FOIA Number: 2006-1066-F

FOIA MARKER

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Vetting Materials

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NON-JUDICIAL PAS VETTING PROCEDURES

RED FILE

I will assign a candidate to you. There should be a red file with the candidate's name on it in the filing cabinet in Room 530. (PAS candidates have red files; PA candidates have blue files).[1] The candidate's file should have:

- a completed White House (PDS) questionnaire.
- a copy of the completed SF-86, the form that the FBI uses to conduct its investigation (however, the file will not have an SF-86 if the person is a candidate for a State Department post; State conducts its own investigation and uses it own forms).
- an IRS tax check (the tax check might not be in the file when you first get it; however, if you do not have it within several days, contact Debbie Ho to make sure that she knows that we have not gotten the tax check yet).

Call & set up interview for 3 days later.

Before beginning the vet, spend at least 15 minutes reviewing these forms in order to begin to get a handle on the person's biography and possible initial areas of concern. Also, this is the time that you should carefully look at the candidate's answer to questions #7 (writings) and #8 (testimony) on the White House PDS form. You are not required to read every one of the candidate's writings, but you should obtain any articles that may be controversial. Some titles will clearly raise a red flag. They should be obtained and read. Also, press the candidate about the ~~subject matter of each separate writing~~ (and testimony) listed and you should obtain and read any such writing or testimony that may be at all controversial. Also, we don't ask candidate in the PDS to give us speeches (ask candidate to get you a list of all speeches and do the same thing for speeches as you did for articles.[2]) When in doubt, get the text! If these documents are not easily accessible to you (for example, on Nexis or in the OEOB library), have the candidate fax or FedEx them to you (remember – time is of the essence, so do not have the candidate send anything via regular mail).

Also, while you are talking to the candidate, see if the candidate has ever filled out forms for a PA or PAS position in the past (even if not nominated). If candidate has during the Clinton Administration, we should have an old red or blue file on candidate. Immediately call Will Winkler and get the old file. It will make your life LOTS easier. Check Black Books for old vets. Ask Mik before relying on old vet.

LEXIS/NEXIS

The first thing that you need to do is to find out all possible names that the person may have used during his/her life so that you can do a comprehensive Lexis/Nexis of the person. The candidate should have listed all current and former names on his/her SF-86. However, you will not have an SF-86 for State Department candidates. In either case, you should CALL UP THE CANDIDATE NOW to ask him/her if s/he ever went by any other names or nicknames (this is also the time to talk to the candidate about writings, testimony and speeches). Be especially aware of former surnames (such as maiden names or name changes due to divorce).

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[1] Sometimes I will also ask you to do a vet on PA (blue file) candidates. Before starting such a vet, however, please talk to me about the vet parameters of the specific vet that you are doing.

[2] Various committees have different questions about how long back one needs to go in providing speeches. You may track that timeframe (Foreign Relations two years; Agriculture, Armed Service, Government Affairs – 5 years; Intelligence – ten years; Banking, Housing, Urban Affairs – since birth) in conducting your search.

In conducting your Lexis/Nexis search, you are looking for several things:

1) Anything that suggests that the person does not possess the professional qualifications for the job.

2) Anything that suggests that the person is not morally fit to hold the job (because of past or present actions).

3) Anything that suggests that the person would have a conflict serving in the job or that would create an untoward appearance for the person to hold the job.

4) Anything that details issues with which any Republican or Democratic politicians would have concerns (and therefore potentially attempt to stymie the candidate's appointment) and any criticisms directed by candidate.

5) Anything that could be (even unreasonably) used to embarrass the candidate or Administration.

6) Any biographical information that should have been but was not put in the candidate's forms.

When conducting your search, remember that if you miss it, we all miss it. So be vigilant and err on the side of inclusion. You will conduct the following searches:

- A **Nexis/News/Allnws** on the candidate, using all possible combinations of the person's name. (Until you have done at least 5 vets, please consult with an experienced vetter regarding the exact terms of the search). If there are too many articles, you can limit the search by doing a "AND NOT" search. For example, if you are looking for John Smith, the banker, but there is also a famous John Smith who was the founder of Jamestown, you can do "John /2 Smith but not Jamestown." However, you can only do this if the limiting word ("Jamestown") is very unlikely to be linked in news articles to our John Smith. If you cannot get the search down to a manageable number doing this, then CONSULT ME. *Do not conduct a limiting "scandal search" (such as John /2 Smith /5 murder) or an "AND" search (John /2 Smith and banker) without my previous permission.*

- **Nexis/News/Allabs** and **Nexis/People/Allbio**. For these searches, you can be more aggressive in limiting your search, BUT still use good judgment.

- **Lexis/Mega/Mega** and **Lexis/Lawrev** searches. Use the same search rules as doing News/Allnws.

  When doing these searches, if you have any questions about relevance, please contact me. I may be able to help you more quickly ascertain the relevant issues.

PUBLIC RECORDS DOCUMENT

Now, write up all pertinent information that you obtained through LEXIS/NEXIS and the candidate's controversial writings, speeches and testimony. The document should be labeled "PERSONNEL INFORMATION – TREAT ACCORDINGLY."

in F/N

The first paragraph of the document should fully detail the searches that you conducted, search terms used for each search, and the number of documents that each search produced. It should also confirm that you contacted the candidate about all possible names.

The document should then fully outline all pertinent information. Please provide the sources for all information provided in the document. The document should contain ONLY public record material.

INTERVIEW QUESTIONNAIRE

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The candidate should then be interviewed. The interview usually takes about 45 minutes to an hour and can be conducted in person (you can borrow my office) or via phone (but not by cell phone). There is a "question form" that will help you in the interview. However, be flexible and feel free to ask follow-up questions that you believe are relevant. Finding out possible issues is an art, not a science.

Everything you say is confidential. Apologize for questions being duplic. but explain we have to ask them

At the beginning of the interview, please point out to the candidate that we do not give legal advice to the candidate. Any advice given or requests made are part of a vetting – not legal – process. Therefore, the candidate should NOT treat our conversations as legal advice. Furthermore, if the candidate is working for a government agency, s/he should not get legal advice from other government workers (unless, of course, cleared by her ethics office). If the candidate wants legal advice, s/he should hire a private professional.

All of the questions should be asked, but below please find some suggestions regarding certain key questions (the question number is followed by the suggestions):

1) To get the candidate to begin talking, also ask when was the last time that the candidate was an inpatient or outpatient at a hospital and the reason for the visit. You can then ask when was the time before that visit, and the time before that one, etc… Also ask when was the candidate's last physical and what if any concerns the doctor expressed to the candidate. Ask if the candidate has been on any medication at any time in the past two years. What?

Note that the first question is the time to set the tone that the candidate must take your questions seriously and that you will ask follow-up questions to ensure full disclosure.

3) Any treatment or counseling by a psychologist, psychiatrist or similar professional? (the question should really read "Have you ever had….").

If the answer is yes, the candidate may short-circuit questions by stating that "it was just family or marital counseling." Fine, but we still need details. Among other things, we are interested in whether there have ever been any issues or accusations (even if unfounded) regarding emotional, physical or drug (including alcohol) abuse by the candidate, or any mental or emotional issues (we are trying to get at anything that could affect current performance or create an opportunity for blackmail). In short, be sensitive, but get the details, including the timeframe and frequency of the counseling. Even if the candidate answers that s/he has had no counseling, please still ask whether the candidate has ever been prescribed or taken any medication for a mental or emotional issue, condition, or illness. What were the issues?

4b) Any DWI/DUI or similar traffic charges involving alcohol or drugs? (Again, the question should be read "Have you ever been the subject of . . .") Please also ask if the candidate has ever been given a Breathalyzer test or ever been made to "walk the line" or been administered any other sobriety tests.

5a) Since age 18, have you used any illegal substances, including marijuana? Although we only focus on "since age 18," ask about drug use all the way back to birth just in case the person is not being fully frank about what happened before as opposed to after the 18th birthday. If the person has ever used any illegal drugs, we then need a full breakdown for each type of drug including the number of times used and a precise timeframe of use. For EACH TIME, you should ask the candidate how s/he obtained the drug (did candidate give money for it, etc…). You should also ask whether the candidate has ever used any legal drug in an illegal way (such as sniffing glue, using prescriptions in an unauthorized manner, etc…).

6b) Misdemeanors (including reckless driving, etc.) Break this down into two questions. (1) "have you ever been charged with any misdemeanors?" (2) "have you ever been charged with reckless driving or a similar offense." Has the candidate ever been given any speeding tickets over $100?

You should also ask at this time whether the candidate has ever had to go to driving school or had restrictions place on his/her license or had license suspended at any point. If so, get details why.

6c) Have you ever been arrested at all (including juvenile offenses)?

Also ask if the person has ever been placed in handcuffs or been in a police car or been interviewed by the police (either in or out of a police station) or been in a police lineup.

8) Ask it in the following way: "To the best of your knowledge, are you (in either your official or personal capacity) currently the subject of any administrative (including, but not limited to, I.G.) criminal, or civil investigation?" (Also look at the supplement to the SF-86 regarding candidate's responses to similar questions)

Also ask whether s/he has ever been the subject of any such investigation.

Also ask if s/he has ever been interviewed by (or otherwise been asked to supply any information at all to) federal (for example, the FBI or an IG), state or local investigators or law enforcement regarding any ethics, administrative, civil, criminal or congressional investigation even if such investigation was not about any of the candidate's own actions and even if candidate was not either a target or subject of the investigation. (press the candidate hard on this one and get details).

9) Have you ever been investigated regarding, or cited for, a security violation? Get specifics about each time. Get dates and story behind each instance. Also, was any information compromised on any of these occasions? Was there any reprimand? Was any action taken against candidate? If no, how did candidate know that there was a security violation? Also ask if the candidate has ever been denied a security clearance or access to classified information for any reason.[3]

IF post 1992 could be a nprool
When?
How many
Any discip. actions?

10a) Break this question down. First ask whether s/he has been a defendant in his personal capacity. Then ask him if he has been a defendant in his professional capacity. Then ask him if he has ever been a plaintiff in any suit. If so, were there any cross-claims or counterclaims?

Get full details about each case, including the terms of settlement (if any) and whether the candidate was deposed or was a witness. Candidates are usually very hazy about cases when you first ask them. Stress to them that you need details. If you need to, suggest that you have a conference call with the candidate and his/her attorney to flesh out the details. Another alternative is that you can tell the candidate that s/he needs to consult his/her attorney and submit a letter to you laying out the circumstances of the case and the details of the resolution. Also ask whether there was any media attention regarding any of the cases. If so, get candidate to supply you with all articles that do not come up on Nexis.
Did any allege any personal ~~wrong~~doing on your part?
Next, ask the candidate if he has ever been deposed or been a witness in any case (even in cases in which the candidate was not a party). Get details. Also, this is the time that you should ask candidate about any cases that came up in your LEXIS search.
What was the resolution?

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[3] If the candidate is going before the Senate Intelligence Committee, but ONLY if the candidate is going in front of said committee, ask if the candidate has ever submitted to a polygraph and whether the candidate has ever refused to submit to a polygraph. Explain that we are asking this only because the committee asks it. ASK Mike or Will about which Comm.

13. Break this down into two questions: (1) Have you ever been disciplined regarding a breach of ethics or unprofessional conduct; (2) Have you ever been the subject of a complaint regarding a breach of ethics or unprofessional conduct?

Also ask if candidate has ever been the subject of a contempt motion, rule 11 motion (or analogous state motions), or sanction motion. Ask if anybody has ever formally or informally complained in writing to anybody about candidate in any context. How about orally?

Candidates almost always suggest that they have no tax issues and pay taxes when due. The questions on the form should be asked but do not get fleshed-out information. Therefore, many follow-up questions are usually needed.[4] Let them know - we don't give legal advice

14. What you really want to know is whether on either federal OR state OR local taxes the candidate (a) has ever paid any money for a previous tax year after April 15th; (b) ever filed beyond April 15th, and if so did candidate always file within the extended period, and (c) did candidate ever pay any penalties. Possible problems:

many people withhold throughout the year and have paid all their taxes by April 15th, but they don't bother to file their tax return until after April 15th. If they get an extension and file within the extended period, this is o.k. However, if they don't get an extension or don't file within the extended period, this is not good (even though candidate says – "but I paid on time"). Look for patterns to see if this happens often and ask for details about why they did not file promptly.

