

# EXECUTIVE LEGAL & ACCOUNTING GUIDE

North Bay  
**Business Journal**  
NORTH SAN FRANCISCO BAY AREA: SONOMA, NAPA AND MARIN COUNTIES

ADVERTISING SUPPLEMENT TO THE JULY 27, 2009 NORTH BAY BUSINESS JOURNAL

**AG & C** ALVAREZ-GLASMAN & COLVIN  
ATTORNEYS AT LAW

**B|C**  
BEYERS  
COSTIN

**E** Eckhoff Accountancy Corporation  
Empowered Professionals Meeting Client Challenges

MOSS-ADAMS LLP

**P** PISENTI & BRINKER LLP  
Certified Public Accountants and Advisors  
An Independently Owned Member of the RSM McGladrey Network

**f** FARELLA BRAUN + MARTEL LLP

O'Brien  
Watters  
& Davis LLP

**SMT**  
SPAULDING MCCULLOUGH & TANSIL LLP  
ATTORNEYS AT LAW

**DP&F**  
Dickenson, Peatman & Fogarty

Frank, Rimerman + Co. LLP

G&J Seiberlich & Co LLP  
CERTIFIED PUBLIC ACCOUNTANTS



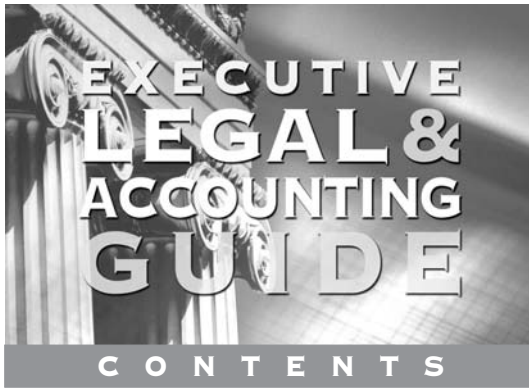
**SMT**  
SPAULDING MCCULLOUGH & TANSIL LLP  
ATTORNEYS AT LAW

We provide effective and efficient legal services for businesses and individuals in Northern California and beyond, helping our clients reach their personal and professional goals.

- Business
- Environmental
- Insurance
- Intellectual Property & Technology
- Labor & Employment
- Litigation
- Real Estate
- Trusts & Estates
- Alternative Dispute Resolution

---

90 South E Street, Suite 200 Santa Rosa, California 95404  
11 Western Avenue Petaluma, California 94952  
*phone* 707 524 1900 *fax* 707 524 1906  
[www.smlaw.com](http://www.smlaw.com)



The Business Journal incorporating the  
 Santa Rosa Business Journal and The Good Life

ADVERTISING SUPPLEMENT  
 July 27, 2009

*Editor in Chief,*  
*Associate Publisher:*  
 Brad Bollinger

*Director of Advertising,*  
*Associate Publisher:*  
 Sue Wildermuth-Adams

*Reporters:*  
 D. Ashley Furness  
 Jenna V. Loceff  
 Jeff Quackenbush  
 Lorelee Stevens

*Event Development Manager:*  
 Noelani Price

*Special Correspondent:*  
 Gary Quackenbush

*Production Manager:*  
 Susan Schreiner

*Production Assistant & Online Administrator:*  
 Joann DiNova

*Account Executives:*  
 Natasha Berger  
 Joyce Jason  
 Kathryn Santos

*Business Manager:*  
 Stacey Miller

*Event Coordinator:*  
 Linda Perkins



North Bay Business Journal  
 427 Mendocino Ave., Santa Rosa, CA 95401  
 707-521-5270  
 E-mail: [news@busjrn.com](mailto:news@busjrn.com)  
[www.NorthBayBusinessJournal.com](http://www.NorthBayBusinessJournal.com)

For advertising information, call:  
 707-521-5270



**DICKENSON, PEATMAN & FOGARTY**  
 The death tax: going...going...*not* gone! ..... 4

**BEYERS|COSTIN**  
 Protecting agricultural lands through the Williamson Act ..... 6

**MOSS ADAMS LLP**  
 New game. New rules. Same You.  
*Strategic planning in the new economy*..... 8

**FARELLA BRAUN + MARTEL LLP**  
 Alcoholic beverage control advisory gives starting place  
 for navigating regulatory maze ..... 10

**ALVAREZ-GLASMAN & COLVIN**  
 Building the solar city:  
*What developers, builders and real estate professionals  
 should know about the law of solar rights and shade* ..... 12

**PISENTI & BRINKER LLP**  
 Is your small business taking advantage of current tax incentives? ..... 14

**SPAULDING MCCULLOUGH & TANSIL LLP**  
 Water and energy, satus and resolutions ..... 16

**ECKHOFF ACCOUNTANCY CORPORATION**  
 Fraud and the private company  
*A report you cannot afford to ignore* ..... 18

**MOSS ADAMS WEALTH ADVISORS**  
 Personal financial planning helping you see the big picture ..... 20

**BEYERS|COSTIN**  
 Choosing a trademark ..... 22

**O'BRIEN WATTERS & DAVIS LLP**  
 So you think your estate planning is completed... ..... 24

**FRANK, RIMERMAN + Co. LLP**  
 Unlocking enterprise value ..... 26

**G&J SEIBERLICH & Co. LLP**  
 Limit your risk from IRS winery audits  
 over 'LIFO' inventory pool issues ..... 28

The material in this supplement is intended to provide general information. It should not be construed as legal or accounting advice, opinion or a viable substitute for either. Please contact the firms listed for more information regarding your specific questions or situation.

# The death tax: going...going...*not* gone!

If you are thinking about dying in 2010 to save taxes, you may want to reconsider. Or at least keep an eye on Washington while you make funeral arrangements. That's because Congress is on the verge of saving the estate tax or "death tax" from extinction, thanks to Senate Bill 722 (Baucus, D – Mont).

## HOW WE GOT HERE

Back in 2001, Republican efforts to repeal the death tax permanently were thwarted. Instead, lawmakers passed a schizophrenic statute that provided some tax relief but left estate planners and clients mired in confusion and uncertainty.

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("the 2001 Act"), the maximum estate tax rate was reduced from 60% to 45%, the exemption was increased to \$3.5 million (phased in over eight years), and the estate tax was repealed in 2010 for one year only. Unless Congress takes action, the 2001 Act will sunset on December 31, 2010, restoring the \$1 million exemption and 60% tax rate for 2011 and beyond.

Like a bar patron at closing time, estate tax repeal under the 2001 Act – even if it had been permanent – was not as attractive as it first appeared and came with plenty of baggage. For example, to partially offset lost revenue, the capital gains tax was surreptitiously increased by capping the basis step-up at death. In effect, Congress bestowed a gift with one hand while it picked your pocket with the other. Additionally, the 2001 Act's

phase-out of the state death tax credit encouraged many states (not California, due to a constitutional prohibition) to enact their own estate tax systems, creating a minefield for individuals with multi-state assets. Finally, de-unification of the estate tax and gift tax exemptions (the latter being frozen at \$1 million) further complicated planning.

## 2009 PROPOSED

### LEGISLATION

We finally got a preview of the Congressional fix we have been anxiously awaiting since 2001 with the introduction in March of Senate Bill 722 (Baucus, D-Mont). Under Baucus, which essentially mirrors President Obama's campaign position, the one-year repeal of the estate tax scheduled for 2010 is gone. Instead, the current \$3.5 million exemption will continue into 2010 and beyond with annual cost-of-living adjustments. The 45% estate tax rate will be retained, and the estate and gift tax exemptions will be reunified at \$3.5 million.

### "PORTABILITY"

Senate Bill 722 also introduces a radical new concept into the estate tax law: "portability" of exemption between spouses. To demonstrate how portability compares to the current "use it or lose it" system, consider the following hypothetical:

Homer and Marge have a community estate of \$5 million and no estate plan. Homer dies in January 2009 when the exemption is \$3.5 million. Marge inherits Homer's \$2.5 million estate by

intestate succession. Marge, now worth \$5 million, dies in December 2009. Marge's \$5 million estate exceeds her \$3.5 exemption by \$1.5 million, generating an estate tax of \$675,000.

One might reasonably ask why there is an estate tax of \$675,000 when a married couple is supposed to have a combined \$7 million of exemption.

What happened to Homer's \$3.5 million exemption? The answer is that the exemption is a "use it or lose it" proposition. Because Homer's estate went to Marge outright, his exemption vanished.

This unfortunate result can easily be avoided through proper planning. If Homer and Marge had consulted with an estate planning attorney, they would have been advised to create an "A-B trust plan." Under this arrangement, Homer's estate would fund an irrevocable trust ("bypass trust") for Marge's benefit during her lifetime, with the remainder, if any, passing to the kids at Marge's death. Because the assets in Homer's bypass trust would be excluded from Marge's taxable estate, her \$3.5 million exemption would cover her \$2.5 million estate. The kids would receive the entire \$5 million estate free of tax, a \$675,000 savings.

Under portability, Homer and Marge could achieve the same tax savings without paying a lawyer to draft an A-B trust plan. At Homer's death, his \$3.5 exemption would pass to Marge along with his assets. As in our original hypothetical, Marge would still have a \$5 million estate, but now she would

“*For better or worse, it looks like the federal estate tax is going to be around for the foreseeable future.*”

have \$7 million of exemption (hers plus Homer's), easily wiping out the \$675,000 estate tax bill.

So if Congress enacts portability, no one will need a lawyer to draft an A-B trust plan anymore, right? Wrong! What if Homer has children from a prior marriage? Thanks to portability, Homer no longer needs a bypass trust to save taxes, but he still needs one to ensure that his estate will go to his children rather than to Marge's next husband or her children from a prior marriage. Marge still benefits from portability, however, because Homer's unused exemption of \$1 million (remember that he had \$3.5 million of exemption but only a \$2.5 million estate) would not be lost, as it would be under current law, but would augment Marge's exemption, giving her a total of \$4.5 million for later use.

In theory, portability would simplify and reduce the cost of estate planning for married couples, at least for those in first marriages. But closer examination reveals that these benefits may not be real. The reason is that the only way to preserve the unused estate tax exemption of a deceased spouse is to file a timely estate tax return.

Currently, an estate tax return is not required where the deceased spouse's estate is less than the exemption amount. However, under portability, one would always file an estate tax return regardless of the size of the estate to preserve a deceased spouse's unused exemption "just in case." After all, even if the surviving spouse does not have a

taxable estate today, one cannot predict with reasonable certainty the value of the estate at death. What if the surviving spouse wins the lottery or remarries and inherits from a wealthy second spouse?

If portability in the form proposed becomes law, the IRS is going to be swamped with thousands of "just in case" estate tax returns filed for the sole purpose of preserving estate tax exemption that might not even be needed. Meanwhile, the legal fees theoretically saved on estate planning services at the front end will instead be spent on estate administration services at the back end. So much for simplification and cost savings...

#### WHAT SHOULD YOU DO?

The odds are good that federal estate tax legislation in some form will be passed into law this year. When that happens, it will be imperative to review your estate plan with your attorney to determine whether your documents should be re-written. This is especially true if your estate plan is already out of date.

For better or worse, it looks like the federal estate tax is going to be around for the foreseeable future. That might not seem like good news for you, but for attorneys who make a living drafting trusts and administering estates, it is very good news indeed. ■



David A. Diamond, a shareholder in the law firm of Dickenson, Peatman & Fogarty, is a California State Bar Certified Specialist in Estate Planning, Trust & Probate Law with 25 years of experience.

DP&F

DICKENSON, PEATMAN & FOGARTY

809 Coombs Street, Napa • 707-252-7122

50 Old Courthouse Square, Santa Rosa • 707-542-7000

[www.dpf-law.com](http://www.dpf-law.com)

# Protecting agricultural lands through the Williamson Act

The California Land Conservation Act, which is usually referred to as the Williamson Act (after its author, Assemblyman John Williamson), was enacted in 1965 with the purpose of preserving agricultural and open space land from premature and unnecessary urban development. The program has been popular, and property owners have enrolled about 16 million acres of the 30 million acres of agricultural property in the state in the Williamson Act Program. According to the California Department of Conservation (“DOC”), as of 2007, property owners in Marin, Mendocino, Napa, and Sonoma counties have enrolled approximately 85,000 acres, 500,000 acres, 70,000 acres, and 270,000 acres, respectively. The Program, however, creates real constraints on a property owner’s use of land, such that participation in the Program requires a careful evaluation of development alternatives.

