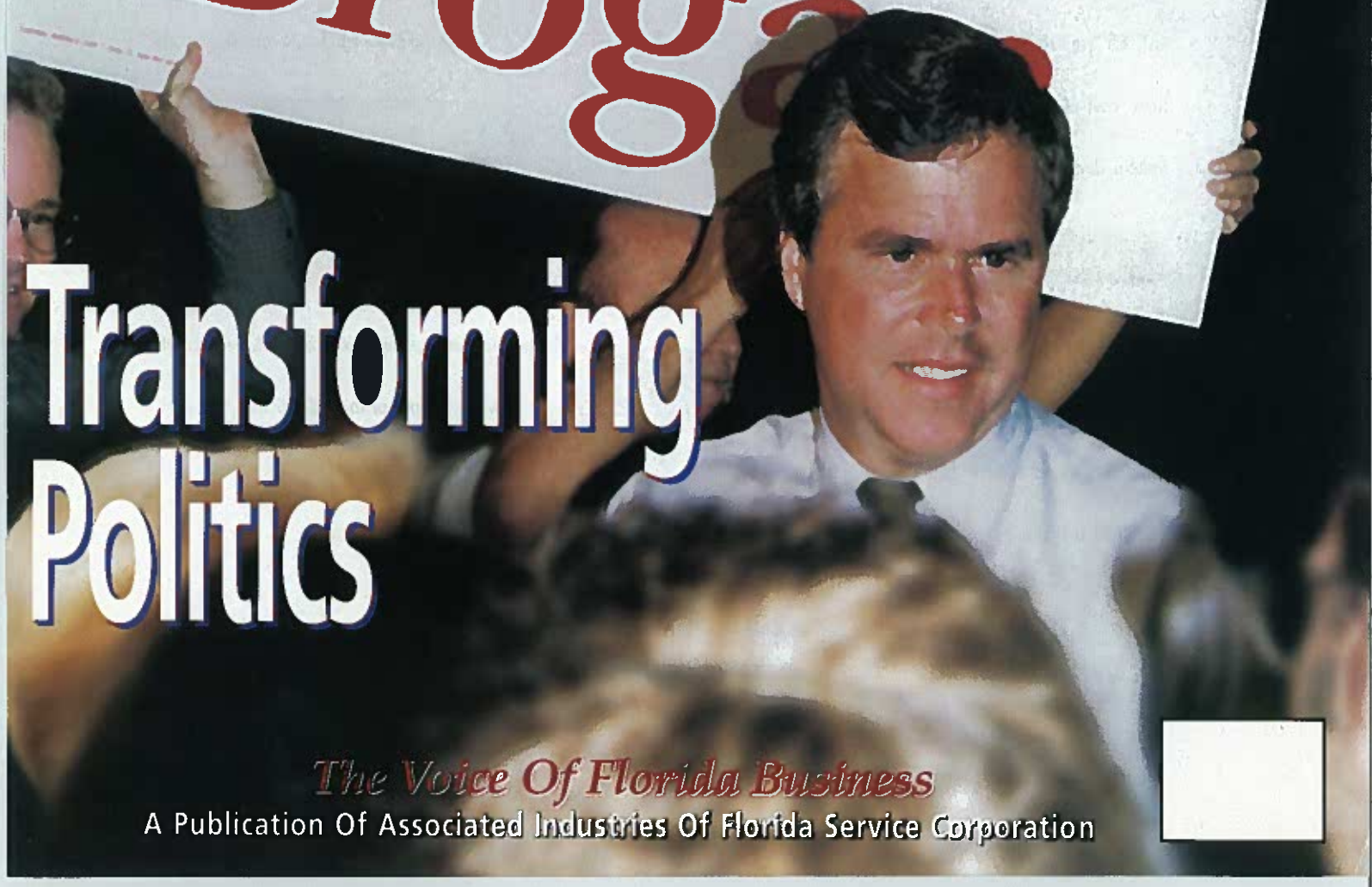
FLORIDA BUSINESS INSIGHT

NOV. DEC. 1998

The Magazine Of Free Enterprise & Public Policy

# Bush '98

## Brog

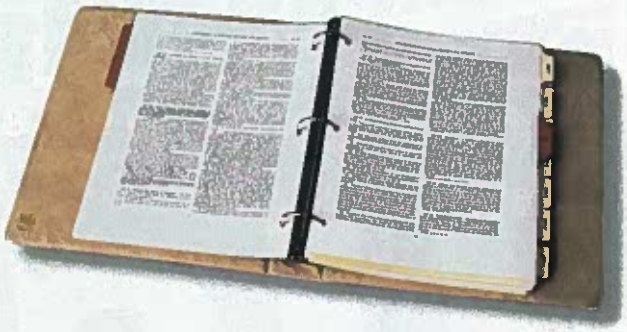


# Transforming Politics

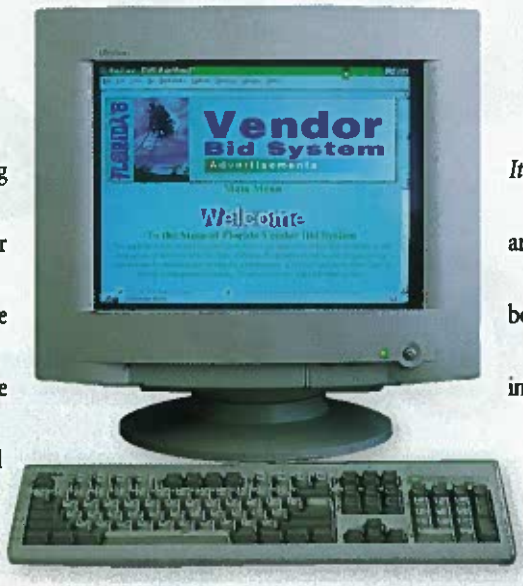
*The Voice Of Florida Business*

A Publication Of Associated Industries Of Florida Service Corporation

# You've Done It By The Book,



# Now Do It Online!




The choice is yours. Searching through print advertisements for State bids can be a cumbersome task for your business. With the new, cost-effective Vendor Bid System, designed by the State Purchasing Team, the bidding process is now high-tech! The Vendor Bid System is an innovative online computer service that lets you easily search for the State bids that fit your business.

*It's timely* — online bid advertisements are posted within 24 hours! *It's free* — to both the state agencies that are advertising their bids and to the companies who are seeking business opportunities. *It's available now* — to check out the Vendor Bid System, simply look us up on the Internet. Don't be left out of the bid process any longer. Selling your products or services to the State of Florida has never been easier!

**ONLINE FLORIDA VENDOR BIDS ARE FAST, FREE AND EASY**

**bids.state.fl.us or call (850) 488-0018 for more information**

*The State Purchasing Team - Helping Make Government Work Better And Cost Less*

FLORIDA BUSINESS INSIGHT
The Magazine of Free Enterprise & Public Policy

November/December 1998
Volume 2, Issue 6

**ON THE COVER:**
Florida's Grand *New* Party.
COVER PHOTO: LEANN WEISS

# features



page 16

page 33

page 36



# columns

*by jon l. shebel, publisher*

# In The Winds That Blow

**With the collapse of economies around the globe, pundits are predicting the end of capitalism. But the failure has not been one of capitalism. And it has been just as much a political miscarriage as an economic one.**

Much of the Clinton Administration's foreign policy has been trade-based, in the belief that democracy flows from capitalism. And sometimes that is true — to a point. The freedom to succeed in a free market makes citizens less likely to succumb to the blandishments of autocrats. But the opportunity to succeed in a free market diminishes without the existence of political instruments such as rule of law, private property rights, and inviolability of contracts. Freedom nurtures prosperity and vice versa.

And because democracy and free markets depend upon accountability, they do more to nurture morality than any other political or economic system. They also demand the engagement of the citizens to defend that accountability. That's why so much of our political discourse since the first settlers set foot on these shores has been about virtue, or what we today call values.

That's also why, especially with government, how things get done is just as important as what gets done. When those who hold positions of power in government bend the rules or cut corners to reach their objectives, they do more harm than any private individual or corporation because they are striking at the very heart of the bond that makes it possible for us to live together in liberty.

Over the last four years, the top leaders of this state, other states, and this nation have seen fit to bend the rules and cut corners so that they could "get Big Tobacco." No matter the means, we were promised, they were justified because it was all being done on behalf of the children.

But, we were also promised, the rest of us were safe because tobacco was "unique." Don't believe it for a second. Once erected, this mechanism for a huge power and money grab won't be easily dismantled. As you'll read in this month's story, *Whither Tobacco*, ominous rumblings emanating from Big Government, Big Law, and Big Public Health presage the next assault on the political and economic freedom of the business community. Once again, it will all be done for the children.

In the movie, *A Man For All Seasons*, the great English statesman and lawyer Sir Thomas More debates with his son-in-law over the sanctity of the law. When the son-in-law says he'd "cut down every law in England" to vanquish evil, More remonstrates, "And when the last law was down and the devil turned around on you, where would you hide?"

Then he continues, "This country is planted thick with laws, from coast to coast, man's laws, not God's, and if you cut them down ... do you really think you could stand upright in the winds that would blow then? Yes, I'd give the devil the benefit of law for my own safety's sake."

Sir Thomas More's defense of the law cost him his life. Chances are, we won't be asked to make a similar sacrifice. All we need do is stand firm against those who would cut down the laws to achieve this or that "worthy" outcome. Because once those laws are cut down, they will not so easily be made to stand upright again. ■

*Jon L. Shebel is president and CEO of Associated Industries of Florida and affiliated companies.*

PHOTO: JAMES ORIG

FLORIDA BUSINESS INSIGHT

**PUBLISHER**
Jon L. Shebel

**EXECUTIVE EDITOR/ CREATIVE DIRECTOR**
Dwight M. Sumners

**EDITOR**
Jacquelyn Horkan

**GRAPHIC DESIGNER**
Gregory Vowell

**EDITORIAL & ADVERTISING OFFICES**
516 North Adams Street
Post Office Box 784
Tallahassee, FL 32302-0784
Phone: (850) 224-7173
Fax: (850) 224-6532
E-mail: insight@aif.com
Internet: http://aif.com

*Florida Business Insight* is published bi-monthly by Associated Industries of Florida Service Corporation to inform readers about issues pertinent to Florida's business community.



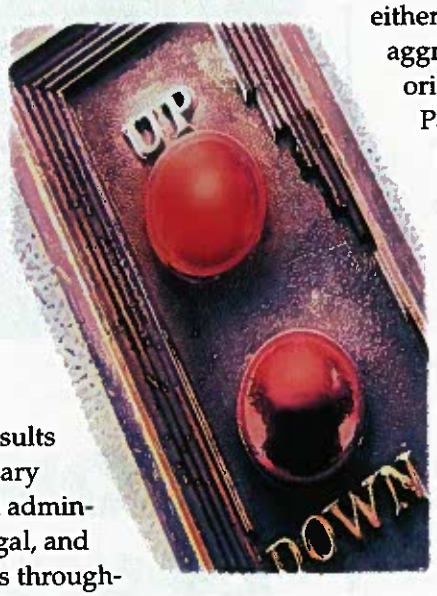
**Postmaster:** Send address changes to Florida Business Insight, 516 North Adams Street, P.O. Box 784, Tallahassee, FL 32302-0784.

*Member, Florida Magazine Association*

by frank t. white

# Rates Back On The Upward Track

**Can it really be that, four years after sweeping reform of workers' comp, insurance rates are going up?**




In October, the National Council for Compensation Insurance, the group that reviews Florida's workers' comp system and recommends rates, recommended a 15.3 percent rate increase, which was later revised to 13.1 percent. Politicians would have you believe the problem rests with insurance companies. They are wrong.

According to the Department of Labor and Employment Security, the number of workplace injuries that cause employees to miss time from work is actually on the decline. The problem, simply put, is that there are fewer injuries but they cost more.

A return to upward trending medical costs is one culprit. The 1993 reforms brought some savings by introducing managed care into the system. Managed care alone, however, cannot fully contain medical inflation and costly advances in medical technology forever. And the workers' comp system is not alone in this trend. Inflation is hitting all areas of the health insurance field, with most analysts predicting health care costs will rise sharply over the next several years. Trial lawyers also drive up medical costs by manipulating the system, requesting additional referrals to specialists, second and third opinions, expert witness fees, etc.

In addition to medical expenses, litigation results in unnecessary increases in administrative, legal, and benefit costs throughout the system. Measures in the 1993 reforms to reduce the need for attorney involvement have not worked. Litigation has not decreased, but increased over the last several years. Government statistics show a continued increase in attorney fees.

One final major cost driver is permanent and total disability. The number of permanent total awards per 100,000 workers in Florida, prior to the enacted reforms, was second in the nation and more than three times the national average. This is not because Florida is a dangerous place to work, but rather because of how workers' comp judges define *permanent* and *total* disability.

In 1993, lawmakers tried to restrict lifetime permanent total benefits to catastrophic cases of true total disability. They have been ignored. As a matter of fact, state statistics show that the number of permanent total awards continues to steadily increase despite the 1993 reforms. This of course, also drives medical costs as many, if not most, medical problems arising after an award of permanent total disability will be either fully attributable to, or an aggravation caused by, the original industrial accident. Payment of those benefits should be reserved to those who are truly catastrophically disabled, and not for those with wily lawyers.

These cost drivers are emerging in insurance company statistics. Without legislative remedies, employers can expect a return to annual rate hikes. Associated Industries of Florida will be proposing legislative changes to address these issues, among others, while at the same time attempting to increase benefits to the truly injured worker without increasing costs to the employer.

While politically palatable, keeping rates artificially low is not the way to attack this problem. Squeezing insurers out of the market will just make workers' comp insurance more expensive and harder to get. Pruning back wasteful litigation and unjustified awards of permanent and total benefits is the only way to bring genuine and lasting savings to the system. ■

*Frank T. White is executive vice president and COO for Associated Industries Insurance Services, Inc.*

PHOTO: CHRISTOPH WIHELM

# Meet our latest Lottery Winners.




These kids may not be old enough to play the Florida Lottery, but they're already winners. Next year, they will attend West Navarre Elementary, a new school being built for them with the help of Lottery dollars.

They live in Santa Rosa County, a rapidly growing county in Florida's Panhandle. Like many Florida counties, Santa Rosa's population will continue to grow.

To avoid overcrowded classrooms, the Florida Lottery is helping to fund the construction of new schools over the next twenty years. That way, while Florida is growing, class sizes will be shrinking.

So, keep playing the Florida Lottery because for kids like Brittany, Laura and Jessica, every ticket is a winner.

Florida Lottery

**When you play, we all win.**

Visit our website at www.flalottery.com.

by marian p. johnson

# All Polls Are Not Created Equal

**Polling is a science, but not in the traditional sense of the systematic examination of a body of facts or truths. Rather the science of polling deals with the techniques you use to get the most accurate results possible.**

There are many aspects to conducting a political poll, but the following are the three most critical to producing a sound product:

- accurate sample
- good voter screen
- carefully phrased questions

A good sample must include persons from all demographic and geographic sections. In recent years, most pollsters have been using a method called random digit dialing, in which the area code and phone exchange are selected. The computer then randomly makes up the last four digits to complete the phone number.

The size of the sample renders the margin of error. Most polls have a confidence level of 95 percent which means that if all persons in that demographic and geographic profile were surveyed, 19 out of 20 would have the same response.

Demographic and geographic characteristics are not enough. Interviewing just anyone who happens to answer the phone does not give an accurate picture of voter attitudes. A campaign only wants to know what's on the mind of those who are likely to vote.


Those who don't vote will not influence the outcome of the election so knowledge of their opinions is of no help in winning the election.

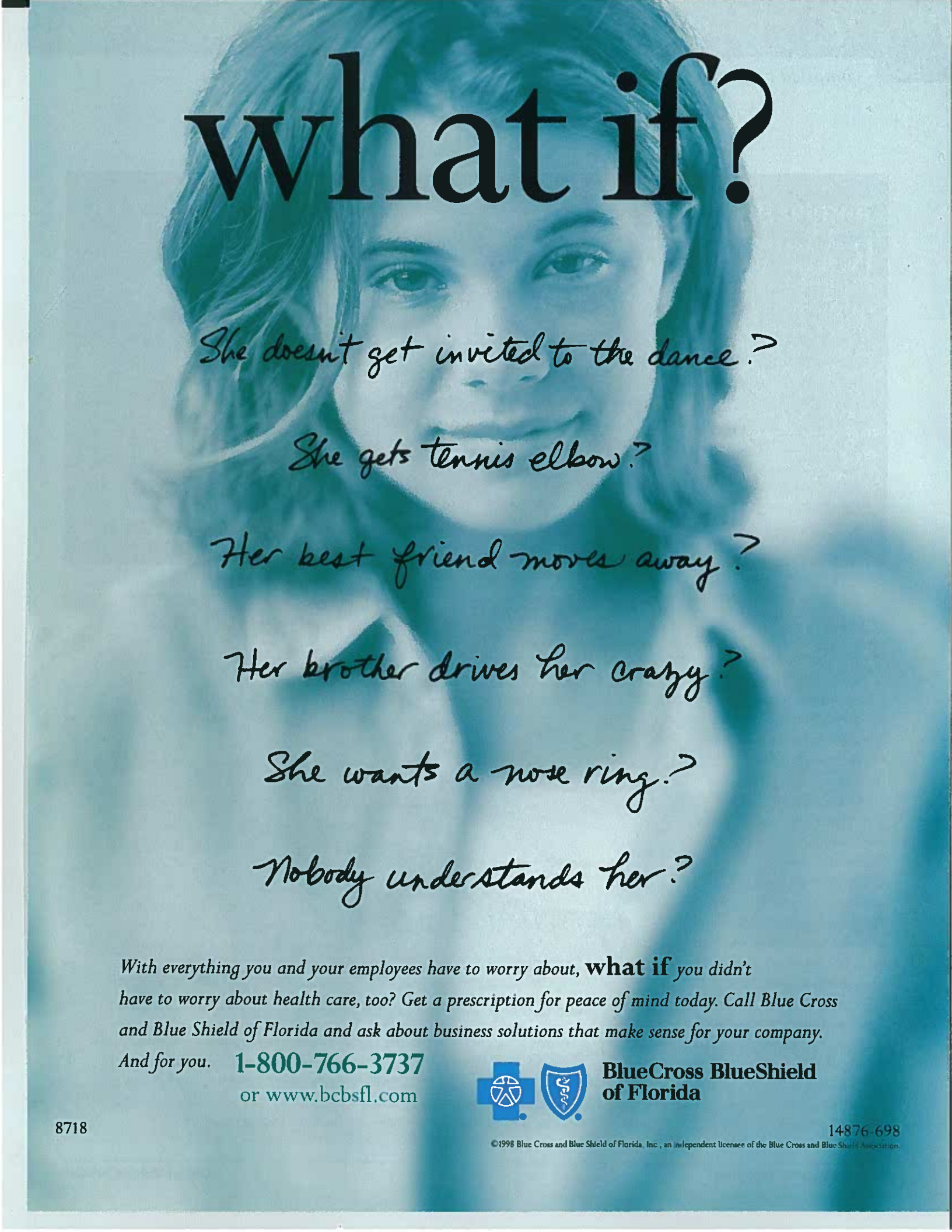
The methods for screening likely voters vary among pollsters and depend upon the specific election. For example, many voters will vote in a presidential general election only. So, if you are polling for a primary election in a non-presidential year, your voter screen for likely voters would not be simply, "Did you vote in the last election?" Rather, it might be something like, "Did you vote in the 1996 primary and the general election?"

