was growing rapidly) was spun off into two separate corporations. However, the hedging activity continued to be handled in the name of the C corporation which ceased to own hogs. When losses were encountered, it became clear that the losses were speculative (and not hedges) with highly disadvantageous tax consequences. The case of *Welter v. Commissioner*[4] met a similar fate with the shareholder of two family farm corporations engaged in commodity trades in the shareholder's own name with the result of capital gains on the security transactions that produced gains but also capital losses with limited deductibility.

Eligibility for I.R.C. § 179 deductions

It is clear that the amount eligible to be expensed under the Section 179 rules is limited to the taxable income derived from an active trade or business[5] and, for a partnership, the test is applied at both the partner and partnership levels.[6] In a case decided in 2000,[7] there was insufficient taxable income at the partnership level so there was no pass-through of expense method depreciation to the partners.

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Agricultural Law Digest is published by the Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 (ph 360-200-5666), bimonthly except June and December. Annual subscription $90 by e-mail. http://www.agrilawpress.com Printed on recycled paper.

The use of multiple entities raises a serious question of whether the likely generation of income in the various entities (some of which might not meet the "active trade or business" test) could jeopardize eligibility for the deduction which, through 2014, was available at the $500,000 level and promises to return to that level or possibly higher.[8]

"At risk" rules

Multiple entity farming and ranching operations (except for the partial exemption for partnerships, as discussed in the next issue) must necessarily see that each entity is in compliance with the "at risk" rules.[9] Farming (and presumably ranching is included in "farming") is specifically listed as one of the five types of activities that come under the "at risk" statutory provisions.[10]

Self-employment tax

Ironically, although some multi-entity operations are structured with an objective of reducing self-employment tax liability,[11] the outcome in some instances has been that the Internal Revenue Service position that "material participation" as a necessary element in having "self-employment income[12] in meeting the "trade or business" test can be achieved by combining the involvement from a separate land-owning entity and the entity carrying on the farming or ranching operation which virtually assures liability for self-employment tax, rather than avoidance of self-employment tax liability as anticipated.[13] The Eighth Circuit Court of Appeals, however, rejected the IRS position and held that rents consistent with market rates "very strongly suggest" that the rental arrangement should stand on its own as an independent transaction without self-employment tax being due.[14] On October 20, 2003, IRS entered a non-acquiescence in the appellate court case of *McNamara v. Commissioner*.[15]

Having lost at the Eighth Circuit Court of Appeals, IRS has proceeded to challenge multiple entity situations in the Second Circuit Court of Appeals area (which was settled out of court) and the Seventh Circuit Court of Appeals area (with a case set for trial in late 2015). It has become clear that IRS intends to continue pressing for self-employment tax liability in all multi-entity situations under the theory advanced in the earlier case of *Mizell v. Commissioner*.[16]

Economic distortion

Setting up multiple entities has the potential to interfere with how assets are used, resulting in higher costs and lower net at the end of the year. IRS looks askance at machinery owned by one entity and used by another, at least that is the case if it appears that there is a tax advantage involved. One common example is to route ownership of expensive farm equipment into an entity owned by high tax bracket members of the overall operation but allow the equipment to be used by other entities.

Filing multiple tax returns and keeping separate records

The cost and inconvenience of necessarily filing federal and state tax returns for each entity (and keeping separate records for each entity) are significant factors to take into account in planning the structure of an operation. Whether it is a Form 1120 for a C corporation, a Form 1120-S for an S corporation or a Form 1065 for each of the pass-through entities taxed as a partnership (and most limited liability companies and limited liability partnerships are classified as partnerships for income tax purposes), the cost and time devoted to preparing and filing separate returns for each entity are significant, not to mention the additional record keeping.

So is there a "best" way?

As with most management issues, there is no single "best way" to structure an operation. It is a matter of weighing the pluses and minuses for each feature of the organizational chart. Our suggestion: especially when it comes to creating new entities, put the burden on new proposed entities to show that the pluses outweigh, comfortably, the minuses.

ENDNOTES

[1] See generally 6 Harl, *Agricultural Law* Chs. 50, 51 (2015) for a discussion of the economic and legal considerations for the choice of organizational structure.

[2] TAM 9720003, January 15, 1997 (dairy farm carried on by S corporation; taxpayer attempted to hedge feed ingredients but it was carried out by the wrong entity).

[3] T.C. Memo. 2001-176.

[4] T.C. Memo. 2003-299.

[5] I.R.C. § 179(b)(3)(A), Treas. Reg. § 1.179-2(c). See Hayden v. Comm'r, 112 T.C. 115 (1999), *aff'd*, 204 F.3d 772 (7th Cir. 2000).

[6] I.R.C. § 179(d)(8).

[7] *Id.*

[8] I.R.C. § 179(b)(2)(C).

[9] I.R.C. § 465.

[10] I.R.C. § 465(c)(1)(B).

[11] I.R.C. § 1402(a), (b).

[12] I.R.C. § 1402(a)(1).

[13] See Mizell v. Comm'r, T.C.Memo. 1995-571.

[14] McNamara v. Comm'r, 236 F.3d 410 (8th Cir. 2000), *non-acq.*, I.R.B. 2003-42.

[15] AOD, CC-2003-3, October 20, 2003, I.R.B. 2003-42.

[16] T.C. Memo. 1995-571.

HAPPY DAY, INC.
AGREEMENT REGARDING CAPITAL STOCK

This Agreement is made by and between John Doe and Jane Doe, hereinafter collectively referred to as "Shareholders", also referring to all future holders of capital stock of the subject corporation; HAPPY DAY, INC., a Nebraska corporation, hereinafter referred to as "Corporation".

WHEREAS, the Shareholders are the owners of all the capital stock of the Corporation.

WHEREAS, the Corporation and the Shareholders realize that the harmonious and successful management and control of the Corporation will tend to be disrupted in the event of the death or disability of any of the individual Shareholders or upon the sale or transfer of ownership or control of the stock of the Corporation to a person other than the Shareholder; and

WHEREAS, it is the desire of the Corporation and Shareholders to avoid such a contingency and assure the Shareholders of a succession to the ownership and control of the Corporation, and recognizing that the best interests of the Corporation may be served by providing that no stock of the Corporation shall be sold, transferred, or encumbered except pursuant to the terms and conditions of this Agreement.

IT IS THEREFORE AGREED:

1. **Restriction on Transfer of Stock of Corporation**.

   a. No stock of Corporation shall be transferred on the books of the Corporation except in compliance with the terms of this Agreement.

   b. Each certificate representing capital stock of the Corporation, whether now issued and outstanding, or hereafter issued, shall have legibly typed or stamped thereon: "This stock certificate is issued and held subject to certain restrictions on sale, transfer, or encumbrance and subject to repurchase by the Corporation, and/or one or more Shareholders, pursuant to an agreement among the Corporation and its Shareholders dated June 28, 2016."

   c. Except as otherwise provided herein, a shareholder shall not sell, transfer, assign hypothecate, give or in any way alienate any share or shares in the Corporation or any right or interest therein; nor shall such share or shares be subject to transfer by order of Court, sale

upon execution of judgement, appointment of a receiver or trustee in bankruptcy for a shareholder, or other legal process.

d. When a shareholder voluntarily desires, or is required under the terms of this Agreement or by process of law, to dispose of shares of stock in the Corporation during his/her lifetime, except as otherwise provided herein, he/she shall offer to sell all of the shares subject to such contemplated disposition upon the terms specified in this Agreement. The Corporation shall be notified in writing of said offer, and the same shall constitute a "Notice of Disposition" of shares, under the terms of this Agreement.

2. **Notice of Disposition. The Notice of Disposition shall consist of a written offer setting forth the following**:

a. A statement of intent as to the manner of assignment, transfer or other disposition of shares of stock in the Corporation;

b. The name and the address of the prospective assignee, transferee or other prospective recipient of shares;

c. The number of shares to be assigned, transferred, or otherwise disposed of; and

d. The amount of consideration and terms of assignment, transfer or other disposition. In the event of death of a shareholder, the consideration shall be established solely by this Agreement.

3. **Purchase of Shares.**

a. Within a period of thirty (30) days following the delivery of such Notice of Disposition of shares, the Corporation shall notify the holder of such shares, in writing, hereinafter referred to as the "selling shareholder", if it elects to purchase all or a portion of such shares.

b. The occurrence of any event which would require transmission to the Corporation of a Notice of Disposition of shares shall forthwith give rise to all options given by the Corporation and shareholders of the Corporation, herein, to purchase such shares, and such options may be exercised without regard to whether any Notice of Disposition of shares is in fact given by selling shareholder. The time period under paragraph (a) above of this Article Three (3) shall not, however, commence to run until Corporation through its officers or directors shall receive the Notice of Disposition.

c. To the extent that it may legally purchase stock under the restrictions of the Business Corporation Act governing the right of the Corporation to purchase its own stock, the Corporation may purchase all or a part of the aforementioned stock.

d. The purchase price and terms of such purchase shall be the lesser of that set forth at either Article Eight (8) entitled "Purchase Price of Stock - Voluntary" or Article Nine (9) entitled "Purchase Price of Stock - Death" below as required by the terms of the event requiring such Disposition, or the consideration set forth in the Notice of Disposition.

e. To the extent the Corporation may not legally purchase such shares, or to the extent the Corporation shall not elect to purchase such shares, the Corporation shall, within said thirty (30) day period, so notify all shareholders of record at that time. Any other shareholder may within the thirty-one (31) days thereafter elect to purchase any part or all of the stock of the Corporation so offered. Any shareholder desiring to purchase said stock shall notify the selling shareholder in writing within said thirty-one (31) day period. In the event more than one shareholder requests in writing to purchase said stock, the shares available to purchase by said shareholders shall be prorated among them based on their respective stockholdings in the Corporation.

f. In the event neither the Corporation or any shareholder shall elect to purchase said stock, the holder thereof may within a period of ninety (90) days from the date of giving Notice of Disposition sell or transfer said stock pursuant to said Notice. The party acquiring the same shall, however, hold such stock subject to all terms, conditions and options contained in this Agreement and further as a condition to the completion of the transfer of such stock, affirm in writing to the Corporation his Agreement to be bound by all terms, provisions, options and restrictions of this Agreement. If no sale be made within said period of ninety (90) days, no further disposition of said stock may be made without again giving the Notice of Disposition and providing the options to the Corporation and shareholders as herein provided.

4. **Transfer of Stock to Family**. The Shareholders may not transfer Corporation stock without Notice of Disposition and without restriction, to his/her spouse or his/her issue or the spouse of his/her issue. The provisions set out in this Article Four (4) shall apply equally by bequests of stock in this Corporation by Will, transfer into joint tenancy, or other transfer taking effect on death. Any such stock of the Corporation shall be subject

to this Agreement and the donee of such gift shall, as a condition to the completion of such gift, affirm in writing to the Corporation his/her Agreement to be bound by all the terms, provisions, options and restrictions of this Agreement. Any gift to a minor shall be subject to the condition that the same be affirmed by such minor upon attaining majority, and, if not affirmed by a letter in writing to the Corporation within sixty (60) days after such minor attained majority, such stocks shall be subject to the purchase option provision hereinafter set forth as if a Notice of Disposition had been given on the last day of said period for affirmance.

5. **Pledge of Shares**. In no circumstance shall any Shareholder of the Corporation pledge his or her shares as security for a debt or obligation, but should such pledge occur it shall trigger a Notice of Disposition. The Corporation and Shareholders of the Corporation of record as of the date of foreclosure shall have all rights and options given under provisions of Article Three (3) above as to such stock.

6. **Voluntary Disposition.** The following events shall constitute a voluntary disposition of the stock. As such, the purchase price and terms of such purchase shall be the lesser of that set forth at Article Eight (8) entitled "Purchase Price of Stock - Voluntary" below, or the consideration set forth in the Notice of Disposition.

   a. Retirement of Shareholder. In the event of a retirement from the Corporation or the termination of Shareholder's involvement or employment with the Corporation, upon such happening such event shall be deemed to require Notice of Disposition to the Corporation except as provided in Article Four (4) above. The Corporation and shareholders of the Corporation of record as of the date of such Notice shall have all rights and options given under provisions of Article Three (3) above as to such stock.

   b. Divorce of Shareholder. In the event of a dissolution of the marriage of a shareholder, wherein the spouse of the shareholder has acquired stock in the Corporation from the shareholder, through the Decree of Dissolution of Marriage or upon prior gift such Decree shall be deemed to require Notice of Disposition to the Corporation. The Corporation and shareholders of the Corporation of record as of the date of such Decree of Dissolution of Marriage shall have all rights and options given under provisions of Article Three (3) above as to such stock acquired by the reason of the Decree.

   c. Disability of Shareholder. In the event of the disability of a shareholder, the guardian and/or conservator of his/her estate, trustee of his/her living trust, or other successor in interest of his/her shares

shall within ninety (90) days of the date of the disability of such shareholder deliver Notice of Disposition to Corporation except as provided in Article Four (4) above. The Corporation and the shareholders of the Corporation of record at the date of disability of said shareholder shall have all rights and options, given under the provisions of Article Three (3) above as to such stock owned by the disabled shareholder. Disability shall be defined as when such shareholder is unable to perform his normal and customary duties due to a long term, terminal or permanent mental or physical condition as provided in writing by a licensed medical doctor.

d. Conviction of Felony by a Shareholder. In the event of conviction of a felony of a shareholder, the shareholder, trustee of his/her living trust, or other successor in interest of his/her shares shall within ninety (90) days of the conviction of such shareholder deliver Notice of Disposition to Corporation except as provided in Article Four (4) above. The Corporation and the shareholders of the Corporation of record at the date of conviction of said shareholder shall have all rights and options, given under the provisions of Article Three (3) above as to such stock owned by the shareholder.

e. Bankruptcy of Shareholder. In the event of a filing for bankruptcy by a shareholder, the initial filing in court shall be deemed to require Notice of Disposition to the Corporation. The Corporation and shareholders of the Corporation of record as of the date of such filing shall have all rights and options given under provisions of Article Three (3) above as to such stock acquired by the reason of such filing.

7. **Death of Shareholder**. In the event of death of a shareholder, the personal representative of his/her estate, trustee of his/her living trust, or other successor in interest of his/her shares shall within ninety (90) days of the date of death of such shareholder deliver Notice of Disposition to Corporation except as provided in Article Four (4) above. The Corporation and the shareholders of the Corporation of record at the date of death of said deceased shall have all rights and options, given under the provisions of Article Three (3) above as to such stock owned by the deceased shareholder. The purchase price and terms of such purchase shall be the lesser of that set forth at either Article Nine (9) entitled "Purchase Price of Stock - Death" below, or the consideration set forth in the Notice of Disposition.

8. **Purchase Price of Stock - Voluntary**. The aggregate purchase price of the stock pursuant to the terms and events of this Agreement shall be a Base Book Value of Two Thousand Two Hundred Nine Dollars ($2,209.00) per share, provided such value shall be redetermined as follows:

   a. A Base Book Value shall be placed upon all the outstanding stock of the Corporation at least annually, at the annual meeting of shareholders of the Corporation. Such Base Book Value of the Corporation shall be determined as of the end of business at the close of the last fiscal year prior to the annual meeting.

   b. To the Base Book Value, as determined above, shall be added the net earnings of the Corporation (after provision for income taxes) and capital additions, if any, subsequent to the date of establishment of the last Base Value and up to the last day of the month preceding the event requiring Notice of Disposition hereunder. There shall be subtracted from said Base Value the net losses of the Corporation, any dividends paid or declared, and any other capital reductions, if any, during said period. All foregoing additions or reductions to the Corporation's capital and surplus shall be made in accordance with generally accepted accounting principles and practices.

   c. The Total Book Value above arrived at shall be divided by the number of outstanding shares of stock of the Corporation at the date of the event requiring a Notice of Disposition hereunder. The value of the shares owned by the selling shareholder shall be determined by multiplying such value per share times the total number of shares owned by such selling shareholder.

   d. In the event a period of more than two (2) years have elapsed from the date of the last previous agreement as to the Base Book Value contemplated under this Article Eight (8) above at such date constituting such Notice of Disposition, the Base Book Value shall be the last previous Base Book Value arrived at by Agreement or the net book value of Corporation, determined in accordance with generally accepted accounting principles, whichever is higher.

9. **Purchase Price of Stock - Death**. The aggregate purchase price of the stock pursuant to the terms and events of this Agreement shall be a Base Fair Value of Three Thousand Five Hundred Eighty Dollars ($3,580.00) per share, provided such value shall be redetermined as follows:

   a. A Base Fair Value shall be placed upon all the outstanding stock of the Corporation at least annually, at the annual meeting of

shareholders of the Corporation. Such base fair value shall be determined as of the end of business at the close of the last fiscal year prior to the annual meeting.

b. To the Base Fair Value, as determined above, shall be added the net earnings of the Corporation (after provision for income taxes) and capital additions, if any, subsequent to the date of establishment of the last Base Value and up to the last day of the month preceding the event requiring Notice of Disposition hereunder. There shall be subtracted from said Base Fair Value the net losses of the Corporation, any dividends paid or declared, and any other capital reductions, if any, during said period. All foregoing additions or reductions to the Corporation's capital and surplus shall be made in accordance with generally accepted accounting principles and practices.

c. The Total Fair Value above arrived at shall be divided by the number of outstanding shares of stock of the Corporation at the date of the event requiring a Notice of Disposition hereunder. The value of the shares owned by the selling shareholder shall be determined by multiplying such value per share times the total number of shares owned by such selling shareholder.

d. In the event a period of more than one (1) year has elapsed from the date of the last previous agreement as to the Base Fair Value contemplated under this Article Nine (9) above at such date constituting such Notice of Disposition, the Base Value shall be the last previous Base Fair Value arrived at by Agreement or the net book value of Corporation, determined in accordance with generally accepted accounting principles, whichever is higher.

10. **Purchase Terms**. The payment of the purchase price for shares of the Corporation to be purchased and sold pursuant to this Agreement shall be as follows:

a. The down payment shall be ten percent (10%) of the total purchase price and shall be payable in cash on or before thirty (30) days after the time notification is made by the purchaser of election to purchase, or upon determination of the total purchase price under the provisions of this Agreement.

b. The balance of the purchase price shall be represented by the promissory note of the purchaser or purchasers payable in five (5) consecutive equal annual installments of principal and interest, the first installment is due one (1) year after payment of the down

payment. Any and all such installments may be prepaid at any time without penalty and correspondingly reduce the interest.

c. Such promissory note shall be non-negotiable in form and shall bear interest on the unpaid principal balance, with such interest payable as a part of the equal annual installments, at the annual rate of one percent (1%) above the highest rate of interest currently paid by the State Bank, Omaha, Nebraska on their one year Certificate of Deposit effective January 1 of the year the down payment is due and payable. Interest shall commence on the date the down payment is due and payable. The holder of such note shall have the right to declare the same due and payable in full in the event of default in the making of any payment, and time shall be considered the essence thereof. In the event of the death of the maker of the note, any unpaid balance of that note may be prepaid at any time thereafter.

d. The selling shareholder shall, upon receiving the down payment in cash, and delivery of said note for the balance of the purchase price, endorse the certificates representing the shares being sold to the purchaser or purchasers of said shares.

e. The purchaser of said shares shall pledge the same to secure payment of such installment note for the purchase thereof, and enter into the appropriate security agreement and financing statement arising therefrom.

f. So long as no default occurs in the making of the payment of such note, the purchaser of the shares shall be entitled to receive all dividends thereon and shall be entitled to vote such shares.

11. **Adjustments on Corporation Books**. The purchase of any stock purchased by the Corporation pursuant to this Agreement shall be charged on the Corporation's books as follows, to wit:

a. First, the capital stock to the extent of the par value of the stock so purchased;

b. Secondly, to paid-in surplus, to the extent that such Shareholder's cost of such stock exceed par value; and,

c. Any remainder to earned surplus.

12. **Restriction on Sale of Stock by Corporation**. No stock of the Corporation shall be issued by the Corporation, or sold from its treasury, without the written consent of the holders of all of the outstanding stock at such time, and subject to this Agreement.

13. **Life Insurance**. The Corporation may, if it deems advisable, in order to assure continuity in the management and policies of the Corporation, purchase life insurance policies in such amounts as it deems advisable upon the lives of any one or more of the shareholders, but shall not be obligated to do so. Should such insurance be taken out, the down payment to be made by reason of sale following the death of such insured shareholder shall be increased above the amount, provided above, to the amount of sixty-five percent (65%) of the agreed selling price.

The life insurance death benefits shall not be added to the value of the Corporation in determining the redemption price; nor shall the tax liability on death benefits be deducted from the Corporation in determining the redemption price.

If Corporation has purchased a policy of life insurance on the life of a shareholder who has sold his/her shares in the Corporation under the provisions of this Agreement during his/her lifetime, the Corporation shall continue such policy in force during the period allowed for the installment payment for such shares. After final payment has been received by the selling shareholder, the selling shareholder shall have the option to purchase from the Corporation any life insurance policies then in effect on his/her life at the cash surrender value of the same.

14. **Testamentary Provisions**. Each shareholder agrees to insert in his/her Will a direction and authorization to his/her executor to fulfill and comply with the provisions hereof.

15. **Tax Option Status**.

a. In the event the Corporation shall have in force a valid election under Section 1372 (a) of the Internal Revenue Code, or comparable provisions thereof ("Sub-Chapter S Election") no shareholder shall make any transfer of share, otherwise allowed by the terms of this Agreement, to any person not then already a shareholder of this Corporation unless there shall be procured and delivered to the Corporation a shareholder's statement of consent to election under said provision of the Internal Revenue Code executed by the Shareholder to whom such shares are transferred. No such transfer shall be made which would result in revocation of any such tax option status.

b. A shareholder making any transfer in violation of any of the provisions of this Article Fourteen (14) above shall immediately thereupon transmit a Notice of Disposition to the Corporation. The Corporation

and the shareholders of the Corporation of record at the date of such violation and then parties to this Agreement shall have rights and options otherwise given under the provisions in Article Three (3) above.

16. **Benefit**. This Agreement shall be binding upon the parties, their heirs, legal representatives, successors and assigns.

17. **Termination**. This Agreement shall terminate on the following:

    a. The written agreement of the shareholders; or

    b. the dissolution, receivership, or bankruptcy of the Corporation; or

    c. death of all shareholders simultaneously or within a period of sixty (60) days; or

    d. when there remains only one shareholder apart to this Agreement.

18. **Construction**. This Agreement shall be construed accordingly to the laws of the State of Nebraska.

19. **Explanatory Provisions**. This Agreement is executed in multiple counterparts, each of which shall for all purposes constitute an original. Time is of the essence of this Agreement. Headings of the various paragraphs of this Agreement are inserted for convenience and reference and do not in any manner define, limit or describe the scope or intent of the particular paragraph to which they refer. The parties hereto have executed this Agreement in multiple counterparts each representing an original.

Dated: June 28, 2016.

Happy Day, Inc.

By:_____
John Doe, President

Attest:

_____ _____
John Doe, Shareholder Jane Doe, Shareholder

Basis Disclosure - Notes & Comments

The IRS released Form 8971, "Information Regarding Beneficiaries Acquiring Property From a Decedent", and instructions on January 29, 2016. The crux of Form 8971 is to require that a beneficiary's basis in property acquired from a decedent will be no higher than the finally determined estate tax values (new §1014(f)), and beneficiaries will no longer have the ability to claim that the FMV of an asset on the date of death was actually greater than the value used for estate tax purposes. Form 8971 will be used for executors/PRs to report required information to the IRS, and Schedule A, attached to the Form, is used to provide each beneficiary with information the must be reported under the new authorizing statute.

Reports must go to recipients of the estate (i.e., "each person acquiring any interest in property included in the decedent's gross estate") and the IRS. §6035(a)(1). Effectively, this enables the IRS to match and track basis reporting on individual beneficiaries' income tax returns when they report the sales of assets received from estates.

Form 8971 is only required to be filed in situations where a Federal estate tax return is otherwise required in the first place. As a result, the new rules will generally only apply to those with a gross estate above $5.45M in 2016, or noncitizen nonresidents with an estate in excess of $60,000. And notably, under Proposed Treasury Regulation 1.6035-1(a)(2) issued in early March of 2016, a Form 8971 is not required to be filed in situations where the Federal estate tax return was filed solely to claim portability of the deceased spouse's unused estate tax exemption.

Statements must be furnished no later than 30 days after the return's due date, including extensions (or 30 days after the return is filed, if earlier). If information reported on From 8971 and the Schedule A filed with the IRS or provided to a beneficiary differs from the final value (as the result of the resolution of a valuation dispute or otherwise), the executor or other person required to file Form 8971 must file a supplemental Schedule A to each affected beneficiary no later than 30 days after the adjustment.

Under the final version of the form itself, executors will be required to report in Part I both the decedent and executor's names, and in Part II a list of all beneficiaries and their tax ID numbers (Social Security numbers for individuals, or TINs for trusts). This first page of the form goes only to the IRS (as it would be a potential privacy breach to share with other beneficiaries).

Then, for each beneficiary, the executor must prepare a copy of Form 8971 Schedule A, which details for each beneficiary what property was inherited, the valuation amount (and date of valuation), and whether the asset increases the estate tax liability (such that it would be subject to cost basis consistency rules under IRC Section 1014(f)). If the estate's property has not been fully distributed yet, then each beneficiary's Schedule A must list any property that could be used to satisfy the beneficiary's interest (to ensure the beneficiary and IRS both have the right information for whatever property actually is inherited).

There are accuracy-related penalties on under payments under §6662 which apply if a taxpayer reports a higher basis than the estate tax value basis that applies under new §1014(f). Also, penalties for the failure to file correct "information returns" or "payee statements" are provided in §§6721 and 6722, respectively. The penalty provisions are technical, but suffice it to say that the penalty could be quite large for intentionally disregarding the requirement to file the information return or statements. There is a waiver if the "failure is due to reasonable cause and not ... willful neglect."

Future gifts of assets listed on Form 8971, Schedule A must be disclosed to the IRS and to the transferee of a related party in effect notifying the transferee of the basis of such gift.

> IRS Reg. § 1.6035-1 Basis information to persons acquiring property from decedent.
> "(f) Subsequent transfers. If all or any portion of property that previously was reported or is required to be reported on an Information Return (and thus on the recipient's Statement or supplemental Statement) is distributed or transferred (by gift or otherwise) by the recipient in a transaction in which a related transferee determines its basis, in whole or in part, by reference to the recipient/transferor's basis, the recipient/transferor must, no later than 30 days after the date of the distribution or other transfer, file with the IRS a supplemental Statement and furnish a copy of the same supplemental Statement to the transferee. The requirement to file a supplemental Statement and furnish a copy to the transferee similarly applies to the distribution or transfer of any other property the basis of which is determined in whole or in part by reference to that property (for example as the result of a like-kind exchange or involuntary conversion). In the case of a supplemental Statement filed by the recipient/transferor before the recipient/transferor's receipt of the Statement described in paragraph (a) of this section, the supplemental Statement will report the change in the ownership of the property and need not provide the value information that would otherwise be required on the supplemental Statement. In the event the transfer occurs before the final value is determined within the meaning of proposed § 1.1014-10(c), the transferor must provide the executor with a copy of the supplemental Statement filed with the IRS and furnished to the transferee in order to notify the executor of the change in ownership of the property. When the executor subsequently files any Return and issues any Statement required by paragraphs (a) or (e) of this section, the executor must provide the Statement (or supplemental Statement) to the new transferee instead of to the transferor. For purposes of this provision, a related transferee means any member of the transferor's family as defined in section 2704(c)(2), any controlled entity (a corporation or any other entity in which the transferor and members of the transferor's family (as defined in section 2704(c)(2)), whether directly or indirectly, have control within the meaning of section 2701(b)(2)(A) or (B)), and any trust of which the transferor is a deemed owner for income tax purposes. If the transferor chooses to include on the supplemental Statement provided to the transferee information regarding any changes to the basis of the reported property as described in § 1.1014-10(a)(2) that occurred during the transferor's ownership of the

property, that basis adjustment information (which is not part of the requirement under section 6035) must be shown separately from the final value required to be reported on that Statement.

Form **8971**
(January 2016)
Department of the Treasury
Internal Revenue Service

Information Regarding Beneficiaries Acquiring Property From a Decedent

► Information about Form 8971 and its separate instructions is at *www.irs.gov/form8971.*

OMB No. 1545-2264

Check box if this is a supplemental filing ☐

Part I Decedent and Executor Information

1 Decedent's name	2 Decedent's date of death	3 Decedent's SSN
4 Executor's name (see instructions)	5 Executor's phone no.	6 Executor's TIN

7 Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code)

8 If there are multiple executors, check here ☐ and attach a statement showing the names, addresses, telephone numbers, and TINs of the additional executors.

9 If the estate elected alternate valuation, indicate the alternate valuation date:

Part II Beneficiary Information

How many beneficiaries received (or are expected to receive) property from the estate? For each beneficiary, provide the information requested below. If more space is needed, attach a statement showing the requested information for the additional beneficiaries.

A Name of Beneficiary	B TIN	C Address, City, State, ZIP	D Date Provided

Notice to Executors:

Submit Form 8971 with a copy of each completed Schedule A to the IRS. To protect privacy, Form 8971 should not be provided to any beneficiary. Only Schedule A of Form 8971 should be provided to the beneficiary. Retain copies of all forms for the estate's records.

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, all information reported herein is true, correct, and complete.

► Signature of executor _____ Date _____

May the IRS discuss this return with the preparer shown below? See instructions . . . . . ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ►			Firm's EIN ►	
Firm's address ►			Phone no.	

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 3 -2016)

EXHIBIT
tabbies
2. b.

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SCHEDULE A—Information Regarding Beneficiaries Acquiring Property From a Decedent

▶ **Information about Form 8971 (including Schedule A) and its separate instructions is at *www.irs.gov/form8971*.**

Check box if this is a supplemental filing ☐

Part 1. General Information

1 Decedent's name	2 Decedent's SSN	3 Beneficiary's name	4 Beneficiary's TIN

5 Executor's name	6 Executor's phone no.

7 Executor's address

Part 2. Information on Property Acquired

A Item No.	B Description of property acquired from the decedent and the Schedule and item number where reported on the decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. If the beneficiary acquired a partial interest in the property, indicate the interest acquired here.	C Did this asset increase estate tax liability? *(Y/N)*	D Valuation Date	E Estate Tax Value *(in U.S. dollars)*
1	Form 706, Schedule _____ , Item _____ Description —			

Notice to Beneficiaries:

You have received this schedule to inform you of the value of property you received from the estate of the decedent named above. **Retain this schedule for tax reporting purposes.** If the property increased the estate tax liability, Internal Revenue Code section 1014(f) applies, requiring the consistent reporting of basis information. For more information on determining basis, see IRC section 1014 and/or consult a tax professional.

Form 8971 (1-2016)

SCHEDULE A—Continuation Sheet

Use only if you need additional space to report property acquired (or expected to be acquired) by the beneficiary.

Check box if this is a supplemental filing ☐

Part 1. General Information

1 Decedent's name	2 Decedent's SSN	3 Beneficiary's name	4 Beneficiary's TIN

5 Executor's name	6 Executor's phone no.

7 Executor's address

Part 2. Information on Property Acquired

A Item No. *(continue from previous page)*	B Description of property acquired from the decedent and the Schedule and item number where reported on the decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. If the beneficiary acquired a partial interest in the property, indicate the interest acquired here.	C Did this asset increase estate tax liability? *(Y/N)*	D Valuation Date	E Estate Tax Value *(in U.S. dollars)*

Notice to Beneficiaries:

You have received this schedule to inform you of the value of property you received from the estate of the decedent named above. **Retain this schedule for tax reporting purposes.** If the property increased the estate tax liability, Internal Revenue Code section 1014(f) applies, requiring the consistent reporting of basis information. For more information on determining basis, see IRC section 1014 and/or consult a tax professional.

IRS

General Instructions

Table of Contents

Purpose of Form

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 requires executors of an estate and other persons who are required to file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return; Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return Estate of nonresident not a citizen of the United States; or Form 706-A, United States Additional Estate Tax Return; to report the final estate tax value of property distributed or to be distributed from the estate, if the estate tax return is filed after July 2015. Form 8971, along with a copy of every Schedule A, is used to report values to the IRS. One Schedule A is provided to each beneficiary receiving property from an estate.

Provide each beneficiary only with a copy of that beneficiary's own Schedule A. Do not provide a copy of the Form 8971 with or without attached Schedule(s) A to any beneficiary.

Certain property received by a beneficiary may be subject to a consistency requirement, meaning that the beneficiary cannot use a value higher than the value reported on Schedule A as the beneficiary's initial basis in the property.

