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## DAVID N. REED ENDOWED MEMORIAL SCHOLARSHIP FUND AT SOUTHERN METHODIST UNIVERSITY



This scholarship is being established in memory of David N. Reed, a founding partner of Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P., who died on December 31, 2013. For over 30 years, David counseled his clients on a wide array of legal issues while practicing primarily Corporate and Securities Law.

David was born and raised in Fort Worth, Texas. He received his B.A. from the University of Texas at Austin in 1971 and his J.D.

from Southern Methodist University School of Law in 1974. During law school, he was the recipient of the Russell M. Baker Moot Court Award.

David was a member of the American and Dallas Bar Associations. He was a Life Patron Fellow of the Dallas Bar Foundation and a member

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## IRS CRIMINAL INVESTIGATION CURRENT INITIATIVES UPDATE

BY MICHAEL A. VILLA, JR., J.D., LL.M. AND AARON P. BORDEN, J.D., CPA

### IRS CI FOCUSED ON TOP INVESTIGATIVE PRIORITIES IN 2013

The IRS Criminal Investigation (CI) recently released its 2013 Annual Business Report. CI is the division of the IRS responsible for criminal investigations of the Internal Revenue Code, and a review of its Annual Business Report provides insight into the IRS's criminal priorities, funding and new initiatives.

### IRS CRIMINAL INVESTIGATION ACHIEVES 25.7-PERCENT INCREASE IN NUMBER OF CONVICTIONS IN 2013 DESPITE CONTINUING DECLINE IN THE STAFFING LEVELS

Like most of the IRS, CI has seen steady decline in staffing since 2009.<sup>1</sup> In fact, the number of investigative agents employed by CI in 2013 was 5.4 percent below 2012 levels and nearly 10 percent below 2009 levels.<sup>2</sup> Despite decline in investigative agents, CI achieved a 25.7 percent increase in the number of convictions in 2013 compared to 2012.<sup>3</sup> In

addition, CI completed 12.5 percent more cases in 2013 than in 2012 and increased the number of cases recommended for prosecution by 17.9 percent.<sup>4</sup>

### IDENTITY THEFT REMAINS TOP PRIORITY FOR IRS CRIMINAL INVESTIGATION

Identity Theft Fraud remained CI's highest priority in 2013.<sup>5</sup> CI opened 66 percent more Identity Theft investigations in 2013 than it opened in 2012.<sup>6</sup> In addition, CI expanded its Law Enforcement Assistance Program on Identity Theft nationwide in March of 2013.<sup>7</sup> The Law Enforcement Assistance Program allows local law enforcement agencies to obtain a suspected identity theft victim's tax records with the victim's written consent.<sup>8</sup> A pilot version of the program began in April of 2012 in Florida and was expanded to nine additional states in October of 2012.<sup>9</sup> CI also coordinated an "identity theft sweep" in January 2013 that yielded 734 enforcement actions in 2013.<sup>10</sup>

The Annual Business Report indicates that there is no identity theft case that CI will not pursue. The report highlights an identity theft conviction in 2013 that

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of the State Bar of Texas Business Law Section and served on the Securities Law Committee.

David was a thoughtful, supportive and patient person and a caring listener. He lived his life guided by the principles of kindness and forgiveness. David was a very respected attorney and was viewed as an extremely nice person by his Partners, his business associates and his many close friends. He also loved to teach and pass on his knowledge, both legal and non-legal. This scholarship is established to honor his life and carry on his name in perpetuity.

The purpose of the Fund shall be to provide scholarships for full-time law students attending the Dedman School of Law who have demonstrated a financial need with a preference given to students ranking in the top 25% of his or her class.

Contributions will be matched 100% by the Dedman Foundation if they are received by no later than November 30, 2014. To date, we have received many significant contributions, for which we and David's family are very grateful.

If you would like to join us in honoring David's life, please mail your contribution check, payable to SMU and noted for the fund, to Robert Don Collier, 901 Main Street, Suite 3700, Dallas, Texas 75202 and please make sure we receive your contribution before November 30, 2014.

Further, if you would like to review the fund agreement, please contact Susan House by phone, 214.749.2411 or by email at shouse@meadowscollier.com. If you have any questions, please contact Bob Collier at 214.744.3700.

We thank you in advance for your consideration of this wonderful way of honoring David. Contributions in any amount will be appreciated.

involved only 13 victims.<sup>11</sup> And, on the other end of the spectrum, the report also highlights the successful prosecution of a case involving more than 1,000 false tax returns claiming over \$1.7 million in fraudulent tax refunds.<sup>12</sup>

## IRS CI MAKES SIGNIFICANT CHANGES TO THE REMAINDER OF THE IRS'S INVESTIGATIVE PRIORITIES INCLUDING TWO NEW PRIORITIES IN 2013

CI made significant changes to its investigative priorities in 2013 including two new priorities in 2013<sup>13</sup> CI added Return Preparer Fraud & Questionable Refund Fraud and the Voluntary Disclosure Program and removed Money Laundering from its list of investigative priorities.<sup>14</sup> Return Preparer Fraud & Questionable Refund Fraud made its debut as CI's second highest priority.<sup>15</sup> While Offshore Tax Evasion and Tax Treaty Cases no longer appear on the CI's list of investigative priorities, they are arguably encompassed in the third highest priority International Tax Fraud.<sup>16</sup>

