Winter 2007

Miller Canfield Hot~Po!nts

~ Climate change has far-reaching impact How will YOU be affected?

CLIMATE CHANGE
Mark J. Bennett, 248/267-3269

~ No Kidding

If you're 18 or over, you need a will

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~ Haste makes waste Beware of copy and paste!

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~ Are you a franchisor? Get ready for new disclosure rules

FRANCHISE & DISTRIBUTION
P. Rivka Schochet, 313/496-7636

~ Hello Chicago

We've opened an office in Chicago, right in the heart of the Loop!

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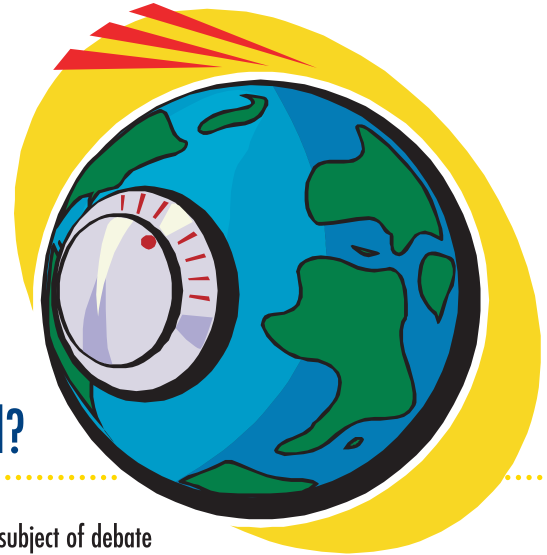

Climate change has far-reaching impact

How will YOU be affected?

The urgency of global climate change is certain to be a subject of debate for the foreseeable future. But its impact on financial institutions, insurance companies, and businesses — as well as regulators at every level of government — is well underway.

REAL PROPERTY
Financial institutions are factoring in climate change risks when they assess collateral and lend money — on both a transactional and portfolio basis. Insurance companies, too, are taking a harder look before underwriting real property.

MERGERS & ACQUISITIONS
Costs related to climate-change compliance are now increasingly incorporated into merger and acquisition transactions. Watch for due diligence procedures (now in an early evolutionary stage) to identify carbon-related liabilities, along with any positive impact associated with energy efficiency.

STEWARDSHIP POLICIES
More corporations and financial institutions are adopting environmental stewardship statements to reflect their beliefs, commitment, and actions related to operations and investments. Some of these policies could extend to relationships with vendors and customers.

KYOTO CATCH-UP
The Kyoto Protocol, adopted by many countries in 1997, has become the standard for contemporary climate-change regulation. Nations that embraced Kyoto now enjoy a head start in developing regulatory and transactional procedures that could serve as instructive models for the U.S.

GOING GREEN
Climate change is driving market demand for green buildings and sustainable development. Still, the definition of a green structure is far from clear. Currently the Leadership in Energy and Environmental Design (LEED) program, created by the U.S. Green Building Council, offers the most cogent guidelines for green designation.

DEVELOPMENT INCENTIVES
A carrot-and-stick regulatory approach is emerging at the local level. Reduced permit fees, accelerated permit turnaround, and tax credits or abatements are just some of the incentives currently offered.

continued on page 2

Climate Change is a HOT Topic.

To help our clients manage all the anticipated climate-related issues, we've launched an interdisciplinary Climate Change initiative. Turn to page 2 for news!

continued from page 1

LENDING OPPORTUNITIES

Because energy will consume an increasing percentage of revenue, it's taken into consideration when attaching value to an income-producing asset. A lender's ability to calculate the energy/net-operating-income nexus, apply it to a particular type of asset, and compare it to similar assets in that class, could identify strategies to reduce the energy impact on a particular type of asset—and increase lending opportunities in the process.