Why is it so popular? According to the DOC, average real property-tax savings that accompany participation in the Williamson Act Program amount to between 20% and 75%. The DOC states that one in three farmers or ranchers it surveyed claim that without the property-tax savings of the Williamson Act Program, they would no longer own their property.

## OVERVIEW OF THE WILLIAMSON ACT PROVISIONS

Property taxes are reduced because the property-tax assessments of land restricted by Williamson Act contracts are based on the income generated by the agricultural use of the land, rather than the fair market value of the property. Local govern-

ment receives a partial subvention (a reimbursement, really) of the foregone property-tax revenues from the state to encourage local government to participate.

The Williamson Act’s tax-reduction mechanism is unique. Provided property is situated within a Williamson Act preserve designated by resolution of a local government, the property owners within a preserve can voluntarily enroll in the Williamson Act Program by entering into a contract with the local government. Pursuant to the contract, which runs with the land and is binding on successor owners, the property owner agrees to restrict land to agricultural or related open space uses and “compatible” uses. Depending on the jurisdiction, compatible uses include a residence, some guest houses, accessory structures necessary to the agricultural operation, and other uses consistent with the agricultural nature of the property.

Each local government creates its own rules as to the properties that can qualify for Williamson Act contracts. For example, Sonoma County allows enrollment of properties of 10 acres or more if the land is considered “prime” agricultural land – meaning capable of carrying at least one animal per acre, or land planted to crops generating \$200 per acre in gross revenue (typically grapes or orchards). Meanwhile, land that produces between \$2.50 and \$199.99 per acre in gross revenue (typically grazing land) must be at least 40 acres in size to qualify for a Williamson Act contract.

The contracts have a minimum term of 10 years and automatically renew each year, so that no less than 9 years always

remain on the contract term until the contract is terminated or a party provides notice of non-renewal. A “super” Williamson Act contract alternative also exists pursuant to which the property owner may restrict land uses for 20 years for an additional 35% property-tax savings.

Typically contracts are terminated by notice of non-renewal. When this notice is provided – either by the local government or the property owner – the contract lapses over the remaining 9 years and is void at the end of the term. During the phase-out period, property taxes gradually increase until they reach non-restricted levels at termination.

The ability to unilaterally cancel the contract is tightly restricted and expensive. The landowner must pay a fee of 12.5% of the full market value of the property. In addition, the local government must agree to the termination but must first make findings that the cancellation will not reduce agricultural or open space lands, and that the cancellation is in the public interest. In light of these rules, a property owner almost certainly cannot cancel the contract in order to subdivide the property for even partial non-agricultural use, as to do so would reduce agricultural lands.

## ENFORCEMENT AND PENALTIES

What happens when a property owner breaches the obligation to limit use to agricultural and compatible uses? Prior to the passage of Assembly Bill 1492, which took effect January 1, 2004, local government could bring an action to enforce the contract or cancel the contract after making the required statutory findings and requiring payment by the property owner

of the cancellation fee. As these choices were not particularly attractive to local governments, they tended to overlook some breaches. AB 1492 sought to remedy this situation by providing an additional remedy for a "material breach of contract," which arises from the construction of buildings(s) exceeding 2,500 square feet that were not permissible under the contract or applicable law. When a material breach is found, the owner may eliminate the condition that resulted in the breach (i.e., remove the offending structures) or be assessed a penalty for the portion of the contract made incompatible by the breach. The penalty is potentially quite steep: a maximum of 25% of the unrestricted fair market value of the land and 25% of the value of any incompatible improvements.

Owners must be very cautious about erecting improvements even with local government approval as the DOC takes the position that a property owner is subject to these enforcement penalties even if the structures were approved by local government. Additional amendments to the Williamson Act effective January 1 of this year make it clear that local government cannot utilize the cancellation mechanism as a method of resolving material breaches of contracts.

Interestingly, the DOC tests the material breach of contract on a contract-basis, not a parcel-basis. Hence, if a property owner has four parcels under a single contract, even though each parcel could separately qualify for its own Williamson Act contract (perhaps because each parcel is 10 acres or more and is planted to vines), that owner would be restricted to one residence, one guest house, and other improvements consistent with the vineyard use. By contrast, if that owner had in the first place obtained four separate contracts, one on each of the parcels, then that owner would be able to build residences (and other compatible improvements) *on each* of the four parcels. This distinction between contract-basis versus parcel-basis is particularly significant when a property owner with a long-standing Williamson

Act contract seeks recognition of multiple historical parcels through administrative certificates of compliance (i.e., formal agency certification of separate, legal parcels).

#### **SUBDIVISIONS AND OTHER LAND USE APPLICATIONS**

The subdivision of Williamson Act contracted property is challenging. Under the California Subdivision Map Act, the county must deny approval of a tentative map if the resulting parcels would be too small to sustain agricultural use or the subdivision will result in residential development not incidental to commercial agricultural use. Land is conclusively presumed to be too small to sustain agricultural use if it is less than 10 acres in the case of prime agricultural land, and less than 40 acres for other agricultural land.

Lot line adjustments of land subject to the Williamson Act are performed by rescinding the existing contract and simultaneously replacing it with a new contract or contracts. There cannot be a

decrease in the total amount of the acreage restricted and, among other technical requirements, the lot line adjustment cannot result in a greater number of developable parcels than existed before. So, under the scenario above, the four-parcel property owner could not propose a lot line adjustment to cause the rescission and replacement of the single existing contract with four new contracts, if the result would be to increase the number of developable parcels. These rules on lot line adjustments have been extended through January 1, 2010.

#### **CONCLUSION**

In short, the Williamson Act presents a tremendous opportunity for the rural landowner to realize significant real property-tax savings. However, before entering into the 10-year commitment that a Williamson Act contract entails, the property owner should carefully evaluate future development options and perform adequate due diligence as to any historical parcels that make up the owner's property. ■



A shareholder at Beyers|Costin, Thomas Davenport specializes in business organization and finance, as well as real estate acquisitions, leasing, sales and development, with an emphasis on wineries and vineyards.



#### **BEYERS | COSTIN**

A Professional Corporation

707-547-2000 • [www.BeyersCostin.com](http://www.BeyersCostin.com)

# New game. New rules. Same you.

## *Strategic planning in the new economy*

“We can’t put our pieces on the table until we know what game we’re playing.”

This was the response of a character in a television series when faced with a very interesting and unexpected “move” by a competitor. As he struggled to determine the next steps, he realized that he didn’t know exactly where he was or whether the goals he thought he knew were still valid. With such paralyzing questions, it is impossible to develop a strategy.

This is where business owners are today. Having learned much in the past year, first and foremost is this: The economic downturn is not a blip. The current environment is here to stay for the foreseeable future – at least for long enough that business owners can’t just wait for it to go away. Owners have learned a lot about their companies – what makes them tick, which employees are valuable, what activities are profitable, and how to bring cash through the door faster.

Perhaps now business owners are also starting to look outside of their own organization and its daily urgencies to see what future opportunities exist. They are evaluating the new market landscape to see, now that the dust has settled a bit, where does their company stand relative to their competitors and relative to their customers?

What business owners are discovering is that the game has changed – and not only for their own organization. Their competitors have gone through changes. More interestingly, so have their customers. We can

confidently say that, relative to 12 months ago, very few companies are selling the same volume of products to the same customers for the same price.

As a business owner, then, how can you evaluate this changed landscape so that you know not only what game you are playing but how to strategically put your pieces on the table?

The answer is simple – analyze the new market with a focus on the customer. The old “SWOT” analyses (Strengths, Weaknesses, Opportunities, and Threats) that we have all performed are, frankly, a little too narcissistic. By analyzing the market the “old way,” one tends to focus on internal capabilities and those of their competitors, losing sight of the customer and the real market opportunity that may or may not exist.

Figure A is a good visual analysis of how

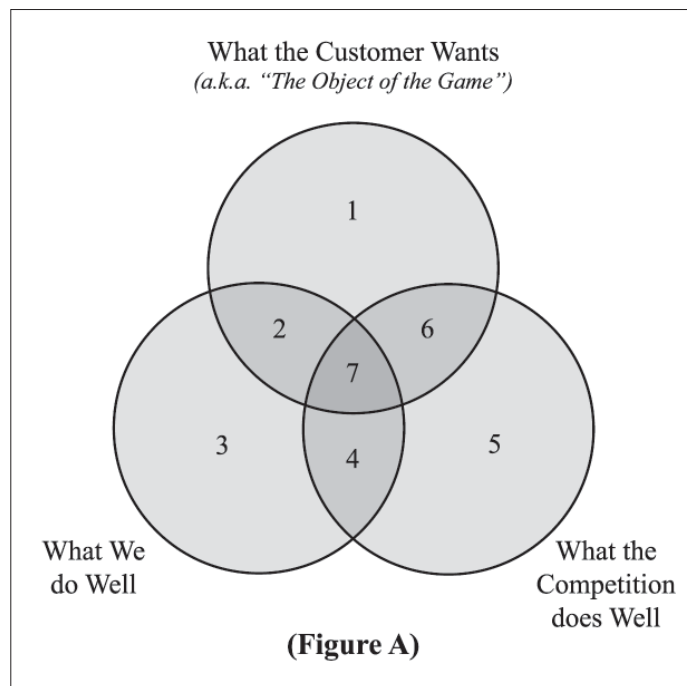
all the pieces of a market analysis truly co-exist. This picture defines “the object of the game,” if you will, as the top circle of the diagram, titled “What the customer wants.” This is the battleground. This is why companies are in business. Their success is defined by the efficiency and effectiveness with which they move into that area.

Important to note is that, within the last year, this circle – what the customer wants and the priorities in which they want it – has moved; it requires a fresh look.

The next piece focuses on “What we do well” (the lower left circle of Figure A). Ideally, several different groups are included in this analysis. Business owners should ask their management team, as well as other internal groups, “What do we do well?” Additionally, and most importantly, they should ask customers: “What is it that you, Mr. or Mrs. Customer, value about

what we do or how we do it?” It will become clear in this analysis, as demonstrated in Figure A, where businesses are aligned with their customers and where they are not. It is extremely important to identify and internalize these data as quickly as possible.

Alternatively, companies may also discover things about their customers’ wants that were unknown. For example, if Mrs. Customer is asked what she appreciates about a company, she might not say much about innovation, pricing, or the new technological differentiator that has been marketed so aggressively. Rather, she might



comment on an attribute never considered as a core element to a company's relationship with its customers.

With these first two pieces defined, a company now knows what game it is playing and how well it is playing. Specifically, Section 2 represents its success thus far – the overlap of what the customer wants and what the company does well. Section 1 continues to represent the opportunity to do better, or how a company can move the pieces on the board for the best result.

The next step is to look at the competition and define what they do well (lower right circle of Figure A). This should be done objectively and with the input of several sources. Plainly seen, as with a company's own internal analysis, are areas in which the competition is succeeding with customers (Section 6) and areas in which they have missed the mark (Section 5).

A company now has a market landscape that it can analyze. Business owners now know what game they're playing, how the rules have changed, and where their competitor's pieces lay. Business owners now have defined actionable opportunities and risks to their future. Now they are ready to make strategic decisions.

However, with strategic decisions comes risk. The first risk – Section 3 – is a common mistake in sales and marketing. This is the list of things a company does well, but that don't align with customer wants. The real risk is if these items represent competitive differentiators (capabilities that competitors do not have); it is so easy for companies to focus on differentiators and tout them as "things that only we can do." The customer doesn't care about a differentiator if it isn't what they want – it is not the object of the game.

The second risk, now plainly seen, is on the other side of that same coin – Section 5. These are the things competitors tout as *their* differentiators. The risk is that companies try to close this competitive gap by adding competitor's product capabilities or services to their own repertoire. But,

again, this does not increase a company's effectiveness with customers. By closing this "competitive gap," a company spends time and money on something that, ultimately, has no consequence.