Who Must File

An executor of an estate or other person(s) required to file Form 706 or Form 706-NA under sections 6018(a) and 6018(b) or a qualified heir required to file Form 706-A under section 2032A, if the return is filed after July 2015, and whether or not that form is filed timely, is required to file Form 8971 with attached Schedule(s) A with the IRS and to provide each beneficiary listed on the Form 8971 with that beneficiary's Schedule A.

The filing requirement for Form 8971 does not apply to an executor of an estate that is not required to file an estate tax return because the gross estate plus adjusted taxable gifts is less than the basic exclusion amount, but who does so for the sole purpose of making an allocation or election respecting the generation-skipping transfer tax. See the Instructions for Form 706, Form 706-NA, or Form 706-A for more information on the filing requirement for those forms.

When To File

Form 8971 (including all attached Schedule(s) A) must be filed with the IRS and only the Schedule A is to be provided to the beneficiary listed on that Schedule A, no later than the earlier of:

- The date that is 30 days after the date on which Form 706, Form 706-NA, or Form 706-A is required to be filed (including extensions) with the IRS; or
- The date that is 30 days after the date Form 706, Form 706-NA, or Form 706-A is filed with the IRS.

If the first Form 706, Form 706-NA, or Form 706-A is filed both after the form's due date (including extensions) and after July 2015, the Form 8971 and Schedule(s) A are due 30 days after the filing date.

Form 8971 is a separate filing requirement from the estate's Form 706, 706-NA, or 706-A, and should not be attached to the respective estate tax return. The 8971 and attached Schedule(s) A must be filed with the IRS, separate from any and all other tax returns filed by the estate.

Note.

Notice 2015-57, 2015-36 I.R.B. 294, available at www.irs.gov/irb/2015-36_IRB/ar12.html, made February 29, 2016, the due date for:

- All Forms 8971 (including the attached Schedule(s) A) required to be filed with the IRS after July 31, 2015, and before February 29, 2016; and
- All Schedules A required to be provided to beneficiaries after July 31, 2015, and before February 29, 2016.

Where To File

File Form 8971 (including all Schedule(s) A) at the following address.

Department of the Treasury
Internal Revenue Service Center
Mail Stop #824G
Cincinnati, OH 45999

A beneficiary can be provided Schedule A:

- In person to an individual beneficiary, to the trustee(s) of a beneficiary trust, or to the executor(s) of a beneficiary estate;
- By email;

- By U.S. mail to the beneficiary's last known address; or
- By private delivery service to the beneficiary's last known address (see below).

The executor of the estate (or other person required to file) must certify on Form 8971, Part II, Column D, the date on which Schedule A was provided to each beneficiary and should keep proof of mailing, proof of delivery, acknowledgment of receipt, or other information relevant for the estate's records. In cases where a trust or another estate is a beneficiary and has multiple trustees or executors, providing Schedule A to one trustee or executor is enough to meet the requirement.

Private delivery services. Certain private delivery services designated by the IRS may be used to meet the "timely mailing as timely filing" rule for tax returns. These private delivery services include only the following.

- Federal Express (FedEx): FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2Day, FedEx International Priority, FedEx International First, FedEx First Overnight, FedEx International Next Flight Out, and FedEx International Economy.
- United Parcel Service (UPS): UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, UPS 2nd Day Air A.M., UPS Worldwide Express Plus, UPS Worldwide Express, and UPS Next Day Air Early AM.

The private delivery service can tell you how to get written proof of the mailing date.

Supplemental Forms 8971 and Schedules A

The value of the property to be reported on the initial Form 8971 and the attached Schedules A is the fair market value of the asset as reported on the estate tax return. However, the final value for purposes of the federal estate tax may differ from that reported on the estate tax return. A value is considered "final" when:

- The value of the property shown on an estate tax return filed with the IRS is not contested by the IRS before the period of assessment expires;
- The value of the property is specified by the IRS and is not timely contested by the estate (or other person required to file under section 6018(b)); or
- The value of the property is determined by a court or pursuant to a settlement agreement with the IRS, including the resolution of a claim for abatement or refund.

If information reported on Form 8971 and the Schedule(s) A filed with the IRS or provided to a beneficiary differs from the final value (as the result of the resolution of a valuation dispute or otherwise), the executor or other person required to make this filing must file a supplemental Form 8971 and affected Schedule(s) A with the IRS and provide an updated supplemental Schedule A to each affected beneficiary no later than 30 days after the adjustment. See *Where To File*, earlier. On both the supplemental Form 8971 and each supplemental Schedule A, the "Supplemental Filing" box should be checked and only the information that has changed should be reported.

If the executor or other person required to file Form 8971 has been notified that a Form 706, Form 706-NA, or Form 706-A related to the Form 8971 and Schedule(s) A has been selected for examination, a copy of the supplemental Form 8971 with attached supplemental Schedule(s) A should be provided to the office conducting the examination.

Rounding Off to Whole Dollars

The value of property should be reported in U.S. dollars and rounded to whole-dollar amounts. To round, drop amounts under 50 cents and increase amounts from 50 to 99 cents to the next dollar. For example, $1.39 becomes $1 and $2.55 becomes $3. If you add two or more amounts to figure an item's value, include the cents when adding the amounts and round off only the total.

Penalties

Failure to file correct Forms 8971 by the due date (section 6721). If the executor of an estate or other person required to file Form 8971 fails to file a correct Form 8971 and/or Schedule A with the IRS by the due date and reasonable cause is not shown, a penalty may be imposed. The penalty applies if there is a failure to file timely, a failure to include all information required to be shown on the form or schedule, a failure to include correct information on the form or schedule, or a failure to file a correct supplemental Form 8971 and/or Schedule A by the due date. A complete Form 8971 includes all Schedule(s) A.

Only one penalty will apply for all failures relating to a single filing of a single Form 8971 and the Schedule(s) A required to be filed along with it. Each filing of a Form 8971 with Schedule(s) A is a separate filing, regardless as to whether the filing is of the initial Form 8971 and Schedule(s) A or a supplemental Form 8971 and Schedule(s) A.

The amount of the penalty depends on when the correct Form 8971 with Schedule(s) A is filed.

The penalty is as follows.

- $50 per Form 8971 (including all Schedule(s) A) if it is filed within 30 days after the due date. The maximum penalty is $532,000 per year (or $186,000 if the taxpayer qualifies for lower maximum penalties, as described below).
- $260 per Form 8971 (including all Schedule(s) A) if it is filed more than 30 days after the due date or if it is not filed. The maximum penalty is $3,193,000 per year ($1,064,000 if the taxpayer qualifies for lower maximum penalties, as described below).

All penalty amounts shown are subject to adjustment for inflation.

Lower maximum penalties. You qualify for lower maximum penalties if your average annual gross receipts for the 3 most recent tax years (or for the period you were in existence, if shorter) ending before the calendar year in which the information returns were due are $5 million or less.

Intentional disregard of filing requirements. If any failure to file a correct Form 8971 or Schedule A is due to intentional disregard of the requirements to file a correct Form 8971 and Schedule(s) A, the minimum penalty is at least $530 per Form 8971 and the Schedule(s) A required to be filed with it, with no maximum penalty.

Inconsequential error or omission. An inconsequential error or omission is not considered a failure to include correct information. An inconsequential error or omission does not prevent or hinder the IRS from processing the Form 8971 and the Schedule(s) A required to be filed along with it. Errors and omissions that are **never** inconsequential are those related to a TIN, a beneficiary's surname, and the value of the asset the beneficiary is receiving from the estate.

Note.

A TIN is a Social Security Number (SSN), an Employer Identification Number (EIN), an Individual Taxpayer Identification Number (ITIN), or any other number used by the IRS in the administration of tax laws.

Failure to furnish correct Schedules A to beneficiaries by the due date (section 6722). If the executor of an estate or other person required to file Form 8971 fails to provide a correct Schedule A to a beneficiary and does not show reasonable cause, a penalty may be imposed. The penalty applies if there is a failure to provide the Schedule A by the due date, a failure to include all information required to be shown on the schedule, a failure to include correct information on the schedule, or a failure to provide a correct supplemental Schedule A by the due date. The penalty applies for each Schedule A required to be provided.

The amount of the penalty depends on when a correct Schedule A is provided.

The penalty is as follows.

- $50 per Schedule A if it is provided within 30 days after the due date. The maximum penalty is $532,000 per year (or $186,000 if the taxpayer qualifies for lower maximum penalties, as described below).

- $260 per Schedule A if it is provided more than 30 days after the due date or if it is not provided. The maximum penalty is $3,193,000 per year ($1,064,000 if the taxpayer qualifies for lower maximum penalties, as described below).

All penalty amounts shown are subject to adjustment for inflation.

Lower maximum penalties. You qualify for lower maximum penalties if your average annual gross receipts for the 3 most recent tax years (or for the period you were in existence, if shorter) ending before the calendar year in which the information returns were due are $5 million or less.

Intentional disregard of filing requirements. If any failure to provide a correct Schedule A is due to intentional disregard of the requirements to provide correct Schedules A, the penalty is at least $530 per Schedule A with no maximum penalty.

Inconsequential error or omission. An inconsequential error or omission is not considered a failure to include correct information. An inconsequential error or omission cannot reasonably be expected to prevent or hinder the beneficiary from timely receiving correct information and using the information to report basis on the beneficiary's own return. Errors and omissions that are **never** inconsequential are those related to (a) the value of the asset the beneficiary is receiving from the estate, and (b) a significant item in a beneficiary's address.

Reasonable cause exception to the penalties for failing to file Forms 8971 and Schedules A and for failing to provide Schedules A to beneficiaries. The penalties for failing to file correct Form 8971 and Schedules A with the IRS and for failing to provide correct Schedules A to beneficiaries will not apply to any failure that is shown to be due to reasonable cause and not to willful neglect. In general, it must be shown that the failure was due to an event beyond the taxpayer's control or due to significant mitigating factors. It must also be shown that the executor or other person required to file acted in a responsible manner and took steps to avoid the failure.

Penalties for Inconsistent Filing

Beneficiaries who report basis in property that is inconsistent with the amount on the Schedule A may be liable for a 20% accuracy-related penalty under section 6662.

Obtaining Forms and Publications To File or Use

You can access the IRS website 24 hours a day, 7 days a week, at IRS.gov to:

- Download forms, instructions, and publications;
- Order IRS products;
- Research tax questions;
- Search publications by topic or keyword; and
- Sign up to receive local and national tax news by email.

Specific Instructions

Complete Form 8971 and each attached Schedule A in its entirety. A form or schedule filed with the IRS without entries in each field will not be processed. A form with an answer of "unknown" will not be considered a complete return.

Part I — Decedent and Executor Information

Line 3. Enter the SSN of the decedent. If the decedent did not have an SSN, the executor (or other person required to file Form 706) should obtain one for the decedent by filing Form SS-5, Application for a Social Security Card. You can get Form SS-5 online at www.socialsecurity.gov or by calling the SSA at 1-800-772-1213.

Line 4. If there is more than one executor, enter the name of one executor and see the instructions for line 8.

Line 6. Provide only the TIN of the executor listed on line 4 and see the instructions for line 8.

Line 7. Provide only the address of the executor listed on line 4. Use Form 8822, Change of Address, to report a change of the executor's address. Also, see the instructions for line 8.

Line 8. On an attached statement, provide the name, address, telephone number, and TIN of each executor (if any) other than the one named on line 4.

Line 9. If the executor made an election on the estate tax return to use alternate valuation under section 2032, provide the alternate valuation date.

Part II — Beneficiary Information

A beneficiary is an individual, trust, or other estate who has acquired (or is expected to acquire) property from the estate. If the executor is also a beneficiary who has acquired (or is expected to acquire) property from the estate, the executor is a beneficiary for purposes of the Form 8971 and Schedule A.

Column A. Enter the name of each individual, trust, or other estate that acquired (or is expected to acquire) property from the estate. Retain a copy of the Form 8971 (including all attached Schedule(s) A) for the estate's records.

Column B. Enter the TIN of each beneficiary listed. Entering "none," "unknown," or similar language, or otherwise failing to enter a TIN, will cause the form to be considered incomplete and may subject the estate to penalties.

Column D. For each beneficiary, enter the date on which the executor gave Schedule A to the beneficiary. See *Where To File*, earlier.

Return preparer. Permission to discuss the Form 8971 is limited to the information reported on (or required to be reported on) the Form 8971 and attached Schedule(s) A and does not authorize the return preparer to represent the estate before the IRS or to enter into any agreements with the IRS respecting the Form 8971 and attached Schedule(s) A.

Complete and attach Form 2848, Power of Attorney and Declaration of Representative, if the executor would like the return preparer to represent the estate before the IRS with respect to the Form 8971 and Schedule(s) A or any other matter related to the estate. Completing Form 2848 may authorize the person designated on that form to sign agreements, consents, waivers, or other documents.

Anyone who is paid to prepare the Form 8971 and/or any Schedule A must sign the form as a paid preparer and give a copy of the completed Form 8971 and/or Schedule(s) A to the executor required to file Form 706, Form 706-NA, or Form 706-A.

Note.

A paid preparer may sign original or amended returns by rubber stamp, mechanical device, or computer software program.

Signature and Verification

All executors shown on Form 8971 and listed on any attached statement are responsible for the reporting requirements related to Form 8971 and Schedule(s) A. However, it is enough for only one of the executors to sign Form 8971.

Form 8971 is signed under penalties of perjury and all executors are responsible for the information included on Form 8971 and Schedule(s) A as filed with the IRS and Schedules A provided to beneficiaries. All executors are also liable for all applicable penalties.

Schedule A — Information Regarding Beneficiaries Acquiring Property From a Decedent

Executors of estates filing Form 8971 are required to complete a Schedule A for each beneficiary that acquired (or is expected to acquire) property from the estate. You will need a copy of the Form 706, Form 706-NA, or Form 706-A filed by the estate of the decedent to complete this schedule. All property acquired (or expected to be acquired) by a beneficiary must be listed on that beneficiary's Schedule A. If the executor has not determined which beneficiary is to receive an item of property as of the due date of the Form 8971 and Schedule(s) A, the executor must list all items of property that could be used, in whole or in part, to fund the beneficiary's distribution on that beneficiary's Schedule A. (This means that the same property may be reflected on more than one Schedule A.) A supplemental Form 8971 and corresponding Schedule(s) A should be filed once the distribution to each such beneficiary has been made.

Use and duplicate page A-2 (Schedule A—Continuation Sheet) if additional space is needed to list the property acquired (or expected to be acquired) by a beneficiary. Attach a copy of each completed Schedule A to Form 8971 and submit to the IRS. Provide a copy of each Schedule A only to the beneficiary named on that Schedule A. Do not provide a copy of the Form 8971 to a beneficiary. See the instructions under *Where To File*, earlier.

Column A. Number the items received by the beneficiary. Continue this numbering on page A-2 of the Schedule A—Continuation Sheet (if necessary).

Column B. Use the same description in column B that the executor used for the property on the Form 706, Form 706-NA, or Form 706-A. Include in column B the schedule and item number where the property was reported on Form 706, Form 706-NA, or Form 706-A, as applicable.

For more information on details to be included by asset type or schedule, see the Instructions for Form 706, Form 706-NA, or Form 706-A. If the beneficiary acquired (or is expected to acquire) a joint interest, a fractional interest, or any other interest in property which is less than 100%, indicate the interest in the property the beneficiary will acquire.

Column C. An entry (Y or N) is required in this column for each asset. Indicate "Y" if the property contributed to the amount of the federal estate tax payable by the estate.

Generally, any property that qualifies for a marital deduction under section 2056 or 2056A or a charitable deduction under section 2055 will not generate estate tax and "N" should be indicated.

Column D. Generally, the valuation date of property will be the decedent's date of death. If the estate elected to use an alternate valuation date, list the value of the property on the alternate valuation date. See section 2032 for additional guidance.

Column E. List the value reported on Form 706, Form 706-NA, or Form 706-A. If the value reported on a Schedule A that has already been filed with the IRS or provided to a beneficiary changes (as a result of the resolution of a valuation issue or otherwise), you must file a supplemental Form 8971 and associated Schedule(s) A with the IRS and provide an updated Schedule A to each affected beneficiary no later than 30 days after the adjustment.

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Ashlea Ebeling Forbes Staff
I write about how to build, manage and enjoy your family's wealth.

PERSONAL FINANCE 3/09/2016 @ 12:14PM | 21,021 views

Executors, Inheritors, Lawyers Flummoxed By New IRS Forms

12 Tips For IRA And 401(k) Heirs

Update: In this notice, the IRS has extended the March 31, 2016 deadline to June 30, 2016.

Imagine getting an IRS form listing $10 million worth of property that was your late great uncle's. At the bottom of the form (Form 8971 Schedule A), there's a boldface "Notice to Beneficiaries" that says: "You have received this schedule to inform you of the value of property you received from the estate of the decedent named above." Sorry but you might be getting just a $10,000 or $100,000 bequest.

Form 8971, Information Regarding Beneficiaries Acquiring Property From A Decedent, is new this year. The first forms are due March 31, and the Internal Revenue Service just released anticipated guidance (45 pages worth) last week. So it's only now that estate executors and the lawyers helping them settle estates in estate tax territory are tackling filling them out and sending Schedule A on to beneficiaries. After that, there's a rolling due date of 30 days after an estate tax return is due.

The guidance, proposed rules on "Consistent Basis Reporting Between Estate and Person Acquiring Property From Decedent" has several surprises. Duplicate reporting of a deceased's assets on information statements going out to multiple beneficiaries is one of the problem areas. There are new reporting requirements for subsequent transfers. And there's also a zero basis trap.

"[The guidance] does help us, but it's a mixed bag," says Gregg Simon, an estate layer with Much Shelist in Chicago who has three estates ranging from $10 million to $100 million with the forms due. "In one case, we're waiting for the IRS audit; it may take years; but I have the 8971 due in days," he says.

The new basis reporting law, which spawned the new forms, was a loophole closer/revenue raiser in last summer's highway bill intended to reign in beneficiaries who overstate the original value of inherited property on their income tax returns to lessen the tax hit. The IRS estimates the new law will affect 10,000 estates a year. Under the new law, for estate tax returns filed after July 31, 2015, executors have a new duty to report to the

beneficiaries—and the IRS—the value of specific assets passed down. In the case of taxable estates, beneficiaries, when they later sell an asset, are now tied for income tax purposes to the value the estate put on the asset—or they face a 20% penalty applied to any underpayment due to an inconsistent basis position.

One of the really odd things in the law is that you can have an estate subject to the reporting rules where the beneficiaries aren't bound by the basis consistency rules, says Kenneth Brier, an estate lawyer in Needham, Mass. He is working on a widow's $12 million estate going to her children who will be subject to the basis consistency rules, and a $9 million estate going to a surviving spouse who won't be subject to the basis consistency rules. But in both cases the information forms have to be sent to the IRS and the beneficiaries. "It's a huge disconnect. You're filling out forms that nobody's bound by," he says incredulously.

There is some good news in the rules. The guidance clarifies that if you're filing an estate tax return to elect portability (preserving the first spouse to die's estate tax exclusion amount), you don't have to fill out a Form 8971. And for estates where the form is required, some things don't have to be reported: cash, pretax retirement accounts, personal property worth less than $3,000 and assets sold by the estate and not distributed out. That can still leave a really long list of assets, considering we're talking about estates valued at $5.45 million or more.

That's why the laundry list of assets is problematic. In cases of unfunded bequests—where it's not clear yet who is to get what by the time the form is due—the executor has to tell the beneficiary about every asset in the estate that could conceivably be used to fund the bequest. "A lot of beneficiaries might think they're entitled to assets worth a lot more than what they're getting," says Simon. He says the cover letter from the executor who has to send out the form better explain it better than the IRS form.

A second problem area is subsequent transfers. The proposed rules impose new reporting requirements on beneficiaries who later give assets to a related party. They have to file another Form 8971 to alert the IRS of the new owner of the asset, and send Schedule A to the new owner. "How is a beneficiary to know?" asks Simon.

Also troubling to beneficiaries is a new concept in the proposed rules called zero basis property. If assets are discovered after the estate tax return is filed and not reported to the IRS on a supplemental return, the basis of after-discovered property will be zero. Even harsher, if an estate tax return is never filed but it should have been, then the basis of all property will be zero until the estate files a return.

The IRS is accepting comments here through June 2. The first comment submitted, by The Commerce Trust Company (a division of Commerce Bank), asks for a 60-day extension to May 31 for the first forms to be due, to take in the new proposed rules and to check software for glitches. For now, the IRS says the March 31 deadline stands, and executors can rely on the proposed rules.

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Tax Issues Associated with Unharvested Crops in a Decedent's Estate

2321 N. Loop Drive, Ste 200 • Ames, Iowa 50010 www.calt.iastate.edu

February 10, 2009
Updated October 15, 2014
- by Roger McEowen*

Overview

The presence of unharvested crops in a decedent's estate raises income tax and, if the estate is large enough, estate tax issues. The matter can be complicated if the decedent's farmland was rented and crop rent had accrued but had not yet been received as of the date of the decedent's death.

There are several possible ways to determine the value of unharvested crops.[1] One approach is to arrive at a value by discounting the crop by the amount of risk involved between the date of death and harvest with the amount of risk tied to the type of lease involved. Alternatively, the crop could be valued by the amount of a loan, secured by the crop that could have been negotiated as of the date of death. Or, perhaps the simplest (and least beneficial to the decedent's estate) approach would be to pro-rate the allocation of the crop proceeds between the pre-death and post-death periods. It is this pro-rata approach that IRS utilizes to address both estate tax and income tax issues involving unharvested crops in a decedent's estate. In addition, some states (such as Iowa) follow the pro-rata approach for purposes of state-level taxes.

Character of Income and Basis Issues.

General rule. Under the general rule, property interests of a decedent that the decedent owns at death are valued for estate tax purposes at their fair market value as of the date of the decedent's death.[2] For income tax basis purposes, the basis of property that is included in a decedent's estate equals the value of the property as of the date of the decedent's death.[3] This is generally known as the "stepped-up" basis rule, although it is also possible that property values could have declined as of the date of death. The rule operates to eliminate any taxable gain in the property upon later sale by an heir at the date of death value.

Exception. Income in respect of decedent (IRD) property does *not* receive any basis step-up.[4] IRD is taxable income that is received after a taxpayer has died – it is income the taxpayer earns before death, but is not included on the decedent's final income tax return because the taxpayer was not eligible to collect the income before death. IRD is subject to both income tax and (for large estates) estate tax. So, while IRD does not receive a basis step-up by virtue of being included in the decedent's estate, the recipient of the IRD is entitled to a deduction for the federal estate tax that is attributable to the IRD as a result of its inclusion in the decedent's estate.[5]

Application of the IRD Rule

The IRD issue turns on the status of the decedent at the time of death. Two questions are relevant – (1) was the decedent an operating farmer or a farm landlord? and (2) if the decedent was a farm landlord, was the decedent a materially

participating landlord or a non-materially participating landlord?

Operating farmers and materially participating landlords: For operating farmers (including a materially participating farm landlord) unsold livestock, growing crops and grain inventories are *not* IRD.[6] The rule is the same if the decedent was a landlord under a material participation lease.[7] Those assets are included in the decedent's gross estate and receive a new basis equal to their fair market value as of the decedent's death.[8] No allocation is made between the decedent's estate and the decedent's final income tax return.[9]

From an income tax perspective, all of the growing costs incurred by the farmer before death are deducted on the decedent's income tax return. At the time of death, the FMV value of the growing crop established in accordance with a formula (as set forth below) is capitalized as inventory and deducted as sold. The remaining costs incurred after death are also deducted by the decedent's estate. In many cases, it may be possible to achieve close to a double deduction.

Non-materially participating landlords: For non-materially participating farm landlords that die during a rent period, the matter is more complex. If a cash basis landlord rents out land under a non-material participation lease, the landlord normally includes the rent in income when the crop share is reduced to cash or a cash equivalent, not when the crop share is first delivered to the landlord. In this situation, a portion of growing crops or crop shares or livestock that will be sold post-death will be IRD and a portion will be post-death ordinary income to the landlord's estate. That is the result if the crop share is received by the landlord before death, but is not reduced to cash until after death. It is also the result if the decedent had the right to receive the crop share, and the share is delivered to the landlord's estate and then reduced to cash. In essence, an allocation is made with the portion of the proceeds allocable to the pre-death period (in both situations) being IRD in accordance with a formula set forth in Rev. Rul. 64-289.[10] In these situations, IRD is not incurred until the crop share is sold. However, if the landlord received the crop share and sold it *before* death, the income realized is includable on the landlord's final return and is not IRD.[11]

> **Note:** If the estate sells grain inventory within six months after death, the income from the sale is treated as long-term capital gain if the basis in the crops are not IRD (in other words, if the basis in the crops was determined under the I.R.C. §1014 date-of-death fair market value rule).[12] Also, while the sale of raised crops or livestock in the estate of an active farmer usually triggers ordinary income, the sale by the estate of land with growing crops results in capital gain treatment for the income that is attributable to the crop.[13] The same result can be achieved when the crops are harvested during the process of liquidating the farming operation and the land is sold. But, ordinary income treatment occurs if the crop is being raised on land that is leased to a tenant.[14]

The allocation formula set forth in Rev. Rul. 64-289 splits out the IRD and estate income based on the number of days in the rental period before and after death.

Example:

On February 4, 2008, Jerry Mander leased his farm to a tenant on a 60/40 crop share lease (i.e., Jerry gets 40 percent of the crop and pays for 40 percent of the expenses). The lease ran from March 1, 2008 through February 28, 2009, and was for the growing of corn and soybeans on Jerry's farm. Jerry died on July 4, 2009. The tenant harvested the corn on October 15 and sold it later the same day for $135,000. The soybeans were harvested on October 7 and stored. The soybeans were later sold on January 27, 2009, for $40,000.

The allocation formula would operate as follows: The lease period was for 365 days (March 1 to February 28) and Jerry was alive for 126 of those days. Thus, 126/365 of the amount that the estate received for the corn is IRD - $18,641.10 (.4 x $135,000 (126/365)). The balance of the amount received by the estate ($35,358.90) is taxable to the estate as ordinary income. The entire amount that the estate received for the soybeans ($16,000) is taxed to the estate as ordinary income.

Note: Expenses attributable to IRD items are deducted as an expense on Schedule K of Form 706 (federal estate tax return) and are deducted as an expense item on the income tax return of the person or estate when the expense item is paid.

Note: If Jerry had died *after* the crop shares were sold (but before the end of the rental period), the proceeds would have been reported on Jerry's final return. No proration would have been required.

Note: If Jerry had received his crop share in-kind and held it until death with the heirs selling it after death, the sale proceeds would be allocated between IRD and ordinary income of the estate under the formula set forth above.

For crop share rents of a non-materially participating landlord that are fed to livestock *before* death, if the animals are also owned on shares, IRD results. If the decedent utilized the livestock as a separate operation from the lease, the in-kind crop share rents (e.g., hay, grain) would be treated as any other asset in the farming operation – included in the decedent's gross estate and entitled to a date-of-death fair market value basis.

Crop share rents fed to livestock after the landlord's death are treated as a sale at the time of feeding[15] with an offsetting deduction.

State-Level Taxation

Some states have specific rules for handling unharvested crops at death for tax purposes. In Iowa, for example, the Iowa Department of Revenue (IDOR) follows the pro-rata approach. Thus, growing crops owned by a decedent at death are valued via a formula.[16] Under the formula, the cash value of the crop realized upon sale is prorated by attributing a portion of the value to the period before death and a portion to the period after death. The amount attributed to the pre-death period is the value for Iowa inheritance tax purposes. The numerator of the ratio expresses the number of days the decedent lived during the growing season (corn and soybeans) – which is considered to be May 15 through October 15 (153 days). The 153-day period is the denominator. The ratio is multiplied by the number of bushels realized upon harvest with that result multiplied by the local elevator price at the time of maturity. However, if the estate sells the crop within a reasonable time after harvest in an arm's length transaction, the selling price can be used as the fair market value basis. The regulation provides the following example:[17]

Example:

The decedent raised corn and beans and died on August 15. Thus, the decedent lived 92 days of the growing season. In the fall, the estate harvested 2,000 bushels of corn which were sold to a local elevator for 3.10/bushel. As a result, the value of the crop for Iowa inheritance tax purposes would be $3,728.10 (92/153 x 2,000 x $3.10).[18]

The regulations also address the valuation issue if the decedent was a farm landlord with a tenant operating under a cash lease.[19] In that situation, the Iowa inheritance tax value of the crop is

determined in accordance with a formula in which the cash rent for the entire rental period is prorated over the entire year. The proration period is the number of days the decedent lived during the rental period, divided by 365 days. The resulting percentage is then applied to the total cash rent for the entire year. The regulation allows a deduction for rent payments made before death and specifies that if such a deduction results in a negative amount, no refund or credit is allowed.[20]

Note: Apparently, crop harvesting costs can be deducted from the value of the crop that results from the use of the formula.

Other states don't have specific procedures for valuing unharvested crops.[21] In those states, value is arrived at by either discounting the crop by the amount of risk involved between the date of death and harvest with the amount of risk tied to the type of lease involved or by pegging the crop's value to the amount of a loan, secured by the crop that could have been negotiated as of the date of death. There may also be other acceptable methods of arriving at a reasonable value for unharvested crops.

Deceased Farm Landlords - Crop Rental Income Income Tax Issues

Crop rents that have accrued as of the date of the decedent's death, but which the decedent did not receive before death are included in the decedent's gross estate.[22] They are not allocated between the estate and the decedent's final income tax return.[23] According to the IRS, a crop rent which is not payable until harvest is included, to the extent it has accrued, in the decedent's gross estate even though the decedent died before harvest. For estate tax valuation purposes, the crop is valued as of the date of death or six months after death if the executor makes an alternate valuation election.[24] If an alternate valuation election is made, any increase in value attributable to crop growth during the six-month alternate valuation period is not directly included in the gross estate.[25] Instead, the crop value (for both date-of-death and alternate valuation purposes) is allocated between the pre-death and post-death period in accordance with a formula. The formula multiplies the value by a fraction. The numerator of the fraction is the number of days in the part of the rental period which ends with the decedent's date of death, and the denominator is the total number of days in the rental period. When the crop is later sold (or fed to livestock) the sale proceeds (or the value of the crop on the date of disposition by feeding to livestock) are plugged into the formula to determine which portion of the crop rental is income in respect of decedent (IRD) and which portion is income to the estate.

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*Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa, and Director of the ISU Center for Agricultural Law and Taxation. Member of the Iowa and Kansas Bar Associations and licensed to practice in Nebraska.

[1] The following possible ways to value an unharvested crop were suggested to the author as a first-year practicing attorney by Donald H. Kelley, then of Kelley, Scritsmier and Byrne in North Platte, NE.

[2] I.R.C. §2031.

[3] I.R.C. §1014(a)(1).

[4] I.R.C. §691.

[5] The deduction occurs in the year the income from the IRD property is recognized. I.R.C. §691(c). The deduction is computed at the average estate tax rate and is determined by the ratio that the value of the items bear to the gross estate. This is because the amount subject to tax is lesser than the value of the gross estate. In addition, the deduction is allowed regardless of whether the IRD item is used to fund a marital deduction for the surviving spouse (in estate of the first spouse to die). Thus, in larger estates, it may be wise practice to fund the marital deduction with IRD items or with property items that are intended to be held by the recipient rather than resold or which have relatively low appreciation.

[6] Rev. Rul. 58-436, 1958-2 C.B. 355.

[7] Rev. Rul. 64-289, 1964-2 C.B. 173. While the Internal Revenue Code and the Treasury Regulations are unclear on the issue, it appears that the decedent could achieve material participation through an agent.

[8] *See, e.g.*, Estate of Tompkins v. Comr., 13 T.C. 1054 (1949).This is the rule for decedents on the cash method. For those on the accrual method, the items would be included in the decedent's closing inventory on the final return.

