PRACTICAL TAX STRATEGIES

APRIL 2007

Evaluate Charitable Giving Choices

Decipher Attorney's Fees Deduction

Structure S Corporation Loans

TAX STRATEGIES

APRIL 2007

Volume 78 Number 4

ARTICLES

196
STRUCTURE S CORPORATION LOANS TO RAISE SHAREHOLDER BASIS
John M. Malloy, Craig Langstraat, and Erin Ellis

204
NUMEROUS PENSION ACT CHANGES AFFECT CHARITABLE AND ESTATE PLANNING
Avi Z. Kestenbaum and Jeffrey Perelman

212
SORT OUT THE TAX RULES FOR DEDUCTING PAYMENTS OF ATTORNEY'S FEES
L. Stephen Cash, Thomas L. Dickens, and Megan E. Mowrey

DEPARTMENTS

225 ACCOUNTING
- Payroll taxes on deferred pay could be currently deductible
- Indemnification payments not deductible as business expense or loss
- Final regs. explain depreciation for exchanged MACRS property
- Joint Committee on Taxation issues list of expiring tax provisions

232 PERSONAL
- Even professional gambler is subject to deduction limit
- IRS lists dirty dozen tax scams for 2007
- Couple employed overseas on yacht get foreign earned income exclusion

237 ESTATE PLANNING
- Nonrecognition for transfer between former spouses
- Proceeds excludable even if life insurance transferred between trusts

240 CORPORATIONS
- Tax preparation firm is personal service corporation
- IRS clarifies guidance on triangular reorganizations
- Assumption of liability rules do not apply to certain reorganizations

245 COMPENSATION & QUALIFIED PLANS
- More rollovers permitted to health savings accounts
- IRS outlines rules for rollovers to nonspouse beneficiaries

252 PROCEDURE
- IRS explains revisions to offer in compromise form
- Interest netting not allowed between consolidated group and member
- Small case threshold applies to aggregate collection amount

FEATURES

How would you rule? 242

IRS examination questions 250

Tax newsline 193

Test your tax knowledge 256

WG&L

NUMEROUS PENSION ACT CHANGES AFFECT CHARITABLE AND ESTATE PLANNING

Charitable organizations and their donors need to cope with a variety of provisions in the Pension Protection Act, and a few changes can actually produce tax savings.

AVI Z. KESTENBAUM, Attorney, and JEFFREY PERELMAN, CPA

The Pension Protection Act of 2006 (the "Act") was enacted on 8/17/06. As its name indicates, the Act addresses many significant problems associated with underfunded and "at-risk" pension plans. Despite its name, however, the Act also includes a significant array of substantial reforms in the laws governing charitable organizations, and charitable and estate planning; it is, perhaps, the most comprehensive legislation affecting charities and charitable giving since the Tax Reform Act of 1969. In fact, the Act could have very well been titled "The Charitable Reform Act of 2006" because of all its major reforms affecting charities.

This article will tie together the important provisions in the Act affecting charitable organizations and charitable and estate planning. To aid in a better understanding of the provisions, historical context and the rationale for the changes are provided. This background is critical to the estate and tax planner who needs to advise clients in the new era of increased rules and regulations for charitable and estate planning.

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Recent history

The provisions in the Act cannot be properly understood without an awareness of the heightened legal climate in which charitable organizations and their directors and officers now dwell. Even before the Act, recent reform has been greater in the charitable sector than in the for-profit sector.[1] This assertion even takes into account the adoption of Sarbanes-Oxley in 2002, which mostly affects only for-profit entities (although the whistleblower protection and document destruction rules apply to nonprofit entities as well).[2] This is in no small part due to the recent actions by Congress, state legislatures, the judiciary, the IRS, donees, and beneficiaries to curb the abuses by charities and their directors and officers. Examples of this include:

- Increased standing to sue directors and officers.[3]
- Charitable solicitation reforms.[4]
- New state restrictions and compliance.[5]

- Increased audits and requirements by the IRS in several areas (e.g., vehicle donations,[6] charitable tax shelters,[7] IRS filings and applications, credit counseling agencies, and director and officer compensation).
- Congressional hearings to address the growing discontent with the behavior of charities and their directors and officers. (Several congressional hearings since 2004 have specifically addressed abuses in the charitable sector.[8])

Furthermore, in the estate planning arena, many of the recent leading cases involve disputes between the IRS and the taxpayers regarding valuation discounts.[9] In fact, recently the IRS seems to focus more on this line of attack than on any other in the gift and estate tax litigations and audits. Not surprisingly, then, the Act contains substantial rules and restrictions on appraisers and appraisals, as well as increased penalties and thresholds for valuation misstatements.