Asking just one screening question is not adequate. Good pollsters continue with other questions to screen voters. They will ask the voter the likelihood of his voting in the specific election and perhaps a question or two to ascertain if the voter is an informed voter or not—maybe who his representative is or where he votes. Whatever, a good pollster sets a criteria that must be met before proceeding with the survey.

We all know that a child can ask the same thing a dozen ways. It is the same with polling. Questions must be unbiased. Slanting a question in an improper way might get you the results you want to see, but the results would be erroneous. And it is imperative that the person asking the question does not reflect his own view when asking the question.

Complete accuracy in polling is not possible; you just try to get as close to the truth as you can. That's why you see so many polls on the same topic that come up with such different results. Whether it's for politics or the launch of a new product, following the rules is the key to getting accurate results. They may not be the response you want; they will be the response you need. ■

*Marian P. Johnson is senior vice president of political operations for Associated Industries of Florida Service Corporation.*




*With everything you and your employees have to worry about,* **what if** *you didn't have to worry about health care, too? Get a prescription for peace of mind today. Call Blue Cross and Blue Shield of Florida and ask about business solutions that make sense for your company. And for you.* **1-800-766-3737**
or www.bcbsfl.com

**BlueCross BlueShield of Florida**

8718

14876-698

*compiled by jacquelyn horkan, editor*

## Surplus Reflux

Remember when Bill Clinton admitted that he agreed with those who thought he had raised taxes too much in 1993? That was just reelection talk, full of sound and fury, signifying nothing.

Federal revenues have now risen above 20 percent of the gross domestic product; they are at the highest levels since World War II. According to the Tax Foundation, every man, woman, and child in America pays a total $9,959 in federal, state, and local taxes. That is greater than the amount they spend on food ($2,537), clothing ($1,360), and shelter ($5,625) combined.

Today, President Clinton absolutely refuses to consider tax cuts. Instead, he promises the ridiculous, namely to devote the surplus to saving Social Security, thus combining two surplus fictions into one. The surplus comes from Social Security, which is currently taking in $120 billion more than it spends. That extra money is "invested" in (loaned to, really) the U.S. Treasury, which uses it on general expenditures. Without it, the federal government would be running a $50 billion deficit. The surplus can't be used to save Social Security because it is Social Security.

So if the federal budget actually is in deficit, how could across-the-board tax cuts be a good idea? The following four reasons:

1) to restore the balance between what people earn and what they send to Washington

2) to restore federal spending to proper peacetime levels

3) to stop politicians from evading the tough decisions demanded by fiscal responsibility

4) to devote more of the nation's resources to productive spending, thus warding off the threat of recession ■

## This Is Not A Joke

Ralph Nader has a plan to revitalize his hometown of Winsted, Conn. The consumer crusader is trying to raise $10 million to fill a long-vacant warehouse with the Museum of American Tort Law.

"There'll be the Pinto with the exploding gas tank, flammable pajamas, asbestos, and breast implants, the whole history of medical malpractice, and of course the more recent toxic pollution, like Love Canal," Nader told the *New York Times*.

According to the project manager, Dr. Fred Hyde, the museum gift shop will offer mementos "like models of defective toys, products that were taken off the market."

Bet the museum restaurant also serves lukewarm coffee. ■

## Speaking Of Coffee

For those who enjoy a rich cup of java, lawyer-free, try visiting the Web site of The Original Conservative Coffee Company (*http://www.toccc.com*).

The company is the brainchild of two Sumner, Wash., entrepreneurs who bill their product as the "official beverage of the vast right-wing conspiracy."

Serenaded by the strains of Sousa marches and other patriotic songs, visitors to the site can purchase whole bean or ground coffee by the pound. Offerings include Gore's Blend ("this sedate coffee is our decaffeinated blend ... for those special fund-raising telephone calls to China") and Say Hey Paula and Monica Blend ("satisfying and sweet, with no apologies"). The most popular brand? The American Hero Blend that celebrates Ronald Reagan.

Those without computers may call **1 (888) RIGHT81.** ■

## Tortious Exhibitionism

A Garden City, N.J., woman has filed a palimony suit against her common-law husband for cheating on her after he took the anti-impotence drug, Viagra. She says she may also sue Pfizer, which makes Viagra, for not "training" him on how to handle the drug before selling it to him.

Wonder how the Nader museum will "handle" that exhibit? ■

## Acid Reflux

**The retirement festivities cost a total of $124,396.73, with $120,300 of it spent on the lavish farewell dinner.**

**What corporate titan merited such an elaborate good-bye? Marvin T. Runyon, postmaster general of the U.S. Postal Service, that's who.**

**Now you know why the price of postage is going up.** ■

## Quote Worth Noting

"I'm afraid if Al gave a fireside chat, the fire would go out."

*Bob Dole on Vice President Al Gore*

# Slow Burn

Last summer, newspapers began running stories extolling the virtues of controlled burns, a technique foresters use to burn away underbrush, eliminating the fuel that feeds the kind of conflagrations that raged across Florida this summer. According to these reports, a growing urban population of newcomers caused this practice to fall into disfavor. Actually, the villification of controlled burns dates back to the beginning of this century.

As the head of the U.S. Forest Service under Theodore Roosevelt, Gifford Pinchot was one of a new breed called conservationists, a term he coined himself. Pinchot wanted to conserve and use the nation's natural resources for the common good, an objective he believed required his control of private land. Prevention of forest fires was one method to gain the control he sought.

The Forest Service launched a propaganda campaign against forest fires that would eventually introduce Smokey Bear as an American icon. As part of the campaign, the Forest Service tried to eliminate the practice of controlled burns. It went so far as to hire a psychologist in 1939 to explain why Southern woodsmen continued to defy the wisdom of the federal agency.

The psychologist, John Shea, concluded that setting fires was merely a "folk custom" sustained by irrational impulses. When the Southerners tried to explain that the fires helped control snake, tick and weevil populations, their reasons were dismissed as the "defensive beliefs of a disadvantaged cultural group."

We now know that controlled burns are perfectly rational and salutary. That folk custom disdained by John Shea enjoys a long heritage that predates the first appearance of Europeans on this shore. Captain John Smith of the Jamestown settlement remarked, "A man may gallop a horse amongst these woods any waie, but where creeks or Rivers shall hinder." Another early visitor noted a horse drawn coach could travel from the east coast to the present-day location of St. Louis without stopping to clear a road.

The early primeval forests of America were actually the carefully managed and manipulated creations of the native tribes. They practiced controlled burns to create parklike woods of widely separated trees, clear of underbrush, so that enemies could not stage surprise attacks. The fires also improved visibility for hunting, and controlled summer pests and snakes.

Only today are we rediscovering that uninformed wisdom, proof again that traditions are not hidebound nonsense, but repositories of accumulated wisdom. ■

ILLUSTRATION (TOP): JERZY KOLACZ

*by kathleen "kelly" Bergeron*

# The One Constant: Leadership

**"Leadership is a difficult concept to define, for it includes a wide array of capabilities that can be used in endless combinations. But if a general or manager can lead, all else becomes possible." The words are those of James Dunnigan and Daniel Masterson from their book *The Way of The Warrior.***

The authors examine the leadership styles of 12 military leaders (including Alexander the Great, Napoleon, Ulysses S. Grant, Douglas MacArthur, Norman Schwarzkopf), while demonstrating their management acumen. The authors operate under the premise that fighting wars and running businesses are more alike than different. Both are practices that involve outmaneuvering the competition through better strategic planning and execution. As a retired Marine Corps officer with 21 years of experience, I can attest to the validity of the parallel.

Each of the 12 leaders faced unique challenges, and exhibited varied capabilities and skills depending upon their individual personalities. "One thing they all had in common was the ability to mobilize their skills into a successful style of leadership," write Dunnigan and Masterson. "Modern managers face much the same situation. As a manager, you must lead, and the only way you can do that is to use your innate skills as effectively as possible."

What qualities do successful military leaders share with business managers?

• *Communication.* People cannot accomplish the mission/assignment if they don't understand it. A leader has to communicate effectively with different groups, in writing and orally. Napoleon used to tell his battle orders to his corporal. If the corporal understood, Napoleon was sure his battle commanders would also.

• *Courage.* Cowards have no followers. Bravery on the battlefield is as important as a manager doing what is right, regardless of the consequences. Courage means facing the difficult task and taking appropriate and considered risks. It means admitting when you are wrong, taking corrective action, and moving on to the next task.

• *People Skills.* Yes, a military leader does sometimes scream in a soldier's face—when necessary. But generally, our successful military leaders inspire—they do not bully—their people to follow them. Leaders care about their people and stay in touch with their needs and wants. Respect is a two-way street—you've got to give it to get it.

• *Leading By Example.* Leaders do not ask others to do what they would not do themselves. When you're the boss, all eyes are on you. Your people notice everything you do and say. They watch how you treat others and how you conduct yourself in all situations.

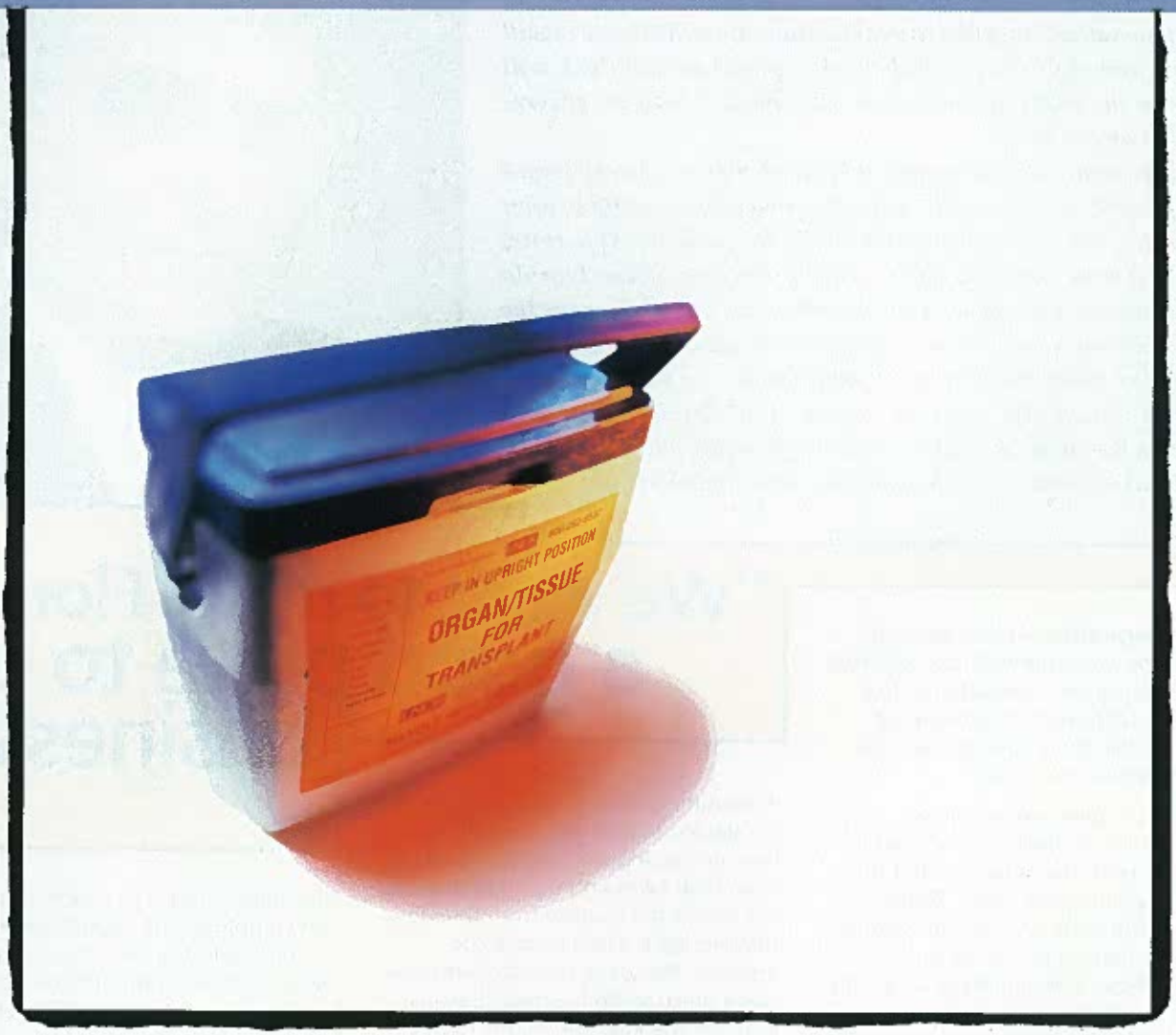
• *Training and Discipline.* People need to know their jobs and receive timely training on new technologies to enhance performance. Employees must know the rules and what is expected of them. Violators must be held accountable and disciplined appropriately.

By explaining how top military leaders applied these principles, *The Way of the Warrior* offers insight into the unchanging qualities of successful leadership, and the rewards.

As the authors observe, "War, then and now, consists of a little fighting and a whole lot of managing. The former is usually not possible without the latter, although ultimately one has to fight. But the warrior with the best management skills generally wins." ■

*Kathleen "Kelly" Bergeron is executive vice president and chief of staff of Associated Industries of Florida and affiliated companies.*

# CHOOSING A HEALTH PLAN CAN AFFECT MORE THAN YOUR BUSINESS. IT CAN CHANGE YOUR LIFE.




Your own health can depend on your decision. For nationally recognized medical specialists, you want a plan that includes Shands HealthCare. Florida physicians have been referring their most difficult patients to Shands at the University of Florida for more than 40 years. They count on Shands where advanced treatment is offered in virtually every medical specialty. At the heart of this world class care are the University of Florida faculty physicians – many of them numbered among the "Best Doctors in America." So when you choose a health plan, for yourself as well as for your employees, make sure it includes Shands HealthCare and the University of Florida physicians. For more information on these plans, call 1-800-749-7424.

SHANDS HealthCare

A national leader in cancer treatment, cardiovascular medicine, children's health, organ transplantation, neurology, neurosurgery, and a full range of specialties.

# AIF Names Old Friend To New Post

*On Oct. 6, 1998, Randy Miller was named senior executive vice president and chief operating officer of Associated Industries of Florida (AIF), a post created as part of the association's ongoing reorganization efforts. Miller, who will report directly to Jon L. Shebel, AIF's president and CEO, will oversee the daily operations of AIF and will lead its governmental affairs effort.*

*Miller signed up AIF as one of his first clients when he joined the private sector in 1988 as a governmental consultant after spending his entire professional life in government service, the last nine years as the executive director of the Florida Department of Revenue. As a consultant to AIF, Miller was the force behind many of the association's legislative proposals using tax exemptions to impel job creation.*

*After joining AIF full time on Nov. 1, Miller sat down with* **Florida Business Insight** *to share his thoughts about the future of the association and Florida's business community.*

## "We want to make Florida a good place to do business."

***FBI Magazine:*** *At one time you were the government's tax collector. Now you're the advocate for the private taxpayers. What kind of perspective does having been the taxman give you now?*

**Miller:** It gives me a unique perspective in that I know what is fair for both the taxpayer and the taxing agency, the state. There are things the state can do that would be detrimental to the citizens, and I know those and can make sure that they don't abuse that power. I also know what's not fair. I have a saying, "If it doesn't make good sense, it doesn't make good law." Tax laws are full of that—it doesn't make good sense and therefore it doesn't make good law.

***FBI Magazine:*** *What do you see as your major challenges and your major goals at AIF.*

**Miller:** Our major challenge is to make Florida a friendly place for business. We have a unique challenge in the year 2000 in that we have term limits. A great percentage of the legislators that we know have been our friends are going to be gone. Our challenge is to be active in recruiting and electing pro-business legislators. In addition, we will be busy protecting Florida's economy from high taxes and trying to dissuade the rest of the country from the idea that Florida is a bad place to do business. We want to make Florida a good place to do business. Because jobs are the key. We've got to have jobs to keep our youngsters here and to make Florida a decent place to live.

***FBI Magazine:*** *What are the top things that need to be done to make Florida a better place for business?*

**Miller:** The number one thing right now is that we've got to do some tort reform. Tort reform in the state of Florida, tort reform nationwide. It's a problem that has to be solved.

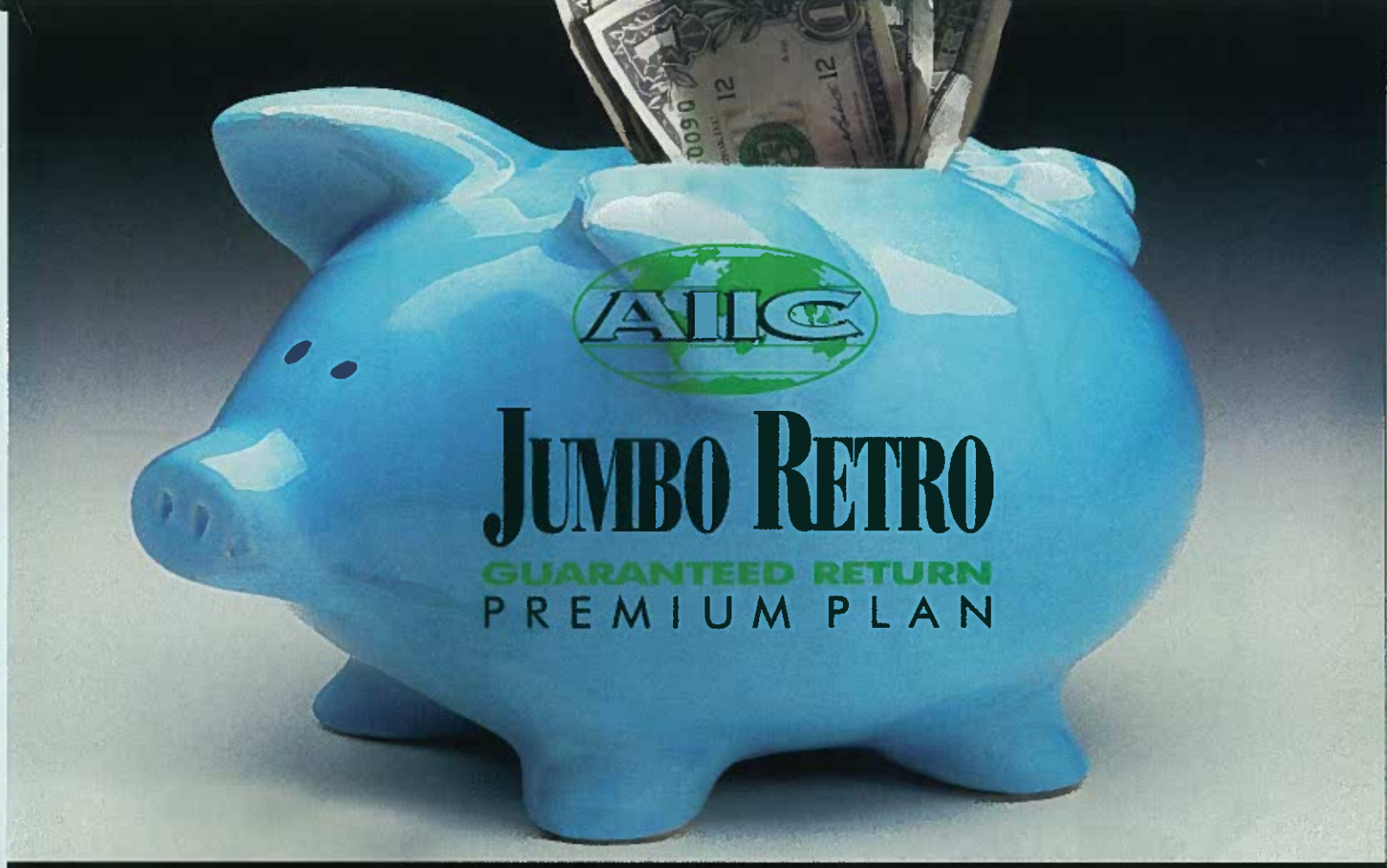
The second thing, we need to look at our educational system and get it to where we are able to produce people who are educated and qualified to go into new employment.