Some people get a legitimate extension beyond April 15th and file within the extended period and owe money when they file. If this is a pattern, this is not good – because even if candidates get a valid extension post-April 15th, they are still supposed to pay estimated taxes quarterly (and estimated total by April 15th). If candidate has whole lot of money due each year post April 15th, there is often a story behind it (such as financial instability or irresponsibility). For example, some people just don't deduct taxes during the year because of a financial crunch. Note that people have an obligation to pay quarterly (the IRS is not a lending institution!). So anything paid after April 15 is an issue (*and even if paid by April 15, you should look to see if any penalties were assessed because didn't pay quarterly*). Of course, if the candidate files for an extension and pays after April 15 but within the extended period, AND has a legitimate reason why s/he underestimated taxes (such as a law firm's totally unexpected settlement that was not fully realized until all forms were received, etc...) on April 15th, then this is not a huge vetting deal (so long as it is not for a huge amount or is not a pattern – at some point, the unexpected turns into the expected). However, watch for patterns and get details.

If candidate both owes money post April 15th and does not file within extended date, this is big problem!

Furthermore, you want to know whether the IRS or state or local taxing authority has ever sent a notice (even one of those seemingly informal computer generated notices) to the candidate suggesting that the candidate owed additional money for taxes.

On any occasion in which there is ANYTHING unusual, you need to get full details, including how much of the additional money owed is penalty and how much is interest. If the candidate is unclear about details

[4] Make sure that you inform the candidate that we are not giving legal advice or a legal ruling about the candidate's taxes. We are not the IRS and are not speaking on behalf of the IRS. It is possible that the IRS may legitimately suggest that there are tax issues that we did not identify. The mere fact that we are not reviewing the candidate's taxes does not absolve the candidate from future scrutiny by the IRS on these same issues. It is the candidate's responsibility, and the candidate's alone, to ensure that the candidate has complied, is complying and will comply with all laws.

(which is usually the case), tell the candidate that s/he should sit down with an accountant and have the accountant produce a letter to the candidate given all pertinent details of all issues. The candidate will sometimes say that s/he has only used an accountant for the past X number of years. This may be so, but an accountant may be able to help the candidate reconstruct old tax forms.

When I have any concerns about possible bad tax patterns, I tell candidates that they have to get me a letter outlining every tax year for the past ten years, giving details about any payments after April 15th (including breakdown of principal, penalty, and interest) and whether candidate ever filed after April 15 or outside of an extension period or ever paid any penalties. The candidate can do this him/herself without the aid of an accountant if the candidate is capable, but it is often easier to get an accountant involved in the process. If you have any concerns about how forthcoming the candidate is or the candidate's tax picture, do not hesitate to make the candidate do a ten-year tax reconstruction. (please note that we are interested in tax problems for anything beyond the past ten years as well, and you should feel free to have the accountant outline those problems as well. However, if you just have a concern that something may be wrong with taxes, a ten-year "check up" will usually give you an idea regarding candidate's respect of tax laws.) The accountant's letter should be addressed to the candidate.

Finally, you should have a copy of the IRS tax check by this point. However, do not simply rely on the tax check because the tax check gives you very limited information. The tax check only goes back three years and only deals with issues when the candidate did not pay within 45 days of IRS notice and demand. DO NOT ASSUME THAT A CLEAN TAX CHECK MEANS THAT THE CANDIDATE HAS NO TAX ISSUES (be vigilant).

15b) Also find out how much debt the candidate has on all of his credit cards combined.

15c) Also find out if the candidate (or spouse, during marriage) has ever defaulted on a loan or bill, has ever been 90 days late with a loan or bill, has ever been 60 days late in paying a loan or bill, has ever been referred to a credit agency (even if incorrectly). Ask the same questions about any companies in which candidate has been an officer or board member.

15e) Also find out if there have ever been any bankruptcies in current or former spouse's personal or professional background.

21) Also ask if the candidate or the candidate's spouse has lobbied, either formally or informally – directly or indirectly, at any time over the past ten years on any issue. During the past ten years, has candidate or candidate's firm or business ever been charged with noncompliance with applicable laws or regulations regarding lobbying disclosure?

22) Ask if spouse is employed, and what s/he does (for conflict purposes). For divorces, you also want to find out the official grounds for the divorce (cruel and abusive?) and the real reasons for the divorce. You also want to find out if there were depositions or testimony in the matter and whether ex-spouse raised any negative accusations against you, such as possible physical or emotional abuse or drug use or excessive drinking. Did/does candidate have to pay alimony. Has ex-spouse ever complained, formally or informally, that candidate was late with payments or not paying proper amount? If there were children in the relationship, you want to FULLY inquire into support issues. Did the support issues need to be litigated or was agreement reached pre-litigation. Have you or spouse ever tried to alter the initial arrangement? What is the arrangement? Has spouse or guardian ad litem ever accused you of reneging or being delayed on support obligations? What can ex-spouse say against you? Were you deposed? Anyone else?

We can fax I-9 forms for current EE

2 issues
Legal?
Paid taxes?

If they say yes – paid taxes – then it's it.

23a) HHH: Be vigilant about this question. Often the candidate will just say "No" because the candidate interpreted the question as just being limited to people that the candidate considered to be employees. NO! This question is about both employees and people that the candidate claims

Current or past worker?
Legal entire time working for you? I-9 post 1986 is ER's respo
Taxes on the person? Soc. Soc.? State Local?

If continuously emp. since 1986 then n I-9 necess. But [illegible] our are independent contractors. Furthermore, this question refers to all current AND all past persons. We want to know about anybody who has come into the candidate's property to do anything. You want to stress to the candidate that this question includes, among others, part time house-cleaners and babysitters and lawnmowers that the candidate does not consider to be employees (although we are not really interested in one day construction visits). The drill on this issue is seemingly complex but workable.[5]

- If the candidate paid from the beginning all federal and state taxes on the person (treating the person as an employee), and the candidate has a current I9 (get copy) , and the worker has been legal the entire time while in the employment of candidate, then there is no VETTING issue.

- If the candidate paid all taxes from the beginning but does not have an I9 form for the employee then:

    - (1) if the person is a current employee – ~~or~~ has been an employee at some point in the past year – the candidate should get an I9 for the person (check to see that the I9 covers entire time of employ).

    - (2) if the person has not worked for the candidate in the past year, fully question the candidate about whether the candidate knows whether the person was legal and how the candidate knows what he knows. If you have any concerns about possible legality issues, you can ask the candidate to track the former employee down to get indicia of legality, such as filling out an I-9 form or getting a copy of the person's green card or birth certificate (candidate will always balk at this, but push back and see if there is any possibility that candidate can find the person – and if the candidate can't find person, why not?). Also, for past employees, the candidate should definitely be able to at least get the worker's SS# off of the candidate's old tax forms. Although a SS# by itself is not absolute proof that the person was legal (because there are temporary SS#s), it is sometimes the best proof that we can get for past employees.

- If the candidate claims that a past or present person is/was not an employee, then:

    For EES. 94 97, 96, 95, under ~~[illegible]~~ no $1000 - taxes ~~Before 95~~ ~~$50 quarter~~

    - If the worker was paid below the tax floor for that year then we are not worried about the tax issues. However, we are still worried about immigration issues. See below. Also, really test the candidate how candidate knows that was below the floor.
      FE EES under $1100/yr – 98 + 99

    - If the worker gets/got above the floor, the candidate should get the person's FEIN number. Preferably, the person (or corporation) will write a letter to the candidate stating (if true) that the person considers him-herself an independent contractor, that s/he pays (and has always paid during the relevant period) all relevant employer taxes and that she pays them under the following FEIN number…. (FEIN number is usually not a SS#. Question FEIN numbers that look like SS#s). Note that there will be occasion where independent contractor will be so confused about FEIN number that s/he instead gives candidate all copies of worker's taxes to show that the worker has been paying appropriate taxes. This may be a workable solution. Consult me on the circumstances. If the person or corporation verifiably is an independent contractor, then we do not need to ask for their I9s.

    - If the worker did not have an FEIN number and candidate cannot verify whether worker paid employer-side of taxes, then the candidate must get an opinion letter from an accountant or tax

[5] As mentioned above, emphasize to the candidate that we are not giving the candidate legal advice about taxes or immigration issues (or any other issues). The mere fact that the candidate is going through this vetting process DOES NOT mean that the candidate is insulated from further review on these same issues by the IRS, Department of Justice, or other federal, state or local agency. Again, we do not give legal advice. If the candidates want legal advice, they should hire a private attorney.

we don't call EE or indep. contractor; we don't call IRS

lawyer in which the professional gives an opinion about whether the worker should have been treated as an employee or independent contractor for tax purposes. In essence, should the candidate have paid taxes on the person. The accountant's letter should not merely give an opinion, it should state in great detail the factual scenarios and the rationale behind the accountant's opinion. For example, there is a twenty-point test to determine whether the IRS treats the person as an employee, and the accountant should fully outline this test as well as his conclusions. Please emphasize to the candidate and/or the accountant that we do not want a predetermined opinion. WE WANT THE CANDIDATE TO DO THE PROPER THING (if the person was an employee and the candidate should have been paying taxes, so be it; the candidate should go back and pay back taxes). Also, in regard to people that the candidate did not treat as employees and who candidate cannot verify that worker paid the taxes (as an independent contractor) , whether we need I9s for past workers will depend on circumstances (talk to me about it). However, for present workers (and workers who left within the past year) who accountant says are independent contractors, we still want strong indicia of citizenship (I9 or copy of current green card or birth certificate) (even though candidate may say that such indicia is not required of independent contractors). Finally, for current worker who accountant says is an independent contractor but who candidate cannot confirm pays employer side of taxes, you need to talk to me about whether it is appropriate for candidate to continue using worker's services.

24) We don't want to know WHO (or which party) they vote for. We just want to know whether they regularly engage in the democratic process.

26) The term minority is rather vague. Push them on this. For example, there are still some country clubs in Florida that apparently don't have any Jewish members; some Pittsburgh-area clubs have a history of having discriminatory policies against African Americans; some San Diego clubs have a history of discrimination against Mexican-Americans. Another example: if a club has Jewish people and Hispanics (and therefore allows minorities) but does not have African Americans, this could be a big problem. The rule is ---- USE COMMON SENSE. Look at the demographics to see whether it strikes you as odd that there are no members of a certain race (etc...) in a club (for example, many parts of West Virginia have a much lower percentage of African Americans than North Carolina). The core of the question is not just whether the club discriminates in policy (most do not) but also whether it discriminates in PRACTICE. Ask insightful questions, and do not be deterred by a statement such as "Oh, I'm sure the club has African Americans..." How is candidate sure? Secondly, make sure the rules of the club do not discriminate against women. Can women be full-fledged members on their own accord? Have there ever been any women on the Board of Directors? Are there separate women's tee times or tennis times? Is there a Men's Grill or a restaurant that only men can use during certain hours? Etc... Also ask them if they have ever belonged to a club or organization that discriminated (while candidate was a member) against people on basis of race, sex, religion, ethnicity, etc... Point out that we don't just mean invidious discrimination. For example, has candidate ever belonged to a club or organization that has not allowed members of opposite sex (when the candidate starts naming stuff like the Boy Scouts, Girl Scouts, or a high school soccer league, you know that you have somebody who is really trying to be as responsive as possible!). Also, with fraternities and sororities (which candidate should actually usually name because most are not co-ed), were they racially segregated when candidate was in college? Are they racially segregated now? How does candidate know? With all clubs, do not hesitate to ask for the by-laws if you have any concerns. Country clubs tend to be problems – so ask about all of those. Eating clubs.

28) Also ask if there were any FEC (or similar state) concerns or inquiries (formal or informal). Also, tell candidate that many Senate committees are asking about political contributions of candidates. We therefore need to find out if the candidate has given any contributions in past that may attract Senate attention. Has the candidate given a large amount (do sliding scale questioning, similar to with credit questions) of money to a political candidate, committee or PAC (that may become an issue with Senate)? Of course, the candidate will likely not be able to remember way back, but most should be able to at least detail with some specificity large donations given in past five to ten years or so. Please emphasize that this in no way will impact whether candidate gets nominated
We're not interested in the person they've given money to -- just whether they've made large contributions.

