AMERICAN BAR ASSOCIATION

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January 14, 2008

notice.comments@irscounsel.treas.gov
Internal Revenue Service
CC:PA:LPD:PR (Notice 2007-90)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

RE: Notice 2007-90 (Security Under Section 6166 Elections)

Dear Sir or Madam:

Enclosed are the comments to Notice 2007-90 (Security Under Section 6166 Elections) submitted by the American Bar Association Section of Real Property, Trust and Estate Law. The comments were prepared by the Section's Business Planning Group, which includes the Committee on Estate Planning and Administration for Business Owners, Farmers and Ranchers and the Committee on Business Investment Entities, Partnerships, LLC's, and Corporations.

The comments have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Kathleen M. Martin
Chair, Section of Real Property, Trust and Estate Law

cc: Steve R. Akers, Chair-Elect, Section of Real Property, Trust and Estate Law
Alan R. Rothschild, Jr., Vice-Chair, Section of Real Property, Trust and Estate Law
David J. Dietrich, Supervisory Council Representative, Business Planning Group
James D. Spratt, Jr., Chair, Business Planning Group
William S. Forsberg, Vice-Chair, Business Planning Group
Jessica A. Cohan

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January 14, 2008

The Honorable Max Baucus
511 Hart Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
135 Hart Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Charles Rangel
2354 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable Jim McCrery
242 Cannon House Office Building
United States House of Representatives
Washington, DC 20515

RE: Comments Regarding Internal Revenue Code Sections 6166, 6324, 6324A, and 6325

Dear Chairman Baucus, Senator Grassley, Chairman Rangel, and Representative McCrery:

The Internal Revenue Service has recently requested comments on obtaining adequate security when estate tax attributable to a closely-held business is paid over an extended period of time under Internal Revenue Code Section 6166. Under Section 6324, a general estate tax lien arises upon the decedent's death and attaches to all assets of the gross estate for a period of ten years. This ten year period may not be extended. As such, when an estate elects to pay the estate tax in installments under Section 6166, the government's interest in the deferred estate tax is secured by the general estate tax lien for only the first nine years and three months of the installment payment period; however the government needs security until the deferred tax is paid in full, typically fourteen years and nine months after the decedent's death.

To simplify this process for the Internal Revenue Service and taxpayers, we suggest that Congress consider amending Section 6324 to provide that the general estate tax lien for estates electing to pay the estate tax in installments under Section 6166 would be extended for the duration of the installment payment period, plus a reasonable period of time thereafter should the Service need to foreclose and collect after a default in payment by the estate. This suggested change would increase the government's level of security, in that the general estate tax lien is superior to the lien currently provided for such assets. We also suggest that Congress consider amending Section 6325 to provide the Service with greater flexibility to accommodate business financing for the duration of the lien.

Enclosed are the comments we provided to the Internal Revenue Service, which explain how we envision this process working. We appreciate your consideration of our comments and welcome the opportunity to discuss them further with you. If you would like to discuss these comments, please contact the following:

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Sincerely,

Kathleen M. Martin
Chair, Section of Real Property, Trust and Estate Law

cc: Elizabeth Crewson Paris, Tax Counsel, Senate Finance Committee
Steve R. Akers, Chair-Elect, Section of Real Property, Trust and Estate Law
Alan R. Rothschild, Jr., Vice-Chair, Section of Real Property, Trust and Estate Law
David J. Dietrich, Supervisory Council Representative, Business Planning Group
James D. Spratt, Jr., Chair, Business Planning Group
William S. Forsberg, Vice-Chair, Business Planning Group
Jessica A. Cohan

COMMENTS OF THE
REAL PROPERTY, TRUST AND ESTATE LAW SECTION
OF THE
AMERICAN BAR ASSOCIATION

Notice 2007-90 (Security Under Section 6166 Elections)

January 14, 2008

The following comments are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law ("Section"). They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

The comments were prepared by members of the Business Planning Group, which includes the Committee on Estate Planning and Administration for Business Owners, Farmers and Ranchers and the Committee on Business Investment Entities, Partnerships, LLC's, and Corporations, of the Trust and Estate Division of the Section. Principal responsibility was exercised by William S. Forsberg of Leonard, Street and Deinard, Minneapolis, Minnesota, vice-chair of the Business Planning Group, and the principal author of these comments was Jessica A. Cohan of King & Spalding LLP, Atlanta, Georgia. Also participating in the preparation of the comments were Hugh F. Drake of Brown, Hay & Stephens, LLP, Springfield, Illinois; Steven B. Gorin of Thompson Coburn LLP, St. Louis, Missouri; E. Burke Hinds of Hindsight Family Business Solutions, PLLC and Inrelex Law Group, PLLC, Minneapolis, Minnesota; Cheryl A. Kelly of Thompson Coburn LLP, St. Louis, Missouri; Don Kozusko of Kozusko Harris Vetter Wareh LLP, Washington, DC; and Daniel H. McCarthy of The Blum Firm, P.C., Fort Worth, Texas. These comments were reviewed by Jonathan G. Blattmachr of Milbank, Tweed, Hadley & McCloy LLP, New York, New York, on behalf of the Section's Committee on Governmental Submissions.

Although members of the Section who participated in preparing these comments and recommendations have clients who would be affected by the Federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a governmental submission with respect to, or to otherwise influence the development or the outcome of, the specific subject matter of these comments.

Background

Under Section 6166(a),[1] a qualifying estate may elect to pay the estate tax attributable to a decedent's interest in a closely held business in up to ten equal, annual installments. The first payment must be made no later than five years after the due date (without regard to any extension) of the Federal estate tax return (normally, nine months from the decedent's date of

[1] The term "Section" throughout this letter refers to a section of the Internal Revenue Code of 1986 as amended, unless otherwise indicated.

death). An estate qualifies to make a Section 6166 election if, among other conditions, the value of the decedent's interest in the closely held business exceeds thirty-five percent of the decedent's adjusted gross estate and the decedent was a citizen or resident of the United States at the time of his or her death. Sections 6166(k) and 6165 provide that the Internal Revenue Service ("Service") may require an estate to furnish a bond (not exceeding double the amount of estate tax deferred) when an estate makes a Section 6166 election. In lieu of furnishing a bond, under Section 6324A, an estate may elect to grant the Service a special extended lien on property with a value of at least the amount of the deferred estate tax plus interest on the deferred amount for the first four years of the deferred payment period calculated as of the due date of the estate tax return ("the required interest amount").