## IRS CRIMINAL INVESTIGATION FOCUSES ON IDENTITY THEFT AND QUESTIONABLE REFUNDS IN 2013

In 2013, CI focused its resources on its highest priority, Identity Theft, and the Questionable Refund portion of its second highest priority. CI reported that it initiated 1492 new Identity Theft investigations in 2013 compared to 898 in 2012, which represents a 66-percent increase.<sup>17</sup> Similarly, CI reported that it initiated 1513 new Questionable Refund investigations in 2013 compared to 921 in 2012, which represents a 64-percent increase.<sup>18</sup>

However, the growth in the number of Identity Theft and Questionable Refund cases appear to have resulted from a shift of resources away from the Return Preparer portion of its second highest priority and CI's other investigative priorities. CI reported that it initiated 309 new Return Preparer investigations in 2013 compared to 443 in 2012 which represents a 30-percent decrease.<sup>19</sup>

The Annual Business Report does not provide the detail on all of CI's investigative priorities. Nevertheless, by subtracting the information above from the total new cases initiated in 2013 and 2012 respectively, the remaining number of cases in each year can be determined. This calculation indicates that CI likely reduced the number of cases initiated involving its other investigative priorities by 30 percent. Table 1 summarizes the computation.

**Table 1**

	2012	2013	Change
Total Investigations Initiated	5125	5314	4%
Identity Theft Investigations Initiated	898	1492	66%
Questionable Refund Investigations Initiated	921	1513	64%
Return Prepare Investigations Initiated	443	309	(30%)
All Other Cases Initiated	2863	2000	(30%)

## TECHNOLOGICAL IMPROVEMENTS ALLOW CI TO DO MORE WITH LESS

CI closes its annual report with a discussion of the improvements it made to Technology Operations & Investigative Services in 2013.<sup>20</sup> While use of data analysis by the IRS is not a new development, the IRS, and CI specifically, appear to finally be implementing 21st century technology.<sup>21</sup> CI upgraded its operating system to Win-7 and began implementation of a new digital evidence management

system that it expects to complete in 2014.<sup>22</sup> Hopefully, these improvements will allow quicker resolution of client investigations.

## IRS CRIMINAL INVESTIGATION OUTLINES INTERNATIONAL TAX FRAUD PRIORITIES FOR THE FUTURE

The future of CI's investigative priorities regarding international tax fraud may be gleaned from the February 26, 2014 report from the U.S. Senate's Permanent Subcommittee on Investigations, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts*.<sup>23</sup> The report sets forth a number of factual findings based on the Subcommittee's multi-year investigation, including a finding that U.S. law enforcement in the area remains "lax" and has failed to prosecute more than a dozen Swiss banks that facilitated U.S. tax evasion and failed to take legal action against thousands of U.S. persons whose names and hidden Swiss accounts were disclosed by UBS.

The report set forth five broad recommendations, summarized below.

- **Improve Prosecution of Tax Haven Banks and Hidden Offshore Account Holders.** DOJ should use available U.S. legal means, including enforcing grand jury subpoenas and John Doe summons in U.S. courts, to obtain the names of U.S. taxpayers with undeclared accounts at tax haven banks. DOJ should hold accountable tax haven banks that aided and abetted U.S. tax evasion, and take legal action against U.S. taxpayers to collect unpaid taxes on billions of dollars in offshore assets.
- **Increase Transparency of Tax Haven Banks That Impede U.S. Tax Enforcement.** U.S. regulators should use their existing authority to institute a probationary period of increased reporting requirements for, or to limit the opening of new accounts by, tax haven banks that enter into deferred prosecution agreements, non-prosecution agreements, settlements, or other concluding actions with law enforcement for facilitating U.S. tax evasion, taking into consideration repetitive or cumulative misconduct.
- **Streamline John Doe Summons.** Congress should amend U.S. tax laws to streamline the use of John Doe summons procedures to uncover the names of taxpayers using offshore accounts and other means to evade U.S. taxes, including

by allowing a court to approve more than one John Doe summons related to the same tax investigation.

- **Close FATCA Loopholes.** To obtain systematic disclosure of undeclared offshore accounts used to evade U.S. taxes, the U.S. Treasury and IRS should close gaping loopholes in FATCA regulations that have no statutory basis, including provisions that allow financial institutions to ignore account information stored on paper, and allow foreign financial institutions to treat offshore shell entities as non-U.S. entities even when beneficially owned and controlled by U.S. persons.
- **Ratify Revised Swiss Tax Treaty.** The U.S. Senate should promptly ratify the 2009 Protocol to the U.S. Switzerland tax treaty to take advantage of improved disclosure standards.

## BITCOIN, AND OTHER VIRTUAL CURRENCIES, WILL LIKELY BECOME A FOCUS OF IRS CRIMINAL INVESTIGATION IN THE FUTURE

Currently, taxpayers do not need to report Bitcoin balances on an FBAR.<sup>24</sup> However, the IRS has warned taxpayers that this position could change in the future.<sup>25</sup> CI has identified virtual currencies like Bitcoin as a medium for use in money laundering and other financial crimes.<sup>26</sup> In an attempt to stay ahead of the issue, CI and other law enforcement agencies have formed a Virtual Currency and Emerging Threats group to track virtual currency trends.<sup>27</sup>



*Michael A. Villa, Jr. is a partner whose practice concentrates on resolving federal tax controversies and white collar crime such as securities, tax and bank fraud. He represents individuals, closely-held businesses, and large corporations in IRS audits, appeals, and litigation. Mr. Villa received his LL.M. in Taxation from New York University of Law.*

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### ENDNOTES

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\* Special thanks to Jason Freeman, J.D., CPA, for his contribution on this update.