The real strategic opportunity is Section 1. This is what the customer truly cares about, but what is not being effectively provided by anyone. This – what the customers want but are not getting – is the board on which the game should be played. How companies choose to play in this regard is what separates successes from statistics.

The new, current economic reality is just that – not a passing phase but a new set of rules and, ultimately, a new object. Yours is not the only business that has been affected, and it's time not only to look inside your business but to look outside of it for opportunities to improve as well. Find out how your customers have been impacted and what they have done as a result. Alignment with your customers should shape how you strategically place and move your pieces from this point forward, and how you set the target toward which you now should run. ■

Steve Jannicelli is a senior business consultant for Moss Adams LLP in Northern California, which specializes in ownership transition, management succession, strategic planning, growth and capital strategy, and financial advisory services for privately-owned and family-controlled businesses.

Jannicelli has over 13 years of experience with organizations, including Deloitte & Touche, The Gap, PeopleSoft, and Macromedia. Jannicelli's diverse professional background has allowed him to gain hands-on expertise in such areas as budgeting, forecasting, P&L reporting and analysis, real estate proformas, portfolio management, brand and product management and marketing, industry and competitive analysis, compensation analysis, M&A impact analysis, and sales operations management.

Since joining Moss Adams in 2006, Jannicelli has focused on CFO services, including cash-flow forecast modeling, financial management and planning, operational assessments and profitability improvements, strategic planning, industry benchmark analyses, as well as analyses such as life insurance scenarios and inventory sensitivity analyses.

Jannicelli received a Bachelor's of Science degree in Economics and Business Administration with concentration in Accounting from St. Mary's College and a Master's degree in Business Administration with concentration in Finance and Marketing from Santa Clara University.



## MOSS ADAMS LLP

CERTIFIED PUBLIC ACCOUNTANTS – BUSINESS CONSULTANTS

3700 Old Redwood Highway, Suite 200

Santa Rosa, CA 95403

707-527-0800 • [www.mossadams.com](http://www.mossadams.com)

# Alcoholic beverage control advisory gives starting place for navigating regulatory maze

In recent weeks, there has been a maelstrom in the business sector that provides logistics, information management and other services to wineries. A third-party service provider showed signs of significant financial distress resulting in disruptions in order fulfillment and concerns over inventory security. An online retail business announced it was entering into the winery direct-to-consumer fulfillment business. An innovative software company unveiled a software solution to ease winery compliance selling wine through the three-tier systems. These developments present wineries with an unparalleled opportunity to reevaluate their sales through direct-to-consumer and three-tier channels, optimize logistics and perhaps reduce costs.

Yet, innovation in beverage alcohol trade often meets resistance from regulators charged with enforcing laws that hearken back to Prohibition. When Prohibition was repealed in 1933, unique power to regulate alcohol was conveyed to the states; the federal government retains concurrent jurisdiction over permitting, labeling and trade regulation. Lawmakers created new rules to govern the entire system of production, marketing, sales and distribution. The policy goals behind the new rules were orderly market conditions, limits or prohibitions on vertical integration, avoiding dominance by suppliers over retailers through bribery or predatory

marketing practices, product integrity, temperance and taxation. The resulting regulatory maze hinders how a winery may outsource some or all of its functions.

Both California and the federal government recently issued advisories in response to the explosion of service providers that enable wineries to outsource one or more components of their direct-to-consumer, direct-to-trade and three-tier sales. California sternly warned wineries to beware of companies that might engage in activities that require a license or, if licensed, to be wary of the minefield of trade regulation. The federal government issued guidance on how to utilize bailment warehouses without triggering bans on consignment sales.

California's advisory was issued by the Department of Alcoholic Beverage Control (ABC). ABC spelled out when certain businesses or activities require a license, run afoul of tied house laws or potentially violate the ban on consignment sales. When a winery is considering options to outsource marketing online, compliance and/or logistics, the winery must determine if the provider is properly licensed or if no license is required.

ABC's advisory described when third-party providers require a license. In California a license is required when a business sells (transfers title), solicits a sale or delivers alcohol pursuant to an order. If interpreted according to its

plain language, the definition of sale would require the following types of businesses to obtain licenses to sell wine: delivery companies, credit card companies that offer wine to certain cardholders, banks with loyalty programs, florists that offer wine through retail partners, airlines and many more.

To avoid opening Pandora's Box, ABC offered some exceptions. For example, the advisory noted that a delivery company under the express direction of a winery could deliver wine to a purchaser without obtaining a retail license to sell alcohol. ABC did not proffer the same exception for a website that solicits sales from consumers. That said, if a website merely publishes an offer made by a winery this should not be construed as a solicitation by the web provider. If ABC were to hold otherwise, every media publication accepting winery advertisements would require a retail license. When evaluating a service provider that is not licensed, the winery must ensure that it retains control of business decisions, inventory and core operations such as pricing, making offers, transferring title and directing delivery.

Beyond the cautions on entering into arrangements with an unlicensed provider of services, ABC reminds wineries that if they outsource functions to an entity that holds a license, the arrangement could violate "tied house" laws. Unlawful inducements under federal and state "tied house" prohibitions include

---

*“Innovation in beverage alcohol trade often meets resistance from regulators charged with enforcing laws that hearken back to Prohibition.”*

furnishing things of value to a licensee and paying a retailer for display space or advertising. Wineries cannot pay online storefronts licensed to sell as retailers for loading content, posting any material or any advertising whatsoever. A winery cannot pay for infrastructure that a retailer needs to conduct its own business. The retailer only can receive money from its markup and sale of wine products. In addition, beware of the word “FREE:” ABC reminded industry that no free goods or premiums may be provided in connection with the marketing and sale of alcoholic beverages. This includes free shipping. Shipping may be included in the price, but it cannot be offered as free shipping.

Finally, ABC reminded industry that some of the outsourcing arrangements result in consignment sales. Consignment sales include transfers of title with the privilege of return by the transferee. Attempts to improve inventory management through just-in-time logistics can be problematic for innovative service companies if the inventory is not handled properly. A licensee must sell alcoholic beverages to which it has title. Inventory cannot be returned if unsold. Any just-in-time delivery solutions should be carefully examined to ensure that the transaction is not a disguised consignment sale.

In early June, the Alcohol and Tobacco Tax and Trade Bureau issued an advisory that in essence establishes a safe harbor

under federal law for handling inventory stored at a provider’s facility without violating federal consignment sales provisions. In order to store inventory at a provider’s warehouse, the winery must maintain control over the inventory and satisfy the following conditions:

- The winery must retain title to the alcohol until it is transferred to the wholesaler or other purchaser;
- The alcohol must be segregated from alcohol owned by others;
- The purchaser must place an order in writing or by telephone with the winery’s authorized representative (who need not be on the warehouse premises but must be considered to have custody of the product) and such order must have been accepted by the winery;
- The alcohol must be readily accessible to the winery without consent of the storage facility, and the winery must be free to sell the alcohol to other purchasers;
- The winery and storage facility must maintain adequate commercial

records that show the transfers of the products to and from the warehouse to the purchaser’s inventory of products; and

- The transfer from the warehouse to the purchaser’s inventory of products must be a final bona fide sale.

Failure to satisfy these conditions could result in a violation of the consignment sales provisions of the Federal Alcohol Administration Act.

The web of federal and California law is full of traps for the unwary. ABC’s recent advisory identifies many of the traps without offering solutions. Businesses must examine the totality of the circumstances and ensure that the essential elements of each transaction and control of these elements rest with licensees. The new opportunities and solutions show promise and should be evaluated carefully in light of the regulatory maze. When evaluating these options, consider carefully the level of transparency, portability of inventory and reliability of the provider. ■



**FARELLA BRAUN + MARTEL LLP**

235 Montgomery St., San Francisco, CA 94104 • 415-954-4400

899 Adams St., St. Helena, CA 94574 • 707-967-4000

[www.fbm.com](http://www.fbm.com)

# Building the solar city:

*What developers, builders and real estate professionals should know about the law of solar rights and shade*

## INTRODUCTION

With environmental concerns and the cost of energy reaching an all-time high, governments, businesses, and property owners are desperately searching for alternative, environmentally friendly, and cost-effective sources of energy. One such source of energy, solar power, is becoming exceedingly popular. This has focused attention on two little-known laws that regulate solar power development in California: the *Solar Rights Act* and the *Solar Shade Control Act*.

The Solar Rights Act and the Solar Shade Control Act advance a state policy in favor of solar power development. Under the acts, developers have special rights in seeking permits for solar energy installations, as well as rights against others who cast shade on those systems. As solar power becomes an increasingly common part of the community, builders, developers, property owners, property managers, and others should be aware of the legal issues surrounding the installation, maintenance, and use of solar energy technologies.

## OVERVIEW OF THE SOLAR RIGHTS ACT

Enacted in 1978, the Solar Rights Act established a number of provisions that make it easier for developers to incorporate solar energy systems into their projects (codified at Civil Code Sections 714, 714.1, 801 and 801.5; Government Code Sections 65850.5, 66475.3 and 66473.1; and Health & Safety Code Section 17959.1.) The Act bars cities and counties from establishing roadblocks to the installation of solar energy systems and expedites the is-

suance of permits for those systems. Under the Act, a developer is essentially granted the absolute right to a permit for a solar energy system, so long as the system will not cause an adverse impact upon public health or safety. Thus, cities, counties, and other local agencies have little, if any, discretionary authority to restrict the permitting of solar energy systems.

In order to determine whether a system qualifies for protection under the Act, a developer must ensure the system meets the following requirements:

- The system meets all local health and safety standards.
- A solar energy system for heating water must be certified by the Solar Rating Certification Corporation or other comparable national organization.
- A solar energy system for producing electricity must meet all applicable standards in the National Electric Code and the Public Utilities Commission regarding safety and reliability.

If these requirements are satisfied, and public health and safety impacts are absent, the Solar Rights Act effectively guarantees a developer's right to install a solar energy system.

Notably, while the issuance of government permits for solar energy systems is expedited under the Solar Rights Act, the Act is less aggressive when it comes to *privately imposed* building restrictions, such as restrictions imposed through homeowners associations and private deed restrictions. Under the Act, such private restrictions may be placed on solar energy systems provided that the restrictions do not significantly increase the cost of the

system or decrease its efficiency. However, the Solar Rights Act prohibits covenants, restrictions, or conditions in a deed, contract, or security instrument (i.e., CC&Rs and similar deed restrictions) that establish a flat-out prohibition on the installation or use of a solar energy system.

Thus, while developers are guaranteed the right to install systems on buildings subject to private covenants, the type of system can be regulated. Developers, property managers, and landowners installing solar systems on buildings subject to covenants should be aware of the restrictions in place and, if appropriate, seek approval of the type of system prior to installation to ensure it meets covenant restrictions.

## PROBLEMS WITH THE SOLAR RIGHTS ACT

Left unanswered in the Solar Rights Act is whether a developer must comply with a local agency's conditions on solar energy permits. If, for example, a local agency believes a solar installation will disrupt the visual appearance of a neighborhood, may conditions be imposed that address aesthetic impacts? This issue has not been addressed by the courts, but the prudent developer should consider the possible reasonable conditions a city or county may impose on permits authorizing installation of a solar energy system.

One of the most controversial applications of the Solar Rights Act is the Act's interference with historic buildings and landmarks. Because the Act mandates approval of a solar energy system unless it would threaten public health or safety, a developer can install a solar energy system on a historical building, unless some aspect of the

installation would pose a danger to the public. While this may detract from (or destroy) the very historic character of the building or structure sought to be preserved by its historic designation, the Solar Rights Act provides no exception for impacts on aesthetics, historic resources, or visual concerns.

Other concerns have been voiced over the Act's application to large-scale solar power projects. While courts have not yet decided whether the Solar Rights Act applies in this context, the pace of large-scale solar power development may make this issue ripe for judicial review in the coming years. Environmental concerns such as storm water runoff from the solar panels, wetland protection, and environmental preservation may inhibit large-scale solar construction projects, if those projects are not protected by the Act.