CARBON IMPACT

A carbon footprint—the measurement of an entity's carbon dioxide emissions based on consumption of purchased energy, direct emission output, supply-change efficiency, and several other quantifiable environmental factors—will become increasingly important in real estate and other business transactions. Once quantified, a Carbon Impact Assessment (CIA) can become a powerful negotiating tool for buyers, sellers, and lenders.

These are just a few issues connecting climate change and the law. For an in-depth analysis, see Mark Bennett's article. "The Evolution of Climate Change Due Diligence Standards" by contacting him, or visiting our Web site and clicking on Climate Change.

Where global climate change intersects with the law

What does climate have to do with the law? Plenty, as it turns out. That's why our firm is one of the first in this region to create a practice area dedicated to climate-change matters.

The Climate Change initiative includes attorneys in our environmental, real estate, corporate, public law, and finance groups—giving it a broad perspective and depth of understanding well suited to this dynamic field of law. We're especially pleased to have Mark J. Bennett aboard to coordinate this promising area.

Prior to joining Miller Canfield, he was managing partner at a private equity firm, structuring real estate development projects that utilized Brownfield redevelopment credits, tax increment financing, and other government incentives. His knowledge of environmental issues, and wide-ranging experience in real estate, due diligence, risk management, sustainable development, project finance, and government incentives, give him just the right talent mix to manage this multidisciplinary group.

Mark J. Bennett

Count on our capable Climate Change team to help you meet the challenges and make the most of all the opportunities ahead.

E or Paper Hot-Po!nts?

If you prefer reading new issues of *Hot Points* on line, just email us, silkworth@millercanfield.com, and give us your preferred online address.

~PERSONAL SERVICES
Brian R. Jenney
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NO KIDDING
If you're 18 or over, you need a will

Think only old folks or rich people need to think about an estate plan? Think again. Recent cases like Terri Schiavo or Anna Nicole Smith (not to mention all those young soldiers going off to battle) should serve as timely reminders that every adult should have an up-to-date plan in place. Here are a few tips to get you started.

What's an estate plan?

In general, a basic estate plan spells out your preferences for care and treatment should you become incapacitated; and the disposition of assets at the time of your death. An estate plan is made up of several documents that address those issues:

- Last will and testament
- General durable power of attorney
- Medical power of attorney
- Medical authorization and waiver
- Revocable living trust

How to begin

1. Ask yourself these questions ~
   - Who do I want to manage my finances if I become unable to handle them?
   - Who do I want communicating with my doctors and making medical decisions for me if I become incapacitated?
   - Who should make end-of-life decisions for me?
   - Who do I want to inherit my assets?
   - How and when should they inherit them?
   - Who should manage my affairs at the time of my death?
2. Discuss your estate plan and personal wishes with your family. It helps to have everyone on the same page.
3. Write down all your assets and update the list regularly. Keep this list with your estate documents, and let others know where they are.

Strategies for saving

1. The current federal estate tax ("death tax") exclusion amount is $2 million. If a couple's total assets exceed that amount, they should consider creating a trust with specific tax plans for both the husband and wife. Such a trust will allow them to pass up to $4 million to their children, free of estate tax.
2. The annual gift tax exclusion is currently $12,000 per person, per recipient. Thus, a married couple may give up to $24,000 a year to each of their children or other designated recipients. Making a gift of this kind is a simple way to reduce the size of an estate—and share in the pleasure of giving during a lifetime.
3. Other tax-saving strategies include paying a child's tuition or medical expenses directly to the provider, or giving money to charities.

Our Personal Services Group can help you get started—or discuss other tax strategies and estate planning options to enhance your existing directives. Call us if you'd like some assistance.

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~ FEDERAL TAX & EMPLOYEE BENEFITS
Christopher A. McMican
313/496-7922

Compliance deadline extended for nonqualified deferred compensation arrangements?

Maybe NOT.

