High Net Worth Family TAX REPORT

LOEB & LOEB adds Knowledge.

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IRS Limits Popular Tax-Deferral Strategy

In 1997, Congress enacted Section 1259 of the Internal Revenue Code to stop a variety of strategies employed by taxpayers to “monetize” appreciated securities positions without recognizing the capital gain embedded in the positions. The most popular of these strategies was the “short against the box” sale, whereby the taxpayer entered into a short sale of a stock that he owned. By securing his obligation to cover the short sale through the pledge of his own shares, the taxpayer was able to access the proceeds that resulted from the short sale and use them to diversify his portfolio. Even though the short sale completely hedged the taxpayer’s position in the stock, IRS rulings had established that taxable gain did not result until the taxpayer delivered his own appreciated shares to close out the short position.

While Section 1259 eliminated the short sale strategy, other strategies were thought to be unaffected. One such strategy is the “variable prepaid forward sale.” The holder of an appreciated stock position enters into a forward contract to sell his shares at a future date, usually to an investment bank. The seller receives payment for the shares up front, basically at the current price, discounted to present value from the closing date. The feature that prevents the contract from being considered a current taxable sale is that the number of shares the taxpayer will actually deliver to close the sale is variable and depends on the price of the stock at the time of the closing. The contract specifies a minimum and maximum number of shares to be delivered. The economic effect of this is that the seller’s potential for gain or loss with respect to his position is limited but not eliminated. A typical transaction might leave the seller exposed to a 20% decline in the price, as well as the opportunity to profit from up to a 20% increase in the price. As with the short sale, the taxpayer gets cash up front that can be used to diversify his portfolio. Revenue Ruling 2003-7 confirmed that such a transaction is not subject to current taxation under Section 1259.

To hedge its risk under the contract, the investment bank must enter into a short sale of the stock. To limit the cost of the transaction to the seller, some of these transactions also involve a share-lending agreement whereby the seller loans his own shares to the investment bank to enable the bank to execute the short sale. This saves the cost the bank would have to pay if it borrowed the shares in the market.

In TAM 20064033, issued earlier this year, the IRS held that such a share-lending agreement results in the transaction being currently taxable. The IRS position has not been tested in court. Some taxpayers are ignoring it and continuing to do these transactions as before. A more conservative approach is not to loan the investment bank your own shares. The transaction can be done in this way, but at a higher cost, since the investment bank will pass on to the taxpayer the cost it incurs to borrow the shares for the short sale. Until the uncertainty over this issue is resolved, we recommend that clients follow the conservative route. These transactions are highly complex and require careful planning and documentation.

Gifts of Stock May Also Be Subject to Valuation Discounts

Gifts of the stock of a closely held corporation may also be subject to valuation discounts for factors such as minority interest and lack of a ready market in which to sell the shares. In *Huber v. Commissioner,* TC Memo 2006-96 (5/09/06), the IRS determined that the taxpayer had undervalued shares of a closely held corporation that had been given to family members and proposed an assessment of additional gift tax. The corporation had about 250 shareholders. Each year, it engaged an accounting firm to perform a valuation of the business and the shares. These annual valuations were used for a variety of purposes, including sales among shareholders, gifts to tax exempt organizations, the pricing of options granted to executives and the awarding of executive bonuses. The accounting firm determined a "free market" price for the shares and then applied a 50% discount for lack of marketability.

The IRS thought that this discount was too high; however, the Tax Court accepted it as accurate. The court relied heavily on the fact that this valuation methodology had been applied in some 90 transactions involving the company's stock. Some involved sales among distant relatives or transfers to nonprofit organizations. The court equated these with "arm's length" transactions and determined that the 50% discount was reflective of the shares' fair market value.

A good valuation study from a qualified firm is critical to establishing significant discounts for minority interests and lack of marketability with respect to interests in closely held entities. Many cases devolve into battles of "dueling experts," in which the taxpayer and the IRS both have valuation experts on their sides. Sometimes the court will favor one expert over the other. Other times, the court may disregard both of the experts and do its own analysis of value. Here, the taxpayer had the benefit of an excellent valuation report as well as numerous transactions in which the price so determined had been used. This proved to be an unbeatable combination.

Clients frequently are reluctant to incur the fees that a good valuation study may entail. This is shortsighted, as a professionally done valuation study is critical to supporting the discount the client is seeking. The tax savings that will result from the discount being sustained is many times the cost of the valuation study.