#### THE SOLAR SHADE CONTROL ACT

The Solar Shade Control Act (codified at Section Section 25980, *et seq.*, of the California Public Resource Code), restricts the planting and growing of trees which cast shade on solar panels. As amended in 2008, the Act prevents any property owner from the planting or maintaining of any tree or brush that will cast a shadow on greater than 10% of the solar collector's absorption surface at any time between the hours of 10:00 a.m. and 2:00 p.m. The Act in effect grants an implied solar easement to developers, restricting neighboring land owners from blocking a collector's access to sunlight.

However, this limitation on tree growth does not apply to trees or bushes grown subject to a city or county ordinance. Under the Act, local government agencies can exempt themselves from its requirements by enacting ordinances providing for such exemption. Thus, while the implied solar easement protects against private landowners, governing agencies are granted immunity from easement protection.

Because local agencies may infringe solar rights, property owners should consider the natural environmental and aesthetic benefits trees provide when planning con-

struction projects. Recent studies prove, for example, that placing mature trees near homes and businesses increases energy efficiency and reduces greenhouse gasses. Additionally, California law requires developers to take advantage of passive or natural cooling and heating alternatives when planning projects.

While the laws requiring developers to utilize trees and other natural environmental benefits seemingly conflict with efforts to utilize solar energy, developers should view this as an opportunity. The competing energy conservation methods allow developers to present their clients with environmentally friendly building options, regardless of the building site location.

#### CONCLUSION

As the popularity of solar energy sys-

tems rises, real estate professionals should be aware of the laws governing such systems and the rights implicated by the Solar Rights and Shade Control Acts. Installers of solar energy systems in subdivisions should be aware of their important rights in obtaining local permits and approval, but should also be wary of potential restrictions on use, including those imposed through deed restrictions or CC&Rs. Particular awareness of the unique legal issues governing the interplay of solar energy, tree growth, and access to sunlight is also important.

With such understanding in mind, the Solar Rights Act and Solar Shade Control Act promise to streamline the process for incorporating solar energy systems into current properties and new projects. ■



Matthew Gorman

Matthew Gorman is a Partner at the law firm of Alvarez-Glasman & Colvin in Santa Rosa, California. His practice focuses on land use, environmental law, and real estate matters. He may be reached at 707-542-4833 or [mgorman@agclawfirm.com](mailto:mgorman@agclawfirm.com).

Anthony Marinaccio is an Associate at Alvarez-Glasman & Colvin's City of Industry office. His practice focuses on municipal law, land use, and real estate litigation. He may be reached at 562-699-5500 or [amarinaccio@agclawfirm.com](mailto:amarinaccio@agclawfirm.com).

Christopher Cardinale is a law student at Pepperdine University in Malibu, California, and a Law Clerk at Alvarez-Glasman & Colvin.

ALVAREZ-GLASMAN & COLVIN specializes in all aspects of public law, regulatory compliance, law enforcement, environmental law, real estate, redevelopment, and legislative advocacy. With offices in Northern and Southern California, AGC is able to provide comprehensive legal service to clients throughout the State.



ALVAREZ-GLASMAN & COLVIN  
ATTORNEYS AT LAW

600 Bicentennial Way, Suite 300, Santa Rosa, CA 95403  
707-542-4833 • Fax 707-542-4839 • [www.agclawfirm.com](http://www.agclawfirm.com)  
13181 Crossroads Parkway North, Suite 400 West Tower  
City of Industry, CA 91746

# Is your small business taking advantage of current tax incentives?

If there is a positive note in the current economy, it is that in times where people are having trouble finding jobs, entrepreneurship increases and new businesses are started. The Obama Administration has provided several tax incentives to encourage growth in small businesses. Some of these incentives have been around for awhile and some are new. Several of the incentives that are the most beneficial for small businesses and some potential changes that may be on the horizon are:

**Research and Development (R&D) Credit** – This is one of the most lucrative tax credits available to small businesses, but because of its complexity, it is often overlooked. Studies have shown that the United States economy benefits from a two-to-one and even possibly a three-to-one return on investment from the R&D tax credit.

The R&D credit is generally allowed for costs paid or incurred for qualified research. Qualified research is research undertaken in the United States that is meant to discover information that is technological in nature, and its application must be intended for use in developing a new or improved business process, function, product, performance, quality, reliability or a significant reduction in cost. Generally a taxpayer will receive a credit equal to 20% of the cost of the qualifying expenditures. Qualified research expenses include in-house research expenses such as wages, supplies and the rental or lease of computers, and contract research expenses. The R&D tax credit is set to

expire on December 31, 2009.

A proposal under the Fiscal Year 2010 Revenue Proposals would make the R&D credit permanent.

**75% Exclusion of Capital Gains Taxation on Investments in Small Businesses** – To incentivize individuals to invest in small businesses, the IRS currently allows investors who invest in qualified small business stock to exclude 75% of the gain upon sale of the stock. The taxable portion of the gain is taxed at a maximum rate of 28%, and under current law, 7% of the excluded gain is a tax preference subject to the alternative minimum tax (AMT). The stock must be purchased after February 17, 2009, and before January 1, 2011, and must be held for more than five years.

The amount of gain eligible for the exclusion is the greater of (a) ten times the taxpayer's basis in the stock issued by the corporation and disposed of during the year, or (b) \$10 million reduced by the gain excluded in prior years. To qualify as a small business, the corporation must not have gross assets exceeding \$50 million and may not be an S Corporation.

Under the Fiscal Year 2010 Revenue Proposals, the percentage exclusion for qualified small business stock sold by an individual would increase to 100 percent, and the AMT preference item for the gain excluded would be eliminated.

**Expanded Net Operating Loss (NOL) Carryback Provisions** – Small businesses with expenses that exceed their income in 2008 can elect to carry back those losses for up to five years,

rather than two years as was previously available. These rules were designed to smooth out fluctuations in income taxes that result from swings in business income. This could mean a tax refund on a 2008 tax return that might not have been able to be claimed until the business had a profitable year sometime in the future. This is only available to businesses with an average of no more than \$15 million in gross receipts over a three-year period.

The Fiscal Year 2010 Revenue Proposals that are currently under consideration would allow NOLs incurred in 2009-2010 to be able to elect the five-year carryback provision.

**Bonus Depreciation and Section 179 Depreciation** – Depreciation is a method of deducting the cost of property and equipment over several years to more closely match the useful life of the property. Many small businesses that invest in new property and equipment in 2009 are now able to write off most or all of these purchases on their 2009 returns through the Section 179 Depreciation Deduction and Bonus Depreciation.

- **Section 179 Depreciation** – The section 179 deduction enables businesses to deduct up to \$250,000 of the cost of machinery, vehicles, equipment and other qualifying property placed in service in 2009. The ability to take this additional depreciation deduction begins to phase-out for businesses that acquire more than \$800,000 of qualifying property during 2009.

- In 2009 small businesses can take

a special 50% depreciation allowance on property placed in service in 2009, or **Bonus Depreciation**. To qualify, the property must be new, tangible property with a recovery period of 20 years or fewer, off-the-shelf computer software, water utility property or qualified leasehold improvements. Bonus depreciation can be taken on property after reducing the cost of the property for any Section 179 depreciation taken.

**Enterprise Zone Tax Credit** – The Enterprise Zone tax credit offers businesses located in Enterprise Zones the opportunity to reduce their California state income tax through a variety of tax incentives, the most useful of which is the hiring credit. Qualifying businesses can reduce their state income tax by **\$37,440 per year per qualified employee hired, over a five-year period**. Credits can be carried forward from year to year until fully used. In addition, there are several other Enterprise Zone tax credits available, including a sales-or use-tax credit, business expense deduction, net interest deduction and a net operating loss deduction.

**Energy Credits** – Through 2013, a company that produces electricity by installing a solar system can deduct 30% of the cost of the solar system in the year the facility is placed in service through an investment credit. A production tax credit, payable over a 10-year period, is available for facilities that produce electricity from wind, geothermal, hydro-power, closed-loop biomass; open-loop biomass, small irrigation; landfill gas; waste-to-energy; and marine renewable facilities. In lieu of producers taking the production tax credit, they can now elect to take the 30% investment credit. The IRS limits the election for wind to property placed in service between 2009 and 2012.

**COBRA Credit** - Employers that provide the 65% COBRA premium subsidy under the American Recovery

and Reinvestment Act to eligible former employees' can claim a credit for the subsidy on their quarterly or annual employment tax returns. To help avoid the cash flow-burden, employers can reduce their employment tax deposit by the amount of the credit.

**Domestic Production Activities Deduction (DPAD)** – A business engaged in a qualifying production activity is eligible to take a tax deduction of 6% of income from that activity in 2009. The amount increases to 9% in 2010. The

DPAD incentive is available to manufacturers, developers, producers, growers, extractive industries, contractors, engineers and architects.

The current economic conditions have made it more important than ever that small business owners be aware of the tax incentives that can impact their business. Businesses would be wise to consult with their tax accountant now to ensure proper planning is done to best utilize the incentives that might be available to them. ■

**Bobbi Beehler** is a Certified Public Accountant and Chartered Financial Analyst with Pisenti & Brinker LLP in Santa Rosa. Mrs. Beehler has also received her Series 7 and Series 63 Securities licenses as well as her Real Estate Salesperson license. In 2008 she received her EcoGreen certification and was recognized as one of the top "Forty under 40" business professionals in the North Bay by the North Bay Business Journal.

Mrs. Beehler currently concentrates on business valuations, management advisory services, corporate taxation and assurance services for start-up and mid-size companies. She is a member of the North Bay Angels and is the Chairwoman for the 7th North Bay Growth and Investor Forum. She also serves as the Vice-President of Finance for the Board of Directors of the Boy Scouts of America, is an appointed member of the Measure O Oversight Commission and is a member of the Economic Vitality Committee for the Santa Rosa Chamber of Commerce. In 2008 she co-launched the Sustainable Business Practice Group at Piseniti & Brinker, where she advises companies on adopting sustainable practices including rate-of-return and payback-period analysis for green initiatives and examinations of tax incentive and rebate opportunities for adopting sustainable practices.



Santa Rosa 707-542-3343 • Petaluma 707-762-9900 • Napa 707-224-4097  
www.pbllp.com

# Water and energy, status and resolutions

Last year in this issue I wrote about potential changes in the regulatory world compelled by greenhouse gas emissions (GHGs) and California's oft cited AB 32. Specific details in these regards remain difficult to track, despite the frequent conferences and seminars offered for our continuing education. But while the particulars may be sparse, the certainty of change increases as management of water and air issues becomes increasingly difficult.

Indeed, in California and throughout the West businesses are confronted with impending water shortages and GHG-related regulations that pose increasing challenges and seemingly diminishing opportunities. In facing these circumstances, businesses are becoming more aware and more involved in understanding the natural resource problems confronting us, but increasingly bewildered by the complex issues and proposed resolutions to these problems.

Though we cannot help but be chagrined by the situation, and increasingly perplexed, there are a variety of actions to be taken by all of us interested in maintaining a viable and thriving business climate. These steps range from the small to the earth changing, and they warrant significant discussion throughout the various tracts of society. Some of this action will be discussed below, but first, a brief examination of our dilemma, concerning just water and global warming, is warranted.

**GLOBAL WARMING** is a topic much discussed today throughout the world. As California is considered the seventh-largest economy in the world, and one of the largest emitters of carbon dioxide, the California Global Warming Solutions Act of 2006, aka AB 32, is well considered. However, the regulations and schemes to be

proposed as statewide solutions remain years off and will be extraordinarily complicated and relatively untested.

A straight carbon tax may be the simplest form of regulation, though such a tax is certain to negatively impact business in a state already stumbling over regulatory hurdles. Accordingly, the political will to enact such a tax in these economic times is sure to be lacking. A cap-and-trade system working only intrastate is sure to have minimal effect on emissions initially and promises enormous legal action through the decade ahead. Even with the experience provided by the EU's cap-and-trade program, real results will be slow in coming. Additional GHG regulations imposed on business, particularly the manufacturing and transportation industries, lack sufficient enforcement tools. Impending budget cut-backs on government agencies only weaken the ability of government to regulate air quality and GHGs.

Under these scenarios, the management of the earth's GHG emissions, so critical to our energy needs, is more than daunting.