<sup>1</sup> IRS CI Fiscal Year 2013 National Operations Annual Business Report-Staffing, at 3, available online at [www.irs.gov/pub/foia/lg/ci/REPORTfy2013-ci-annual-report-02-14-2014.pdf](http://www.irs.gov/pub/foia/lg/ci/REPORTfy2013-ci-annual-report-02-14-2014.pdf).

<sup>2</sup> Id.

<sup>3</sup> Id. Accomplishments-Overall Fiscal Year 2013 (FY 2013) Investigation Statistics, at 2

<sup>4</sup> Id.

<sup>5</sup> Id. Investigative Priorities, at 2.

<sup>6</sup> Id. Identity Theft, at 10.

<sup>7</sup> Id., at 8.

<sup>8</sup> Id.

<sup>9</sup> IRS Expands Law Enforcement Assistance Program on Identity Theft to 50 States; Victim Assistance and Criminal Investigations Grow, IR-2013-34 (Mar. 28, 2013).

<sup>10</sup> Id.

<sup>11</sup> IRS CI Fiscal Year 2013 National Operations Annual Business Report-Identity Theft, at 9.

<sup>12</sup> Id., at 8.

<sup>13</sup> Id. Investigative Priorities at 2; IRS CI Fiscal Year 2012 National Operations Annual Report - Investigative Priorities, at 3.

<sup>14</sup> IRS CI Fiscal Year 2013 National Operations Annual Business Report-Investigative

Priorities, at 2.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id. Identity Theft, at 10.

<sup>18</sup> Id. Questionable Refund Program, at 13.

<sup>19</sup> Id. Return Preparer Program, at 11.

<sup>20</sup> Id. Technology Operations and Investigative Services, at 35.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Available online at [www.hsgac.senate.gov/subcommittees/investigations/hearings/offshoretax-evasion-the-effort-to-collect-](http://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshoretax-evasion-the-effort-to-collect)

unpaid-taxes-on-billions-in-hidden-offshore-account.

<sup>24</sup> IRS: No Bitcoin Reporting on FBARs for This Filing Season, but Future Changes Possible, Allison Bennet, 10B DTR G-3, June 5, 2014.

<sup>25</sup> Id.

<sup>26</sup> IRS CI Fiscal Year 2013 National Operations Annual Business Report — Money Laundering and Bank Secrecy Act (BSA), at 26.

<sup>27</sup> Id.

# VOLUNTARY DISCLOSURES AND STREAMLINED RELIEF

BY JASON B. FREEMAN, J.D., CPA

The Internal Revenue Service recently announced major changes to its existing Offshore Voluntary Disclosure Program. In doing so, it again raised the stakes for many taxpayers with undisclosed foreign accounts. For some, the changes provide welcome relief that may make the prospect of disclosing their account(s) easier to swallow — and even less costly. For others, it reinforces the message that time is of the essence, a theme the government underscored as it rolled out the changes, once again reminding taxpayers that it may “decide to end the program entirely at any time.”<sup>1</sup>

The Service’s offshore voluntary disclosure programs have seen tremendous success, bringing forward more than 50,000 Americans and infusing over \$6.5 billion in taxes, penalties, and interest back into federal coffers over the past five years. But they have also met with their fair share of criticisms — one-size-fits-all penalty regimes, a lack of flexibility, and overly harsh consequences for some. The new changes represent the government’s most recent attempt to address some of these criticisms and to reinforce its mantra that now is the time to come forward and disclose.

## A WHOLE NEW WORLD

The world is rapidly changing, and the risk of detection for those with undisclosed accounts is growing every day. The past five years have seen unprecedented changes marked by the fall of Swiss bank secrecy, the rise of FATCA, and an increasingly global push for cross-border transparency. These changes will translate into more prosecutions and increased government momentum.

The Foreign Account Tax Compliance Act, also known as “FATCA,” is at the forefront of the government’s attack on undisclosed offshore accounts. FATCA was part of the 2010 HIRE Act, though its provisions were set for delayed and phased-in implementation. The first wave of disclosure obligations and

withholding tax went into effect on July 1, 2014, and the effects will soon be seen.

FATCA requires foreign financial institutions to report foreign accounts held by U.S. persons to the United States government or incur a 30-percent withholding tax on investment income received from the United States. As a result, foreign financial intermediaries will soon be reporting many, many more accounts to the IRS.

FATCA’s rollout has seen a growing number of countries sign on to information-exchange agreements with the United States. Over the past several years, the United States has entered into many Intergovernmental Agreements (“IGAs”) with other countries, providing for the streamlined exchange of tax information. The IRS now has 43 IGAs in place, and has reached agreements in substance with another 59 countries.<sup>2</sup> And it now has a network of more than 140 tax treaties, tax information exchange agreements, and Mutual Legal Assistance Treaties and Agreements with over 90 jurisdictions.<sup>3</sup>

These agreements have made cross-border tax transparency a real possibility. That transparency greatly increases the risk of detection for those with undisclosed accounts. And that means that more account holders who are still on the fence should consider a proactive approach to disclosure — either through the Offshore Voluntary Disclosure Program or, where applicable, the streamlined filing compliance procedures.