(unless of course the contributions were not legal or ethical); rather we want information so that we can anticipate Senate questioning.

29) Get details and copies of articles. Also ask if the candidate knows whether there is any information about the candidate on the Internet. This is also the time where you should question the candidate about any articles that popped up on Nexis if you have questions. Articles that may need more detailed explan.

INTERVIEW WRITE-UP

Again make a header that says "Personnel Information."

In the interview memo, include any responses of interest. We want all of the unvarnished information in this memo. However, please make sure – for our sake as well as for the candidate's sake -- that you are 100% accurate in these memos. Since you now have a very good understanding of the candidate's background and issues, you should now once again go through the PDS and SF-86 for any inconsistencies. Don't include any "no" answers.

Always, always, always, feel free to call the candidate again and again until you feel like you have all of the information needed.

When you are fully done, bring the file to me, and I will give you my comments.

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: JAM DATE: 2/13/15
2006-1066-F

Privileged and ~~Confidential~~

MEMORANDUM

TO: Researchers

FROM: Stacy Reynolds

RE: Research Guidelines -- Lexis/Nexis Searches

DATE: May 11, 1996

We conduct Lexis/Nexis research on every PAS, PA and SES candidate we vet. Our techniques are similar for each level of candidate: the only variable is the number of cites you choose to look through. For PAS candidates you should look through up to 150 cites, for PA 120 and for SES candidates approximately 100. These numbers can vary based on the sensitivity of the position or the amount of time we have in which to complete research.

I. NEWS;ALLNWS

To begin searching a candidate, you will start with the "News w/group files" menu option (option 2). The first database you will use is "news;allnws."

A. Name Search

All candidate searches begin with a "name" search. If you are researching Jane Doe, for example, you should type in **Jane pre/2 Doe and Doe**. You should use "pre/2" because you want NEXIS to catch all the Jane's that are one or two words before the word Doe. You should type "and Doe" so that Nexis picks up references to the name throughout an article, and not just when the first name appears with it. In a long article about Jane Doe, for example, she will undoubtedly be referred to as "Doe," or "Ms. Doe," after the author's initial reference to her.

If you know the middle name or initial of the candidate, you should type in **(Jane or Jane L.) pre/1 Doe and Doe** or **(Jane or Jane L. or Jane Lane) pre/1 Doe and Doe**. With these searches, you can eliminate all the Jane Doe's with other middle initials or middle names. If there are too many cites to look through at this point (determined by the level of the position, as described earlier), you should modify the search by using one of the mechanisms described in the following sections.

B. Job Search

You should conduct a job search only if your original name search produces cites on many different people with the same name. This often happens if someone has a common name.

A job search is conducted by typing in the candidate's name and then adding key words to your search so that it will only produce articles about your candidate. For example, you would type **Jane pre/2 Doe and Doe and Doe w/30 (assistant secretary or department of defense or DOD or acquisition or Clinton campaign or professor or military or army or Wesleyan or Illinois Clean Water or Governor's Task Force)**. As the above example illustrates, a job search should include places that the candidate has worked, positions held, schools attended, boards on which the candidate has served and any other words that would help limit your search to just your candidate, but would not lead you to miss crucial articles. This is a delicate balancing act because you want to find as many articles about the candidate as possible without pulling up too many other people.

C. Scandal Search

You should use a scandal search if a job search still produces too many stories, or if the initial name search produces too many articles, all of which involve the correct person.

A scandal search should be conducted by typing **Jane pre/2 Doe and Doe and Doe w/30 (illegal! or drug! or convict! or arrest! or indict! or discriminat! or harass! or clinton* or republican* or investigat! or contov! or scandal! or illicit! or critic! or blam! or embarrass! or improp! or complain! or dispute! or corrupt!)**. If you are conducting a job search and a scandal search concurrently, you should type **Jane pre/2 Doe and Doe and Doe w/30 [jobs] and Doe w/30 [scandal]** because a search should always include the last name by itself, and each of the "w/30" modifiers should be connected to a separate entry of the last name.

If the full scandal search brings up too many articles, certain words can be eliminated. In eliminating words, the researcher should use his or her judgment to determine what words are likely to bring up a lot of articles containing no potential issues. However, if at all possible, retain the base scandal search terms: **(illegal! or drug! or convict! or arrest! or indict! or discriminat! or harass!)**. If you still have too many articles, it might be advisable to discuss the search with someone else.

D. Other Limiting Searches

If the job search and scandal search still produce too many articles, there are a few other searches that can be used to limit the search and produce a manageable number of stories.

1. And Not Searches

The first additional limiting search is the "and not" search. This search can be used when there is someone with the same name as the candidate who has some identifying characteristic. For example, if there is a Jane Doe who is a Vice President of Mega Corp. and the candidate has never been connected to Mega Corp., then you can type: **Jane pre/2 Doe and Doe and not (mega corp!)**. A common "and not" search to be used for candidates who often appear before Congress is: **and not (fns or reuter!)**. This modification is intended to primarily eliminate instances when the candidate is named in a list of people to testify before Congress in the daybooks published by FNS (Federal News Service) and Reuter. However, Reuter is a wire service and should only be eliminated if there seem to be an excessive number of Daybook entries.

It is important to remember to ALWAYS put the "and not" search last because it will negate anything that comes after it, even in a subsequent search level.

2. Atleast2 Searches

Another search that can be used if none of the above searches seems to help is the "atleast2" search, which can be conducted by typing: **Jane pre/2 Doe and Doe and atleast2 (Doe)**. This search requires that the candidate's last name appear at least two times in the article before retrieving it. The atleast search is a good search to use when a person's name has been equated with a particular issue or product (i.e. the "Zoe Baird issue") and is mentioned often in articles that are not relevant to the candidate. The number can be can be changed from 2 to a higher number, but should not go above 5 without consulting someone else.

3. Headline/Lead Searches

A headline/lead search will produce only stories in which your candidate is mentioned in the headline, or lead sentence, of an article. You write such a search by typing **Jane pre/2 Doe and Doe and Hlead (Doe)**. You should only use this as a last resort, as it severely limits the number of stories your search will produce.

E. Special Notes

It is very important to remember three things:

1. Always have one entry of a candidate's last name by itself, one connected to the candidate's first name and one for each modification.

2. Always put the "and not" search last.

3. Always conduct a byline search when you do a jobs, scandal or other additional search.

II. Byline Searches

Whenever you limit a search by using a job, scandal or other additional search, you should couple that with a byline search, produced by typing **Jane pre/2 Doe and Doe and Byline (Doe)**. This ensures that you will catch all of the articles or letters written by Ms. Doe. All articles by the candidate should be printed out in full unless there is an excessive amount.

III. GENFED;MEGA

The second database you will use is "genfed;mega." To get to this database, you will have to change to menu option 1, "Legal." You can do this by typing: **.cm;1**. All candidate searches begin with a basic "name" search. (See above, I.A.) If there are too many cites to look through at this point (determined by the level of the position, as described earlier), you should modify the search by using **name ((Jane or Jane L. or Jane Lane) pre/1 Doe) and Doe**. This search will retrieve all cases in which Jane Doe is a named party.

SAMPLE LEXIS/NEXIS SEARCHES ON JOHN JAY DOE

Menu: 2 (News w/group files) Library: nexis;allnws

I. NAME SEARCH: (john or john j or john jay or johnny or johnny j or johnny jay or jack or jack j or jack jay or j jay or j j or jay) pre/1 doe and doe

**Note: We try to use every possible nickname and combination of names. Always include the last name alone so that it is highlighted throughout the article. If you do not have a middle name or initial, use pre/2 instead of pre/1.

If the Name Search retrieves more than about 150 articles, type ".m1" to modify and narrow it by adding the following searches to the end of the name search:

AND NOT: and not (fns or reuter!)

Note: **Always put this last. Other terms can be added inside the parenthesis if they definitely apply to the wrong person. For example, use: and not (fns or reuter! or football) if many of the stories relate to a football player who is not our candidate.

JOBS SEARCH: and doe w/30 (new job or current job or old job or old job or school)

**Note: Jobs should be listed broadly enough to retrieve all references to candidate but narrowly enough to avoid too many other people being pulled in.

SCANDAL SEARCH: and doe w/30 (illegal! or drug! or convict! or arrest! or indict! or discriminat! or harass! or clinton* or republican* or investigat! or controv! or scandal! or illicit! or critic! or blam! or embarrass! or improp! or complain! or dispute! or corrupt!)

**Note: The Scandal Search is programmed into all three lexis computers as a macro. Just type Ctrl-1, Ctrl-2, Ctrl-3 (or Alt-1) and it magically appears. If the Scandal Search and the Job Search combined do not get you below 200 stories, eliminate words from the Scandal Search. If at all possible, retain the words that, in the example above, appear before clinton. If you still have too many articles, discuss the search with someone else.

II. BYLINE SEARCH: (john or john j or john jay or johnny or johnny j or johnny jay or jack or jack j or jack jay or j jay or j j or jay) pre/1 doe and doe and byline (doe)

Note: If you do a Jobs Search or a Scandal Search, you **must do a separate Byline Search.

Change Menu: .cm;1 (Legal) Library: genfed;mega

III. GENFED SEARCH: name ((john or john j or john jay or johnny or johnny j or johnny jay or jack or jack j or jack jay or j jay or j j or jay) pre/1 doe) and doe

**Note: This may only be narrowed by using the candidate's birth date: and date aft (00/00/1900)

Print cite list: .pa;.ci;2;y Print selected items: .pa;.fu;2;sel;1,3,5;y Print single page: .sp

.pr - print now

101ST CONGRESS
2D SESSION

COMMITTEE RESOLUTION

IN THE SENATE OF THE UNITED STATES

Mr. KENNEDY submitted the following committee resolution, which was adopted by the Committee on the Judiciary of the Senate on August 2, 1990.

COMMITTEE RESOLUTION

Expressing the sense of the Committee on the Judiciary concerning membership in clubs that engage in discrimination.

Resolved by the Committee on the Judiciary, That it is the sense of the Committee on the Judiciary of the Senate that—

(1) clubs where business is conducted that by policy or practice intentionally discriminate on the basis of race, color, religion, sex, disability or national origin operate to exclude persons, including women and minorities, from business and professional opportunities;

(2) in recent years, awareness has grown that such discrimination is invidious and that membership in such discriminatory clubs may be viewed as a tacit endorsement of the discriminatory practices;

(3) membership in such discriminatory clubs conflicts with the appearance of impartiality required of persons who may serve in positions in the Federal judiciary or the Department of Justice;

(4) it is inappropriate for persons who may be nominated in the future to serve in the Federal judiciary or the Department of Justice to belong to such discriminatory clubs, unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices;

(5) such membership is an important factor which Senators should consider in evaluating such persons, in conjunction with other factors which may reflect upon their fitness and ability;

(6) so as to promote a consistent policy on this issue in the legislative branch as well, any Senator belonging to such a club should resign his or her membership in light of this resolution;

(7) to be considered a club where business is conducted, a club must have one of the following characteristics—

(A) club members bring business clients or professional associates to the club for conferences, meetings, meals, or use of the facilities;

(B) club members or their employers deduct dues, fees or payments as business expenses on tax returns;

(C) the club is one where contacts valuable for business purposes, employment and professional advancement are formed; or

(D) the club receives payments from nonmembers for meals or services provided by the club;

except that country clubs and clubs where meals are served shall be presumed to be clubs where business is conducted;

(8) paragraphs (1) through (7) do not apply to fraternal, sororal, religious or ethnic heritage organizations;

(9) this resolution shall take effect January 1, 1991; and

(10) the Chairman of the Committee on the Judiciary of the Senate is requested to transmit a copy of this resolution to the President and the Attorney General of the United States and all members of the Senate, for such use as they deem appropriate in

considering future nominations to the Federal bench and the Department of Justice.

Adopted by the Committee on the Judiciary of the Senate on August 2, 1990.