The third thing is to create those new employment opportunities, to keep people from having to move away. Let's keep them here. Let's create opportunities for them here.

***FBI Magazine:*** *What are the top priorities for the next session.*

**Miller:** We're still analyzing what those are. But top on our list will be to go back and visit tort reform again and make sure we get a bill that is fair to the business community and that can be signed by Governor Bush. We would like again to continue with our economic development activities and tax reform and economic incentives for business. And finally, we want to make sure that other facets of Florida's business community are shored up to make Florida a good place for business. ■

PHOTO: DOC KOKOL




# Our Workers' Comp Plan Has Some Great Things In Store For You — *Guaranteed!*

Our Jumbo Retro Program gives you something you can bank on — results! Of all our initial Jumbo Retro accounts, 90 percent recently received a Return Premium check.

Not only that, but 95 percent of those insureds received the maximum return based on their individual premium size.

The Jumbo Retro Program, designed for small- to medium-size businesses, employs aggressive loss control and safety programs and rewards insureds with a *guaranteed* return of premium up to 20%.

Other companies can only offer dividend promises. Associated Industries Insurance Company is approved by the Department of Insurance to *guarantee* a return of premium.

Workers' Compensation Insurance Return Premium Plan

| Premium Range | Incurred Loss Ratio: Less than 10% | 10% to 19% | 20% to 29% | 30% to 39% | 40% to 49% | 50%+ |
|---|---|---|---|---|---|---|
| | Percentage of Return Premium | | | | | |
| Less than $5,000 | 5% | 3% | 3% | | | |
| $5,000 to $10,000 | 6% | 5% | 3% | 3% | | |
| $10,000 to $20,000 | 8% | 6% | 5% | 3% | | |
| $20,000 to $30,000 | 10% | 8% | 6% | 5% | 3% | |
| $30,000 to $50,000 | 12% | 9% | 7% | 5% | 3% | |
| $50,000 to $75,000 | 15% | 12% | 9% | 6% | 3% | |
| $75,000 to $100,000 | 17% | 13% | 10% | 6% | 3% | |
| Greater than $100,000 | 20% | 15% | 10% | 6% | 3% | |

If you're safe and you'd like money back for your efforts, your advantage is AIIC's Jumbo Retro Program. Discover the difference you can bank on!

**NO OTHER PROGRAM IN FLORIDA CAN DO WHAT JUMBO RETRO DOES. FEWER LOSSES EQUALS A GREATER RETURN OF YOUR PREMIUM DOLLARS — *GUARANTEED.***

## Contact Your Agent Or AIIC For More Information.

**Associated Industries Insurance Company, Inc. • Boca Raton, Florida • (800) 866-1234**

AIIC

# WHAT TOBACCO?

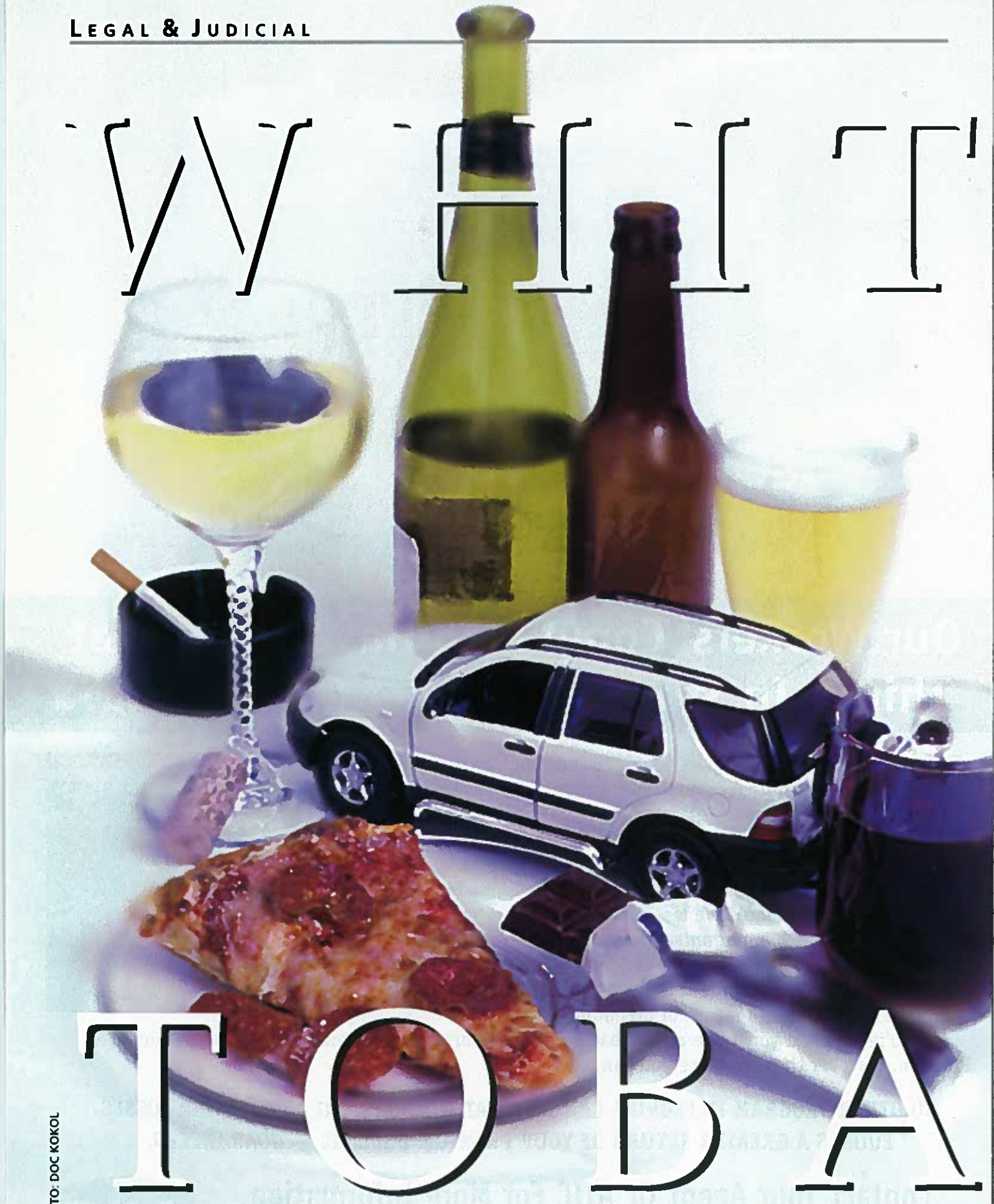


PHOTO: DOC KOKOL

*by jacquelyn horkan, editor*

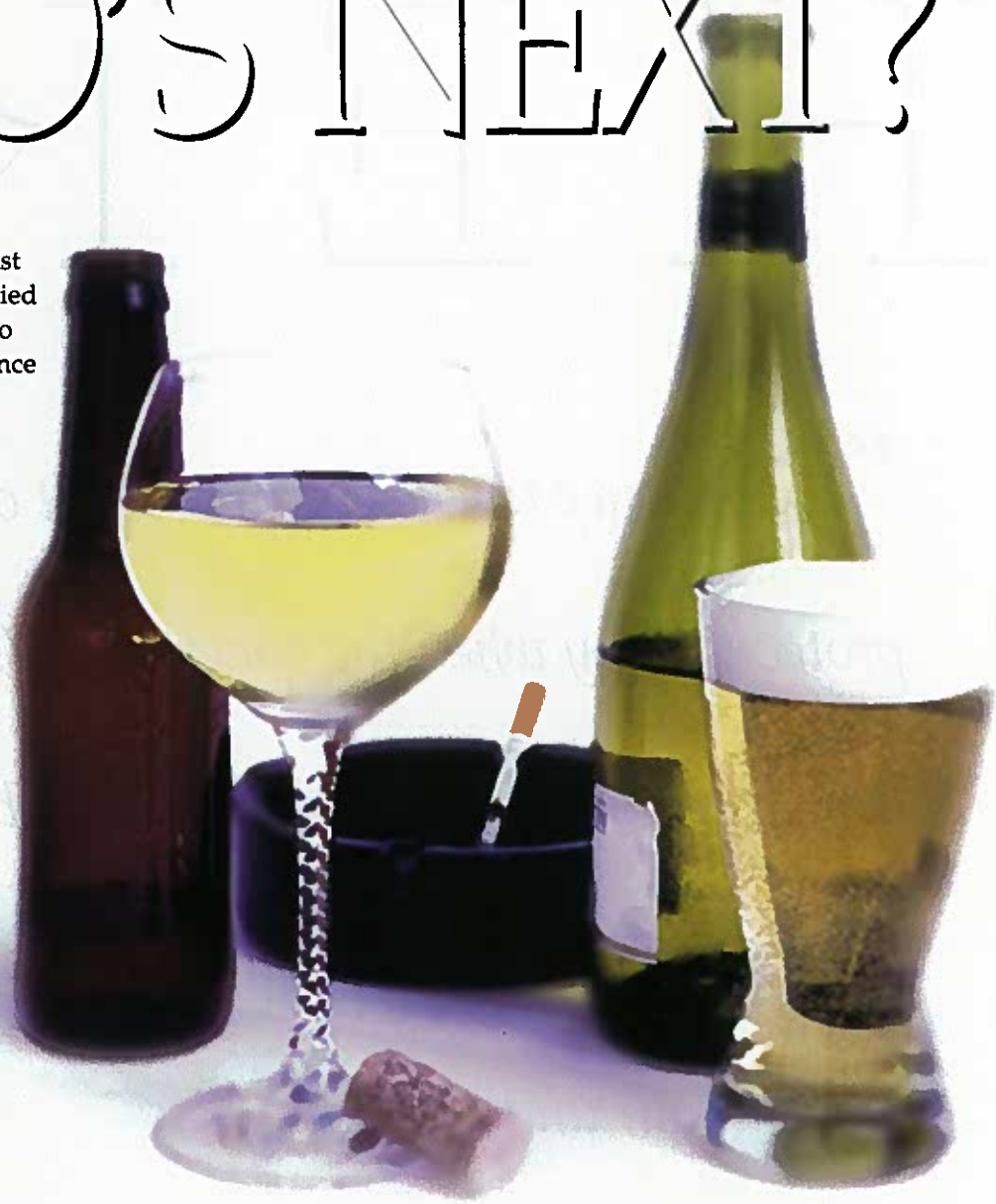
# HER

*"Experience teaches us to be most on our guard to protect liberty when the government's purposes are beneficent. The greatest dangers to liberty lurk in the insidious encroachment of men of zeal, well-meaning but without understanding."*

U.S. Supreme Court Justice
Louis D. Brandeis (1856-1941)

# CEO?

# WHO'S NEXT?



Justice Louis Brandeis, liberal activist and appointee of Woodrow Wilson, died half a decade before the Great Tobacco Escapade of the 1990s, but his eloquence tolls the warning embedded in this sorry episode.

In governing, what is done matters less than how it is done. There are certain rules and procedures government must follow. Otherwise, its actions, no matter how defensible or desirable, cannot be considered just. Those rules and procedures are what differentiate democracy from tyranny. They were blithely discarded in the pursuit of the cigarette makers.

The mechanism and rationale erected to bring the tobacco companies to heel will not be so easily dismantled. If it was used to achieve something good for us once, why shouldn't it be used again?

That is the natural progression that should trouble every person who manufactures, sells, or buys a product unpopular with some constituency.

## THE NEXT MERCHANTS OF DEATH?

*The greatest potential for improving the health of the American people is to be found in what they do and don't do to and for themselves. Individual decisions about diet, exercise, stress, and smoking are of critical importance.*
1977 textbook, *Principles of Community Health*

In the early days of the public health profession, officials concerned themselves with preventing the spread of disease, assuring sanitary living conditions, compiling vital statistics, and abating public nuisances. In 1906, Congress created the Food and Drug Administration (FDA) to ensure purity in those products. The Centers for Disease Control (CDC) was established during World War II as a unit of the U.S. Public Health Service to fight malaria in the South.

Today, the FDA, CDC, and their public health brethren busy themselves with such diseases as eating fast food, not exercising, drinking alcohol, and consuming caffeine. Yes, caffeine.

The Center for Science in the Public Interest, a Ralph Nader spin-off, has called upon the FDA to regulate caffeine content in coffee, tea, soda, and chocolate. Already the propaganda campaign has begun. In its April 27, 1998, cover story, *The Nation* magazine warned, "Caffeine Inc. is raking it in, often targeting teens and younger kids. ... The major caffeine suppliers to kids have been throwing millions into advertising and

PHOTO: DOC KOKOL

giveaways." Kind of sounds like the cigarette companies doesn't it?

Big Coffee isn't the only one drawing comparisons to tobacco. Arguing that the focus of attention should now shift to alcohol, Richard Yoast, the director of the American Medical Association's Office of Alcohol and Other Substances, told an AP reporter, "The beer industry is acting more and more like the tobacco industry. The ads with the animals, you could substitute cigarettes and it would be the same thing."

Then there's the proposed Fat Tax, the brainchild of one Professor Kelly D. Brownell, director of Yale University's Center for Eating and Weight Disorders. Professor Brownell wants to subsidize healthy foods, tax unhealthy foods, and regulate food advertising aimed at children, all in an attempt to fight what he calls an "out-of-control epidemic of obesity."

To support his contentions, Professor Brownell has said, "As a culture, we get upset about Joe Camel, yet we tolerate our children seeing 10,000 commercials a year that promote foods that are every bit as unhealthy."

The anti-caffeine Center for Science in the Public Interest is also on the side of Professor Brownell. Its executive director, Michael Jacobson, has announced, "It's high time the [restaurant] industry begins to bear some responsibility for its contribution to obesity, heart disease, and cancer."

Thanks to the anti-tobacco crusade, it almost seems as if we've embarked on a beauty pageant of sorts for pet projects and crusades. And why not? As Ron Motley, one of the lead anti-tobacco plaintiff lawyers, has said, "We're negotiating with [state attorneys general] in another disease area. We're also negotiating to take on some business tort cases. And some consumer protection cases."

And don't forget the remarks of Dexter Douglass, Gov. Lawton Chiles's general counsel when Florida's lawsuit was filed. Asked why the state was suing tobacco and not alcohol, Douglass replied, "At this point, we don't have the statistics to proceed in that regard. We're only proceeding against tobacco. You [sic] got to take them one at a time. I don't believe anyone in the world can handle all those industries at once."

So, the question, it appears, is who's next? Meaning, who's most vulnerable. Creating that vulnerability is the job of the activists. The task of exploiting it falls to the politicians and the trial lawyers.

## THE INVENTION OF EVIL

*Tobacco is the only product we know of that, when it's used as directed, leads to illness and death.* Florida Gov. Lawton Chiles

If we are to believe the anti-smoking zealots, cigarette manufacturers are merchants of death, marketing a ruthless killer that lures innocent children into a macabre dance of inescapable addiction leading inevitably to their death.

But then, facts are only tangentially relevant when manufacturing the outrage essential to a modern crusade.

For example, here are a few of the facts overlooked in the tobacco episode.

- Only 18 to 36 percent of smokers die of smoking-related diseases.
- According to the Surgeon General's Office, of the 2 million customers that tobacco companies have to "replace" each year, 20 percent die, the rest quit. What's more, 90 percent of those who quit do so without formal treatment, usually cold turkey.
- According to the Centers for Disease Control, there are approximately the same number of smokers and ex-smokers in America today.
- According to a 1991 RAND Corporation study, smoking cigarettes reduced the life expectancy of a 20-year old by about 4.3 years, years that are lost in old age, not youth.

As journalist Ramesh Ponnuru wrote in *National Review* magazine, "In a just world, the anti-tobacco campaign would collapse of its own hypocrisies."

But creating support for that campaign was predicated upon winning acceptance of arguments that defy common sense. In 1964, when the Surgeon General's report warning of the dangers of smoking was released, surveys showed that most Americans already associated smoking with cancer. After all, since the 1930s they'd been swept in a rising stream of scientific reports linking the habit to the disease. So much for alleging that smokers had not received adequate warning of the dangers of smoking and blaming tobacco companies for that ignorance.

As a result of the growing body of evidence, in the 1950s cigarette manufacturers began developing safer cigarettes with lower tar and nicotine levels. Contrary to the claims of the anti-tobacco forces, the manufacturers did not manipulate nicotine levels to keep smokers addicted. The levels were manipulated to maintain consistency with the advertised amounts.

Further attempts to make smoking safer were squashed by the anti-tobacco zealots who would brook no middle ground between keeping cigarettes as dangerous as possible and eradicating them completely. In 1988 and again in 1994, R.J. Reynolds announced plans to introduce cigarette brands with charcoal tips to reduce smoke and ash. The new designs significantly reduced the amount of harmful ingredients inhaled by the smoker. Both times, members of the Coalition on Smoking or Health howled with outrage at the prospect of safer cigarettes.

# BUT THEN, FACTS ARE ONLY TANGENTIALLY RELEVANT when manufacturing the outrage essential to a modern crusade.

Just as threats of litigation and public controversy steered the cigarette makers away from safer cigarettes, so they were left in the untenable position of denying the harmful and habit-causing nature of their product.

Call that denial foolish, irresponsible, unethical—at least it was grounded in logic, the avoidance of litigation. What excuse do the crusaders have for thwarting the development of a safer cigarette to reduce the risk for those who choose to continue smoking of their own free will?

## FOR WHAT GOOD CAUSE?

*They're going to have to come to court, and no more of these stupid little defenses.* Fred Levin, (Pensacola plaintiff lawyer who helped draft Florida's Medicaid Third-Party Liability Act)

Studies show that smokers tend to be risk-takers and, for them, the risk of losing a few years of life is outweighed by the benefits of their habit. And there are benefits. Nicotine is one psychoactive substance that does not impair performance. Depending on the circumstances and dosage, nicotine can calm nerves, enhance concentration, alleviate irritability, and increase levels of energy.