More on Family Limited Partnerships and Minority Interest Discounts

The popularity of family limited partnerships is evidenced by the amount of tax litigation surrounding them. Last time we reported on the *Kelly* case, in which a discount of more than 30% was allowed for a partnership that held only cash and marketable securities. Since then, several more cases have been decided, with the taxpayers winning some and the government winning some. Many of these cases turn on their facts, and by now there are some "bad fact" patterns that we know should be avoided.

In *Temple v. United States* (Dist. Ct. Texas 3/10/06), a district court upheld substantial discounts on the value of gifted interests in family limited partnerships and limited liability companies. The partnerships held land and marketable securities. Depending on the particular gift, discounts ranging from 38% to 60% were allowed.

Taxpayers have not done nearly as well where the partnership is formed when the donor is in poor health and passes away within a few years, especially where he transfers most of his assets to the partnership and is left without

sufficient assets to pay his living expenses. *Estate of Lillie Rosen v. Commissioner,* TC Memo 2006-115 (6/01/06), was such a case. The decedent's daughter, as her attorney-in-fact (due to decedent's poor health), caused the decedent to form a family limited partnership in 1996 and fund it with stocks and bonds. Significant gifts were made of partnership interests so that when the decedent died in 2000, her estate held just under 35% of the partnership.

The IRS took the position that all of the partnership assets should be included in the decedent's estate for estate tax purposes under Section 2036(a) of the Internal Revenue Code, which subjects to estate tax the value of property the decedent gave away during her lifetime but retained some right over the property, such as the right to receive income from the property. Because the decedent could not pay her living expenses without resorting to assets she contributed to the partnership, the court had no difficulty finding that there was an implicit agreement the decedent would have access to the gifted property to pay her living expenses. Hence, inclusion in her estate under Section 2036(a) was appropriate.

This is a classic "bad facts" case. A taxpayer in poor health resorted to "desperate" planning measures because she realized death was likely just around the corner and she had not done any other estate planning. Not an enviable position in which to find oneself. It is clear that a family limited partnership will not be effective in these circumstances. Such entities should always be structured so that the taxpayer has sufficient assets outside of the partnership to pay her living expenses.

We have also learned from these cases that it is very important for the partnership to conduct its affairs in a businesslike manner. It should hold regular meetings and keep accounting records. If the partnership is set up to hold securities, the portfolio should be actively managed. You need to be able to show business reasons for the existence of the partnership and demonstrate by actions that these reasons are being carried out. In other words, it is not enough to sign the papers at the lawyer's office and then put them in a file and forget about them. We provide our clients with checklists of things that should be done and work with them to maximize the likelihood that the partnership will be successful.

A Buy-Sell Agreement Is Successful

Last time we reported on a case involving a buy-sell agreement that was not effective in limiting the estate tax value of shares, because it failed to restrict sales of stock during the decedent's lifetime. In *Amlie v. Commissioner,* TC Memo 2006-76 (4/17/06), the taxpayer got it right. An agreement was entered into during the decedent's lifetime to settle some disputes within the family. The court held that the price at which shares were to be sold under the agreement was determinative of the value of the shares for estate tax purposes. The agreement established the value of the shares and was binding both during the decedent's lifetime and at death. It thereby satisfied the requirement of a line of court cases and the more recent statutory requirement of IRC Section 2703, enacted in 1990. Section 2703 requires that the agreement establish a bona fide business arrangement and not serve as a device to transfer property to a decedent's family for less than fair market value.

Buy-sell agreements serve an important role in connection with closely held businesses. They can be used to maintain control over who owns the interests in the business. More important, they can afford an owner or his family the right to require the company or the other owners to purchase his interest at certain times, such as retirement or death. Such agreements can provide much needed liquidity with respect to the interest of a closely held business that otherwise would be difficult or impossible to sell.

Preparing an agreement that satisfies the tax law is the easy part. The difficulty comes in tailoring the agreement to meet the needs of the business and its owners. The business owner is required to address the difficult question of planning for his own succession. Does he have children who are well qualified to run the business? Can he even address that question objectively? Is there a management team that can take over? Should the business be sold?