[9] Treas. Reg. §20.2031-1(b).
[10] 1964-2, C.B. 173 (1964). The formula is directed to decedents who were on the cash method and specifies that for decedent's dying during the rent period, only the crop (or livestock share) rents attributable to the rent period ending with the decedent's death are IRD.
[11] *Id.*
[12] I.R.C. §1223(11). But, this treatment does not apply to cattle (which must be held for 24 months) or other livestock (which must be held for 12 months) if the animals were used in the decedent's trade or business and were held for draft, breeding or sporting purposes. Rev. Rul. 75-361, 1975-2 C.B. 344. The ruling points out that there is no exception under I.R.C. §1223(11) from the special holding period requirements of 24 months for cattle and 12 months for other livestock. See I.R.C. §1231(b)(3)(A)-(B). However, the holding period requirements don't apply to livestock held for sale, such as non-replacement calves. This type of livestock, if included in the estate of an active operator or a materially participating landlord are classified as property and are entitled to a basis equal to the date of death value, and any resulting gain upon sale is entitled to long-term capital gain treatment.
[13] I.R.C. Secs. 268, 1231(b)(4).
[14] See, e.g., Bidart Brothers v. U.S., 262 F.2d 607 (9th Cir. 1959).
[15] Rev. Rul. 75-11, 1975-1 C.B. 27.
[16] IAC §701-86.11(7).
[17] *Id.*
[18] The resulting amount can be reduced by harvesting costs. Such reduction does not appear to be mandatory and, if taken, will increase the income tax payable by reason of the resulting increase of IRD.
[19] IAC §701-86.11(8).
[20] *Id.* The regulation also states that the valuation formula is to be utilized whether the decedent is the landlord or tenant of the property.
[21] Conversely, some states not having established procedures for valuing unharvested crops may have rules for valuing mineral interests at death. In Kansas, for example, interests associated with oil and gas leases are treated as tangible personal property. If the interest is large enough, an appraisal will be necessary. But, for smaller interests the state may prescribe the valuation approach to be used. For example, in Kansas, with respect to oil leases and royalties, the average annual income from production for the immediate three years before death is to be multiplied by 3.5. For a gas well, the average annual production for the five years immediately preceding death is to be multiplied by 10. If no production had occurred in the prior five years, valuation can be based on original cost if the gas well was purchased within a reasonable time before death and there has not been activity in the area to cause an increase in value.
[22] I.R.C. §691(c).
[23] *Id.*
[24] *See, e.g.,* I.R.C. §2032.
[25] Compare Priv. Ltr. Rul. 7743007 and Priv. Ltr. Rul. 7805008.

Agricultural Law Press
Publisher/Editor
Robert P. Achenbach, Jr.
Contributing Editor
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Issue Contents

Agricultural Law Digest

Volume 26, No. 4 February 13, 2015 ISSN 1051-2780

Valuing Ownership Interests in a Closely-held Business

-by Neil E. Harl*

For businesses listed on the various stock exchanges or on an active over-the-counter market, the valuation of ownership interests is relatively simple; the trades of ownership interests represent fair market value for exchanges and for tax reporting purposes as measured by actual transactions. However, relatively few farm and ranch corporations are listed for public trading and so the task is to create a value representing fair market values for use in transactions and or tax reporting purposes but derived from non-market sources.[1] The failure to assure such determinations of value on a regular basis is a major source of conflict in many closely-held businesses, farm and non-farm.

The basic methods for determining value using non-market sources

Over time, several methods of valuation have been developed for closely-held firms with no access to market determinations of value of ownership interests. The valuations from those methods of valuation often vary significantly from each other – and from what is believed to be a fair market value. In some instances, the Internal Revenue Service is likely to challenge the valuations reported to the Internal Revenue Service for gifts or sales of ownership interests; in other situations, the challenge is likely to come from minority owners.[2]

Here, in brief, are the valuation methods in fairly common use today.

Book value. Essentially, "book value" is typically based on the income tax basis of assets within the firm as shown on the balance sheet. That generally means the basis on acquisition of assets (the purchase price plus improvements made, if any, and minus depreciation claimed for depreciable assets) for taxpayers or entities on the cash method of accounting. The use of "book value" obviously reflects the method of accounting used by the firm.[3] The result is almost always a value well below fair market value for cash accounting taxpayers especially. It is important to note whether the firm involved has, in its organizational document or documents, defined "book value."

For a farm or ranch operation, machinery has often been heavily depreciated (particularly for those years when expense method depreciation (often referred to as Section 179 depreciation) was available up to a limit of $500,000 (through 2014) and for years when "bonus" depreciation[4] was available at the 100 percent level without a maximum limit (for acquisitions after September 8, 2010 and before January 1, 2012)[5] and at the 50 percent level (also without a maximum limit) for eligible acquisitions during 2012, 2013 and 2014.[6] For a dairy operation or a cow-calf operation the animals in the herd (other than for purchased

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Agricultural Law Digest is published by the Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 (ph 360-200-5666), bimonthly except June and December. Annual subscription $90 by e-mail. http://www.agrilawpress.com Printed on recycled paper.

animals and the value of those animals is often deducted as Section 179 depreciation of "bonus" depreciation) often have a zero basis because they were raised by the taxpayer and taxpayers are no longer required to capitalize the costs of raising the replacement animals.[7] For those on accrual accounting, and relatively few farming and ranching operations are under accrual accounting, plus those *required* to use accrual accounting,[8] those assets subject to redetermination of value annually at least have a value from the closing inventory closer to fair market value but because of the various inventory valuation rules, inventory value is often less than fair market value.[9]

The result of all of these provisions is that assets, even for accrual taxpayers, are often substantially below fair market value and certainly cash accounting produces income tax basis that peg value well below fair market value.

Appraised value. Some entities, on formation, prescribe appraisal as a solution to the problem of determining fair market value. However, for two reasons appraised value is often rejected as a method of valuation—(1) appraisal has a cost attached and (2) the entity may reject an appraisal conducted by certified or licensed appraisers. Nonetheless, an entity may turn to appraisal as a back-up where the regular method of valuation has not been kept current or is otherwise unacceptable.

The periodically renegotiated fixed price. Perhaps the most workable (and fair) method of valuation of ownership interests is a method in fairly widespread use based on a required annual determination of value by the governing board or the owners of the firm.[10] That method involves a commitment in the articles of incorporation or bylaws for a corporation, operating agreement for an LLC or other organizational document to value, annually, every asset owned by the entity. The burden of accomplishing the evaluation task is generally placed on the governing board of the entity but for small firms it may involve all of the owners. The job is not as great as it might seem, with stored grain valued with local elevator quotes at year end, the local machinery dealer can provide values on used equipment and livestock can be valued based upon quotes obtained from those engaged in buying and selling livestock of the type in question. As for annual adjustments in land values, some states publish the results of land value surveys. Also, some Federal Reserve Districts publish changes in land values in the District.

Once the value of each asset is determined, the sum becomes the updated value for sales of ownership interests, gifts of ownership interests and filing federal estate tax returns and the probate inventory if death should occur over the ensuing 12 months. Ideally, the values of ownership interests in such situations would be determined in a market. This approach uses market-based determinations of value but does so on an item-by-item basis.

One firm, now going into its third generation, has faithfully performed revaluations every year since 1965. That entity, which happens to be a corporation, started with stock valued at $100 per share and is now just under $1200 per share some 50 years later. That firm has not missed a year in performing the annual chore of determining stock value. Over that half century, there have been two deaths (of both parents) and the buy-out of stock of one of the sons whose family had no desire to be involved with the farming operation.

If done regularly, it soon becomes the chief social event of the winter season. Because every owner was either involved in the valuation process (which is preferable) or voted on the final value set per unit of entity ownership, disputes have been rare, almost non-existent, for those pursuing this approach to entity valuation.

A properly drafted provision of this nature also should provide a back-up for valuation (such as appraisal by a qualified appraiser) if it is not carried out on an annual basis. Coupled with the valuation procedure, there should also be provisions for a buy-out term of 10 to 20 years with interest on the basis of a prescribed formula on the unpaid balance or an option by the seller of the interest to accept cash payment at the time of the sale of the interest as well as a specific statement of the restrictions imposed on transfer of ownership interests.

Is such a valuation procedure acceptable for federal income, federal estate and federal gift tax purposes? Such procedures were permitted before 1990 if—(1) the price was fixed or determinable by formula; (2) for estate tax purposes, the estate had to be under an obligation to sell under a buy-sell agreement or upon exercise of an option; (3) the obligation to sell had to be binding during life and (4) the arrangement had to be entered into for *bona fide* business reasons and not as a substitute for a testamentary disposition. In 1990, the Congress (with approval by the President) supplemented the pre-1990 rules in two respects - (1) the 1990 Act provided a general rule that property is to be valued without regard to any option, agreement, restriction "or other right" which set price at less than fair market value of the property;[11] and (2) the 1990 Act specified that the general rule would not apply if the option, arrangement, restriction "or other right" met each of the following requirements – (a) it is a *bona fide* business arrangement, (b) it is not a device to transfer value to family members for less than full consideration and (c) the terms are comparable to "similar" arrangements entered into in an arm's length transaction.[12] The Committee Reports indicate that the 1990 Act was meant to supplement, but not to replace, prior case law.[13]

In 2006, a Tax Court case, *Estate of Amlie v. Commissioner*,[14] was decided involving valuation of bank stock at death. The valuation provision, which contained a fixed and determinable price, was upheld. The exceptions in I.R.C. § 2703(b) were satisfied so I.R.C. § 2703(a) did not provide a basis for disregarding the pre-death agreement.

ENDNOTES

[1] See generally 6 Harl, *Agricultural Law* App. 51B, Article VII (2014).

[2] See,e.g., Baur v. Baur Family Farms, Inc., 832 N.W.2d 663 (Iowa Sup. Ct. 2013). See also Harl, The "Revolution in Farm Estate and Business Planning," ___ *Estate Planning* ___ (2015) (forthcoming).

[3] See Harl, *Farm Income Tax Manual* § 1.07 (2014 ed.).

[4] I.R.C. § 168(k).

[5] The Tax Relief, Unemployment Insurance Reauthorization,

Frank Heinisch

From: Frank Heinisch [mailto:frank@hllawoffice.com]
Sent: Wednesday, April 15, 2015 8:37 PM
To: 'Nebraska Bar Association'
Cc: (email@HLlawoffice.com)
Subject: RE: [realestate] value of Cass Cty farm land

County assessed value as discounted to 75% is a starting point in valuation but does not often reflect FMV of Nebraska agricultural land. Review the University of Nebraska Agricultural Economics Publication, Nebraska Farm Real Estate Market Highlights 2013-2014 published June 2014, http://agecon.unl.edu/2015-trends-in-nebraska-farmland-values-and-rental-rates and the updated valuations as of February 1, 2015, http://agecon.unl.edu/2015-trends-in-nebraska-farmland-values-and-rental-rates.

For Nebraska Real Estate Transfer Statement form 521 line 14 "What is the current market value of the real property," the county assessed value is generally accepted. Computation of life estates for form 521 the county assessed value is also generally accepted.

For the clear market value for inheritance tax, at a minimum use the county assessed value. Often a higher value, reflecting FMV is appropriate to take advantage of stepped up basis. Federal estate tax and gift tax requires FMV that is generally higher than the assessed value of farm ground. In Fillmore County the pivot irrigated land is about 160% of the 2014 county assessed value.

We often use county assessed values for houses and improvements and value the farm land at average sales rates representative of the UNL reports. There are IRS restrictions on using averages for valuation rather than actual sales, but the average will generally reflect a FMV in the ball park of what is acceptable and the level of error in FMV is insignificant in many estates. The next step is to hire an appraiser for larger estates involving taxable federal estate tax or recite actual comparable sales as the basis for determining FMV.

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Agricultural Law Press
Publisher/Editor
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Issue Contents

Agricultural Law Digest

Volume 25, No. 24 December 12, 2014 ISSN 1051-2780

Uniform Basis: Who Can Claim Depreciation After Death and How Much?

-by Neil E. Harl*

Leaving property at death to the surviving spouse for life (a legal life estate or a life estate in trust) with a remainder interest to a child or children has been a fairly common strategy and continues to be used even with the larger applicable exclusion amount[1] and "portability" (which allows the surviving spouse to use the unused applicable exclusion amount at the death of the first spouse to die if the requirements are met).[2] One important issue is how is the income tax basis handled under the "uniform basis" rules? What happens if the holder of the life estate dies first in terms of the effect on income tax basis? And what happens if the holder of the remainder interest dies first? Moreover, what if the estate of the decedent whose death gave rise to the new basis at that individual's death[3] claims depreciation before the estate passes the property to the life estate holder and the holder of the remainder interest?

The concept of a "uniform basis"

The regulations have made it clear for a number of years that the income tax basis acquired from a decedent is uniform in the hands of every person having possession or enjoyment of the property involved at any time under the will or trust (or other instrument) or under the laws of descent and distribution.[4] The concept of a "uniform basis" means that the income tax basis is the same (and is uniform) whether the property is possessed and enjoyed by the executor or administrator, an heir (whether the holder of a life estate, remainder or outright ownership), a legatee or devisee or the trustee or beneficiary of a trust created by a will or inter vivos trust.[5]

Factors are provided, based on life expectancies, for use in determining the income tax basis of the life estate interest or term interest as well as the basis for the remainder interest.[6] The income tax basis of the life interest, the remainder interest or the term interest is computed by multiplying the uniform basis by the appropriate factor.

Example: Grandfather Jones died leaving 240 acres of farmland to his son for life with a remainder interest to a grandson. The fair market value at death was determined to be $10,000 per acre or $2,400,000 for the entire tract. The only depreciable property was tile lines which were ascertained to be valued at $50,000 as of the date of death which was the amount allocated at death from the new basis at the grandfather's death.

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Next issue will be published on January 2, 2015.
Happy Holiday to You and Yours

Agricultural Law Digest is published by the Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 (ph 360-200-5666), bimonthly except June and December. Annual subscription $90 by e-mail. http://www.agrilawpress.com Printed on recycled paper.

If the estate claimed $2500 in depreciation while the estate was open and before the property passed to the son (for life) and the grandson (remainder interest), the available depreciation after the transfer to the son and grandson would be reduced to $47,500. The depreciation thereafter could be claimed by the son as holder of the life estate (based on the life expectancy of the holder of the life estate) and ultimately by the grandson (who would be entitled to claim the rest of the depreciation but there would be no new basis at the deaths of either one.[7] Each would be eligible to claim depreciation, first the life tenant and then the holder of the remainder interest. But there would be no new basis at the deaths of either the holder of the life estate or the holder of the remainder interest.

New basis for the remainder?

If a remainder holder dies before the death of the holder of the life estate, does the remainder holder receive an adjustment in the income tax basis (up to fair market value) of the property in the example? The answer is no, there is no adjustment in the income tax basis at the death of the remainder holder. The uniform basis rules prescribe an allocation of part of the basis determined at the grandfather's death to the remainder holder but deny an adjustment of basis if the remainder holder dies before the holder of the life estate dies.[8] At the death of the life estate holder, the holder of the remainder interest assumes complete ownership and death thereafter produces an adjustment of the basis. But that is not the case if the remainder holder dies before the holder of the life estate dies.

The regulations dealing with the bequest, devise or inheritance of a remainder interest state --

> "Where property is transferred for life, with remainder in fee, and the remainderman dies before the life tenant, no adjustment is made to the uniform basis of the property on the death of the remainderman."[9]

The regulation goes on to state that the successor's basis for the property interest is determined by adding to (or subtracting from) the adjusted uniform basis assigned to the remainder interest the difference between the value of the remainder interest included in the remainderman's estate and the basis of the remainder interest prior to the remainderman's death.[10] An example in the regulations shows how that calculation is handled.[11] Remember, for the distribution of property of decedents, all titles to property acquired by bequest, devise or inheritance, relate back to the death of the decedent, whether the interest is legal, equitable, vested, contingent, general, specific, residual, conditional, executory or otherwise.[12]

Keep in mind that *granted* life estates are not included in the gross estate of the holder of the life estate and, therefore, holders of granted life estates do not receive a new basis at death. By comparison, the holder of a *retained* life estate receives a new income tax basis at death because the property is brought back into the gross estate at death.[13]

So what happens at the death of the remainder holder after the death of the life tenant?

In a case that arose before the current regulations[14] became final, the taxpayer had acquired an interest from a remainder holder with a life estate held by the grantor's spouse.[15] The question was the taxpayer's basis on sale of the property interest. The court determined that the value related to the fair market value at the death of the decedent-remainder holder from whom the taxpayer had acquired the property interest, not the value when the original testator died.[16] The current regulations, as noted above,[17] reach a much different conclusion. The regulations became final in 1957.[18]

ENDNOTES

[1] I.R.C. §§ 2010, 2001(b)(2)(B) (inflation adjusted to $5,340,000 for deaths in 2014).

[2] I.R.C. § 2010(c)(4), (5). See Harl, "Portability – Great Idea But Full of Planning Problems," 22 *Agric. L. Dig.* 137 (2011).

[3] I.R.C. § 1014.

[4] See I.R.C. § 1014(a); Treas. Reg. § 1.1014-4(a)(1). See also Pierson v. Comm'r, 253 F.2d 928 (3d Cir. 1958; Wilson v. Tomlinson, 61-2 U.S. Tax Cas. (CCH) ¶ 9533 (S.D. Fla. 1961).

[5] Treas. Reg. § 1.1014-4(a)(1).

[6] Treas. Reg. § 1.1014-5(a)(3).

[7] See Treas. Reg. § 1.1014-8(a)(1).

[8] Treas. Reg. § 1.1014-8(a)(1).

[9] Treas. Reg. § 1.1014-8(a)(1).

[10] *Id.*

[11] Treas. Reg. § 1.1014-8(b).

[12] Treas. Reg. § 1.1014-4(b). See Harl, "Income Tax Basis for a Remainder Interest," 21 *Agric. L. Dig.* 25 (2010).

[13] I.R.C. § 2036.

[14] Treas. Reg. § 1.1014-8(a).

[15] Bauer v. United States, 168 F. Supp. 539 (Cls. Ct. 1958).

[16] *Id.*

[17] See Treas. Reg. § 1.1014-8(a).

[18] T.D. 6265, Nov. 6, 1957.

IN THE COUNTY COURT OF FILLMORE COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF	CASE #PR 16-
[NAME OF DECEDENT], DECEASED Date of Death:	**INVENTORY**

The undersigned Personal Representative hereby certifies that the following is a true and complete inventory of the property owned by the Decedent at the time of death together with the type and amount of any encumbrance existing with reference to any item.

ITEM	DESCRIPTION	Probate	Non-Probate
A- 1	An undivided <u>one-third (⅓) interest</u> in the North Half of the Northwest Quarter (N½NW¼) of Section Sixteen (16), Township Seven (7) North, Range Two (2), West of the 6th P.M. in Fillmore County, Nebraska **(Grandpa Zed Place)** titled [Name of Decedent], [Names of other Owners] and held as tenants in common; including irrigation well, well column, bowls, pump, gearhead and drive shaft valued at $20,000 (Parcel ID 300034972)	493,722.67	
	2016 Assessed Value of Land $839,800.00 2016 Assessed Value of Outbuildings $30,585.00 2016 Assessed Value of Dwelling $62,110.00 Total 2016 Assessed Value $932,495.00		
	Land Type / # of Acres / $/Acre / Total Irrigated 153.06 $8,800.00 $1,346,928.00 Home Site 1.00 $6,500.00 $6,500.00 Bldg Site 1.96 $6,500.00 $12,740.00 Road 3.98 $0.00 Total 160.00 $1,366,168.00 Reinke 7 tower pivot $30,000.00 Morton Building $25,000.00 Rental House $60,000.00 **Total Value $1,481,168.00**		
	Total Schedule A	493,722.67	

EXHIBIT 3.b.

ITEM	DESCRIPTION	Probate	Non-Probate
B- 1	160 shares of Class A $100.00 par value voting common stock of XYZ Corporation, Inc., a Nebraska Corporation valued at $1,700.00 per share	272,000.00	
B- 2	790 shares of Class B $100.00 par value non-voting common stock of XYZ Corporation, Inc., a Nebraska Corporation valued at $1,590.00 per share	1,256,100.00	
B- 3	Waddell & Reed; Account #XXXX9686; titled [Name of Decedent]	146,470.72	
B- 3a.	Waddell & Reed Accumulative Fund Class A (UNACX); CUSIP #930057880 # of shares: 3,012.351 — Price/Share: $11.84 — Date of Death Value: $35,666.24		
B- 3b.	Waddell & Reed Science & Technology Fund Class A (UNSCX); CUSIP #930057500 # of shares: 6,483.586 — Price/Share: $17.09 — Date of Death Value: $110,804.48		
	TOTAL WADDELL & REED **$146,470.72**		
	Total Schedule B – Stock & Bonds	**1,674,570.72**	
F- 1	Household items and personal effects	10,000.00	
F- 2	Rent due Decedent from XYZ Corporation, Inc.	45,000.00	
F- 3	Corn (yellow) 33,813.11 bushels on hand @ $3.70 per bushel per 1/19/16 Cash price at Geneva Milling, Geneva, NE	125,108.51	
F- 4	Case AFS 7088 Combine, sold at public auction on [date of auction]	110,000.00	
F- 5	1995-7220 Case Tractor, with auto steer, sold at public auction on [date of auction]	48,000.00	
F- 6	Case 955 Planter, sold at public auction on [date of auction]	9,500.00	
	Total Schedule F – Miscellaneous Property	**347,608.51**	

Note: *Form 2553 begins on the next page.*

Cincinnati Fax Number for Filing Form 2553 Has Changed

The fax number for filing Form 2553 with the IRS center in Cincinnati has changed.

The new number is 855-270-4081. The previous number of 859-669-5748 is no longer in service.

Form **2553**

(Rev. December 2013)

Department of the Treasury
Internal Revenue Service

Election by a Small Business Corporation

(Under section 1362 of the Internal Revenue Code)

▶ **See Parts II and III on page 3.**

▶ **You can fax this form to the IRS (see separate instructions).**

▶ **Information about Form 2553 and its separate instructions is at *www.irs.gov/form2553*.**

OMB No. 1545-0123

Note. This election to be an S corporation can be accepted only if all the tests are met under *Who May Elect* in the instructions, all shareholders have signed the consent statement, an officer has signed below, and the exact name and address of the corporation (entity) and other required form information have been provided.

Part I Election Information

Type or Print		
	Name (see instructions)	**A** Employer identification number
	Number, street, and room or suite no. (If a P.O. box, see instructions.)	**B** Date incorporated
	City or town, state, and ZIP code	**C** State of incorporation

D Check the applicable box(es) if the corporation (entity), after applying for the EIN shown in **A** above, changed its ☐ name or ☐ address

E Election is to be effective for tax year beginning (month, day, year) (see instructions) . . . . . ▶ _____

Caution. A corporation (entity) making the election for its first tax year in existence will usually enter the beginning date of a short tax year that begins on a date other than January 1.

F Selected tax year:

(1) ☐ Calendar year

(2) ☐ Fiscal year ending (month and day) ▶ _____

(3) ☐ 52-53-week year ending with reference to the month of December

(4) ☐ 52-53-week year ending with reference to the month of ▶ _____

If box (2) or (4) is checked, complete Part II.

G If more than 100 shareholders are listed for item J (see page 2), check this box if treating members of a family as one shareholder results in no more than 100 shareholders (see test 2 under *Who May Elect* in the instructions) ▶ ☐

H Name and title of officer or legal representative who the IRS may call for more information	**I** Telephone number of officer or legal representative

If this S corporation election is being filed late, I declare that I had reasonable cause for not filing Form 2553 timely, and if this late election is being made by an entity eligible to elect to be treated as a corporation, I declare that I also had reasonable cause for not filing an entity classification election timely and that the representations listed in Part IV are true. See below for my explanation of the reasons the election or elections were not made on time and a description of my diligent actions to correct the mistake upon its discovery (see instructions).

Sign Here

Under penalties of perjury, I declare that I have examined this election, including accompanying documents, and, to the best of my knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete.

▶ **Signature of officer**	**Title**	**Date**

Part I Election Information (continued) **Note.** If you need more rows, use additional copies of page 2.

J Name and address of each shareholder or former shareholder required to consent to the election. (see instructions)	K **Shareholder's Consent Statement** Under penalties of perjury, I declare that I consent to the election of the above-named corporation (entity) to be an S corporation under section 1362(a) and that I have examined this consent statement, including accompanying documents, and, to the best of my knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete. I understand my consent is binding and may not be withdrawn after the corporation (entity) has made a valid election. If seeking relief for a late filed election, I also declare under penalties of perjury that I have reported my income on all affected returns consistent with the S corporation election for the year for which the election should have been filed (see beginning date entered on line E) and for all subsequent years.		L Stock owned or percentage of ownership (see instructions)		M Social security number or employer identification number (see instructions)	N Shareholder's tax year ends (month and day)
	Signature	Date	Number of shares or percentage of ownership	Date(s) acquired		

Part II Selection of Fiscal Tax Year (see instructions)

Note. All corporations using this part must complete item O and item P, Q, or R.

O Check the applicable box to indicate whether the corporation is:

1. ☐ A new corporation **adopting** the tax year entered in item F, Part I.
2. ☐ An existing corporation **retaining** the tax year entered in item F, Part I.
3. ☐ An existing corporation **changing** to the tax year entered in item F, Part I.

P Complete item P if the corporation is using the automatic approval provisions of Rev. Proc. 2006-46, 2006-45 I.R.B. 859, to request **(1)** a natural business year (as defined in section 5.07 of Rev. Proc. 2006-46) or **(2)** a year that satisfies the ownership tax year test (as defined in section 5.08 of Rev. Proc. 2006-46). Check the applicable box below to indicate the representation statement the corporation is making.

1. Natural Business Year ▶ ☐ I represent that the corporation is adopting, retaining, or changing to a tax year that qualifies as its natural business year (as defined in section 5.07 of Rev. Proc. 2006-46) and has attached a statement showing separately for each month the gross receipts for the most recent 47 months (see instructions). I also represent that the corporation is not precluded by section 4.02 of Rev. Proc. 2006-46 from obtaining automatic approval of such adoption, retention, or change in tax year.

2. Ownership Tax Year ▶ ☐ I represent that shareholders (as described in section 5.08 of Rev. Proc. 2006-46) holding more than half of the shares of the stock (as of the first day of the tax year to which the request relates) of the corporation have the same tax year or are concurrently changing to the tax year that the corporation adopts, retains, or changes to per item F, Part I, and that such tax year satisfies the requirement of section 4.01(3) of Rev. Proc. 2006-46. I also represent that the corporation is not precluded by section 4.02 of Rev. Proc. 2006-46 from obtaining automatic approval of such adoption, retention, or change in tax year.

Note. If you do not use item P and the corporation wants a fiscal tax year, complete either item Q or R below. Item Q is used to request a fiscal tax year based on a business purpose and to make a back-up section 444 election. Item R is used to make a regular section 444 election.

Q Business Purpose—To request a fiscal tax year based on a business purpose, check box Q1. See instructions for details including payment of a user fee. You may also check box Q2 and/or box Q3.

1. Check here ▶ ☐ if the fiscal year entered in item F, Part I, is requested under the prior approval provisions of Rev. Proc. 2002-39, 2002-22 I.R.B. 1046. Attach to Form 2553 a statement describing the relevant facts and circumstances and, if applicable, the gross receipts from sales and services necessary to establish a business purpose. See the instructions for details regarding the gross receipts from sales and services. If the IRS proposes to disapprove the requested fiscal year, do you want a conference with the IRS National Office?

☐ Yes ☐ No

2. Check here ▶ ☐ to show that the corporation intends to make a back-up section 444 election in the event the corporation's business purpose request is not approved by the IRS. (See instructions for more information.)

3. Check here ▶ ☐ to show that the corporation agrees to adopt or change to a tax year ending December 31 if necessary for the IRS to accept this election for S corporation status in the event (1) the corporation's business purpose request is not approved and the corporation makes a back-up section 444 election, but is ultimately not qualified to make a section 444 election, or (2) the corporation's business purpose request is not approved and the corporation did not make a back-up section 444 election.

R Section 444 Election—To make a section 444 election, check box R1. You may also check box R2.

1. Check here ▶ ☐ to show that the corporation will make, if qualified, a section 444 election to have the fiscal tax year shown in item F, Part I. To make the election, you must complete **Form 8716,** Election To Have a Tax Year Other Than a Required Tax Year, and either attach it to Form 2553 or file it separately.

2. Check here ▶ ☐ to show that the corporation agrees to adopt or change to a tax year ending December 31 if necessary for the IRS to accept this election for S corporation status in the event the corporation is ultimately not qualified to make a section 444 election.

Part III Qualified Subchapter S Trust (QSST) Election Under Section 1361(d)(2)*

Income beneficiary's name and address	Social security number
Trust's name and address	**Employer identification number**

Date on which stock of the corporation was transferred to the trust (month, day, year) . . . . . ▶

In order for the trust named above to be a QSST and thus a qualifying shareholder of the S corporation for which this Form 2553 is filed, I hereby make the election under section 1361(d)(2). Under penalties of perjury, I certify that the trust meets the definitional requirements of section 1361(d)(3) and that all other information provided in Part III is true, correct, and complete.

Signature of income beneficiary or signature and title of legal representative or other qualified person making the election — Date

*Use Part III to make the QSST election only if stock of the corporation has been transferred to the trust on or before the date on which the corporation makes its election to be an S corporation. The QSST election must be made and filed separately if stock of the corporation is transferred to the trust **after** the date on which the corporation makes the S election.

Part IV Late Corporate Classification Election Representations (see instructions)

If a late entity classification election was intended to be effective on the same date that the S corporation election was intended to be effective, relief for a late S corporation election must also include the following representations.

1 The requesting entity is an eligible entity as defined in Regulations section 301.7701-3(a);

2 The requesting entity intended to be classified as a corporation as of the effective date of the S corporation status;

3 The requesting entity fails to qualify as a corporation solely because Form 8832, Entity Classification Election, was not timely filed under Regulations section 301.7701-3(c)(1)(i), or Form 8832 was not deemed to have been filed under Regulations section 301.7701-3(c)(1)(v)(C);

4 The requesting entity fails to qualify as an S corporation on the effective date of the S corporation status solely because the S corporation election was not timely filed pursuant to section 1362(b); **and**

5a The requesting entity timely filed all required federal tax returns and information returns consistent with its requested classification as an S corporation for all of the years the entity intended to be an S corporation and no inconsistent tax or information returns have been filed by or with respect to the entity during any of the tax years, **or**

b The requesting entity has not filed a federal tax or information return for the first year in which the election was intended to be effective because the due date has not passed for that year's federal tax or information return.

Note: ***The Instructions for Form 2553 begin on the next page.***

Cincinnati Fax Number for Filing Form 2553 Has Changed

The fax number for filing Form 2553 with the IRS center in Cincinnati has changed.

The new number is 855-270-4081. The previous number of 859-669-5748 is no longer in service.

Instructions for Form 2553

(Rev. December 2013)

Election by a Small Business Corporation

Department of the Treasury
Internal Revenue Service

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 2553 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form2553*.

What's New

New simplified methods for a corporation (entity) to request relief for a late S corporation election, ESBT election, QSST election, or corporate classification election are in effect. See *Relief for Late Elections*.

General Instructions

Purpose of Form

A corporation or other entity eligible to elect to be treated as a corporation must use Form 2553 to make an election under section 1362(a) to be an S corporation. An entity eligible to elect to be treated as a corporation that meets certain tests discussed below will be treated as a corporation as of the effective date of the S corporation election and does not need to file Form 8832, Entity Classification Election.

The income of an S corporation generally is taxed to the shareholders of the corporation rather than to the corporation itself. However, an S corporation may still owe tax on certain income. For details, see *Tax and Payments* in the Instructions for Form 1120S.

Who May Elect

A corporation or other entity eligible to elect to be treated as a corporation may elect to be an S corporation only if it meets all the following tests.

1. It is (a) a domestic corporation, or (b) a domestic entity eligible to elect to be treated as a corporation, that timely files Form 2553 and meets all the other tests listed below. If Form 2553 is not timely filed, see *Relief for Late Elections*, later.

2. It has no more than 100 shareholders. You can treat an individual and his or her spouse (and their estates) as one shareholder for this test. You can also treat all members of a family (as defined in section 1361(c)(1)(B)) and their estates as one shareholder for this test. For additional situations in which certain entities will be treated as members of a family, see Regulations section 1.1361-1(e)(3)(ii). All others are treated as separate shareholders. For details, see section 1361(c)(1).

3. Its only shareholders are individuals, estates, exempt organizations described in section 401(a) or 501(c)(3), or certain trusts described in section 1361(c)(2)(A).

For information about the section 1361(d)(2) election to be a qualified subchapter S trust (QSST), see the instructions for Part III. For information about the section 1361(e)(3) election to be an electing small business trust (ESBT), see Regulations section 1.1361-1(m). For guidance on how to convert a QSST to an ESBT, see Regulations section 1.1361-1(j)(12). If these elections were not timely made, see Rev. Proc. 2013-30, 2013-36 I.R.B. 173, available at *www.irs.gov/irb/2013-36_IRB/ar12.html*.