## THE OFFSHORE VOLUNTARY DISCLOSURE PROGRAM

The current Offshore Voluntary Disclosure Program was introduced in 2012 and is the IRS’s third offshore disclosure initiative in the past five years. The program was introduced following the successes of the IRS’s 2009 and 2011 programs which,

themselves, built on a similar, though more limited, 2003 initiative.

Generally, the OVDP allows a taxpayer with undisclosed foreign accounts to come forward and disclose their accounts in exchange for reduced penalties and a promise that the government will not prosecute them criminally. It is open to individuals as well as entities, such as corporations, partnerships, and trusts. For those account holders facing the threat of civil penalties or criminal exposure the possibility of making a voluntary disclosure may offer a welcome path to becoming compliant.

A citizen with an undisclosed account faces potential civil penalties, including a FBAR penalty that can range up to the greater of \$100,000 or 50 percent of the account balance during each year that it is undisclosed, as well as various tax penalties, including fraud penalties equal to 75-percent of unreported income. Recent case law has generally supported the imposition of penalties exceeding the balance of the undisclosed account, despite protestations that such harsh penalties violate the Eighth Amendment’s prohibition against excessive fines.

Taxpayers with undisclosed offshore accounts also run the risk of criminal prosecution. Criminal prosecutions are on the rise and, just this year, the Senate Permanent Subcommittee on Investigations pushed the Department of Justice to initiate more prosecutions, as it called on the DOJ “to obtain the names of U.S. taxpayers with undeclared accounts at tax haven banks” and to “take legal action against” them.<sup>4</sup> Possible criminal charges for those who do not report offshore accounts include charges for tax evasion and the filing of a false return. Willfully failing to file an FBAR and filing a false FBAR are also separate violations subject to criminal penalties, including up to 10 years imprisonment.

Taxpayers who come in under the OVDP mitigate the risk of

criminal prosecution and limit their civil penalty exposure as well. Under the current OVDP, such taxpayers generally agree to pay an “offshore penalty” equal to 27.5 percent of the highest year’s aggregate value of “OVDP assets” during the period covered by the disclosure, along with any applicable failure-to-file, failure-to-pay, and accuracy-related penalties. Generally, a voluntary disclosure covers an eight-year period. Again, in exchange, the taxpayer receives assurances that the government will neither seek criminal prosecution nor impose the harsh civil penalties described above.

## KEY MODIFICATIONS

Effective July 1, 2014, the IRS introduced several key modifications to the current OVDP and streamlined filing compliance procedures.

## THE NEW 50-PERCENT PENALTY

The modifications introduce a new 50-percent offshore penalty if the taxpayer’s account was held at a foreign financial institution, or was established or maintained by a facilitator, that has been publicly identified as being under investigation or as cooperating with a government investigation. Once the foreign financial institution or facilitator has been publicly identified, the higher penalty applies. In other words, time is of the essence. The risk that a foreign financial institution will fall into one of these categories will only increase as FATCA takes effect.

## EXPANDED STREAMLINED RELIEF

The new provisions also expanded the IRS’s streamlined filing compliance procedures. The streamlined option under the original 2012 program was quite limited. It was available only to “low risk,” nonresident non-filers. The program offered such taxpayers the option of filing three years’ of delinquent returns and six years of FBARs if the tax return reported less than \$1,500 in additional tax due. In exchange, the foreign non-filer would not be subject to penalties.

With the new provisions, the streamlined filing procedures were expanded and modified to accommodate a broader group of U.S. taxpayers. The newly expanded streamlined provisions extend eligibility to U.S. taxpayers residing in the United States and eliminate the \$1,500 tax threshold. They are available to taxpayers who certify that their failure to report foreign financial assets and pay all tax due related to those assets did not result from willful conduct on their part. The streamlined program offers a significantly lower penalty than the OVDP, so for those who qualify, it offers a real incentive to become compliant at a greatly reduced price.

## TRANSITIONAL RELIEF

While the streamlined relief procedure is generally not available to taxpayers participating in the OVDP, there is a notable and limited exception: taxpayers in the OVDP who submitted their OVDP letter on or before July 1, 2014 and who do not yet have a fully-executed OVDP closing agreement may request treatment under the penalty terms available through the streamlined procedures. This transitional relief offers an opportunity for the astute advisor to potentially save some clients big dollars. But taking advantage of this transitional relief presents a few traps for the unwary, and should be done in consultation with counsel.

## CONCLUSION

The recent changes to the IRS’s OVDP and streamlined filing compliance program offer new opportunities for noncompliant taxpayers to come back into the system. While the stakes are rising for those with undisclosed offshore accounts, and the risk of detection is increasing in light of FATCA and a growing international commitment to cross-border tax transparency, there is still a window of opportunity for such taxpayers to come forward. The time to do so, however, is now.



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- <sup>1</sup> <http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised>. FAQ No. 1.
- <sup>2</sup> List of countries available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>.
- <sup>3</sup> See U.S. Government Accountability Office, *Tax Administration: IRS’s Information Exchanges with Other Countries Could Be Improved through Better Performance Information*, Report No. GAO-11-730 (Sept. 2011).
- <sup>4</sup> United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts*, Feb. 26, 2014, p. 7.