One of the most important issues is figuring out how to pay for shares that are required to be purchased under a buy-sell agreement. Sometimes payments are structured over time to accommodate the cash flow of the business. Other times life insurance is purchased on the lives of the owners to serve as a source of funds for the purchase. Whether the shares are purchased by the business or by the other owners can have numerous tax and other consequences and must be thought through carefully. We have extensive experience with all varieties of businesses. We can work with you to address management succession issues and to design a buy-sell agreement that addresses the needs of your business and its owners.

Using an Art Collection to Establish a Charitable Fund

We recently had clients who wanted to use their art collection to establish a fund for charitable giving. To these clients, setting up a substantial fund was far more important than the size of the tax deduction they obtained. They donated their collection to a philanthropic fund (a public charity that permits the donors to recommend both investment of the assets and contributions to qualified charities selected by the donors and their family, often referred to as a "donor-advised fund"). The fund consigned the art collection to an auction house, which sold the works for more than $40,000,000. Because the sale was for a philanthropic fund, it was exempt from New York State sales tax, which permitted bidders to get 8.565% more for their money (and bid more accordingly, to the benefit of the fund).

People more commonly give their art collections to museums that will display the art. That would have allowed our clients a charitable contribution deduction equal to the fair market value of the art, but would not have resulted in the creation of a fund for charitable giving. Had the clients sold the art and donated the proceeds, they would have had a reduced amount to give to the fund, because they would have paid sales tax and the 28% capital gains tax on the sale of "collectibles." This was avoided by donating the art to the fund. Because the fund sold the art rather than displaying it, the clients' deduction was limited to their tax basis in the art, which was very low. These particular clients did not mind that, because their objective was to create a charitable fund, not to achieve a large tax deduction. We applaud their generosity.

More on Funding Education

Our article last time about the grandfather prepaying private school tuition for all of his grandchildren generated a lot of interest. The IRS ruled that the prepayment was exempt from gift tax pursuant to IRC Section 2503(e), which allows a person to pay tuition (and also medical expenses) for anybody without incurring any gift tax liability or having to use any annual exclusion or lifetime exemption, so long as the payment is made directly to the school or the provider of medical services.

The question many clients asked is whether you could do that through a trust, which would be especially useful if you wanted to set something up for your children or grandchildren but did not necessarily know where they were going to school. The answer to this is clear, and unfortunately, it is no. The regulations are very clear that gifts in trust do not qualify for the exemption of Section 2503(e).

There is, however, a type of trust that can be used to set up a perpetual education and healthcare fund for your family. The trust is called a healthcare and education exemption trust (HEET). The taxpayer sets up a trust that provides the income and principal of the trust can be used to i) make contributions to a qualified charity and ii) pay healthcare and education expenses for family members, which can be defined as broadly as the taxpayer wishes. The trust can go on for multiple generations. The charitable beneficiary is the key, as this feature prevents the trust from ever being subject to the generation-skipping tax, even though it may provide benefits for multiple generations of family members. The charitable beneficiary must be a real one; the trustee should make some gift to it out of the trust each year.

Any gift the taxpayer makes to the trust to fund it is not exempt from the gift tax and will not give rise to any charitable deduction. He can use a portion of his lifetime exemption if he wishes. A more creative approach may be to name a HEET as the remainder

beneficiary of a grantor retained annuity trust (GRAT). If the taxpayer sets up a zeroed-out GRAT and the assets grow at a rate that exceeds the payout rate, the remainder going to the HEET will be completely free from estate, gift and generation-skipping taxes indefinitely. This can be a great legacy to leave your family. It is especially significant that the proceeds in the trust can be used to pay the cost of insurance for medical expenses. We have set these vehicles up for a number of clients and would be happy to discuss their possible application to your own situation.

Kiddie Tax Now Applies to Age 18

Somewhat lost in the excitement of the extension of the 15% tax rate on capital gains and dividends for two more years was a provision in HR 4297 that increases from 14 to 18 the age at which children are taxed on their unearned income at their parent's highest marginal tax rate. The original provision was designed to prevent parents from transferring income- or dividend-producing assets to their children to use up the kids' lower tax rate brackets. The extension of this provision to age 18 will add to the complexity of the tax returns for some children affected by the new rules. Some of these kids may have summer or part-time jobs and will have a combination of earned income, which is taxed according to their own rate brackets, and unearned income, taxed at the parents' highest rate. There is a small exemption from these rules. For 2006, the first $1,700 of a child's unearned income is taxed at his bracket rather than the parents' highest bracket.