If you're a lawyer, human resource professional, or compensation manager responsible for administering certain deferred compensation plans, take note. You might assume Internal Revenue Code 409A has extended the deadline for compliance. In fact, all nonqualified deferred compensation arrangements must still be identified, reviewed, and—in some cases—revised prior to December 31, 2007. Failure to do so could expose your organization and its employees to significant tax, interest, and penalties.

What is a "nonqualified deferred compensation" arrangement? Basically, it's a situation in which compensation is paid to an employee (including a rank-and-file employee) or to another service provider (such as a director or independent contractor) in a year following the year in which it was earned.

Nearly 400 pages in length, 409A was issued by the IRS in April as a means of tightening the requirements related to deferred distributions. The authorities stated that governing documents for nonqualified plans must be in compliance by January 1, 2008. As a result, many organizations began scrambling to inventory their nonqualified plans, employment agreements, severance packages, and more in preparation for a compliance review.

The confusion stems from a notice issued by the IRS in September. That notice (Notice 2007-78) moves the deadline to December 31, 2008, *for certain situations only*. Specific requirements still must appear in all governing plan documents by the end of 2007—including time periods for distribution, and form of payment for the deferred compensation in question.

Bottom line? Any organization that maintains an arrangement with any element of deferred compensation should continue with its review of those arrangements in order to make necessary compliance changes by December 31, 2007.

The IRS has indicated that a nonqualified deferred compensation plan is among the key executive compensation issues upon which an audit might focus. And there are severe penalties for failing to comply with 409A—including immediate tax on all vested, deferred compensation for prior years.

It's possible the IRS will consider a voluntary compliance program for violations, and the American Bar Association has recommended a delay in the complicated 409A regulations until January 1, 2009. But, as this issue of *Hot Points* goes to press, the rules stand.

For updates on 409A, visit our Web site, millercanfield.com, go to Client Alerts, and click on Federal Tax & Employee Benefits. Or, visit the IRS Web site, irs.gov/business/corporations. Of course, we welcome your calls, too.

Looking for Clues?

A few places where deferred compensation arrangements can be found

- Garden-variety executive supplemental retirement plans
- Excess benefit and top-hat plans
- Employment agreements
- Non-compete agreements
- Severance plans
- Bonus and incentive plans
- Stock option or other equity incentive plans
- Stock appreciation rights
- Phantom stock plans
- Director deferred compensation arrangements
- Post-retirement benefits (including post-employment healthcare or COBRA)
- Split-dollar life insurance arrangements

Viva VEBA!

An important benefit-funding option—the VEBA—is back in the news, thanks to recent state legislation and union negotiations with the Big Three. VEBAs (Voluntary Employees Beneficiary Association) are deserving of attention, since they may prove to be an extremely cost-effective solution for some public and private employers.

First created in the 1920s, VEBAs are tax-exempt funds that hold contributions from employers and employees. Those contributions, in turn, are used to pay insurance premiums—health, life, or other benefits—promised to employees. Created under Section 501(c)(9) of the Internal Revenue Code, the VEBA is a separate legal entity, and its assets are generally safe from the creditors of any sponsoring employer.

From a participant's tax perspective, there's no difference whether benefits come directly from an employer or a VEBA. The benefit continues to be excluded for tax purposes. So, what's the big deal, you ask?

The big deal is that the IRS permits VEBA assets and their investment earnings to accumulate tax-free. This tax-free feature enables contributions to grow much faster than if the earnings were taxed each year at the employer level.

Like a tax-qualified retirement plan, a VEBA can be created as a defined benefit plan (where assets are pooled and available to cover the costs of all participants), or a defined contribution plan (where participants have separate accounts). Regardless of its form, a VEBA can be funded by employer and/or employee contributions—including accrued sick pay or vacation pay.

VEBAs can be established for union or non-union employees, in both the private and public sectors. The only requirement is that covered employees share—or once shared—an employment-related bond.