Private foundations

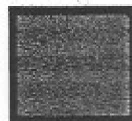
As mentioned above, the Act contains many provisions affecting exempt organizations. Several of them target private foundations.

Increase in excise taxes. Certain transactions by private foundations and their insiders are subject to excise taxes. These transactions are often referred to as "prohibited transactions." "Prohibited transactions" include:

- Self-dealing between private foundations and "disqualified persons."[10]
- Failure to meet minimum annual charitable distribution requirements.[11]
- Excess business holdings.[12]
- Jeopardy investments.[13]
- Taxable expenditures.[14]

The Act doubles the amounts and percentages of these excise taxes effective with tax years beginning after 8/17/06.

Tax on net investment income. Private foundations are subject to a 2% (in limited circumstances and with proper planning, 1%) annual excise tax on net investment income.[15] Prior law generally excluded from this tax the capital gains on sales of property used to further a private foundation's exempt purposes. In addition, income derived from options, futures, and foreign currency transactions was not subject to net investment income tax following the *Zemurray Foundation*[16] decision in 1983. The Act makes it clear that all financial gains are now subject to this tax. Furthermore, gains on dispositions of property used for exempt purposes are also immediately taxable unless the property is held for more than a year and is exchanged for another property of similar value. These provisions are also effective for tax years beginning after 8/17/06.



THE ACT CONTAINS SUBSTANTIAL RULES AND RESTRICTIONS ON APPRAISERS AND APPRAISALS, AS WELL AS INCREASED PENALTIES AND THRESHOLDS FOR VALUATION MISSTATEMENTS.

Donor-advised funds

Many financial institutions and community organizations administer funds referred to as "donor-advised funds." These funds are established by donors who reserve the right to advise the sponsoring organization (the charitable entity housing the fund) concerning charitable distributions from, or investments to be made by, the fund. Under prior law, such funds were generally not subject to any regulation apart from the tax provisions applying to all public charities. The Act introduces two new Code sections dealing exclusively with donor-advised funds and imposes a several new restrictions including, but not limited to, the following:

Substantiation. The donor must receive a contemporaneous written acknowledgement from the sponsoring organization that includes a statement that the organization has exclusive legal control over the contributed assets. This provision applies for contributions made after 2/13/07.[17]

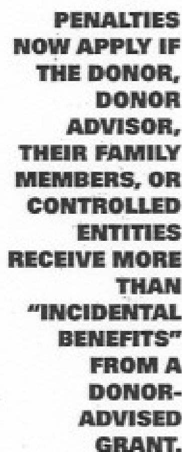
Prohibited distributions and punitive taxes. Donor-advised funds are now put on a similar playing field as private foundations. Distributions to individuals, even if for charitable purposes, are prohibited (perhaps even more strictly than private foundations) and will subject the recipients and persons approving the distributions to excise taxes.[18] Other taxable grants include distributions for any noncharitable purpose and distributions to private nonoperating foundations and certain supporting organizations. These rules apply for tax years beginning after 8/17/06.

Also, grants for charitable purposes to nonpublic charities, other than private operating and conduit foundations, are permitted only if "expenditure responsibility" is exercised.[19] "Expenditure responsibility" generally requires a pre-grant investigation of the recipient organization, a grant agreement with the recipient organization, measures to verify that the grant

is used for the intended purpose, and post-grant reporting. Grants to other donor-advised funds are allowed and do not require expenditure responsibility.