But the facts and how they can be manipulated is hardly important once you accept the supposition that government must intervene when people do things that do not promote their physical well-being. Once that supposition is accepted, any method, any distortion, any exaggeration is automatically acceptable.

Try spreading the arguments of the anti-tobacco crusaders around to a few other legal products. Fat, when used as intended, causes heart disease, which kills more people each year than smoking.

And how can government ignore alcohol abuse, the addiction most associated with child abuse, spousal abuse, and violent crime, but go after smoking which poses no danger to society or family life?

For that matter, why not hold automobile makers liable for deaths by caused by speeding. Shouldn't they make cars that can't exceed the speed limits?

Through taxes and savings on nursing homes, pensions, Medicare, Social Security, etc., smokers actually bring a net benefit to society of approximately 85 cents per pack smoked. Can the same be said of alcohol, fast food, and guns?

The runaway rationale that informed the anti-tobacco crusade can easily be stamped onto a new cause by the do-gooder control freaks who can't resist the temptation to organize people's lives better than the people do themselves.

Watch the state's anti-smoking ads carefully. Don't they emit a distinct air of narcissism? They seem to have been designed with the egos of the crusaders in mind, something like a modern school system that would rather teach self-esteem than reading, resulting in a cadre of students who think they can read well when they can't read at all.

The ads certainly won't stop anyone from picking up the habit or help them drop it once they've started. After all, people don't quit smoking because tobacco companies are evil. They sue. Which may just be the point: convincing smokers to sue rather than quit, while spreading the kind of propaganda that will persuade potential jurors to award damages.

That's why once the crusading rationale spreads, so will the mechanism. In the pursuit of money and power, governors, attorneys general, bureaucrats, and, of course, trial lawyers will be more than happy to renew their partnership. They will gladly knock down what Fred Levin calls "these stupid little defenses," what the rest of us call the bulwarks of a just legal system.

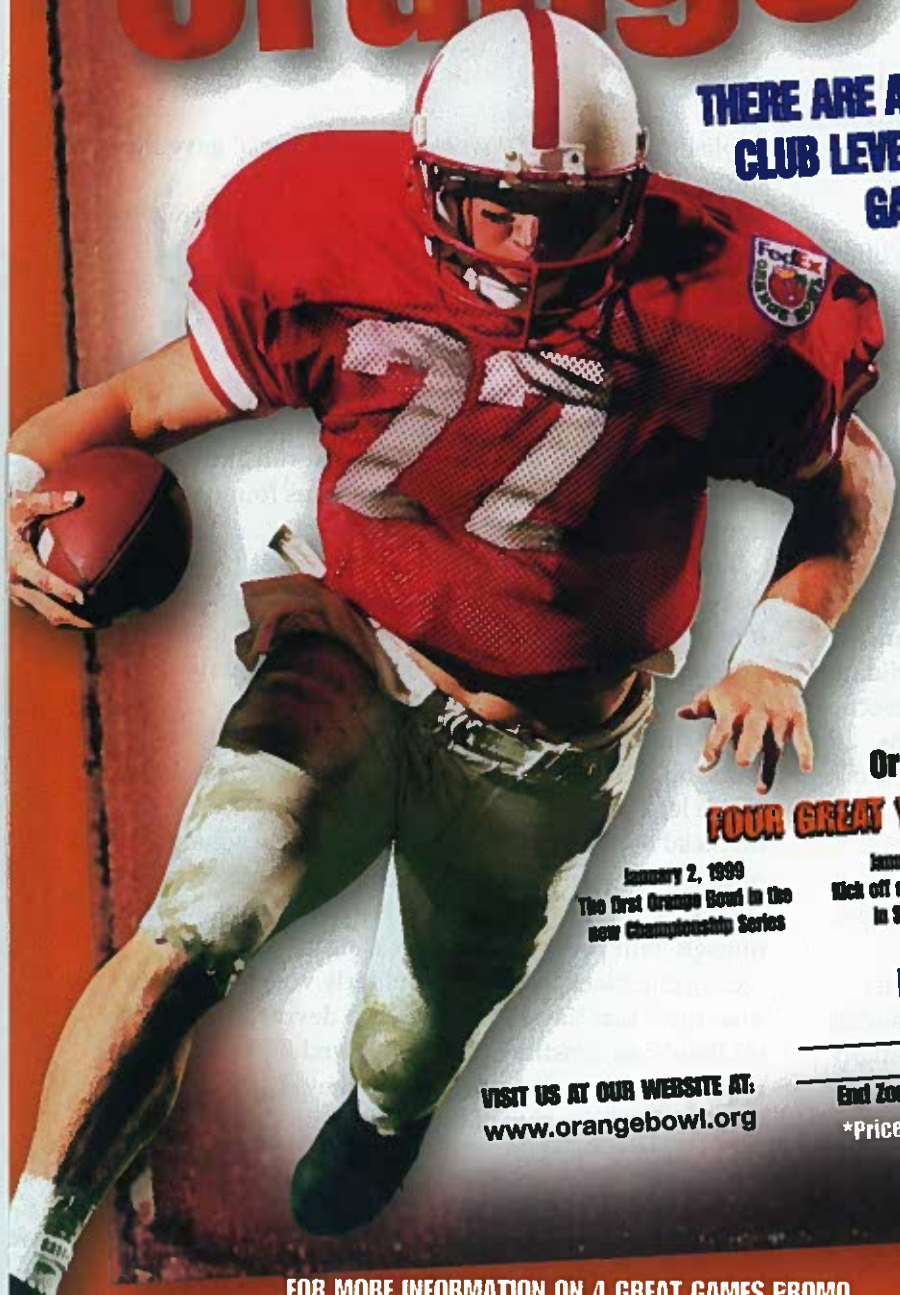
The anti-smoking crusaders blended what good intentions they may have possessed with a lust for power, control, and money. They were willing to trample legal principles and constitutional verities in pursuit of their goals. They promised that it would be just this once because tobacco was "unique."

But, if the politicians could so easily be convinced to set aside restraint this time, what is to stop them in the future? Government officials who, in the pursuit of outcomes, are willing to shatter the boundaries set in constitutions threaten the very thing that binds us together in liberty.

Because constitutions are more than mere thoughts, words on paper. They are the restrictions we place on those who hold the power of government. If we don't demand their obedience to those restrictions, who will? ■

# TICKETS ON SALE!

# FedEx Orange Bowl



**THERE ARE A LIMITED NUMBER OF SIDELINE & CLUB LEVEL SEATS AVAILABLE FOR THE BIG GAME! ACT NOW! BECAUSE WHEN THEY'RE GONE, THEY'RE GONE!**

Don't miss your chance to get these great seats - at just $105 for Club Level, $80 for Sideline and $70 for EndZone/Corner seats. For more information, or to place your order for 1999 game tickets, call Ticketmaster at:

**Miami/Dade: (305) 358-5885**

**Broward: (954) 523-3309**

**Palm Beach: (561) 966-3309**

Or take advantage of our great

**FOUR GREAT YEARS • FOUR GREAT GAMES PACKAGE**

January 2, 1999
The first Orange Bowl in the new Championship Series

January 1, 2000
Kick off a new millennium in South Florida

January 3, 2001
The National Championship #1 and #2 go head-to-head

January 2, 2002
After four years, cheer as a veteran in the Grand Finale

**Lock in Your Ticket Prices Today.***

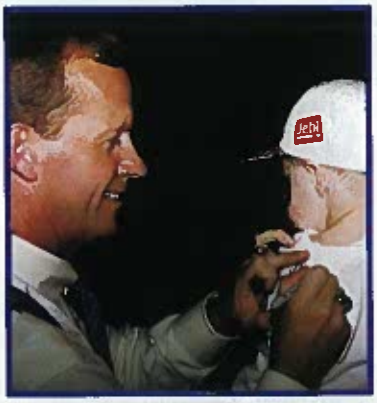
| Location | 1999 | 2000 | 2001 | 2002 | Total |
|---|---|---|---|---|---|
| Sideline | $80 | $80 | $150 | $90 | $400 |
| End Zone/Corner | $70 | $70 | $125 | $80 | $345 |

*Prices are subject to increase and can only be guaranteed through the purchase of this ticket package

VISIT US AT OUR WEBSITE AT:
www.orangebowl.org

FOR MORE INFORMATION ON 4 GREAT GAMES PROMO, CONTACT THE ORANGE BOWL TICKET OFFICE TOLL-FREE

**1-888-879-2200**



Florida's new lieutenant governor, Frank Brogan.

# Transfo Politi

Complacency was just as much the campaign opponent of Jeb Bush and Frank Brogan as was Buddy MacKay.

In 1994, after losing the closest gubernatorial election in Florida history, there existed in some quarters a sense of inevitability about the future inauguration of Jeb Bush. As the fall of 1998 closed in, the feeling grew as every advantage seemed to accrue to the favorite son of the state GOP. A cohesive and talented staff, a stuffed campaign coffer, a unified and energized party, a 12-point lead in the polls two months before the election — the race was his to lose. But win he did, by a 10-point margin.

The glitter of money and the supposedly unfair advantage of a famous name attracted the censure of journalists like June bugs that zap themselves against the porch light. But dollars and lineage didn't give Jeb Bush the edge. It was the hard work of running a campaign of density and depth.

If anything, the Bush/Brogan campaign, for all its money, seemed a throwback to the old shaking-hands-kissing-babies days of campaigning. The two candidates were everywhere — from small-town political barbecues to the places providing outreach and services to the once-proud men of the military who now wander the streets homeless.

Bush and Brogan played a new style of identity politics, replacing the old mode of fomenting antagonism with one that sought concord among those of differing ethnic and interest affiliations. And it worked. They drew the endorsements of Agriculture Commissioner Bob Crawford, a conservative Democrat from the center of the state, as well as that of T. Willard Fair, head of the Urban League in Miami. Jim Towey, advocate for the elderly, and Rabbi Bruce Warshal, publisher of the liberal weekly *Jewish Journal*, gave their support to the GOP ticket.

The MacKay/Dantzler campaign tried to resurrect the 1994 image of Bush as an uncaring, penny-pinching right-winger. The ploy failed, in large part because of four years of yeoman's work by the Foundation for Florida's Future. Bush established the private think tank shortly after his loss to Gov. Lawton Chiles. Peopled by key staff from the 1994 campaign, the foundation was often derided as a shell for Bush's next run at the office. During 1998, the anonymity of generous foundation donors became fodder for his opponents.

But the real muscle of the foundation was not money, just as the election of Bush was not its best achievement. If nothing else, it thrust conservative ideas into the mainstream, and politics is just as much about ideas as it is about power.

Yes, the Foundation for Florida's Future kept Bush's name on the public radar, gave him an opportunity to shape legislation, and maintained his network of financial backers. It also yielded intangible benefits, infusing the Bush/Brogan campaign with creative energy. It also let Bush spend four years acquainting himself with people around the state.

Courting black, Jewish, and elderly voters did more than force MacKay and Dantzler to devote time shoring up their core constituencies. It allowed Bush and Brogan to delve into the common ground they shared with the traditional opponents of the Republican Party.

*by jacquelyn horkan, editor*


(Left) Governor-elect Jeb Bush on the campaign trail and (above) on election night.

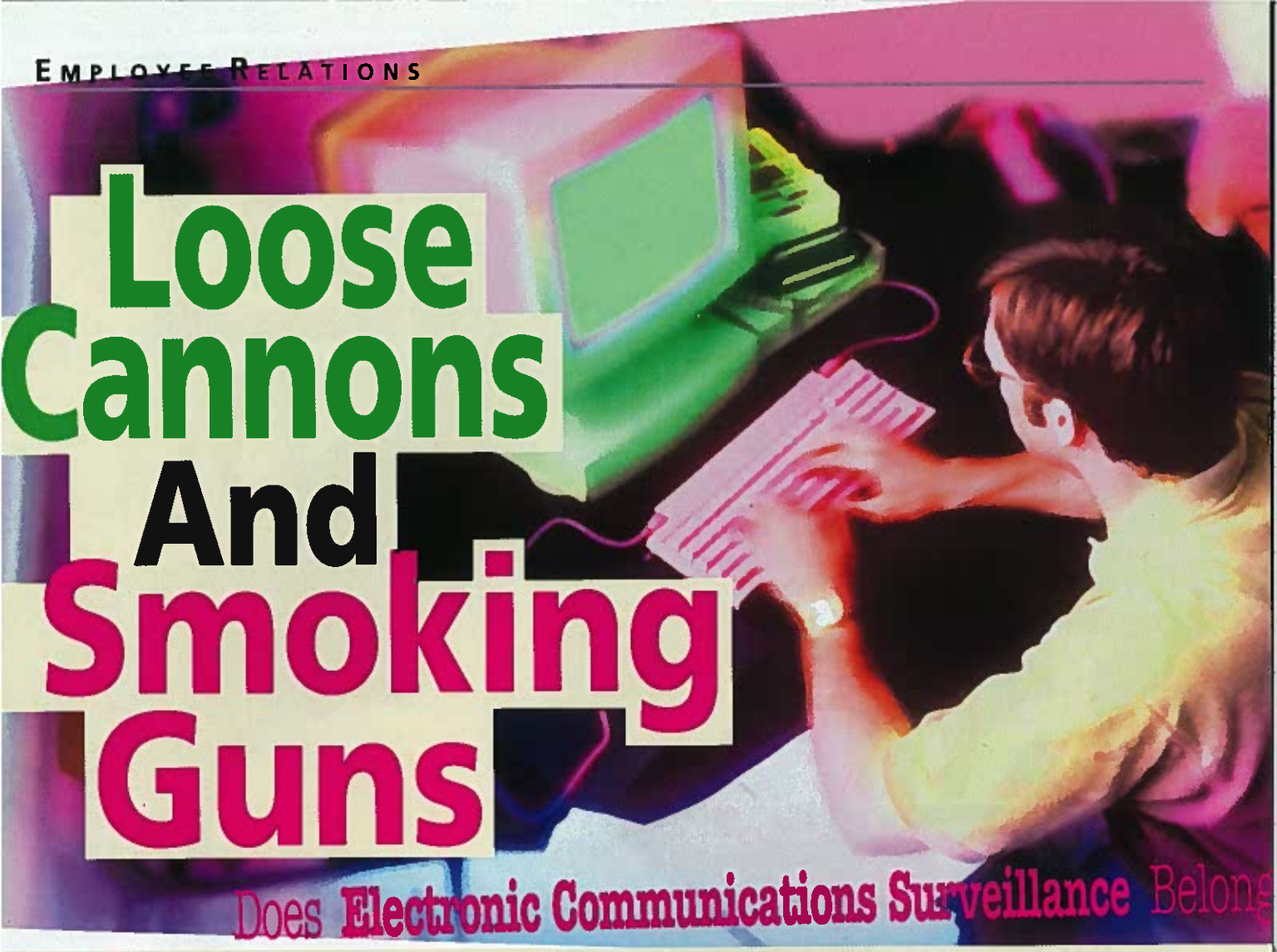
As a result, Bush successfully blended his principles with their shared aspirations and dreams.

In the end, the Bush/Brogan campaign dissolved stereotypes.

Campaigns are won on the ground, not at the bank or in the pages of *Who's Who*. They cost a lot of money, but making fund-raising easier takes candidates out of the handsome mansions of their well-to-do backers and puts them before the regular people who cast most of the votes.

Jeb Bush and Frank Brogan showed voters what they should expect from those who seek their favor, even as the new governor and lieutenant governor wrote a new maxim for future campaigners: The earthy clash of power politics does mix well with the inspiriting luster of idea politics. ■

PHOTOS: LEANN WEISS



# Loose Cannons And Smoking Guns

## Does Electronic Communications Surveillance Belong

According to some estimates, there are currently 20 million users of e-mail transmitting 60 billion messages annually; usage is expected to double by the year 2000. E-mail and other electronic communications, such as voice mail, are useful—indeed, necessary—workplace tools. These technological advances, however, also bear negative consequences, namely a whole new species of lawsuits against employers.

E-mail is an easy and speedy method of communication, which is not necessarily a good thing. With the click of a mouse, an employee can e-mail every computer user in a company, or he can post a message on the Internet where hundreds of thousands of people can read it.

With that mouse click, a trusted employee could turn into a loose cannon, shooting off a blast that exposes the employer to a barrage of potential losses and liabilities. For example, the employee might leak trade secrets to competitors, engage in sexual harassment of a coworker or subordinate, disseminate racially offensive remarks, defame someone, or even infringe upon a trademark or copyright by reproducing and disseminating the protected intellectual property of another. An employer's interest in protecting itself from the substantial—even disastrous—liability that could ensue is obviously significant.

And, because e-mail is virtually unerasable, it can be the kind of smoking gun plaintiffs' attorneys try to sniff out during the discovery phase of litigation. Deleting an e-mail does not eradicate its existence because it can be retrieved from back-up files or hard drives virtually into perpetuity.

### THE COST OF E-MAIL

A case in point is the 1995 lawsuit, *Strauss v. Microsoft*. This case involved an allegation of sex discrimination against Microsoft. In support of her claim, the employee sought to admit into evidence sexually discriminatory statements made by her boss via the company's e-mail system. Notwithstanding Microsoft's objection, the federal court ruled the e-mail messages admissible under the Federal Rules of Evidence to the same extent as any paper document. Thus, in one fell swoop, e-mail transmissions made by Microsoft employees were both the instrument and the evidence of actionable sex discrimination.

Two other interesting e-mail cases are *Curtis v. Citibank* and *Owens v. Morgan Stanley & Company*, lawsuits that some speculate will unleash an avalanche of cases in which e-mail is used as critical evidence against an employer.

*Curtis* involved two black employees of Citibank who alleged that white supervisors disseminated "vulgar and

PHOTO: RON CHAPPLE

racially vile messages that demeaned and ridiculed African-American people." The plaintiffs further alleged that these messages resulted in the creation of a "pervasively abusive, racially hostile work environment" in violation of Title VII of the Federal Civil Rights Act.

In *Owens*, the plaintiffs claimed that an e-mail message transmitted by an employee of the firm, purporting to be a homework assignment by a public school ninth-grader named Leroy who misuses words in an obscene manner, was intended to mock African-American street slang. In an effort to increase the potential liability of Morgan Stanley, the plaintiffs brought the lawsuit as a class action on behalf of all black employees of the huge investment firm.

Many other cases have been filed against employers by third parties based on e-mail messages sent by employees, exposing their employers to potential liabilities on many different premises. Although some cases have been settled out of court, the costs of settlement and related litigation run into the millions.

Is surveillance of e-mail the solution? Obviously many believe so. Statistics indicate that at least 20 million U.S. employees may be subject to electronic monitoring in the workplace. However, surveillance is a far-from-perfect solution, and may, in and of itself, give rise to a different panoply of legal problems and concerns that can't be ignored.