DEPARTMENT OF JUSTICE
EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: BIDEN, SENATOR JOSEPH R., JR., CHMN, COMM. ON THE JUDICIARY
To: AG. ODD: 09-17-90
Date Received: 08-31-90 Date Due: 09-17-90 Control #: X0083114927
Subject & Date
08-30-90 LETTER FROM THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, ENCLOSING A COPY OF A RESOLUTION ADOPTED BY THE COMMITTEE WHICH STATES THAT IT IS INAPPROPRIATE FOR PERSONS WHO MAY BE NOMINATED IN THE FUTURE TO THE FEDERAL JUDICIARY, OR TO A POST IN DOJ, TO BELONG TO DISCRIMINATORY CLUBS WHERE BUSINESS IS CONDUCTED UNLESS SUCH PERSONS ARE ACTIVELY ENGAGED IN BONA FIDE EFFORTS TO ELIMINATE THE DISCRIMINATORY PRACTICES. THE RESOLUTION TAKES EFFECT ON JANUARY 1, 1991.

	Referred To:	Date:		Referred To:	Date:	
(1)	OAG;DICKMAN	08-31-90	(5)			W/IN:
(2)			(6)			
(3)			(7)			PRTY:
(4)			(8)			1

INTERIM BY: DATE: OPR:
Sig. For: AG. Date Released: MAU

Remarks
INFO CC: OAG, DAG. ORIGINAL TO OLA.
(1) ADVISE EXEC. SEC. OF ACTION TAKEN.

Other Remarks:

SEP 4 12 16 PM '90
OFFICE OF LEGISLATIVE AFFAIRS

FILE:
L00831 4550

REMOVE THIS CONTROL SHEET PRIOR TO FILING AND DISPOSE OF APPROPRIATELY
****

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 25, 1990

MEMORANDUM

TO: Judiciary Committee Chief Counsels

FROM: Jeff Blattner JMB
Senator Kennedy's Office

RE: Clubs Resolution

Enclosed are a copy of a proposed Judiciary Committee resolution on discriminatory clubs and a summary of the resolution. The Judiciary Committee will hold a hearing on the resolution on May 3rd. Senator Kennedy intends to bring it before the Committee for a vote shortly thereafter. The resolution will be a committee resolution; unlike sense-of-the-Senate resolutions, it will not be introduced or reported to the Senate.

Please call me if you have any questions or if your Senator wishes to be added as a cosponsor.

Thanks.

SUMMARY OF THE PROPOSED COMMITTEE RESOLUTION ON MEMBERSHIP IN DISCRIMINATORY CLUBS

Senators Kennedy, Specter, Metzenbaum, Biden and Simon intend to offer a resolution expressing the sense of the Judiciary Committee that it is inappropriate for persons who may be nominated to positions in the federal judiciary or the Department of Justice to belong to clubs where business may be done that discriminate on the basis of race, religion, gender or national origin, unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices.

We ask for your cosponsorship and support for this resolution because we believe that the resolution will be useful in advising persons who wish to be considered for these important positions of the Committee's view that membership in discriminatory clubs conflicts with the impartiality, and the appearance of impartiality, required of persons involved in the administration of justice.

Background

Since the late 1970s, members of the Senate Judiciary Committee have recognized that it is inappropriate for a person nominated to the federal bench to belong to a club that engages in invidious discrimination. In 1979, Senator Kennedy (who was then Chairman of the Committee) and Senator Thurmond expressed this view in a letter to Judge Bailey Brown, who had been nominated for a seat on the U.S. Court of Appeals for the Sixth Circuit:

> "In our view, it is inadvisable for a nominee for a federal judgeship to belong to a social club that engages in invidious discrimination. While we have not discussed all forms of discrimination, we feel that 'invidious discrimination' exists when the club's discrimination, in historical context, constitutes a stigma or badge of social inferiority. A social club's discrimination based on race or religion would ordinarily be considered invidious."

Over the past decade, awareness has increased that discrimination on the basis of sex, as well as on the basis of race, religion, or national origin by clubs where business may be conducted is invidious. This is based on the widespread recognition that discriminatory practices by such clubs operate to exclude women and minorities from significant business and professional opportunities. Many communities across America have enacted legislation to ban these kinds of discriminatory clubs. The Supreme Court has repeatedly upheld the constitutionality of such legislation. See, e.g., New York State Club Ass'n Inc. v. City of New York, 108 S.Ct. 2225 (1988).

During the same period, concerns have frequently been voiced by members of the Judiciary Committee, and by members of the legal profession and the general public, that membership in discriminatory clubs by persons who may be nominated for the federal bench or positions in the Department of Justice raises conflicts with the impartiality, and the appearance of impartiality, required of such persons.

In 1984, the commentary to the American Bar Association's Canons of Judicial Ethics made it clear that it is inappropriate for judges to belong to clubs that practice invidious discrimination. Efforts are underway to further strengthen the Canons in this regard.

Questions regarding membership in discriminatory clubs have been raised in connection with numerous nominations before the Judiciary Committee, including the Bailey Brown nomination itself in 1979, the nomination of Anthony Kennedy to the Supreme Court in 1987, the Mason and Erickson nominations in 1988, the Walker nomination in 1989, and the Dunne and Martin nominations in 1990.

As Justice Kennedy stated during his confirmation hearings with respect to clubs that discriminate against women:

> "There was just cause for [women] to want access to these professional contacts. It is most unfortunate, and almost Dickensian, for a group of lawyers to meet at 11:30 and to settle a case and to celebrate and say, well, let's all go to the club. And suddenly there is a silence, and they cannot go because there is a woman there. That is stigmatizing. That is inappropriate."

While it is up to each Senator on the Judiciary Committee to decide how to vote on any particular nomination before the Committee, we believe that a clear expression of the Committee's views regarding membership in discriminatory clubs will be helpful to persons who may be nominated to positions on the bench or in the Justice Department, and to those who make and consider such nominations -- the President, Attorney General, and members of the Senate.

Explanation of the Resolution

Paragraph 1 of the Resolution sets forth the finding that in clubs where business may be conducted, discrimination on the basis of race, religion, sex or national origin operates to exclude women and minorities from business and professonal opportunities.

Paragraph 2 reflects the increasing awareness that discrimination by such clubs is invidious and that membership in these clubs may be viewed as a tacit endorsement of the discriminatory practices.

Paragraph 3 reflects the Committee's view that membership in discriminatory clubs conflicts with the impartiality, and the appearance of impartiality, required of persons who may serve in positions in the federal judiciary or the Department of Justice.

Paragraph 4 sets forth the Committee's view that it is inappropriate in 1990 for persons who may be nominated in the future to serve in the federal judiciary or the Department of Justice to belong to discriminatory clubs, unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices.

Paragraph 5 makes it clear that the Resolution does not apply to bona fide fraternal, sororal, religious or ethnic heritage organizations, such as the Masons, Knights of Columbus, or Sons of Italy.

Paragraph 6 requests the Chairman of the Judiciary Committee to transmit a copy of the Resolution to the President and the Attorney General of the United States and all members of the United States Senate, for use in considering future nominations to the federal bench and the Department of Justice.

The Resolution does not bind the President, the Attorney General, or any Senator, with regard to any future nomination. Nevertheless, we believe that a clear expression of the Committee's views regarding membership in discriminatory clubs will be helpful to them in considering future nominations.

101ST CONGRESS
2D SESSION

COMMITTEE RESOLUTION

IN THE SENATE OF THE UNITED STATES

MR. KENNEDY ______________________________ submitted the following committee resolution.

COMMITTEE RESOLUTION

To express the sense of the Committee on the Judiciary concerning membership in clubs that engage in discrimination.

Resolved by the Committee on the Judiciary, That it is the sense of the Committee on the Judiciary of the Senate that—

(1) clubs where business may be conducted that discriminate on the basis of race, religion, sex or national origin operate to exclude women and minorities from business and professional opportunities;

(2) in recent years, awareness has grown that such discrimination is invidious and that membership in such discriminatory clubs may be viewed as a tacit endorsement of such discriminatory practices;

(3) membership in such discriminatory clubs conflicts with the impartiality, and the appearance of impartiality, required of individuals who may serve in positions in the Federal judiciary or the Department of Justice;

(4) it is inappropriate today for individuals who may be nominated in the future to serve in the Federal judiciary or the Department of Justice to belong to such discriminatory clubs, unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices;

(5) paragraphs (1) through (4) do not apply to fraternal, sororal, religious or ethnic heritage organizations; and

(6) the Chairman of the Committee on the Judiciary shall transmit a copy of this resolution to the President and the Attorney General of the United States and all members of the Senate, for use in considering future nominations to the Federal bench and the Department of Justice.

Section 2522

Section 2522 of the Code provides for a gift tax charitable deduction for the value of property transferred to charitable organizations described in section 2522(a).

Section 2522(c)(2) denies the deduction if a donor transfers an interest in property to charity and retains an interest in the same property or transfers an interest in the same property to a noncharitable donee. Section 2522(c)(2), however, provides certain exceptions in allowing a charitable deduction for specific kinds of gifts of partial interests, including an exception for charitable interests described in section 170(f)(3)(B).

Section 170(f) places restrictions on the income tax deduction available for gifts of partial interests to charity. Section 170(f)(3)(B) provides exceptions for certain charitable gifts, among them, the gift of a legal remainder interest in a personal residence or farm.

Rev. Rul. 76–357, 1976–2 C.B. 285, holds that the exception applies only to remainders not in trust. *Ellis First National Bank v. U.S.*, 550 F.2d 9 (Ct. Cl. 1977), and *Estate of Burgess v. Commissioner*, 622 F.2d 700 (4th Cir. 1980), reach the same conclusion.

Estate of Blackford v. Commissioner, 77 T.C. 1246 (1981), *acq. in result*, 1983–2 C.B. 1, held that the section 170(f)(3)(B) exception applied to a legal remainder interest in a residence bequeathed to four different charities, where the executor was instructed to sell the residence and divide the proceeds. Rev. Rul. 83–158, 1983–2 C.B. 159, based the Service's acquiescence in this result on the applicable provisions of local law that would have permitted the four charities to elect to receive the realty as tenants in common in lieu of receiving the cash proceeds.

Rev. Rul. 76–544, 1976–2 C.B. 288, however, holds that the exception for remainder interests in farms or residences does not apply to a remainder interest that vests in a charitable organization and an individual as equal tenants in common, because the entire remainder interest does not pass to charity.

The limitations on the charitable contribution deduction for the gift of split interests to charity were first imposed by section 201 of the Tax Reform Act of 1969, 1969–3 C.B. 10, 51. Extensive discussions in the committee reports show that the intent of these limitations was to deny a charitable deduction in situations where the subsequent administration of a trust or some other contingency might favor a noncharitable beneficiary at the expense of the charitable remainderman. Congress was responding to situations where trusts were administered to the advantage of noncharitable life tenants, where charitable remainders were contingent and never became possessory, or where governing instruments permitted invasions of principal under standards that were too vague to lend themselves to accurate valuation.

Congress concluded, however, that a nontrust gift of a remainder interest in a residence was not subject to such abuses. S. Rep. No. 91–552, 91st Cong., 1st Sess. 88 (1969), 1969–3 C.B. 479, 480. Accordingly, sections 2522(c)(2) and 170(f)(3)(B) of the Code permit a charitable deduction for "a remainder interest in a personal residence." In the present situation, the charity did not receive the entire remainder interest; nevertheless, its interest is a remainder interest in the residence.

The legislative history does not suggest that the charity must receive the entire remainder interest. Indeed, section 170(f)(3)(B)(ii) allows a charitable deduction for a gift of "an undivided portion of the taxpayer's entire interest in property." The fact that a taxpayer may convey a fractional interest in realty to charity and receive a deduction indicates that there is no statutory policy against a charity and an individual holding real property as tenants in common.

More important, the abuses that the split interest rules were designed to prevent would not be possible in this case. *C* is certain to receive its 10 percent interest as a tenant in common; thus, the deduction that *A* receives for the value of the 10 percent remainder interest will correspond to the value of the interest charity ultimately will receive. Should ownership in common involve any disadvantage to *C*, that disadvantage can be resolved by sale of the property.

In this respect, the present case is similar to Rev. Rul. 83–158. That ruling allowed a charitable deduction because the four charities could have chosen to receive the realty as tenants in common rather than receive the proceeds of its sale. There is no reason to conclude that any one of the four charities would have been worse off had one or more of its prospective co-tenants been individuals rather than unrelated charitable organizations.