Prohibited benefits. Penalties now apply if the donor, donor advisor, their family members, or controlled entities receive more than "incidental benefits" from a donor-advised grant.[20] A donor advisor is any person designated by a donor to advise the fund. The definition of a controlled entity includes any corporation, partnership, estate, or trust in which a donor or a family member owns more than a 35% voting power, profits, or beneficial interest.[21] Examples of prohibited benefits include:

- Dinners.
- Concert tickets.
- "Charitable travel" paid through the fund.



PENALTIES NOW APPLY IF THE DONOR, DONOR ADVISOR, THEIR FAMILY MEMBERS, OR CONTROLLED ENTITIES RECEIVE MORE THAN "INCIDENTAL BENEFITS" FROM A DONOR-ADVISED GRANT.

Incidental benefits, such as name recognition and receipt of token items, does not trigger the tax. The new rules are effective for tax years beginning after 8/17/06.

Automatic excess benefits transaction. The Act prohibits grants, loans, and compensation (including expense reimbursement) from donor-advised funds to donors, advisors, and related parties. Receipt of such payments is automatically treated as an "excess benefit transaction" subject to significant penalties.[22] This provision is effective for transactions entered into after 8/17/06. It is important to note that penalties would apply to the entire amount paid, not just the "excessive amount." Automatic excess benefit rules do not apply to the sponsoring organization itself unless it is acting as an agent for the donor-advised fund.

Investment advisors. In addition to the donor, the donor's family, and the donor advisors, investment advisors are also now regarded as "disqualified persons" for purposes of this excess benefit rule.[23] Therefore, investment advisors are subject to penalties if they receive excessive compensation (once again, effective after 8/17/06). Investment advisors are money managers or other investment professionals compensated by the sponsoring organization for providing investment advice to the donor-advised fund.

Excess business holdings rule. The private foundation "excess business holdings" rules are now applicable to donor-advised funds as well.[24] These rules are complex, but generally provide that the donor-advised fund and disqualified persons with respect to the fund together cannot own more than 20% of a business enterprise. Investments and partnerships that derive at least 95% of their income from interest, dividends, capital gains, and trading in various financial instruments are considered to be passive investments not subject to the 20% limit. The new rules are effective for tax years beginning after 8/17/06.

Supporting organizations

Many charitable organizations (i.e., public charities) have organizations or other affiliates, known as "supporting organizations," that provide financial support to carry out one or more functions of the supported organization. Supporting organizations were recognized as "public charities" under prior law and were not subject to the restrictions placed on private foundations. The Act significantly increases the regulation of supporting organizations by providing the following:

Excess benefit transactions. The Act provides that grants, loans, compensation, or similar payments (including expense reimbursement) to the supporting organization's substantial contributors, members of the substantial contributor's family, or businesses they control are automatically considered to be prohibited excess benefit transactions after 7/25/06.[25]

Loans prohibited. Supporting organizations may not make loans to "disqualified persons" after 7/25/06.[26]

Supported organization disqualified status. Disqualified persons with respect to a supporting organization are also disqualified with respect to the supported organization after 8/17/06.[27]

Excess business holdings rule. The "excess business holdings" rules are now applicable to certain supporting organizations, effective for tax years beginning after 8/17/06.[28]

Grants by private foundations to certain supporting organizations. Private foundations must now exercise "expenditure responsibility" for grants to certain supporting organizations if a disqualified person of the private foundation directly or indirectly controls the supported organization or the supporting organization. In addition, grants to several types of supporting organizations are no longer treated as qualifying distributions. These provisions are effective for expenditures and distributions after

8/17/06.[29] Further guidance on this is provided in Notice 2006-109.[30]

Increased filing requirements

The Act requires certain exempt organizations to provide the IRS with more information than was required in the past. Under prior law, public charities were not required to file an annual tax return (Form 990) if gross receipts of the organization did not normally exceed $25,000. Beginning for tax years after 2006, these organizations are required to furnish more information to the IRS.[31] Required data includes:

- The entity's legal name.
- Taxpayer identification number.
- Mailing address.
- Internet address, if any.
- Name and address of the principal officer.
- Evidence for the continuing justification for the organization's exemption from filing Form 990.