**ALTERNATIVELY, TAKE WATER**, which is what I have advised business to do, reasonably, while the State Water Board attempts to sort out the many regulatory problems faced by Northern California water users. Take water, use it reasonably for productive purposes, file the appropriate permit applications, and your water rights should be protected under California law. Right? Unfortunately, not.

For the most part we agree about the finite nature of water; it is a resource with limits largely beyond our control. Uses of water include not only human consumption and business and agricultural applications of all types, but also fish and wild-

life maintenance. There is little dispute that water is required for our daily biological needs, the protection or sustenance of the earth's flora and fauna, and the industry upon which our economy relies.

In Northern California these competing uses put the legal water system to its ultimate test. For decades the Sonoma County Water Agency has relied on water diverted from the natural flow of the Eel River into the Russian River watershed. As this diversion is reduced to protect wildlife, less water flows to the waterways and storage areas we have relied on historically, and less is available for our consumption and use.

The State Water Board (SWB) recognizes these facts and has commenced the process of defining what is reasonable use and what is not. Despite the historic use of water for lawns, the SWB has mandated that commercial lawns may be watered no more. Tomorrow, reasonable use will be defined by different standards than the historic uses relied on by California's water law. This is a significant change, and it is new territory for lawmakers and scientists alike.

Efforts at conservation have been effective, and water use per capita throughout California has decreased. However, that "per capita" qualifier continues to spell trouble. As the population increases water needs necessarily increase and wastewater issues compound. While a variety of conservation techniques and water recycling products exist and continue to be developed, that basic equation whereby increasing water consumption attempts to match a finite pool remains unsolved.

This is not to say that all is lost. Partial resolutions to these problems are abundant, and new technologies consistently

attempt to address these issues throughout the world. But what steps can be taken by Northern California business that are reasonable, practical, effective, and financially sound?

**SMALL STEPS** include switching from Thomas Edison's light bulbs to fluorescent, turning down thermostats and turning off air-conditioners. Install skylights for natural light, and open windows for natural cooling effects. Low-flow water fixtures are readily available, and simple awareness of every-day water use can be very effective. Such small steps are not costly but can make a real difference to your budget's bottom line.

The cost of energy and water are certain to rise significantly in the near future. Any efforts taken to conserve will be rewarded next month, and more significantly next year, and the year after. These small steps should be taken with a view to realizing real cost savings.

**MEDIUM STEPS** require a more significant investment in realizing cost savings over a longer term. The installation of solar panels requires an investment that will be recouped in a number of years but will allow for future energy independence and potentially even income. Rain water capture is a relatively simple technology that bears a cost but may achieve long-term income in the savings realized on future water bills. This is particularly true for water needed to fill pools or water landscape. Replacing landscape that requires frequent watering with low-maintenance landscape saves gardening time as well as water costs. Utilizing the latest in irrigation techniques will prove to be remarkably efficient and cost saving for home, industrial and agricultural users.

Recycled water technology is being tested around the world on relatively small-scale structures so that in the years to come business parks will water landscapes with water recycled from the business park itself. Homes will use gray water for all uses other than human consumption, and landscaping in California will rely almost exclusively on recycled water sources.

These capital investments must be ana-

lyzed to determine the balance between costs and savings, but incentive programs are available to assist in that balancing effort. A variety of incentive and rebate programs are available from PG&E and the Sonoma County Water Agency, among other water and energy utilities, to promote the advancement of technologies such as the ones noted above. The Sonoma County Energy Independence Program allows a property owner to finance water- and energy-related improvements through property taxes. As government attempts to address these issues more consistently, additional incentive programs are certain to be enacted.

**LARGE STEPS** must also be taken to address the need for greater energy production and more efficient water use. Companies investing in the production of geothermal, solar and other alternative energy will allow California to sustain a thriving and expanding economy while realizing substantial economic benefits. The alternative energy industry is growing exponentially throughout the world. Business leaders willing and able to invest in and manage such clean companies will reap real dividends as energy becomes more valued.

Similarly, water companies investing in procuring and maintaining reliable water resources are certain to become increas-

ingly valuable in the coming years. New technologies in water use and recycling will reap huge profits from dry areas such as America's southwestern states.

**STILL GREATER STEPS** will be required to maintain any semblance of our present water and energy use. Conservation and investment will not solve these problems in the future. Ultimately, the resolutions to these problems must include new technologies, new science and revolutionary concepts.

**REVOLUTIONARY COOPERATION** between government and business will be necessary to see California through the difficult years ahead. No longer will business be able to ignore governmental mandates addressing water and GHGs, and government leaders must recognize the immense societal value to be found in cooperating with the business leaders attacking these environmental problems.

While water and GHG issues cloud business prospects, action of all kinds must be taken by business to keep California's economy viable in our ever more complex world. Every business has a role to play, with large and small steps to take, huge and medium projects to finish. Equally important, cooperative attitudes from all sides of the issues will be required to meet these challenges.



Cameron Scott Kirk is Of Counsel with Spaulding McCullough & Tansil LLP. He emphasizes environmental, real estate and water law within his litigation and regulatory practice of more than 25 years. He has extensive experience in complex litigation and regulatory matters, has taught Environmental Law at Sonoma State University and has lectured and published numerous articles concerning his areas of expertise.

**SMT**  
**SPAULDING MCCULLOUGH & TANSIL LLP**  
ATTORNEYS AT LAW

90 South E Street, Suite 200, Santa Rosa, CA 95404  
11 Western Ave., Petaluma, CA 94952  
707-524-1900 • www.smlaw.com

# Fraud and the private company

## *A report you cannot afford to ignore*

During a severe economic downturn, business owners are motivated to control operating costs any way they can. Shopping for lower insurance rates, seeking more competitive suppliers and reducing the number of employees are examples of strategies that receive focused attention in hard times. Unfortunately, many business owners remain in denial regarding their potential for losses from occupational fraud (frauds perpetrated against the business by insiders).

All business owners should read the 2008 Report to the Nation on Occupational Fraud & Abuse ("the Report") published by the Association of Certified Fraud Examiners (ACFE). They will learn that of the cases studied in the report:

- Nearly 40% of the frauds occurred in private companies.
- The median loss related to the above was \$278,000.
- 38% of frauds studied occurred in companies with fewer than 100 employees.

Ponzi schemes and manipulation of debt derivatives may have dominated recent headlines, but occupational fraud is the primary threat to private companies. Loss to schemes such as:

- Check tampering
- Skimming
- Billing and collections fraud
- Payroll irregularities

It is not auditors or systems of internal control that have the highest success rate with uncovering occupational fraud. According to the ACFE's report, 38.4% are discovered as the result of tips from employees, customers and vendors. (Instructions for obtaining a copy

of the Report are outlined at the conclusion of this article.)

### **THE ACCOUNTING PROFESSION STEPS UP TO HELP**

The American Institute of Certified Public Accountants (AICPA) has strived in recent years to equip its member CPAs with the tools necessary to assist clients in combating this growing threat. The AICPA has attacked the issue in several ways:

#### **FIRST – REVISED AUDITING STANDARDS**

The standards now require auditors to consider the risk of fraud in every audit and plan accordingly. The planning includes consideration of the possibility of fraud in each of the subject companies' accounting segments and the existence and efficacy of the companies' internal controls in preventing or detecting such fraud.

#### **SECOND – A NEW KIND OF CPA**

In recognition that a large number of CPAs have expanded their practices to include forensic accounting services such as fraud investigation, the AICPA established a number of supporting programs. The Forensic and Valuation Services Section (FVS) provides an array of tools and resources to its members in order to render high-quality forensic services. The newly introduced Certified in Financial Forensics (CFF) credential provides recognition for CPAs that have obtained high levels of education, training and experience in forensic services. The AICPA has created an extensive library of practice aids on forensic issues and each year produces multiple national conferences focused on forensic

and litigation support services.

#### **THIRD – DISSEMINATE INFORMATION**

To inform the business community and the public at large about the threat posed by fraud, the AICPA (in association with several other sponsoring organizations) published Managing the Business Risk of Fraud: A Practical Guide. This guide is an invaluable resource to owners and management of all businesses regardless of size. (Instructions for obtaining a copy are outlined at the conclusion of this article.)

#### **OWNERS NEED TO ACT**

The right mix of fraud prevention and detection measures will vary from company to company. The process of reducing a company's risk of loss through occupational fraud begins with management's acknowledgment of the existence of such risk. Next comes the "homework" of figuring out where the company's greatest risks lie and designing controls to address them. The guide from the AICPA mentioned above would be a good place to start. The result should be a set of policies and procedures scaled to the company's size and custom fit to meet its unique threats.

#### **SMALL IS NOT POWERLESS**

Many businesses may feel they lack sufficient staffing to implement the policies and procedures recommended to prevent or detect fraud. However, there are still very effective measures available to them to combat fraud. The first is a clearly communicated zero-tolerance policy. This should be done in the employee manual and periodically reinforced in staff meetings. It goes with-

“*Business owners do not have to tolerate occupational fraud, but it will require their dedication and discipline to combat it.*”

out saying that violation of the policy must result in termination.

#### **DON'T IGNORE THE TIPS**

Since such a high percentage of occupational fraud is detected through tips, businesses should establish a safe channel for honest employees to report any potentially fraudulent activities they have observed. A number of companies (large and small) have set up hotlines or confidential mail drops to receive anonymous tips from employees and third parties.

#### **GET INVOLVED**

Regular monitoring of certain key points in all transaction cycles by the owner/manager is very effective. For example, many misappropriation schemes require the perpetrator to conceal their theft by manipulating the accounting for cash. The owner/manager should always have the opportunity to review bank statements before the accounting staff. To insure receipt of unopened bank statements, some business owners receive them at home.

#### **PRIORITIZE**

Business owners must always assess the cost/benefit relationship of any measures they consider implementing. Conversely, they must come to terms with the level of occupational fraud that they will accept as a “cost of doing business.” To illustrate, it usually does not make sense to set up elaborate controls to keep pens and pencils from walking out the door, while it does for laptops.

#### **WHO ARE YOU GOING TO CALL?**

The final component concerns what the business will do when it discovers instances of suspected fraud. At that point, advice should be obtained from legal counsel. That advice will contribute to the

decision of whether or not to involve law enforcement. At some point, forensic accounting services may be required to quantify the amount of loss and provide a report for presentation to a court, an arbitrator or insurance company. The forensic services should be performed by qualified professionals with the appropriate credentials and experience.

#### **CONCLUSION**

Business owners do not have to tolerate occupational fraud, but it will require their dedication and discipline to combat it. Fortunately, help is available.

The reports cited in this article provide excellent guidance, and assistance is available from qualified professionals. In the end, it is no different than any other cost-reduction strategy. If it is done well, it pays off.

Links to obtain copies of the ACFE's [2008 Report to the Nation on Occupational Fraud & Abuse](#) and the AICPA's [Managing the Business Risk of Fraud: A Practical Guide](#) are posted under “Links” and “Fraud Control” on Eckhoff Accountancy Corporation's website [www.eckhoff.com](http://www.eckhoff.com). ■

**Ted Israel** is Eckhoff Accountancy Corporation's partner in charge of forensic services. He is a Certified Public Accountant, Certified in Financial Forensics and credentialed in business valuation by both the American Institute of Certified Public Accountants and the National Association of Certified Valuation Analysts. He has provided expert testimony in multiple Bay Area counties. A more complete resume can be found at [www.eckhoff.com](http://www.eckhoff.com). Mr. Israel's e-mail address is [tedi@eckhoff.com](mailto:tedi@eckhoff.com).

**Denise Frey** is senior litigation specialist at Eckhoff Accountancy Corporation. She is a Certified Public Accountant, Certified in Financial Forensics and credentialed in business valuation by the National Association of Certified Valuation Analysts. The majority of her professional time is devoted to forensic and litigation support services. Ms. Frey's e-mail address is [denisef@eckhoff.com](mailto:denisef@eckhoff.com).

**Eckhoff Accountancy Corporation** is a firm of Certified Public Accountants based in San Rafael, California, that has been providing a full range of accounting and consulting services to the Bay Area since 1955.