Accordingly, a charitable deduction is allowable to *A* for the value of *C*'s remainder interest in the residence. In determining the amount of the deduction allowable, however, the value of the charitable interest must be reduced to reflect appropriate valuation discount for the cotenancy arrangement. *See Estate of Fawcett v. Commissioner*, 64 T.C. 889, 900 (1975), *acq.*, 1978–2 C.B. 2.

CONCLUSION

A charitable contribution deduction is allowable for a gift to charity of a legal remainder interest in the donor's personal residence even though the interest conveyed to charity is in the form of a tenancy in common with an individual.

Rev. Rul. 76–544 is revoked.

Subtitle C.—Employment Taxes
Chapter 21.—Federal Insurance Contribution Act
Subchapter C.—General Provisions

Section 3121.—Definitions

26 CFR 31.3121(d)–1: Who are employees.
(Also Sections 3306, 3401; 31.3306(i)–1, 31.3401(c)–1.)

Employment status under section 530(d) of the Revenue Act of 1978. Guidelines are set forth for determining the employment status of a taxpayer (technical service specialist) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialists are to be classified as employees under generally applicable common law standards.

Rev. Rul. 87–41

ISSUE

In the situations described below, are the individuals employees under the common law rules for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24 respectively, subtitle C, Internal Revenue Code)? These situations illustrate the application of section 530(d) of the Revenue Act of 1978, 1978–3 (Vol. 1) C.B. 119 (the 1978 Act), which was added by section 1706(a) of the Tax Reform Act of 1986, 1986–3 (Vol. 1) C.B. 698 (the 1986 Act) (generally effective for services performed and remuneration paid after December 31, 1986).

FACTS

In each factual situation, an individual worker (Individual), pursuant to an arrangement between one person (Firm) and another person (Client), provides services for the Client as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

Situation 1

The Firm is engaged in the business of providing temporary technical services to its clients. The Firm maintains a roster of workers who are available to provide technical services to prospective clients. The Firm does not train the workers but determines the services that the workers are qualified to perform based on information submitted by the workers.

The Firm has entered into a contract with the Client. The contract states that the Firm is to provide the Client with workers to perform computer programming services meeting specified qualifications for a particular project. The Individual, a computer programmer, enters into a contract with the Firm to perform services as a computer programmer for the Client's project, which is expected to last less than one year. The Individual is one of several programmers provided by the Firm to the Client. The Individual has not been an employee of or performed services for the Client (or any predecessor or affiliated corporation of the Client) at any time preceding the time at which the Individual begins performing services for the Client. Also, the Individual has not been an employee of or performed services for or on behalf of the Firm at any time preceding the time at which the Individual begins performing services for the Client. The Individual's contract with the Firm states that the Individual is an independent contractor with respect to services performed on behalf of the Firm for the Client.

The Individual and the other programmers perform the services under the Firm's contract with the Client. During the time the Individual is performing services for the Client, even though the Individual retains the right to perform services for other persons, substantially all of the Individual's working time is devoted to performing services for the Client. A significant portion of the services are performed on the Client's premises. The Individual reports to the Firm by accounting for time worked and describing the progress of the work. The Firm pays the Individual and regularly charges the Client for the services performed by the Individual. The Firm generally does not pay individuals who perform services for the Client unless the Firm provided such individuals to the Client.

The work of the Individual and other programmers is regularly reviewed by the Firm. The review is based primarily on reports by the Client about the performance of these workers. Under the contract between the Individual and the Firm, the Firm may terminate its relationship with the Individual if the review shows that he or she is failing to perform the services contracted for by the Client. Also, the Firm will replace the Individual with another worker if the Individual's services are unacceptable to the Client. In such a case, however, the Individual will nevertheless receive his or her hourly pay for the work completed.

Finally, under the contract between the Individual and the Firm, the Individual is prohibited from performing services directly for the Client and, under the contract between the Firm and the Client, the Client is prohibited from receiving services from the Individual for a period of three months following the termination of services by the Individual for the Client on behalf of the Firm.

Situation 2

The Firm is a technical services firm that supplies clients with technical personnel. The Client requires the services of a systems analyst to complete a project and contacts the Firm to obtain such an analyst. The Firm maintains a roster of analysts and refers such an analyst, the Individual, to the Client. The Individual is not restricted by the Client or the Firm from providing services to the general public while performing services for the Client and in fact does perform substantial services for other persons during the period the Individual is working for the Client. Neither the Firm nor the Client has priority on the services of the Individual. The Individual does not report, directly or indirectly, to the Firm after the beginning of the assignment to the Client concerning (1) hours worked by the Individual, (2) progress on the job, or (3) expenses incurred by the Individual in performing services for the Client. No reports (including reports of time worked or progress on the job) made by the Individual to the Client are provided by the Client to the Firm.

If the Individual ceases providing services for the Client prior to completion of the project or if the Individual's work product is otherwise unsatisfactory, the Client may seek damages from the Individual. However, in such circumstances, the Client may not seek damages from the Firm, and the Firm is not required to replace the Individual. The Firm may not terminate the services of the Individual while he or she is performing services for the Client and may not otherwise affect the relationship between the Client and the Individual. Neither the Individual nor the Client is prohibited for any period after termination of the Individual's services on this job from contracting directly with the other. For referring the Individual to the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. The Individual is not paid by the Firm either directly or indirectly. No payment made by the Client to the Individual reduces the amount of the fee that the Client is otherwise required to pay the Firm. The Individual is performing services that can be accomplished without the Individual's receiving direction or control as to hours, place of work, sequence, or details of work.

Situation 3

The Firm, a company engaged in furnishing client firms with technical personnel, is contacted by the Client, who is in need of the services of a drafter for a particular project, which is expected to last less than one year. The Firm recruits the Individual to perform the drafting services for the Client. The Individual performs substantially all of the services for the Client at the office of the Client, using materials and equipment of the Client. The services are performed under the supervision of employees of the Client. The Individual reports to the Client on a regular basis. The Individual is paid by the Firm based on the number of hours the Individual has worked for the Client, as reported to the Firm by the Client or as reported by the Individual and confirmed by the Client. The Firm has no obligation to pay the Individual if the Firm does not receive payment for the Individual's services from the Client. For recruiting the Individual for the Client, the Firm receives a flat fee that is fixed prior to the

Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. However, the Firm does receive a reasonable fee for performing the payroll function. The Firm may not direct the work of the Individual and has no responsibility for the work performed by the Individual. The Firm may not terminate the services of the Individual. The Client may terminate the services of the Individual without liability to either the Individual or the Firm. The Individual is permitted to work for another firm while performing services for the Client, but does in fact work for the Client on a substantially full-time basis.

LAW AND ANALYSIS

This ruling provides guidance concerning the factors that are used to determine whether an employment relationship exists between the Individual and the Firm for federal employment tax purposes and applies those factors to the given factual situations to determine whether the Individual is an employee of the Firm for such purposes. The ruling does not reach any conclusions concerning whether an employment relationship for federal employment tax purposes exists between the Individual and the Client in any of the factual situations.

Analysis of the preceding three fact situations requires an examination of the common law rules for determining whether the Individual is an employee with respect to either the Firm or the Client, a determination of whether the Firm or the Client qualifies for employment tax relief under section 530(a) of the 1978 Act, and a determination of whether any such relief is denied the Firm under section 530(d) of the 1978 Act (added by section 1706 of the 1986 Act).

An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in the following three substantially similar sections of the Employment Tax Regulations: sections 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.

These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

Conversely, these sections provide, in part, that individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees.

Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. *Instructions*. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the *right* to require compliance with instructions. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

2. *Training*. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229.

3. *Integration*. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See *United States v. Silk*, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. *Services Rendered Personally*. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

5. *Hiring, Supervising, and Paying Assistants*. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593, 1955-2 C.B. 610.

6. *Continuing Relationship*. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See *United States v. Silk*.

7. *Set Hours of Work*. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

8. *Full Time Required.* If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56–694, 1956–2 C.B. 694.

9. *Doing Work on Employer's Premises.* If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56–660, 1956–2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56–694.

10. *Order or Sequence Set.* If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. See Rev. Rul. 56–694.

11. *Oral or Written Reports.* A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70–309, 1970–1 C.B. 199, and Rev. Rul. 68–248, 1968–1 C.B. 431.

12. *Payment by Hour, Week, Month.* Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. See Rev. Rul. 74–389, 1974–2 C.B. 330.

13. *Payment of Business and/or Traveling Expenses.* If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55–144, 1955–1 C.B. 483.

14. *Furnishing of Tools and Materials.* The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71–524, 1971–2 C.B. 346.

15. *Significant Investment.* If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See Rev. Rul. 71–524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. *Realization of Profit or Loss.* A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. See Rev. Rul. 70–309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

17. *Working for More Than One Firm at a Time.* If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70–572, 1970–2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. *Making Service Available to General Public.* The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56–660.

19. *Right to Discharge.* The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75–41, 1975–1 C.B. 323.

20. *Right to Terminate.* If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70–309.

Rev. Rul. 75–41 considers the employment tax status of individuals performing services for a physician's professional service corporation. The corporation is in the business of providing a variety of services to professional people and firms (subscribers), including the services of secretaries, nurses, dental hygienists, and other similarly trained personnel. The individuals who are to perform the services are recruited by the corporation, paid by the corporation, assigned to jobs, and provided with employee benefits by the corporation. Individuals who enter into contracts with the corporation agree they will not contract directly with any subscriber to which they are assigned for at least three months after cessation of their contracts with the corporation. The corporation assigns the individual to the subscriber to work on the subscriber's premises with the subscriber's equipment. Subscribers have the right to require that an individual furnished by the corporation cease providing services to them, and they have the further right to have such individual replaced by the corporation within a reasonable period of time, but the subscribers have no right to affect the contract between the individual and the corporation. The corporation retains the right to discharge the individuals at any time. Rev. Rul. 75–41 concludes that the individuals are employees of the corporation for federal employment tax purposes.

Rev. Rul. 70–309 considers the employment tax status of certain individuals who perform services as oil well pumpers for a corporation under contracts that characterize such individuals as independent contractors. Even though the pumpers perform their services away from the headquarters of the corporation and are not given day-to-day directions and instructions, the ruling concludes that the pumpers are employees of the corporation because the pumpers perform their services pursuant to an arrangement that gives the corporation the right to exercise whatever control is necessary to assure proper performance of the services; the pumpers' services are both necessary and incident to the business conducted by the corporation; and the pumpers are not engaged in an independent enterprise in which they assume the usual business risks, but rather work in the course of the corporation's trade or business. See also Rev. Rul. 70–630, 1970–2 C.B. 229, which considers the employment tax status of salesclerks furnished by an employee service company to a retail store to perform temporary services for the store.

Section 530(a) of the 1978 Act, as amended by section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, 1982–2 C.B. 462, 536, provides, for purposes of the employment taxes under subtitle C of the Code, that if a taxpayer did not treat an individual as an employee for any period, then the individual shall be deemed not to be an employee, unless the taxpayer had no reasonable basis for not treating the individual as an employee. For any period after December 31, 1978, this relief applies only if both of the following consistency rules are satisfied: (1) all federal tax returns (including information returns) required to be filed by the taxpayer with respect to the individual for the period are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee ("reporting consistency rule"), and (2) the taxpayer (and any predecessor) has not treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for periods beginning after December 31, 1977 ("substantive consistency rule").

The determination of whether any individual who is treated as an employee holds a position substantially similar to the position held by an individual whom the taxpayer would otherwise be permitted to treat as other than an employee for employment tax purposes under section 530(a) of the 1978 Act requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals. Differences in the positions held by the respective individuals that result from the taxpayer's treatment of one individual as an employee and the other individual as other than an employee (for example, that the former individual is a participant in the taxpayer's qualified pension plan or health plan and the latter individual is not a participant in either) are to be disregarded in determining whether the individuals hold substantially similar positions.

Section 1706(a) of the 1986 Act added to section 530 of the 1978 Act a new subsection (d), which provides an exception with respect to the treatment of certain workers. Section 530(d) provides that section 530 shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. Section 530(d) of the 1978 Act does not affect the determination of whether such workers are employees under the common law rules. Rather, it merely eliminates the employment tax relief under section 530(a) of the 1978 Act that would otherwise be available to a taxpayer with respect to those workers who are determined to be employees of the taxpayer under the usual common law rules. Section 530(d) applies to remuneration paid and services rendered after December 31, 1986.