VEBAs likely will become a popular benefit-funding vehicle for government entities. Under the new Governmental Accounting Standards Board Statement 45 (regulating "Other Post-Employment Benefits"), VEBAs permit municipalities and other governmental units to remove retiree benefit obligations from their financial accounting, thereby maintaining or improving their credit status and lowering the interest rate they pay on bond offerings.

Remarkably, under the recently enacted Public Employees Health Benefits Act of 2007 (effective October 1, 2007), all Michigan governmental and public employers must now obtain a price quote from a VEBA when establishing or renewing medical benefit plans.

While VEBAs may be the perfect option for some employers, it's certainly not appropriate in all situations. Our Federal Tax and Employee Benefits Group has extensive experience with many post-employment benefit vehicles. Contact Kal Goren or Ken Sachs if you'd like to discuss your situation.

Growing practice group welcomes two new attorneys

Kalman G. Goren and Kenneth J. Sachs have joined our Employee Benefits and Tax Group, bringing extensive experience in executive compensation, business and tax planning, estate planning, and workplace benefits to our firm—and making the group the largest in Michigan.

Kalman G. Goren
248/267-3267

Principal Kal Goren has represented individuals and employers in all aspects of tax-qualified retirement plans during his 36 years in practice. He also works with high net worth individuals in designing and coordinating their estate planning with retirement benefits.

Ken Sachs, senior attorney, focuses his practice on employee benefits, business planning, health care issues, and executive compensation. He has substantial experience in the design and implementation of qualified and non-tax qualified retirement plans and ESOPs, as well as benefit compliance issues related to mergers and acquisitions.

Kenneth J. Sachs
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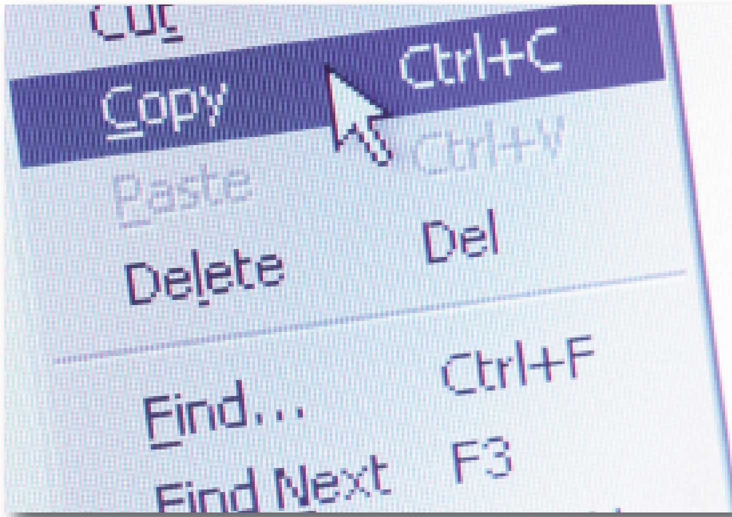

~INFORMATION TECHNOLOGY
Carla M. Perrotta
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Haste makes waste.

Beware of copy and paste!

It's time to update your company's Web site. No sweat. You'll just surf the 'Net's plethora of images and content to see what you like. Then copy, paste, and ta-dah! Right? Wrong. You've just exposed your company to the risk of an infringement claim.

Every company wants its Web site to generate buzz. Here's how to be sure your buzz brings in business—not legal liability!

KNOW THE SOURCE

Was your Web site developed by your own company? If so, where did the creative team obtain their content? If a third party was responsible for writing, designing, and building your site, make sure you have an agreement in place between your company and the Web developer that sufficiently protects you from any infringement claims.

GET PERMISSION

While Internet technology makes it easy to grab and glue text, graphics, photos, and logos, doing so may violate copyright law. Make sure you seek permission to cut and paste someone else's work. More and more copyright holders are taking strict measures to enforce their rights. For example, Getty Images, the world's leading provider of visual content, has established a partnership with a company that uses sophisticated crawling and image recognition technology to track unauthorized use of copyrighted work online.