## In Your Arsenal?

### I NEED MY CYBERSPACE

Even with electronic monitoring, by the time an employer finds the offending message the damage may already have been done. Even if the employer disciplines the employee or curtails further wrongful acts, once the loose cannon has fired its missile, litigation may be unavoidable. Surveillance may also foster an atmosphere of distrust, lowering employee morale and breeding poor employee relations, that may lead to union campaigns or the loss of key employees. Some employees are bound to perceive monitoring as Orwellian, a case of Big Brother watching.

Legitimate attempts by employers to monitor their employees' workplace communications have spawned expensive and time-consuming litigation against the employer by the employees themselves. Most of these lawsuits, which are growing in number, are based on claims that the employer has invaded the privacy of the employee in violation of state and/or federal law.

For instance, monitoring lawsuits may be predicated on the federal Electronic Communications Privacy Act (ECPA) that, generally speaking, forbids the interception of oral, wire, or electronic communications. Violation of ECPA is a federal crime; it can also result in civil liability to the aggrieved party. While our research has not revealed a single case involving e-mail privacy brought under ECPA, there is no question that the law not only applies to tape recording of statements and monitoring of live phone conversations, but also to the monitoring of voice mail and e-mail.

There are exceptions to ECPA under which an employer may legally intercept the communications of its employees and even disclose those communications to others. For example, if an employer obtains the prior consent of its employees, the employer may monitor its employees' communications without fear of criminal or civil liability under ECPA. This consent may either be express (an employee signs a consent form) or implied (the employer clearly notifies its employees that communications will be monitored).

A second important exception recognized by ECPA is monitoring of employee communications for legitimate business purposes, such as quality assurance, employee evaluation, or to ensure productivity. Moreover, since the employer has provided computers, e-mail, voice mail, and the like to further its business purposes, it should be able to monitor them to ensure employees are not misusing these communications media. Certainly no employer wants employees lost deep in the world of cyber-porn or other diversions when they should be furthering the business purposes of the employer.

However caution must be exercised. There have been instances where courts have found that employers have exceeded the bounds of legitimate monitoring and violated ECPA. In an Arkansas telephone monitoring case, *Deal v. Spears*, the court found that the employer unlawfully monitored the content of over 22 hours of personal calls while attempting to confirm a suspected conspiracy to commit theft of employer property. The calls, many of which related to an extramarital affair, were made by the suspected employee from a phone in his mobile home which was linked by an extension to the phone in the employer's business.

If confined to business calls, telephone monitoring should present few problems, as long as some guidelines are followed (see next paragraph). As a rule of thumb, however, most courts hold that monitoring of personal calls, even at work, is *not* within an employer's legitimate

FACT: Individuals and employers who **unlawfully monitor** telephone, e-mail, or other electronic communications **could face up to five years in prison** and $250,000 in fines for each violation.

business purposes. Because an employer will not know beforehand whether a given call is related to personal or business affairs, it is allowed to monitor personal calls for the limited purpose of making a determination of the nature of the call. Clearly, employers have a bona fide business interest in making sure employees do not spend an inordinate amount of time on personal calls while at work, and courts have found monitoring to reduce personal use to be permissible under ECPA.

In a case involving a potential violation of ECPA, the courts will consider the following:

- Did the employer have a reasonable business purpose for the intrusion?
- Were the employees provided notice of the possibility of monitoring?
- Did the employer act consistently with respect to the extent of the notice of monitoring given to the employees?

This last factor suggests that employers must be careful to exercise their monitoring policies in an even-handed, nondiscriminatory fashion. For example, the employer will want to avoid being lenient or overlooking the use of communications devices for some non-business purposes, while clamping down on other, less favored uses, such as employees using e-mail or the telephone for unionizing activities.

**FACT:** Chevron Corporation settled a sex discrimination **lawsuit for $2.2 million** after an e-mail message entitled "25 Reasons Why Beer is Better than Women" was retrieved from the corporate computer system.

In a 1992 case, a company that allegedly used hidden bugging devices and telephone wiretaps to thwart a unionization drive agreed to pay $50,000 to individual plaintiffs, $125,000 for attorney fees, and $200,000 toward a class claim by workers whose conversations were allegedly recorded secretly by the company. Believe it or not the company "got off easy." Yes, it settled for a huge sum of money, but if found guilty under ECPA each individual violator could have received up to five years in prison and up to $250,000 in fines.

## THE STATE OF STATE PRIVACY LAWS

In addition to federal law, there are state laws that govern employee privacy. If the state law is more stringent it will supersede federal law in court. This is the case with the Florida Security in Communications Act (FSCA), which for the most part echoes the provisions of ECPA. Under the state law, however, an employee's prior consent to monitoring may not be enough to relieve an employer of liability.

Under FSCA, *both* parties to the communication must consent to monitoring. In other words, if an employer monitors the telephone or e-mail communication between an employee and a non-employee, the employer could still be liable for the interception if the non-employee has not consented to the monitoring. Like ECPA, however, Florida's law provides a separate legitimate business purpose exception. A Florida employer can also help itself by making sure that it monitors only business-related communications for legitimate business purposes and by clearly notifying employees beforehand that it is going to do so.

Employees subjected to monitoring have sometimes sued employers for invasion of privacy under state common law tort principles. Virtually every state, including Florida, has several species of privacy torts under which a plaintiff can potentially recover money damages. The most germane to our purposes is the so-called "unreasonable intrusion" tort. Briefly put, an employer is liable for this tort when it unreasonably intrudes upon an employee's private life or activities in a manner that would be considered substantial and highly offensive to a reasonable person.

*Smyth v. Pillsbury Corporation* is the seminal case involving e-mail monitoring in the workplace. The case involved Smyth, one of Pillsbury's regional operations managers who, while working at his home, transmitted "inappropriate and unprofessional" e-mail messages from his home computer to his supervisor at work. The messages were highly critical of the company's sales managers and contained threats to "kill the back-stabbing bastards." Smyth also referred to a planned company party as the "Jim Jones Kool-Aid affair."

After intercepting the messages, Pillsbury terminated Smyth, who then sued for common law invasion of privacy and wrongful termination under Pennsylvania state law. However, the court ruled that Smyth had no valid claim against Pillsbury, mainly because he had no reasonable expectation of privacy in his workplace e-mail. Pillsbury had a written policy informing employees that their e-mail could be monitored and the court found this, coupled with the fact that the messages were voluntarily sent over a system provided by the company for work-related purposes, overshadowed the fact that Pillsbury had allegedly orally assured Smyth that his e-mails would be confidential and private.

Furthermore, the court ruled that the company's interest in preventing inappropriate and unprofessional comments or illegal activity over its e-mail system outweighed any privacy interest Smyth might have had or expected in his comments. The main thrust of the *Pillsbury* case is that if an employee does not have a reasonable expectation of privacy in the content of the communication, an employer

## The following are the main considerations in developing a comprehensive and effective electronic communications policy:

- The policy should be disseminated in as many ways as practicable. Employees should be given a written copy of the policy and, in turn, should acknowledge in writing that they have received and understood it. The policy should be included in employee handbooks, on company bulletin boards, and perhaps in periodical written reminders to employees. Having the notification appear on computer screens each and every time an employee logs onto the network would also be wise.
- All notifications, regardless of format, should clearly inform employees that the computers, e-mail and voice mail systems, and similar equipment are the property of the employer, are subject to monitoring by the employer, and are not for personal use.
- Employees should be specifically advised that they should not expect privacy in the content of their e-mail or other messages and that the employer unequivocally reserves the right, without prior notice, to monitor, access, and disclose anything sent over its electronic systems.
- Make it clear that the employer may override passwords and codes for legitimate business purposes and that all passwords and codes must be promptly disclosed to facilitate the employer's access.
- Specify in the written policy that the use of computers, telephones, voice mail, and e-mail for unlawful, threatening, harassing, defamatory, obscene, or any other inappropriate communications, or one that violates the policy of the employer in any way, is strictly prohibited and that violators of the policy are subject to disciplinary measures up to and including termination.
- Explain to employees in the written policy that comments that may be intended simply as jokes or merely to "let off steam" can be, and often are, misconstrued, leading to costly legal problems for the business on which they all rely for a paycheck.
- Employees should be made acutely aware that the delete function on the e-mail system simply stores messages differently, it does not delete them.
- Emphasize to managers and employees that in composing e-mail messages, they should be as careful as they would in preparing any written document and that each document they author should be written as if it were going to be read in public, or to their parents, spouse, or children.
- Employees should be reminded that any transmission goes out, in essence, with the company's letterhead over it, meaning that, however informal the communication, it is still undertaken on behalf of the company. ■

cannot be liable for the tort of invasion of privacy for intercepting or accessing electronic communications transmitted by the employee via systems and equipment provided by the employer.

### BALANCING COMPETING INTERESTS

Both electronic communications and the monitoring of it have become practical business necessities in the age of cyberspace. So, how does one maintain state of the art communication systems while at the same time minimizing liability and maximizing employee satisfaction and morale?

The answer lies in implementation and maintenance of an intelligent monitoring policy under the guidance of experienced labor and employment law counsel. Such a policy should be constructed within the contours of applicable state and federal laws and tailored to fit the needs and style of the particular business to optimize protection from liability.

The implementation strategy should also include educating employees as to why the policy is necessary, as well as *in their best interest*. Treating employees as adults who are capable of understanding that workplace monitoring is done for sound business reasons will help. After all, what good will it do the employees if a business is forced to close its doors because of a disastrous money judgment rendered against it?

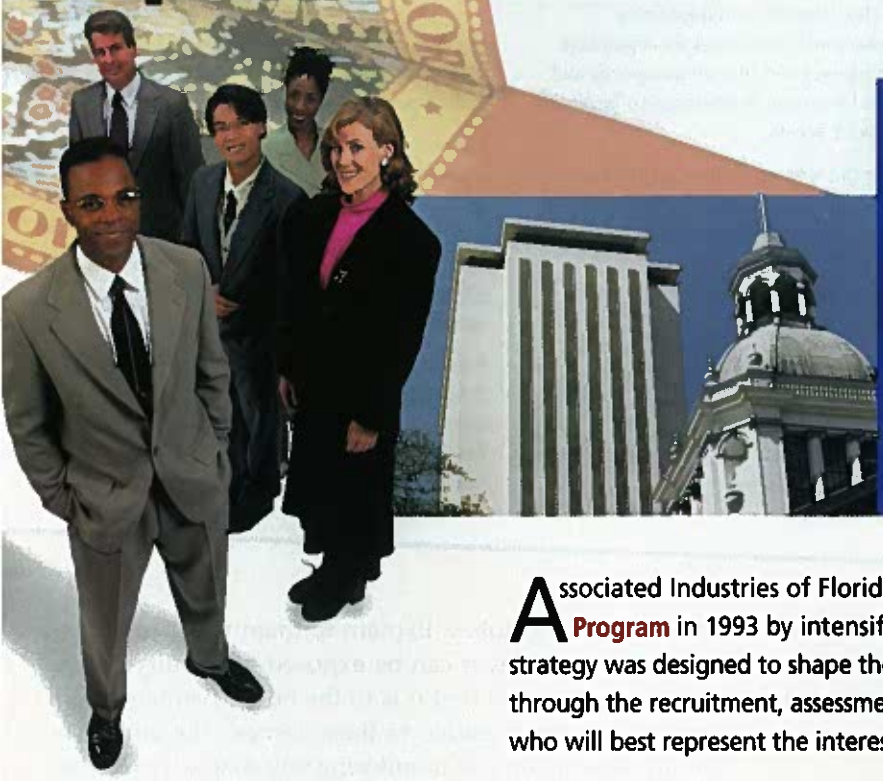
Employees are far more likely to accept the monitoring practices of their employers if the employer notifies them beforehand. They should be made aware of the necessity for a monitoring policy. Explain to them the many ways in which an employer can be exposed to liability in this litigious society and that it is to the best advantage of all concerned to be sensitive to these issues. The employer should also explain that monitoring will enable it to further the crucial goals of quality, efficiency, productivity and good customer relations that, in turn, will inure to the benefit of the entire team.

To avoid legal problems, every employer should have an electronic communications policy and practice that is clear and unambiguous. The articulation and dissemination of such a policy and practice, coupled with training sessions to educate managers and employees about the law and the rationale for monitoring, should provide ample protection to employers against any claim that an employee's reasonable expectation of privacy was violated. At the same time, it will foster good employee relations.

Electronic communications in the workplace and the technology facilitating it are bound to increase. Concomitantly, the law will continue to evolve. Therefore, the resourceful, enlightened, and prudent employer will stay abreast of the technological innovations—and accompanying legal changes—while maintaining policies and practices that will protect, and even foster its business interests, while creating a climate of loyalty and high morale among employees. ■

*John-Edward Alley and Jason L. Gunter are with the law firm of Alley and Alley/Ford & Harrison, LLP, where Alley is a partner.*

# Because Political Action Is More Important Now Than Ever Before




Associated Industries of Florida (AIF) began expanding its **Political Operations Program** in 1993 by intensifying its involvement in election campaigns. This strategy was designed to shape the direction and philosophy of the Florida Legislature through the recruitment, assessment, and financial support of only those candidates who will best represent the interests and concerns of Florida's business community.

**The result:** since 1994, **contributions** made by the AIFPAC and AIF affiliated companies to pro-business candidates have totaled more than **$1.5 million,** including $249,274 in 1994; $449,126 in 1996; and $821,125 in 1998. Additionally, members of AIF's Florida Business United contributed more than **$6 million** during the 1998 election cycle. Our **success ratio** has been equally impressive since 1994 — more than **91 percent** of the candidates supported by AIF **have won election,** including 92 percent in 1994; 92 percent in 1996; and 90 percent in 1998.

But now, our efforts are more important than ever before due to **eight-year term limits.** Beginning with the 2000 election cycle, there will be **68 open seats** because of term limits, which means many experienced, pro-business lawmakers will be replaced by less experienced legislators.

**We encourage you to join our efforts today** to help ensure that when the 2000 election rolls around, Florida's business community is represented by **pro-business legislators** who understand and advocate public policies that promote economic freedom and prosperity.

**For more information on AIF's Political Operations, Florida Business United, or the AIFPAC, contact Marian Johnson, senior vice president - political operations, at (850) 224-7173, or e-mail her at mjohnson@aif.com.**

### ▶ AIF POLITICAL ACTIVITIES

Political operations at AIF is not just an election-year effort; rather, it's a full-time, year-round continuing operation with the purpose of electing pro-business candidates.

**Political Operations**

- Electorial district analysis
- Candidate recruitment and assessment
- Campaign evaluation and technical assistance
- Polling and get out the vote phone banks
- Campaign expenditure analysis

**Florida Business United**

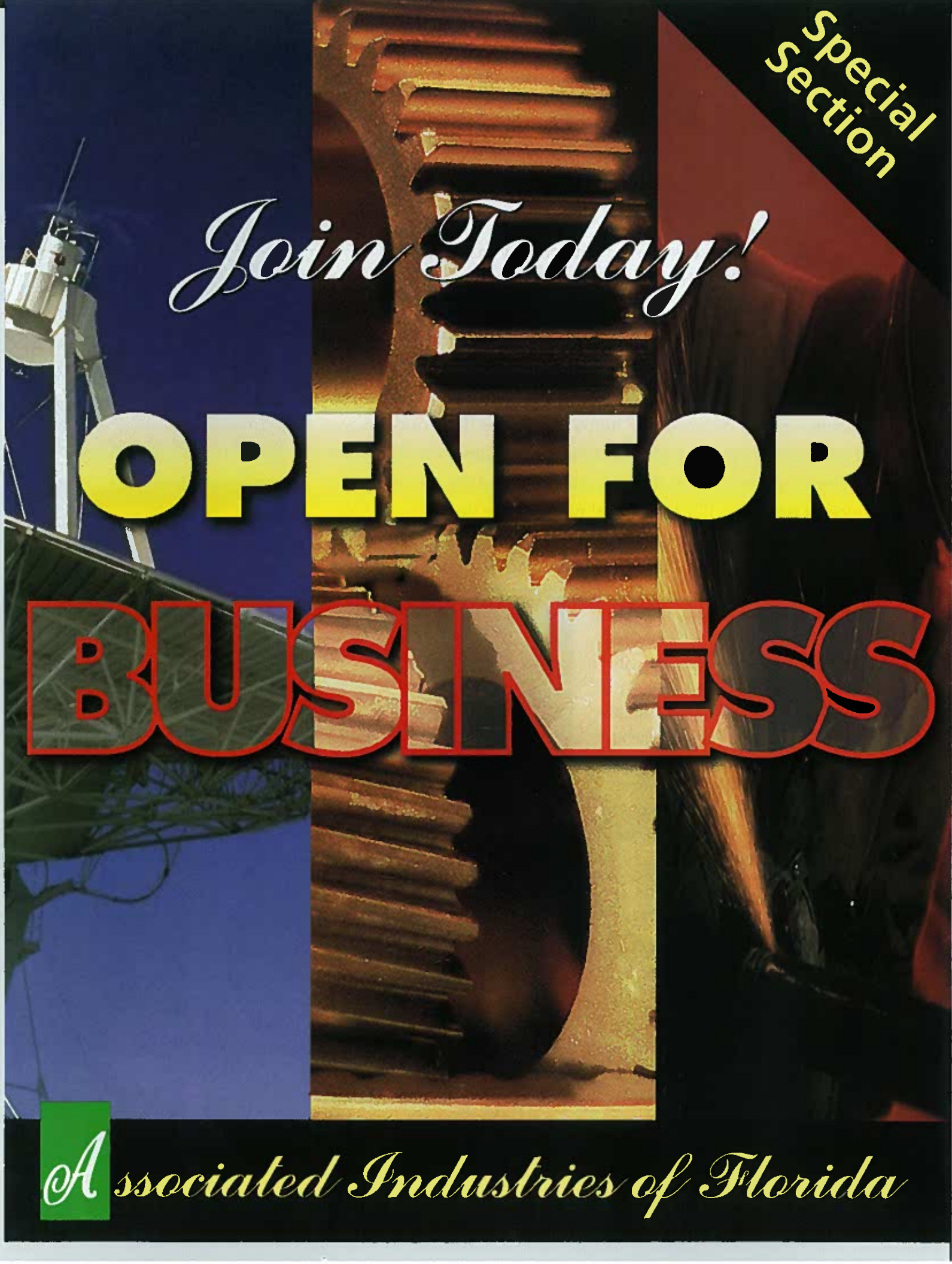
FBU, a membership-based group comprised of Florida business people, keeps its members current on the state's political environment through extensive research and analysis.

**AIF Political Action Committee**

AIFPAC financially supports those candidates who understand and embrace our free-enterprise system. Contributions to candidates are determined by a board of directors, with input from AIFPAC members.

*Associated Industries of Florida*

516 North Adams Street • P.O. Box 784 • Tallahassee, FL 32302


Special Section
Join Today!
OPEN FOR
BUSINESS
Associated Industries of Florida

# The Voice of Flo

We welcome the opportunity to invite you into the membership of Associated Industries of Florida. For almost eight decades, wherever and whenever governmental officials have met, AIF has been there to make sure they listen to the voice of Florida's employers.