4. It has no nonresident alien shareholders.

5. It has only one class of stock (disregarding differences in voting rights). Generally, a corporation is treated as having only one class of stock if all outstanding shares of the corporation's stock confer identical rights to distribution and liquidation proceeds. See Regulations section 1.1361-1(l) for details.

6. It is not one of the following ineligible corporations.

a. A bank or thrift institution that uses the reserve method of accounting for bad debts under section 585.

b. An insurance company subject to tax under subchapter L of the Code.

c. A corporation that has elected to be treated as a possessions corporation under section 936.

d. A domestic international sales corporation (DISC) or former DISC.

7. It has or will adopt or change to one of the following tax years.

a. A tax year ending December 31.

b. A natural business year.

c. An ownership tax year.

d. A tax year elected under section 444.

e. A 52-53-week tax year ending with reference to a year listed above.

f. Any other tax year (including a 52-53-week tax year) for which the corporation establishes a business purpose.

For details on making a section 444 election or requesting a natural business, ownership, or other business purpose tax year, see the instructions for Part II.

8. Each shareholder consents as explained in the instructions for column K.

See sections 1361, 1362, and 1378, and their related regulations for additional information on the above tests.

A parent S corporation can elect to treat an eligible wholly owned subsidiary as a qualified subchapter S subsidiary. If the election is made, the subsidiary's assets, liabilities, and items of income, deduction, and credit generally are treated as those of the parent. For details, see Form 8869, Qualified Subchapter S Subsidiary Election.

When To Make the Election

Complete and file Form 2553:

- No more than two months and 15 days after the beginning of the tax year the election is to take effect, or
- At any time during the tax year preceding the tax year it is to take effect.

For this purpose, the 2-month period begins on the day of the month the tax year begins and ends with the close of the day before the numerically corresponding day of the second calendar month following that month. If there is no

corresponding day, use the close of the last day of the calendar month.

Example 1. No prior tax year. A calendar year small business corporation begins its first tax year on January 7. The 2-month period ends March 6 and 15 days after that is March 21. To be an S corporation beginning with its first tax year, the corporation must file Form 2553 during the period that begins January 7 and ends March 21. Because the corporation had no prior tax year, an election made before January 7 will not be valid.

Example 2. Prior tax year. A calendar year small business corporation has been filing Form 1120 as a C corporation but wishes to make an S election for its next tax year beginning January 1. The 2-month period ends February 28 (29 in leap years) and 15 days after that is March 15. To be an S corporation beginning with its next tax year, the corporation must file Form 2553 during the period that begins the first day (January 1) of its last year as a C corporation and ends March 15th of the year it wishes to be an S corporation. Because the corporation had a prior tax year, it can make the election at any time during that prior tax year.

Example 3. Tax year less than 2 1/2 months. A calendar year small business corporation begins its first tax year on November 8. The 2-month period ends January 7 and 15 days after that is January 22. To be an S corporation beginning with its short tax year, the corporation must file Form 2553 during the period that begins November 8 and ends January 22. Because the corporation had no prior tax year, an election made before November 8 will not be valid.

Relief for Late Elections

The following two sections discuss relief for late S corporation elections and relief for late S corporation and entity classification elections for the same entity. For supplemental procedural requirements when seeking relief for multiple late elections, see Rev. Proc. 2013-30, section 4.04.

When filing Form 2553 for a **late** S corporation election, the corporation (entity) **must** write in the top margin of the first page of Form 2553 "FILED PURSUANT TO REV. PROC. 2013-30." Also, if the late election is made by attaching Form 2553 to Form 1120S, the corporation (entity) **must** write in the top margin of the first page of Form 1120S "INCLUDES LATE ELECTION(S) FILED PURSUANT TO REV. PROC. 2013-30."

The election can be filed with the current Form 1120S if all earlier Forms 1120S have been filed. The election can be attached to the first Form 1120S for the year including the effective date if filed simultaneously with any other delinquent Forms 1120S. Form 2553 can also be filed separately.

Relief for a Late S Corporation Election Filed by a Corporation

A late election to be an S corporation generally is effective for the tax year following the tax year beginning on the date entered on line E of Form 2553. However, relief for a late election may be available if the corporation can show that the failure to file on time was due to reasonable cause.

To request relief for a late election, a corporation that meets the following requirements can explain the reasonable cause in the designated space on page 1 of Form 2553.

1. The corporation intended to be classified as an S corporation as of the date entered on line E of Form 2553;

2. The corporation fails to qualify as an S corporation (see *Who May Elect*, earlier) on the effective date entered on line E of Form 2553 solely because Form 2553 was not filed by the due date (see *When To Make the Election*, earlier);

3. The corporation has reasonable cause for its failure to timely file Form 2553 and has acted diligently to correct the mistake upon discovery of its failure to timely file Form 2553;

4. Form 2553 will be filed within 3 years and 75 days of the date entered on line E of Form 2553; and

5. A corporation that meets requirements (1) through (4) must also be able to provide statements from all shareholders who were shareholders during the period between the date entered on line E of Form 2553 and the date the completed Form 2553 is filed stating that they have reported their income on all affected returns consistent with the S corporation election for the year the election should have been made and all subsequent years. Completion of Form 2553, Part I, column K, *Shareholder's Consent Statement* (or similar document attached to Form 2553), will meet this requirement; or

6. A corporation that meets requirements (1) through (3) but not requirement (4) can still request relief for a late election on Form 2553 if the following statements are true.

a. The corporation and all its shareholders reported their income consistent with S corporation status for the year the S corporation election should have been made, and for every subsequent tax year (if any);

b. At least 6 months have elapsed since the date on which the corporation filed its tax return for the first year the corporation intended to be an S corporation; and

c. Neither the corporation nor any of its shareholders was notified by the IRS of any problem regarding the S corporation status within 6 months of the date on which the Form 1120S for the first year was timely filed.

To request relief for a late election when the above requirements are not met, the corporation generally must request a private letter ruling and pay a user fee in accordance with Rev. Proc. 2014-1, 2014-1 I.R.B. 1 (or its successor).

Relief for a Late S Corporation Election Filed By an Entity Eligible To Elect To Be Treated as a Corporation

A late election to be an S corporation and a late entity classification election for the same entity may be available if the entity can show that the failure to file Form 2553 on time was due to reasonable cause. Relief must be requested within 3 years and 75 days of the effective date entered on line E of Form 2553.

To request relief for a late election, an entity that meets the following requirements can explain the reasonable cause in the designated space on page 1 of Form 2553.

1. The entity is an eligible entity as defined in Regulations section 301.7701-3(a) (see *Purpose of Form* in the Form 8832 instructions).

2. The entity intended to be classified as an S corporation as of the date entered on line E of Form 2553.

3. Form 2553 will be filed within 3 years and 75 days of the date entered on line E of Form 2553.

4. The entity failed to qualify as a corporation solely because Form 8832 was not timely filed under Regulations section 301.7701-3(c)(1)(i) (see *When To File* in the Form

8832 instructions), or Form 8832 was not deemed to have been filed under Regulations section 301.7701-3(c)(1)(v)(C) (see *Who Must File* in the Form 8832 instructions).

5. The entity fails to qualify as an S corporation (see *Who May Elect*, earlier) on the effective date entered on line E of Form 2553 because Form 2553 was not filed by the due date (see *When To Make the Election*, earlier).

6. The entity either:

a. Timely filed all Forms 1120S consistent with its requested classification as an S corporation, or

b. Did not file Form 1120S because the due date for the first year's Form 1120S has not passed.

7. The entity has reasonable cause for its failure to timely file Form 2553 and has acted diligently to correct the mistake upon discovery of its failure to timely file Form 2553.

8. The S corporation can provide statements from all shareholders who were shareholders during the period between the date entered on line E of Form 2553 and the date the completed Form 2553 is filed stating that they have reported their income on all affected returns consistent with the S corporation election for the year the election should have been made and all subsequent years. Completion of Form 2553, Part I, column K, *Shareholder's Consent Statement* (or similar document attached to Form 2553), will meet this requirement.

To request relief for a late election when the above requirements are not met, the entity generally must request a private letter ruling and pay a user fee in accordance with Rev. Proc. 2014-1, 2014-1 I.R.B. 1 (or its successor).

Where To File

Generally, send the original election (no photocopies) or fax it to the Internal Revenue Service Center listed below. If the corporation files this election by fax, keep the original Form 2553 with the corporation's permanent records. However, certain late elections can be filed attached to Form 1120S. See *Relief for Late Elections*, earlier.

For the latest mailing address of Form 2553, go to IRS.gov and enter "Where to file Form 2553" in the search box.

If the corporation's principal business, office, or agency is located in:	Use the following address or fax number:
Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin	Department of the Treasury Internal Revenue Service Center Cincinnati, OH 45999 Fax: (859) 669-5748
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming	Department of the Treasury Internal Revenue Service Center Ogden, UT 84201 Fax: (801) 620-7116

Acceptance or Nonacceptance of Election

The service center will notify the corporation if its election is accepted and when it will take effect. The corporation will also be notified if its election is not accepted. The corporation should generally receive a determination on its election within 60 days after it has filed Form 2553. If box Q1 in Part II is checked, the corporation will receive a ruling letter from the IRS that either approves or denies the selected tax year. When box Q1 is checked, it will generally take an additional 90 days for the Form 2553 to be accepted.

Care should be exercised to ensure that the IRS receives the election. If the corporation is not notified of acceptance or nonacceptance of its election within 2 months of the date of filing (date faxed or mailed), or within 5 months if box Q1 is checked, take follow-up action by calling 1-800-829-4933.

If the IRS questions whether Form 2553 was filed, an acceptable proof of filing is:

- A certified or registered mail receipt (timely postmarked) from the U.S. Postal Service, or its equivalent from a designated private delivery service (see Notice 2004-83, 2004-52 I.R.B. 1030, available at www.irs.gov/irb/2004-52_IRB/ar10.html (or its successor));
- Form 2553 with an accepted stamp;
- Form 2553 with a stamped IRS received date; or
- An IRS letter stating that Form 2553 has been accepted.

Do not file Form 1120S for any tax year before the year the election takes effect. If the corporation is now required to file Form 1120, U.S. Corporation Income Tax Return, or any other applicable tax return, continue filing it until the election takes effect.

End of Election

Once the election is made, it stays in effect until it is terminated or revoked. IRS consent generally is required for another election by the corporation (or a successor corporation) on Form 2553 for any tax year before the 5th tax year after the first tax year in which the termination or

revocation took effect. See Regulations section 1.1362-5 for details.

Specific Instructions

Part I

Name and Address

Enter the corporation's true name as stated in the corporate charter or other legal document creating it. If the corporation's mailing address is the same as someone else's, such as a shareholder's, enter "C/O" and this person's name following the name of the corporation. Include the suite, room, or other unit number after the street address. If the Post Office does not deliver to the street address and the corporation has a P.O. box, show the box number instead of the street address. If the corporation changed its name or address after applying for its employer identification number, be sure to check the box in item D of Part I.

Item A. Employer Identification Number (EIN)

Enter the corporation's EIN. If the corporation does not have an EIN, it must apply for one. An EIN can be applied for:

- Online–Click on the Employer ID Numbers (EINs) link at *www.irs.gov/businesses/small*. The EIN is issued immediately once the application information is validated.
- By telephone at 1-800-829-4933, or at 1-800-829-4059 for individuals who are deaf, hard of hearing, or have a speech disability and who have access to TTY/TDD equipment.
- By mailing or faxing Form SS-4, Application for Employer Identification Number.

If the corporation has not received its EIN by the time the return is due, enter "Applied For" and the date the corporation applied in the space for the EIN. For more details, see the Instructions for Form SS-4.

Item E. Effective Date of Election

TIP *Form 2553 generally must be filed no later than 2 months and 15 days after the date entered for item E. For details and exceptions, see* When To Make the Election, *earlier.*

A corporation (or entity eligible to elect to be treated as a corporation) making the election effective for its first tax year in existence should enter the earliest of the following dates:

- The date the corporation (entity) first had shareholders (owners),
- The date the corporation (entity) first had assets, or
- The date the corporation (entity) began doing business.

CAUTION *When the corporation (entity) is making the election for its first tax year in existence, it will usually enter the beginning date of a tax year that begins on a date other than January 1.*

A corporation (entity) not making the election for its first tax year in existence that is keeping its current tax year should enter the beginning date of the first tax year for which it wants the election to be effective.

A corporation (entity) not making the election for its first tax year in existence that is changing its tax year and wants to be an S corporation for the short tax year needed to switch tax years should enter the beginning date of the short tax year. If the corporation (entity) does not want to be an S corporation for this short tax year, it should enter the beginning date of the tax year following this short tax year and file Form 1128, Application To Adopt, Change, or Retain a Tax Year. If this change qualifies as an automatic approval request (Form 1128, Part II), file Form 1128 as an attachment to Form 2553. If this change qualifies as a ruling request (Form 1128, Part III), file Form 1128 separately. If filing Form 1128, enter "Form 1128" on the dotted line to the left of the entry space for item E.

Item F

Check the box that corresponds with the S corporation's selected tax year. If box (2) or (4) is checked, provide the additional information about the tax year, and complete Part II of the form.

Signature

Form 2553 must be signed and dated by the president, vice president, treasurer, assistant treasurer, chief accounting officer, or any other corporate officer (such as tax officer) authorized to sign.

If Form 2553 is not signed, it will not be considered timely filed.

Column J

Enter the name and address of each shareholder or former shareholder required to consent to the election. If stock of the corporation is held by a nominee, guardian, custodian, or an agent, enter the name and address of the person for whom the stock is held. If a single member limited liability company (LLC) owns stock in the corporation, and the LLC is treated as a disregarded entity for federal income tax purposes, enter the owner's name and address. The owner must be eligible to be an S corporation shareholder.

For an election filed before the effective date entered for item E, only shareholders who own stock on the day the election is made need to consent to the election.

For an election filed on or after the effective date entered for item E, all shareholders or former shareholders who owned stock at any time during the period beginning on the effective date entered for item E and ending on the day the election is made must consent to the election.

If the corporation timely filed an election, but one or more shareholders did not timely file a consent, see Regulations section 1.1362-6(b)(3)(iii). If the shareholder was a community property spouse who was a shareholder solely because of a state community property law, see Rev. Proc. 2004-35, 2004-23 I.R.B. 1029, available at *www.irs.gov/irb/2004-23_IRB/ar11.html*.

Column K. Shareholder's Consent Statement

Each shareholder consents by signing and dating either in column K or on a separate consent statement. The following special rules apply in determining who must sign.

- If an individual and his or her spouse have a community interest in the stock or in the income from it, both must consent.
- Each tenant in common, joint tenant, and tenant by the entirety must consent.
- A minor's consent is made by the minor, legal representative of the minor, or a natural or adoptive parent of the minor if no legal representative has been appointed.
- The consent of an estate is made by the executor or administrator.

• The consent of an electing small business trust (ESBT) is made by the trustee and, if a grantor trust, the deemed owner. See Regulations section 1.1362-6(b)(2)(iv) for details.
• If the stock is owned by a qualified subchapter S trust (QSST), the deemed owner of the trust must consent.
• If the stock is owned by a trust (other than an ESBT or QSST), the person treated as the shareholder by section 1361(c)(2)(B) must consent.

Continuation sheet or separate consent statement. If you need a continuation sheet or use a separate consent statement, attach it to Form 2553. It must contain the name, address, and EIN of the corporation and the information requested in columns J through N of Part I.

Column L

Enter the number of shares of stock each shareholder owns on the date the election is filed and the date(s) the stock was acquired. Enter -0- for any former shareholders listed in column J. An entity without stock, such as a limited liability company (LLC), should enter the percentage of ownership and date(s) acquired.

Column M

Enter the social security number of each individual listed in column J. Enter the EIN of each estate, qualified trust, or exempt organization.

Column N

Enter the month and day that each shareholder's tax year ends. If a shareholder is changing his or her tax year, enter the tax year the shareholder is changing to, and attach an explanation indicating the present tax year and the basis for the change (for example, an automatic revenue procedure or a letter ruling request).

Part II

Complete Part II if you checked box (2) or (4) in Part I, Item F.

Note. Corporations cannot obtain automatic approval of a fiscal year under the natural business year (box P1) or ownership tax year (box P2) provisions if they are under examination, before an appeals (area) office, or before a federal court without meeting certain conditions and attaching a statement to the application. For details, see section 7.03 of Rev. Proc. 2006-46, 2006-45 I.R.B. 859, available at *www.irs.gov/irb/2006-45_IRB/ar14.html*.

Box P1

A corporation that does not have a 47-month period of gross receipts cannot automatically establish a natural business year.

Box Q1

For examples of an acceptable business purpose for requesting a fiscal tax year, see section 5.02 of Rev. Proc. 2002-39, 2002-22 I.R.B. 1046, and Rev. Rul. 87-57, 1987-2 C.B. 117.

Attach a statement showing the relevant facts and circumstances to establish a business purpose for the requested fiscal year. For details on what is sufficient to establish a business purpose, see section 5.02 of Rev. Proc. 2002-39.

If your business purpose is based on one of the natural business year tests provided in section 5.03 of Rev. Proc. 2002-39, identify which test you are using (the 25% gross receipts, annual business cycle, or seasonal business test). For the 25% gross receipts test, provide a schedule showing the amount of gross receipts for each month for the most recent 47 months. For either the annual business cycle or seasonal business test, provide the gross receipts from sales and services (and inventory costs, if applicable) for each month of the short period, if any, and the three immediately preceding tax years. If the corporation has been in existence for less than three tax years, submit figures for the period of existence.

If you check box Q1, you will be charged a user fee of $2,700 (subject to change by Rev. Proc. 2015-1 or its successor). Do not pay the fee when filing Form 2553. The service center will send Form 2553 to the IRS in Washington, DC, who, in turn, will notify the corporation that the fee is due.

Box Q2

If the corporation makes a back-up section 444 election for which it is qualified, then the section 444 election will take effect in the event the business purpose request is not approved. In some cases, the tax year requested under the back-up section 444 election may be different than the tax year requested under business purpose. See Form 8716, Election To Have a Tax Year Other Than a Required Tax Year, for details on making a back-up section 444 election.

Boxes Q3 and R2

If the corporation is not qualified to make the section 444 election after making the item Q2 back-up section 444 election or indicating its intention to make the election in item R1, and therefore it later files a calendar year return, it should write "Section 444 Election Not Made" in the top left corner of the first calendar year Form 1120S it files.

Part III

In Part III, the income beneficiary (or legal representative) of certain qualified subchapter S trusts (QSSTs) may make the QSST election required by section 1361(d)(2). Part III may be used to make the QSST election only if corporate stock has been transferred to the trust on or before the date on which the corporation makes its election to be an S corporation. However, a statement can be used instead of Part III to make the election. If there was an inadvertent failure to timely file a QSST election, see the relief provisions under Rev. Proc. 2013-30.

Note. Use Part III only if you make the election in Part I. Form 2553 cannot be filed with only Part III completed.

The deemed owner of the QSST must also consent to the S corporation election in column K of Form 2553.

Part IV

The representations listed in Part IV must be attached to a late corporate classification election intended to be effective on the same date that a late S corporation election was intended to be effective. For more information on making these late elections, see *Relief for a Late S Corporation Election Filed By an Entity Eligible To Elect To Be Treated as a Corporation*, earlier.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will depend on individual circumstances. The estimated average time is:

Recordkeeping	9 hr., 48 min.
Learning about the law or the form	2 hr., 33 min.
Preparing and sending the form to the IRS	4 hr., 1 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAR:MP:TFP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where To File*, earlier.

FILED PURSUANT TO REV PROC 2013-30

[Name]

[Address, City, State, Zip Code]

June 24, 2016

Department of the Treasury
Internal Revenue Service Center
Attention: Director
Ogden, UT 84201

RE: Application for termination relief under Code Sec. 1362(f) pursuant to Rev Proc 2013-30, with regard to the election of a "**qualified sub-chapter** S trust" shareholder

I, [Name], am the sole current income beneficiary of the [Name of Trust]. In order for the trust to be a **qualifying** shareholder of [Name of S-Corporation], an S corporation, I hereby make the **qualified sub-chapter** S Trust (QSST) Election required by Code Sec. 1361(d)(2).

The name, address, and taxpayer identification number of [Name] (the sole current income beneficiary), the [Name of Trust] (the **qualified subchapter** S trust), and [Name of Corporation] (the S corporation) are as follows:

[Name], [Address, City, State, Zip Code]; [SS#]
[Name of Trust], [Name of Trustee], [Address, City, State, Zip Code]; [EIN]
[Name of S-Corporation], [Address, City, State, Zip Code]; [EIN]

Shares of [Name of S-Corporation] were originally transferred to the trust on January 6, 2015.

The trust contains the following provisions to meet all of the requirements of Reg sect. 1.1361-1(j)(6)(ii)(E)(1), (2), and (3):

a. All trust income will be or is required to be distributed currently to one individual beneficiary.
b. The beneficiary is an individual who is a citizen or resident of the U.S.
c. During the life of the current income beneficiary, there is only one income beneficiary of the trust.
d. Any trust corpus distributed during the life of the current income beneficiary may be distributed only to that income beneficiary.
e. The current income beneficiary's income interest in the trust terminates on the earlier of that beneficiary's death or the termination of the trust.
f. If the trust terminates during the life of the current income beneficiary, the

trust will distribute all of its assets to that income beneficiary.

g. No distribution by the trust (income or corpus) will be in satisfaction of the grantor's legal obligation to support the income beneficiary.

Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented in support of this election are true, correct, and complete.

Date:_____ _____
[Name]

Affidavit of Trustee

[Name of Trustee], Trustee of the [Name of Trust]
[Address of Trust]
[City, State, Zip Code]
EIN:

I, [Name of Trustee], the sole trustee of the [Name of Trust] ("the trust"), do hereby declare that the trust satisfies the requirements of Code Sec. 1361(d)(3), that all income of the trust is required to be distributed and that all of the future income of the trust will be required to be distributed.

[NAME OF TRUST]

Date:_____ _____
[Name of Trustee], Trustee

Affidavit of Current Income Beneficiary

[Name]
[Address]
[City, State, Zip Code]
SS#

I, [Name], am the QSST beneficiary who inadvertently failed to make the election required by Code Sec. 1361(d)(2).

I was the sole beneficiary of the [Name of Trust] during the calendar year 2015, the year that the trust received [number of shares transferred to Trust] shares of [Name of S-Corporation] stock.

Except for the inadvertent failure on my part to make the QSST election, the trust would have qualified as an eligible S corporation shareholder.

I was unaware that a QSST election was necessary for the trust to qualify as an S corporation shareholder.

I will report my prorata share of the corporation's income in a manner consistent with having made the QSST election.

The request for relief in accordance with Rev Proc 2013-30 was made as soon as the omission was discovered.

Under penalties of perjury, I declare that the statement made herein is tithe best of my knowledge and belief true, correct, and complete.

Date:_____ _____
[Name]

Affidavit of Shareholders

We, the shareholders of [Name of S-Corporation], during the termination period, do hereby declare under penalties of perjury, that we have reported our income on all affected returns consistent with the S election for the year the QSST election should have been made and for any subsequent year.

Shareholder Name	Shareholder Signature	Date Signed

Partnerships, LLCs & Corporations - Cases & Comments

1. Partnership – LLC – Election to Adjust Inside Basis under IRC §754.

An LLC that elects to be taxed as a partnership may elect to adjust inside basis under I.R.C. §754 to "step-up" the inside basis of assets of a partnership to be equal to the outside basis. Thus the decedent's outside basis in the partnership that is stepped up to date of death value may likewise step up the partnership inside basis of assets to the same date of death value under a §754 election filed with the income tax return effective in the year filed. This is especially beneficial if such asset is to be depreciated or sold. Remember the opposite holds true, if the inside basis is greater than the outside basis a §754 election may not be prudent.

If the §754 election to adjust the inside basis of a partnership [LLC] is not timely made, there are many instances the IRS has often granted ane extension of time to file and amend a return with a §754 election to step-up the inside basis of the partnership assets. **Ltr. Rul. 201514002, Dec. 4, 2014. Ltr. Rul. 201519023, Jan. 20, 2015. Ltr. Rul. 201530004, April 10, 2015. Ltr. Rul. 201528027, April 13, 2015. Ltr. Rul. 201548012, Aug. 13, 2015.. Ltr. Rul. 201605007, Oct. 28, 2015.. Ltr. Rul. 201620002, Jan. 7, 2016. Ltr. Rul. 201622010, Feb. 18, 2016.**

2. Election of LLC to be Taxed as Corporation

Form 8832 Entity Classification Election not timely filed for LLC to elect to be taxed as a partnership; IRS granted extension of time to file the form. **Ltr. Rul. 201532003, March 12, 2015; Ltr. Rul. 201532027, April 23, 2015; and Ltr. Rul. 201620005, Feb. 8, 2016**. Note instructions on the form state that the default rule is that a domestic association is a partnership if it has two or more members and if there is a single owner then it is a disregarded entity. The form 8832 with instructions is attached, see Materials 4.c.iv. The Instructions are very descriptive.

3. Partner's Distributive Share revised Reg.

If a partner's interest changes during the partnership's taxable year, the partnership shall determine the partner's distributive share using the interim closing method unless the partnership by agreement requires the proration method. **80 Fed. Reg. 45865 (Aug. 3, 2015)**

4. Partnership Disguised Payment For Services

An arrangement that is treated as a disguised payment for services under the proposed regulations will be treated as a payment for services involving transaction occurring between the partnership and a person acting other than in the capacity as a partner. **Proposed REG-115452-14, 80 Fed. Reg. 43652 (July 23, 2015)**.

5. **S Corporation recognized gain from C corporation conversion is permanent five years.**

S corporation election, in which built in gain is recognized following conversion from a C corporation to an S corporation, commencing the first of the year in which the S corporation was formed, is now permanently five years [prior was ten years that was reduced to seven years then five year temporary relief].

6. **Constructive Dividends when one corporation pays the expenses of another.**

Wages paid by one corporation were found to be for labor for a second corporation and not reasonable and necessary expenses and of no benefit to the payer of the wage. Such wages were held to be constructive dividends paid to the shareholder of the corporation that benefitted by the labor but did not pay the wage. **Key Carpets, Inc. v. Comm'r, T.C. Memo. 2016-30**

7. **Penalty Relief Due to First Time Penalty Abatement or Other Administrative Waiver -- First Time Penalty Abatement Waiver [FTA] (also works for partnerships and S Corporations.**

The IRS may provide administrative relief from a penalty that would otherwise be applicable under its First Time Penalty Abatement policy.

You may qualify for administrative relief from penalties for failing to file a tax return, pay on time, and/or to deposit taxes when due under the Service's First Time Penalty Abatement policy if the following are true:

> You didn't previously have to file a return or you have no penalties for the 3 tax years prior to the tax year in which you received a penalty.
>
> You filed all currently required returns or filed an extension of time to file.
>
> You have paid, or arranged to pay, any tax due.

The failure-to-pay penalty will continue to accrue, until the tax is paid in full. It may be to your advantage to wait until you fully pay the tax due prior to requesting penalty relief under the Service's first time penalty abatement policy.

Other administrative relief: If you received incorrect oral advice from the IRS, you may qualify for administrative relief. Call the Toll-free Number on Your Notice

Is the information on your notice correct? If there is an issue you can resolve with your notice, a penalty might not be applicable. Call the toll-free number on your notice either to resolve the issue with your notice or to determine if you are eligible for First Time Penalty Abatement or other administrative waiver.

Is Interest Relief Available?

Interest charged on a penalty will be reduced or removed when that penalty is reduced or removed. If an unpaid balance remains on your account, interest will continue to accrue until the account is full paid. See the following:

a. https://www.irs.gov/businesses/small-businesses-self-employed/penalty-relief-due-to-first-time-penalty-abatement-or-other-administrative-waiver
b. Requesting a first-time abatement penalty waiver by Jim Buttonnow, July 1, 2013; http://www.journalofaccountancy.com/issues/2013/jul/20137885.html

With the repeal of the "Small Partnership" Exception this may be a godsend.

8. New Partnership, S Corporation and Corporation tax filing due dates.

Partnership returns have a new due date of March 15 for calendar-year, (and 15th day of the **third** months of the close of the fiscal year). (Prior due date was the 15th day of the fourth month) The extension due date is six months for the 1065, (September 15).

S Corporation returns have a new due date of March 15 for calendar-year, (and 15th day of the **third** months of the close of the fiscal year).

Corporations filing date is the 15th day of the **fourth** month of the close of the fiscal year (April 15 for calendar year). (Prior filing date was the third month.) The Corporate extension is **six months** except that **calendar-year** corporations have a **five-month** extension until 2026 and corporations with a **June 30** year end have a **seven-month** extension until 2026

Trusts and Estates fiduciary tax return due date has not changed, of April 15, (the 15th day of the fourth month of the close of the fiscal year) but the **extension** due date is increased to **September 30** from September 15

Individual tax runs for due date and extended due date has **not changed**.

The new filing due dates will **apply** to returns for tax years beginning **after Dec. 31, 2015**. C corporations with fiscal years ending on June 30, the new due dates will not apply until tax years beginning after Dec. 31, 2025.

Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, P.L. 114-41), applies to the 2017 filing season (2016 tax returns).

Small Partnership Exception Eliminated after 2017

The "small partnership" exception passed in 1982 along with major legislation cracking down on tax sheltering. The Committee reports stated that the intent was to create a simpler way for farmers and ranchers (and other small businesses) to file their tax returns.

The Small Partnership Exception permits entities with 10 or fewer members (husband and wife are one); including individuals or estates and C corporations, are not required to file a partnership tax return, Form 1065. Rather the members report their share of the income on their individual tax return such as Schedule F, C or E. The entity is not liable for penalties unless the income is not fully reported by the members. See Rev Proc. 84-35.

How often do farm families not file a partnership return, rather just report on their individual tax returns the their share of income and expenses. Even if you do not have a partnership agreement, when you are in business with another person you are automatically a partnership required to file a form 1065 unless you fall under the Small Partnership Exception.

Under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), audit procedures were changed for partnerships. Prior to TEFRA, each partner was audited separately and one partner's outcome did not necessarily affect another partner's outcome. TEFRA changed that so that most partnerships are audited as a single entity and the outcome affects all partners. Form 8893 Election of Partnership Level Tax Treatment (elects out of the Small Partnership Exception) and Form 8894 Request to Revoke Partnership Level Tax Treatment Election. It is very unusual to elect out of the Small Partnership Exception. TEFRA audit rules are substantially more cumbersome that non TEFRA partnership audits. [Form 8893 was the original "check the box" form for LLC partnership election before the default rules.]

The loss of the Small Partnership Exception has far reaching ramifications and broad based substantial unanticipated IRS penalties. The repeal of the Small Partnership Exception was adopted in the Bipartisan Budget Act of 2015, Public Law No 114-74, §1101(a), 129 Stat. 584 (2015).

Agricultural Law Press
Publisher/Editor
Robert P. Achenbach, Jr.
Contributing Editor
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Issue Contents

Agricultural Law Digest

Volume 26, No. 22 November 6, 2015 ISSN 1051-2780

The "Small Partnership" Exception: Failing to Pay the Income Tax

-by Neil E. Harl*

The "small partnership" exception, as it is termed, one of the greatest moves toward simplification in the history of the federal income tax, has made headlines because some of the members failed to pay their shares of the income tax imposed on the farming operation.[1] Some members of the group opposed to the small partnership concept have used the occasion to criticize the use of the provision enacted in 1982[2] as a response to the tax sheltering going on at that time. As written, the small partnership exception, by its terms, provides an avenue for many small partnerships to sidestep the increased complexity of federal partnership law added by TEFRA.

An overview of the "small partnership" concept

Under the governing statute for "small partnerships," entities with 10 or fewer members (with a husband and wife counted as one), each of whom is a natural person other than a non-resident alien, with those members being individuals or estates of individuals or C corporations, are not even considered a partnership *and no election is required to be treated as a "small partnership."*[3] Indeed, an election is necessary if an entity eligible for the "small partnership" exception wishes to be treated as a partnership.[4] Pass-through entities such as S corporations, limited liability companies (LLCs), limited partnerships (LPs) and limited liability partnerships (LLPs) are not eligible to be members of such a "small partnership." A "corporation sole" under state law is considered a C corporation, which makes such entities eligible for the "small partnership" exception.[5]

As for how taxable income, losses, credits and other tax items are to be reported, the income, losses, credits and other tax items simply pass through to the appropriate schedule of the members of the entity.[6]

The controversy

The issue in a 2015 Federal District Court decision in South Dakota[7] was that some of the members of the LLC, operating as a "small partnership,"[8] did not file or pay their federal income tax, allegedly in multiple years, specifically in 2007 and 2008.[9] For the 2007 tax year, six members of the LLC failed to timely file their personal income tax returns. For the 2008 taxable year, three members failed to timely file their personal income tax returns.[10]

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Agricultural Law Digest is published by the Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 (ph 360-200-5666), bimonthly except June and December. Annual subscription $90 by e-mail. http://www.agrilawpress.com Printed on recycled paper.