Cost of Mold Removal Is Deductible with Respect to Income-Producing Real Property

The IRS issued an important private letter ruling on the tax treatment of the cost of removing mold from buildings. Costs that increase the useful life of a building, add value to it or adapt it to a different use must be capitalized and depreciated over the applicable period prescribed by the Internal Revenue Code. In PLR 200607003, the IRS determined that the cost of mold removal did none of these things; it merely kept the building serviceable. Thus, it permitted the cost to be deducted in the year incurred by the taxpayer. The ruling did state that it was presumed that none of the mold had been present at the time the taxpayer purchased the property. Had that been the case, the mold remediation may have been treated as a part of the purchase cost. Finally, this would not apply to the costs of mold removal in your home, which is a personal use asset with respect to which maintenance costs are not deductible for income tax purposes.

Feeling Generous Toward Your Country Club?

Section 2503(b) of the Internal Revenue Code allows a taxpayer to make annual gifts to an unlimited number of persons without incurring any gift tax liability or using any of his lifetime exemption. The amount that can be given is indexed for inflation and for 2006 is $12,000. In PLR 200608011, the IRS ruled that permitted donees of such gifts include organizations such as golf clubs to which the taxpayer may belong. The taxpayer will not receive an income tax deduction for such a gift, but at least he will not incur a gift tax liability. So, if you love your club and it could use the money (most can), go ahead and write out that check for $12,000! By the way, you can send them another one in January.

IRS Explains When Interests in Real Estate Qualify for Estate Tax Deferral

When someone whose major asset is a closely held business dies, it is often difficult for his estate to pay the estate taxes that are due with respect to that business. A closely held business is not always easy to sell, especially following the death of its key employee. Even if the business is readily saleable, it is common that by the time the founder passes away, there are one or more children and sometimes grandchildren working in the business. In these cases, a sale is not a desirable alternative to fund the payment of estate taxes.

The Internal Revenue Code provides some relief for these situations. If a closely held business comprises more than 35% of a decedent's adjusted gross estate, then IRC Section 6166 allows the estate tax attributable to the business to be deferred for up to five years and then paid in installments over

up to ten years. Further, the interest payments are at a very favorable rate. In order to qualify, the interest must be in an active business. The IRS recently issued Revenue Ruling 2006-34, which explains the circumstances under which real estate holdings may constitute an active business that qualifies for deferral under Section 6166.

The ruling gave several examples. If the owner personally manages the day-to-day operation, management and maintenance of the real estate holdings, it constitutes an active business. In the facts in the ruling, the owner did most of the repairs to the property himself, but hired an independent contractor to do repairs that he could not handle. However, if the owner hires a property management company to lease, manage and maintain the property, it is not an active business unless he owns 20% or more of the property management company.

In another example, the decedent owned a 1% interest as a general partner and a 20% interest as a limited partner in a partnership that owned three strip malls. As general partner, the decedent provided the partnership with the services necessary to operate its real estate either directly or with the assistance of employees or agents. The decedent received a salary from the partnership for these functions. The ruling concluded that both the decedent's general and limited partnership interests qualified as active business interests.

Finally, a decedent owned all of the stock of a corporation that owned an automobile dealership. He actively managed its business. Separately, he owned the real estate where the dealership's business was conducted. He leased the real estate to the corporation under a net lease. Employees of the corporation performed maintenance and repairs necessary on the real estate. The IRS ruled that the value of the real estate was part of the active business of the automobile dealership.

Determining whether your estate will qualify for deferral of estate tax due to having a significant interest in a closely held business is a key part of good estate planning. This ruling provides helpful guidance for clients with substantial real estate holdings. There are a lot of cases clearly on one side or the other of the line of what constitutes an active business. Unfortunately, there are also a lot of cases that fall into gray areas in the middle. You may be able to ensure active business treatment with slight modifications to the way you manage your real estate holdings.

Ownership of Property in Mexico May Trigger U.S. Reporting Obligations

A growing number of American citizens and permanent residents are investing in beachfront property in Mexico as retirement and/or vacation homes, particularly because of the reasonable prices of such property compared to similar property in the United States. Mexican law requires that these nonnationals own such property through a Mexican bank trust (*fideicomisos*). This trust is a legal substitute for deeded (commonly referred to in the U.S. as fee-simple) ownership and is provided specifically for non-Mexican nationals to own property in the formerly restricted zones (border and beach areas, including the highly popular Cabo San Lucas area).