On April 12, 2007, the Tax Court decided *Estate of Roski v. Commissioner*, 128 T.C. 113 (2007). The Service moved for summary judgment to approve the Service's denial of the estate's Section 6166 election for failure to provide a bond or lien, and the Tax Court held that the Service abused its discretion by imposing a mandatory bond or special lien requirement for all estates electing to pay the estate tax in installments under Section 6166. The Tax Court found that Congress intended that the Service determine whether a bond or special lien should be required for an estate making a Section 6166 election based on the facts and circumstances of each case. However, the Tax Court also denied the estate's summary judgment motion to allow its Section 6166 election without the requirement of a bond or special lien because the record included insufficient evidence to make a determination as to whether a bond/special lien should be applied in this case. The Tax Court stated that the issue would be ripe for review only after the Service exercised its discretion.

On November 13, 2007, the Service issued Notice 2007-90 ("Notice") in response to the *Roski* decision. The Notice states that the Service will determine on a case-by-case basis whether it will require security when a qualifying estate elects to pay all or a part of the estate tax in installments under Section 6166 and provides interim guidance with regard to the factors the Service will consider in determining whether to require a bond or special lien from an estate making a Section 6166 election. The Notice states that the United States Treasury Department ("Treasury") intends to promulgate regulations concerning the appropriate standards to be applied by the Service in determining whether to require a bond or special lien from an estate making a Section 6166 election and requests comments from interested persons regarding such standards and possible alternatives to a bond or special lien for providing security under Section 6166.

On November 23, 2007, the Service released Chief Counsel Advice 200747019 ("CCA"), regarding the Service's acceptance of stock as collateral for the special lien under Section 6324A. The CCA states that if the requirements under Section 6324A are met, the collateral (including an interest in a closely held business) proffered by the estate must be accepted by the Service. The Service may not reject collateral on the grounds that it would be burdensome for the Service to make the economic or business calculations to determine the value or because the Service would prefer other collateral.

Comments and Recommendations

In light of the numerous issues raised by the *Roski* opinion, the Notice, and the CCA, we have expanded our comments to address issues related to those on which the Service specifically requested comments. The following is a summary of the manner of presentation of our specific comments:

(1) General comments regarding Notice 2007-90 and the *Roski* opinion.
(2) General comments regarding Chief Counsel Advice 200747019 and collateral for the Section 6324A lien.
(3) Legislative solution by amending Sections 6324, 6324A, and 6325.
(4) General policy to delay the bond requirement decision to secure deferred tax payment after expiration of the existing Section 6324 general lien.
(5) Comments to the questions posed by the Notice.
(6) Comments regarding the application of Section 6325 regarding releases and subordination of the Section 6324 and 6324A liens.

I. General Comments Regarding Notice 2007-90 and the *Roski* Opinion

The administrative issue presented by the *Roski* decision involves the proper exercise of the Service's discretion in determining whether a bond will be required to secure payment of the deferred estate tax under Section 6166 that is not "arbitrary, capricious, or unreasonable"[2] as held by the *Roski* Court. The Tax Court took notice of the Legislative history and Congressional intent behind Section 6166 and the Service's security for payment as follows:

> Congress was concerned that "In many cases, the executor is forced to sell a decedent's interest in a farm or other closely held business in order to pay the estate tax." H. Rept. 94-1380, supra at 30, 1976-3 C.B. (Vol. 3) at 764. Allowing the Commissioner to impose a mandatory bond requirement exacerbates the problem that Congress was dealing with in enacting the statute. Estates such as the one in this case have liquidity problems that would make it difficult not only to pay tax but also to secure a bond. Also, the closely held nature of the small businesses that give rise to the election may make it more difficult for these businesses to be able to offer to secure their assets with liens. This does not mean, however, that the financial risk is too great to allow the estate to pay its tax in installments. The record in this case suggests that the executor is a wealthy, well-respected businessman; that the businesses giving rise to the election are extremely profitable and well managed; and that the nature of the estate's business assets ensures adequate cashflow to pay the installments timely. There may be cases where the facts reveal that collection is reasonably assured and a bond is not necessary. We are not implying that a bond or a special lien is not necessary in this case. We are merely stating that without exercising his discretion and evaluating the facts diligently and thoroughly, respondent is

[2] *Roski*, 128 T.C. at 127.

> depriving the estate of the opportunity to demonstrate why a bond is not necessary.[3]

The Tax Court further observed the following:

> Respondent (the Service) argues that factors such as the estate's creditworthiness are not the only factors he is able to consider in making his decision. He contends that the difficulties in administering the deferrals that were discussed in the TIGTA report were valid factors for him to consider in the estate's case. Respondent further argues that there is always risk of default in a debtor-creditor relationship and that IRS collection experience showed a high default rate in collection. We agree that respondent should be able to consider factors such as administrative convenience and revenue collection. However, considering these factors exclusively precludes any exercise of discretion in a particular case, which is what the Court of Appeals for the Ninth Circuit eschewed in *Asimakopoulos*.[4]

We acknowledge the challenge to the Service to apply the TIGTA report to improve collection while also balancing the Congressional intent of preventing the forced liquidation of closely held businesses to pay estate taxes.

Notice 2007-90 requests comment on "whether deferred installment payments of estate tax under section 6166 pose a sufficient credit risk to the government to justify the requirement of a bond or special lien." The three factors presented in the Notice as being those that the Service will apply focus on the credit or default risk to the government without providing a counterbalancing list of factors of burden on the business or estate consistent with the purpose and Congressional intent of Section 6166. Consequently, it is our view that the factors presented in the Notice fail to address the explicit concerns expressed by the *Roski* Court regarding the reasonableness of the exercise of the Service's discretion.

II. General Comments Regarding CCA 200747019 and Collateral for the Section 6324A Lien

To qualify as collateral for a lien under Section 6324A, the collateral must be expected to survive the deferral period, the collateral must be identified in an agreement, and the value of the collateral must be sufficient to pay the estate tax liability plus the required interest amount. Section 6324A(b)-(c). We agree with the CCA statement that the Service has no authority to reject collateral proffered by an estate on the grounds that it would be burdensome for the Service to make the economic or business calculations to determine the collateral's value or because the Service would prefer other collateral, as long as the three requirements are met. However, anecdotal evidence indicates that this is not the practice always followed by the Service.

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[3] *Roski*, 128 T.C. at 129-30.

[4] *Roski*, 128 T.C. at 131; *Asimakopoulos v. INS*, 445 F.2d 1362 (9th Cir., 1971).

We are aware of situations in which the Service has rejected an estate's offer of stock in a closely held business as collateral for the Section 6324A lien and requested real estate, marketable securities, a letter of credit by a large financial institution, or the underlying assets of the closely held business as collateral instead. We acknowledge the risk the Service takes in accepting an interest in closely held business as collateral for a lien; however, as the CCA points out, the language and legislative history of Section 6324A indicate that Congress intended that the Service bear that risk. *See* Staff of H.R. Comm. on Ways & Means, 94th Cong., *Background Materials on Federal Estate and Gift Taxation* 302 (Comm. Print 1969) ("The Government will not only permit the deferral of taxes, but will bear part of the risk that the illiquid asset may decline in value during the deferral period.").

