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RE: Amendment Allowing Corporate Action by Less Than Unanimous Written Consent and Executive Employees' Personal Use of Company Property in Exempt Organizations

In this July edition of the Gelt & Grassgreen P.C. Newsletter, we address the amendment to Section 7-107-104 of the Colorado Business Corporation Act that allows corporate action by less than unanimous written consent and also executive employees' personal use of company property in exempt organizations.

Amendment Allowing Corporate Action by Less Than Unanimous Written Consent

With the passage of the amendment to Section 7-107-104 of the Colorado Business Corporation Act (the "Amendment"), Colorado corporation shareholders (the "Shareholders") are now permitted to take action by less than unanimous written consent. Prior to the Amendment, Shareholders could only take action by the required vote at a Shareholders' meeting or by unanimous written consent, but now, as of April 22, 2005, Shareholders are able to take action with the written consent of the Shareholders who could have approved the action at a meeting.

For Colorado Corporations formed after April 22, 2005, the original Articles of Incorporation may include a provision permitting less than unanimous written consent. For Colorado Corporations formed prior to April 22, 2005, an amendment to the Articles of Incorporation must be filed to permit less than unanimous written consent. Such amendment to the Articles of Incorporation must either be approved by the required vote at a Shareholders' meeting or by unanimous written consent; a Colorado Corporation in existence prior to April 22, 2005 may not amend its Articles of Incorporation by approving such amendment with less than unanimous written consent.

If an action is taken by less than unanimous written consent, the Shareholders taking such action must send a notice to all of the Shareholders who did not sign the written consent. The information included in the notice would be the same information that is included in a notice for a meeting on the subject. If the action creates dissenters' rights (such as merger, consolidation, sale of substantially all of the assets or liquidation), additional notice pursuant to Section 7-113-201(2), Notice of Dissenter's Rights, must also be given.

Executive Employees' Personal Use of Company Property in Exempt Organizations

Having increased staffing in its exempt organizations division, the IRS is closely examining executive employees' personal use of company property in exempt organizations, such as private foundations and public charities. Personal cell phone use and the resulting implications on executive compensation have been specifically targeted. If an exempt organization supplies an executive employee with a cell phone and pays the bills for such phone, then 100% of the calls an executive employee places using the cell phone must be for business, unless the employee reimburses the exempt organization for a portion of the bill or shows that the personal use of the cell phone is part

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of such employee's compensation. Personal use of cell phones provided by an exempt organization, if not properly accounted for, triggers the excess benefit rules under Internal Revenue Code § 4958.

Under § 4958, an excise tax is assessed against the executive employee in the amount of 25% of the excess benefit such employee received (i.e. 25% of the cost of personal calls made on the organization's cell phone). If the excess benefit transaction is not corrected, an additional excise tax is assessed against such employee in the amount of 200% of the excess benefit received. The excise tax is in addition to the income tax owed on the unreported compensation. To avoid triggering the excess benefit rules, an exempt organization should report personal cell phone use on either the executive employee's W-2 or on the exempt organization's income tax return, Form 990.

While the IRS has recently targeted personal cell phone use, the IRS is still very concerned by the personal use of any company property by executive employees (e.g., cars and computers), so it is important to understand that all such uses of company property are subject to the § 4958 excise tax if not properly accounted for.

If you have any questions regarding the above Amendment to the Colorado Business Corporation Act or executive employees' personal use of company property in exempt organizations, please feel free to contact us.

Sincerely,

GELT & GRASSGREEN P.C.

A handwritten signature in cursive script, appearing to read "Jeff Tauscher".

Jeffrey C. Tauscher, Esq.

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