By standing up for your right to succeed, free from government intrusion and interference, AIF helps companies like yours grow. Our mission is to protect and promote the business community so that Floridians may enjoy the jobs it creates, and the goods and services it provides. Florida's employers are the very base of our economy. AIF works to keep that foundation strong.

## Taking the Lead

Energy seasoned with experience has made AIF the state's premier business association. Taking the lead in policy debates over such business issues as tort reform, workers' compensation, taxation, and health care, AIF is often the lone voice against the status quo, arguing for policies that promote economic growth.

More than a dozen of Florida's most prominent lobbyists — with over two centuries of cumulative experience among them — lobby legislators on a year-round basis on behalf of the members of AIF.

## Wired

Bursting with the energy of the Information Age, AIF applies the most progressive communications technologies to the business of lobbying for business.

- *Phone Banks* are used on issues of extreme urgency to connect interested citizens with their legislators, the governor, or the head of a state agency.
- *Florida Business FaxNet* is used to send urgent notices to business people, advising them on matters of government affecting their business interests and to request action from them. The system can send more than 50,000 faxes every hour.
- *In-house TV and Radio Production Services* let AIF use the power of mass media to spread its message of economic prosperity.

## In the Know

In your quest for timely, insightful, and crucial information, turn to the publications of AIF.

- *Florida Business Insight*, the magazine of free enterprise and public policy
- *Know Your Legislators*, the complete pocket-sized directory of Florida's lawmakers
- *Legislative Fax Report*, a weekly

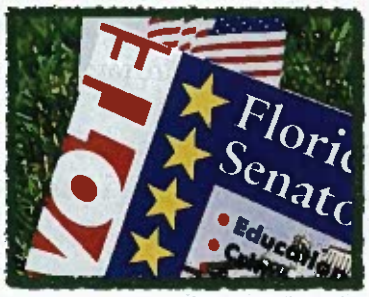
# ida Business

update on Capitol happenings

• *Voting Records*, charting each state lawmaker's votes on the bills that matter to business

## Political Operations

AIF's political operations department was created to promote the candidacy of those who honor our American legacy of economic opportunity and political liberty. Since the 1994 elections, more than 90 percent of the candidates supported by AIF have won election. The political staff pursues the following objectives:




• identifying, recruiting, and supporting candidates for the Florida Legislature who understand and advocate public policies that promote prosperity

• opposing candidates who, by their actions, voting records, and histories, show they are or will be anti-business public servants if elected or reelected

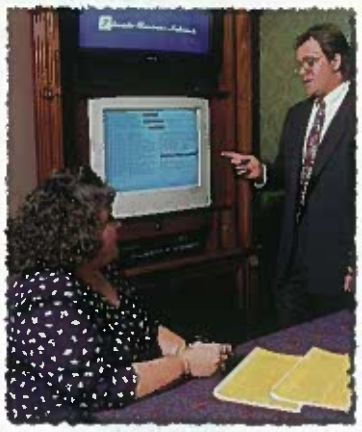
• collecting and analyzing data to increase understanding of Florida's political climate

• keeping employers and business owners up-to-date on the events and people shaping Florida politics

## Florida Business Network

Each legislative session, state lawmakers mull over thousands of bills and legislative proposals.

Florida Business Network, the state's top on-line governmental information system, gathers all the information about the laws and the lawmakers into one easy-to-use database. Subscribers get the inside scoop on every bill, every action, and every vote taken by the politicians and the regulators.



## Insuring Your Business Future

AIF's insurance operations were formed to provide AIF members with a stable and affordable source for workers' compensation insurance. Associated Industries Insurance Services, Inc., provides third-party administration services to individual and group self-insureds. Associated Industries Insurance Company, Inc., sells workers' compensation policies to safety-conscious employers.

The insurance operations provide stability for insureds through a philosophy of careful risk selection, unique products and superior claims service. Aggressive claims management, extensive managed care programs, and in-depth loss control programs help reduce claims costs for policyholders, saving money for employers while protecting the safety of their employees.

# AIF Membership Application

## To the Board of Directors

***Firmly believing that every Florida business needs a voice in the state capital and having become convinced that Associated Industries of Florida effectively fulfills this capacity for its members, we desire to participate in its activities. We wish to add strength to our belief that a sound business climate is a basic requirement for our own long-range success and for Florida's economic future. We therefore seek the assistance of the association and agree to support it financially in accordance with the prescribed annual dues schedule until such time as we give notice to the contrary.***

## AIF Annual Dues Schedule

**Corporations**
$5 per Employee
Subject to a *Minimum* of $100
Subject to a *Maximum* of $25,000

**Associations**

| | |
|---|---|
| $500 | Local (city/county/regional) |
| $1,000 | Statewide |
| $5,000 | Multi-State/National |

**Law Firms**

| | |
|---|---|
| $15,000 | Fewer than 50 Attorneys |
| $25,000 | 50 or More Attorneys |

## AIFPAC Annual Dues Schedule

**Individuals**
$50*

**Companies**

| | |
|---|---|
| $250* | Small (1-24 employees) |
| $500* | Medium (25-99 employees) |
| $1,500* | Large (100+ employees) |

**Political Action Committees**
$1,500*

**Amounts Reflected are the Minimum Dues. Maximum Dues for All Categories = $10,000*

## Florida Business Network (FBN) Annual Subscription

$2,000 Basic On-Line Services

☐ *Please contact me regarding your full schedule of FBN services, prices, and terms.*

*(Please print or type)* **Date** _____

**Firm Name** _____

**Mailing Address** _____

**Business Address** _____

( ) **Phone Number** _____ ( ) ***Fax Number** _____

***Please indicate the method of facsimile delivery you prefer:**
- ☐ **OK to fax at night and/or during business hours**
- ☐ **Please fax during business hours only**
- ☐ **Please call first; fax machine requires manual switch**

**Nature of Business** _____

**SIC Number** _____ **No. of Employees** _____

**Annual Commitment to AIF $** _____

**Annual Commitment to AIFPAC $** _____

**TOTAL ANNUAL COMMITMENT $** _____

**Method of Payment:**
- ☐ **Please send me an invoice**
- ☐ **Check • money order • purchase order • cashiers check**
- ☐ **VISA/MasterCard #** _____ **Exp. date** _____

**We designate** _____

**whose title is** _____

**as our official member of Associated Industries of Florida.**

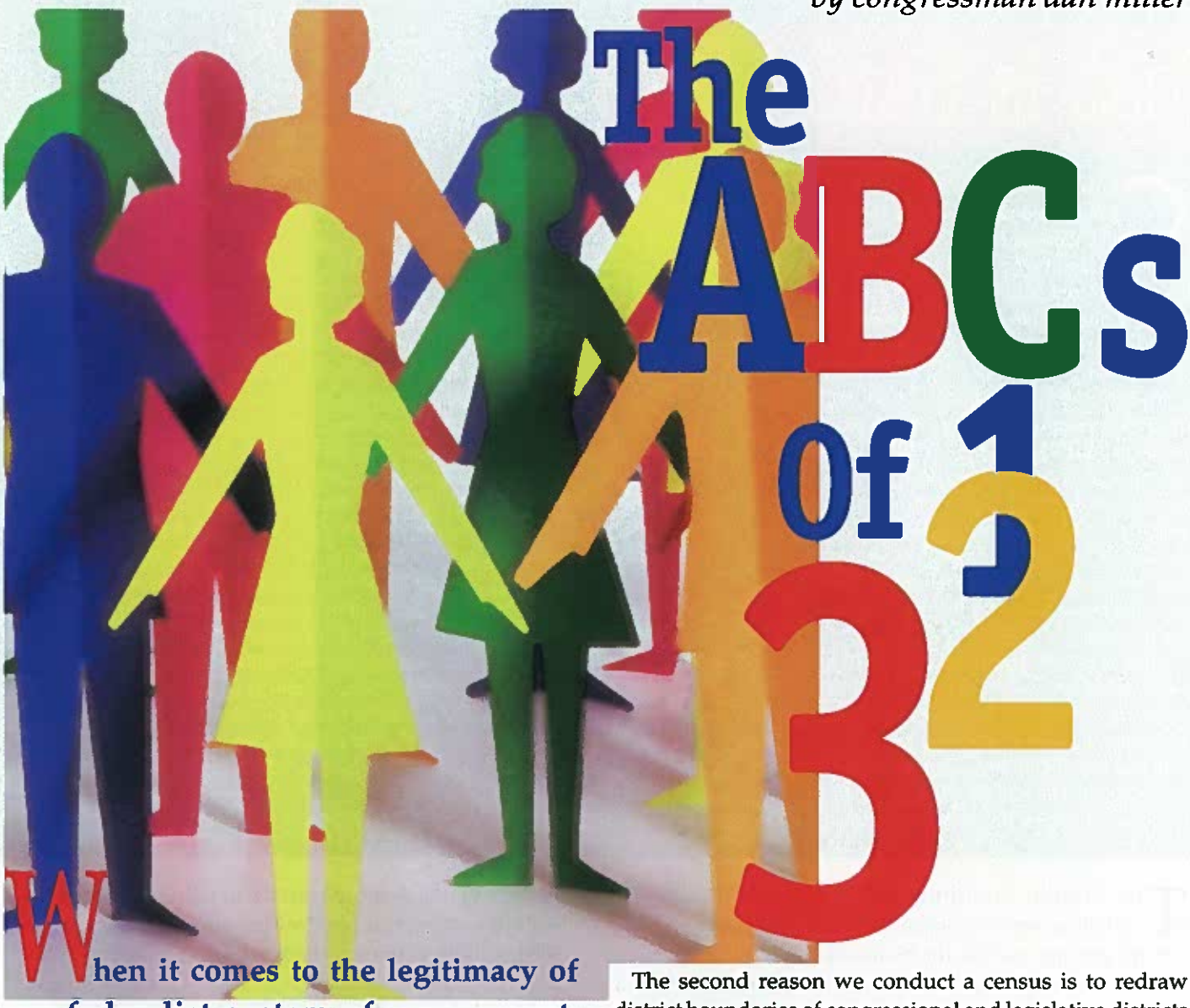
**Signature** _____

Associated Industries of Florida is a tax-exempt trade association as provided by Section 501(c)(6) of the Internal Revenue Code. Accordingly, dues paid to Associated Industries of Florida are not deductible as a charitable contribution, but may be deductible as an ordinary and necessary business expense except to the extent that Associated Industries of Florida engages in lobbying. This nondeductible portion of dues is estimated each year and will be reported on the dues invoice.

Associated Industries of Florida
516 North Adams Street • P.O. Box 784 • Tallahassee, FL 32302
PHONE: (850) 224-7173 • FAX: (850) 224-6532 • E-MAIL: aif@aif.com • INTERNET: http://aif.com

*by congressman dan miller*

# The ABCs of 1, 2, 3



**When it comes to the legitimacy of our federalist system of government, the issue of the decennial census must be taken seriously.**

The American people must have confidence in the accuracy and fairness of the census. Unfortunately, the 2000 census has become a political hot potato because of the Clinton Administration's controversial plan to use statistical sampling.

The U.S. Constitution requires Congress to conduct a census every ten years for two reasons. First, as Article One instructs, Congress must conduct an "actual enumeration" of the population at the beginning of every decade in order to apportion representation in the House of Representatives among the 50 states. As the population grows and shifts between the states, the number of representatives each state elects to the House increases or decreases accordingly.

The second reason we conduct a census is to redraw district boundaries of congressional and legislative districts to equalize those districts' population so that each member represents the same number of persons. This must be done for congressional, state legislative, county commission, and even city council districts. This is necessary to preserve the historic gains of our civil rights laws that guarantee one person, one vote. The census provides the underpinning of our entire national, state, and local systems of representative government.

## TRY TRY AGAIN?

The Clinton Administration has decided that, for the first time in over 200 years, we should not do an "actual enumeration" as called for by the Constitution. It instead proposes that we only count 90 percent of the population, which means deliberately not counting more than 26 million Americans. The administration intends to "guesstimate" the remaining 10 percent of Americans using an unproven technique called statistical sampling.

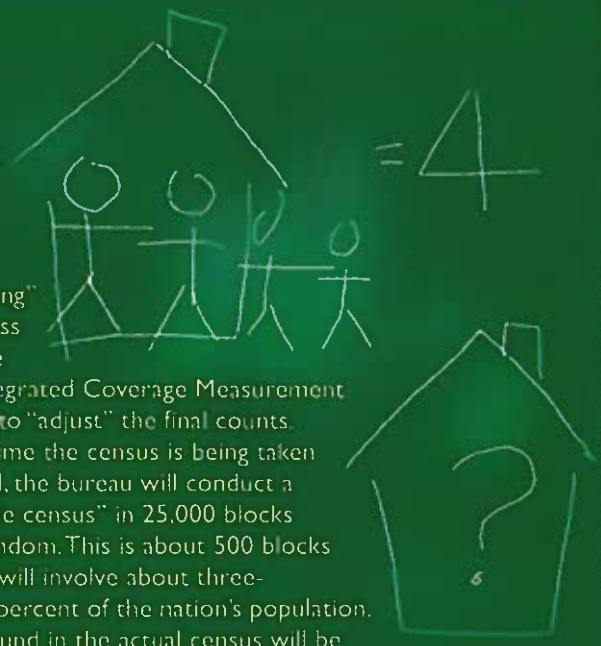
PHOTO: MICHEL TCHEREVKOFF, LTD

# What Is Sampling?

Census forms are mailed out to every known household contained on the Census Bureau's address list. Census Day is April 1, 2000. The Census Bureau is expecting about 67 percent of the households on its address list to mail back a form. The mail-back return rate will vary widely from neighborhood to neighborhood. The households that do not return forms are called "non-responding households."

In 1990, the Census Bureau attempted to obtain a form from every non-responding household. This process is called "non-response follow-up." In 2000, the bureau has decided it will only perform non-response follow-up on enough households so that the households that returned their forms, plus the households included in non-response follow-up, will equal only 90 percent of the known households. This means that 10 percent of all households randomly selected before non-response follow-up begins, will not be contacted by a census taker.

Instead of collecting data on the 10 percent of the households set aside—which were not included in non-response follow-up—the bureau will assign them the exact same data collected from the nearest neighboring household that was included in the non-response follow-up. In other words, their data will be "cloned" from a nearby household. Congress opposes this process because the Census Bureau should make an equal effort to count every household in America.




The "sampling" which Congress opposes is the use of the Integrated Coverage Measurement (ICM) Survey to "adjust" the final counts. At the same time the census is being taken and processed, the bureau will conduct a second "sample census" in 25,000 blocks selected at random. This is about 500 blocks per state and will involve about three-quarters of 1 percent of the nation's population. The people found in the actual census will be compared to the people found in the sample (ICM) census.

After many statistical manipulations have been made on the sample data, the sampled people will be divided into hundreds of subgroups (or "strata") and an undercount or overcount factor will be calculated for each subgroup. The bureau will then add or subtract people from the real census counts to adjust the final numbers. This is the sampling that Congress opposes because it subtracts persons actually counted in the census and adds virtual people who were not counted. ■

*Prepared by Majority Staff, Census Subcommittee*

The Clinton sampling plan would be the largest statistical experiment in our nation's history.

Some groups, such as the National Academy of Sciences (NAS), have endorsed the *theory* of sampling, but that's a far cry from saying the Clinton plan will work. Contrary to the claims of some, there are many in the statistical community who oppose sampling for use in the 2000 census and fear disaster should this risky experiment be allowed to continue. Clinton's own Undersecretary of Commerce, Robert Shapiro, clarified recently that no statistical or scientific group—including NAS—could endorse the Clinton sampling plan, because no one has seen it. This complex and controversial sampling plan has yet to be finalized.

Would the Clinton sampling plan result in a more accurate census? Probably not. After all, the Census Bureau has already tried a simpler version of sampling in the 1990 census and it failed.

In June 1991, Commerce Secretary Robert Mosbacher was faced with a decision about whether to "adjust" the results of the 1990 census using sampled data. He rejected "adjustment" because the numbers developed from the polling scheme were not considered accurate enough.

Later events demonstrated that the secretary was absolutely correct in his decision. In 1992, after several reformulations of the so-called "adjusted" numbers, a huge computer error was discovered. Indeed, had the adjusted numbers been used, the sampling scheme would have wrongfully given an extra seat in the House of Representatives to the state of Arizona at the expense of Pennsylvania. What do you do in this case? Do you say to Pennsylvanians, "So sorry, you shouldn't have lost that seat," and then turn to people of Arizona and say, "Now give me back one seat"?

Despite the marked failure of sampling in 1990, Mr. Clinton now wants to use a more complex sampling plan that is five times as large and must be accomplished in half the time. This is a recipe for disaster. Clinton's Commerce Inspector General and the nonpartisan General Accounting Office both have warned Congress that the Clinton plan is at risk for operational failure. Congress continues to be concerned about the accuracy and feasibility of this administration's sampling plan. More importantly, however, the rule of law also demands that we not proceed with statistical sampling in the census. In August and September, two different federal appeals

ILLUSTRATION: GREGORY VOWELL

courts, with a total of six judges, ruled unanimously against the administration. In the first court's thorough, 71-page opinion, Judge Royce Lamberth wrote, "This Court finds that the use of statistical sampling to determine the population for purposes of apportionment of representatives in Congress among states violates the Census Act."

Early judicial review of this matter is vital. If Congress had waited and let the Clinton plan be used for the 2000 census, the entire census could have been ruled invalid in 2001. And because the Clinton Administration only wants to count 90 percent of the population, we wouldn't even have had a complete census to fall back on. That scenario would have undermined the government and cost taxpayers almost $10 billion.

Naturally, the Clinton Administration has appealed the courts' rulings to the U.S. Supreme Court and the high court has agreed to hear the cases in late November. The Court should issue a final ruling next spring, a ruling eagerly awaited because each day that we continue to prepare for a sampled census we divert much-needed resources from improving our full enumeration methods.

## IS GUESSWORK GOOD ENOUGH?

In a recent speech, President Clinton had this to say about statistical sampling: "Most people understand that a poll taken before an election is a statistical sample ... and sometimes it's wrong, but more often than not it's right."

That's the point. Polling is the same as statistical sampling. And as we all know, polls can be wrong and they can be manipulated to achieve a particular outcome. Americans inherently distrust polls. If we thought polling was the most accurate method of counting, Americans would not bother to show up on election day to cast their vote. If polls were completely dependable the 1948 election would have written the name of President Thomas Dewey on the tablets of history. Instead, Harry Truman pulled off an upset victory and served another four years.

Government should conduct its business in a way that inspires trust and confidence. To rely on a population polling scheme to conduct the census is to invite error and bias into the count. Congress has an obligation under the Constitution to conduct an accurate and trustworthy census. The Clinton plan accomplishes neither objective.

## ACCOUNTING FOR ALL AMERICANS

How bad is the problem of undercounting? The Census Bureau counted 98.4 percent of the population in 1990, which is hardly a failure, but we still have work to do to ensure that 100 percent of Americans are counted in the census. Congress does take seriously its obligation to prevent an undercount in the 2000 census—but it must do so within the boundaries set forth in the Constitution and the rule of law.