The statute governing the penalties for failing to file a timely partnership return and pay the tax[11] does not state whether that authority applies to "small partnerships" but *Rev. Proc. 84-35*[12] states that such small partnerships ". . . will be considered to have met the reasonable cause test and will not be subject to the penalty imposed by section 6698 for the failure to file a complete or timely partnership return provided that the partnership, or any of the partners, establishes. . . that all partners have fully reported their shares of the income, deductions, and credits of the partnership on their timely filed income tax return.[13] That Revenue Procedure has been published verbatim in the Internal Revenue Manual.[14]

In the South Dakota case, *Battle Flat, LLC v. United States*,[15] the LLC argued, unsuccessfully, that the court should not enforce *Rev. Proc. 84-35*[16] because revenue procedures do not have the force of law and are not entitled to deference under a U.S. Supreme Court case, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[17] Also, the Battle Flat's LLC argued, also unsuccessfully, that the "reasonable cause" exception should be satisfied ". . . so long as the partners in a "small partnership" file their personal income tax returns at some unspecified future date."[18] The court pointed out that IRS had been rather lenient by choosing not to enforce the late penalty provision against Battle Flat for the 2006 tax year because of Battle Flat's prior history of compliance.

The essential message in the case

The holding in *Battle Flat, LLC v. United States*[19] should neither come as a surprise nor should it be interpreted as discouraging use of the "small partnership," one of the greatest opportunities to simplify income tax filing in decades. A fair reading of *Rev. Proc. 84-35*[20] should have provided convincing evidence that the "small partnership" involved in the litigation was not in compliance with the rules and should not prevail in an argument that the members of the entity could decide when their taxes were to be paid.

ENDNOTES

[1] I.R.C. § 6231(a)(1)(B). See Harl, "The 'Small Partnership' Exception: A Way to Escape Partnership Tax Complexities," 23 *Agric. L. Dig.* 1 (2012); Harl, "Farm and Ranch Estate (and Business) Planning-Part II," *Estate Planning*, vol. 42, no. 4, pp. 21-30 (April 2015). See generally 8 Harl, *Agricultural Law* § 60.01(1)(b)(4) (2015); Harl, *Agric. L. Manual* § 7.03(2)(b)(x) (2015); 2 Harl, *Farm Income Tax Manual* § 6.01(3) (2015 ed.).

[2] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 402(a), 96 Stat. 324 (1982) (TEFRA), enacting I.R.C. § 6231(a).

[3] I.R.C. § 6231(a)(1)(B)(i).

[4] I.R.C. § 6231(a)(1)(B)(ii).

[5] CCA 201530019, June 17, 2015.

[6] See Rev. Proc. 84-35, 1984-1 C.B. 509.

[7] Battle Flat, LLC v. United States, 2015-2 U.S. Tax Cas. ¶ 50,490 (D. S.D. 2015).

[8] The case before the court and the regulations under I.R.C. § 6231(a)(1)(B), Treas. Reg. § 301.6231(a)(7)-2(b)(1), makes it clear that LLCs are eligible for the "small partnership" exception unless, perhaps, the LLC had elected to be taxed as an association.

[9] *Id.*

[10] *Id.*

[11] I.R.C. § 6698.

[12] 1984-1 C.B. 509.

[13] Rev. Proc. 84-35, § 3.01, 1984-1 C.B. 509.

[14] IRM 20.1.2.3.3.1.

[15] 2015-2 U.S. Tax Cas. ¶ 50,490 (D. S.D. 2015).

[16] 1984-1 C.B. 509.

[17] 467 U.S. 837 (1984).

[18] Battle Flat, LLC v. United States, 2015-2 U.S. Tax Cas. ¶ 50,490 (D. S.D. 2015).

[19] *Id.*

[20] 1984-1 C.B. 509.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

SURCHARGE ON COLLATERAL. The debtor had granted a security interest in dairy herds, feed, milk and milk proceeds, machinery, and other personal property to a bank to secure a loan. The debtor had also granted a security interest in dairy facilities, equipment and dairy products and proceeds to a second bank to secure a loan. A Chapter 11 trustee was appointed after the creditors objected to allowing use of cash collateral in the estate. The trustee sought to surcharge the banks' collateral for expenses incurred in the administration of the estate as allowed by Section 506(c). The trustee argued that expenses incurred by the estate in liquidating the collateral produced a direct and quantifiable benefit to both creditors and maintained that both creditors consented to a surcharge for the fees and expenses incurred by the trustee. The court identified reasonable and necessary expenses in maintaining the operating status of the debtor's dairy so as to preserve the value of the dairy assets until sold. On the issue of consent to the surcharge, the court first discussed whether consent to a surcharge was sufficient to allow a surcharge. The court found substantial precedent to support

Agricultural Law Press
Publisher/Editor
Robert P. Achenbach, Jr.
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Issue Contents

Agricultural Law Digest

Volume 27, No. 5 March 7, 2016 ISSN 1051-2780

Repeal of the "Small Partnership" Exception: A Devious and Highly Suspicious Congressional Move

-by Neil E. Harl*

In what must rank as the most outrageous move by Congress in modern times, the Senate and House of Representatives passed and the President signed the *Bipartisan Budget Act of 2015*[1] which, understandably, focused on budget matters, but allowed those with no sense of (or respect for) the original purpose of the "small partnership" exception[2] to add a major piece of *tax* legislation in a *budget* bill killing that tax provision after 2017.[3] The provision in question, the "small partnership" exception was conceived by a group of Senators and Representatives who feared that the "get tough" legislation about to be passed in 1982, in the *Tax Equity and Fiscal Responsibility Act of 1982*,[4] would impose a heavy burden on small businesses including most farms and ranches. That move, to reduce the complexity of filing income tax returns for which 90 percent or more of the small businesses would likely be eligible, received its death notice in the 2015 Budget bill with no hearings, no prior notice that the provision was being considered for amendment or repeal *and with no good reason (in fact no reason whatsoever) for taking the action.*

Why all the fuss?

The highly complex amendments enacted otherwise in the 1982 legislation were designed to discourage tax sheltering including tax sheltering in the agricultural sector.[5] The 1982 enactments increased the complexity of partnership tax law to the point that only taxpayers with competent tax advice could master the filing of Form 1065 with the various schedules (and heavy penalties (currently $195 per partner per month for up to 12 months) and now adjusted for inflation.[6]

The "small partnership" exception for eligible taxpayers specified that the concept was available to entities with 10 or fewer members (with a husband and wife counted as one), each of whom is a natural person or estate or, after a 1997 amendment, a C corporation and each partner's share of each "partnership" was the same as each partner's share of every other item).[7] Those qualifying (and it was widely believed that more than 90 percent of the farmers and ranchers were eligible), no Form 1065 (partnership tax return) or other tax form is required to be filed at the entity level; rather, the income, losses, credits and other tax items were merely passed through to the members to report on their own Form 1040, which in most cases was to Schedules C, F or E for farm and ranch entities. No penalties were to be imposed providing the members paid the tax due at the member level.

* Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University; member of the Iowa Bar.

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The "small partnership" provision specified that even entities calling themselves a partnership were not a partnership if they met the specifications for eligibility. To be a partnership, they had to *elect* to be a partnership.[8]

Who was pushing for repeal?

Judging from more than 50 years of giving seminars on the subject and more than 30 years since enactment of the legislation in 1982, it certainly was not farmers or ranchers or their organizations that were behind the repeal move.

For several years it was observed that the Internal Revenue Service, after issuing *Revenue Procedure 84-35*[9] which was reproduced word-for-word in the IRS Manual (for internal use),[10] it was clear that the Regional Service Centers and nearly all IRS agents were in denial as to the existence of the statutory authority behind the "small partnership" exception. Rather than buckle down and adapt to the concept, which was detailed in their own Internal Revenue Manual, they were mostly denying that it existed. Certainly, IRS was in a position to accept the concept, as is expected of any federal agency facing a statutory mandate, but utterly failed to do so. However, considering the standing of IRS with the Congress (and the public) in recent years, it is doubtful that the agency did the heavy lifting in lobbying for repeal.

The other culprit, as became clear over the years, was the influential organizations representing accountants as well as accounting firms and a few tax practitioners. Their concern, it became clear, was their bottom line. With a typical partnership return, the cost often ran $2,500 or more per return. A taxpayer functioning under the "small partnership" exception could almost always file their own return and, if assistance was needed, it was available on a reasonable basis. Certainly, those tax practitioners opposed to the "small partnership" exception tended to throw cold water on the concept, almost always misrepresenting the idea, as often as possible.

Lessons learned

One important lesson for any professional practicing their profession, is that decisions made and recommendations made to clients should be in the age-old tradition that those decisions should be made in the client's best interest, rather than in the practitioner's best interest.

Secondly, no matter how much pressure is exerted on the legislative bodies, it is simply not appropriate to slip an important piece of *tax* legislation into a *budget* bill to insure that it would remain hidden until passage, especially when there have been no hearings held and no discussions about the proposal. There are three Tax Committees (House Ways and Means, Senate Finance and the Joint Tax Committee). They are there for a purpose – to see that tax legislation is appropriate and represents the thinking of a majority of the House and Senate Members. Those tax committees apparently were not involved.

So what's next?

Hopefully, the Congressional leadership will re-enact the biggest step toward tax simplification in half a century – before 2018.

ENDNOTES

[1] Pub. L. No. 114-74, § 1101(a), 129 Stat. 584 (2015).

[2] I.R.C. § 6231(a)(1)(B).

[3] See Harl, "The 'Small Partnership' Exception: A Way to Escape Partnership Tax Complexities," 23 *Agric. L. Dig.* 1 (2012); Harl, "Farm and Ranch Estate (and Business) Planning-Part II," *Estate Planning*, vol. 42, no. 4, pp. 21-30 (April 2015). See generally 8 Harl, *Agricultural Law* § 60.01(1)(b)(4) (2015); Harl, *Agricultural Law Manual* § 7.03(2)(b)(x) (2015); 2 Harl, *Farm Income Tax Manual* § 6.01(3) (2016 ed.).

[4] Pub. No. 97-248, § 402(a), 96 Stat. 324 (1982) (TEFRA), enacting I.R.C. § 6231(a)).

[5] This author served on a task force formed by the Department of the Treasury in 1967 to review what was needed to be done to reduce or eliminate tax sheltering. The Washington view then was that the cash method of accounting was primarily responsible. The task force refused to recommend the elimination of cash accounting but made other recommendations which were mostly enacted in 1969, 1976, 1982 and 1986.

[6] I.R.C. § 6698(a),(b).

[7] I.R.C. § 8231(a)(1)(B).

[8] I.R.C. § 6231(a)(1)(B)(ii).

[9] Rev. Proc. 84-35, 1984-1 C.B. 509.

[10] IRM 20.1.2.3.3.1.

Form **8832**

(Rev. December 2013)

Department of the Treasury
Internal Revenue Service

Entity Classification Election

► **Information about Form 8832 and its instructions is at *www.irs.gov/form8832.***

OMB No. 1545-1516

	Name of eligible entity making election	Employer identification number
Type or Print	Number, street, and room or suite no. If a P.O. box, see instructions.	
	City or town, state, and ZIP code. If a foreign address, enter city, province or state, postal code and country. Follow the country's practice for entering the postal code.	

►Check if: ☐ Address change ☐ Late classification relief sought under Revenue Procedure 2009-41
☐ Relief for a late change of entity classification election sought under Revenue Procedure 2010-32

Part I Election Information

1 Type of election (see instructions):

a ☐ Initial classification by a newly-formed entity. Skip lines 2a and 2b and go to line 3.
b ☐ Change in current classification. Go to line 2a.

2a Has the eligible entity previously filed an entity election that had an effective date within the last 60 months?

☐ **Yes.** Go to line 2b.
☐ **No.** Skip line 2b and go to line 3.

2b Was the eligible entity's prior election an initial classification election by a newly formed entity that was effective on the date of formation?

☐ **Yes.** Go to line 3.
☐ **No.** Stop here. You generally are not currently eligible to make the election (see instructions).

3 Does the eligible entity have more than one owner?

☐ **Yes.** You can elect to be classified as a partnership or an association taxable as a corporation. Skip line 4 and go to line 5.
☐ **No.** You can elect to be classified as an association taxable as a corporation or to be disregarded as a separate entity. Go to line 4.

4 If the eligible entity has only one owner, provide the following information:

a Name of owner ►
b Identifying number of owner ►

5 If the eligible entity is owned by one or more affiliated corporations that file a consolidated return, provide the name and employer identification number of the parent corporation:

a Name of parent corporation ►
b Employer identification number ►

Part I Election Information (Continued)

6 Type of entity (see instructions):

- **a** ☐ A domestic eligible entity electing to be classified as an association taxable as a corporation.
- **b** ☐ A domestic eligible entity electing to be classified as a partnership.
- **c** ☐ A domestic eligible entity with a single owner electing to be disregarded as a separate entity.
- **d** ☐ A foreign eligible entity electing to be classified as an association taxable as a corporation.
- **e** ☐ A foreign eligible entity electing to be classified as a partnership.
- **f** ☐ A foreign eligible entity with a single owner electing to be disregarded as a separate entity.

7 If the eligible entity is created or organized in a foreign jurisdiction, provide the foreign country of organization ▶

8 Election is to be effective beginning (month, day, year) (see instructions) . . . . . ▶ _____

9 Name and title of contact person whom the IRS may call for more information	**10** Contact person's telephone number

Consent Statement and Signature(s) (see instructions)

Under penalties of perjury, I (we) declare that I (we) consent to the election of the above-named entity to be classified as indicated above, and that I (we) have examined this election and consent statement, and to the best of my (our) knowledge and belief, this election and consent statement are true, correct, and complete. If I am an officer, manager, or member signing for the entity, I further declare under penalties of perjury that I am authorized to make the election on its behalf.

Signature(s)	Date	Title

Part II Late Election Relief

11 Provide the explanation as to why the entity classification election was not filed on time (see instructions).

Under penalties of perjury, I (we) declare that I (we) have examined this election, including accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete. I (we) further declare that I (we) have personal knowledge of the facts and circumstances related to the election. I (we) further declare that the elements required for relief in Section 4.01 of Revenue Procedure 2009-41 have been satisfied.

Signature(s)	Date	Title

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 8832 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form8832*.

What's New

For entities formed on or after July 1, 2013, the Croatian Dionicko Drustvo will always be treated as a corporation. See Notice 2013-44, 2013-29, I.R.B. 62 for more information.

Purpose of Form

An eligible entity uses Form 8832 to elect how it will be classified for federal tax purposes, as a corporation, a partnership, or an entity disregarded as separate from its owner. An eligible entity is classified for federal tax purposes under the default rules described below unless it files Form 8832 or Form 2553, Election by a Small Business Corporation. See *Who Must File* below.

The IRS will use the information entered on this form to establish the entity's filing and reporting requirements for federal tax purposes.

Note. An entity must file Form 2553 if making an election under section 1362(a) to be an S corporation

A new eligible entity should not file Form 8832 if it will be using its default classification (see Default Rules *below).*

Eligible entity. An eligible entity is a business entity that is not included in items 1, or 3 through 9, under the definition of **corporation** provided under *Definitions.* Eligible entities include limited liability companies (LLCs) and partnerships.

Generally, corporations are not eligible entities. However, the following types of corporations are treated as eligible entities:

1. An eligible entity that previously elected to be an association taxable as a corporation by filing Form 8832. An entity that elects to be classified as a corporation by filing Form 8832 can make another election to change its classification (see the *60-month limitation rule* discussed below in the instructions for lines 2a and 2b).

2. A foreign eligible entity that became an association taxable as a corporation under the foreign default rule described below.

Default Rules

Existing entity default rule. Certain domestic and foreign entities that were in existence before January 1, 1997, and have an established federal tax classification generally do not need to make an election to continue that classification. If an existing entity decides to change its classification, it may do so subject to the 60-month limitation rule. See the instructions for lines 2a and 2b. See Regulations sections 301.7701-3(b)(3) and 301.7701-3(h)(2) for more details.

Domestic default rule. Unless an election is made on Form 8832, a domestic eligible entity is:

1. A partnership if it has two or more members.

2. Disregarded as an entity separate from its owner if it has a single owner.

A change in the number of members of an eligible entity classified as an **association** (defined below) does not affect the entity's classification. However, an eligible entity classified as a partnership will become a disregarded entity when the entity's membership is reduced to one member and a disregarded entity will be classified as a partnership when the entity has more than one member.

Foreign default rule. Unless an election is made on Form 8832, a foreign eligible entity is:

1. A partnership if it has two or more members and at least one member does not have limited liability.

2. An association taxable as a corporation if all members have limited liability.

3. Disregarded as an entity separate from its owner if it has a single owner that does not have limited liability.

However, if a qualified foreign entity (as defined in section 3.02 of Rev. Proc. 2010-32) files a valid election to be classified as a partnership based on the reasonable assumption that it had two or more owners as of the effective date of the election, and the qualified entity is later determined to have a single owner, the IRS will deem the election to be an election to be classified as a disregarded entity provided:

1. The qualified entity's owner and purported owners file amended returns that are consistent with the treatment of the entity as a disregarded entity;

2. The amended returns are filed before the close of the period of limitations on assessments under section 6501(a) for the relevant tax year; and

3. The corrected Form 8832, with the box checked entitled: Relief for a late change of entity classification election sought under Revenue Procedure 2010-32, is filed and attached to the amended tax return.

Also, if the qualified foreign entity (as defined in section 3.02 of Rev. Proc. 2010-32) files a valid election to be classified as a disregarded entity based on the reasonable assumption that it had a single owner as of the effective date of the election, and the qualified entity is later determined to have two or more owners, the IRS will deem the election to be an election to be classified as a partnership provided:

1. The qualified entity files information returns and the actual owners file original or amended returns consistent with the treatment of the entity as a partnership;

2. The amended returns are filed before the close of the period of limitations on assessments under section 6501(a) for the relevant tax year; and

3. The corrected Form 8832, with the box checked entitled: Relief for a late change of entity classification election sought under Revenue Procedure 2010-32, is filed and attached to the amended tax returns. See Rev. Proc. 2010-32, 2010-36 I.R.B. 320 for details.

Definitions

Association. For purposes of this form, an association is an eligible entity taxable as a corporation by election or, for foreign eligible entities, under the default rules (see Regulations section 301.7701-3).

Business entity. A business entity is any entity recognized for federal tax purposes that is not properly classified as a trust under Regulations section 301.7701-4 or otherwise subject to special treatment under the Code regarding the entity's classification. See Regulations section 301.7701-2(a).

Corporation. For federal tax purposes, a corporation is any of the following:

1. A business entity organized under a federal or state statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic.

2. An association (as determined under Regulations section 301.7701-3).

3. A business entity organized under a state statute, if the statute describes or refers to the entity as a joint-stock company or joint-stock association.

4. An insurance company.

5. A state-chartered business entity conducting banking activities, if any of its deposits are insured under the Federal Deposit Insurance Act, as amended, 12 U.S. C. 1811 et seq., or a similar federal statute.

6. A business entity wholly owned by a state or any political subdivision thereof, or a business entity wholly owned by a foreign government or any other entity described in Regulations section 1.892-2T.

7. A business entity that is taxable as a corporation under a provision of the Code other than section 7701(a)(3).

8. A foreign business entity listed on page 7. See Regulations section 301.7701-2(b)(8) for any exceptions and inclusions to items on this list and for any revisions made to this list since these instructions were printed.

9. An entity created or organized under the laws of more than one jurisdiction (business entities with multiple charters) if the entity is treated as a corporation with respect to any one of the jurisdictions. See Regulations section 301.7701-2(b)(9) for examples.

Disregarded entity. A disregarded entity is an eligible entity that is treated as an entity not separate from its single owner for income tax purposes. A "disregarded entity" is treated as separate from its owner for:

- Employment tax purposes, effective for wages paid on or after January 1, 2009; and
- Excise taxes reported on Forms 720, 730, 2290, 11-C, or 8849, effective for excise taxes reported and paid after December 31, 2007.

See the employment tax and excise tax return instructions for more information.

Limited liability. A member of a foreign eligible entity has limited liability if the member has no personal liability for any debts of or claims against the entity by reason of being a member. This determination is based solely on the statute or law under which the entity is organized (and, if relevant, the entity's organizational documents). A member has personal liability if the creditors of the entity may seek satisfaction of all or any part of the debts or claims against the entity from the member as such. A member has personal liability even if the member makes an agreement under which another person (whether or not a member of the entity) assumes that liability or agrees to indemnify that member for that liability.

Partnership. A partnership is a business entity that has at least two members and is not a corporation as defined above under *Corporation.*

Who Must File

File this form for an eligible entity that is one of the following:

- A domestic entity electing to be classified as an association taxable as a corporation.
- A domestic entity electing to change its current classification (even if it is currently classified under the default rule).
- A foreign entity that has more than one owner, all owners having limited liability, electing to be classified as a partnership.
- A foreign entity that has at least one owner that does not have limited liability, electing to be classified as an association taxable as a corporation.
- A foreign entity with a single owner having limited liability, electing to be an entity disregarded as an entity separate from its owner.
- A foreign entity electing to change its current classification (even if it is currently classified under the default rule).

Do not file this form for an eligible entity that is:

- Tax-exempt under section 501(a);
- A real estate investment trust (REIT), as defined in section 856; or
- Electing to be classified as an S corporation. An eligible entity that timely files Form 2553 to elect classification as an S corporation and meets all other requirements to qualify as an S corporation is deemed to have made an election under Regulations section 301.7701-3(c)(v) to be classified as an association taxable as a corporation.

All three of these entities are deemed to have made an election to be classified as an association.

Effect of Election

The federal tax treatment of elective changes in classification as described in Regulations section 301.7701-3(g)(1) is summarized as follows:

- If an eligible entity classified as a partnership elects to be classified as an association, it is deemed that the partnership contributes all of its assets and liabilities to the association in exchange for stock in the association, and immediately thereafter, the partnership liquidates by distributing the stock of the association to its partners.
- If an eligible entity classified as an association elects to be classified as a partnership, it is deemed that the association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership.
- If an eligible entity classified as an association elects to be disregarded as an entity separate from its owner, it is deemed that the association distributes all of its assets and liabilities to its single owner in liquidation of the association.
- If an eligible entity that is disregarded as an entity separate from its owner elects to be classified as an association, the owner of the eligible entity is deemed to have contributed all of the assets and liabilities of the entity to the association in exchange for the stock of the association.

Note. For information on the federal tax consequences of elective changes in classification, see Regulations section 301.7701-3(g).

When To File

Generally, an election specifying an eligible entity's classification cannot take effect more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date the election is filed. An eligible entity may be eligible for late election relief in certain circumstances. For more information, see *Late Election Relief*, later.

Where To File

File Form 8832 with the Internal Revenue Service Center for your state listed later.

In addition, attach a copy of Form 8832 to the entity's federal tax or information return for the tax year of the election. If the entity is not required to file a return for that year, a copy of its Form 8832 must be attached to the federal tax returns of all direct or indirect owners of the entity for the tax year of the owner that includes the date on which the election took effect. An indirect owner of the electing entity does not have to attach a copy of the Form 8832 to its tax return if an entity in which it has an interest is already filing a copy of the Form 8832 with its return. Failure to attach a copy of Form 8832 will not invalidate an otherwise valid election, but penalties may be assessed against persons who are required to, but do not, attach Form 8832.

Each member of the entity is required to file the member's return consistent with the entity election. Penalties apply to returns filed inconsistent with the entity's election.

If the entity's principal business, office, or agency is located in:	Use the following Internal Revenue Service Center address:
Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, Wisconsin	Cincinnati, OH 45999

If the entity's principal business, office, or agency is located in:	Use the following Internal Revenue Service Center address:
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wyoming	Ogden, UT 84201
A foreign country or U.S. possession	Ogden, UT 84201-0023

Note. Also attach a copy to the entity's federal income tax return for the tax year of the election.

Acceptance or Nonacceptance of Election

The service center will notify the eligible entity at the address listed on Form 8832 if its election is accepted or not accepted. The entity should generally receive a determination on its election within 60 days after it has filed Form 8832.

Care should be exercised to ensure that the IRS receives the election. If the entity is not notified of acceptance or nonacceptance of its election within 60 days of the date of filing, take follow-up action by calling 1-800-829-0115, or by sending a letter to the service center to inquire about its status. Send any such letter by certified or registered mail via the U.S. Postal Service, or equivalent type of delivery by a designated private delivery service (see Notice 2004-83, 2004-52 I.R.B. 1030 (or its successor)).

If the IRS questions whether Form 8832 was filed, an acceptable proof of filing is:

- A certified or registered mail receipt (timely postmarked) from the U.S. Postal Service, or its equivalent from a designated private delivery service;
- Form 8832 with an accepted stamp;
- Form 8832 with a stamped IRS received date; or
- An IRS letter stating that Form 8832 has been accepted.

Specific Instructions

Name. Enter the name of the eligible entity electing to be classified.

Employer identification number (EIN). Show the EIN of the eligible entity electing to be classified.

Do not put "Applied For" on this line.

Note. Any entity that has an EIN will retain that EIN even if its federal tax classification changes under Regulations section 301.7701-3.

If a disregarded entity's classification changes so that it becomes recognized as a partnership or association for federal tax purposes, and that entity had an EIN, then the entity must continue to use that EIN. If the entity did not already have its own EIN, then the entity must apply for an EIN and not use the identifying number of the single owner.

A foreign entity that makes an election under Regulations section 301.7701-3(c) and (d) must also use its own taxpayer identifying number. See sections 6721 through 6724 for penalties that may apply for failure to supply taxpayer identifying numbers.

If the entity electing to be classified using Form 8832 does not have an EIN, it must apply for one on Form SS-4, Application for Employer Identification Number. The entity must have received an EIN by the time Form 8832 is filed in order for the form to be processed. An election will not be accepted if the eligible entity does not provide an EIN.

Do not apply for a new EIN for an existing entity that is changing its classification if the entity already has an EIN.

Address. Enter the address of the entity electing a classification. All correspondence regarding the acceptance or nonacceptance of the election will be sent to this address. Include the suite, room, or other unit number after the street address. If the Post Office does not deliver mail to the street address and the entity has a P.O. box, show the box number instead of the street address. If the electing entity receives its mail in care of a third party (such as an accountant or an attorney), enter on the street address line "C/O" followed by the third party's name and street address or P.O. box.

Address change. If the eligible entity has changed its address since filing Form SS-4 or the entity's most recently-filed return (including a change to an "In care of" address), check the box for an address change.

Late-classification relief sought under Revenue Procedure 2009-41. Check the box if the entity is seeking relief under Rev. Proc. 2009-41, 2009-39 I.R.B. 439, for a late classification election. For more information, see *Late Election Relief*, later.

Relief for a late change of entity classification election sought under Revenue Procedure 2010-32. Check the box if the entity is seeking relief under Rev. Proc. 2010-32, 2010-36 I.R.B. 320. For more information, see *Foreign default rule*, earlier.

Part I. Election Information

Complete Part I whether or not the entity is seeking relief under Rev. Proc. 2009-41 or Rev. Proc. 2010-32.

Line 1. Check box 1a if the entity is choosing a classification for the first time (i.e., the entity does not want to be classified under the applicable default classification). Do not file this form if the entity wants to be classified under the default rules.

Check box 1b if the entity is changing its current classification.

Lines 2a and 2b. 60-month limitation rule. Once an eligible entity makes an election to *change* its classification, the entity generally cannot change its classification by election again during the 60 months after the effective date of the election. However, the IRS may (by private letter ruling) permit the entity to change its classification by election within the 60-month period if more than 50% of the ownership interests in the entity, as of the effective date of the election, are owned by persons that did not own any interests in the entity on the effective date or the filing date of the entity's prior election.

Note. The 60-month limitation does not apply if the previous election was made by a newly formed eligible entity and was effective on the date of formation.

Line 4. If an eligible entity has only one owner, provide the name of its owner on line 4a and the owner's identifying number (social security number, or individual taxpayer identification number, or EIN) on line 4b. If the electing eligible entity is owned by an entity that is a disregarded entity or by an entity that is a member of a series of tiered disregarded entities, identify the first entity (the entity closest to the electing eligible entity) that is not a disregarded entity. For example, if the electing eligible entity is owned by disregarded entity A, which is owned by another disregarded entity B, and disregarded entity B is owned by partnership C, provide the name and EIN of partnership C as the owner of the electing eligible entity. If the owner is a foreign person or entity and does not have a U.S. identifying number, enter "none" on line 4b.

Line 5. If the eligible entity is owned by one or more members of an affiliated group of corporations that file a consolidated return, provide the name and EIN of the parent corporation.

Line 6. Check the appropriate box if you are changing a current classification (no matter how achieved), or are electing out of a default classification. Do not file this form if you fall within a default classification that is the desired classification for the new entity.

Line 7. If the entity making the election is created or organized in a foreign jurisdiction, enter the name of the foreign country in which it is organized. This information must be provided even if the entity is also organized under domestic law.

Line 8. Generally, the election will take effect on the date you enter on line 8 of this form, or on the date filed if no date is entered on line 8. An election specifying an entity's classification for federal tax purposes can take effect no more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date on which the election is filed. If line 8 shows a date more than 75 days prior to the date on which the election is filed, the election will default to 75 days before the date it is filed. If line 8 shows an effective date more than 12 months from the filing date, the election will take effect 12 months after the date the election is filed.

Consent statement and signature(s). Form 8832 must be signed by:

1. Each member of the electing entity who is an owner at the time the election is filed; or

2. Any officer, manager, or member of the electing entity who is authorized (under local law or the organizational documents) to make the election. The elector represents to having such authorization under penalties of perjury.

If an election is to be effective for any period prior to the time it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must sign.

If you need a continuation sheet or use a separate consent statement, attach it to Form 8832. The separate consent statement must contain the same information as shown on Form 8832.

Note. Do not sign the copy that is attached to your tax return.

Part II. Late Election Relief

Complete Part II only if the entity is requesting late election relief under Rev. Proc. 2009-41.

An eligible entity may be eligible for late election relief under Rev. Proc. 2009-41, 2009-39 I.R.B. 439, if **each** of the following requirements is met.

1. The entity failed to obtain its requested classification as of the date of its formation (or upon the entity's classification becoming relevant) or failed to obtain its requested change in classification solely because Form 8832 was not filed timely.

2. Either:

a. The entity has not filed a federal tax or information return for the first year in which the election was intended because the due date has not passed for that year's federal tax or information return; or

b. The entity has timely filed all required federal tax returns and information returns (or if not timely, within 6 months after its due date, excluding extensions) consistent with its requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed by or with respect to the entity during any of the tax years. If the eligible entity is not required to file a federal tax return or information return, each affected person who is required to file a federal tax return or information return must have timely filed all such returns (or if not timely, within 6 months after its due date, excluding extensions) consistent with the

entity's requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed during any of the tax years.

3. The entity has reasonable cause for its failure to timely make the entity classification election.

4. Three years and 75 days from the requested effective date of the eligible entity's classification election have not passed.

Affected person. An affected person is either:

- with respect to the effective date of the eligible entity's classification election, a person who would have been required to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the tax year of the person which includes that date; or
- with respect to any subsequent date after the entity's requested effective date of the classification election, a person who would have been required to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the person's tax year that includes that subsequent date had the election first become effective on that subsequent date.

For details on the requirement to attach a copy of Form 8832, see Rev. Proc. 2009-41 and the instructions under *Where To File*.

To obtain relief, file Form 8832 with the applicable IRS service center listed in *Where To File*, earlier, within 3 years and 75 days from the requested effective date of the eligible entity's classification election.

If Rev. Proc. 2009-41 does not apply, an entity may seek relief for a late entity election by requesting a private letter ruling and paying a user fee in accordance with Rev. Proc. 2013-1, 2013-1 I.R.B. 1 (or its successor).

Line 11. Explain the reason for the failure to file a timely entity classification election.

Signatures. Part II of Form 8832 must be signed by an authorized representative of the eligible entity and each affected person. See *Affected Persons*, earlier. The individual or individuals who sign the declaration must have personal knowledge of the facts and circumstances related to the election.