III. Legislative Solution by Amending Sections 6324, 6324A, and 6325

A. Amend Section 6324 to extend the term of the general estate tax lien with respect to estate tax deferrals under Section 6166

Under Section 6324(a), a general estate tax lien arises upon the decedent's death and attaches to all assets of the gross estate for a period of ten years. This ten year period may not be extended. As such, when an estate elects to pay the estate tax in installments under Section 6166, the Service's interest in the deferred estate tax is secured by the general estate tax lien for only the first nine years and three months of the installment payment period.

Rather than promulgating regulations pertaining to bonds or special liens, we recommend that a better solution is for Treasury to seek legislative relief from Congress in the form of an amendment to Section 6324(a) which would extend the general estate tax lien for estates electing to pay the estate tax in installments under Section 6166 for the duration of the installment payment period, plus a reasonable period of time thereafter should the Service need to foreclose and collect after a default in payment by the estate. We are separately submitting comments to members of Congress to this effect.

The Notice appears to indicate that the Service believes its interest is adequately secured by the general estate tax lien for the first nine years and three months of the installment payment period, but is concerned with securing its interest until the deferred estate tax is paid in full.[5] Further, the general estate tax lien under Section 6324(a) is easier for the Service to enforce than the special lien under Section 6324A lien, both administratively and in terms of its strength as a lien. Additionally, predicting the credit risk of any business over an extended period of time is a difficult task to undertake. Businesses with a previously successful history which would not appear a credit risk may prove to provide so over time. Conversely, a relatively new business or established business going through a difficult period may pose a credit risk upon initial examination, but then thrive in future years. Extending the general estate tax lien for estates

[5] Notice 2007-90, 2007-46 I.R.B. 1003 ("[W]hen an estate qualifies and elects under section 6166 to pay estate tax over a period of up to 14 years, the government's interest in the deferred estate tax is secured by the general federal estate tax lien for only the first nine years and three months of the installment payment period. . . . During the final four years and nine months of the 14-year installment payment period, the government's interest is no longer secured by the general estate tax lien. In most cases, approximately one-half of the total deferred estate tax still remains to be paid during that final, unsecured portion of the deferral period.")

electing to pay the estate tax in installments for the duration of the installment payment period would provide the Service with the security it desires and help to alleviate the burden of devoting resources to balancing the risk of collection, without imposing an undue burden on the estate or the closely held business.

The procedures in Section 6324A should also be changed such that the special lien could still apply at the option of the taxpayer. Businesses should have a flexible credit structure that allows them to continue operating with lines of credit and other financing of operations without the estate tax lien causing operational problems.

B. Amend Section 6325 to provide more flexibility regarding release, subordination, and substitution of collateral for the estate tax liens

Under Section 6325, the Service has little flexibility to accommodate business financing through the release and subordination of liens or through the substitution of collateral security similarly valued property. We recommend that Section 6325 be amended to provide greater flexibility for the Service to facilitate business financing. See below in part VI for a detailed discussion of the need for greater flexibility under Section 6325.

IV. General Policy to Delay the Bond Requirement Decision to Secure Deferred Tax Payment After Expiration of the Existing Section 6324 General Lien

Since the Service's interest in the deferred estate tax is adequately secured by the general estate tax lien for the first nine years and three months of the installment payment period, we recommend, as an alternative to seeking legislative relief or as a temporary measure until such relief is granted, that Treasury issue regulations or the Service implement a procedure whereby the Service agrees that a bond or special lien from an estate electing to pay the estate tax in installments under Section 6166 would ordinarily not be required until, at the earliest, a reasonable period before the expiration of the general estate tax lien.

We recommend that in conjunction with the annual notice in the eighth or ninth year of the installment period (prior to the expiration of the general estate tax lien), the Service evaluate whether a bond or special lien should be required for each estate on a case-by-case basis, using the factors described below and balancing the Service's interest in collecting the estate tax with the burden of the bond or special lien on the estate and business.[6]

We do not think the new procedure should apply in all cases without exception. The Service should retain the authority to require a bond, coupled with the estate's corresponding right to elect to provide a special lien, during the initial deferral period when the Section 6324 general lien is in place, in order to allow for special cases, but these cases should be exceptional. Delaying the imposition of a bond or special lien could affect the Service's priority of its security interest compared to other creditors holding security interests that arise between the time of

[6] The Service already has a system in place with respect to each installment payment date prior to each anniversary of the regular estate tax due date requiring the executor to certify that the estate tax has not been accelerated due to dispositions or distributions under Section 6166(g). The information and procedure for evaluating whether a bond should reasonably be required could be incorporated into such system.

application of the general lien and the later imposition and filing of a Section 6324A special lien. This possibility should exist, however, only in those cases where the Service could reasonably determine that all four of the following factors apply:

(1) the estate's interest in the closely held business will likely be retained for a period extending beyond the end of the ten year Section 6324 general lien;[7]
(2) the business will likely be unable (or unwilling) to distribute sufficient cash to the estate to make the payments if the estate has insufficient other assets to pay the deferred estate tax and interest when due beyond the ten year period;[8]
(3) the government's interest will not, for some reason, be adequately protected by the acceleration provisions of Section 6166;[9] and
(4) competing liens with respect to the qualifying business interest likely would be filed in the future by other creditors in a timely manner and take priority over the government's position when the general lien has expired.[10]

We believe that the circumstances would rarely exist for the Service to reach such a determination that all four of these conditions could apply and thereby threaten the government's position as a creditor after the general lien expires, but nevertheless, the Service should continue to retain discretionary authority to allow for such a possibility, subject to the estate's right under Section 7479 to have the Tax Court determine the reasonableness of the exercise of such discretion as described in the *Roski* opinion.

These alternative recommendations balance the Service's interest in collecting the estate tax with Congress's intent of preventing the forced liquidation of closely held businesses because substantial estate taxes must be paid. *See* H.R. Rep. No. 94-1380, at 30 (1976) ("The present provisions have proved inadequate to deal with the liquidity problems experienced by estates in which a substantial portion of the assets consist of a closely held business or other illiquid assets. In many cases, the executor is forced to sell a decedent's interest in a farm or other closely held business in order to pay the estate tax."); S. Rep. No. 94-938 (Supplemental Report, Part II), at 18 (1976) (same). These solutions also provide estates with certainty as to whether they will qualify to make a Section 6166 election and with certainty as to whether making a Section 6166

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[7] Otherwise the government's interest would be protected by the general lien.

[8] Otherwise there would be no default by the estate and the risk created by the government's failure to have the special lien from the outset would be meaningless.