INTENT MAY NOT MATTER

Finally, keep in mind that unintentional infringement may still be cause for legal action. If your Web site contains infringing content—even if a third-party Web designer was responsible for its placement—you may be liable, despite the fact that you weren't aware of the limitations of copyright laws.

THE FINAL WORD

Without permission from the original source, copying content from another Web site isn't allowed. Our Information Technology team can help you assess potential infringement and other liability issues related to your online design.

P. Rivka Schochet
313/496-7636

Are you a franchisor?

Get ready for new disclosure rules

Changes are coming. As of July 1, 2008, franchisors will be required to comply with new disclosure rules. The Federal Trade Commission recently amended the rules, replacing the Uniform Franchise Offering Circular Guidelines and the old FTC rule format with a new Franchise Disclosure Document (FDD). It's not too soon to start preparing. Here's what you should know.

Timing

Franchisors must deliver the new FDD to prospective franchisees at least 14 days prior to the franchisee signing a binding agreement or making any payment. Some states (Michigan included) still have the old "10 business day or first personal meeting" requirement—and it's unclear whether they'll adopt the new rule.

Expanded Parent Company Disclosure

A franchisor controlled by a parent corporation now must provide audited financial statements of any parent that "commits to perform post-sale obligations for the franchisor or guarantees the franchisor's obligations."

Brokers

Under the new rule, brokers no longer need to be disclosed in Item 2. However, they do fall under the new term "franchise seller," and must be disclosed on the receipt page.

Litigation

All material litigation initiated by the franchisor against its franchisees during the last fiscal year must now be disclosed in Item 3—including collection actions for unpaid royalties. In addition, the reporting period for all other litigation matters has been extended from seven years to ten.

Financial Performance Representations

A Financial Performance Representation (FPR) replaces the former Earnings Claim. It does not include cost in its definition, so franchisors will now be permitted to provide cost-only data to prospective franchisees. However, caution should be exercised. Any cost information that refers to sales, revenue, or profit goes beyond "cost only" and will trigger an Item 19 disclosure.

Electronic Disclosure

The FDD may be delivered to a franchisee by email or other electronic means. However, the 14-day clock won't start until the receipt is signed. It too may be sent electronically. Franchisors may begin using electronic disclosure immediately, prior to updating the disclosure document.

Words of Advice

Amending your documentation now will help you avoid the scramble this coming summer—and may prove to be cost-effective, too, by saving you the expense of double document preparation. You should be aware that you cannot adopt only portions of the new rule (except electronic disclosure). Once you decide to make the switch, you'll need to comply with all requirements. As in the past, individual states may impose additional requirements as long as they're consistent with the FTC rule.

Disclosure documents that don't conform to the new FTC rule by July 1, 2008, will be in violation of federal law. If you want to get a head start on the process, our Franchise & Distribution Team is ready to help. Call the author or Lindsey Stetson at 734/ 668-7754.

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Hello Chicago

We've opened an office in Chicago, right in the heart of the Loop!

The City of Big Shoulders. Largest economic center in the Midwest. Miller Canfield is pleased and proud to be part of the hustle and bustle of Chicago.

Among the experienced lawyers joining our new office are public finance and capital markets attorneys Darryl R. Davidson and Paul D. Durbin; Janice K. Hamblin, a corporate, mergers and acquisitions, and international transactions attorney; Robert T. Zielinski, whose practice focuses on labor and employment issues; and John L. Senica, a corporate, M&A, and real estate lawyer. Senica also serves as the office resident director.

Our firm has numerous clients headquartered in the Chicago area, and we work with many of the city's underwriters and financial institutions. This expansion will create new opportunities and enhance regional and international access for clients—especially in transactional and litigation matters—while strengthening our link to an exciting, vibrant market.

Chicago is our kind of town!

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