Foreign Entities Classified as Corporations for Federal Tax Purposes:

American Samoa—Corporation
Argentina—Sociedad Anonima
Australia—Public Limited Company
Austria—Aktiengesellschaft
Barbados—Limited Company
Belgium—Societe Anonyme
Belize—Public Limited Company
Bolivia—Sociedad Anonima
Brazil—Sociedade Anonima
Bulgaria—Aktsionerno Druzhestvo
Canada—Corporation and Company
Chile—Sociedad Anonima
People's Republic of China—Gufen Youxian Gongsi
Republic of China (Taiwan)—Ku-fen Yu-hsien Kung-szu
Colombia—Sociedad Anonima
Costa Rica—Sociedad Anonima
Croatia—Dionicko Drustvo
Cyprus—Public Limited Company
Czech Republic—Akciova Spolecnost
Denmark—Aktieselskab
Ecuador—Sociedad Anonima or Compania Anonima
Egypt—Sharikat Al-Mossahamah
El Salvador—Sociedad Anonima
Estonia—Aktsiaselts
European Economic Area/European Union—Societas Europaea
Finland—Julkinen Osakeyhtio/Publikt Aktiebolag
France—Societe Anonyme
Germany—Aktiengesellschaft
Greece—Anonymos Etairia
Guam—Corporation
Guatemala—Sociedad Anonima
Guyana—Public Limited Company
Honduras—Sociedad Anonima
Hong Kong—Public Limited Company
Hungary—Reszvenytarsasag
Iceland—Hlutafelag
India—Public Limited Company
Indonesia—Perseroan Terbuka
Ireland—Public Limited Company
Israel—Public Limited Company
Italy—Societa per Azioni
Jamaica—Public Limited Company
Japan—Kabushiki Kaisha
Kazakstan—Ashyk Aktsionerlik Kogham
Republic of Korea—Chusik Hoesa
Latvia—Akciju Sabiedriba
Liberia—Corporation
Liechtenstein—Aktiengesellschaft
Lithuania—Akcine Bendroves
Luxembourg—Societe Anonyme
Malaysia—Berhad
Malta—Public Limited Company
Mexico—Sociedad Anonima
Morocco—Societe Anonyme
Netherlands—Naamloze Vennootschap
New Zealand—Limited Company
Nicaragua—Compania Anonima
Nigeria—Public Limited Company
Northern Mariana Islands—Corporation
Norway—Allment Aksjeselskap
Pakistan—Public Limited Company
Panama—Sociedad Anonima
Paraguay—Sociedad Anonima
Peru—Sociedad Anonima
Philippines—Stock Corporation
Poland—Spolka Akcyjna
Portugal—Sociedade Anonima
Puerto Rico—Corporation
Romania—Societe pe Actiuni
Russia—Otkrytoye Aktsionernoy Obshchestvo
Saudi Arabia—Sharikat Al-Mossahamah
Singapore—Public Limited Company
Slovak Republic—Akciova Spolocnost
Slovenia—Delniska Druzba
South Africa—Public Limited Company
Spain—Sociedad Anonima
Surinam—Naamloze Vennootschap
Sweden—Publika Aktiebolag
Switzerland— Aktiengesellschaft
Thailand—Borisat Chamkad (Mahachon)
Trinidad and Tobago—Limited Company
Tunisia—Societe Anonyme
Turkey—Anonim Sirket
Ukraine—Aktsioneme Tovaristvo Vidkritogo Tipu
United Kingdom—Public Limited Company
United States Virgin Islands—Corporation
Uruguay—Sociedad Anonima
Venezuela—Sociedad Anonima or Compania Anonima

CAUTION *See Regulations section 301.7701-2(b)(8) for any exceptions and inclusions to items on this list and for any revisions made to this list since these instructions were printed.*

Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	2 hr., 46 min.
Learning about the law or the form	3 hr., 48 min.
Preparing and sending the form to the IRS	36 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAR:MP:TFP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where To File* above.

Form **8893**
(December 2004)
Department of the Treasury
Internal Revenue Service

Election of Partnership Level Tax Treatment

For tax year beginning ..... , 20 ..... and ending ..... , 20 .....

OMB No. 1545-1912

Partnership's name, address, and ZIP code	**Employer identification number**

Election

We, the partners of the above named partnership, elect to have the provisions of subchapter C of chapter 63 of the Internal Revenue Code apply with respect to this partnership. This election will subject the partnership to the unified audit and litigation procedures of sections 6221 through 6234. We understand that this election is revocable only with IRS consent. All partners, who were members of the partnership at any time during the tax year shown above, have signed this form.

Partners' Signatures

All partners, who were partners at any time during the tax year shown above, must sign below.

Under penalties of perjury, I declare that I was a partner during the taxable year as stated above and my signature confirms my agreement with the request for election. I have examined this consent statement, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature	Date

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

Form 8893 is used only by small partnerships electing the unified audit and litigation procedures as set forth in section 6231(a)(1)(B)(ii). A "small partnership" is defined as any partnership having 10 or fewer partners each of whom is an individual (other than a nonresident alien), a C corporation, or an estate of a deceased partner. For this pupose, a husband and wife (and their estates) are treated as one partner.

How To File

This form must be attached to the partnership return for the tax year shown and must be filed by the due date of the return (including extensions). If the partnership files Form 1065 on time, the election can be made on an amended return filed no later than 6 months after the due date (excluding extensions) of the original return. Write "FILED PURSUANT TO SECTION 301.9100-2" in the top margin of the amended return and file it at the same address the original return was filed.

The election will be effective for the partnership tax year to which the return relates and all subsequent tax years unless revoked with IRS consent. A revocation of the election can be requested by filing Form 8894, Request to Revoke Partnership Level Tax Treatment Election.

Signing the Form

Each partner who was a partner in the partnership during the tax year for which the election is filed must sign the form. This includes all partners during the year, not just those who are partners at the end of the year.

A husband and wife are generally considered as one partner, and should both sign the election. Corporate partners should name the corporation, with the signature of the appropriate corporate officer. Attach a continuation sheet if more signature space is needed.

Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	1 hr., 25 min.
Learning about the law or the form	24 min.
Preparing and sending the form to the IRS	25 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.

Form **8894**
(Rev. September 2008)
Department of the Treasury
Internal Revenue Service

Request to Revoke Partnership Level Tax Treatment Election

OMB No. 1545-1955

For tax year beginning , 20 and ending , 20

Partnership name, address, and ZIP code	Employer identification number

Revocation

We, the partners of the above named partnership, request permission to revoke the election to have the provisions of subchapter C of chapter 63 of the Internal Revenue Code apply with respect to this partnership. We understand that the revocation of this election will not become effective without IRS consent. All partners, who were partners at any time during the tax year shown above, have signed this form.

Partners' Signatures

All partners, who were partners at any time during the tax year shown above, must sign below.

Under penalties of perjury, I declare that I was a partner during the taxable year as stated above and my signature confirms my agreement with the request for revocation. I have examined this consent statement, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature	Date

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

Form 8894 is used only by small partnerships revoking a prior election to be governed by the unified audit and litigation procedures as set forth in section 6231(a)(1)(B)(ii). A "small partnership" is defined as any partnership having 10 or fewer partners each of whom is an individual (other than a nonresident alien), a C corporation, or an estate of a deceased partner. For this pupose, a husband and wife (and their estates) are treated as one partner.

Note. *If the partnership does not qualify as a small partnership for the tax year shown (after a revocation of the prior election), a revocation cannot be made and will not be accepted.*

Where To File

Form 8894 must be sent to the address below.

Department of the Treasury
Internal Revenue Service Center
Ogden, UT 84201

The form must be filed at the address listed above by the due date (including extensions) of the partnership return for the tax year shown. Notification will be sent as to the acceptance or denial of the request for revocation.

Who Must Sign

Each partner who holds or held an interest in the partnership during the tax year for which the revocation is filed must sign the form. This includes all partners during the year, not just those who were partners at the end of the tax year. This will be deemed to have occurred if all partners listed on the Schedules K-1 of the Form 1065 filed for the revocation year, sign the request.

A husband and wife are generally considered as one partner, and should both sign the election. One spouse may sign for the other if acting under a power of attorney, which, if not previously filed, must accompany this form. Corporate partners should name the corporation, with the signature of the appropriate corporate officer. Attach a continuation sheet if more signature space is needed.

Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	1 hr., 25 min.
Learning about the law or the form	12 min.
Preparing and sending the form to the IRS	13 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where To File*, above.

NEBRASKA
Continuing Legal Education

Estate Planning Issues with Farmland in a C Corporation

Frank Heinisch and Patrick Sullivan
Heinisch & Lovegrove Law Office, Geneva

Available in NSBA Library
http://www.nebar.com/?page=EstatePlanLibrary
PDF "2015 Estate Planning & Probate Institute"
or request a copy from Frank at
email@hllawoffice.com

March 13, 2015
Cornhusker Hotel, Lincoln

Agricultural Law Press
Publisher/Editor
Robert P. Achenbach, Jr.
Contributing Editor
Dr. Neil E. Harl, Esq.
* * * *

Issue Contents

Agricultural Law Digest

Volume 26, No. 8 April 10, 2015 ISSN 1051-2780

Tightening the Rules for Farm and Ranch Entities with Non-Family Members

-by Neil E. Harl*

The Agricultural Act of 2014[1] directed the United States Department of Agriculture to define the term "significant contribution of active personal management" for purposes of the Food Security Act of 1985[2] and ". . . to establish limits for varying types of farming operations on the number of individuals who may be considered to be actively engaged in farming with respect to the farming operation when a significant contribution of active personal management is the basis used to meet the requirement of being actively engaged in farming under section 1001A of the Food Security Act of 1985."[3] The Secretary of Agriculture was under orders not to ". . . apply the regulations . . .to individuals or entities comprised solely of family members" and to apply the requirements of any resulting regulation ". . . beginning with the 2015 crop year."[4]

The proposed regulations were published in the *Federal Register*[5] on March 26, 2015.

Exceptions for Entities Comprised Solely of Family Members

As specified in the 2014 farm bill[6] that any new regulations would *not* apply to farming (and ranching) operations comprised of persons or entities involving *solely family members*, the proposed regulations respect that statutory limitation.[7] The new regulations state that ". . . all persons who are partners, stockholders, or persons with an ownership interest in the farming operation or of any entity that is a member of the farming operation are family members. . . or the farming operation is seeking to qualify only one person as making a significant contribution of active personal management for the purposes of qualifying only one person or entity is actively engaged in farming."[8]

Farming Operations With Nonfamily Members

If a farming operation includes *any* nonfamily members and the farming operation is seeking to qualify more than one person as providing a significant contribution of active personal management, then (1) each such person must maintain contemporaneous records or logs as specified. . .and (2). . . if the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is large, then the operation may qualify for one such additional person if the farming operation (a) produces and markets crops on 2,500 acres or more of cropland; or (b) for farming operations that produce honey with moré than 10,000 hives; or (c) for farming operations that produce wool with more than 3,500 ewes, and (3) if the farming operation seeks not more than one additional person to qualify as providing a significant

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Agricultural Law Digest is published by the Agricultural Law Press, 127 Young Rd., Kelso, WA 98626 (ph 360-200-5666), bimonthly except June and December. Annual subscription $90 by e-mail. http://www.agrilawpress.com Printed on recycled paper.

contribution of active personal management because the operation is complex, then the operation may qualify for one such additional person if the farming operation is determined by the FSA state committee as complex after considering the factors specified in the regulations.[9] If a farming operation seeks to qualify a total of three persons as providing a significant contribution of active personal management, then the farming operation must demonstrate both size and complexity to obtain approval.[10] However, *in no case may more than three persons in the same farming operation qualify as providing a significant contribution of active personal management.*[11]

Economic Consequences of the Proposed Regulations

The Department of Agriculture estimates that roughly 1,400 joint operations could lose eligibility for around $50 million in total crop benefits for the 2016 to 2018 crop years from the Price Loss Coverage (PLC), Agricultural Risk Coverage (ARC) and Marketing Assistance Loans (MAL) programs, ranging from $38 million for the 2016 crop year down to approximately $4 million for the 2018 crop year. The economic consequences depend upon prices and yields under the various programs of course.

The proposed regulations do not change the payment limitation per person which is a joint $125,000 for the various programs.

The official explanation notes that the $125,000 payment limit per person applies to general partnerships and joint operations based on the number of eligible partners in the operation That is to say, each partner may qualify for a separate payment limit of $125,000. Stated differently, each person in the partnership or joint operation who loses eligibility because of the proposed regulations will lose eligibility for up to $125,000 in payments. Other types of entities, such as corporations and limited liability companies (LLCs), that share a single payment limit of $125,000, regardless of the number of owners, would not have their payments reduced by the regulations. Once again, entities comprised solely of family members would not be impacted by the proposed regulation.

New Definition of Significant Contribution of Active Personal Management

The existing definition of a "significant contribution"[12] specifies that for active personal management, a significant contribution includes "activities that are critical to the profitability of the farming operation"[13] but that definition does not specify what specific types of activities are included, whether those activities need to be direct actions and not passive activities, and to what level or degree such activities must be performed to achieve a level of significance.

The proposed regulations would apply a new definition of "significant contribution of active personal management" but only to non-family farming operations that are seeking more than one farm manager.[14] The proposed regulations add a new, more specific definition for "active personal management' that includes a list of critical management activities that may be used to qualify as a significant contribution under one or more of several categories including – (1) capital, which includes (a) arranging financing and managing capital, (b) acquiring equipment, (c) acquiring land and negotiating leases, (d) managing insurance and (e) managing participation in USDA programs; (2) labor which includes hiring and managing hired labor; and (3) agronomics and marketing, which includes – (a) selecting crops and making planting decisions, (b) acquiring and purchasing crop inputs, (c) managing crops (that is, whatever it takes to keep the growing crops living and healthy including soil fertility and fertilization, weed control, insect control, irrigation (if applicable) and making harvest decisions, and (d) pricing and marketing of crop production.

The proposed regulations go on to state that "significant contribution of active personal management" means active personal management activities performed by a person with a direct or indirect ownership interest in the farming operation on a regular, continuous and substantial basis to the farming operation and meets at least one of the following to be considered significant – (1) performing at least 25 percent of the total management hours required for the farming operation on an annual basis, or (2) performing at least 500 hours of management annually for the farming operation.[15]

ENDNOTES

[1] Pub. L. No. 113-79, § 1604, 128 Stat. 649 (2014). See generally 11 Harl, *Agricultural Law* Ch. 91, App. 91C (2014).

[2] Pub. L. No. 99-198, 99 Stat. 1430 (1985). See 11 Harl, *Agricultural Law* § 91.03[1][e] (2014).

[3] Pub.L. No. 99-198, 99 Stat. 1430 (1985). See 7 U.S.C. § 1308-1.

[4] Pub. L. No. 113-79, § 1604, 128 Stat. 649 (2014). However, in the 7 CFR commentary on economic impacts, the examples appear to be assuming the effective date would be 2016.

[5] 80 Fed. Reg. 15,916 (March 26, 2015).

[6] See note 4 *supra*.

[7] 7 CFR Part 1400, 7 U.S.C. § 1308, 1308-1, 1308-2, 1308-3, 1308-3a, 1308-4, 1308-5. See 7 CFR § 1400-600(c).

[8] 7 CFR § 1400.600(c).

[9] 7 CFR § 1400.602.

[10] 7 CFR § 1400.602(c).

[11] 7 CFR § 1400.602(d).

[12] 7 CFR § 1400.3.

[13] *Id.*

[14] 7 CFR § 1400.601.

[15] *Id.*

[**ONLY USE THIS FORM IF DECEDENT IS OVER 55]
IN THE COUNTY COURT OF VARIABLE(CAP-COUNTY**) COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF VARIABLE(CAP-DECEDENT**), Deceased. Date of Death: VARIABLE(D/O/D**).	CASE # PR 16 - **PETITION FOR DETERMINATION OF INHERITANCE TAX** (Preliminary, for Decedent over 55)

PETITIONER STATES:

1. Name of Decedent: VARIABLE(DECEDENT**)
   Decedent Died: Testate
   Date of Death: VARIABLE(D/O/D**)
   Domicile at Date of Death: VARIABLE(RESIDENCE**)

2. The Petitioner is the Successor Trustee of VARIABLE(TRUST), and all amendments thereto and has a legal interest in the property involved in the Determination of Inheritance Tax herein. It is necessary for petitioner to submit this preliminary petition at this time prior to the actual determination of amounts due in order to comply with a notice requirement to Nebraska Department of Health and Human Services to ask for and receive from the Nebraska Department of Health and Human Services the Medicaid waiver of lien claim and/or statement of Medicaid lien as required under Neb. Rev. Stat. §77-2018.02(6) (enacted by LB 72, 2015 Legislative Session) for decedents who died after August 30, 2015.

3. Decedent did not during Decedent's lifetime convey any property in trust or otherwise in contemplation of death or intended to take effect in possession or enjoyment after death, and no person became entitled to any property by reason of the death of the Decedent except as alleged herein.

4. The Inheritance Tax Worksheet states the clear market value of all assets of the Decedent, the proper deductions and correct computation of the Nebraska Inheritance Tax, which should be determined and assessed as stated therein, and the Worksheet is incorporated by this reference.

5. [X] All persons against whom an inheritance tax may be assessed are either a petitioner or have or will execute(d) a waiver of notice of hearing, or have or will enter(ed) a voluntary appearance.

6. The County Attorney of each county in which the property described in this Petition is located will, upon presentation of the final inventory and worksheet, execute a Waiver of Notice upon him or her to show cause, or of

the time and place of hearing, and will enter a Voluntary Appearance in such proceedings on behalf of the county and State of Nebraska.

WHEREFORE, the Petitioner prays that the Court:

Dispense with giving of any further notice as provided by law; and upon hearing, without delay, determine the clear market value of all assets of the decedent and determine the amount of Nebraska inheritance tax, and order that any potential lien of the Nebraska inheritance tax be extinguished upon payment of the tax.

Dated: _____, 2016

By: _____

Christin P. Lovegrove, Bar #24169
Attorney for Petitioner
Heinisch & Lovegrove Law Office, PC LLO
179 North 9th Street
Geneva, NE 68361
(402) 759-3122
christin@hllawoffice.com

VARIABLE(TRUSTEE**), Trustee, being first duly sworn upon oath, deposes and says that he/she is the above and foregoing Petitioner, and that he/she has read the same, knows the contents thereof, and that the allegations therein contained are true as he/she verily believes. The undersigned further represents that to the best of his/her knowledge and belief the clear market value of all property of the decedent will be duly reported and the Nebraska inheritance tax will be correctly computed as set forth in the foregoing Petition and the subsequent inventory and worksheet to be filed herein.

_____

VARIABLE(TRUSTEE**)
VARIABLE(TRUSTEEAdd**)
VARIABLE(TRUSTEEPhone#**)

SUBSCRIBED and sworn to before me on _____, 2016, by VARIABLE(TRUSTEE**), Trustee(s).

_____

Notary Public

[**ONLY USE THIS FORM IF DECEDENT IS OVER 55]
IN THE COUNTY COURT OF FILLMORE COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF VARIABLE(CAP-DECEDENT**), Deceased. Date of Death: VARIABLE(D/O/D**).	CASE # PR 16 - **NOTICE TO THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE FILING OF A STAND ALONE PETITION FOR DETERMINATION OF INHERITANCE TAX**

TO:
Nebraska Department of Health and Human Services
Attn: Estate Recovery
P.O. Box 95026
Lincoln, NE 68509

You are hereby notified that a Petition for Determination of the Inheritance Tax in the above-captioned estate was filed in the County Court in the above-captioned case on _____, 2016 when there has not been a filing of a formal probate proceeding, an informal probate proceeding, a formal determination of heirs in intestacy, an informal determination of heirs in intestacy, a special administration, an ancillary probate proceeding or any other proceeding under Chapter 30, Articles 24 or 25 of the Nebraska Statutes.

You are further notified that an Order has been entered by the Fillmore County Court giving the Trustee through the Trustee's attorney authority to ask for and receive from the Nebraska Department of Health and Human Services the Medicaid waiver of lien and/or statement of Medicaid lien as required under Neb. Rev. Stat. §77-2018.02(6), a copy of which Order is being served on you along with this Notice.

Under the Nebraska Supreme Court Rules §6-1464 a social security number is not able to be filed and thus the decedent's social security number and that of the decedent's spouse, if any, are sent in a separate cover letter which is not being filed with this Court.

ESTATE AND TRUST OF VARIABLE(CAP-DECEDENT**):
VARIABLE(TRUSTEE**), Petitioner(s)

By: _____

Christin P. Lovegrove, Bar #24169
Heinisch & Lovegrove Law Office, PC LLO
179 North 9th Street
Geneva, NE 68361
(402) 759-3122
christin@hllawoffice.com
Attorney for the Petitioner(s)

[**ONLY USE THIS FORM IF DECEDENT IS OVER 55]
IN THE COUNTY COURT OF FILLMORE COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF VARIABLE(CAP-DECEDENT**), Deceased. Date of Death: VARIABLE(D/O/D**).	CASE # PR 16 - **APPLICATION FOR ORDER REGARDING NOTICE TO THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE FILING OF A STAND ALONE PETITION FOR DETERMINATION OF INHERITANCE TAX PER LB72, §77-2018.02(6)**

The Estate and Trust of VARIABLE(DECEDENT**) moves the Court for an Order granting the Successor Trustee(s) of the VARIABLE(TRUST), to-wit VARIABLE(TRUSTEE**), authority as Successor Trustee (s) to ask for and receive from the Nebraska Department of Health and Human Services the Medicaid waiver of lien claim and/or statement of Medicaid lien as required under Neb. Rev. Stat. §77-2018.02(6) (enacted by LB 72, 2015 Legislative Session); and, further, to provide in such Order that all required notice, cover letter, and certificate of service may be submitted and signed by their attorney of record, Christin P. Lovegrove.

Applicant shows the Court that decedent died after August 30, 2015, the effective date of the statute; was over age 55 on date of death; and that due to a conflict in wording between federal law and Neb. Rev. Stat. §77-2018.02(6) it is necessary to obtain a Court order granting the Successor Trustee(s) authority to file the required notice, cover letter, and certificate of service.

VARIABLE(TRUSTEE**),
ESTATE AND TRUST OF
VARIABLE(CAP-DECEDENT**), Petitioner

By: _____

Christin P. Lovegrove, Bar #24169
Heinisch & Lovegrove Law Office, PC LLO
179 North 9th Street
Geneva, NE 68361
(402) 759-3122
christin@hllawoffice.com
Attorney for the Petitioner(s)

[**ONLY USE THIS FORM IF DECEDENT IS OVER 55]
IN THE COUNTY COURT OF FILLMORE COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF VARIABLE(CAP-DECEDENT**), Deceased. Date of Death: VARIABLE(D/O/D**).	CASE # PR 16 - **ORDER** **(§77-2018.02(6))**

IT IS HEREBY ORDERED that the Successor Trustee(s) of the VARIABLE(TRUST) , to-wit VARIABLE(TRUSTEE**), are hereby granted authority as Successor Trustee(s) to ask for and receive from the Nebraska Department of Health and Human Services the Medicaid waiver of lien claim and/or statement of Medicaid lien as required under Neb. Rev. Stat. §77-2018.02(6) (enacted by LB 72, 2015 Legislative Session).

IT IS FURTHER ORDERED that all required notice, cover letter, and certificate of service to Nebraska Department of Health and Human Services and the Court may be submitted and signed by the attorney of record for said Trustee, Christin P. Lovegrove.

Dated and signed _____, 2016.

BY THE COURT

_____
County Judge

[**ONLY USE THIS FORM IF DECEDENT IS OVER 55]

June 27, 2016

Nebraska Department of Health and Human Services
Medicaid and Long-Term Care
Attn: Estate Recovery
P.O. Box 95026
Lincoln, NE 68509-5026

RE: The Estate of VARIABLE(DECEDENT**)
Fillmore County Court Case # PR 16-

Dear Sir/Madam:

Pursuant to Nebraska Stat. § 77-2018.02, I am sending you a copy of the Notice to the Nebraska Department of Health and Human Services of the filing of a Petition for Determination of Inheritance Tax in the Estate of VARIABLE(DECEDENT**) outside of any proceeding under Chapter 30, Article 24 or 25 of the Nebraska Statutes. I am further providing you a copy of the Order entered by the County Court granting the Trustee(s) through the undersigned as their attorney of record to ask for and receive from the Nebraska Department of Health and Human Services the Medicaid waiver of lien and/or statement of Medicaid lien as required under Neb. Rev. Stat. §77-2018.02(6).

The inheritance tax proceeding was filed in the County Court of Fillmore County, Nebraska as Case Number PR 16 - XX. The following information is supplied pursuant to the statute.

Decedent's Social Security number: XXX-XX-XXXX.

Decedent's date of birth: _____, 19XX.

Decedent's date of death: _____, 2016.

[ ] The decedent's spouse is deceased and the spouse's name was _____ and the social security number of the spouse was XXX-XX-XXXX.

[ ] The decedent's spouse is deceased and the spouse's name was _____ and upon reasonable investigation the spouse's social security number is unavailable.

[ ] The decedent never married. [ ] The decedent's spouse is still alive.

[ ] The decedent had been married, but the decedent was divorced from the decedent's spouse by a final order at or before death.

A completed Nebraska Department of Health and Human Services Authorization of Disclosure Form per Chapter 42 Code of Federal Regulations is also attached with this mailing.

Yours very truly,

Christin P. Lovegrove, *Attorney*
Heinisch & Lovegrove Law Office, PC LLO
christin@HLLawoffice.com

CPL/ch
Enc.

O:\Seminar\2016 Estes\Appendix docs\DHHS forms.wpd

[**ONLY USE THIS FORM IF DECEDENT IS OVER 55]
IN THE COUNTY COURT OF FILLMORE COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF VARIABLE(CAP-DECEDENT**), Deceased. Date of Death:VARIABLE(D/O/D**)	CASE # PR 16 - **CERTIFICATE OF MAILING OF THE NOTICE TO THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES PURSUANT TO §77-2018.02 (6)**

I hereby certify that on _____, 2016, a true and correct copy of:

1. The Order of the Fillmore County Court giving the Trustee through the Trustee's attorney authority to ask for and receive from the Nebraska Department of Health and Human Services the Medicaid waiver of lien and/or statement of Medicaid lien as required under Neb. Rev. Stat. §77-2018.02(6);

2. The Notice to the Nebraska Department of Health and Human Services pursuant to §77-2018.02(6) of the filing of a Petition for Determination of Inheritance Tax in the above-captioned estate

was mailed by regular United States first class mail to the Department addressed as follows:

Nebraska Department of Health and Human Services
Attn: Estate Recovery
P.O. Box 95026
Lincoln, NE 68509

In addition I hereby certify that a separate cover letter containing the decedent's Social Security number, and if available upon reasonable investigation, the decedent's spouse's Social Security number, was sent to the department at the above address and that the Social Security number or Social Security numbers were not included in the notice filed with the court under Nebraska Supreme Court rule §6-1464.

_____
Christin P. Lovegrove, Bar #24169
Heinisch & Lovegrove Law Office, PC LLO
179 North 9th Street
Geneva, NE 68361
(402) 759-3122
christin@hllawoffice.com

[**ONLY USE THIS FORM IF DECEDENT NOT OVER 55 & NOT IN A NURSING HOME]
IN THE COUNTY COURT OF FILLMORE COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF VARIABLE(CAP-DECEDENT**), Deceased. Date of Death: VARIABLE(D/O/D**).	CASE # PR 16 - **NOTICE - NO NOTICE TO DEPARTMENT OF HEALTH AND HUMAN SERVICES REQUIRED**

Pursuant to Neb. Rev. Stat. §77-2018.02(6), notice is not required to the Nebraska Department of Health and Human Services as the decedent **was NOT 55 years of age or older and/or did NOT reside in a medical institution as defined in Neb. Rev. Stat. §68-919(1) at the time of their death**.

Therefore the petitioner is not required to notify the Nebraska Department of Health and Human Services that a petition for the determination of inheritance tax was filed with this court and is not required to provide a Certificate of Mailing of such.

_____ Date: _____, 2016
Signature of Petitioner(s)

_____ _____
Print or Type Name — Street Address/PO Box

_____ _____
Bar Number & Firm Name (attorneys only) — City/State/ZIP Code of

_____ _____
Phone — E-mail Address

42 U.S. Code § 1396p - Liens, adjustments and recoveries, and transfers of assets

Current through Pub. L. 114-38 (http://www.gpo.gov/fdsys/pkg/PLAW-114publ38/html/PLAW-114publ38.htm). (See Public Laws for the current Congress (http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws).)

US Code (/uscode/text/42/1396p?qt-us_code_temp_noupdates=0#qt-us_code_temp_noupdates)

Notes (/uscode/text/42/1396p?qt-us_code_temp_noupdates=1#qt-us_code_temp_noupdates)

prev (/uscode/text/42/1396o%E2%80%931) | next (/uscode/text/42/1396q)

(a) IMPOSITION OF LIEN AGAINST PROPERTY OF AN INDIVIDUAL ON ACCOUNT OF MEDICAL ASSISTANCE RENDERED TO HIM UNDER A STATE PLAN

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual—

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in

accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home,

except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if—

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title (/uscode/text/42/1382c), or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution),

is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) ADJUSTMENT OR RECOVERY OF MEDICAL ASSISTANCE CORRECTLY PAID UNDER A STATE PLAN

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such

medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of—

(I) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(II) at the option of the State, any items or services under the State plan (but not including medical assistance for medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:a:10:E)).

(C)

(I) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(II) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, and which satisfies clause (iv), or which has a State plan amendment that provides for a qualified State long-term care insurance partnership (as defined in clause (iii)) which provided for the disregard of any assets or resources—

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(III) For purposes of this paragraph, the term "qualified State long-term care insurance partnership" means an approved State plan amendment under this subchapter that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments

that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if the following requirements are met:

(I) The policy covers an insured who was a resident of such State when coverage first became effective under the policy.

(II) The policy is a qualified long-term care insurance policy (as defined in section 7702B(b) of the Internal Revenue Code of 1986) issued not earlier than the effective date of the State plan amendment.

(III) The policy meets the model regulations and the requirements of the model Act specified in paragraph (5).

(IV) If the policy is sold to an individual who—

(aa) has not attained age 61 as of the date of purchase, the policy provides compound annual inflation protection;

(bb) has attained age 61 but has not attained age 76 as of such date, the policy provides some level of inflation protection; and

(cc) has attained age 76 as of such date, the policy may (but is not required to) provide some level of inflation protection.

(V) The State Medicaid agency under section 1396a(a)(5) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:a:5) provides information and technical assistance to the State insurance department on the insurance department's role of assuring that any individual who sells a long-term care insurance policy under the partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care.

(VI) The issuer of the policy provides regular reports to the Secretary, in accordance with regulations of the Secretary, that include

notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate to the administration of such partnerships.

(VII) The State does not impose any requirement affecting the terms or benefits of such a policy unless the State imposes such requirement on long-term care insurance policies without regard to whether the policy is covered under the partnership or is offered in connection with such a partnership.

In the case of a long-term care insurance policy which is exchanged for another such policy, subclause (I) shall be applied based on the coverage of the first such policy that was exchanged. For purposes of this clause and paragraph (5), the term "long-term care insurance policy" includes a certificate issued under a group insurance contract.

(iv) With respect to a State which had a State plan amendment approved as of May 14, 1993, such a State satisfies this clause for purposes of clause (ii) if the Secretary determines that the State plan amendment provides for consumer protection standards which are no less stringent than the consumer protection standards which applied under such State plan amendment as of December 31, 2005.

(v) The regulations of the Secretary required under clause (iii)(VI) shall be promulgated after consultation with the National Association of Insurance Commissioners, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data and information to be reported and the frequency with which such reports are to be made. The Secretary, as appropriate, shall provide copies of the reports provided in accordance with that clause to the State involved.

(vi) The Secretary, in consultation with other appropriate Federal agencies, issuers of long-term care insurance, the National Association of Insurance Commissioners, State insurance commissioners, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, shall develop recommendations for Congress to authorize and fund a uniform minimum data set to be reported electronically by all issuers of long-term care insurance policies under qualified State long-term care insurance partnerships to a secure, centralized electronic query and report-generating mechanism that the State, the Secretary, and other Federal agencies can access.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title (/uscode/text/42/1382c); and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B) of this section, when—

(I) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(II) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3)

(A) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(B) The standards specified by the Secretary under subparagraph (A) shall require that the procedures established by the State agency under subparagraph (A) exempt income, resources, and property that are exempt from the application of this subsection as of April 1, 2003, under manual instructions issued to carry out this subsection (as in effect on such date) because of the Federal responsibility for Indian Tribes and Alaska Native Villages. Nothing in this subparagraph shall be construed as preventing the Secretary from providing additional estate recovery exemptions under this subchapter for Indians.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual—

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(5)

(A) For purposes of clause (iii)(III), the model regulations and the requirements of the model Act specified in this paragraph are:

(I) In the case of the model regulation, the following requirements:

(I) Section 6A (relating to guaranteed renewal or noncancellability), other than paragraph (5) thereof, and the requirements of section 6B of the model Act relating to such section 6A.