[9] In particular, the deferred estate tax will be accelerated under Section 6166(g) if the business interest is depleted by post-mortem sales or distributions equal to fifty percent (50%) or more of its value and by the acceleration of the estate tax principal payments under Section 6166(g)(2). Accordingly, if the estate had insufficient liquidity to make the required payments from distributions from the business beyond the ten year Section 6324 general lien (such as if the business were failing), then it would be forced to dispose of all or a portion of the qualifying business interest or other estate assets to make the required payments. If, on the other hand, the business was successful and making significant distributions, it would be likely that the estate would be required to apply its excess undistributed income to reduce the deferred estate tax principal balance under Section 6166(g)(2).

[10] The government would not be giving up its special lien under the proposal but only reserving it for the future, if and when needed. Thus the competing liens would have to be filed prior to the delayed filing of a special lien under Section 6324A or else those creditors do not enjoy priority over the "late" Section 6324A lien. *See* Section 6324A(d)(3).

election will be feasible for the estate. Not knowing with certainty whether the Service will require a bond or special lien often times may put Section 6166 deferral out of the reach of estates that are unwilling to take a chance on what will be required at the time to obtain deferral and keep it in place. While we recognize that approaching the bond or special lien requirement on a case-by-case basis is necessary under the current regime and that any case-by-case determination necessarily involves a degree of uncertainty, we believe that providing certainty for estates on the front end should be a paramount goal.

V. Comments to the Questions Posed by the Notice

We believe that the alternative solutions offered above best balance the Service's interest in collecting the estate tax with Congress's intent of alleviating the liquidity problems experienced by estates in which a substantial portion of the assets consist of a closely held business. However, should Treasury decide to go forward with issuing regulations as indicated in the Notice, we offer comments in response to the questions posed in the Notice. We emphasize, however, that we believe the alternatives regarding the general estate tax lien above represent a better solution to this issue.

A. What factors, in addition to or in place of those stated in the Notice, should the Service use in determining whether to require a bond or special lien from an estate electing to pay the estate tax in installments?

The three factors provided in the Notice (duration and stability of the business, ability to pay the installments of tax and interest timely, and compliance history) all focus on the credit risk to the Service. Consistent with the purpose behind Section 6166, we believe that the factors provided in the Notice should be balanced against factors that focus on the burden of the bond or special lien on the estate and business. These factors include the commercial availability of a bond, the effect of the lien on the existing terms of the business's financing, the effect of the lien on the availability of future financing opportunities for the business, the effect on distributions from the business, and the nature and number of potential beneficiaries required to be signatories to the Section 6324A agreement. This list is not intended to be exhaustive, but merely illustrative.

Whether the estate controls the business. In addition, whether the estate controls the business or not is a relevant factor.[11] To the extent that the estate holds a controlling interest, it has the ability, and the incentive, to manage the business and distributions in a manner that will facilitate the payment of the tax deferred under Section 6166. Furthermore, if the estate has control, it has the ability to participate in the negotiation with other lenders with respect to the estate's estate tax liability and the business financing requirements.

If the estate does not control the business, the liquidity concerns, of which Section 6166 was intended to alleviate, may be even greater for the estate and make the balancing analysis more difficult. If the estate is a significant enough owner of the business that other lenders

[11] Guidance from the Service on what constitutes "control" will be necessary. We recommend that any guidance take into consideration the executor's fiduciary duties to all of the beneficiaries of the estate. We would appreciate the opportunity to comment on any proposed guidance before it becomes final.

required the guaranty of the decedent with respect to business borrowing, it may reasonably be assumed that the estate will be required to provide a similar guaranty to maintain the business financing. The imposition of a bond or lien in those circumstances may force the sale of the interest, contrary to Congress' intent in enacting Section 6166.

Executor's potential personal liability for deferred estate tax. The executor's potential personal liability for payment of deferred estate tax under Section 6166 should also be a factor. As a general matter, the executor may be *personally* liable for payment of deferred estate taxes.[12] Such personal liability for deferred estate taxes is discharged only upon the posting of a bond or when a Section 6324A lien is provided. *See* Reg. § 20.2204-1(b). In particular, Reg. § 20.2204-3 and I.R.M. 5.5.8.5.4.E provide that the executor is discharged from personal liability under Section 2204 once a Section 6324A lien is provided. As long as the executor has potential personal liability, we believe that the executor is in the best position to determine whether it is in the best interest of the executor, the estate, and its beneficiaries to provide a Section 6324A lien or to continue with the Section 6324 general lien. The executor is likely to refuse to make distributions from the estate unless the executor has confidence that sufficient assets and liquidity will be available to make deferred estate tax principal and interest payments. If the executor does not have that confidence, then it is likely that the estate will voluntarily elect to provide a Section 6324A lien, even without the Service's demand for a bond under Section 6165, to enable the estate to make distributions to its beneficiaries. Even if such distributions are made, the beneficiaries would continue to be jointly and severally liable for any deficiency as transferees. *See* Section 6901.

Elections reducing the Section 6166 payment deferral period to less than fifteen years. If the estate makes an election under Section 6166(b)(7) (regarding certain non-readily tradable stock or partnership interests), Section 6166(b)(8) (a "Holding Company" election), or Section 6166(b)(10) (Lending or Financing Company election), the five-year interest only deferral of Section 6166(a)(3) is not available and the first principal payment is due on the normal estate tax payment date, nine months following the decedent's death. The deferred estate tax must be paid within nine (9) years of the initial payment date with respect to the Section 6166(b)(7) and (8) elections, and within four (4) years of the initial payment date with respect to the Section 6166(b)(10) election. Consequently, there should be an *absolute policy* of not requiring a bond or Section 6324A lien when such elections are made, since the due date for all payments is within the period of the Section 6324 general lien.

See the attached case study in the appendix to this letter for an illustration of the numerous issues that may arise upon the death of an owner of a closely held business that relies on a secured institutional lender to finance its ongoing operations.

B. How often during the installment payment period (or on what occurrences) should the Service reevaluate whether the estate poses a sufficient credit risk to justify the requirement of a bond or special lien?

Consistent with our recommendations regarding the general estate tax lien above, we

[12] *See* Sections 2002, 2204; 31 U.S.C. 3713(b).

believe that the Service should not reevaluate whether the estate poses a sufficient credit risk to justify the requirement of a bond or special lien until the earlier of default, one year before the expiration of the general estate tax lien, or the reporting of an adverse event on the annual Section 6166 notification discussed below in part V.D.

C. What facts evident from a review of the estate tax return are likely to be reasonably accurate predictors of either a future default or full payment of the deferred tax payments and interest?