**READ AND FOLLOW JOSH UNGERMAN’S BLOG ON FORBES IRS WATCH.**

**THE LINK TO HIS LATEST BLOG IS:**

<http://www.forbes.com/sites/irswatch/2014/10/03/are-virtual-currencies-the-next-offshore-bank-account-for-tax-evaders/>



# EMPLOYERS WITH INDEPENDENT CONTRACTORS FACE ADDITIONAL EXPOSURE

BY BRIAN J. SPIEGEL, J.D. LL.M.

Whether a worker is an employee or independent contractor can be a difficult question, and with few bright-line rules it is an inherently subjective inquiry. As a result, businesses with independent contractors have always faced a certain amount of exposure, with the IRS performing employment tax audits and often taking the position that an employer has misclassified a worker as an independent contractor and therefore underpaid its employment taxes. And now, with the passage of the Affordable Care Act (ACA) and the upcoming implementation of the employer-shared responsibility payment, businesses face another significant category of misclassification exposure.

In the June 2014 issue of the Meadows Collier newsletter, Aaron Borden discussed the excise tax that “large employers” face beginning in 2015 if they fail to offer healthcare coverage to full-time employees.<sup>1</sup> In short, beginning in 2015, employers who had 100 or more employees for a certain amount of time in 2014 are required to offer healthcare coverage to 70% of their full-time employees. The penalty for failing to do so, set forth in Section 4980H, is 1/12 of \$2,000 times the number of full-time employees, less 30, for any month in which any full-time employee obtains subsidized coverage on the insurance exchanges.

Because potential liability for this assessable payment depends on the number of employees a business has and what percentage of its employees are offered coverage, reclassification of workers by the IRS is a significant concern. First, the reclassification of workers initially classified by an employer as independent contractors could push an employer into “large employer” status. Second, even if the business offered healthcare coverage to all of its employees, reclassifying workers could result in the business failing to meet the 70% coverage test (95% in 2016) once the reclassified workers are considered. For example, assume during 2014 ABC Inc. operates its business believing it has 95 full-time employees and 50 independent contractors. Assume further that in 2015 ABC Inc. offers each employee health insurance. If the IRS audits ABC Inc. and reclassifies 45 of the independent contractors, ABC Inc. becomes a large employer immediately subject to Section 4980H. Moreover, ABC Inc. would fail the 70% coverage test (140 employees x 70% = 98). If just one reclassified worker received a premium tax credit, the business would face a penalty in the amount of \$220,000, calculated by taking the number of full-time employees (140) less 30 and multiplying the result (110) by \$2,000. Keep in mind that the amount of the assessable penalty is determined based on the number of employees, not the number of reclassified workers who were not offered health coverage.

As this example shows, now is the time for businesses to make sure that they are comfortable with how they are classifying their workers.

## DETERMINING WORKER CLASSIFICATION STATUS

In regulations issued by Treasury earlier this year, the government made clear that the common law factors used by the IRS to decide whether a worker is an employee or independent contractor for employment tax purposes will also be used to determine worker classification status for purposes of the ACA. The determination of whether a worker is an employee is done on a case-by-case basis looking at the particular facts and circumstances. The IRS focuses on three general categories: behavioral, financial, and type of relationship.

### BEHAVIORAL

The ultimate question in this category is whether the business has the right to direct and control the worker. Fact and circumstances favoring an independent contractor relationship include: (1) the worker has the freedom to complete its assigned tasks in any way it deems appropriate; (2) the worker is able to set his own hours and work when and where he chooses; and (3) the worker rarely, if ever, has to report to a supervisor or manager.

However, if the following circumstances are present, an employer-employee relationship is more likely: (1) the worker receives instruction and training that the business expects the worker to use; (2) the worker has a set work schedule or a minimum number of hours that he must work; (3) the worker is required to perform his duties in an office or other set location; and (4) the business requires the worker to turn in reports or other documents describing the work performed, how it was performed, and what remains to be accomplished.

### FINANCIAL

The second category focuses on the expense side of the worker’s job — for what items is the worker responsible? For example, if the worker travels as part of his or her job duties, does the business reimburse the worker or offer a per diem? If so, this would weigh in favor of an employer-employee relationship. However, if the worker is required to purchase his or her own tools or materials to perform the job duties, this factor supports independent contractor classification. Likewise, if the worker incurs significant costs to maintain an office and is therefore not dependent on the business to provide a work space, this too supports independent contractor classification. Finally, the IRS considers whether the business covers certain costs, for example a license or insurance needed by the worker. If so, this factor points toward employer-employee status.

### TYPE OF RELATIONSHIP

The final category looks at the structure and duration of the work relationship. Here the IRS will examine whether there exists a contract describing the type of relationship. Note, however, that independent contractor agreements

are just one factor that the IRS considers. A contract stating that the worker will be treated as an independent contractor does not trump the other factors discussed. The IRS will also look to see what benefits, if any, are provided to the worker. For example, does the worker receive sick or vacation pay, the opportunity to participate in a retirement plan, or insurance? Receipt of these benefits would support an employer-employee relationship.

Other considerations in this category support an independent contractor arrangement. If the worker is authorized to hire a third party to perform the duties, this factor favors an independent contractor relationship. Additionally, if the worker is free to work for a competitor at the same time as he is performing services for the business in question, this fact likewise supports an independent contractor relationship.

## CONCLUSION

With the upcoming implementation of Section 4980H and the employer-shared responsibility payment, large businesses utilizing the services of independent contractors face significant exposure. In order to mitigate the exposure associated with worker misclassification, businesses that use independent contractors should review their current arrangements to determine if those workers have been properly classified.