The Conference Report on the 1986 Act discusses the effect of section 530(d) as follows:

> The Senate amendment applies whether the services of [technical service workers] are provided by the firm to only one client during the year or to more than one client, and whether or not such individuals have been designated or treated by the technical services firm as independent contractors, sole proprietors, partners, or employees of a personal service corporation controlled by such individual. The effect of the provision cannot be avoided by claims that such technical service personnel are employees of personal service corporations controlled by such personnel. For example, an engineer retained by a technical services firm to provide services to a manufacturer cannot avoid the effect of this provision by organizing a corporation that he or she controls and then claiming to provide services as an employee of that corporation.
>
> . . . [T]he provision does not apply with respect to individuals who are classified, under the generally applicable common law standards, as employees of a business that is a client of the technical services firm.

2 H.R. Rep. No. 99–841 (Conf. Rep.), 99th Cong., 2d Sess. II–834 to 835 (1986).

Under the facts of Situation 1, the legal relationship is between the Firm and the Individual, and the Firm retains the right of control to insure that the services are performed in a satisfactory fashion. The fact that the Client may also exercise some degree of control over the Individual does not indicate that the individual is not an employee. Therefore, in Situation 1, the Individual is an employee of the Firm under the common law rules. The facts in Situation 1 involve an arrangement among the Individual, Firm, and Client, and the services provided by the Individual are technical services. Accordingly, the Firm is denied section 530 relief under section 530(d) of the 1978 Act (as added by section 1706 of the 1986 Act), and no relief is available with respect to any employment tax liability incurred in Situation 1. The analysis would not differ if the facts of Situation 1 were changed to state that the Individual provided the technical services through a personal service corporation owned by the Individual.

In Situation 2, the Firm does not retain any right to control the performance of the services by the Individual and, thus, no employment relationship exists between the Individual and the Firm.

In Situation 3, the Firm does not control the performance of the services of the Individual, and the Firm has no right to affect the relationship between the Client and the Individual. Consequently, no employment relationship exists between the Firm and the Individual.

HOLDINGS

Situation 1. The Individual is an employee of the Firm under the common law rules. Relief under section 530 of the 1978 Act is not available to the Firm because of the provisions of section 530(d).

Situation 2. The Individual is not an employee of the Firm under the common law rules.

Situation 3. The Individual is not an employee of the Firm under the common law rules.

Because of the application of section 530(b) of the 1978 Act, no inference should be drawn with respect to whether the Individual in Situations 2 and 3 is an employee of the Client for federal employment tax purposes.

Chapter 23.—Federal Unemployment Tax Act

Section 3306.—Definitions

26 CFR 31.3306(i)–1: Who are employees.

Guidelines for determining the employment status of taxpayers (technical service specialists) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialist are to be classified as employees under generally applicable common law standards. See Rev. Rul. 87–41, page 296.

Chapter 24.—Collection of Income Tax at Source on Wages
Subchapter A.—Withholding from Wages

Section 3401.—Definitions

26 CFR 31.3401(c)–1: Employee.

Guidelines for determining the employment status of taxpayers (technical service specialists) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialist are to be classified as employees under generally applicable common law standards. See Rev. Rul. 87–41, page 296

Section 3402.—Income Tax Collected at Source

Information which must be obtained by a withholding agent in order to rely on a nonresident alien student's claim for exemption from federal income tax on compensation for services under an income tax treaty to which the United States is a party. See Rev. Proc. 87–8, page 366.

Information which must be obtained by a withholding agent in order to rely on a nonresident alien's claim for exemption from federal income tax on income received as a teacher or researcher under an income tax treaty to which the United States is a party. See Rev. Proc. 87–9, page 368.

26 CFR 31.3402(f)(1)–1T: Additional withholding exemption to which an employee is entitled in respect of the standard deduction. (temporary)

T.D. 8112

TITLE 26.—INTERNAL REVENUE.—CHAPTER 1, SUBCHAPTER C, PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Employment Taxes and Collection of Income Tax at Source; Submission of Certain Withholding Exemption Certificates and Entitlement to Additional Withholding Exemption

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that relate to the submission of withholding exemption certificates when the total number of withholding exemptions claimed on the certificate exceeds 10, and to the requirements that an employee must meet to be entitled to the additional withholding exemption in respect of the standard deduction. The temporary rules modify the withholding rules as made by the Tax Reform Act of 1986. In addition, the temporary regulations set forth in this document serve as the text of the proposed regulations***[page 805, this Bulletin].

EFFECTIVE DATE: These regulations are effective with respect to Forms W–4 received after November 30, 1986.

FOR FURTHER INFORMATION CONTACT: Laura Ann M. Lauritzen of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue N.W., Washington, DC 20224 (Attention: CC:LR:T) (202–566–3459, not a toll-free call).

SUPPLEMENTARY INFORMATION:

BACKGROUND

This document contains temporary regulations under section 3402 of the Internal Revenue Code of 1986 that detail the circumstances under which an employer must submit an Employee's Withholding Allowance Certificate and those under which an employee may claim an additional withholding exemption. The Tax Reform Act of 1986 increased the amount of each withholding exemption. It also modified or eliminated a number of deductions and credits which an employee previously could take into account in determining the number of withholding allowances the employee was entitled to claim on the withholding exemption certificate. The temporary regulations provided by this document will remain in effect until superseded by final regulations on this project.

EXPLANATION OF PROVISIONS

Section 3402(f)(2) of the Code provides that an employee must furnish his or her employer with a withholding exemption certificate claiming a number of withholding exemptions, which may in no event exceed the number to which the employee is entitled. In an attempt to ensure that employees do not claim an excessive number of withholding exemptions, current §31.3402(f)(2)–1(g) provides that an employer must submit to the Internal Revenue Service a copy of any withholding exemption certificate if the total number of withholding exemptions claimed on the certificate exceeds 14. Since the Tax Reform Act of 1986 increased the amount of each withholding exemption and eliminated or limited a number of the deductions and credits previously used in determining the number of withholding allowances to which an employee was entitled, in some cases the number of withholding exemptions that an employee is entitled to claim has been reduced. To reflect these changes, these temporary regulations amend the regulations relating to withholding exemption certificates to require employers to submit to the Service a copy of any Form W–4 (Employee's Withholding Allowance Certificate) on which an employee claims more than 10 exemptions.

Section 31.3402(f)(1)–1(e) provides that an employee may claim an additional withholding exemption if certain requirements are met. Since the Tax Reform Act of 1986 replaced the zero bracket allowance with the standard deduction and to ensure that withholding more closely matches tax liabilities, these temporary regulations amend the regulation relating to this additional withholding exemption to reflect the new law.

NON-APPLICABILITY OF EXECUTIVE ORDER 12291

The Commissioner of Internal Revenue has determined that this temporary rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required.

REGULATORY FLEXIBILITY ANALYSIS

A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly,

DETERMINED TO BE AN ADMINISTRATIVE MARKING
INITIALS: JAM DATE: 2/13/15
2006-1066-F

Privileged and ~~Confidential~~

October 24, 1994

MEMORANDUM FOR BETH NOLAN
ASSOCIATE COUNSEL TO THE PRESIDENT

CLARISSA CERDA
ASSISTANT COUNSEL TO THE PRESIDENT

MARVIN KRISLOV
ASSISTANT COUNSEL TO THE PRESIDENT

FROM: **Jana L. Blair**
Office of Counsel to the President

SUBJECT: **Social Security Domestic Employment Reform Act of 1994**

For purposes of consideration of "nanny taxes" in the appointment process, pertinent provisions of the Social Security Domestic Employment Reform Act of 1994 provide the following:

Threshold Requirement

1. The threshold wage requirement for social security tax purposes is raised to $1000 per calendar year. This change applies to remuneration paid **after December 31, 1993**.

2. Beginning in calendar years **after 1995** the threshold requirement of $1000 per year will be adjusted based on indexing calculations set forth in the Social Security Act.

Age Limit

3. Domestic employees who are under the age of 18 during any portion of the subject calendar year of employment and for whom the domestic service is not the principal occupation, are excluded from coverage. In other words, the employer does not pay Social Security taxes on this individual.

It should be noted that the exemption does not apply to individuals whose principal occupation is household employment. Furthermore, for purposes of the act, being a student is considered an occupation.

** Also note that the age provision applies to remuneration paid in calendar years beginning **after 1994**. There is no provision with respect to retroactive adjustment of the threshold for 1993 and 1994.

Federal Unemployment Insurance

4. There was no change made to the threshold requirement of $1000 or more per calendar quarter for payment of Federal unemployment insurance.

Effective Dates

5. **The $1,000 threshold is effective for the calendar year 1994. The simplified reporting system and other provisions of the conference agreement are effective January 1, 1995.**

Refunds for 1994 tax year

6. Refunds will be given for payroll taxes on wages paid in 1994 when the total wages that an employee receives from an employer are below the $1,000 threshold.

There will be no loss to the employee of Social Security wage credits with respect to amounts refunded for 1994. To ensure that there is no loss of credits, an employer who would have been required to file a Form W-2 (without regard to enactment of the provisions discussed herein) will continue to be required to file the Form W-2. The employer must do this even though he or she may receive a refund of any Social Security taxes paid.

One Hundred Third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-fifth day of January, one thousand nine hundred and ninety-four

An Act

To make improvements in the old-age, survivors, and disability insurance program under title II of the Social Security Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Social Security Domestic Employment Reform Act of 1994".

SEC. 2. SIMPLIFICATION OF EMPLOYMENT TAXES ON DOMESTIC SERVICES.

(a) THRESHOLD REQUIREMENT FOR SOCIAL SECURITY TAXES.—

(1) AMENDMENTS OF INTERNAL REVENUE CODE.—

(A) GENERAL RULE.—Subparagraph (B) of section 3121(a)(7) of the Internal Revenue Code of 1986 (defining wages) is amended to read as follows:

"(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service described in subsection (g)(5)), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;".

(B) APPLICABLE DOLLAR THRESHOLD.—Section 3121 of such Code is amended by adding at the end thereof the following new subsection:

"(x) APPLICABLE DOLLAR THRESHOLD.—For purposes of subsection (a)(7)(B), the term 'applicable dollar threshold' means $1,000. In the case of calendar years after 1995, the Commissioner of Social Security shall adjust such $1,000 amount at the same time and in the same manner as under section 215(a)(1)(B)(ii) of the Social Security Act with respect to the amounts referred to in section 215(a)(1)(B)(i) of such Act, except that, for purposes of this paragraph, 1993 shall be substituted for the calendar year referred to in section 215(a)(1)(B)(ii)(II) of such Act. If any amount as adjusted under the preceding sentence is not a multiple of $100, such amount shall be rounded to the next lowest multiple of $100.".

(C) EMPLOYMENT OF DOMESTIC EMPLOYEES UNDER AGE 18 EXCLUDED FROM COVERAGE.—Section 3121(b) of such Code (defining employment) is amended—

(i) by striking "or" at the end of paragraph (19),

(ii) by striking the period at the end of paragraph (20) and inserting "; or", and

(iii) by adding at the end the following new paragraph:

"(21) domestic service in a private home of the employer which—

"(A) is performed in any year by an individual under the age of 18 during any portion of such year; and

"(B) is not the principal occupation of such employee.".

(D) CONFORMING AMENDMENTS.—The second sentence of section 3102(a) of such Code is amended—

(i) by striking "calendar quarter" each place it appears and inserting "calendar year", and

(ii) by striking "$50" and inserting "the applicable dollar threshold (as defined in section 3121(x)) for such year".

(2) AMENDMENT OF SOCIAL SECURITY ACT.—

(A) GENERAL RULE.—Subparagraph (B) of section 209(a)(6) of the Social Security Act (42 U.S.C. 409(a)(6)(B)) is amended to read as follows:

"(B) Cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service described in section 210(f)(5)), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in section 3121(x) of the Internal Revenue Code of 1986) for such year;".

(B) EMPLOYMENT OF DOMESTIC EMPLOYEES UNDER AGE 18 EXCLUDED FROM COVERAGE.—Section 210(a) of such Act (42 U.S.C. 410(a)) is amended—

(i) by striking "or" at the end of paragraph (19),

(ii) by striking the period at the end of paragraph (20) and inserting "; or", and

(iii) by adding at the end the following new paragraph:

"(21) Domestic service in a private home of the employer which—

"(A) is performed in any year by an individual under the age of 18 during any portion of such year; and

"(B) is not the principal occupation of such employee.".