To the extent that an estate tax return contains an appraisal in accordance with Revenue Ruling 59-60, we believe that the opinion of the expert as to the continued viability of the business is the most reasonably accurate predictor of either a future default or full payment of the deferred tax payments and interest. If an estate is audited, the Service's estate tax attorney immediately becomes privy to company information and financial data which should allow the Service to make a preliminary evaluation of the business's financial stability, cash flow, and tax compliance history, as well as its ability to make the required tax installment payments. An analysis of an estate's undistributed income may also be a reasonably accurate predictor of either a future default or payment in full. This factor is discussed in detail below in part V.D.

D. What additional financial information should the Service require from an estate to assist in making the determination as to whether the estate poses a sufficient credit risk to justify the requirement of a bond or special lien?

The Service already has a procedure in place with respect to each installment payment date prior to each anniversary of the regular estate tax due date requiring the executor to certify that the estate tax has not been accelerated due to dispositions or distributions under Section 6166(g).

Annual certification of non-default of other financing. In conjunction with this certification, the Service could require the executor to certify that the estate has not been notified that any business lender (whether senior or subordinated to the Sections 6324 or 6324A liens) has notified the business of a default on any existing financing arrangements, nor has any lender to the estate declared a default on any loan to the estate. Any such default would justify a reevaluation of the appropriateness of a bond, lien or other security arrangement with respect to the deferred estate tax.

Providing income tax/information returns for the estate and business. The Service could also require the executor to include a copy of the estate's most recently filed fiduciary income tax return and the business's most recently filed income tax return. Any requirements with respect to business records need to be flexible to account for situations in which the executor does not have access to all of the business's records. This might be the case were the estate is a minority shareholder or owner of the business.

Additional Section 6166(g)(2) payments. Section 6166(g)(2) provides that the estate is obligated to made additional principal payments on the deferred estate tax equal to the undistributed income of the estate by the extended due date for the estate's income tax return for

any taxable year ending on or after the date for the first principal installment payment.[13] Undistributed net income is essentially the estate's distributable net income (defined by Section 643(a)) less (1) the deductions for distributions under Section 661(a); (2) the federal income tax imposed on the estate; and (3) Section 6166 federal principal and interest payments (but not equivalent deferred state estate tax payments and interest).[14]

We are unaware of any procedure in place within the Section 6166 administrative structure to determine whether such additional payments are being made, which would reduce the amount of the deferred estate tax balance. Requiring a copy of the estate's fiduciary income tax return in conjunction with the annual certification would provide such a mechanism. Having undistributed income that results in additional payments should be strong evidence that no bond or lien should be required for an estate. A similar analysis would also be appropriate at the time of the estate tax examination (even if Section 6166(g)(2) does not apply at that time) as one factor to consider as to whether a bond or lien should be required. Since most administrative expenses are deducted on the estate tax return rather than the income tax return (and are incurred early in the administration), the income analysis, potentially adjusted for non-recurring expenses, is a reasonable tool for analyzing the estate's future ability to make Section 6166 payments.

E. Should the Service define a surety bond to also include other forms of security, and, if so, what other forms should be included?

We believe that the Service should define a surety bond to include other forms of security. The other forms should include letters of credit from reputable financial institutions and personal guarantees from creditworthy ultimate beneficiaries of an estate. These alternative forms of security should not be substitutes for the surety bond that may be mandated by the Service, but instead should be alternatives that are available to the taxpayer at its election.

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[13] For most estates making Section 6166 elections to which the five-year principal deferral payment applies, this would require the estate to make additional payments of deferred estate tax in the fifth or sixth year following the initial estate tax payment date that is nine months after the decedent's death. If the estate makes an election under Section 6166(b)(7) (regarding non-readily tradable stock), Section 6166(b)(8) (a "Holding Company" election), or Section 6166(b)(10) (Lending or Financing Company election), the five-year interest only deferral of Section 6166(a)(3) is not available and the first principal payment is due on the normal estate tax payment date, nine months following the decedent's death.

[14] Unfortunately, Section 6166(g)(2)(C) treats any distribution by a subsidiary to a Holding Company that made the election under Section 6166(b)(8)(A) as having been made to the estate, even if the Holding Company makes no distribution to the estate. We do not understand the policy behind this provision, especially where the estate does not control the Holding Company, and whether such provision is intended to modify Section 643 or how such a provision is intended to be applied. Furthermore, since the Section 6166(b)(8) Holding Company election applies only to corporations and not partnerships (or entities treated as partnerships for federal tax purposes), the application of this provision is even more uncertain. Ultimately, a legislative clarification of this provision will be required. This is particularly difficult to understand in light of Section 6166(g)(1)(D) in which a distribution from the estate to a beneficiary under the terms of the testamentary instrument is not treated as a withdrawal for purposes of the Section 6166(g)(1) acceleration of payment rules. Depending upon how this provision is interpreted, if the estate receives no actual distribution from the Holding Company, it is unable to make an actual distribution to a beneficiary qualifying as a permitted distribution under Section 661(a) or 6166(g)(1)(D) that would prevent the application of the requirement of a Section 6166(g)(2) payment when the estate has no cash to make such a payment.

VI. Comments Regarding the Application of Section 6325 Regarding Releases and Subordination of the Section 6324 and 6324A Liens

A. Applicability of Section 6325 Security Subordination and Substitution to Initial Determination Regarding Bond or Section 6324A Lien

The application of Section 6325 and the exercise of the Service's discretion regarding the subordination or substitution of security when a Section 6324A lien is required is, in our judgment, a relevant factor in the reasonable exercise of the Service's initial discretion. In fact, the very nature of the Service's discretion regarding such matters is a factor that we believe should weigh against initial requirement of a bond or Section 6324A lien. We assume that, since it is difficult or impossible for an estate to provide a Section 6165 bond,[15] such a bonding requirement is the practical equivalent of requiring the estate to provide a Section 6324A lien to obtain a Section 6166 election approval, even though offering such a lien is the estate's election under the statute.[16]

The Service's practical decision to require a Section 6324A lien will potentially affect the estate and business for up to fifteen years. Section 6325(d) and Reg. § 301.6325-1(d)(2) provide the Service with discretion to accept or reject a request by an estate to subordinate the Section 6324 or 6324A liens that will often be required to facilitate reasonable business financing.[17] Even that discretion is limited by those provisions to circumstances in which the district director "believes that the subordination of the lien will ultimately result in an *increase* in the amount realized…from the property subject to the lien and will ultimately facilitate the ultimate collection of the tax liability."[18] See the case study in the appendix to this letter for an example. In addition, Sections 6325 and 6324A and the existing regulations[19] do not appear to provide *any* opportunity to the estate to substitute security initially given in a Section 6324A lien agreement.[20]

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[15] Anecdotally, an experienced attorney recently contacted several bonding firms. None was willing to provide a Section 6165 bond and each advised that no other bonding company would provide such a bond. To the extent the Service is aware of bonding companies that will provide such bonds, we request that the Service make this information available to the public. One attorney participating in the preparation of these comments found a bonding company willing to provide a Section 6165 bond; however, the premium payment on such bond was so high that it was economically infeasible for the estate to obtain. Section 6165 permits the Service to require a bond in an amount up to *double* the amount of estate tax deferred which amplfies the economic infeasibility of obtaining such a bond.