Failure to file the new reports for three years results in the automatic revocation of the organization's tax-exempt status.[32]

Public inspection of tax returns

Effective for returns filed after 8/17/06, the Act requires private foundations and public charities to make available for public inspection their unrelated business income tax returns (Form 990-T).[33] Previously, while the annual tax returns (Forms 990 and 990-PF) had to be made available, Form 990-T was not in the public domain.

Disclosure to state agencies

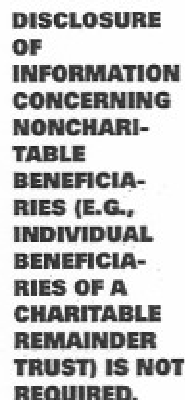
The Act provides new disclosure rules that allows the IRS, on request, to disclose to state agencies (such as an attorney general, tax officials, or agencies overseeing solicitation of funds for charitable purposes) materials related to specific organizations, including:

- IRS notices of proposed refusal to recognize tax-exempt status.
- Proposed revocation of tax-exempt status.
- Tax deficiencies for excise taxes.
- Names, addresses, and tax identification numbers of charitable organizations seeking tax-exempt status.
- Materials related to the above items.[34]

The purpose of these new disclosure rules is to assist state governments with the enforcement of their charitable laws related to tax-exempt status, charitable solicitation, and consumer fraud. The new law is effective for requests made after 8/16/06.

Penalties on charitable lead and remainder trusts

The Act provides for higher penalties for charitable remainder trusts and charitable lead trusts that file late or incomplete returns.[35] In addition to penalties imposed on the trusts, trustees who knowingly fail to file required returns are, for the first time, also personally liable for penalties. These trusts are also now subject to public disclosure rules. However, disclosure of information concerning noncharitable beneficiaries (e.g., individual beneficiaries of a charitable remainder trust) is not required.[36]



DISCLOSURE OF INFORMATION CONCERNING NONCHARITABLE BENEFICIARIES (E.G., INDIVIDUAL BENEFICIARIES OF A CHARITABLE REMAINDER TRUST) IS NOT REQUIRED.

Charitable giving

The Act provisions discussed above are directed at charitable organizations. Other law changes, however, target donors. Most of the new rules take aim at abuses (or perceived abuses), but some changes are beneficial to taxpayers.

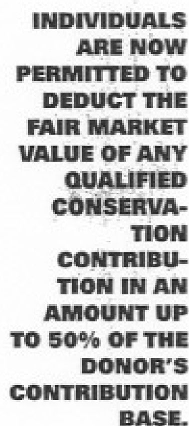
Conservation easements. The Act provides new benefits in certain areas of charitable giving, including new rules for qualified conservation easement deductions. While donations of partial interests in property are generally not deductible, an exception is provided for qualified conservation contributions.[37] Such contributions include the transfer of a remainder interest or the establishment of a restriction so that the property is used exclusively for conservation purposes, such as the preservation of land areas for protection of a natural habitat, the preservation of open space where such preservation will yield a significant public benefit, and the preservation of historically important land.

The Act makes three significant changes to the rules for qualified conservation contributions. The first one is a new benefit, but the final two are reforms:

1. Individuals are now permitted to deduct the fair market value of any qualified conservation contribution in an amount up to 50% (in the case of farmers or

ranchers, 100%) of the donor's contribution base (i.e., adjusted gross income less net operating losses); any excess contribution amount may be carried forward and deducted for up to 15 years.[38] Under prior law, the charitable deduction was limited to 30% of AGI, and the general five-year carryforward period applied. This new rule applies to contributions made in tax years beginning after 2005 and before 2008.

2. The Act reduces the charitable deduction for qualified conservation contributions of historic structures by the amount of recent rehabilitation credits allowed to the taxpayer for a building that is part of the contribution.[39]
3. The Act narrows the definition of certified historic structures for this purpose to exclude structures and land that are not certified as historic, but instead merely located in a registered historic district, precluding deductions for contributions of such properties.[40] (The Act also creates restrictions on contributions of "facades" and provides that the contribution must include the entire exterior of the structure as well.)