**Eckhoff Accountancy Corporation**

*Empowered Professionals Meeting Client Challenges*

145 North Redwood Drive, San Rafael, CA 94903

415-499-9400 • Fax 415-499-1408

[www.eckhoff.com](http://www.eckhoff.com)

# Personal financial planning helping you see the big picture

All one has to do is open their most recent 401K statement to realize that what they thought their financial picture would look like is very different than what it actually looks like today. The past 20 months have been extremely difficult for anyone who plans to retire. And let's face it, this includes just about all of us.

President Obama in his inaugural address said, *"Starting today, we must pick ourselves up, dust ourselves off, and begin again the work of remaking America."*

The same statement could apply to each of us; to make a commitment to get our personal financial house in order. Sometimes it takes a "100-year financial storm" like the one we are presently in to recognize the importance of having a well-thought-out financial plan for our future.

A good financial plan is like the blueprint for your financial future. Most people wouldn't begin to build a new home without a set of blueprints that would define the type of house they would like. The same should be said of your financial future.

Do you picture yourself putting your children through college, creating a trust to protect your family, being able to retire on a schedule that allows you to enjoy your retirement, and making sure you have the long-term health care that you will need in place during retirement? These are a few of the financial goals that may be important to you, and

each comes with a price tag attached.

That's where personal financial planning comes in.

What is personal financial planning?

Personal financial planning is a process to help you reach your goals by first evaluating your entire financial picture, and then outlining strategies tailored to your individual needs and available resources.

Why is personal financial planning important?

A comprehensive personal financial plan serves as a framework for organizing and balancing the pieces of your financial picture. With a personal financial plan in place, you'll be better able to focus on your goals, understand what it will take to reach them, and how they are related to one another. For example, how does saving for your children's college education impact your ability to save for retirement? Knowing the answers to questions such as this can help you prioritize your goals, implement specific strategies, and choose suitable services. Best of all, you'll have the peace of mind that comes from knowing that your financial life is planned and on track.

And, just like the building of your dream home, there will be changes and adjustments during "construction" that will be required along the way. A good financial plan allows for modification and revisions to account for the unanticipated events that will occur.

What is typically covered in a personal financial plan?

Your personal financial plan addresses the following:

- Financial independence in retirement
- Specific goals like education funding, health care costs, travel
- Liquidity needs
- Tax efficiencies
- Risk management and asset protection

How do I create and preserve financial independence?

The uncertainty of the future – including market changes, the impact of inflation, Social Security, and the increasing costs of health care – has never been greater. Retirement can create fear and emotional insecurity. For many, this fear is driven by not knowing their complete financial picture.

The personal financial planning process can help minimize this insecurity by allowing you to set financial boundaries and offering direction on lifestyle spending and goal-funding. Knowing you are on the right track for funding your retirement goals is invaluable when making pre-retirement spending choices. If you are not on track to meet your goals, the plan recommendations will give you guidance on what adjustments are necessary. Knowing this before retirement will allow you a much better opportunity to reach your goals.

What are my liquidity needs?

Having sufficient net worth to provide for retirement does not necessarily mean those funds will be available when

you need them. A cash-flow analysis can show you how to match your investments with your income needs to cover your expenses. Investing in a diversified manner within various asset classes can provide the necessary cash flow for liquidity during market cycles and help prevent non-liquid investments from being sold at an inopportune time. Finding the proper balance between your current liquidity needs and long-term investment requirements is a fundamental goal for your personal financial plan.

How can I maximize tax efficiencies?

There is a balance between the need to reduce taxes and the desire to increase income, which can increase taxes. Personal financial planning considers the benefits of deferring taxable income into the future and/or accelerating tax deductions to offset current income.

Some assets are more tax efficient than others. Allocating assets to take advantage of efficiencies and individual circumstances are accomplished through a personal financial plan.

How can I minimize risk?

Accumulated assets are prematurely depleted when certain events occur. Knowing you are financially prepared can provide you with some security. A financial plan includes an analysis of property and casualty insurance, life insurance, disability insurance, umbrella insurance, and an analysis of projected long-term care expense needs.

Determining the types and amounts of insurance needed is a complex and personal process. It should be considered in conjunction with estate planning, business planning, and personal financial planning. Your insurance planning should occur through a coordinated dialogue between your CPA, personal financial planner, attorney, and insurance advisor.

What can you do?

Most people spend little or no time setting goals or planning for their future. Procrastination is the single biggest factor in why people do not have a personal financial plan. Ego or overcon-

fidence is the second major contributor, and the third reason is that many people believe financial planning is only for the rich.

Financial planning is a beneficial exercise for many people, whether you are just starting out or are anticipating the sale of a business and moving into a new stage of your life.

Who can help me?

There are many individuals that call themselves financial planners. It is rec-

ommended you engage an individual that has met the requirements to use the designation Certified Financial Planner, CFP®. For more information on how a financial planner can help you and how to choose the right one, go to [www.fpanet.org/public](http://www.fpanet.org/public).

Again in, the words of President Obama, "For everywhere we look, there is work to be done. The state of the economy calls for action, bold and swift, and we will act," – and so should you. ■

### John Whiting, CFP®, AIF®, Partner

#### PROFESSIONAL EXPERIENCE

John Whiting has been in the financial services and investment planning profession since 1998. He advises business owners and high net worth individuals in the creation of highly personalized financial plans and comprehensive wealth strategies. John works closely with business owners in crafting the steps toward transition from active management of their company to successful financial independence. His clients enjoy a very personal relationship with him, meeting regularly to discuss their plan, investments and wealth strategies. As a Partner with Moss Adams Wealth Advisors, in addition to personal financial planning and investment management services, John also provides insurance management analysis, estate planning, education planning and investment consulting.



#### PROFESSIONAL EXPERIENCES AND ACCOMPLISHMENTS:

- A member of the Business Owner Succession Services initiative
- Northern California lead in the Personal Financial Planning technical discipline team which sets firm policy and procedures for personal financial planning
- Presents and speaks for various industry groups on Financial Planning and Investment Management topics
- Helps train new investment advisor representatives in personal financial planning and investment management services

#### PROFESSIONAL CERTIFICATIONS AND LICENSES:

- CFP®, Certified Financial Planner
- AIF®, Accredited Investment Fiduciary
- Member, Financial Planning Association
- FPA – San Francisco Bay Area Chapter
- Life insurance licensed
- FINRA, Series 7 licensed
- NASAA, Series 65 licensed

## MOSS ADAMS WEALTH ADVISORS

MOSS ADAMS WEALTH ADVISORS is an affiliate of MOSS ADAMS LLP

3700 Old Redwood Highway, Suite 200

Santa Rosa, CA 95403

707-527-0800 • [www.mossadams.com](http://www.mossadams.com)

# Choosing a trademark

Choosing a trademark for your product or service is an important, yet sometimes frustrating, process. Often what appears to be a good trademark choice from a marketing perspective is a poor choice from a legal perspective, and vice versa.

Before making a significant investment in advertising your new brand, you should determine whether your selected trademark is protectable in the first place and, if so, how much protection your selected trademark will afford you. It could be quite devastating to your company to expend considerable sums promoting a new brand only to find out later that your selected trademark provides little, if any, protection against someone entering into the marketplace with a similar trademark, or worse, infringes someone else's trademark rights.

## WHAT IS A TRADEMARK?

Before selecting a trademark, you should understand what a trademark is. A trademark is a word, phrase, symbol or design that distinguishes the *source* of a product or service from others offering similar products and services. The trademark generally communicates to the consumer who it is that is providing the product or service but not necessarily what the product or service is or does. For example, the trademark "Exxon" tells the consumer who is providing the gasoline they are purchasing but does not describe or suggest what the product actually is. A trademark does not necessarily have to communicate the name of the company offering the product or service, as long as it distinguishes the product or service from other similar product or services. Note,

the trademark "Techron" used in conjunction with fuel-additive products does not reveal that Chevron is the company offering the additive products, but it still distinguishes Chevron's "Techron" branded additives from additives offered by its competitors.

The law protects the owner of a trademark from competitors entering into the marketplace with a similar trademark in a manner that may cause the consumer to be confused about the origin of the product or service. Many factors affect whether a consumer is likely to be confused by the use of a similar trademark, including the similarity between the two trademarks – do the trademarks look alike, sound alike, have the same meaning – the nature of the products being sold under the trademarks, and the care the consumer might take in purchasing the products. Even identical trademarks may not confuse the consumer if they are associated with disparate products or services as evidenced by the well-known brands "Apple" Computer and "Apple" Records.

Another factor associated with consumer confusion is the legal strength of the trademark. Strong trademarks generally receive greater and broader protection than trademarks that are considered weak. Some trademarks are so weak, they are not entitled to any protection at all.

## STRONG VS. WEAK TRADEMARKS

In order to be entitled to protection, a trademark must be "distinctive." That is to say that the consuming public must recognize the trademark as a source signifier rather than as a description of the

product or service being sold. Some trademarks are inherently distinctive and thus entitled to protection right away, while others will only obtain distinctiveness after substantial longstanding exclusive use. Generally speaking, the more a trademark communicates what the product is or does, the less distinctive it is.

Trademarks fall within a spectrum of distinctiveness that is roughly divided into four categories: Arbitrary/Fanciful, Suggestive, Descriptive and Generic. Arbitrary/Fanciful and Suggestive trademarks are inherently distinctive and thus are afforded some protection immediately upon use. Descriptive trademarks are not immediately distinctive, but may become distinctive after substantial longstanding exclusive use in the marketplace causes the consumer to associate the trademark as a source signifier rather than a description of the product. Generic marks are never entitled to protection.

Arbitrary and fanciful trademarks are very strong trademarks and are afforded a great deal of protection. A fanciful trademark is a made-up word or term such as Exxon or Verizon, while an arbitrary trademark comprises an actual word or phrase that is meaningless in the context that it is used such as "Apple" for computers or "Chevron" for gasoline.

Suggestive trademarks fall below arbitrary and fanciful trademarks on the spectrum of distinctiveness. While suggestive trademarks are inherently distinctive and entitled to immediate protection, the scope of the protection is generally less broad. Suggestive trademarks allude to some quality or charac-

teristic of the product or service, but do not actually describe the product or service. Examples of suggestive trademarks include Coppertone for sunscreen and Roach Motel for insect traps.

Descriptive trademarks are generally not entitled to protection unless and until the consuming public comes to recognize the trademark as a designation of the source of the product. Descriptive trademarks are trademarks that describe the quality, nature, characteristic or function of the product such as King Size (for large men's clothing.) Although descriptive trademarks are not afforded protection until they acquire distinctiveness they can become relatively strong trademarks over time as evidenced by Holiday Inn (hotels) and Windows (computer software utilizing window screens).

Generic terms are last in the spectrum and are never afforded protection. A generic term is simply the common name associated with the product or service. "Apple" is a common name for the fruit and therefore cannot be a trademark associated with the marketing of the fruit product.

From a marketing perspective, choosing a trademark that describes your product or service often seems desirable since a descriptive trademark can immediately convey to the consumer what the product or service is – reducing your initial promotion and advertising costs. However, from a legal perspective, a descriptive trademark may offer little, if any, protection from others entering into the marketplace with a similar trademark. An informed and careful balancing of the legal and marketing benefits should be made before ultimately settling on a trademark.

**SELECTING A TRADEMARK  
THAT DOES NOT INFRINGE ON  
SOMEONE ELSE'S RIGHTS**

Once you have selected a possible

trademark, you need to make sure that your use of the trademark will not infringe on someone else's trademark rights. A simple search of the trademark database on the United States Patent and Trademark Office's website will tell you if someone has registered the same trademark. However, since trademarks do not have to be registered in order to be protected, and since the ultimate test for infringement is not whether the alleged infringing trademark is identical to the senior trademark but whether the consumer is likely to be confused, further analysis is necessary.

Before you invest a lot of money branding your products or services with your selected trademark, I recommend that a U.S. availability search be conducted by a professional search firm. These searches are fairly robust, search-

ing many different databases and using as search terms not only the proposed trademark but also words or terms that sound similar, look similar, or have similar meaning to the proposed trademark. The final result of the search is usually a report, sometimes hundreds of pages long, providing critical information about other uses of similar trademarks. The report should be analyzed by a competent trademark attorney who can advise you of any risks you might face proceeding with your proposed trademark.