[16] This may not be the case if the guidance resulting from this process follows our recommendation in part V.E. regarding other security in lieu of a bond is followed.

[17] *See* IRS, Publication 784, How to Prepare Application for Certificate of Subordination of Federal Tax Lien (Rev. 8-2005); IRS, Publication 1153, How to Apply for a Certificate of Subordination of Federal Estate Tax Lien Under Section 6325(d)(3) of the Internal Revenue Code (Rev. 1-2006).

[18] Reg. § 301.6325-1(d)(2)(i); *see also* Reg. § 301.6325-1(d)(2)(ii), Ex. (1)-(3).

[19] *See* Regs. §§ 20.6325-1, 301.6325-1.

[20] Section 6325(b)(4), titled "Right of substitution of value," only permits cash or a bond to substitute the value of a liened property for purposes of preparing for sale, the proceeds of which much be immediately applied against the tax and, practically, does not permit any substitution of collateral from the collateral originally given. Section 6325(c) permits promulgation of separate regulations regarding the "discharge" of a lien for estate and gift tax purposes if the tax has been fully satisfied or provided for. Consequently, it appears that the Service may have

Consequently, the factors that the Service must weigh to reasonably exercise its discretion must anticipate the potential burden of requiring a bond/Section 6324A lien over an extended period of time. Furthermore, unless other provisions permit a substitution of collateral for liened property, the Service must assume that such a decision is irrevocable.[21]

Finally, the Service must also assume that subordination of a previously granted Section 6324A lien is not in any way assured. Therefore, the inflexibility imposed by Section 6325 would strongly suggest, in our view, not requiring a Section 6324A lien other than in select cases, such as those cases in which all four factors discussed above in part IV exist. The incremental value of the lien would ordinarily be outweighed by the potential burden to the business and its future financing arrangements over a dozen or more years.

Given this background, we strongly encourage the Service and Treasury to expand the scope of their considerations beyond the limited request of Notice 2007-90 to include revisions to make the guidance under Section 6325 (in whatever form) more workable over extended periods of time. Failure to do so, as demonstrated by the attached case study, would have the effect of eviscerating the Congressional intent of Section 6166. The factors for making a determination regarding the Service's discretion to subordinate should be substantially similar to the factors in making the initial bond or Section 6324A lien decision.

The next logical step from the issues raised in *Roski* that resulted in the Notice requesting these comments regarding the initial determination is a similar inquiry regarding the reasonable exercise of the Service's discretion under Section 6325. The opinion in *Roski* and the Notice each acknowledge that the Tax Court has jurisdiction under Section 7479 regarding issues as to whether Section 6166 has "ceased to apply." Such an analysis would certainly raise similar issues if the Service fails to reasonably exercise its discretion to subordinate its Section 6324A lien to accommodate reasonable, commercial business financing terms that further results in an acceleration of tax under Section 6166. Such a circumstance would most likely be subject to the same jurisdiction and standard of review expressed in the *Roski* opinion. The more flexibility that can be built into the factors in favor of reasonable (and timely) subordination to later estate/business requests will provide more reasonable flexibility to the Service in its initial determination than if the guidance of Section 6325 is unaltered. If the Service believes that it has little flexibility under Section 6325 to accommodate business financing through subordination and substitution of similarly valued security, such business uncertainty must necessarily weigh against an initial bond/Section 6324A lien requirement to be consistent with the purposes of Section 6166.

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no discretion under this Section to actually substitute equivalent security once a lien attaches to specific property, but only permits subordination of the lien under specific circumstances described above.

[21] Under the Section 6324 general lien, it is possible for the estate to use assets other than the company stock to make the deferred estate tax and interest payments and still provide a pledge of the company stock to the bank for business financing purposes. Imposition of a Section 6324A lien would not permit such an arrangement because of the nature of the Section 6324A lien—the general lien is released as to the Section 6324A liened property. Once a Section 6324A lien is agreed to, it is irreversible. There is no later opportunity to rely upon the more flexible Section 6324 general lien. *See* Section 6324A(d)(4).

B. Consistency of lien procedures with respect to Sections 6324A and 6324B (for Section 2032A Special Use Valuation)

Under Section 6325(d)(1)-(2), the Service may issue a certificate of subordination for a special lien arising under Section 6324A if the estate pays over to the government an amount equal to the amount of the lien or interest subordinated or if the Service believes that the amount the government will collect will ultimately be increased by reason of the issuance of a certificate and that the ultimate collection of the tax liability will be facilitated by the subordination. In addition to the two situations in which the Service may issue a certificate of subordination for a special lien arising under Section 6324A, the Service, under Section 6325(d)(3), may also issue a certificate of subordination for a special lien arising under Section 6324B, if the Service determines that the government's interest will continue to be adequately secured after the subordination.

Thus, the subordination relief available to an estate is more limited with respect to Section 6324A liens than it is for Section 6324B liens, despite the fact that a Section 6324B lien arises under Section 2032A, which offers a greater benefit to the estate than Section 6166, since it reduces tax liability rather than merely deferring payment (with interest). Therefore, we recommend that Section 6325(d)(3) be amended to provide that the Service may issue a certificate of subordination for a special lien arising under Section 6324A, if the Service determines that the government's interest will continue to be adequately secured after the subordination. This change will result in consistent standards for subordination of the special liens under Sections 6324A and 6324B.

Conclusion

We appreciate your consideration of our comments and welcome the opportunity to discuss them further with you. If you would like to discuss these comments, please contact the following:

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Appendix

Case Study Analysis of Factors Relevant to IRS Requirement of a Bond or Section 6324A Lien

Notice 2007-90 requested comments on factors that should be considered when the Service is determining whether a bond or Section 6324A lien should be required in conjunction with an estate's Section 6166 election. Our comments recommended several specific factors. Our comments are consistent with the purpose of Section 6166 to avoid forced sales of interests in closely held businesses. Therefore, the factors should balance the Service's interest in assuring that the deferred estate tax be paid against the burden on the business and whether the mere requirement of such a bond or lien would have the practical effect of requiring the sale of such business to pay estate taxes. Since the government already has a general, unrecorded lien on all estate assets under Section 6324 for a significant portion of the Section 6166 estate tax deferral period, the factors should further consider the incremental value to the Service's collection results of a recorded Section 6324A lien balanced against the burden of such a lien on the business as an exercise of reasonable discretion.