INDIVIDUALS ARE NOW PERMITTED TO DEDUCT THE FAIR MARKET VALUE OF ANY QUALIFIED CONSERVATION CONTRIBUTION IN AN AMOUNT UP TO 50% OF THE DONOR'S CONTRIBUTION BASE.

Fractional interests

This is perhaps the most cumbersome new provision in the Act relating to charitable giving. Previously, a donor would be able to obtain a fair market value deduction for the donation of a fractional or percentage interest in tangible personal property, like artwork, to a public charity if the "related use" rules were met.[41] (The "related use" rules require that the public charity actually use the taxable personal property in furtherance of its exempt purpose.) The Act provides significant additional requirements, including the following:[42]

1. The donor will need to own the entire interest in the property prior to donation.
2. The lesser of the fair market value of the property at the time the first percentage or fractional interest is donated or the date of the future contribution will control the value of the donations. This will apply to the gift and estate tax charitable deduction as well, and could create significant complications and gift and estate tax consequences.
3. The donee must receive full title to the property within ten years of the initial gift or by the time of the death of the donor, whichever occurs first, and the donee must have gained substantial possession of the property for charitable use in the time between receipt of the initial gift and obtaining full title. If the donee does not receive substantial use and full title as required, there will be recapture of the donation deduction for the fractional interest, plus a penalty.

Violation of the new rules would result in the income tax recapture of the entire deduction, not just the excess of fair market value over basis. Furthermore, unless technical corrections are enacted, a taxable estate could result even though the entire remaining interest goes to charity at death. For these reasons, any planning involving gifts of fractional shares is highly complicated. The new rules are effective for contributions made after 8/17/06.

Charitable contributions of cash. For monetary (e.g., cash and checks) contributions made in tax years beginning after 8/17/06 (for calendar-year taxpayers, this means beginning in 2007), a deduction is available only if the donor maintains a bank record or a written communication from the charity showing the name of the donee organization, the date of the contribution, and the contribution amount.[43] Cash contributions without an acknowledgment will not be deductible, making it advisable to use a check in circumstances, such as a collection box, in which a receipt will not be available.

IRAs and charitable contributions. Under the Act, certain taxpayers can exclude from taxable income distributions from an IRA to a public charity or private operating foundation. To qualify for the tax-free distribution, the distribution must be made by the IRA trustee directly to the public charity or a private operating foundation. Donor-advised funds and supporting organizations are not eligible to receive such distributions. The IRA owner must be at least age 70 1/2 at the time of the distribution. The maximum yearly exclusion from income is $100,000.[44] Thus, the distribution to a charity can be used also to satisfy the IRA owner's minimum distribution requirements.

A taxpayer who makes use of this provision may not claim a charitable contribution deduction for the IRA distribution. Even so, having an IRA distribution go directly to a char-

ity can produce more favorable tax results than if the taxpayer received the distribution and then made a deductible charitable contribution with the funds. The advantages may arise from a variety of circumstances. Some are connected with the distribution's not increasing the taxpayer's adjusted gross income. For instance:

- Itemized deductions, personal exemptions, and other tax benefits phase out at higher income levels.[45]
- Social Security benefits are taxed when income exceeds certain thresholds.[46]
- The alternative minimum tax exemption phases out at certain income thresholds.[47]

Also, a taxpayer who normally claims the standard deduction can do so while, in effect, getting a tax benefit for charitable contributions. Finally, the contribution would not count towards the 50%-of-contribution-base deduction limit.[48]

Charitable contributions for household goods. The Act makes changes to the rules governing contributions of household goods and clothing effective for contributions made after 8/17/06. Under the new provisions, deductions are disallowed unless the donated items are in "good used condition or better."[49] However, a deduction will be allowed for a charitable contribution of $500 or more even if the item is not in good used condition or better, provided the taxpayer includes a qualified appraisal with respect to the property. The Act also gives the IRS the authority to deny a deduction for donated items of little value.