Selecting the right trademark for your product or service can make or break a business. A trademark should only be selected after considering both the legal and marketing benefits of the trademark and after the trademark has been analyzed to determine if it infringes on the rights of others. ■

Richard O'Hare is a registered patent attorney with Beyers|Costin whose practice includes complex business litigation, intellectual property law and insurance matters. He has successfully litigated multimillion-dollar infringement cases involving technology licensing, trademarks, patents, copyrights and commercial agreements.



**B | C**  
**BEYERS**  
**COSTIN**

**BEYERS | COSTIN**  
A Professional Corporation  
707-547-2000 • [www.BeyersCostin.com](http://www.BeyersCostin.com)

# So you think your estate planning is completed...

You've worked with your attorney, reviewed the drafted documents, even met again to ask questions, and, then, signed the final documents...

Or,

You've attended that trust seminar, met with a representative, provided your personal information, gone through the process and now have a binder containing all your documents...

And, you think your estate planning is completed. Well, it may not be, and your documents may not be revisited until your health declines or your family must handle your estate.

The following is a brief outline of common areas in which estate plans may be lacking.

## **1. If you have a revocable living trust, are most or all of your assets titled in the name of your trust?**

Some assets (such as retirement accounts) should not be titled in your trust. Depending on the overall estate plan, perhaps the daily checking account also will not be titled in the trust. However, your real estate and major financial accounts usually should be titled in your trust.

Your living trust is intended to avoid a conservatorship if you are incapacitated and the probate process upon your death. If valuable assets are not titled in your living trust, they may need to be probated. It is common for assets to inadvertently not be titled in the trust and, therefore, the probate process becomes necessary.

While titling assets as joint tenants, community property, community property with right of survivorship, ITF (in trust for) or POD (payable on death to) will avoid probate, upon your death those as-

sets will pass to the joint tenant, surviving spouse or beneficiary and be part of that person's estate when they die. Those assets will not be subject to the terms of your living trust and may cause unnecessary estate taxes in the surviving spouse's estate.

For example, your trust may provide that property distributed to your children or grandchildren will be retained in a trust until that child or grandchild reaches age 25, 30 or even older. If, instead, the property is in joint tenancy or in a POD account, the child will receive that property at age 18.

## **2. Does your living trust have a schedule listing the assets that are part of your trust? Is that schedule completed and signed?**

The probate process may still be avoided if assets that are not titled in the trust are listed on a property schedule attached to the trust agreement. Ideally, that list of assets indicates that the assets are a part of the trust and is signed. Although an attorney will have to petition the court for an order confirming that the assets are a part of the living trust, the probate process may be avoided as to those assets.

It is extremely common for living trusts to either not have such an attached schedule of assets or for the schedule to be left blank.

## **3. Have your estate planning documents been recently updated?**

Estate tax laws, probate laws, family dynamics and perhaps also your personal goals are constantly changing. Have you read your documents within the past three to five years or requested that the drafter of your documents do so? Your documents may not reflect your current desires or be

the most efficient method of avoiding or minimizing estate or income taxation.

Be aware of the recent changes in estate, gift and income tax laws. Your documents that served as the best mechanism to avoid such taxes at the time you signed them may no longer accomplish that purpose.

Have you married, borne children, lost parents or moved since your documents were drafted? Have you acquired real estate (maybe a vacation home) in another state or another country? These are all areas of personal change that will affect your estate plan. While California has no estate or inheritance taxes, other states do and their exemptions from tax may not be identical to the United States federal estate tax exemptions.

For example, currently under federal estate tax laws, there is a personal exemption from estate tax in the amount of \$3.5 million. Certain other states have lower personal exemptions. If you own property in those states and your estate plan is not sufficiently flexible to take this into consideration, your estate may unnecessarily be subject to death tax.

It is also common for recently married or separated couples or those enjoying the bliss of sleepless nights associated with a new-born child to assume that their estate plans will address their changed family. Unfortunately, that is not always the case. If your desires of whether to include or exclude the spouse or child are not indicated in your documents, that person may receive a portion of your estate as dictated by the California Probate Code. In the unlikely event that neither you nor your child's other parent survives the child reaching adulthood, a guardian

should also be named in your documents.

**4. Have you and your attorney and/or financial planner reviewed changes in your or your family's financial situation?**

We see many estate plans that were well structured a number of years ago, but due to recent changes in the economy, should be amended. Perhaps the value of your estate is now primarily in your retirement accounts or in your real estate. Perhaps the value of your life insurance policy now makes up more of your taxable estate than it previously did. Perhaps some of your beneficiaries' current needs are greater than they were. All these factors may require changes to your estate plan.

**5. Who are the beneficiaries (primary and contingent) of your retirement and annuity accounts and life insurance policies?**

Generally, these accounts and policies are not titled in your living trust. However, you should periodically review the beneficiary designations of these accounts to ensure that they still reflect your current desires.

An unfortunately common situation occurs when the beneficiary designation forms are not reviewed and re-executed following a couple's marriage or divorce. Retirement accounts may be subject to the highly technical federal law known as ERISA, and a new spouse's signature may be required on the beneficiary forms in order for them to continue to be effective. Following divorce, even if both parties agree as to the disposition of a retirement account, if the beneficiary designation form does not reflect that desire, the administrator of the account may have no choice but to follow the directions on the form; namely, to distribute the account to the beneficiary named on the unrevised form.

In addition, when you review the beneficiary designation forms, take a minute to consider whom the contingent beneficiaries should be. If your child should die before you do, will that child's children receive the deceased child's share? Is that what you wish? Keep in mind that you may usually attach additional pages to the beneficiary designation form to ensure that the primary and contingent beneficiaries reflect your desires.

Also, keep in mind that regarding retirement accounts not only are you planning around estate taxation but usually also deferred income taxation. Your beneficiaries will be taxed on the distributions from your retirement accounts as part of their taxable income. For this reason, you may want to ensure that your beneficiaries can "stretch out" their benefits as long as possible. Will they have this option? If you have named a trust as the beneficiary, is that trust drafted to preserve this option for the trust beneficiaries?

Although life insurance proceeds are not subject to income tax, they are subject to estate tax unless the policy owner is someone other than you. That may be another individual or an irrevocable trust.

**6. Are your financial power of attorney and health care directive current?**

You should review your financial power of attorney and health care directive to ensure they reflect your current desires. Are the agents named still the individuals you wish to make financial and health care decisions for you? Are your agent's powers "springing" or effective immediately upon signing? Is this what you wanted? Does your health care directive still reflect your desires regarding your health care?

**7. Have you reviewed the more complex/specialized aspects of your estate plan?**

If you have set up an irrevocable life insurance trust, has it been administered correctly? Have you made gifts to the trustee, rather than directly paying life insurance premiums? Has the trustee timely sent "Crummey" notices to the trust's beneficiaries, advising them of their right to withdraw funds from the trust?

If you own a business, the Internal Revenue Code may permit your heirs to pay estate taxes in installments over an extended period of time, up to 14 years. (IRC section 6166) Your estate may also take advantage of special valuation of business real estate or other assets based on their current use rather than on their highest and best use. (IRC section 2032A) Has the change in values of your overall assets changed your estate's potential ability to take advantage of such periodic payments or special-use valuation?

With the current low interest rates, are the tax benefits of charitable lead trusts and other more advanced estate planning methods now more attractive to you?

In summary, your life is dynamic, ever-changing and progressing; your estate plan should be also. ■

Deborah G. Corlett is a partner and business attorney. She emphasizes estate planning, trust administration and probate law. She is a Certified Estate Planning, Trust and Probate Law Specialist, The State Bar of California Board of Legal Specialization.



**O'Brien  
Watters  
& Davis** LLP

Fountaingrove Corporate  
Centre I  
3510 Unocal Place, Suite 200,  
Post Office Box 3759,  
Santa Rosa, CA 95402-3759  
707-545-7010  
Fax 707-544-2861  
www.obrienlaw.com

# Unlocking enterprise value

There is significant value that accrues to an enterprise that streamlines its organizational structure, produces reliable financial information, establishes strong controls and has a corporate culture that drives employees to do the right thing. This value, however, is often overlooked.

In a company's early years, management's focus is primarily on product creation, customer development, distribution logistics and fundraising. During this early stage, development of business processes, controls and corporate culture is often set aside; and, in many cases, is not attended to until the company is preparing to go public or when there is a costly breakdown in systems or information. But much of the enterprise value is locked up in how reliably it operates, not just what it sells. This value can be realized by building control maturity.

Over the last six years, we have led efforts at over fifty companies to improve control maturity. Our experience in leading these engagements has enabled us to reduce what can be a complex and expensive process to a simple set of straightforward and relatively inexpensive steps. Our process is based on the framework developed by the Committee of Sponsoring Organizations (COSO). This framework is used by public companies to comply with the Sarbanes-Oxley Act, but don't let that frighten you off. If implemented judiciously, this framework can be a powerful and effective tool for any company. In the paragraphs that follow, I will share key steps to a judicious implementation along with tips to assist in making good

decisions along the way.

## **ASSESSMENT 1 – FINANCIAL REPORTING RISKS**

Conducting an assessment of financial reporting risks is a logical place to start. Begin by mapping out each business process (like purchasing) and sub-process (like requisitions, receiving and disbursements) and then evaluate the relative risk by asking: how material are the transactions which flow through this process; what is the transaction volume; how complex are the transactions; is judgment or estimation involved; how susceptible is the process to errors or fraud? Most businesses have two to four critical business processes that represent the greatest risk of something going wrong. By focusing on these critical risks, control maturity can significantly improve... and that can have enormous value.

*Tip* – Taking time up front to carefully evaluate and document risks focuses the project and creates a roadmap for where effort should be expended.

## **ASSESSMENT 2 – CRITICAL CONTROLS**

Now that you have assessed where the risk lies, turn your attention to defining objectives, evaluating risks and developing controls over these critical business processes. Ask what the objective of this business process is and what could go wrong? Then design a control structure that is responsive to the risks, without going overboard. One thing we have learned over the years is to economize on the number of controls and make them really count. In most critical business processes there are somewhere between six and ten key controls.

If these key controls are carefully designed, they can be very effective. Ironically, stripping away redundant or ineffective controls can oftentimes improve the control structure while reducing processing costs. A couple of tips:

*Tip* – The best controls are built in rather than bolted on. Controls work best when they are part of operational oversight. For example, analytical processes like comparison of business results with meaningful benchmarks can be part of effective operational oversight. If done at the right level of precision, these analytical procedures can also be effective controls.

*Tip* – By automating controls a company can improve control reliability and reduce processing costs. Generally, this is achieved by designing around existing software functionality.

## **ASSESSMENT 3 – CORPORATE CULTURE**

Most people think of controls as activities that occur along a business processing stream. They are right. However, cross-company policies that set norms for how employees are expected to behave and work together have a significant impact on the effectiveness and reliability of the control structure. In fact, the impact of corporate culture can be even more significant than the design of processing controls, and it is often overlooked as a place to devote significant attention. Examples of cultural controls include communication of core values, hiring practices, internal communication, employee development and incentives. A significant resource for understanding and evaluating cultural controls is COSO's supplemental guid-

“Optimizing business processes, controls and corporate culture can unlock enterprise value.”

ance for smaller enterprises (*Internal Control over Financial Reporting—Guidance for Smaller Public Companies*, found at [coso.org/publications](http://coso.org/publications)). Evaluating and improving these controls can have a pervasive impact on the control maturity of a company.

We generally look at about 85 different key attributes of a company's internal environment that can be benchmarked against attributes found in companies as they move up the spectrum of control maturity. We then assess logical steps a company can take to improve control maturity, some of which can be implemented now and some which can be rolled out as the company continues to mature.

**ASSESSMENT 4 –**

**IT GENERAL CONTROLS**

Depending on a company's level of dependence on technology systems, the need for IT controls can vary greatly. However, in every company, there are two IT controls that should be evaluated: change controls and user access controls.