As noted on page 3 of our Comment Letter, the Roski *opinion noted that the business was profitable, well managed, had strong cash flow and suggested that a bond or lien may not be necessary in such circumstances when the factors are balanced.*[1] *Estates owning interests in closely held businesses routinely involve real-world complex administrative issues, especially relating to business financing arrangements, which are burdensome to even profitable businesses. In developing its factors, we believe that the following case study, loosely based upon an actual estate, may be more instructive than attempting to list and describe numerous factors. The bank financing issues identified in the case study are extremely common to closely held businesses. Unfortunately, disputes among beneficiaries of estates holding closely held business interests are present in a significant percentage of estates. Many of the key factors are identified at the end of the case study and the related footnotes comment on the legal and practical consideration of those factors.*

We invite the Service to contact us for further input and comment as it is developing such factors, since we have determined that counsel representing lenders and closely held businesses with respect to financing arrangements are often more knowledgeable about the real-world burden of deferred estate tax liens than trust, estate and tax counsel.

Jack's Seasonings, Inc. Case Study

Jack's Seasonings, Inc. ("Seasonings") manufactures and sells various seasonings and sauces to enhance the flavor of meat and other dishes. The business is profitable, growing, well managed and cash flow is strong. Jimmy Jackson is the sole Seasonings shareholder of record.

Jack's Land Corporation ("Land Company") is wholly-owned by Seasonings. Land Company owns Seasonings' office-manufacturing-warehouse facility, which is leased solely to Seasonings pursuant to a written lease at market rents. The lease payments service the Land Loan described below.

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[1] The Court declined to make a summary judgment decision, leaving the facts to be more fully developed and the balancing process to be considered later.

In early 2005, Local Bank (the "Bank") made a $5 million acquisition, construction and mini-permanent loan to Land Company (the "Land Loan"). The Land Loan is secured by the Land Company assets, including a mortgage encumbering the property on a first priority basis and a collateral assignment of leases and rents, also on a first priority basis.

In addition to the security provided by Land Company, the Bank also required the unlimited continuing guaranty of Seasonings, a security agreement and related financing statements encumbering the majority of Seasonings' personal property on a first priority basis, a pledge of Seasonings' stock in Land Company and the unlimited continuing personal guaranty of Jimmy Jackson and his second wife, Joan.

Following the completion of Seasonings' facility, the Bank extended a revolving line of credit of up to $2 million to Seasonings ("Line of Credit"). The Line of Credit was secured by the unlimited continuing guaranties of the Jacksons and a security interest in all Seasonings' assets. Advances under the Line of Credit were available under a formula related to the value of Seasonings' receivables and inventory that were periodically reported to the Bank as a condition of the Line of Credit. Seasonings was also required to maintain certain financial ratios to remain in compliance under the loan documents.

The Land Loan and Line of Credit loan and security documents cross-default the Land Loan and Line of Credit. Death of either Jimmy or Joan is an event of default permitting the Bank to accelerate each Loan rendering the outstanding balance immediately due and payable in full. The loan and security documents also preclude the transfer of any of Land Company or Seasonings assets (other than in the ordinary course of business) and prohibit any cash distribution from either Land Company or Seasonings to pay anything other than ordinary operating expenses and income taxes without the Bank's consent. The documents include representations and warranties that none of the companies' respective assets are or will be subject to any liens, other than those in favor of the Bank. The loan and security documents also preclude the transfer or pledge of any stock in either company except to the Bank.

When Seasonings was formed in the mid-1990s, Jimmy and Joan Jackson each contributed non-marital property (segregated assets owned by them prior to their marriage) to capitalize the business and both have been continually active in management. Nevertheless, Jimmy Jackson was the record owner of all of Seasonings' outstanding shares. He was also the sole director and officer of both Seasonings and Land Company.

In the fall of 2006, a legal dispute arose between Mr. and Mrs. Jackson regarding ownership and management of Seasonings. Mrs. Jackson sought the , appointment of a receiver for Seasonings and a declaratory judgment regarding the ownership of the stock from the applicable trial court of general jurisdiction (for ease of reference herein, the "District Court"). Shortly thereafter, Mr. Jackson commenced a marital dissolution proceeding in the same District Court and successfully moved to consolidate the receivership and marital dissolution proceedings.

In early 2007, Mr. Jackson died suddenly before any divorce occurred. His will (executed prior to the legal proceedings) named Mrs. Jackson as personal representative and provided for (1) specific bequests to twenty friends and extended family members aggregating $200,000; (2) a specific bequest of $500,000 to Mr. Jackson's favorite charity; (3) a marital trust for Mrs. Jackson, (4) a separate trust for the benefit of Jimmy Jackson, Jr., his son from his first marriage, and (5) a separate trust for his daughter born by Mrs. Jackson. Mrs. Jackson applied to the applicable Probate Court for letters of administration to establish and administer the estate of Mr.

Jackson, which was granted under supervised administration. The District Court retained jurisdiction of the ownership dispute proceedings separate from the Probate Court.

Mr. Jackson's interest in Seasonings qualified for deferral of estate taxes under Section 6166(a). The estate was required to make a Holding Company election under Section 6166(b)(8) because of the Land Company subsidiary, requiring the first principal installment of deferred taxes to be paid nine months following Mr. Jackson's death.

Upon learning of his father's death, Jimmy Jackson, Jr. asserted a claim to the stock of Seasonings in both the Probate and District Court proceedings. Mrs. Jackson sought the appointment of a provisional director for Seasonings in the receivership action, which was granted by the District Court. The provisional director appointed Mrs. Jackson as President of Seasonings and Land Company.

Because of Mr. Jackson's death and the litigation calling into question the stock ownership (which under the applicable loan documents was to be resolved within certain deadlines to the satisfaction of the Bank), the Bank accelerated the Line of Credit and Land Loans, made demand for payment and filed a claim against Mr. Jackson's estate pursuant to his personal guaranty. The Bank is temporarily continuing the financing arrangement under the Line of Credit and Land Loans under a forbearance agreement with certain conditions. The Bank is also willing to reinstate the Loans on certain conditions, which include, among other things, (a) a continued first lien position on all Seasonings and Land Company assets, including all accounts and inventory of Seasonings generated following Mr. Jackson's death, (b) a substitute guaranty from a party (or parties) the Bank deems acceptable.