Although there is some uncertainty as to classification of these bank trusts for U.S. tax purposes, the prudent position is to treat them as trusts and satisfy all U.S. reporting obligations for U.S. persons engaging in certain transactions with foreign trusts. As creator and beneficiary of the trust, the U.S. buyer should report the acquisition of the property on a Form 3520 and disclose its ownership annually thereafter on Form 3520A. In addition, the U.S. buyer must file a Form 3520 for any year in which the buyer transfers additional property or money to the trust (e.g., by making improvements or repairs to the property). A distribution from the trust, such as after the property is sold, would also trigger a Form 3520 reporting requirement.

Failure to timely and fully comply with any of the reporting requirements potentially subjects the U.S. buyer to a penalty of up to 35% of the gross reportable amount (e.g., the unreported value of the property transferred to the trust, the unreported value of the portion of the trust's assets at the close of the taxable year treated as owned by the U.S. buyer, or the unreported distribution). If a failure continues for more than 90 days after the day on which the IRS mails a notice to such person, the IRS will impose an addi-

tional penalty of $10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period. The maximum penalty cannot exceed the gross reportable amount. The penalty can be waived for any failure that is due to “reasonable cause” and not “willful neglect,” but what the IRS considers to be reasonable cause is not all that clear and depends on the facts and circumstances of each situation.

Title to Mexican property outside of the formerly restricted zones generally is held directly by the individual or through a Mexican corporation, and the above reporting requirements would not apply. However, ownership through a Mexican corporation may trigger Form 5471 reporting.

If you already own property in Mexico and have not filed the required forms, please feel free to contact us to assist you in addressing the issue. If you are considering buying property in Mexico, it is important that you have competent legal counsel in Mexico to structure your ownership properly and to advise you of your general legal and tax obligations in Mexico. We would be happy to suggest the names of such Mexican counsel.

Tax Deferral for Retirement Plan Assets

At death, retirement plan assets are potentially subject to both estate and income taxes – a combined tax of 70% or more. Planning for deferral is advisable. The estate tax can be deferred if you have a surviving spouse, and the income tax can be deferred in most cases.

If your estate is large enough (and the federal estate tax remains in effect), your retirement benefits will be subject to federal estate tax. The federal estate tax on plan assets can generally be deferred only if (1) you name your spouse or a trust for your spouse as beneficiary, or (2) you designate a charity as beneficiary. If you designate a charity, the plan assets will escape both federal estate and income taxes permanently.

If your goal is tax deferral rather than philanthropy, keep in mind that these assets may be the only ones in your portfolio that can be invested on a completely tax-deferred basis. Thus, the rate of return on plan assets can, in effect, be 25% to 45% higher than the rate of return on other assets, depending on your beneficiaries’ combined federal and state income tax bracket.

The longer you can postpone distributing the plan assets, the greater the amount of additional wealth that can be created. The IRS has prescribed complex regulations that govern the times at which minimum distributions must be made and the amounts of these distributions. A plan participant must commence taking distributions no later than April 1 of the calendar year following the calendar year in which the participant attains age 70½. Further distributions must be taken no later than each December 31 thereafter. The amount of each distribution must be at least the amount obtained by dividing the plan assets at the end of the year preceding the distribution year by the participant’s life expectancy during the distribution year. (Life expectancies are determined from a table prescribed by the IRS that is generally favorable to taxpayers.) When the participant dies, the minimum distributions that must be made thereafter and the federal estate and income tax consequences with respect to the plan’s remaining assets will depend to a significant extent on whom the participant has designated as beneficiary.

The best tax result can be obtained if a spouse is named as beneficiary. In this case, the assets will not be subject to federal estate tax, because they will be covered by the estate tax marital deduction.[1] In addition, the surviving spouse can roll over the assets to the spouse’s IRA without income tax and spread distributions over the spouse’s life expectancy, starting when the spouse attains age 70½.