(3) EFFECTIVE DATES.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the amendments made by this subsection shall apply to remuneration paid after December 31, 1993.

(B) EXCLUDED EMPLOYMENT.—The amendments made by paragraphs (1)(C) and (2)(B) shall apply to services performed after December 31, 1994.

(4) NO LOSS OF SOCIAL SECURITY COVERAGE FOR 1994; CONTINUATION OF W-2 FILING REQUIREMENT.—Notwithstanding the amendments made by this subsection, if the wages (as defined in section 3121(a) of the Internal Revenue Code of 1986) paid during 1994 to an employee for domestic service in a private home of the employer are less than $1,000—

(A) the employer shall file any return or statement required under section 6051 of such Code with respect to such wages (determined without regard to such amendments), and

(B) the employee shall be entitled to credit under section 209 of the Social Security Act with respect to any such wages required to be included on any such return or statement.

(b) COORDINATION OF COLLECTION OF DOMESTIC SERVICE EMPLOYMENT TAXES WITH COLLECTION OF INCOME TAXES.—

(1) IN GENERAL.—Chapter 25 of the Internal Revenue Code of 1986 (relating to general provisions relating to employment taxes) is amended by adding at the end thereof the following new section:

"SEC. 3510. COORDINATION OF COLLECTION OF DOMESTIC SERVICE EMPLOYMENT TAXES WITH COLLECTION OF INCOME TAXES.

"(a) GENERAL RULE.—Except as otherwise provided in this section—

"(1) returns with respect to domestic service employment taxes shall be made on a calendar year basis,

"(2) any such return for any calendar year shall be filed on or before the 15th day of the fourth month following the close of the employer's taxable year which begins in such calendar year, and

"(3) no requirement to make deposits (or to pay installments under section 6157) shall apply with respect to such taxes.

"(b) DOMESTIC SERVICE EMPLOYMENT TAXES SUBJECT TO ESTIMATED TAX PROVISIONS.—

"(1) IN GENERAL.—Solely for purposes of section 6654, domestic service employment taxes imposed with respect to any calendar year shall be treated as a tax imposed by chapter 2 for the taxable year of the employer which begins in such calendar year.

"(2) EMPLOYERS NOT OTHERWISE REQUIRED TO MAKE ESTIMATED PAYMENTS.—Paragraph (1) shall not apply to any employer for any calendar year if—

"(A) no credit for wage withholding is allowed under section 31 to such employer for the taxable year of the employer which begins in such calendar year, and

"(B) no addition to tax would (but for this section) be imposed under section 6654 for such taxable year by reason of section 6654(e).

"(3) ANNUALIZATION.—Under regulations prescribed by the Secretary, appropriate adjustments shall be made in the application of section 6654(d)(2) in respect of the amount treated as tax under paragraph (1).

"(4) TRANSITIONAL RULE.—In the case of any taxable year beginning before January 1, 1998, no addition to tax shall be made under section 6654 with respect to any underpayment to the extent such underpayment was created or increased by this section.

"(c) DOMESTIC SERVICE EMPLOYMENT TAXES.—For purposes of this section, the term 'domestic service employment taxes' means—

"(1) any taxes imposed by chapter 21 or 23 on remuneration paid for domestic service in a private home of the employer, and

"(2) any amount withheld from such remuneration pursuant to an agreement under section 3402(p).

For purposes of this subsection, the term 'domestic service in a private home of the employer' includes domestic service described in section 3121(g)(5).

"(d) EXCEPTION WHERE EMPLOYER LIABLE FOR OTHER EMPLOYMENT TAXES.—To the extent provided in regulations prescribed by the Secretary, this section shall not apply to any employer for any calendar year if such employer is liable for any tax under this subtitle with respect to remuneration for services other than domestic service in a private home of the employer.

"(e) GENERAL REGULATORY AUTHORITY.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section. Such regulations may treat domestic service employment taxes as taxes imposed by chapter 1 for purposes of coordinating the assessment and collection of such employment taxes with the assessment and collection of domestic employers' income taxes.

"(f) AUTHORITY TO ENTER INTO AGREEMENTS TO COLLECT STATE UNEMPLOYMENT TAXES.—

"(1) IN GENERAL.—The Secretary is hereby authorized to enter into an agreement with any State to collect, as the agent of such State, such State's unemployment taxes imposed on remuneration paid for domestic service in a private home of the employer. Any taxes to be collected by the Secretary pursuant to such an agreement shall be treated as domestic service employment taxes for purposes of this section.

"(2) TRANSFERS TO STATE ACCOUNT.—Any amount collected under an agreement referred to in paragraph (1) shall be transferred by the Secretary to the account of the State in the Unemployment Trust Fund.

"(3) SUBTITLE F MADE APPLICABLE.—For purposes of subtitle F, any amount required to be collected under an agreement under paragraph (1) shall be treated as a tax imposed by chapter 23.

"(4) STATE.—For purposes of this subsection, the term 'State' has the meaning given such term by section 3306(j)(1).".

(2) CLERICAL AMENDMENT.—The table of sections for chapter 25 of such Code is amended by adding at the end thereof the following:

"Sec. 3510. Coordination of collection of domestic service employment taxes with collection of income taxes.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to remuneration paid in calendar years beginning after December 31, 1994.

(4) EXPANDED INFORMATION TO EMPLOYERS.—The Secretary of the Treasury or the Secretary's delegate shall prepare and make available information on the Federal tax obligations of employers with respect to employees performing domestic service in a private home of the employer. Such information shall also include a statement that such employers may have obligations with respect to such employees under State laws relating to unemployment insurance and workers compensation.

SEC. 3. ALLOCATIONS TO FEDERAL DISABILITY INSURANCE TRUST FUND.

(a) ALLOCATION WITH RESPECT TO WAGES.—Section 201(b)(1) of the Social Security Act (42 U.S.C. 401(b)(1)) is amended by striking "(O) 1.20 per centum" and all that follows through "December 31, 1999, and so reported," and inserting "(O) 1.20 per centum of the wages (as so defined) paid after December 31, 1989, and before January 1, 1994, and so reported, (P) 1.88 per centum of the wages (as so defined) paid after December 31, 1993, and before January 1, 1997, and so reported, (Q) 1.70 per centum of the wages (as so defined) paid after December 31, 1996, and before January 1, 2000, and so reported, and (R) 1.80 per centum of the wages (as so defined) paid after December 31, 1999, and so reported,".

(b) ALLOCATION WITH RESPECT TO SELF-EMPLOYMENT INCOME.—Section 201(b)(2) of such Act (42 U.S.C. 401(b)(2)) is amended by striking "(O) 1.20 per centum" and all that follows through "December 31, 1999," and inserting "(O) 1.20 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1989, and before January 1, 1994, (P) 1.88 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1993, and before January 1, 1997, (Q) 1.70 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1996, and before January 1, 2000, and (R) 1.80 per centum of the amount of self-employment income (as so defined) so reported for any taxable year beginning after December 31, 1999,".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to wages paid after December 31, 1993, and self-employment income for taxable years beginning after such date.

(d) STUDY ON RISING COSTS OF DISABILITY BENEFITS.—

(1) IN GENERAL.—As soon as practicable after the date of the enactment of this Act, the Commissioner of Social Security shall conduct a comprehensive study of the reasons for rising costs payable from the Federal Disability Insurance Trust Fund.

(2) MATTERS TO BE INCLUDED IN STUDY.—In conducting the study under this subsection, the Commissioner of Social Security shall—

(A) determine the relative importance of the following factors in increasing the costs payable from the Trust Fund:

(i) increased numbers of applications for benefits;

(ii) higher rates of benefit allowances; and

(iii) decreased rates of benefit terminations; and

(B) identify, to the extent possible, underlying social, economic, demographic, programmatic, and other trends responsible for changes in disability benefit applications, allowances, and terminations.

(3) REPORT.—Not later than October 1, 1995, the Commissioner of Social Security shall transmit a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate setting forth the results of the study conducted under this subsection, together with any recommendations for legislative changes which the Commissioner determines appropriate.

SEC. 5. ADDITIONAL DEBT COLLECTION PRACTICES.

(a) IN GENERAL.—Section 204 of the Social Security Act (42 U.S.C. 404) is amended by adding at the end the following new subsection:

"(f)(1) With respect to any delinquent amount, the Commissioner of Social Security may use the collection practices described in sections 3711(f), 3716, and 3718 of title 31, United States Code, as in effect on October 1, 1994.

"(2) For purposes of paragraph (1), the term 'delinquent amount' means an amount—

"(A) in excess of the correct amount of payment under this title;

"(B) paid to a person after such person has attained 18 years of age; and

"(C) determined by the Commissioner of Social Security, under regulations, to be otherwise unrecoverable under this section after such person ceases to be a beneficiary under this title.".

(b) CONFORMING AMENDMENT.—Section 3701(d) of title 31, United States Code, is amended by inserting ", except to the extent provided under section 204(f) of such Act (42 U.S.C. 404(f))," after "the Social Security Act (42 U.S.C. 301 et seq.)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to collection activities begun on or after the date of the enactment of this Act and before October 1, 1999.

SEC. 6. NURSING HOMES REQUIRED TO REPORT ADMISSIONS OF SSI RECIPIENTS.

(a) IN GENERAL.—Section 1631(e)(1) of the Social Security Act (42 U.S.C. 1383(e)(1)) is amended by adding at the end the following new subparagraph:

"(C) For purposes of making determinations under section 1611(e), the requirements prescribed by the Commissioner of Social Security pursuant to subparagraph (A) of this paragraph shall require each administrator of a nursing home, extended care facility, or intermediate care facility, within 2 weeks after the admission of any eligible individual or eligible spouse receiving benefits under this title, to transmit to the Commissioner a report of the admission.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to admissions occurring on or after October 1, 1995.

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(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to admissions occurring on or after October 1, 1995.

SEC. 7. RULE OF CONSTRUCTION.

Until March 31, 1995, any reference in this Act (other than section 3(d)) or any amendment made by this Act to the Commissioner of Social Security shall be deemed a reference to the Secretary of Health and Human Services.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

Rev. Rul. 87-41

Section 3121. -- Definitions

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

1987-1 C.B. 296; 1987 IRB LEXIS 254; 1987-23 I.R.B. 7; REV. RUL. 87-41

June 8, 1987

[*1]

Employment status under section 530(d) of the Revenue Act of 1978. Guidelines are set forth for determining the employment status of a taxpayer (technical service specialist) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialists are to be classified as employees under generally applicable common law standards.

ISSUE

In the situations described below, are the individuals employees under the common law rules for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24 respectively, subtitle C, Internal Revenue Code)? These situations illustrate the application of section 530(d) of the Revenue Act of 1978, 1978-3 (Vol. 1) C.B. 119 (the 1978 Act), which was added by section 1706(a) of the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. 698 (the 1986 Act) (generally effective for services performed and remuneration paid after December 31, 1986).

FACTS

In each factual situation, an individual worker (Individual), pursuant to an arrangement between one person (Firm) and another person (Client), [*2] provides services for the Client as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

Situation 1

The Firm is engaged in the business of providing temporary technical services to its clients. The Firm maintains a roster of workers who are available to provide technical services to prospective clients. The Firm does not train the workers but determines the services that the workers are qualified to perform based on information submitted by the workers.

The Firm has entered into a contract with the Client. The contract states that the Firm is to provide the Client with workers to perform computer programming services meeting specified qualifications for a particular project. The Individual, a computer programmer, enters into a contract with the Firm to perform services as a computer programmer for the Client's project, which is expected to last less than one year. The Individual is one of several programmers provided by the Firm to the Client. The Individual has not been an employee of or performed services for the Client (or any predecessor or affiliated corporation of the Client) [*3] at any time preceding the time at which the Individual begins performing services for the Client. Also, the Individual has not been an employee of or performed services for or on behalf of the Firm at any time preceding the time at which the Individual begins performing services for the Client. The Individual's contract with the Firm states that the Individual is an independent contractor with respect to services performed on behalf of the Firm for the Client.