Simply stated, change controls help ensure changes in a production system have been properly approved, developed, tested and validated. User access controls isolate information access and enable a company to properly segregate incompatible employee duties. An often-used guide for evaluating these controls is published by ISACA ([isaca.org](http://isaca.org)) titled *IT Control Objectives for Sarbanes-Oxley 2<sup>nd</sup> Edition*.

We generally evaluate a company's control structure against these and other established benchmarks and develop steps to remediate control deficiencies.

**UNLOCK ENTERPRISE VALUE**

Optimizing business processes, controls and corporate culture can unlock enterprise value. The four key assessments outlined above can help a com-

pany to realize this value.

With proper planning and focus these assessments can be done in a cost-effective manner, and the benefits can be enormous. ■



**MICHAEL C. KNOWLES –  
BUSINESS CONSULTING PARTNER**

Mike is the partner in charge of the Services to Businesses Group for Frank, Rimerman + Co. LLP. He also leads the firm's Consulting and Business Valuation practices, where he oversees the delivery of business management consulting, risk management consulting and business valuation services. Prior to leading these practices, Mike was the partner in charge of the firm's Assurance and Advisory practice. Mike has 29 years of public accounting expertise, including 25 years as an audit partner.

Mike was a significant contributor to the book, *How to Comply with Sarbanes-Oxley Section 404* (now in its third edition) and served on the AICPA

Task Force in 2006 and 2007 to develop a practice aid for implementation of the Risk Assessment standards. He is a CPA and is an Accredited Senior Appraiser in the American Society of Appraisers. Mike served as the Chairman of the AICPA National Advanced Accounting and Auditing Technical Symposium from 2001 to 2005. He is the founding member of the Fair Value Forum, a group of business valuation professionals dedicated to elevating the practice of valuation work performed for financial reporting purposes. Mike is also Chairman of the Young Life Africa Regional Committee. He earned a Bachelor of Science in Business Economics from the University of California, Santa Barbara.



**Frank, Rimerman Consulting**

business management consultants  
a division of Frank, Rimerman + Co. LLP

899 Adams Street Suite E, St. Helena, CA 94574  
707-967-5305 • [www.frankrimerman.com](http://www.frankrimerman.com)

# Limit your risk from IRS winery audits over 'LIFO' inventory pool issues

Not since the controversy surrounding the Internal Revenue Service's new Uniform Capitalization (UNICAP) rules in 1986 has there been such a stir among Napa and Sonoma county wineries. The current brouhaha focuses on potential IRS policy changes that surfaced during a recent spate of winery audits among those using the LIFO (Last-In-First-Out) accounting method.

When UNICAP became effective, LIFO cost layers used to determine the value of inventories were required to be restated to determine taxable income — as if UNICAP had been in place since the time that LIFO was elected by the winery. These changes were part of formal IRS rule-making procedures announced a year in advance, and firms had time to make necessary adjustments.

Recently, however, the IRS has challenged the LIFO accounting process by trying to determine whether wineries are properly valuing ending wine inventories and defining their dollar-value LIFO "items" narrowly enough. In other words, the IRS wants to expand the definition of what should be included in the inventory pool.

These new audits are not based on public IRS policy announcements or founded on any solid rationale linked to official tax code changes, but they have cost Northern California wineries hundreds of thousands of dollars in legal, accounting and related expenses.

More than two-dozen wineries have received IRS audit notices, and at least two wineries have elected to settle without a court battle. At the same time, wineries

and professional service organizations have come together to seek a long-term solution.

"We are working with the LIFO Repeal Coalition, Congressman Mike Thompson's office and tax experts from 24 CPA firms to address this problem, such as Greg Scott with PricewaterhouseCoopers and Leslie Schneider of Ivin, Phillips & Barker in Washington, D.C.," said Kevin S. Alfaro, partner with G&J Seiberlich & Co. LLP.

"This informal group is trying to schedule meetings with the IRS in an effort to seek a compromise and to agree upon an appropriate definition of LIFO items. Our goal is to prevent further disruption of the wine industry and to convince the IRS to step back and reconsider what they are doing."

## BEHIND THE AUDITS

Mr. Alfaro and others believe that the Obama Administration wants to put an end to the LIFO accounting method in order to raise additional revenue (potentially billions in LIFO reserves) and reduce the federal deficit. The government is zeroing-in on companies such as wineries, auto dealerships, oil companies, the tobacco industry, food producers and others to analyze varying cost structures associated with each item they produce and to look for inappropriate uses of LIFO.

"Rather than first conducting a wine industry study and then establishing new policy based on traditional rule-making procedures followed by a public document announcement, the IRS is aggressively auditing wineries without published legal authority that would provide a basis for

their attempts to enforce changes, mandate revaluations and assess penalties that no one saw coming."

The government is currently conducting a research study of North Coast California wineries to gather information, however, this study is in progress and no official findings or proposed tax adjustments have been announced.

## RATIONALE FOR LIFO

For decades many wineries have elected to use LIFO to minimize the effects of inflation and cost increases, realize tax savings and improve cash flow by expensing inflation build up in inventory in order to achieve a better balance between costs and revenues. The income tax advantage of LIFO is obvious: a reduction in current income, leading, generally, to a reduction in current income tax.

Until now, the LIFO pool index typically included just a few categories, such as bottled wine, bulk wine and packaging materials, expressed in both base period cost and current period cost. These items are added, and the total current cost is then divided by the total base year cost to arrive at the current year index. The index is used to value an increment in the LIFO inventory. The IRS is now saying these few items are too narrow in scope and distort income.

According to Mr. Alfaro, the government is saying that the wine industry has been taking unfair advantage of the LIFO process by treating all wine as if it were a homogeneous product without breaking out wine pool costs by each varietal, the geographical appellation, purchased versus grown grapes, the length of aging, and

packaging differences. He says the IRS wants wineries to distinguish between different wines based on differing costs to produce them and other criteria.

“The amount and types of varietals used in wine blends may have changed over time, so it would be very difficult, if not impossible, to recalculate the value of each element in the product mix back to the year LIFO was adopted.”

#### AUDIT RISK PROTECTION

Mr. Alfaro estimates that 25 percent or more of his firm’s winery clients currently use LIFO and are at risk of an IRS audit. He says that one way for wineries to get audit protection is by proactively filing special forms required to change accounting methods before receiving an IRS letter.

“Our job is to help our winery clients navigate through this period of increased IRS activity and to show them how they can mollify audit consequences by taking pre-emptive measures. By filing a change in the method of accounting, a winery’s existing LIFO reserve can be locked in and an audit can be limited or put on hold (so long as the filing is postmarked before the date on the IRS audit notification letter), giving the winery a much lower cost option to litigation,” he said. “An accounting method filing change costs a few thousand dollars compared with the higher cost of protracted legal action and possible additional taxes, interest and penalties.”

Once an audit notification letter is received, there is little that a winery can do except defend what it has done. During the IRS initial interview and subsequent document comparative analysis phases to follow, having detailed documentation on each product is essential, as well as having information about each product’s composition and use along with inventory cost work papers.

Winery representatives must also be able to show how long LIFO has been used, the consistency of the product mix,

changes that have been made over the years as well as the cost structure that has been applied. It is important to identify cost disparities from one product to another and whether or not there have been any distortions since the beginning of the LIFO accounting method.

“G&J Seiberlich & Co. has been in the Napa Valley serving the wine and vineyard industries for 60 years. If you have any questions regarding LIFO or other tax and accounting matters, please give us a call. We would be happy to discuss your options,” Mr. Alfaro said. ■

Kevin S. Alfaro, 43, is a partner with the Certified Public Accounting firm of G&J Seiberlich & Co. LLP. He earned a bachelor’s degree in accounting and business management at Sonoma State University and later completed a master’s degree in taxation at Golden Gate University. Mr. Alfaro is a member of the American and California Institutes of CPAs and is currently a board member of Napa Community Bank, the Napa Wine Library and the St. Helena Boys and Girls Club. Prior to joining the company, he was a tax manager for Ernst & Young and PricewaterhouseCoopers in Sacramento and San Francisco.



G&J Seiberlich & Co. LLP is the oldest full-service CPA firm in Napa Valley and the first to specialize in many of the industries that make the region unique. Founded in 1949, the company is currently celebrating 60 years in business. With more than 50 employees and offices in Napa and St. Helena, G&J Seiberlich & Co.’s accountants serve over 2,500 clients and are regarded as experts in the financial issues facing the North Bay’s key industries including wine, viticulture and agriculture, construction, health care and other professions.



G&J Seiberlich & Co. LLP  
CERTIFIED PUBLIC ACCOUNTANTS

3264 Villa Lane, Napa, CA 94558  
707-224-7948 • Fax 707-224-7940  
1344 Adams Street, St. Helena, CA 94574  
707-963-9494 • Fax 707-963-1058  
www.gjscollp.com

# 2009 BUSINESS JOURNAL COVERAGE

## ACCOUNTING AND LAW

*Powerful marketing tools that will put you in front of the Business Journal's premier readership of 24,000-plus business owners and top executives.*

*The Business Journal provides a comprehensive look at developing trends, innovations, legislation, newsmakers and their impact on the law industry in the North Bay.*

LAW	ISSUE/EVENT DATE	AD DEADLINE
Property & Construction Law Special Report	August 3	July 20
Business Law Special Report	September 21	September 7
Legal/Acct. Business Succession Planning Report	October 5	September 21
List: Legal Resources for the Wine Industry	October 19	October 5
Estate & Tax Planning Special Report	October 26	October 12
Law: Green Practices Special Report	November 2	October 19
Laws that Impact Business Special Report	November 30	November 16
List: Business Legislation	November 30	November 16
Special Pub: 2010 Book of Lists	January 2010	October 14

# 42%

NUMBER OF  
NORTH BAY  
BUSINESS JOURNAL  
SUBSCRIBERS  
WHO INFLUENCE  
LEGAL  
DECISIONS

*The Business Journal provides a comprehensive look at developing trends, innovations, legislation, newsmakers and their impact on the accounting industry in the North Bay.*

ACCOUNTING	ISSUE/EVENT DATE	AD DEADLINE
List: Accounting Resources for the Wine Industry	August 24	August 10
Accounting Special Report	September 7	August 24
Legal/Accounting Business Succession Planning	October 5	September 21
Estate & Tax Planning Special Report	October 26	October 12
Banking, Finance & Wealth Mgmt. Special Report	November 2	October 19
List: Accounting Firms	November 9	October 26
Special Pub: 2010 Book of Lists	January 2010	October 14

# 50%

NUMBER OF  
NORTH BAY  
BUSINESS JOURNAL  
SUBSCRIBERS  
WHO INFLUENCE  
ACCOUNTING  
DECISIONS

North Bay  
**Business Journal**  
NORTH SAN FRANCISCO BAY AREA, SONOMA, NAPA AND MARIN COUNTIES

Contact your sales representative today and find out how you can add power and impact to your media plan by being a part of these Business Journal publications and events.  
**707-521-5270 • FAX 707-521-5269 • www.NorthBayBusinessJournal.com**





## a perfect blend

The new hybrid of big firm  
know how and small firm know you.

The knowledge to guide your wine business to the next level. And the insight to anticipate your specific needs.

That's Farella. We're ushering in a new era where legal capabilities and creativity work together to maximize performance.

To help perfect your business in all its complexity, contact Farella.

---

SAN FRANCISCO ST. HELENA 707.967.4000 [www.fbm.com](http://www.fbm.com)



FARELLA BRAUN + MARTEL LLP

# DICKENSON PEATMAN & FOGARTY

WORLD CLASS LAW FIRM - WINE COUNTRY LOCATIONS



Providing sophisticated legal services to businesses and individuals in the North Bay for over 40 Years.

## Areas of Practice:

- \* Alcohol Beverage
- \* Business
- \* Environmental Compliance
- \* Intellectual Property
- \* Labor & Employment
- \* Land Use Regulation
- \* Litigation
- \* Real Property
- \* Trusts & Estates

### Napa County

809 Coombs Street  
Napa, CA 94559

T: 707.252.7122

F: 707.255.6876

### Sonoma County

50 Old Courthouse  
Square, Suite 200  
Santa Rosa, CA 95404

T: 707.524.7000

F: 707.546.6800