There are a number of areas that need improvement to help fix the undercount. For example, almost 50 percent of those undercounted in the 1990 census never even received a census form. It seems that the administration learned the wrong lesson in 1990. The time debating the issue of sampling should have been spent perfecting the master address file.

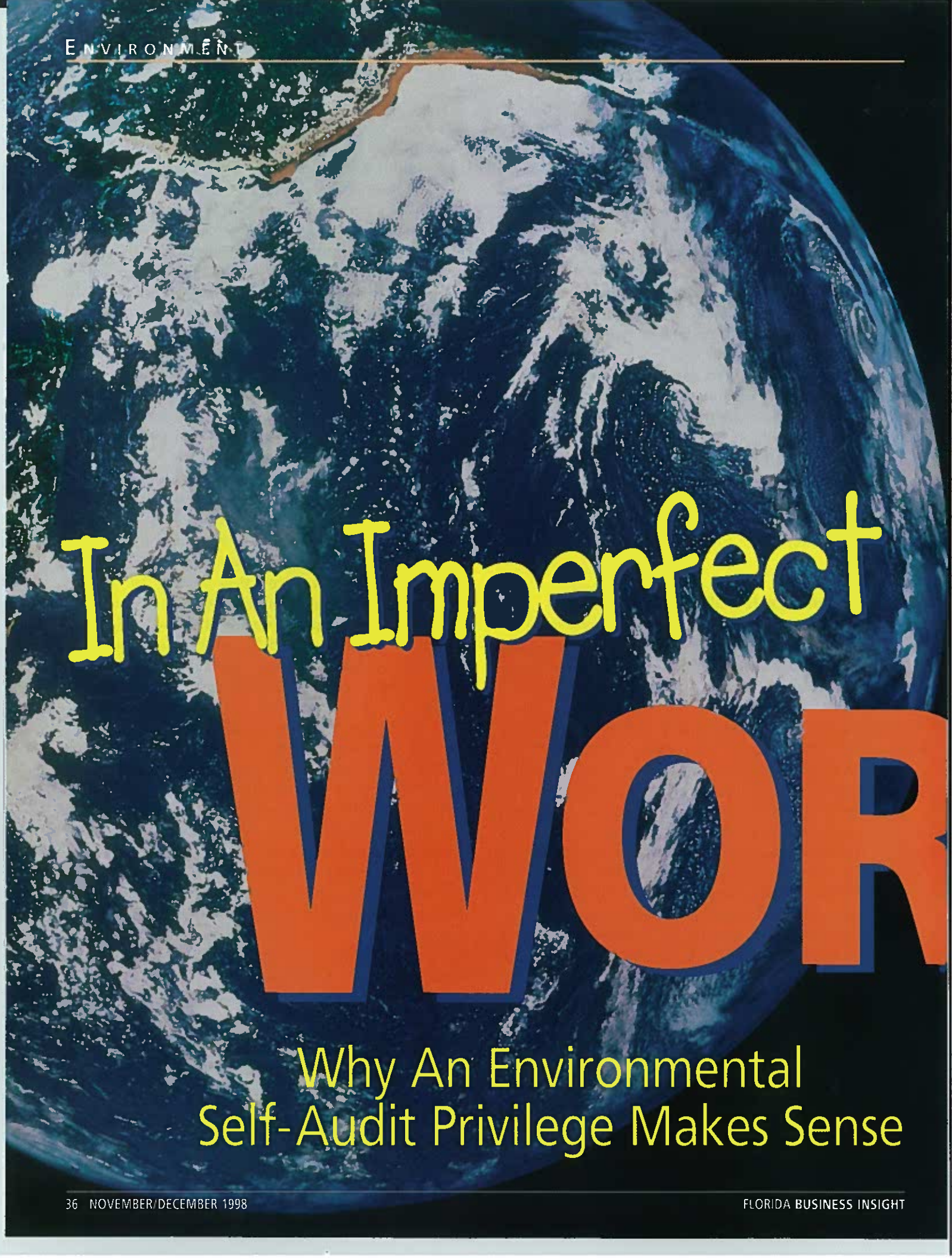
Additionally, the Census Bureau needs to develop community outreach programs to let people, particularly recent immigrants, know the importance of being counted. We also need to be sure that census forms are available in every language and that census takers can speak the same language as the people they are counting.

Ken Blackwell, co-chairman of the Census Monitoring Board, has proposed the use of administrative records. For instance, children under 18 represented 52 percent of those undercounted in the 1990 census. Medicaid records could help us identify and count those children. As Blackwell wrote in a recent *Wall Street Journal* column, "It doesn't take a mathematician to figure out that a single mother struggling to make ends meet might not have time to sit down and fill out a census form. But she will take time to enter similar information on a Medicaid form, because that's time spent on her children's health."

We believe that there are a number of ways to supplement a full enumeration that will prevent an undercount in 2000. Unfortunately, the supporters of sampling have offered very little help in pursuing legal fixes to the undercount. Rather than recognizing that their illegal sampling plan cannot be used and assisting us in developing innovative outreach programs, they spend most of their energy telling us why this idea or that idea won't work. That is unfortunate, because we need their help to reach those that were not counted in the 1990 census.

It will be hard work, but it can be done. We can have a legal, accurate, and honest census to begin the new millennium. Congress is committed to providing the necessary resources to count every American. We can do nothing less, because the American people are counting on us. ■

*Congressman Dan Miller (R-Florida), chairman of the Subcommittee on the Census, was elected to the U.S. House of Representatives in 1992 to represent Manatee and Sarasota counties and portions of Hillsborough and Charlotte.*



# In An Imperfect WOR

## Why An Environmental Self-Audit Privilege Makes Sense

*by martha edenfield*

Facts are unyielding things and here are six that explain the need for an environmental self-audit privilege in Florida.

1. With limited financial and personnel resources, government cannot be everywhere, monitoring every single business all day every day.
2. Despite strict regulations and best efforts, accidents and unintentional violations of environmental permitting standards will occur.
3. Because of limited resources, many of these violations, which might cause environmental damage, will go undetected.
4. The pure purpose and objective of environmental regulation and activism is to provide for a cleaner, safer environment; treating industry as ecological criminals or allowing government to profit from violations does not fulfill that purpose and objective.
5. Given appropriate incentives, regulated entities will use private resources to police themselves, identify violations, and perform immediate cleanup.
6. Active, ongoing assessment and cleanup is preferable to punitive regulations that encourage litigation and delay cleanup.

An environmental self-audit law encourages industry to tackle its own pollution problems before they become matters for federal or state lawsuits. Environmental self audits allow companies to voluntarily conduct good faith inspections of their own operations for compliance with environmental statutes and regulations, without fear of legal repercussions.

There is no great mystery surrounding the mechanics of an environmental self-audit privilege. In exchange for putting the environmental regulatory agency on notice of any self-discovered violation—and promptly remedying it—the disclosing company is granted immunity from civil penalties, and the audit report receives a limited privilege. Without that protection, few companies would voluntarily conduct audits and produce reports for fear that the findings would be used against them by parties more interested in harassment than in working cooperatively for a cleaner environment.

Legislative enactment of a self-audit privilege would allow a business to conduct a candid assessment of its own compliance with environmental regulation. The public good would be served if a company could improve its performance without creating evidence that would put it in jeopardy in future proceedings and litigation. Which is the better option: protecting the environment or protecting lawsuits?

## PAST FAILURES

In 1995, a coalition of business and industry groups tried to get a self-audit privilege bill through the Legislature. Opponents quickly—and inaccurately—dubbed it the "Pollution Secrets Bill" and the "Toxic Immunity Act." Intense lobbying by environmental groups, plaintiffs' lawyers, and others doomed the measure.

The self-audit movement was dealt another blow with the appearance of a report on the matter in 1996 by Florida's Office of Program Policy Analysis and Government Accountability (OPPAGA). OPPAGA concluded that environmental self-audit legislation was unnecessary because Florida's regulatory climate was not "overly punitive in nature" and the primary goals of an environmental self-audit bill can be partly achieved without privilege and immunity laws.

OPPAGA's findings, however, ignored the benefits that follow a self-audit privilege. The goals of an environmental regulatory program are identical to the results of a successful self-audit program: the immediate cleanup of otherwise undiscovered environmental violations, reporting of those violations, and, ultimately, greater compliance with all applicable environmental regulations. The idea that no further incentives are needed because environmental goals can be "partly achieved" under current law deserves rejection. Why accept less when an environmental self-audit privilege offers the potential to do more?

Furthermore, Florida's regulatory climate may or may not be "overly punitive," but that's not the point. What matters is finding ways to improve environmental compliance. Why not provide incentives, rather than punishment, if the incentives produce better results?

Opponents of a Florida self-audit policy also plead Florida's unique Sunshine Law as an argument against allowing companies to keep certain documents secret. With a correctly drafted self-audit law, however, no document that would otherwise be available to the public will be given a privilege. Thus, the public loses no access to information. In fact there is only gain because, as it stands now, the regulator or the public get no information from self audits. Neither do regulators have the opportunity to measure the adequacy of any cleanup undertaken as a result of a self audit conducted under current law.

## OTHER STATES

Despite the lack of success in Florida, other states have recognized that the self-audit privilege leverages scarce public financial resources by providing incentives to private businesses to police themselves.

In 1993, Oregon became the first state to enact an environmental self-audit law. Since then, at least 23 other states have followed suit. As a result of state environmental privilege and immunity legislation, more and more companies today feel confident about conducting environmental self audits. Hundreds of regulated entities use audits to reduce the risk of liability by regularly monitoring environmental compliance. Companies also use audits to evaluate internal environmental management systems.

The model for other states is the Texas Environmental Health and Safety Audit Privilege Act of 1995. The Texas act encompasses more than environmental audits alone; it also covers occupational health and safety regulations. The act places reasonable limits on access to reports produced from environmental health and safety audits that are voluntarily performed by regulated entities.

In Texas, voluntary self-audit reports are privileged and inadmissible in a civil, criminal, or administrative proceeding, unless a regulatory agency is required to collect the information. The act further provides limited immunity from administrative and civil penalties for violation of an environmental or health and safety law discovered in a voluntary audit and duly disclosed to an appropriate regulatory agency.

Texas included safeguards in the law to prevent misuse of the audit privilege or the immunity gained from voluntary disclosure. The privilege applies only to information gained in an actual audit, not for violations uncovered through routine observations. There is no immunity for violations that are committed intentionally, knowingly, or recklessly.

## THERE'S ALWAYS ROOM FOR IMPROVEMENT

A typical environmental self audit centers on a comprehensive examination by a team of qualified inspectors, either by in-house personnel or outside consultants. Using checklists and audit protocols, and relying on professional judgment and evaluations of site-specific conditions, the team appraises the effectiveness of the company's environmental compliance programs and assesses the environmental risk associated with the operation.

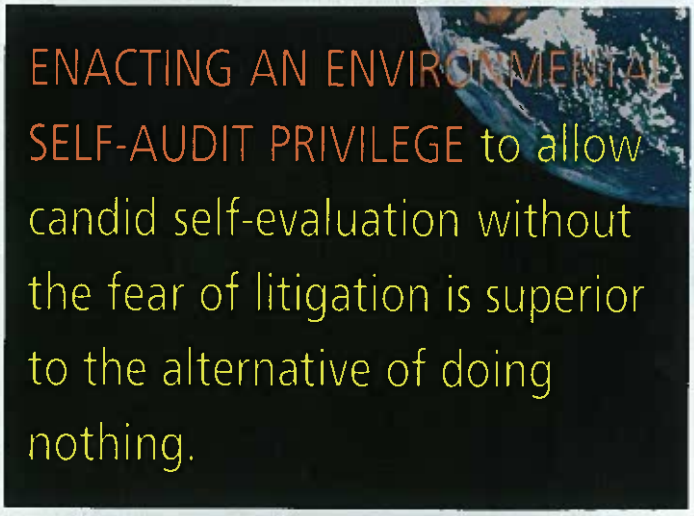
According to the Environmental Protection Agency (EPA), an effective self-audit program includes the following:

- objective, knowledgeable, and well-trained auditors
- supervision and review of thoroughness of audits by company management
- explicit written objectives for the audit
- follow-up procedures
- audit assessment of the company's compliance status
- a process to collect and interpret audit results sufficient to achieve audit objectives
- written reports to management officials
- procedures to determine what audit results are reportable to state and federal agencies
- formal management commitment to correcting violations discovered through an audit

A company conducting a self audit must notify the regulatory agency before the audit begins; usually several months of advance notice is required. The company must fully document the evidence of any non-compliance discovered during the audit process. It must also prepare a prompt and permanent plan of action to remedy the non-compliance for approval by the regulator. The regulator must also confirm that the company has achieved compliance.

In return for voluntarily working to improve environmental performance, non-compliance does not result in the imposition of civil or administrative penalties against the regulated entity. The company receives a qualified limited legal privilege against the disclosure of company documents and records contained in the self audit report.

There are certain safeguards that can be written into law to protect against abuse of the self-audit privilege. For instance, self audits do not replace regular state and federal environmental inspections; investigative efforts continue, augmented by the company's own self-correcting efforts. Companies continue reporting all of the information currently required by statute or




regulation and those reports remain in the public domain. Thus, none of the current environmental regulatory framework is dismantled. The public loses no protection or information; it merely gains by allowing companies to improve their compliance with environmental regulations.

Furthermore, no privilege or immunity attaches to criminal actions. A self-audit privilege would offer no shield to those who intentionally, knowingly, or recklessly violate the law. Additional protection is provided to the public in that habitual violators cannot benefit from this legislation.

A party alleging a substantial personal injury has the power to request an *in camera* (in the privacy of the judge's chambers) review of audit documents by a judge to determine whether there was an intentional violation of an environmental law or if there was an attempt to use the privilege for a fraudulent purpose.

Federal and state whistleblower laws afford protection to the individual who discloses a violation to law enforcement authorities.

Pursuant to EPA guidelines, the self-audit legislation must make provision for citizens to challenge the privilege and obtain access to information in a report. To do this, legislation should provide for a court to require disclosure of any portion of an audit report if it finds clear and convincing evidence of substantial personal injury or a clear and present danger to the public health or environment. This protects the individual citizen's right to redress its grievances against a company or entity for environmental violations.

Environmental self-audit legislation must be—and can be—designed so that it does not interfere with enforcement authority in the event of a potential substantial danger to public health or the environment.

## IMPROVING THE IMPERFECT

The logic of the self-audit legislation is inarguable. Enforcement authorities should not be focusing enforcement resources on companies that are actively attempting to comply with environmental laws. Neither should regulated entities fear necessary reviews of their compliance efforts because such reviews might produce evidence that could be used against them in civil and administrative proceedings.

There will never be enough governmental resources to monitor every plant and every factory in every industry. That's why environmental regulation already relies heavily on self-policing and self-reporting. An environmental self-audit privilege will only make that self-policing more effective.

The self-audit privilege gives business the confidence it needs to share audit information with regulatory agencies and to solicit advice on how to avoid environmental damage or hazards. It encourages the disclosure of problems that regulatory agencies would probably never have discovered because of their limited resources. The self-audit privilege provides incentives for business and regulatory agencies to work together for a cleaner environment.

The desired results would be the aggressive investigation of possible violations and the correction of any violations without creating a self-incriminating record and evidence of liability. Without the privilege, companies will continue to avoid documenting the effectiveness of compliance—undermining their ability to correct violations—just to protect themselves against litigious environmental extremists.

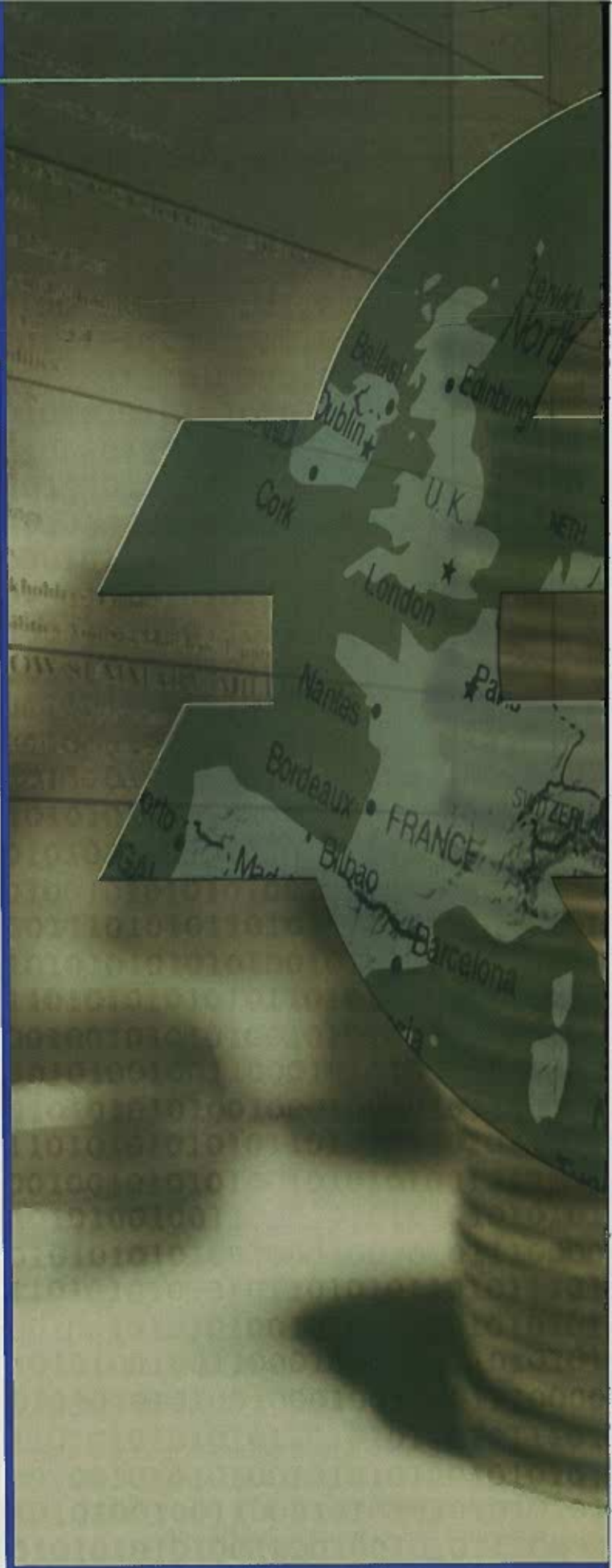
With the successful implementation of self-audit privilege legislation in almost half of the states, why should Florida continue to overlook the opportunity to fully leverage governmental resources? Doesn't the promise of just one additional cleanup, which would otherwise be overlooked, render worthy re-examination of the self-audit privilege? Do we really want an environmental policy that sacrifices environmental protection just so that it can more harshly punish industry?