Charitable contributions by S corporations. As a new benefit to shareholders of S corporations, the Act alters the basis adjustment for an S corporation that contributes property to a charity. Under prior law, the basis of each shareholder's pro rata share in the S corporation was decreased by the fair market value of the donated property. Under the Act, the basis of each shareholder's pro rata share in the S corporation is decreased by only each shareholder's pro rata share of the S corporation's basis in the donated property—similar to the treatment for partners of partnerships.[50]

For example, if an S corporation with one shareholder contributed property with a basis of $1,000 and a fair market value of $4,000, that shareholder would have a $4,000 charitable deduction, but would reduce his or her basis by only $1,000. This provision applies to contributions made in tax years beginning in 2006 and 2007.

Recapture for donations of tangible personal property. Generally, a taxpayer may deduct the fair market value of tangible personal property donated to a public charity provided that the organization uses the property in a manner "related" to the organization's exempt purpose. Under the Act, donations of appreciated tangible personal property to the public charity are subject to recapture if:

1. The deduction claimed exceeds $5,000.
2. The property is identified by the donee organization for use related to the purpose or function that serves as the basis for the donee's tax exemption.
3. The property is subsequently resold within the first three years following the donation.[51]

If the donated property is resold within the tax year of the donation, the charitable deduction for the year is equal to the donor's basis.

THE ACT LOWERS THE THRESHOLD FOR IMPOSING ACCURACY-RELATED PENALTIES RELATED TO VALUATION MISSTATEMENTS FOR INCOME, GIFT, AND ESTATE TAX PURPOSES.

If the resale occurs after the first year, but before three years has expired, the donee includes as ordinary income the amount that the claimed charitable deduction exceeded the basis at the time of the donation. Recapture of the tax benefit can be avoided if the organization makes a certification that either the use of the property by the organization was related to the purpose or function constituting the basis for the organization's exemption and describes how such use furthered that purpose or function, or that the intended use of the property at the time of the donation became impossible or infeasible to implement. Recapture provisions apply to contributions made after 9/1/06.

Disclosure of participation in insurance transactions

The Act creates new reporting rules for tax-exempt entities (including charitable organizations, governmental entities, and Indian tribal governments) that acquire interests in life insurance, annuity, or endowment contracts where the acquisition is part of a structured transaction involving a pool of such contracts.[52] The new rules require that for

transactions entered into after 8/17/06 and before 8/18/08, the tax-exempt organization file an information return in a form and at such time as the IRS prescribes. The new rules do not apply where the charitable organization is merely named as a beneficiary of an insurance policy.

Permanency of certain EGTRRA provisions

The Act makes permanent a multitude of rules affecting qualified plans and IRAs that were enacted in 2001 as a part of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA). These provisions, which include Roth 401(k) plans, "catch-up" contributions for participants age 50 or older, and increased limits on employer and employee contributions, were previously scheduled to expire at the end of 2010. The Act also made permanent provisions in Section 529. Therefore, "Section 529 plans" will continue to be a powerful income and estate planning tool to pay for qualified education expenses.

Extension of certain Katrina provisions

An extension is provided for certain provisions enacted under the Katrina Emergency Tax Relief Act of 2005, including enhanced deductibility for certain inventory and food contributions. This provision is effective for contributions made in 2006 and 2007.

Strict appraisal requirements

The Act lowers the threshold for imposing accuracy-related penalties related to valuation misstatements for income, gift, and estate tax purposes; and imposes significant new rules for appraisers and a restrictive definition of who may serve as a qualified appraiser. Also, for the first time, appraisers themselves will be subject to penalties based on a valuation misstatement and the donor's underpayment of tax.[53] The IRS has issued transitional guidance in the form of Notice 2006-96[54] clarifying definitions of terms contained in the Act.

Appraisers are now required to meet minimum experience and educational requirements.[55] For tax returns filed after 10/19/06, real estate appraisers must be licensed or certified for the type of property being appraised in the state in which the appraised real estate is located. For contributions of property, other than real estate, for tax returns filed after 2/16/07, additional requirements for the appraiser include:

1. The completion of a college or professional-level course relevant to the property being valued.
2. Two years of experience in the trade or business of buying, selling, or valuing the type of property in question.
3. A full description in the appraisal of the education and experience qualifying the appraiser to value the type of property in question.