If the surviving spouse has rolled over the assets to the spouse’s IRA, the spouse will then have the right to designate beneficiaries with respect to that IRA.[2] If the spouse designates the spouse’s children as beneficiaries of the IRA and dies after attaining age 70½, the children will be able to

[1] Special rules apply to non-U.S. citizen spouses. If you are married to a non-U.S. citizen spouse, the plan or IRA assets must be distributed to a “qualified domestic trust” in order to obtain a marital deduction from estate tax.

[2] A trust will be required if the plan or IRA participant wishes to control the distribution of assets at the surviving spouse’s death.

take distributions over the life expectancy of the oldest child, starting in the year after the spouse's death. If there is more than one child, the children may be able to divide the IRA into separate IRAs, each with a different child as its beneficiary, so that each child can control the investment of the assets held for that child's benefit and use his or her own life expectancy to govern distributions.

Sometimes a participant will want to name a trust as beneficiary of the plan or IRA, rather than one or more individuals. If the trust becomes irrevocable on the death of the participant and satisfies certain other requirements set forth in IRS regulations, then the oldest beneficiary of the trust is used to determine the minimum distributions that the plan must make to the trust.

Thus, with careful planning it is almost always possible to extend distributions from qualified plans and IRAs for many years after the participant's death. This approach will significantly defer income taxes and also allow the assets to continue to grow on a tax-deferred basis, which can allow the plan to continue to generate income for beneficiaries long after the death of the participant. Finally, if you have significant philanthropic goals as part of your estate planning, qualified plans and IRAs can be used to achieve these goals.

Circular 230 Disclosure: To assure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer, and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

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Contact Us

Los Angeles

Marla Aspinwall	maspinwall@loeb.com	310.282.2377
C. David Anderson	danderson@loeb.com	310.282.2128
John Arao	jarao@loeb.com	310.282.2231
Leah M. Bishop	lbishop@loeb.com	310.282.2353
Regina I. Covitt	gcovitt@loeb.com	310.282.2344
Terence F. Cuff	tcuff@loeb.com	310.282.2181
Andrew S. Garb	agarb@loeb.com	310.282.2302
Thomas N. Lawson	tlawson@loeb.com	310.282.2289
Jeffrey M. Loeb	jloeb@loeb.com	310.282.2266
David C. Nelson	dnelson@loeb.com	310.282.2346
Ronald C. Pearson	rpearson@loeb.com	310.282.2230
Stanford K. Rubin	srubin@loeb.com	310.282.2090
Paul A. Sczudlo	psczudlo@loeb.com	310.282.2290
Adam F. Streisand	astreisand@loeb.com	310.282.2354
Stuart P. Tobisman	stobisman@loeb.com	310.282.2323
John S. Warren	jwarren@loeb.com	310.282.2208
Laura B. Berger	lberger@loeb.com	310.282.2274
Vikram R. Bhagat	vbhagat@loeb.com	310.282.2281
Tarin G. Bross	tbross@loeb.com	310.282.2267
Linda N. Deitch	ldeitch@loeb.com	310.282.2296
Pamela J. Drucker	pdrucker@loeb.com	310.282.2234
Steven C. Gove	sgove@loeb.com	310.282.2207
Neil B. Jannol	njannol@loeb.com	310.282.2358
Deborah J. Korney	dkorney@loeb.com	310.282.2245
Miriam E. Paul	mpaul@loeb.com	310.282.2179
Alyse N. Pelavin	apelavin@loeb.com	310.282.2298
Jonathan D. Petrus	jpetrus@loeb.com	310.282.2101
Gabrielle A. Vidal	gvidal@loeb.com	310.282.2362

New York

Eliot P. Green	egreen@loeb.com	212.407.4908
Jerome L. Levine	jlevine@loeb.com	212.407.4950
Lanny A. Oppenheim	loppenheim@loeb.com	212.407.4115
Laurie S. Ruckel	lruckel@loeb.com	212.407.4836
John F. Settineri	jsettineri@loeb.com	212.407.4851
C. Michael Spero	mspero@loeb.com	212.407.4877
Alan J. Tarr	atarr@loeb.com	212.407.4900
Bruce J. Wexler	bwexler@loeb.com	212.407.4081
Patricia J. Diaz	pdiaz@loeb.com	212.407.4984
Laura Lavie	llavie@loeb.com	212.407.4165
H. Sujin Kim	skim@loeb.com	212.407.4116
Jennie E. Mooney	jmooney@loeb.com	212.407.4181