<sup>1</sup> This article focuses on the relevant provisions of the ACA that will be in effect during 2015.



*Brian J. Spiegel is an associate practicing in the areas of Income Tax Litigation, White Collar and Government Regulatory Litigation, Estate and Gift Tax Litigation, and State Tax Planning and Litigation. Prior to joining the firm in 2012, Mr. Spiegel was a Law Clerk for The Honorable Juan F. Vasquez, United States Tax Court in Washington, D.C. from 2010-2012.*

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## THE IMPORTANCE OF ESTATE PLANNING FOR NONTAXABLE ESTATES

BY CHARLES J. ALLEN, J.D., LL.M.

In the wake of the American Taxpayer Relief Act of 2012 (ATRA), estate planning has seen a return to its genesis. At its core, estate planning is about making sure assets pass to the right people, at the right time, and in the right manner. For most estates, the tax tail no longer wags the dog due to historically high estate tax exemption amounts which have effectively eliminated the estate tax for all but a few estates. With tax no longer being the driving force behind estate planning, this article briefly highlights the important non-tax reasons for estate planning.

### RETAINING CONTROL

Individuals dying without a will lose all control over the disposition of their estate, and in doing so voluntarily cede this control to the state in which they reside. All states have intestacy laws which control where the assets of a deceased individual will pass without a Will. In Texas, how your property will pass under the intestacy laws depends on three factors: your marital status, the type of property (real or personal), and

the character of your property (separate or community). How property passes under the laws of intestacy is beyond the scope of this article, but suffice it to say it is highly unlikely that your intentions and those of the state of Texas will match.

### PLANNING FOR MINORS

#### 1. USE OF TRUSTS

What if property passes to a minor? Minors are not allowed to take legal title to property in Texas (or any other state). Property passing outright to a minor would necessitate a court appointing a guardian for the estate of the minor. This is an expensive and inefficient process that may be avoided by utilizing trusts for minor beneficiaries.

#### 2. MORE THAN JUST PROPERTY, WHAT ABOUT PEOPLE?

What happens to a decedent's minor child(ren)? If a minor child's parent fails to name a guardian of the person for the

minor, then the court will appoint a guardian. The closest ancestor is entitled to the appointment. This may create issues if both sets of grandparents or multiple siblings cannot agree who should have physical custody of the minor child(ren). By designating a guardian for your minor child(ren) in your Will, you can select who will care for your child(ren) when you are gone.

### PLANNING FOR INCAPACITY

We must plan for incapacity. Many of us live with the belief that it will never happen to us, but it happens and it needs to be planned for. We plan for incapacity through a set of documents designed to avoid the expensive and burdensome court appointment of a guardian to handle our affairs once incapacitated. Just as with minors, an incapacitated person requires a court appointed guardian to handle his or her affairs unless the proper powers of attorney are in effect. The following

*cont. on p. 8*

documents are used to plan for incapacity:

1. **Durable Power of Attorney:** appoints an agent to transact your financial affairs when incapacitated;
2. **Medical Power of Attorney:** appoints an agent to make medical decisions when you are unable to do so for yourself;
3. **Directive to Physicians (aka A Living Will):** declares your intent that medical treatment be either provided or withheld in the event you are terminally ill and unable to communicate your wishes; and
4. **HIPAA Release:** allows medical records to be accessed by your agent in the event of incapacity.

## ASSET PROTECTION PLANNING

Not only are trusts useful in the event assets pass to minors, but trusts can also protect assets passing to your beneficiaries from creditors, and in some instances the beneficiary

themselves. For example, a trust created to hold assets passing to a surviving spouse can provide creditor protection for the spouse while simultaneously allowing the deceased spouse to control where the assets go at the death of the surviving spouse. Trusts can be used to protect the assets passing to a child from divorcing spouses as well as protect the assets from waste by a spendthrift child.

## PROBATE AVOIDANCE PLANNING

Probating assets in multiple jurisdictions is expensive and time consuming, often causing delays in the transfer of legal title to heirs. The use of a revocable living trust to hold out-of-state real property can eliminate the need to go through probate in a state other than Texas.

## BUSINESS SUCCESSION PLANNING

Without a succession plan, business assets may end up in the wrong hands. Maintaining ownership and voting control in the proper hands is crucial to the long term success of a business. A and B may be best friends and may

have been in business together for 30 years, but A may not want to be in business with B's wife or B's children. Proper estate planning and the use of a Buy-Sell Agreement may prevent the business from passing into the wrong hands.

I hope this article has been helpful in highlighting the importance of estate planning for nontaxable estates. This article is just a brief overview of the issues that can arise when no estate planning is done and of the benefits estate planning can provide. Individuals that do not have an estate plan in place would do well to remember that not having a plan is a plan, it may be a bad plan but it is still a plan.



*Charles J. Allen is an associate practicing in the areas of estate planning and probate law, and federal income tax planning. After receiving his LL.M. in Taxation from New York University School of Law in 2012, he joined the firm. He is licensed to practice*

*law in Texas (2013), and in Mississippi and Tennessee (2012).*

*callen@meadowscollier.com*

## THE FIRM WELCOMED A NEW ASSOCIATE IN JULY 2014:

ZACHARY T. JONES



MR. JONES PRACTICES TAX LITIGATION. HE RELOCATED TO DALLAS FROM NEW ORLEANS. HE RECEIVED HIS J.D., *MAGNA CUM LAUDE*, FROM LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW IN 2011 AND HIS LL.M. IN TAXATION FROM NEW YORK UNIVERSITY SCHOOL OF LAW IN 2012. MR. JONES WAS NAMED TO THE 2014 LOUISIANA RISING STARS LIST AS PUBLISHED IN *LOUISIANA LIFE* AND *LOUISIANA SUPER LAWYERS MAGAZINE*.