Furthermore, Part III of the 2006 version of Form 8283, Noncash Charitable Contributions, contains a Declaration of Appraiser. The new language applicable for tax returns filed after 2/16/07, requires the appraiser to acknowledge that he or she might be personally liable under the new Section 6695A for penalties resulting from substantial or gross valuation misstatement.

For income tax purposes, a substantial valuation misstatement occurs when the claimed value is 150% or more of the amount determined to be the correct value and a gross valuation misstatement occurs at 200% of this amount. Donors are liable for a 20% accuracy-related penalty for the tax attributable to a substantial valuation misstatement and a 40% penalty of such amount for a gross valuation misstatement. For the first time, the appraisers are penalized the greater of $1,000 or 10% of the tax attributable to the substantial or gross valuation misstatement—limited to 125% of gross income received from the preparation of the appraisal.

For gift and estate tax purposes, a substantial valuation misstatement begins at 65% or less of the amount as finally determined, and a gross valuation misstatement begins at 40% or less of such amount. Reasonable cause does not excuse a gross valuation misstatement.

Conclusion

The Act cannot possibly be understood without an awareness of the recent history in the charitable and estate planning arena. Practitioners must recognize not only the significant and many recent changes to the law, but the heightened sense of scrutiny in this new environment. Good intentions will no longer suffice, and both the client and the practitioner

are subject to strict penalties for failure to comply with and understand the rules. Seeking specialized and skilled counsel is always a wise decision. ■

NOTES

1 See Kestenbaum, "The New Age of Corporate Governance for Nonprofit Organizations," 17 Tax'n of Exempts 87 (September/October 2005).

2 P.L. 107-204 (7/30/02).

3 See e.g., Smithers v. St. Luke's Roosevelt Hospital Center, 723 N.Y.S.2d 426 (1st Dept., 2001).

4 See, e.g., Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003).

5 See, e.g., The Nonprofit Integrity Act in California.

6 Section 170(f)(12).

7 See, e.g., Jung and Pulliam, "Tax-Exempts Run Risk as Accommodation Parties to Tax Shelters," 77 PTS 157 (September 2006).

8 See note 1, *supra*, for a summary.

9 See, e.g., Dallas, TCM 2006-212; McCord, 461 F.3d 614, 98 AFTR2d 2006-6147 (CA-5, 2006) (discussed in Esterces, "Dollar-Value Formula May Solve Hard-to-Value Asset Problem," 77 PTS 272 (November 2006)); Lappo, TCM 2003-258; Peracchio, TCM 2003-280.

10 Section 4941.

11 Section 4942.

12 Section 4943.

13 Section 4944.

14 Section 4945.

15 Section 4940.

16 53 AFTR2d 842 (DC La., 1983).

17 Section 170(f)(18).

18 Section 4966.

19 Section 4945.

20 Section 4967.

21 Section 4946.

22 Section 4958.

23 Section 4941.

24 Section 4943.

25 Section 4958(c)(3)(A)(i)(I).

26 Section 4958(c)(3)(A)(i)(II).

27 Section 4958(f)(1)(F).

28 Section 4943(f).

29 Section 4945(d)(4)(A).

30 2006-51 IRB 1121.

31 Section 6033(i).

32 Section 6033(j).

33 Section 6104(d)(1)(A)(ii).

34 Section 6104(c).

35 Section 6652(c)(2).

36 Section 6104(b).

37 Sections 2031(c).

38 Section 170(b)(1)(E).

39 Section 170(f)(14).

40 Section 170(h)(4)(C).

41 Section 170(e)(1); Reg. 1.170A-1(c).

42 Sections 170(o), 2055(g), and 2522(e).

43 Section 170(f)(17).

44 Section 408(d)(8).

45 Sections 68(a) and 151(d)(3).

46 Section 86.

47 Section 55(d).

48 Section 170(b)(1).

49 Section 170(f)(16).

50 Section 1367(a)(2).

51 Sections 170(e)(1)(B)(i)(II) and (7).

52 Section 6050V.

53 Section 6695A.

54 2006-46 IRB 902.

55 Section 170(f)(11)(E).