The Individual and the other programmers perform the services under the Firm's contract with the Client. During the time the Individual is performing services for the Client, even though the Individual retains the right to perform services for other persons, substantially all of the Individual's working time is devoted to performing services for the Client. A significant portion of the services are performed on the Client's premises. The Individual reports to the Firm by accounting for time worked and describing the progress of the work. The Firm pays the Individual and regularly charges the Client for the services performed by the Individual. The Firm generally does not pay individuals who perform services for the [*4] Client unless the Firm provided such individuals to the Client.

The work of the Individual and other programmers is regularly reviewed by the Firm. The review is based primarily on reports by the Client about the performance of these workers. Under the contract between the Individual and the Firm, the Firm may terminate its relationship with the Individual if the review shows that he or she is failing to perform the services contracted for by the Client. Also, the Firm will replace the Individual with another worker if the Individual's services are unacceptable to the Client. In such a case, however, the Individual will nevertheless receive his or her hourly pay for the work completed.

Finally, under the contract between the Individual and the Firm, the Individual is prohibited from performing services directly for the Client and, under the contract between the Firm and the Client, the Client is prohibited from receiving services from the Individual for a period of three months following the termination of services by the Individual for the Client on behalf of the Firm.

Situation 2

The Firm is a technical services firm that supplies clients with technical personnel. [*5] The Client requires the services of a systems analyst to complete a project and contacts the Firm to obtain such an analyst. The Firm maintains a roster of analysts and refers such an analyst, the Individual, to the Client. The Individual is not restricted by the Client or the Firm from providing services to the general public while performing services for the Client and in fact does perform substantial services for other persons during the period the Individual is working for the Client. Neither the Firm nor the Client has priority on the services of the Individual. The Individual does not report, directly or indirectly, to the Firm after the beginning of the assignment to the Client concerning (1) hours worked by the Individual, (2) progress on the job, or (3) expenses incurred by the Individual in performing services for the Client. No reports (including reports of time worked or progress on the job) made by the Individual to the Client are provided by the Client to the Firm.

If the Individual ceases providing services for the Client prior to completion of the project or if the Individual's work product is otherwise unsatisfactory, the Client may seek damages from the Individual. [*6] However, in such circumstances, the Client may not seek damages from the Firm, and the Firm is not required to replace the Individual. The Firm may not terminate the services of the Individual while he or she is performing services for the Client and may not otherwise affect the relationship between the Client and the Individual. Neither the Individual nor the Client is prohibited for any period after termination of the Individual's services on this job from contracting directly with the other. For referring the Individual to the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. The Individual is not paid by the Firm either directly or indirectly. No payment made by the Client to the Individual reduces the amount of the fee that the Client is otherwise required to pay the Firm. The Individual is performing services that can be accomplished without the Individual's receiving direction or control as to hours, place of work, sequence, or details of work.

Situation 3

The Firm, a company engaged in furnishing client [*7] firms with technical personnel, is contacted by the Client, who is in need of the services of a drafter for a particular project, which is expected to last less than one year. The Firm recruits the Individual to perform the drafting services for the Client. The Individual performs substantially all of the services for the Client at the office of the Client, using materials and equipment of the Client. The services are performed under the supervision of employees of the Client. The Individual reports to the Client on a regular basis. The Individual is paid by the Firm based on the number of hours the Individual has worked for the Client, as reported to the Firm by the Client or as reported by the Individual and confirmed by the Client. The Firm has no obligation to pay the Individual if the Firm does not receive payment for the Individual's services from the Client. For recruiting the Individual for the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. However, the Firm does receive a reasonable fee for performing the payroll [*8] function. The Firm may not direct the work of the Individual and has no responsibility for the work performed by the Individual. The Firm may not terminate the services of the Individual. The Client may terminate the services of the Individual without liability to either the Individual or the Firm. The Individual is permitted to work for another firm while performing services for the Client, but does in fact work for the Client on a substantially full-time basis.

LAW AND ANALYSIS

This ruling provides guidance concerning the factors that are used to determine whether an employment relationship exists between the Individual and the Firm for federal employment tax purposes and applies those factors to the given factual situations to determine whether the Individual is an employee of the Firm for such purposes. The ruling does not reach any conclusions concerning whether an employment relationship for federal employment tax purposes exists between the Individual and the Client in any of the factual situations.

Analysis of the preceding three fact situations requires an examination of the common law rules for determining whether the Individual is an employee with respect to [*9] either the Firm or the Client, a determination of whether the Firm or the Client qualifies for employment tax relief under section 530(a) of the 1978 Act, and a determination of whether any such relief is denied the Firm under section 530(d) of the 1978 Act (added by section 1706 of the 1986 Act).

An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in the following three substantially similar sections of the Employment Tax Regulations: sections 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.

These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. [*10] In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

Conversely, these sections provide, in part, that individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees.

Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. [*11] The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individuals is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. Instructions. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

2. Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, [*12] by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229.

3. Integration. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certian amount of control by the owner of the business. See United States v. Silk, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. Services Rendered Personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

5. Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the [*13] workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593, 1955-2 C.B. 610.

6. Continuing Relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See United States v. Silk.

7. Set Hours of Work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

8. Full Time Required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly [*14] restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

9. Doing Work on Employer's Premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done

elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694.

10. Order [*15] or Sequence Set. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. See Rev. Rul. 56-694.

11. Oral or Written Reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

12. Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on [*16] a straight commission generally indicates that the worker is an independent contractor. See Rev. Rul. 74-389, 1974-2 C.B. 330.

13. Payment of Business and/or Traveling Expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

14. Furnishing of Tools and Materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

15. Significant Investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence [*17] on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. See Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

17. Working for More Than One Firm at a Time. If a worker performs more than de minimis services for a multiple of [*18] unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. Making Service Available to General Public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660.

19. Right to Discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

20. Right to Terminate. If the worker has the right to end his or her relationship with the person for whom the services [*19] are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309.

Rev. Rul. 75-41 considers the employment tax status of individuals performing services for a physician's professional service corporation. The corporation is in the business of providing a variety of services to professional people and firms (subscribers), including the services of secretaries, nurses, dental hygienists, and other similarly trained personnel. The individuals who are to perform the services are recruited by the corporation, paid by the corporation, assigned to jobs, and provided with employee benefits by the corporation. Individuals who enter into contracts with the corporation agree they will not contract directly with any subscriber to which they are assigned for at least three months after cessation of their contracts with the corporation. The corporation assigns the individual to the subscriber to work on the subscriber's premises with the subscriber's equipment. Subscribers have the right to require that an individual furnished by the corporation cease providing services to them, and they have the further [*20] right to have such individual replaced by the corporation within a reasonable period of time, but the subscribers have no right to affect the contract between the individual and the corporation. The corporation retains the right to discharge the individuals at any time. Rev. Rul. 75-41 concludes that the individuals are employees of the corporation for federal employment tax purposes.

Rev. Rul. 70-309 considers the employment tax status of certain individuals who perform services as oil well pumpers for a corporation under contracts that characterize such individuals as independent contractors. Even though the pumpers perform their services away from the headquarters of the corporation and are not given day-to-day directions and instructions, the ruling concludes that the pumpers are employees of the corporation because the pumpers perform their services pursuant to an arrangement that gives the corporation the right to exercise whatever control is necessary to assure proper performance of the services; the pumpers' services are both necessary and incident to the business conducted by the corporation; and the pumpers are not engaged in an independent enterprise in which they [*21] assume the usual business risks, but rather work in the course of the corporation's trade or business. See also Rev. Rul. 70-630, 1970-2 C.B. 229, which considers the employment tax status of salesclerks furnished by an employee service company to a retail store to perform temporary services for the store.

Section 530(a) of the 1978 Act, as amended by section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 536, provides, for purposes of the employment taxes under subtitle C of the Code, that if a taxpayer did not treat an individual as an employee for any period, then the individual shall be deemed not to be an employee, unless the taxpayer had no reasonable basis for not treating the individual as an employee. For any period after December 31, 1978, this relief applies only if both of the following consistency rules are satisfied: (1) all federal tax returns (including information returns) required to be filed by the taxpayer with respect to the individual for the period are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee ("reporting consistency rule"), and (2) the taxpayer (and any predecessor) [*22] has not treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for periods beginning after December 31, 1977 ("substantive consistency rule").

The determination of whether any individual who is treated as an employee holds a position substantially similar to the position held by an individual whom the taxpayer would otherwise be permitted to treat as other than an employee for employment tax purposes under section 530(a) of the 1978 Act requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals. Differences in the positions held by the respective individuals that result from the taxpayer's treatment of one individual as an employee and the other individual as other than an employee (for example, that the former individual is a participant in the taxpayer's qualified pension plan or health plan and the latter individual is not a participant in either) are to be disregarded in determining whether the individuals hold substantially similar positions.

Section 1706(a) of the 1986 Act added to section 530 of the 1978 Act a new subsection (d), [*23] which provides an exception with respect to the treatment of certain workers. Section 530(d) provides that section 530 shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. Section 530(d) of the 1978 Act does not affect the determination of whether such workers are employees under the common law rules. Rather, it merely eliminates the employment tax relief under section 530(a) of the 1978 Act that would otherwise be available to a taxpayer with respect to those workers who are determined to be employees of the taxpayer under the usual common law rules. Section 530(d) applies to remuneration paid and services rendered after December 31, 1986.

The Conference Report on the 1986 Act discusses the effect of section 530(d) as follows:

The Senate amendment applies whether the services of [technical service workers] are provided by the firm to only one client during the year or to more than one client, and whether or not such individuals have [*24] been designated or treated by the technical services firm as independent contractors, sole proprietors, partners, or employees of a personal service corporation controlled by such individual. The effect of the provision cannot be avoided by claims that such technical service personnel are employees of personal service corporations controlled by such personnel. For example, an engineer retained by a technical services firm to provide services to a manufacturer cannot avoid the effect of this provision by organizing a corporation that he or she controls and then claiming to provide services as an employee of that corporation.

. . . [T]he provision does not apply with respect to individuals who are classified, under the generally applicable common law standards, as employees of a business that is a client of the technical services firm.

2 H.R. Rep. No. 99-841 (Conf. Rep.), 99th Cong., 2d Sess. II-834 to 835 (1986).

Under the facts of Situation 1, the legal relationship is between the Firm and the Individual, and the Firm retains the right of control to insure that the services are performed in a satisfactory fashion. The fact that the Client may also exercise some degree of [*25] control over the Individual does not indicate that the individual is not an employee. Therefore, in Situation 1, the Individual is an employee of the Firm under the common law rules. The facts in Situation 1 involve an arrangement among the Individual, Firm, and Client, and the services provided by the Individual are technical services. Accordingly, the Firm is denied section 530 relief under section 530(d) of the 1978 Act (as added by section 1706 of the 1986 Act), and no relief is available with respect to any employment tax liability incurred in Situation 1. The analysis would not differ if the facts of Situation 1 were changed to state that the Individual provided the technical services through a personal service corporation owned by the Individual.

In Situation 2, the Firm does not retain any right to control the performance of the services by the Individual and, thus, no employment relationship exists between the Individual and the Firm.

In Situation 3, the Firm does not control the performance of the services of the Individual, and the Firm has no right to affect the relationship between the Client and the Individual. Consequently, no employment relationship exists [*26] between the Firm and the Individual.

HOLDINGS

Situation 1. The Individual is an employee of the Firm under the common law rules. Relief under section 530 of the 1978 Act is not available to the Firm because of the provisions of section 530(d).

Situation 2. The Individual is not an employee of the Firm under the common law rules.

Situation 3. The Individual is not an employee of the Firm under the common law rules.

Because of the application of section 530(b) of the 1978 Act, no inference should be drawn with respect to whether the Individual in Situations 2 and 3 is an employee of the Client for federal employment tax purposes.

CONSENT TO DISCLOSURE OF TAX INFORMATION

I authorize the Internal Revenue Service to disclose my returns and return information (as those terms are defined in section 6103(b) of the Internal Revenue Code) for the tax years listed below. Such returns and return information may be disclosed by the Internal Revenue Service to the Office of the White House Counsel in connection with my candidacy for the Commission on Libraries and Information Science.

I am aware that without this authorization, my returns and return information are confidential and protected by law under the Internal Revenue Code.

Taxpayer Name: ______________________________

Social Security No.: ______________________________

Tax Years: ______________________________

Address: ______________________________

____

Taxpayer Signature: ______________________________

Date: ______________________________