# THE FIRM WELCOMED A NEW PARTNER IN MAY 2014:

RUSSELL F. COLEMAN



MR. COLEMAN HAS EXTENSIVE EXPERIENCE IN A BROAD RANGE OF CORPORATE AND SECURITIES MATTERS AND TRANSACTIONS, AND IN MEDIA LAW AND IN FINANCIAL MATTERS. PRIOR TO JOINING THE FIRM, MR. COLEMAN SERVED AS GENERAL COUNSEL OF BELO CORP. (NYSE: BLC, AND FORMERLY A FORTUNE 1000 COMPANY). PRIOR TO SERVING AS GENERAL COUNSEL TO BELO CORP., HE WAS A PARTNER WITH A LARGE LAW FIRM.

## FIRM ATTORNEYS RECEIVED THE FOLLOWING RECOGNITIONS THIS YEAR

- Nine Firm Attorneys were selected as 2014 Texas Super Lawyers: Chuck Meadows and Sarah Wirskye for White Collar Criminal Defense, Bob Collier, Trey Cousins, Joel Crouch, Josh Ungerman, David Colmenero, Charles Pulman, and Mike Villa for Tax
- Chuck Meadows was ranked in the Top 100 2014 Texas Super Lawyers in Texas and the DFW region
- Chuck Meadows, Bob Collier, Charles Pulman and Sarah Wirskye will be listed in the November 2014 issue of *Super Lawyers Business Edition*
- Eric Marchand, Mary Wood and Jason Freeman were selected as 2014 Texas Rising Stars by Super Lawyers
- Five Firm Attorneys were named in The Best Lawyers in America<sup>®</sup> 2015: Chuck Meadows in White Collar Criminal Defense and Tax Litigation and Controversy, Bob Collier in Tax Law and Tax Litigation and Controversy, Trey Cousins in Tax Litigation and Controversy and Joel Crouch and Josh Ungerman in Tax Law
- Bob Collier was also named the Best Lawyers<sup>®</sup> 2014-2015 Litigation and Controversy – Tax “Lawyer of the Year” in Dallas. Only a single attorney in each practice area, in each community, is named a “Lawyer of the Year.”
- Ten Firm Attorneys were selected as 2014 Best Lawyers in Dallas by *D Magazine*: Chuck Meadows, Trey Cousins, Joel Crouch, Josh Ungerman, Mike McCue, Charles Pulman, Steve Beck, Eric Marchand, Anthony Daddino and Matt Beard
- In October 2014, Alan K. Davis became a fellow of The American College of Trust and Estate Counsel (ACTEC)
- In the Sept./Oct. 2014 issue of *Today's CPA*, Jason B. Freeman was recognized as 1 of 20 TSCPA 2014 Rising Stars. TSCPA recognizes CPA members 40 years old and younger who have demonstrated innovative leadership qualities and active involvement in TSCPA, the accounting profession and/or their communities.

# UPCOMING SPEAKING ENGAGEMENTS

FOR COMPLETE SPEAKING ENGAGEMENT INFORMATION, PLEASE VISIT [WWW.MEADOWSCOLLIER.COM](http://WWW.MEADOWSCOLLIER.COM) AND CLICK ON THE "NEWS & EVENTS" TAB ON THE HOME PAGE.

## 11.07.14 | KANSAS CITY, MO

Heart of America Tax Institute

**JOSH UNGERMAN**

*THE EGG SHELL IRS EXAM:  
TIPS FOR SURVIVAL AND  
STRATEGIES FOR SUCCESS*

## 11.17.14 | AUSTIN

Austin Chapter/TSCPA  
Annual Tax Conference

**JOEL CROUCH**

*JUDICIAL UPDATE*

## 11.20.14 | WACO

Heart of Texas Estate Planning Council

**CHUCK MEADOWS & ALAN DAVIS**

*THE IMPORTANCE OF AND  
REQUIREMENTS FOR PORTABILITY  
ELECTIONS IN ESTATES OF ALL SIZES*

## 11.20.14 | SAN ANTONIO

TSCPA Tax Institute

**TREY COUSINS**

*IRS UPDATE: WHAT  
ARE THEY DOING NOW?*

**DAVID COLMENERO**

*THE YEAR OF THE TAXPAYER:  
A GROWING DIVIDE BETWEEN  
TEXAS COMPTROLLER POLICIES  
AND TEXAS COURT IS REFLECTED  
IN RECENT DECISIONS*

## 11.21.14 | LEDYARD, CT

New England IRS  
Representation Conference

**MIKE VILLA**

*WHAT TO DO WHEN THE IRS COMES  
CALLING: A NUTS AND BOLTS  
APPROACH TO IRS EXAMINATION*

## 11.21.14 | DALLAS

TSCPA Tax Institute

**TREY COUSINS**

*IRS UPDATE: WHAT  
ARE THEY DOING NOW?*

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TEXAS COMPTROLLER POLICIES  
AND TEXAS COURT IS REFLECTED  
IN RECENT DECISIONS*