(II) Section 6B (relating to prohibitions on limitations and exclusions) other than paragraph (7) thereof.

(III) Section 6C (relating to extension of benefits).

(IV) Section 6D (relating to continuation or conversion of coverage).

(V) Section 6E (relating to discontinuance and replacement of policies).

(VI) Section 7 (relating to unintentional lapse).

(VII) Section 8 (relating to disclosure), other than sections 8F, 8G, 8H, and 8I thereof.

(VIII) Section 9 (relating to required disclosure of rating practices to consumer).

(IX) Section 11 (relating to prohibitions against post-claims underwriting).

(X) Section 12 (relating to minimum standards).

(XI) Section 14 (relating to application forms and replacement coverage).

(XII) Section 15 (relating to reporting requirements).

(XIII) Section 22 (relating to filing requirements for marketing).

(XIV) Section 23 (relating to standards for marketing), including inaccurate completion of medical histories, other than paragraphs (1), (6), and (9) of section 23C.

(XV) Section 24 (relating to suitability).

(XVI) Section 25 (relating to prohibition against preexisting conditions and

probationary periods in replacement policies or certificates).

(XVII) The provisions of section 26 relating to contingent nonforfeiture benefits, if the policyholder declines the offer of a nonforfeiture provision described in paragraph (4).

(XVIII) Section 29 (relating to standard format outline of coverage).

(XIX) Section 30 (relating to requirement to deliver shopper's guide).

(II) In the case of the model Act, the following:

(I) Section 6C (relating to preexisting conditions).

(II) Section 6D (relating to prior hospitalization).

(III) The provisions of section 8 relating to contingent nonforfeiture benefits.

(IV) Section 6F (relating to right to return).

(V) Section 6G (relating to outline of coverage).

(VI) Section 6H (relating to requirements for certificates under group plans).

(VII) Section 6J (relating to policy summary).

(VIII) Section 6K (relating to monthly reports on accelerated death benefits).

(IX) Section 7 (relating to incontestability period).

(B) For purposes of this paragraph and paragraph (1)(C)—

(I) the terms "model regulation" and "model Act" mean the long-term care insurance model regulation, and the long-term care insurance model Act, respectively, promulgated by the National Association of Insurance Commissioners (as adopted as of October 2000);

(II) any provision of the model regulation or model Act listed under subparagraph (A) shall be

treated as including any other provision of such regulation or Act necessary to implement the provision; and

(III) with respect to a long-term care insurance policy issued in a State, the policy shall be deemed to meet applicable requirements of the model regulation or the model Act if the State plan amendment under paragraph (1)(C)(iii) provides that the State insurance commissioner for the State certifies (in a manner satisfactory to the Secretary) that the policy meets such requirements.

(C) Not later than 12 months after the National Association of Insurance Commissioners issues a revision, update, or other modification of a model regulation or model Act provision specified in subparagraph (A), or of any provision of such regulation or Act that is substantively related to a provision specified in such subparagraph, the Secretary shall review the changes made to the provision, determine whether incorporating such changes into the corresponding provision specified in such subparagraph would improve qualified State long-term care insurance partnerships, and if so, shall incorporate the changes into such provision.

(c) TAKING INTO ACCOUNT CERTAIN TRANSFERS OF ASSETS

(1)

(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:a:18), the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

(B)

(I) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section or in the case of any other disposal of assets made on or after February 8, 2006, 60 months) before the date specified in clause (ii).

(II) The date specified in this clause, with respect to—

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

(C)

(I) The services described in this subparagraph with respect to an institutionalized individual are the following:

(I) Nursing facility services.

(II) A level of care in any institution equivalent to that of nursing facility services.

(III) Home or community-based services furnished under a waiver granted under subsection (c) or (d) of section 1396n of this title (/uscode/text/42/1396n).

(II) The services described in this subparagraph with respect to a noninstitutionalized individual are services (not including any services described in clause (i)) that are described in paragraph (7), (22), or (24) of section 1396d(a) of this title (/uscode/text/42/1396d:a), and, at the option of a State, other long-term care

services for which medical assistance is otherwise available under the State plan to individuals requiring long-term care.

(D)

(I) In the case of a transfer of asset made before February 8, 2006, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(II) In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

(E)

(I) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to—

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(I), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(II) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to—

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) or (ii) with respect to the disposal of an asset shall be reduced—

(I) in the case of periods of ineligibility determined under clause (i), by the number of months of ineligibility applicable to the individual under clause (ii) as a result of such disposal, and

(II) in the case of periods of ineligibility determined under clause (ii), by the number of months of ineligibility applicable to the individual under clause (i) as a result of such disposal.

(iv) A State shall not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) with respect to the disposal of assets.

(F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless—

(I) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or

(II) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

(G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless—

(I) the annuity is—

(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

(II) purchased with proceeds from—

(aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

(bb) a simplified employee pension (within the meaning of section 408(k) of such Code); or

(cc) a Roth IRA described in section 408A of such Code; or

(II) the annuity—

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(H) Notwithstanding the preceding provisions of this paragraph, in the case of an individual (or individual's spouse) who makes multiple fractional transfers of assets in more than 1 month for less than fair market value on or after the applicable look-back date specified in subparagraph (B), a State may determine the period of ineligibility applicable to such individual under this paragraph by—

(I) treating the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) during all months on or after the look-back date specified in subparagraph (B) as 1 transfer for purposes of

clause (i) or (ii) (as the case may be) of subparagraph (E); and

(II) beginning such period on the earliest date which would apply under subparagraph (D) to any of such transfers.

(I) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage—

(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii) prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

(J) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase.

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—

(A) the assets transferred were a home and title to the home was transferred to—

(i) the spouse of such individual;

(II) a child of such individual who (I) is under age 21, or (II) (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in

such program) is blind or disabled as defined in section 1382c of this title (/uscode/text/42/1382c);

(III) a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

(IV) a son or daughter of such individual (other than a child described in clause (II)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

(B) the assets—

(I) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

(II) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(III) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(II)(II), or

(IV) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title (/uscode/text/42/lii:usc:t:42:s:1382c:a:3));

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets

transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.

The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual. While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.

(3) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(4) A State (including a State which has elected treatment under section 1396a(f) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:f)) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

(5) In this subsection, the term "resources" has the meaning given such term in section 1382b of this title

(/uscode/text/42/1382b), without regard to the exclusion described in subsection (a)(1) thereof.

(d) TREATMENT OF TRUST AMOUNTS

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)

(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3)

(A) In the case of a revocable trust—

(I) the corpus of the trust shall be considered resources available to the individual,

(II) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(III) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust—

(I) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(II) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section

1382c(a)(3) of this title (/uscode/text/42/iii:usc:t:42:s:1382c:a:3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter; and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:a:10:A:ii:V), but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:a:10:C).

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title (/uscode/text/42/iii:usc:t:42:s:1382c:a:3)) that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title (/uscode/text/42/iii:usc:t:42:s:1382c:a:3)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

(e) DISCLOSURE AND TREATMENT OF ANNUITIES

(1) In order to meet the requirements of this section for purposes of section 1396a(a)(18) of this title (/uscode/text/42/III:usc:t:42:s:1396a:a:18), a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

(2)

(A) In the case of disclosure concerning an annuity under subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual. Nothing in this paragraph shall be

construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

(B) In the case of such an issuer receiving notice under subparagraph (A), the State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure described in paragraph (1). A State shall take such information into account in determining the amount of the State's obligations for medical assistance or in the individual's eligibility for such assistance.

(3) The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.

(4) Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).

(f) DISQUALIFICATION FOR LONG-TERM CARE ASSISTANCE FOR INDIVIDUALS WITH SUBSTANTIAL HOME EQUITY

(1)

(A) Notwithstanding any other provision of this subchapter, subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds $500,000.

(B) A State may elect, without regard to the requirements of section 1396a(a)(1) of this title (/uscode/text/42/lii:usc:t:42:s:1396a:a:1) (relating to statewideness) and section 1396a(a)(10)(B) of this title (/uscode/text/42/lii:usc:t:42:s:1396a:a:10:B) (relating to comparability), to apply subparagraph (A) by substituting for "$500,000", an amount that exceeds such amount, but does not exceed $750,000.

(C) The dollar amounts specified in this paragraph shall be increased, beginning with 2011, from year to

year based on the percentage increase in the consumer price index for all urban consumers (all items; United States city average), rounded to the nearest $1,000.

(2) Paragraph (1) shall not apply with respect to an individual if—

(A) the spouse of such individual, or

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title (/uscode/text/42/1382c),

is lawfully residing in the individual's home.

(3) Nothing in this subsection shall be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.

(4) The Secretary shall establish a process whereby paragraph (1) is waived in the case of a demonstrated hardship.

(g) TREATMENT OF ENTRANCE FEES OF INDIVIDUALS RESIDING IN CONTINUING CARE RETIREMENT COMMUNITIES

(1) IN GENERAL
For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, the rules specified in paragraph (2) shall apply to individuals residing in continuing care retirement communities or life care communities that collect an entrance fee on admission from such individuals.

(2) TREATMENT OF ENTRANCE FEE For purposes of this subsection, an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that—

(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

(h) DEFINITIONS In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—

(A) by the individual or such individual's spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title (/uscode/text/42/1382a).

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title (/uscode/text/42/iii:usc:t:42:s:1396a:a:10:A:ii:VI).

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.

(5) The term "resources" has the meaning given such term in section 1382b of this title (/uscode/text/42/1382b), without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

(Aug. 14, 1935, ch. 531, title XIX, § 1917, as added Pub. L. 97–248, title I, § 132(b) (http://thomas.loc.gov/cgi-bin/bdquery/L?

d097:./list/bd/d097pl.lst:248(Public_Laws)), Sept. 3, 1982, 96 Stat. 370 (http://uscode.house.gov/statviewer.htm?volume=96&page=370); amended Pub. L. 97–448, title III, § 309(b)(21) (http://thomas.loc.gov/cgi-bin/bdquery/L?d097:./list/bd/d097pl.lst:448(Public_Laws)), (22), Jan. 12, 1983, 96 Stat. 2410 (http://uscode.house.gov/statviewer.htm?volume=96&page=2410); Pub. L. 100–203, title IV, § 4211(h)(12) (http://thomas.loc.gov/cgi-bin/bdquery/L?d100:./list/bd/d100pl.lst:203(Public_Laws)), Dec. 22, 1987, 101 Stat. 1330–207 (http://uscode.house.gov/statviewer.htm?volume=101&page=1330-207); Pub. L. 100–360, title III, § 303(b) (http://thomas.loc.gov/cgi-bin/bdquery/L?d100:./list/bd/d100pl.lst:360(Public_Laws)), title IV, § 411(*l*)(3)(I), July 1, 1988, 102 Stat. 760 (http://uscode.house.gov/statviewer.htm?volume=102&page=760), 803; Pub. L. 100–485, title VI, § 608(d)(16)(B) (http://thomas.loc.gov/cgi-bin/bdquery/L?d100:./list/bd/d100pl.lst:485(Public_Laws)), Oct. 13, 1988, 102 Stat. 2417 (http://uscode.house.gov/statviewer.htm?volume=102&page=2417); Pub. L. 101–239, title VI, § 6411(e)(1) (http://thomas.loc.gov/cgi-bin/bdquery/L?d101:./list/bd/d101pl.lst:239(Public_Laws)), Dec. 19, 1989, 103 Stat. 2271 (http://uscode.house.gov/statviewer.htm?volume=103&page=2271); Pub. L. 103–66, title XIII (http://thomas.loc.gov/cgi-bin/bdquery/L?d103:./list/bd/d103pl.lst:66(Public_Laws)), §§ 13611(a)–(c), 13612(a)–(c), Aug. 10, 1993, 107 Stat. 622–628 (http://uscode.house.gov/statviewer.htm?volume=107&page=622-628); Pub. L. 109–171, title VI (http://www.gpo.gov/fdsys/pkg/PLAW-109publ171/html/PLAW-109publ171.htm), §§ 6011(a), (b), (e), 6012(a)–(c), 6014(a), 6015(b), 6016(a)–(d), 6021(a)(1), Feb. 8, 2006, 120 Stat. 61–68 (http://uscode.house.gov/statviewer.htm?volume=120&page=61-68); Pub. L. 109–432, div. B, title IV, § 405(b)(1) (http://www.gpo.gov/fdsys/pkg/PLAW-109publ432/html/PLAW-109publ432.htm), Dec. 20, 2006, 120 Stat. 2998 (http://uscode.house.gov/statviewer.htm?volume=120&page=2998); Pub. L. 110–275, title I, § 115(a) (http://www.gpo.gov/fdsys/pkg/PLAW-110publ275/html/PLAW-110publ275.htm), July 15, 2008, 122 Stat. 2507 (http://uscode.house.gov/statviewer.htm?volume=122&page=2507); Pub. L. 111–5, div. B, title V, § 5006(c) (http://www.gpo.gov/fdsys/pkg/PLAW-111publ5/html/PLAW-111publ5.htm), Feb. 17, 2009, 123 Stat. 507 (http://uscode.house.gov/statviewer.htm?volume=123&page=507); Pub. L. 113–67, div. A, title II, § 202(b)(3) (http://www.gpo.gov/fdsys/pkg/PLAW-113publ67/html/PLAW-113publ67.htm), Dec. 26, 2013, 127 Stat. 1177 (http://uscode.house.gov/statviewer.htm?volume=127&page=1177).)

Frank Heinisch

Subject: FW: More on LB 72 Medicaid reimbursement waiver to distribute grantor trust early
Attachments: 03 Appl'n & Order for Authority to Serve DHHS.DOC; Aff & Agr Succ Trustee for PDF.pdf

From: Frank Heinisch [mailto:frank@hllawoffice.com]
Sent: Tuesday, June 14, 2016 12:10 AM
To: realestate@mail.nebarlist.com
Subject: More on LB 72 Medicaid reimbursement waiver to distribute grantor trust early

Tom Haase, Dan Wintz, Don Schneider and the RETP list serve,

A common scenario to avoid probate is a revocable grantor trust. The Trustor dies and a successor trustee takes over per the terms of the trust, §30-3860(c)(1). Our best practice for years is an Affidavit of Successor that establishes the death, the creation of the trust, the terms of the trust creating the trustee succession, real estate involved (for purposes of recording the document) and acceptance of the successor trustee to serve as a trustee. A copy of our base form is attached. In January this form was accepted by DHHS to release information to me as attorney for the trustee that no Medicaid benefits were paid to the decedent. The June 9, 2016 letter from Jon Sterns DHHS closes this door.

Now the attached Form 03 resolves the release of DHHS information to the trustee (and attorney) of no prior Medicaid benefits under a court order authorization to receive such information. A probate proceeding may be simpler to understand as we proceed deeper.

Somehow upon the death of the Trustor, the successor trustee of the revocable grantor trust has to establish that he is the successor trustee. I suggest an Affidavit of Succession, as I have been using for years, is appropriate to be referenced in the Form 03. But now is a Judge making a decision on the validity of the Trust or the proper succession of Trustees? Will this require a full hearing with notice?

I often distribute a portion of the revocable grantor trust long before the inheritance tax is due. Without an inheritance tax petition and no probate how is the filing of the motion, form 03, to be handled by the court? A probate case or an inheritance tax case? Remember that distributions from a revocable trust to family are not to be made after the death of the Trustor until DHHS confirms that there were no Medicaid Benefits to be recovered by providing a waiver.

> "After the death of the trustor occurring after August 30, 2015, a **trustee** of a revocable trust which has become irrevocable by reason of the death of the trustor **shall not transfer trust** property to a beneficiary described in section 77-2004 or 77-2005 in relation to the trustor prior to satisfaction of all claims for medicaid reimbursement pursuant to section 68-919 to the extent necessary to discharge any such claim remaining unpaid after application of the assets of the trustor's probate estate. The Department of Health and Human Services **may**, **upon application of a trustee, waive the restriction** on transfers established by this subsection in cases in which the department determines that either there is no medicaid reimbursement due or after the proposed transfer is made there will be sufficient assets remaining in the trust or trustor's probate estate to satisfy all such claims for medicaid reimbursement. If there is **no medicaid reimbursement due**, the department **shall waive** the restriction within sixty days

after receipt of the trustee's request for waiver and the deceased trustor's name and social security number and, if available upon reasonable investigation, the name and social security number of the trustor's spouse if such spouse is deceased." §30-3880(c), §30-3881(b) and §30-3882(d)

Ok, now we have a DHHS waiver, what is to be done with it? I suggest that it is to be filed with the form 03 motion and order that the court authorized the trustee to receive such information. Will this public recording become a breach federal law as an unauthorized disclosure of Medicaid/Non-Medicaid benefits? Also consider recording the DHHS waiver against the real estate in the trust to calm down the title insurance inquiry should the land in the trust be sold in the future, or loans secured by the real estate especially if no certificate of county court proceedings is filed against the real estate.

Bottom line to distribute assets from a revocable grantor trust after the Trustor's death prior to inheritance tax determination: file in county court both the affidavit of successor trustee with the form 03 motion for the court to authorize the release of information and have the court acknowledge who is the successor trustee, then file the waiver from DHHS with the court.

Months down the road proceed with an inheritance tax proceeding outside of probate. Yet, following this course, I have already been requested by title insurance to again give notice to DHHS again as a part of the inheritance tax proceeding without probate when I previously gained the DHHS waiver to permit distribution of trust assets. When will it ever end? I suggested that one waiver from NDHHS is sufficient although I gave a second notice to DHHS to keep the title insurance gods quiet.

I suggest adding to the successor trustee statute §30-3860 a provision similar to the Trust Deed statute regarding successor trustees, §76-1004(4): "Any affidavit ... shall constitute prima facie evidence of the facts required to be stated and conclusive evidence of such facts ... " of filling a vacancy in a trusteeship and notice of waiver of Medicaid reimbursement shall be delivered to the trustee or successor trustee or their legal representative.

Looks like I have opportunity to amend my 48 years of trust documents to add a provision "specifically authorizing a trustee or another to divulge Medicaid eligibility information" per DHHS letter. The real answer is for our Unicameral to clean up such unintended consequences of LB 72.

Currently, until the dust settles, my simple answer is to file a probate proceeding with a PR and a probate inventory of zero (informal open and informal close) [non-probate assets will be inventoried for inheritance tax].

Frank C. Heinisch, *Attorney at Law*

Heinisch & Lovegrove Law Office, PC LLO

Frank C. Heinisch, Attorney

Christin P. Lovegrove, Attorney

[NAME OF TRUST]
DATED [DATE OF TRUST including amendments and date of amendments]
AFFIDAVIT AND AGREEMENT
CONFIRMING TITLE IN SUCCESSOR TRUSTEES

State of Nebraska, County of [Name of County], ss:

COME NOW, the undersigned, being duly sworn, depose and state that they knew the Decedent and that the following information is true and correct:

1. [Decedent's name/Grantor's name] created a revocable grantor trust known as the [Name of Trust] dated [Date of Trust including amendments and date of amendments], appointing himself/herself as trustee.

2. The following described real estate was conveyed to [Name of Grantor/Trustee] as Trustee of the [Name of Trust] dated [Date of Trust including amendments and date of amendments], to-wit:

LEGAL

3. [Name of Grantor/Decedent] died on [Date of Death], a resident of [County of Residence], Nebraska. Upon his/her death the [Name of Trust] dated [Date of Trust including amendments and date of amendments] became irrevocable.

4. [Article Number and/or Section Number of Trust pertaining to Successor Trustee(s)] on page [Page Number (#)] of the [Name of Trust] provides:

Successor Trustee:

5. [Name of Successor Trustee(s)], [Relationship to Grantor, if any] of [Name of Grantor/Decedent], hereby agrees that he/she/they will serve as Trustee/Co-Trustees of the [Name of Trust].

6. Each of the/The undersigned hereby acknowledge that the Trust is in good standing and he/she/they are authorized under the laws of the State of Nebraska to serve as Trustee(s) and by this document accept the position as a Successor Trustee/Co-Trustee

of the [Name of Trust], and the trusts contained therein. [Name of Successor Trustee(s)] acknowledge(s) the principal place of administration of the trust is [County where Trust is located]. State of Nebraska and hereby personally submit(s) to the jurisdiction of the Courts of the State of Nebraska.

FURTHER Affiants saith not.

Dated: June _____, 2016

_____ _____

[Name of Successor Trustee] [Name of Successor Trustee]

Subscribed and sworn to before me on June _____, 2016.

_____

Notary Public

Form **56**
(Rev. December 2015)
Department of the Treasury
Internal Revenue Service

Notice Concerning Fiduciary Relationship

▶ **Information about Form 56 and its separate instructions is at *www.irs.gov/form56*.**
(Internal Revenue Code sections 6036 and 6903)

OMB No. 1545-0013

Part I Identification

Name of person for whom you are acting (as shown on the tax return)	Identifying number	**Decedent's social security no.**

Address of person for whom you are acting (number, street, and room or suite no.)

City or town, state, and ZIP code (If a foreign address, see instructions.)

Fiduciary's name

Address of fiduciary (number, street, and room or suite no.)

City or town, state, and ZIP code	Telephone number (optional)
	( )

Section A. Authority

1 Authority for fiduciary relationship. Check applicable box:

- **a** ☐ Court appointment of testate estate (valid will exists)
- **b** ☐ Court appointment of intestate estate (no valid will exists)
- **c** ☐ Court appointment as guardian or conservator
- **d** ☐ Valid trust instrument and amendments
- **e** ☐ Bankruptcy or assignment for the benefit or creditors
- **f** ☐ Other. Describe ▶

2a If box 1a or 1b is checked, enter the date of death ▶

b If box 1c—1f is checked, enter the date of appointment, taking office, or assignment or transfer of assets ▶

Section B. Nature of Liability and Tax Notices

3 Type of taxes (check all that apply): ☐ Income ☐ Gift ☐ Estate ☐ Generation-skipping transfer ☐ Employment ☐ Excise ☐ Other (describe) ▶

4 Federal tax form number (check all that apply): **a**☐ 706 series **b**☐ 709 **c**☐ 940 **d**☐ 941, 943, 944 **e**☐ 1040, 1040-A, or 1040-EZ **f** ☐ 1041 **g**☐ 1120 **h**☐ Other (list) ▶

5 If your authority as a fiduciary does not cover all years or tax periods, check here . . . . . ▶ ☐ and list the specific years or periods ▶

6 If the fiduciary has a CAF number and wants a copy of notices and correspondence **(see the instructions)** check this box . ▶ ☐ and enter the year(s) or period(s) for the corresponding line 4 item checked. If more than one form entered on line 4h, enter the form number.

Complete only if the line 6 box is checked.

If this item is checked:	Enter year(s) or period(s)	If this item is checked:	Enter year(s) or period(s)
4a		4b	
4c		4d	
4e		4f	
4g		4h:	
4h:		4h:	

Part II Revocation or Termination of Notice

Section A—Total Revocation or Termination

7 Check this box if you are revoking or terminating all prior notices concerning fiduciary relationships on file with the Internal Revenue Service for the same tax matters and years or periods covered by this notice concerning fiduciary relationship ▶ ☐

Reason for termination of fiduciary relationship. Check applicable box:

a ☐ Court order revoking fiduciary authority

b ☐ Certificate of dissolution or termination of a business entity

c ☐ Other. Describe ▶

Section B—Partial Revocation

8a Check this box if you are revoking earlier notices concerning fiduciary relationships on file with the Internal Revenue Service for the same tax matters and years or periods covered by this notice concerning fiduciary relationship . . . . . ▶ ☐

b Specify to whom granted, date, and address, including ZIP code.

▶

Section C—Substitute Fiduciary

9 Check this box if a new fiduciary or fiduciaries have been or will be substituted for the revoking or terminating fiduciary and specify the name(s) and address(es), including ZIP code(s), of the new fiduciary(ies) . . . . . ▶ ☐

▶

Part III Court and Administrative Proceedings

Name of court (if other than a court proceeding, identify the type of proceeding and name of agency)		Date proceeding initiated	
Address of court		Docket number of proceeding	
City or town, state, and ZIP code	Date	Time ☐ a.m. ☐ p.m.	Place of other proceedings

Part IV Signature

Please Sign Here

I certify that I have the authority to execute this notice concerning fiduciary relationship on behalf of the taxpayer.

▶ Fiduciary's signature | Title, if applicable | Date

Form **8855**
(Rev. January 2009)

Department of the Treasury
Internal Revenue Service

Election To Treat a Qualified Revocable Trust as Part of an Estate

OMB No. 1545-1881

Part I Estate (or Filing Trust) Information

Name of estate (or the filing trust, if applicable (see instructions))	**Employer identification number** (see instructions)
Name of executor (or the filing trustee, if applicable)	Type of entity prior to the election: ☐ Domestic estate ☐ Foreign estate ☐ Domestic trust ☐ Foreign trust
Number, street, and room or suite no. (or P.O. box number if mail is not delivered to street address)	
City or town, state, and ZIP code (if a foreign address, see instructions)	Date of executor's appointment

Under penalties of perjury, I, as executor (or filing trustee):

- Confirm that under applicable local law or the governing document, I have the authority to make this election for the estate (if executor) or trust (if filing trustee) and to agree to the conditions of the election;
- Elect the treatment provided under section 645 for the above-named estate (or filing trust, if applicable);
- Confirm that an agreement has been reached with the trustees of each qualified revocable trust (QRT) joining in the election to allocate the tax burden of the combined electing trusts and related estate, if any, for each tax year during the election period in a manner that reasonably reflects each entity's tax obligation;
- Agree to ensure that the related estate's (or filing trust's, if applicable) share of the tax obligations of the combined electing trust(s) and related estate, if any, is timely paid to the United States Treasury;
- Agree to accept responsibility for filing a complete, accurate, and timely income tax return, when required by law, for the combined electing trust(s) and related estate, if any, for each tax year during the election period;
- (If I am the filing trustee) confirm that if there is more than one QRT making this election, that I have been appointed by the trustees of each QRT making this election to be the filing trustee and I agree to accept the responsibility of filing the appropriate income tax return for the combined electing trust(s) for each tax year during the election period and all other responsibilities of the filing trustee;
- (If I am the filing trustee) represent that no executor has been appointed for a related estate and to the best of my knowledge and belief, one will not be appointed;
- (If I am the filing trustee) agree that, if an executor is appointed for the related estate after this Form 8855 is filed, that I will complete and file an amended Form 8855 if the late appointed executor agrees to the election, and I agree to cooperate with the executor in filing any amended returns required to be filed as a result of the executor's appointment; and
- Confirm to the best of my knowledge and belief, that all information contained in this election and any accompanying statements or schedules is true, correct, and complete.

Signature of executor (or filing trustee)	Date

Part II Decedent Information

Name of decedent	SSN of the decedent	Date of death

Part III Qualified Revocable Trust Information

Name of trust	Employer identification number (see instructions)

Name of trustee

Number, street, and room or suite no. (or P.O. box number if mail is not delivered to street address)

City or town, state, and ZIP code (if a foreign address, see instructions)

Under penalties of perjury, I, as trustee of the above-named trust:

- Confirm that under applicable local law or the governing instrument, I have the authority to make this election for the trust and to agree to the conditions of the election;
- Elect the treatment provided under section 645 for this trust;
- Agree to timely provide the executor (or filing trustee if there is no executor) with all the trust information necessary to permit the executor (or filing trustee, if applicable) to file a complete, accurate, and timely Form 1041 (or Form 1040-NR for a foreign estate) for the combined electing trust(s) and the related estate, if any, for each tax year during the election period;
- Confirm that an agreement has been reached with the trustees of each QRT joining in the election, and the executor of the related estate, if any, to allocate the tax burden of the combined electing trust(s) and related estate, if any, for each tax year during the election period in a manner that reasonably reflects each entity's tax obligation;
- Agree to ensure that this trust's share of the tax obligations of the combined electing trust(s) and related estate, if any, is timely paid to the United States Treasury;
- Confirm that if a filing trustee (and not an executor for a related estate) has completed Part I of this Form 8855, the trustee that completed Part I has been appointed the filing trustee, and to the best of my knowledge and belief, an executor has not been appointed to administer a related estate and one will not be appointed;
- Agree that if a filing trustee (and not an executor for a related estate) has completed Part I of this Form 8855 and an executor is appointed for the related estate after this Form 8855 is filed, that I will complete and file an amended Form 8855 if the later appointed executor agrees to the election, and I agree to cooperate with the executor in filing any amended returns required to be filed as a result of the executor's appointment; and
- Confirm to the best of my knowledge and belief, that all information of the electing trust contained in this election and any accompanying statements or schedules is true, correct, and complete.

Signature of trustee	Date

Name of trust	Employer identification number (see instructions)

Name of trustee

Number, street, and room or suite no. (or P.O. box number if mail is not delivered to street address)

City or town, state, and ZIP code (if a foreign address, see instructions)

Under penalties of perjury, I, as trustee of the above-named trust:

- Confirm that under applicable local law or the governing instrument, I have the authority to make this election for the trust and to agree to the conditions of the election;
- Elect the treatment provided under section 645 for this trust;
- Agree to timely provide the executor (or filing trustee if there is no executor) with all the trust information necessary to permit the executor (or filing trustee, if applicable) to file a complete, accurate, and timely Form 1041 (or Form 1040-NR for a foreign estate) for the combined electing trust(s) and the related estate, if any, for each tax year during the election period;
- Confirm that an agreement has been reached with the trustees of each QRT joining in the election, and the executor of the related estate, if any, to allocate the tax burden of the combined electing trust(s) and related estate, if any, for each tax year during the election period in a manner that reasonably reflects each entity's tax obligation;
- Agree to ensure that this trust's share of the tax obligations of the combined electing trust(s) and related estate, if any, is timely paid to the United States Treasury;
- Confirm that if a filing trustee (and not an executor for a related estate) has completed Part I of this Form 8855, the trustee that completed Part I has been appointed the filing trustee, and to the best of my knowledge and belief, an executor has not been appointed to administer a related estate and one will not be appointed;
- Agree that if a filing trustee (and not an executor for a related estate) has completed Part I of this Form 8855 and an executor is appointed for the related estate after this Form 8855 is filed, that I will complete and file an amended Form 8855 if the later appointed executor agrees to the election, and I agree to cooperate with the executor in filing any amended returns required to be filed as a result of the executor's appointment; and
- Confirm to the best of my knowledge and belief, that all information of the electing trust contained in this election and any accompanying statements or schedules is true, correct, and complete.

Signature of trustee	Date

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose

The trustees of each qualified revocable trust (QRT) and the executor of the related estate, if any, use Form 8855 to make a section 645 election. This election allows a QRT to be treated and taxed (for income tax purposes) as part of its related estate during the election period. Once the election is made, it cannot be revoked.

Definitions

A QRT is any trust (or part of a trust) that, on the day the decedent died, was treated as owned by the decedent under section 676 by reason of a power to revoke that was exercisable by the decedent (determined without regard to section 672(e)).

For this purpose, a QRT includes a trust that was treated as owned by the decedent under section 676 by reason of a power to revoke that was exercisable by the decedent with the consent or approval of a nonadverse party or the decedent's spouse. However, a QRT does not include a trust that was treated as owned by the decedent under section 676 by reason of a power to revoke that was exercisable solely by a nonadverse party or the decedent's spouse and not by the decedent.

An electing trust is a QRT for which a valid section 645 election has been made. Once the QRT makes the election, it is treated as an electing trust throughout the entire election period.

An executor is an executor, personal representative, or administrator that has obtained letters of appointment to administer the decedent's estate through formal or informal appointment procedures. For purposes of this election, an executor does not include a person that has actual or constructive possession of property of the decedent unless that person is appointed or qualified as an executor, administrator, or personal representative. If more than one jurisdiction has appointed an executor, then, for purposes of this election, only the person from the primary or domiciliary proceeding is the executor.

A related estate is the estate of the decedent who was treated as the owner of the QRT on the date of the decedent's death.

A filing trustee is the trustee of an electing trust who, when there is no executor, has been appointed by the trustees of each of the other electing trusts to file the Forms 1041 (or 1040-NR, if applicable) due for the combined electing trust(s) for each tax year during the election period and has agreed to accept that responsibility. If there is no executor and there is only one QRT making the section 645 election, the trustee of that electing trust is the filing trustee.