The Bank is considering whether the estate is an appropriate guarantying party and, if so, whether it will require (a) written consent from all parties interested in the estate, including the twenty friends and extended family members and the charity who remain unpaid, Mrs. Jackson, Jimmy Jackson, Jr., the daughter and named trustees for the various trusts. It will also require (b) orders approving of the estate's guaranty and pledge of Seasonings stock from the Probate Court and the separate District Court judge with jurisdiction over the company dispute, (c) confirmation of representations, warranties and obligations from the existing obligors; and (d) an opinion from counsel confirming, among other things, the authority of the obligors to enter into the transactions contemplated and lack of knowledge of any liens (other than those of the Bank) on the collateral.[2]

The Bank is the only source willing to continue financing of Seasonings and Land Company, largely based upon its long history as lender to the business, confidence in Mrs. Jackson's ability to manage the company, the consistently strong financial performance of the business and likelihood of continued financial success in spite of Mr. Jackson's death, and the difficult issues confronting the estate and the business from the ownership dispute.

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Some of the key factors to balance the business' ability to continue without a forced sale and the Service's credit risk are as follows:

[2] The Bank's requirements for reinstatement of the Loans are essentially the same as it would require to extend the Loans following Mr. Jackson's death even if there were no beneficiary disputes.
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(1) The business' fundamental financial soundness and ability to provide cash flow to pay the deferred estate tax;

(2) The estate's direct voting control of Seasonings stock, subject to final determination in the stock ownership dispute with Mrs. Jackson and the requirement that the Bank consent to distributions from Seasonings to the estate to pay deferred estate tax and interest;[3]

(3) The Bank's confidence in existing management's ability to run the business successfully;

(4) The Bank's reliance on the decedent's guaranty of business debt that is not easily substituted;[4]

(5) The Bank's unwillingness to continue lending without a senior secured interest in the business assets;[5]

(6) Whether the ownership disputes have been settled by the time the Service considers whether to impose a bond or Section 6324A lien requirement;[6]

(7) The ability or inability of the principals and their legal counsel to give required assurances (including confirmations by the principals of their representations, warranties and covenants, and an opinion of counsel) necessary to obtaining the financing;[7]

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[3] Assuming the business remains profitable, it generally would seem to be in the Bank's interest to permit distributions to the estate to pay deferred estate tax. The dynamic changes significantly if the District Court rules that Mrs. Jackson's contributions from separate property when the business was formed gave her a legal right to claim ownership of a portion of the stock for estate tax inclusion, valuation and Section 6166 qualification purposes.

[4] Although the decedent had apparent control of the business by ownership of all of the stock, actual control was in dispute at the time of the decedent's death and will be determined in the course of the litigation. A more important factor is the Bank's requirement that the decedent guaranty the debt. The decedent was either a "key management person" or a financial guarantor in the view of the institutional lender without having voting control of the business. This is often true in estates when a business succession has transferred business management, voting control and/or financial ownership from the decedent to others (who may or may not be related).

[5] The Bank may or may not be willing to continue financing if the estate were to provide a Section 6324A lien on the Seasonings shares as long as the Bank has a first secured interest in the business assets. Fundamentally, the Section 6324A lien is of little value to the Service if the lender has a secured interest in all of the business assets. The business can only make distributions to the estate necessary to pay deferred estate tax with the permission of the lender. Therefore, an important factor is the Service's incremental value of the Section 6324A lien if the business were to fail, which is essentially no value at all.

The Section 6324A lien has value to the Service only to the extent that the business itself has value. Therefore, it is quite possible that the Service's imposition of a Section 6324A lien may, in itself, make the business more vulnerable to an inability to obtain financing (or higher cost financing) if the decedent or estate is a key person as described in footnote 4. If the Bank does not require a guaranty of the estate (or any of the estate beneficiaries who will receive company stock) and pledge of its stock, then imposition of a Section 6324A lien seems not to be a burden to either the estate or the business. However, see the discussion at the end of footnote 7 that suggests that such a lien may become a significant issue later.

[6] If the litigation has not been settled, the Bank will probably only continue financing under a forbearance agreement that extends the financing arrangement but permits it to accelerate the loan at any time. Until the dispute is settled, the terms of the Bank financing requirements will not be fully established.

[7] The Service already holds a general lien on all estate assets under Section 6324 that is effective as of date of death. Whether the extension, continuation, or expansion of a loan agreement (against which the company stock is pledged) that has matured of its terms (or accelerated subject to a forbearance agreement) is a "new" agreement that would be subordinated to the Service's general lien on the company stock or whether the continuation of the

(8) The number of beneficiaries who would be required to agree and consent under Section 6324A(c) to the executor's election to provide a lien that may very well include all twenty specific devisees and the named charity (and, under the law of some states, the state attorney general, as the statutory representative of charities), as well as the parties in litigation regarding right to ownership of the stock and control of the business (which may very well include the Court ordered receiver of Seasonings).[8]

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financing retains the Bank's priority secured interest as compared to the Service's general lien is a question that the business lender may insist on resolving and confirming to its satisfaction and at the expense of the borrower and its guarantors as a condition to continuing to finance the business. Regardless of the answer, factors bearing consideration are the relative incremental value of a recorded Section 6324A lien as compared to the Section 6324 general lien and the value of continuing existing financing of the business on customary terms and preserving the flexibility required to do so.

Under the Section 6324 general lien, it is possible for the estate to use assets other than the company stock to make the deferred estate tax and interest payments and still provide a pledge of the company stock to the bank for business financing purposes. Imposition of a Section 6324A lien would not permit such an arrangement because of the nature of the Section 6324A lien—the general lien is released as to the agreed property. Once a Section 6324A lien is arranged, it is irreversible. There is no later opportunity to rely upon the more flexible Section 6324 general lien. *See* Section 6324A(d)(4). Furthermore, it appears that neither Section 6325(b)(4) nor Reg. §§ 20.6325-1, 301.6325-1 provide for *any* substitution of collateral (other than cash or a bond to permit a closing on a sale, which apparently mandates payment of the estate tax). Therefore, once a Section 6324A lien is imposed, there would seem to be no way to substitute collateral. The only option is for the Service to consent to a subordination of its lien to a pledge of the stock to the Bank under Section 6325(d).

[8] Section 6324A(c) requires that the lien agreement must be "signed by each person in being who has *an interest (whether or not in possession)* in *any property*" designated in such agreement. In the case study, there are twenty specific beneficiaries and a substantial charitable beneficiary, all of which are unpaid because of the disputes and the Section 6166 election. Since the Seasonings stock is not specifically allocated to any particular beneficiary, each estate beneficiary arguably has a "non-possessory interest" in *every* estate asset as a matter of local law. It isn't clear who has an interest in the property for this purpose. See the extremely broad definition of "interest" in Reg. § 301.6324A-1(b)(2). The legal disputes in question would make it difficult, if not impossible, to obtain consents from every beneficiary of the estate. Such a burden must be a factor in the Service's consideration. Guidance on this matter would be welcome as part of this process.