## 12.01.14 | DALLAS

Dallas Bar Association  
Tax Section Monthly Meeting

**DAVID COLMENERO**

*RECENT JUDICIAL AND  
ADMINISTRATIVE DEVELOPMENTS  
IN TEXAS TAX COULD HELP  
IMPROVE THE BOTTOM LINE  
FOR MANY TAXPAYERS*

## 12.04.14 | HOUSTON

TSCPA CPE Expo

**MARY WOOD**

*PASSIVE ACTIVITY AND HOBBY LOSS  
LIMITATIONS: WITHSTANDING AN  
IRS ATTACK OF YOUR CLIENT'S  
OUTSIDE BUSINESS ACTIVITIES  
UNDER IRS SECTIONS 469 AND 183*

**JOEL CROUCH**

*WHAT IS HAPPENING  
TO TAXPAYERS IN COURT?*

## 12.05.14 | AUSTIN

UT Law 2014  
Stanley M. Johanson  
Estate Planning Workshop

**CHUCK MEADOWS**

*HANDLING THE SENSITIVE  
ESTATE TAX EXAMINATION*

## 12.05.14 | HOUSTON

TSCPA CPE Expo

**MATT BEARD**

*PROFIT AND LOSS ALLOCATIONS,  
DISTRIBUTIONS, AND OTHER KEY TAX  
PROVISIONS FOR PARTNERSHIP AGREEMENTS*

**TREY COUSINS**

*THEY'VE CHANGED CIRCULAR 230...AGAIN*

## 12.08.14 | SHREVEPORT, LA

Society of Louisiana CPAs' Tax Summit

**MIKE VILLA**

*UNDERSTANDING FATCA AND OTHER  
IRS COMPLIANCE PROGRAMS*

## 12.08.14 | SAN ANTONIO

TSCPA CPE Expo

**MARY WOOD**

*PASSIVE ACTIVITY AND HOBBY LOSS  
LIMITATIONS: WITHSTANDING AN IRS  
ATTACK OF YOUR CLIENT'S OUTSIDE BUSINESS  
ACTIVITIES UNDER IRS SECTIONS 469 AND 183*

**JOEL CROUCH**

*WHAT IS HAPPENING TO TAXPAYERS IN COURT?*

## 12.09.14 | SAN ANTONIO

TSCPA CPE Expo

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*PROFIT AND LOSS ALLOCATIONS,  
DISTRIBUTIONS, AND OTHER KEY TAX  
PROVISIONS FOR PARTNERSHIP AGREEMENTS*

**TREY COUSINS,**

*THEY'VE CHANGED CIRCULAR 230...AGAIN*

**12.11.14 | LAS VEGAS, NV**

ABA 31st Annual National Institute on Criminal Tax Fraud  
and the Fourth Annual National Institute on Tax Controversy

**CHUCK MEADOWS**

*ASK THE EXPERTS: TOP TIPS IN CRIMINAL TAX CASES*

**JOSH UNGERMAN**

*IT'S A SMALL WORLD, PART 1: OFFSHORE ACCOUNTS — TO VOLUNTEER OR NOT*

**12.11.14 | ARLINGTON, TX**

TSCPA CPE Expo

**MARY WOOD**

*PASSIVE ACTIVITY AND HOBBY LOSS LIMITATIONS: WITHSTANDING AN IRS ATTACK  
OF YOUR CLIENT'S OUTSIDE BUSINESS ACTIVITIES UNDER IRS SECTIONS 469 AND 183*

**BRIAN SPIEGEL**

*WHAT IS HAPPENING TO TAXPAYERS IN COURT?*

**12.12.14 | ARLINGTON, TX**

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*PROFIT AND LOSS ALLOCATIONS,  
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PROVISIONS FOR PARTNERSHIP AGREEMENTS*

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*THEY'VE CHANGED CIRCULAR 230...AGAIN*

**12.19.14 | NEW ORLEANS**

Society of Louisiana CPAs' Tax Conference

**STEVE BECK**

*LET'S MAKE A DEAL: FEDERAL INCOME TAX  
ISSUES IN PURCHASING AND SELLING  
BUSINESSES, INCLUDING STEPPED-UP BASIS*

**MIKE VILLA**

*UNDERSTANDING FATCA AND OTHER  
IRS COMPLIANCE PROGRAMS*

**01.15.15 | DALLAS**

State Bar of Texas Tax Section Leadership Academy

**JOEL CROUCH**

*CIRCULAR 230: OVERSIGHT  
OF THE TAX PRACTITIONER*

**JOSH UNGERMAN**

*HOT TOPICS IN IRS AUDITS AND INVESTIGATIONS*

**01.30.15 | CORPUS CHRISTI**

Corpus Christi Chapter/TSCPA Annual Tax Conference

**TREY COUSINS**

*FAMILY LIMITED PARTNERSHIPS*

**ALAN DAVIS**

*ESTATE AND GIFT TAX PLANNING*

**02.19.15 | LUBBOCK**

South Plains Trust and Estate Council

**ALAN DAVIS**

*ESTATE PLANNING — NAVIGATING  
THE POTHOLES AND SPEED BUMPS*

**04.21.15 | SAN ANTONIO**

San Antonio Estate Planners Council

**TREY COUSINS**

*TOPIC TBA*

**05.19.15 | DALLAS**

TSCPA 2015 Nonprofit  
Organizations Conference

**JOSH UNGERMAN**

*SURVIVING AN IRS EO AUDIT*

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