A filing trust is an electing trust whose trustee was appointed as the filing trustee by all electing trust(s) if there is no executor. If there is no executor and only one QRT is making the election, that QRT is the filing trust.

Election Period

The election period is the period of time during which an electing trust is treated and taxed as part of its related estate.

The election period begins on the date of the decedent's death and terminates on the earlier of:

- The day on which each electing trust and the related estate, if any, have distributed all of their assets or
- The day before the applicable date.

Applicable date. To determine the applicable date, you must first determine whether a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, is required to be filed as a result of the decedent's death.

IS a Form 706 required?	THEN the applicable date is...
Yes	The later of: • 2 years after the date of the decedent's death or • 6 months after the final determination of liability for estate tax.
No	2 years after the date of the decedent's death.

Final determination of liability. For purposes of this election only, the date of final determination of liability for the estate tax is the earliest of:

- 6 months after the IRS issues an estate tax closing letter (unless a claim for refund of estate tax is filed within 12 months after the letter is issued);
- The final disposition of a claim for refund that resolves the liability for the estate tax (unless suit is instituted within 6 months after a final disposition of the claim);
- The execution of a settlement agreement with the IRS that determines the liability for the estate tax;
- The issuance of a decision, judgment, decree, or other order by a court of competent jurisdiction resolving the liability for the estate tax (unless a notice of appeal or a petition for *certiorari* is filed within 90 days after the issuance of a decision, judgment, decree, or other order of a court); or
- The expiration of the period of limitations for the estate tax.

When To File

File the election by the due date (including extensions, if any) of the Form 1041 (or Form 1040-NR, if applicable) for the first tax year of the related estate (or the filing trust). This applies even if the combined related estate and electing trust(s) do not have sufficient income to be required to file Form 1041.

In general, the due date for the first income tax return is the 15th day of the 4th month after the close of the first tax year of the related estate. For exceptions, see Regulations section 1.6072-1(c). For the purpose of determining the tax year if there is no executor, treat the filing trust as an estate. If the estate is granted an extension of time to file its income tax return for its first tax year, the due date of the Form 8855 is the extended due date.

For instructions on when to file an amended election, see *Amended Election Needed When an Executor Is Appointed After a Valid Election Is Made* on page 4.

Where To File

IF you are located in . . .	THEN send the election to the . . .
Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin	Department of the Treasury Internal Revenue Service Center Cincinnati, OH 45999
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming	Department of the Treasury Internal Revenue Service Center Ogden, UT 84201
A foreign country or a U.S. possession	

Who Must Sign

If there is more than one executor for a related estate or more than one trustee for an electing trust, only one executor or trustee must sign Form 8855 on behalf of the entity, unless otherwise required by applicable local law or the governing document.

Employer Identification Numbers

The trustee of a QRT **must** obtain a new employer identification number (EIN) for the QRT upon the death of the decedent. Parts I and III require that a trustee enter the EIN obtained by the trustee following the death of the decedent. See Regulations section 301.6109-1.

Retention of Copy of Form 8855

The executor of the related estate, if any, and the trustee of each electing trust must retain a copy of the completed Form 8855 (and any amended Form 8855 required to be filed) and retain proof that the Form 8855 was timely filed.

Tax Treatment

During the election period, all electing trusts and the related estate, if any, file one combined income tax return. For purposes of that return, the electing trusts and the related estate are treated as one estate. For example, the electing trust(s) are treated as part of the estate for purposes of adopting a tax year, for determining whether estimated tax payments are required, the set-aside deduction under section 642(c)(2), the S corporation shareholder requirements of section 1361(b)(1), and the special allowance for rental real estate activities under section 469(i)(4).

Note, however, that each electing trust and the related estate are treated as a separate share for purposes of the separate share rules under section 663(c) when the combined entity computes distributable net income and applies the distribution rules.

Amended Election Needed When an Executor Is Appointed After a Valid Election Is Made

If Form 8855 was filed by the filing trustee because there was no executor and an executor is subsequently appointed, an amended election must be timely made. Otherwise, the election period terminates the day before the executor is appointed.

How to make an amended election. The executor and the trustees of each electing trust complete and file a new Form 8855 and write "AMENDED ELECTION" at the top of the form.

When to file an amended election. File an amended Form 8855 within 90 days of the appointment of the executor.

Correction of returns. See the Instructions for Form 1041 and Regulations section 1.645-1 for information on amending the previously filed returns.

Other Information

For additional information about the reporting rules for a QRT, an electing trust, or a former electing trust, or information about when it is necessary to obtain a new EIN, see the Instructions for Form 1041 and Regulations section 1.645-1.

Specific Instructions

Part I

The executor of the related estate completes the information requested in this part and attests to the making of this election and the conditions for a valid section 645 election by signing (under penalties of perjury) and dating the form in the space provided.

If there is no executor, the filing trustee completes the information and attests to the making of this election and the conditions for a valid section 645 election by signing (under penalties of perjury) and dating the form in the space provided.

The executor must obtain an EIN for the estate prior to filing this election. A filing trustee must enter the new EIN obtained for the trust after the decedent's death in the space for *Employer identification number* in Part I.

If you have a foreign address, enter the information in the following order: City, province or state, and country. Follow the country's practice for entering the postal code. Do not abbreviate the country name.

Part II

The executor (or filing trustee if there is no executor) completes this section.

Part III

The trustee for each QRT that is joining in the election completes the information requested in this part and attests to the making of this election and the conditions for a valid section 645 election by signing (under penalties of perjury) and dating the form in the space provided.

Caution: *A QRT must get a new EIN following the death of the decedent.*

In the space for *Employer identification number,* be sure to enter the new EIN obtained for the trust after the decedent's death.

Space is provided for two QRTs. If more than two QRTs are joining in the election than space provided, use additional Part IIIs. If additional pages of Part III are attached, the executor (or filing trustee) should indicate on the top of the first page of Part III how many additional pages are attached and the total number of QRTs joining in the election.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	3 hr., 21 min.
Learning about the law or the form	1 hr., 5 min.
Preparing, copying, assembling, and sending the form to the IRS	1 hr., 11 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. *Do not* send the tax form to this address. Instead, see *Where To File* on page 3.

PROPOSAL AND AGREEMENT FOR THE DISTRIBUTION AND TERMINATION OF THE VARIABLE(TRUST-CAP**)

WHEREAS, VARIABLE(Grantor**) created a revocable grantor trust known as the VARIABLE(Trust**), appointing himself/herself as Trustee. A true and accurate copy of which is attached hereto and marked as **Exhibit 1** (hereinafter referred to as the "Trust").

WHEREAS, VARIABLE(Article**) on Page One (1) of the VARIABLE(Trust**) provides:

> **[Put in specific language from the Trust relating to Successor Trustees.]**
>
> "(Example of Successor Trustee language from Trust) Section 1.3 Successor Trustees. Should Grantor fail, decline to qualify or cease to act as Trustee, the successor Trustee shall be **VARIABLE(Trustee**)**."

[Use this paragraph if estate was NOT probated and following paragraph IF estate was probated.]

WHEREAS, VARIABLE(Grantor**) died VARIABLE(D/O/D**), a resident of VARIABLE(Residence**) County, Nebraska. His/Her estate was not probated, however an inheritance tax determination was filed in the County Court of VARIABLE(County**) County, Nebraska as Case No. PR VARIABLE(Case #**). Upon the death of VARIABLE(GRANTOR**), the Trust became irrevocable.

OR

WHEREAS, VARIABLE(GRANTOR**) died VARIABLE(D/O/D**), a resident of of VARIABLE(Residence**) County, Nebraska. His/Her estate was probated in the County Court of of VARIABLE(County**) County, Nebraska as Case No. PR VARIABLE(Case #**) . Upon the death of VARIABLE(GRANTOR**), the Trust became irrevocable.

WHEREAS, on VARIABLE(D/O/D**), (the date of death for VARIABLE(Grantor**)), VARIABLE(Trustee**) became the Successor Trustee of the Trust by operation of VARIABLE(Article**), of the VARIABLE(Trust**).

WHEREAS, an Affidavit and Agreement Confirming Title in Successor Trustee was subscribed and sworn by VARIABLE(Trustee**) as the Successor Trustee. Such affidavit was filed against the appropriate real estate and is attached hereto as **Exhibit 2** and incorporated herein by reference.

WHEREAS, VARIABLE(Article**), on pages Two (2) through Five (5) of the VARIABLE(Trust**) provides:

"Copy and paste in language from Trust regarding final distribution

the Trust."

WHEREAS, the VARIABLE(Trust**) was a revocable grantor trust prior to the death of VARIABLE(Grantor**) and no accounting was maintained for the Trust during the life of VARIABLE(Grantor**). Upon the death of VARIABLE(Grantor**), the VARIABLE(Trust**) became irrevocable. Accounting from VARIABLE(D/O/D**) (date of death of VARIABLE(Grantor**)) to VARIABLE(Acctg Date**) OR to the date of this Proposal is attached hereto as **Exhibit 3**.

WHEREAS, the assets of the VARIABLE(Trust**) as of VARIABLE(D/O/D**) (date of death of VARIABLE(Grantor**)) were as follows:

VARIABLE(TRUST-CAP)**

G- 1	**Copy and paste (list) trust assets and date of death values that were reported on Inventory filed with the Court**	$0.00
G- 2	Example: Real estate legal North Half of the Southeast Quarter (N½ SE¼) of Section Sixteen (16), Township Six (6) North, Range Two (2), West of the 6th P.M.,XXXX County, Nebraska Parcel # XXXXX 2016 Assessed Value	$639,900.00

Land Type	# of Acres	$/Acre	Total
Irrigated	66.93	$8,000.00	$535,440.00
Dry	11.72	$5,500.00	$64,460.00
Road	1.01		
Site	0.34		
TOTAL	**80.00**		**$599,900.00**
Grain Bin			$10,000.00
Pivot			$30,000.00
TOTAL IMPROVEMENTS			**$40,000.00**
		Total Value	**$639,900.00**

G- 3	Example: Investment Account #XXX-XX; titled XXX, Trustee	$84,442.12
G- 3a.	Money Market Account (trading symbol); CUSIP # # of shares: 15,000.000 — Price/Share: $1.00 — Date of Death Value: $15,000.00	
G- 3b.	Name of Stock (trading symbol); CUSIP # # of shares: 500.000 — High: $23.40 — Low: $23.13 — Average: $23.27 — Date of Death Value: $11,632.50	
G- 3c.	Name of Mutual Fund (trading symbol); CUSIP # # of shares: 1,423.890 — Price/Share: $26.02 — Date of Death Value: $37,049.62	
G- 3d.	Name of municipal bonds DTD XX/XX/XXXX; Callable XX/XX/XXXX @ $XXX.00; CUSIP #; interest rate: X.X%; Maturity Date: # of units: 20,000.000 — Price/Share: $103.800 — Date of Death Value: $20,760.00	
	TOTAL INVESTMENT ACCOUNT $84,442.12	
G- 4	[Name of Bank] Certificate of Deposit #XXX including accrued interest	$10,132.00
G- 5	[Name of Bank] checking account #XXX titled XXXX, Trustee of the Trust	$16,852.97
	Total Schedule G – Transfer During Life - Trust	**$751,327.09**

[Use this paragraph if Trust owned Real Estate]

WHEREAS, the real estate associated with such real estate shown as Items G-1 and G-2 have been sold. Such Deeds were executed and recorded on May 18, 2016,in Deed Book 94, on Page 502 as Instrument No. 2016-01336, and on June 20, 2016, in Deed Book 94, on Page 503 as Instrument No. 2016-01337 of the Records of the Clerk of VARIABLE(RE County**) County, Nebraska. A true and accurate copy of the Trustee's Deeds are attached hereto and marked as **Exhibit 4**.

[Use one of the following 4 paragraphs if the Trust had an Investment account(s)]

WHEREAS, the aforementioned investments held by VARIABLE(Investment**) shown as Item G-3 were distributed in kind and split equally between VARIABLE(Beneficiaries**) and the investments have been transferred to the individual VARIABLE(Investment**) investment accounts of VARIABLE(Beneficiaries**). The VARIABLE(Investment**) Trust investment account was closed on or about June 13, 2016.

OR

WHEREAS, the VARIABLE(Investment**) Account #XXX-XX shown as Item G-3 is currently in the process of being liquidated.

OR

WHEREAS, the stock, mutual funds, bonds and other investments held by VARIABLE(Investment**) and shown as Item G-3 have been sold and the sale proceeds were deposited into the Trust checking account at VARIABLE(Bank**) in VARIABLE(City**) , Nebraska.

OR

WHEREAS, the VARIABLE(Investment**) Account #XXX-XX shown as Item G-3 was closed and all funds were transferred to a new VARIABLE(Investment**) Account #XXX-XX.

[Use the following paragraph if the Trust had a Certificate of Deposit(s)]

WHEREAS, the VARIABLE(CD Bank**) Certificates of Deposit #XXXX1, shown as Item G-4 was liquidated and the proceeds was deposited into the VARIABLE(Bank**) checking account #XXXX on June 3, 2016.

WHEREAS, the only substantial asset still in existence for the VARIABLE(Trust**) is the VARIABLE(Bank**) checking account #XXXX. The checking account had a balance of $XX,XXX.XX as of **June 15, 2016**.

WHEREAS, the balance of the Trust checking account #XXXX will be distributed in equal amounts to VARIABLE(Beneficiaries**) to bring the account balance down to zero.

WHEREAS, upon the liquidation of the Trust checking account #XXXX, there will no longer be any assets still in existence for the VARIABLE(Trust**).

WHEREAS, the Successor Trustee of the Trust will provide to the beneficiaries and qualified beneficiaries accounting for the Trust from the date of death of VARIABLE(D/O/D**)
to the date of this Proposal; a true and accurate copy of which is attached hereto and marked as **Exhibit 3**. Further, the Trustee hereby provides notice to all beneficiaries that he(she) may petition the VARIABLE(County**) County Court of VARIABLE(Court City**), Nebraska, to approve such accounting and release the trustee from any further liability in his capacity as trustee.

WHEREAS, the Successor Trustee of the Trust acknowledge that the final income tax return for the Trust will not be filed until all of the 1099's that are needed to prepare the return are received and that the final income tax return will be prepared by VARIABLE(CPA**).

WHEREAS, the Successor Trustee of the Trust acknowledges that the trust has received notification from the Nebraska Department of Health and Human Services that there is no Medicaid reimbursement due and that the Nebraska Department of Health and Human Services waived the statutory restriction pursuant to Neb. Rev. Stat. §30-3880(c), §30-3881(b), and §30-3882(d) and therefore the Trust can be officially terminated. A true and accurate copy of the Nebraska Department of Health and Human Services letter is attached hereto and marked as **Exhibit 5**.

NOW THEREFORE, the Trustee of the Trust proposes to terminate the Trust and distribute the Trust's assets as follows:

A. The above recitals are hereby incorporated as a part of this proposal.

B. Such past distributions shall be considered a part of this Proposal that encompasses both past and future distributions.

[Use the following paragraph if the Trust had an Investment account(s) that is being distributed in kind rather than being liquidated]

C. The Trustee of the Trust will **distribute and transfer** the stocks, mutual funds, and municipal bonds held in the Trust VARIABLE(Investment**) account #XXX-XX in kind.

D. The Trustee of the Trust will **distribute and transfer** the remaining **asset** (cash) in equal amounts to VARIABLE(Beneficiaries**) in accordance with the Trust **after** payment of all expenses.

E. The aforementioned transfers were subject to charges for attorneys fees and

costs due VARIABLE(ATTORNEY**) in the amount of $XX,XXX.00 **plus advances and expenses** that were incurred for legal services performed for or on behalf of the Trust and the Estate and also includes preparation of the first and final Trust income tax return.

F. The interested parties are deemed to have waived any further accounting and annual reports of the Trust while VARIABLE(Grantor**) was alive.

G. The interested parties are deemed to have approved all accounting and annual reports of the Trust after the death of VARIABLE(Grantor**).

H. The Trust receipts and disbursements reported in the attached **Exhibit 3** shall be deemed by the interested parties to the Trust that have received a copy of this Proposal as authorized by the Trust and deemed as an accepted, approved, true, correct, and complete accounting of the Trust from VARIABLE(D/O/D**) (date of death of VARIABLE(Grantor**)) to VARIABLE(Acctg Date**) OR to the date of this Proposal.

I. The interested parties acknowledge that the final income tax return for the Trust will not be filed until all of the 1099's that are needed to prepare the return are received.

J. The interested parties acknowledge that the trust has received notification from the Nebraska Department of Health and Human Services that there is no Medicaid reimbursement due and that the Nebraska Department of Health and Human Services has waived the statutory restriction pursuant to Neb. Rev. Stat. §30-3880(c), §30-3881(b), and §30-3882(d) and therefore, the Trust can be officially terminated. A true and accurate copy of DHHS's letter is attached hereto and marked as **Exhibit 5**.

K. Pursuant to Neb. Rev. Stat. § 30-3882, any beneficiary of the Trust has the right to object to this proposal for the distribution and termination of the Trust. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent.

L. The trustee of the Trust may seek Court approval of the termination of the Trust in the County Court of VARIABLE(County**) County, Nebraska.

M. This proposal is binding upon and inures to the benefit of the heirs, devisees, successors, assigns and representatives of the parties hereto and shall be subject to the laws of the State of Nebraska.

Dated: June _____, 2016

VARIABLE(Trustee**), as Trustee of the VARIABLE(Trust**), and as a Beneficiary thereunder

RELEASE AND DISCHARGE OF TRUSTEE
BY QUALIFIED BENEFICIARY
OF THE
VARIABLE(TRUST-CAP)**

The undersigned Qualified Beneficiary of the VARIABLE(Trust**), hereby acknowledges the following recitals:

1. VARIABLE(Grantor**) died VARIABLE(D/O/D**).

2. VARIABLE(Pronoun**) has received the "Proposal for the Distribution and Termination of the VARIABLE(Trust**) and all referenced exhibits.

3. The "Proposal for the Distribution and Termination of the VARIABLE(Trust**)" informed the undersigned beneficiaries of their right to object and to the fact that the right to object to the proposed distribution terminates if the beneficiaries do not notify the Trustee of an objection within thirty (30) days after the Proposal was mailed to them on or before June 23, 2016. Provided the Proposal must inform the beneficiary of the right to object and of the time allowed for objection.[§ 30-3832(a) NUTC].

4. VARIABLE(Pronoun**) has read and accepts the terms and provisions of the "Proposal for the Distribution and Termination of the VARIABLE(Trust**)" and further accepts and ratifies the recitals and exhibits contained therein.

5. The undersigned hereby waives further reports or prior reports, including accounting, for the time the Trust was created through the complete distribution of all Trust assets.

6. The reports and "Proposal for the Distribution and Termination of the VARIABLE(Trust**)" provided by the Trustee adequately describes the Trust property, liabilities, receipts, and disbursements, including the source and amount of the Trustee's compensation, also including a listing of the trust assets and their respective market values and/or tax basis. [see §30-3878(c) NUTC] All payments from the Trust reported in the accounting and recited by or proposed in the "Proposal for the Distribution and Termination of the VARIABLE(Trust**)", including but not limited to distributions to beneficiaries and payment of fees to the Trustee, were appropriate and within the scope of the Trustee's authority.

7. VARIABLE(Pronoun**) has been given adequate time and opportunity to review the "Proposal for the Distribution and Termination of the VARIABLE(Trust**)" and all exhibits and reports, and VARIABLE(Pronoun1**) has no objection to the "Proposal for the Distribution and Termination of the VARIABLE(Trust**)", its recitals, exhibits or reports and VARIABLE(Pronoun1**) accepts all of the documents and recitals as previously presented as true and correct.

Now therefore the undersigned agrees to the following:

a. The above **recitals** are true and correct and are incorporated herein by this reference.

b. The VARIABLE(Trust**) shall be distributed and terminated pursuant to the "**Proposal for the Distribution and Termination of the VARIABLE(Trust**)**" described above without delay upon receipt by the Trustee of a signed Release from the following parties: VARIABLE(Beneficiaries**).

c. The Trustee's **accounting and exhibits** given to the undersigned provided adequate information concerning the administration of the Trust (including but not limited to Trustee compensation), assets and liabilities of the Trust, and receipts and disbursements of the Trust. The undersigned requires no further reports of Trust information. The Trustee acted within the scope of VARIABLE(Pronoun2**) authority in all transactions shown.

d. VARIABLE(Pronoun**) will **save and hold harmless**, and hereby **releases and forever discharges** VARIABLE(Trustee**), Trustee of the VARIABLE(Trust**), VARIABLE(Pronoun2**) employees, agents and attorneys from all claims and rights whatsoever that the undersigned may have against VARIABLE(Pronoun3**) regarding the Trust and/or the administration of the Trust to date.

e. In consenting to this Release, the undersigned is **acting on behalf** of VARIABLE(Pronoun4**), VARIABLE(Pronoun5**) issue, and any unborn heirs who might acquire an interest in the VARIABLE(Trust**) in the event of their birth. These interests are all substantially identical to the interest of their respective parents and all of the persons named in this paragraph are bound by this Release pursuant to Neb. Rev. Stat. §30-3822(b) and §30-3825.

f. This Release is binding upon and inures to the **benefit of** the heirs, devisees, successors, assigns and representatives of the parties hereto and shall be interpreted under and subject to the laws of the State of **Nebraska** and VARIABLE(Pronoun1**) hereby submits VARIABLE(Pronoun4**) to the jurisdiction of the County and District Courts of VARIABLE(County**) County Nebraska in all matters concerning the subject Trust.

g. The undersigned hereby affirms and ratifies the continuation of the Trust for a reasonable time after the receipt by the Trustee of this Release signed by the above named parties to permit a filing of a tax return, payment of attorney fees and distribution of the Trust as described herein.

Dated: June _____, 2016.

_____

VARIABLE(Beneficiary1**)

State of VARIABLE(State**), County of VARIABLE(County1**) - ss.

The foregoing "Release and Discharge of Trustee By Qualified Beneficiary" was acknowledged before me on June _____, 2016, by VARIABLE(Beneficiary1**), as VARIABLE(Pronoun5**) voluntary act and deed.

_____
Notary Public

AICPA®

Original and Extended Tax Return Due Dates

These changes are generally effective for taxable years starting after Dec. 31, 2015 (2016 tax returns prepared during the 2017 tax filing season).

Return Type	Due Dates Under Prior Law	New Law: Original and Extended Due Dates (Dates changed by law in bold)		Comments
Partnership (calendar year) Form 1065	April 15 Sept. 15	**March 15** Sept. 15		Under the new law, for fiscal year partnerships, returns will be due on the 15th day of the 3rd month after the year-end. A six-month extension is allowed from that date.
S Corporation (calendar year) Form 1120S	March 15 Sept. 15	March 15 Sept. 15		No change
Trust and Estate Form 1041	April 15 Sept. 15	April 15 **Sept. 30**		
C Corporation (calendar year) Form 1120	March 15 Sept.15	Before Jan. 1, 2026 April 15 Sept. 15	After Dec. 31, 2025 April 15 **Oct. 15**	Starting with 2016 tax returns, all other C corps besides Dec. 31 and June 30 year-ends (including those with other fiscal year-ends) will be due on the 15th of the **4th month** after the year-end. A six-month extension is allowed from that date.
C Corporation Fiscal Year End (other than Dec. 31 or June 30)	15th day of 3rd month after year-end 15th day of 9th month after year-end	15th day of **4th month** after year-end 15th day of **10th month** after year-end		
C Corporation June 30 Fiscal Year Form 1120	Sept. 15 March 15	Before Jan. 1, 2026 Sept. 15 **April 15**	After Dec. 31, 2025 **Oct. 15** **April 15**	Special rule for C Corporations with fiscal years ending on June 30 — the new due date rules will go into effect for returns with taxable years beginning after Dec. 31, 2025 (2027 filing season).
Individual Form 1040	April 15 Oct. 15	April 15 Oct. 15		No change
Exempt Organizations Forms 990	May 15 Aug. 15 Nov. 15	May 15 **Nov. 15**		New extension will be a single, automatic 6-month extension, eliminating the need to process the current first 90-day extension.
Employee Benefit Plans Form 5500	July 31 Oct.15	July 31 Oct. 15		No change. (Federal law enacted in December 2015 repealed a previously enacted extension.)
Foreign Trusts with a U.S. Owner Form 3520-A	March 15 Sept. 15	March 15 Sept. 15		No change
FinCEN Report 114	June 30	**April 15** **Oct. 15**		Foreign Bank and Financial Accounts Report (FBAR)
Information Returns (i.e., W-2 and 1099s)	To IRS/SSA — Feb. 28 and March 31 if filed electronically	Forms W-2 and certain 1099-MISC due to IRS/SSA Jan. 31. All other Forms 1099 due Feb. 28; March 31 if filed electronically.		Form W-2 and most Forms 1099-MISC due to IRS/SSA Jan. 31 (same date they are due to the taxpayer).

Revised Jan. 22, 2016.

Extended Due Dates:

(These dates apply for taxable years beginning after Dec. 31, 2015 [2017 filing season — for 2016 tax returns]).

1. **Forms 1040, 1065 and 1120S** shall be a six-month period beginning on the due date for filing the return (without regard to any extensions).
2. **Form 1041** shall be a 5½-month period beginning on the due date for filing the return (without regard to any extensions).
3. **Form 1120** generally shall be a six-month period beginning on the due date for filing the return (without regard to any extensions). Note that Dec. 31 year-end C corporations before Jan. 1, 2026, shall have a five-month extension, and June 30 year-end C corporations before Jan 1, 2026, shall have a seven-month extension.
4. **Form 3520,** Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, for calendar year filers shall have due date of April 15, with maximum extension for a six-month period ending Oct. 15.
5. **Form 3520–A,** Annual Information Return of a Foreign Trust with a United States Owner, shall be the 15th day of the 3rd month after the close of the trust's taxable year, and the maximum extension shall be a six-month period beginning on such day.
6. **Forms 990 (series)** returns of organizations exempt from income tax shall be an automatic six-month period beginning on the due date for filing the return (without regard to any extensions).
7. **Form 4720** returns of excise taxes shall be an automatic six-month period beginning on the due date for filing the return (without regard to any extensions).
8. **Form 5227** shall be an automatic six-month period beginning on the due date for filing the return (without regard to any extensions).
9. **Form 6069** returns of excise taxes shall be an automatic six-month period beginning on the due date for filing the return (without regard to any extensions).
10. **Form 8870** shall be an automatic six-month period beginning on the due date for filing the return (without regard to any extensions).
11. **FinCEN Form 114,** relating to Report of Foreign Bank and Financial Accounts, shall be April 15 with a maximum extension for a six-month period ending Oct. 15, and with provision for an extension under rules similar to the rules of 26 C.F.R. 1.6081–5. For any taxpayer required to file such form for the first time, the Secretary of the Treasury may waive any penalty for failure to timely request or file an extension.

AICPA®

[NAME OF LAW FIRM]
BANK AUTHORIZATION

To: **[Name of Bank]**
[Address]
[City, State Zip Code]

RE: [Name of Decedent]
Estate of [Name of Decedent], Deceased.
[Name of Trust] dated [Date Trust created including amendments and date of amendments]

I hereby authorize and direct that [list name of people want to authorize to do the following], all of [Name of Law Firm] may:

1. Receive account information and printouts for all accounts, certificates of deposit and investments in person or by telephone.
2. Request paper statements of all accounts to be sent to [Name of Law Firm or who is to receive the bank statements] and/or request online access to such accounts.
3. Transfer funds between the subject accounts.
4. Make deposits in the subject accounts.
5. Open accounts and/or purchase certificates of deposit.
6. Liquidate and cash certificates of deposit.
7. Receive information on all loans, including but not limited to the loan ledger and financial statements provided to the bank.
8. Gain access to all safety deposit boxes.

Until further notice the Bank named above is hereby authorized and directed to permit the above named or referenced parties to access information and transact business as designated above.

Dated: June _____, 2016.

_____
[Name of Personal Representative/Trustee(s)], Personal Representative of the Estate of [Name of Decedent], Deceased

Trustee of the [Name of Trust] dated [Date Trust created including amendments and date of amendments]

June 24, 2016

[Name of Bank]
[Address]
[City, State, Zip Code]

RE: Estate of [Name of Decedent]
Date of Death:

Ladies and Gentlemen:

We represent [Name of Personal Representatives or Trustee(s) including name of Trust and date of Trust and Amendments and date of Amendments, if any (if no probate proceeding)]. [Name of Decedent] died on [Date of Death], a resident of [Residence of Decedent].

Enclosed is an original [Name of Law Firm] Authorization signed by [Name of Personal Representative or Trustee(s)] along with a copy of the [Name of Trust including date Trust created and Amendments, if any and date of Amendments] Affidavit and Agreement Confirming Title in Successor Trustee and a copy of the Death Certificate for your records.

Please advise whether the above-mentioned decedent had any checking accounts, savings accounts, bonds, or certificates of deposit with your institution.

If so, indicate the balance of the account or accounts as of date of death, [Date of Death], and the name or names in which the funds were held, (including all accounts which the decedent was in a joint account regardless of the order of the names). Also indicate all unpaid interest to date of death. Please provide copies of signature cards and Savings Bonds.

If the account was solely in the name of the decedent, not jointly held, all interest after date of death is income to the estate/trust and not the deceased individual. The employer identification number for the [Name of Estate or Trust including date Trust created and Amendments, if any and date of Amendments] is [EIN of Estate or Trust]. If the account was held in joint tenancy, all interest earned after the decedent's date of death should be reported under the surviving joint tenant's social security number.

Do not hesitate contacting me should you have any questions.

Yours very truly,

[Name of person sending letter], *Attorney/Staff*
[Name of Law Firm]
[email address]

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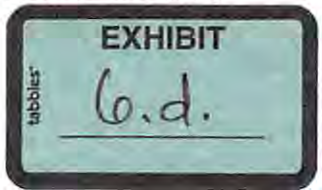

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[NAME OF LAW FIRM]
AUTHORIZATION

To: **[Name of Investment Company]**
[Address]
[City, State Zip Code]

RE: [Name of Decedent]
Estate of [Name of Decedent], Deceased.
[Name of Trust] dated [Date Trust created including amendments and date of amendments]

I hereby authorize and direct that [list name of people want to authorize to do the following], all of [Name of Law Firm] may:

1. Receive account information and printouts for all accounts and investments in person or by telephone.
2. Request paper statements of all accounts to be sent to [Name of Law Firm or who is to receive the bank statements] and/or request online access to such accounts.
3. Transfer funds between the subject accounts.
4. Make deposits in the subject accounts.

Until further notice [Name of Investment Company] is hereby authorized and directed to permit the above named or referenced parties to access information and transact business as designated above.

Dated: June _____, 2016.

_____
[Name of Personal Representative/Trustee(s)], Personal Representative of the Estate of [Name of Decedent], Deceased

Trustee of the [Name of Trust] dated [Date Trust created including amendments and date of amendments]

June 24, 2016

[Name of Investment Company]
[Name of Investment Representative (if known)]
[Address]
[City, State, Zip Code]

RE: Estate of [Name of Decedent]
Date of Death:

Ladies and Gentlemen:

We represent [Name of Personal Representatives or Trustee(s) including name of Trust and date of Trust and Amendments and date of Amendments, if any (if no probate proceeding)]. [Name of Decedent] died on [Date of Death], a resident of [Residence of Decedent].

Enclosed is an original [Name of Law Firm] Authorization signed by [Name of Personal Representative or Trustee(s)] along with a copy of the [Name of Trust including date Trust created and Amendments, if any and date of Amendments] Affidavit and Agreement Confirming Title in Successor Trustee and a copy of the Death Certificate for your records.

Please advise whether the above-mentioned decedent had any accounts with your institution.

If so, indicate the balance of the account or accounts as of date of death, [Date of Death], and the name or names in which the funds were held, (including all accounts which the decedent was in a joint account regardless of the order of the names). Also indicate all unpaid interest to date of death.

If the account was solely in the name of the decedent, not jointly held, all interest or dividends after date of death is income to the estate/trust and not the deceased individual. The employer identification number for the [Name of Estate or Trust including date Trust created and Amendments, if any and date of Amendments] is [EIN of Estate or Trust]. If the account was held in joint tenancy, all interest earned after the decedent's date of death should be reported under the surviving joint tenant's social security number.

Do not hesitate contacting me should you have any questions.

Yours very truly,

[Name of person sending letter], *Attorney/Staff*
[Name of Law Firm]
[email address]

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