If perfection were possible, policies and procedures would never need review and assessment because they could not be improved. But we live in an imperfect world. Remembering that, enacting an environmental self-audit privilege to allow candid self-evaluation without the fear of litigation is superior to the alternative of doing nothing. ■

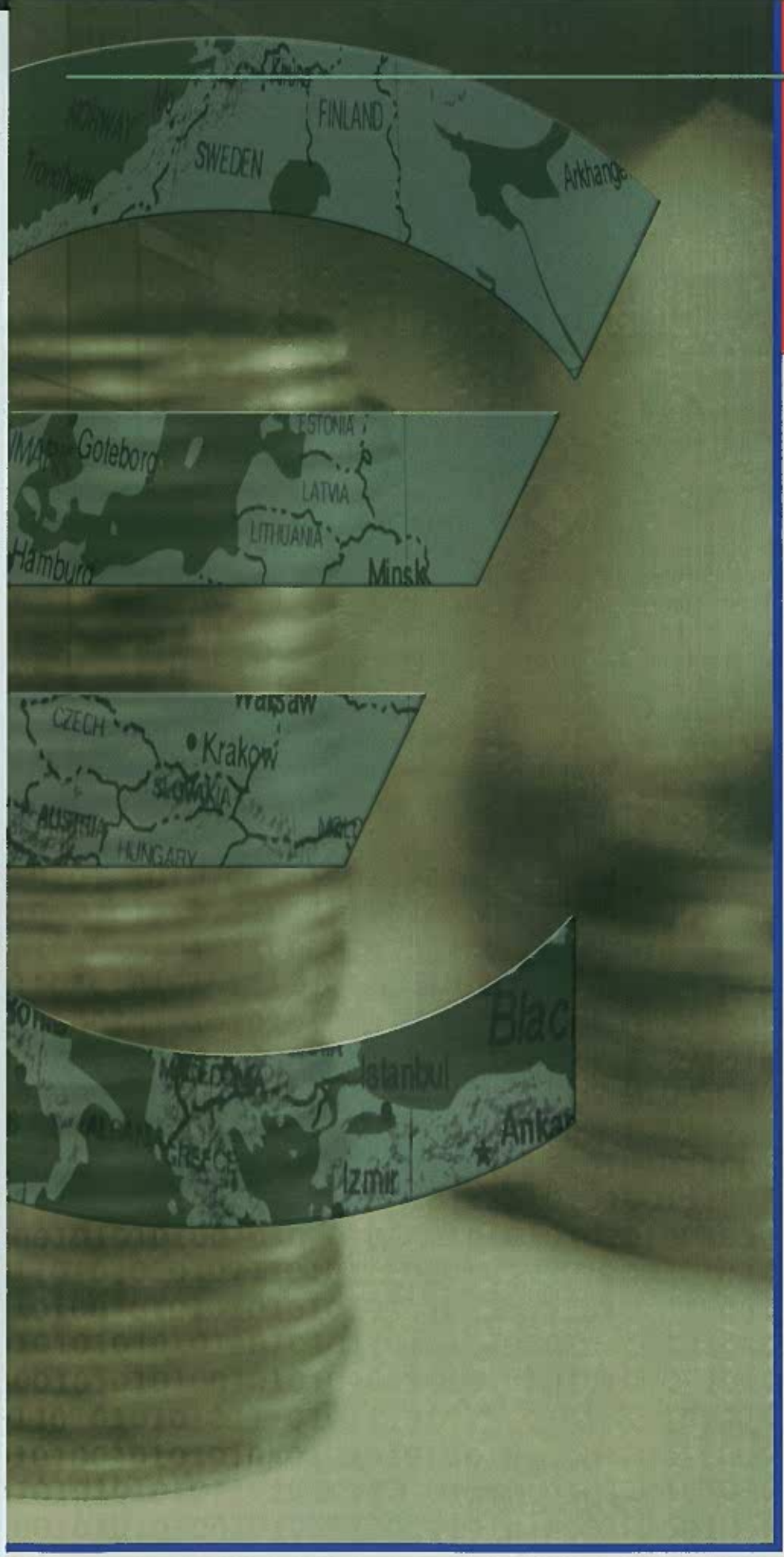
*Martha Edenfield is a partner in the law firm Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., and an environmental consultant to Associated Industries of Florida.*

# EURO

## POSES CHALLENGES FOR FLORIDA COMPANIES




The first day of 1999 will bring the introduction of the euro, the new European currency. European currency unification is important for all American businesses, especially those in Florida, for several reasons.




by alan s. lederman

First, U.S. businesses with European Union (EU) subsidiaries converting to the euro face considerable costs. According to some estimates, the conversion costs will far exceed the costs of fixing the year 2000 problem.

Second, the amount of trade between Florida and the EU is large and growing. Exports, imports, securities transactions, loans, leases, and licenses between Florida companies and European businesses amount to billions of dollars. Transactions involving the euro will likely become more and more frequent for Florida importers, exporters, investors, borrowers, lenders, and licensors and licensees.

Third, Florida is one of the largest states in the nation in terms of trade with the EU that has not adopted continuity of contract legislation. The lack of such legislation raises issues involving the validity of licenses, loans, and other long-term contracts drafted under Florida law that contemplate payment in one of the national currencies that will be replaced by the euro.

Finally, Florida is home to many companies that report to the Securities and Exchange Commission (SEC) that also trade with or have subsidiaries in the EU. The SEC has promulgated special disclosure guidelines concerning publicly traded companies with transactions in currencies converting to the euro, including rules most directly applicable to companies based in Florida or other states without continuity of contract legislation.

FLORIDA IS ONE OF THE LARGEST STATES in the nation in terms of trade with the EU that has not adopted continuity of contract legislation.

In this century filled with significant political and economic events, the conversion to the euro may just be the event with the most enduring consequences.

## ADOPTION OF THE EURO

By adopting the euro, the participating countries will eliminate many of the incidental transaction costs involved in multiple currencies, facilitating cross-border travel, employment, investment, and sale of goods within the EU. The single, price-transparent market created by the euro should lead to further economies of scale, allowing the EU to challenge U.S. dominance of the world market.

On Jan. 1, 1999, the effective date of the euro, the European Central Bank will begin to operate, using reserves transferred from the 11 participating countries (see chart on next page). The central bank will be responsible for managing the money supply, interest rates, foreign exchange rates with the non-euro countries, and other central bank functions.

Beginning on Jan. 1, 1999, the 11 national currencies will no longer be considered separate currencies. Rather, they will become denominations of the euro, just as a quarter and a nickel are viewed as denominations of the U.S. dollar.

Over a three-and-a-half-year transition period, from 1999 to mid-2002, the 11 national currencies will coexist with the euro. Prices will be quoted in both the national currencies and the euro. During this period, under the "no compulsion, no prohibition" provision of EU law, no person can be required to make a payment in the euro instead of a national currency, and vice versa.

On Jan. 1, 2002, the euro bills and coins will begin circulating. The 11 participating countries have the option of allowing their national currencies to circulate along with the euro until June 30, 2002. By July 1, 2002, the national currencies will no longer be legal tender and will be withdrawn from circulation. By July 1, 2002, all transactions, both on paper and in bills and coins, will be conducted in euros, and the transition will be complete.

As a practical matter, the larger multinationals, such as Siemens and Philips Electronics, will be paying bills and moving most transactions to the euro beginning on Jan. 1, 1999. Medium-sized businesses will convert in increasing numbers as the conversion period passes. Because the euro bills and coins will not be introduced until Jan. 1, 2002, the smaller, cash-based businesses will be the last to convert.

## BUSINESS AND SOFTWARE ISSUES

The euro raises significant business issues for all companies, including EU subsidiaries of U.S. companies, that do business in the EU. For example, EU companies must decide whether to quote prices in round euros or round national currencies (e.g. to quote a retail price per item of 9.99 euros = 65.656 French francs or a price of 65.99 French francs = 10.041 euros). As another example, personnel administrators must decide whether employees in different EU countries should be paid identical euro salaries.

Software problems also arise. Between 1999 and 2002, accounting systems must accommodate both the national currency and the euro currencies. Complicating this matter are EU regulations that prohibit direct translations from one national currency to another. Rather, all inter-currency translations will be accomplished by triangulation from one currency to the euro, rounded off after exactly six decimal places, and then converted from the euro to the second currency.

No preexisting software was designed to accommodate the rounding conventions, so new software is needed for the 1999-2002 transition period. Moreover, all historical charts, such as a quarterly sales comparison from 1998-2000, will have to be restated to account for the euro.

Hardware issues also arise. Replacing keyboards with those that include a key for the euro symbol (similar to a "c" with two horizontal lines through it), and replacing pay telephones, vending machines, and cash registers will be quite expensive.

The euro conversion process is sometimes compared to the year 2000 problem. Unlike the year 2000 problem, however, the euro conversion involves business implications, new software development, and extensive training. By contrast, the year 2000 problem is essentially a mechanical issue of reviewing and replacing lines of code. As a consequence, leading consulting firms estimate that, for affected businesses, the costs of complying

## The Euro And The European Union

Eleven of the 15 EU members will adopt the euro on Jan. 1, 1999. Three countries decided not to adopt the euro, and one, Greece, did not meet the eligibility criteria.

### The Adopting Countries

Austria
Belgium
Finland
France
Germany
Ireland
Italy
Luxembourg
Netherlands
Portugal
Spain

### The Non-Adopting Countries

Denmark
Greece (ineligible)
Sweden
The United Kingdom

with the euro conversion are about five times the cost of dealing with the year 2000 problem.

In addition, various litigation issues, similar to those involved with the year 2000 problem, may arise in connection with the euro. For example, as with the year 2000 problem, suppliers to the EU of accounting software that may not conform to the demands of the conversion need to consider their potential liability under such theories as breach of contract, breach of warranty, negligence, implied duty to provide free upgrades, etc. These software exporters may wish to take steps against such liability, such as expressly limiting their warranties.

Conversely, EU subsidiaries of U.S. companies may wish to take affirmative steps to review their accounting software for euro compliance. Besides the commercial and legal importance of being compliant, this review is advisable so that the EU subsidiaries will have taken steps to mitigate damages, and to avoid allowing the statute of limitations on valid software damage claims to expire.

Similarly, if a U.S. business is buying a company with an EU affiliate, some statement on euro-conversion compliance should be obtained from the seller and related due diligence undertaken.

### TAX ISSUES

To illustrate one of the tax implications of the euro conversion, we can examine the hypothetical example of an American mutual fund that bought bonds issued by a major, publicly traded EU corporation a few years ago. Suppose that, due to falling interest rates in general, those bonds, on Jan 1, 1999, are worth much more than their cost to the U.S. investor. Suppose further that, as is likely, beginning on Jan. 1, 1999, the EU corporation decides to pay interest and principal in euros, not the national currency.

If this change in payment currency was interpreted as a material alteration by the IRS, the mutual fund would be subject to a 1999 capital gains tax on the difference between the Jan. 1, 1999, value of the bonds and the mutual fund's original cost of the bonds, even if the euro substitution had no effect whatsoever on the market value of the bonds.

This concern arose because long-standing U.S. Treasury regulations provide that if an American citizen or company owns a bond and the bond is materially altered, the owner of the bond must pay capital gains tax. The taxable gain is not just based on the change in the value of the bond caused by the alteration of the bond terms. Rather, the taxable gain is measured by the excess of the value of the bond after the alteration and the original, historical cost of the bond before the alteration.

By early 1998, there was widespread concern among U.S. investors in EU securities that the IRS might view the substitution of the euro for the national currencies as a taxable material modification. Magnifying such concerns were fears that the IRS might seek to extend this material modification theory to other financial instruments, besides bonds, denominated in the 11 national currencies being replaced by the euro.

Needless to say, this threat of a large amount of capital gains tax, not accompanied by any cash with which to pay the tax, prompted a negative response from American investors. They pleaded with the IRS to treat the euro conversion as tax-neutral. Fortunately, their appeals were heeded.

Under the July 1998 Treasury regulations, the euro conversion is not viewed as a material modification and does not trigger a taxable exchange. Rather, any gain or loss, including any gain or loss attributable to fluctuations between the U.S. dollar and the original foreign currency, and later the euro, are generally to be deferred until the euro-denominated instrument is sold by the U.S. investor.

Unfortunately, U.S. companies with subsidiaries located in the 11 converting nations do face potential tax problems because of the euro conversion. Many of these EU subsidiaries have bank accounts, trade payables, trade receivables, loans receivable, loans payable, and branch investments denominated in currencies of one of the 10 other currencies that will convert to the euro. Although after Jan. 1, 1999, there will be no fluctuations among the 11 national currencies being replaced by the euro, there may have been substantial exchange rate fluctuations prior

to that date (especially prior to May 3, 1998, when post-1998 exchange rates were fixed among the 11 participating currencies). The question arose as to the proper time to take into account this forever-locked-in, pre-1999, inter-EU exchange gain of the EU subsidiaries.

Prior to July 1998, U.S. Treasury regulations appeared to require that this exchange gain be taken into account by the foreign subsidiaries, and thus in many cases by the U.S. parent, in 1998, the year before the subsidiary changed to the euro. Facing large 1998 corporate taxes on pre-1999 exchange gains, without having any cash generated to pay the tax, U.S. parents of EU subsidiaries asked the IRS to treat the euro adoption as tax-neutral in this respect as well. The IRS was somewhat less lenient here than with the EU portfolio securities investment issue discussed earlier.

The July 1998 Treasury regulations do defer the pre-1999 exchange gains on loans and trade accounts payable and receivable until paid off. However, pre-1999 exchange gains on bank accounts denominated in the other 10 euro-adopting currencies are generally immediately taxable in the year before the subsidiary changes its books to the euro (e.g., in 1998), and gains on their investments in branches in the 10 other euro-adopting countries are generally spread over a four-year period.

Not all foreign countries have adopted the same approach as the IRS. For example, Belgium will apparently tax all such pre-1999 exchange gains in 1998. This means that a Belgian subsidiary of a U.S. company may in 1998 have to pay Belgian taxes on pre-1999 exchange gains on a French franc loan repaid in 1999; the U.S. company may have to pay U.S. tax on that same exchange gain in 1999.

Unfortunately, because of some technicalities in the U.S. foreign tax credit rules, it is not clear that the American parent company, in computing its 1999 corporate tax, can claim a tax credit for the 1998 Belgian corporate tax paid on that same income. Therefore, the euro conversion can cause double U.S. corporate taxation to American parent companies of EU subsidiaries.

IRS officials have announced that they will not provide any specific guidance as to which euro conversion costs will be immediately deductible, which are capitalizable and amortizable, and which are non-deductible and non-amortizable.

## CONTINUITY OF CONTRACT

One of the most important euro conversion issues for Florida is the lack of state euro continuity of contract legislation.

Suppose an Irish manufacturer agreed in 1997 to pay a Florida licensor an annual royalty of 100,000 Irish punt at the end of each of the next 10 years. Under EU regulations, the Irish punt will not exist after June 2002, having been replaced by the euro. Therefore, it is literally impossible for the Irish licensee to make the required Irish punt payments to the Florida licensor after 2001. The question arises as to whether the Irish licensee or the Florida licensor may terminate the license after 2001, on the theory that it is literally impossible for the Irish licensee to make the Irish punt payments after that time.

Conversely, suppose a Florida borrower, importer, or licensee owes money in one of the 11 replaced EU currencies after June 2002. Can the Florida obligor or the other party to the contract defend against its obligations to perform due to the literal impossibility of the Florida obligor's paying in the then non-existent national currency?

Let's look at another example, that of a Florida lender that purchased a convertible debenture in a French company, with the interest rate determined by reference to Pibor, a floating rate index of rates charged by French banks for French franc loans. Suppose that, as expected, Pibor is replaced with Euribor, an interest rate index of the 11 euro-adopting countries. Is the debenture still valid? And what is the interest rate?

The EU's euro continuity of contract legislation is designed to prevent a defense based on impossibility of performance. California, Illinois, and New York have likewise adopted euro continuity of contract legislation modeled on the EU law. Michigan and Pennsylvania have such euro legislation pending.

### Comparison Of The European Union And The United States 1998

| | EU | US |
|---|---|---|
| **Population** (millions) | 375 | 270 |
| **GDP** (trillions) | $8 | $8 |
| **Share of world trade** | 20% | 17% |
| **Export to GDP ratio** | 10% | 9% |

## U.S. COMPANIES WITH SUBSIDIARIES located in the 11 converting nations face potential tax problems.

The Illinois law, for example, follows EU law and provides that the introduction of the euro, or tendering euros in compliance with an obligation to pay an equivalent value of the 11 national currencies, does not give any party the right to unilaterally terminate any contract, security, or instrument. The Illinois law further states that a reasonable substitute of an interest rate for an index removed incident to the introduction of the euro likewise does not invalidate the loan.

Florida, however, unlike California, Illinois, and New York, has not adopted euro continuity of contract legislation. Some commentators have suggested that even without such legislation, state courts may be inclined to follow the EU regulations so as to preserve the validity of existing contracts. This continuity of contract result could be based on a general doctrine of *lex monetae*, or "law of the money." This doctrine looks to the law of the country of the currency (in this case, the EU) to determine questions involving payment, even if other law (such as Florida law) would govern other terms of the contract.

Other commentators believe that a court might reach a continuity result by contract interpretation; for example, by interpreting the phrase "German marks" to mean "the currency of Germany," i.e., the euro.

Nevertheless, for contracts, securities, and agreements that are governed by Florida law, either by their express terms or by conflicts of law principles, the absence of continuity legislation may create uncertainty. Florida companies and their legal counsel will wish to keep this in mind in reviewing contracts involving payments in one of the 11 replaced currencies.

Other important concerns include accounting treatment of euro conversion costs. FASB, the body that sets standards for the American accounting profession, has not ruled on whether, for financial accounting purposes, these costs should be deducted currently or capitalized and possibly amortized over the three-and-a-half-year dual currency period. The FASB Emerging Issues Task Force has merely stated that U.S. companies should treat these costs consistently with the way they treated prior similar costs.

There is also the question of the impact of currency fluctuations and exchange gains and losses on U.S. parent companies' consolidated earnings. Fluctuations may increase as more U.S. companies exporting to and importing from the EU agree to accept payment in euros rather than in U.S. dollars. On the other hand, the conversion of 11 national currencies to the euro will mean fewer inter-currency transactions for EU subsidiaries and, thus, less exchange rate fluctuation.

And, finally, U.S. companies that conduct business in the 11 converting nations and that report to the SEC must disclose material items relating to the euro conversion in their filings. Companies that are most effected will be those with significant EU operations, investments, licenses, and sales and other contracts.

According to the SEC, issuers must review the implications of the following:

- increased cross-border competition caused by price transparency
- additional euro conversion costs
- plans to consolidate operations to achieve economies of scale
- changes in marketing approach

Issuers must also review their information technology and other systems with respect to the following:

- converting the 11 replaced national currencies to the euro
- converting one of the 11 currencies to the other through the triangulation convention
- performing rounding computations
- permitting transactions to take place in both the 11 national currencies and the euro during the transition period.

Material exchange risks due to more use of the euro in export or import transactions must also be disclosed.

These are just some of the major issues Florida companies will confront if they trade with or own companies in the nations converting to the euro, or if they plan to expand operations to those countries. No one knows what the consequences of the euro conversion will be, but we do know they will be weighty. Competent legal and accounting advice will be crucial in the years ahead as the conversion to the euro is completed. ■

*Alan S. Lederman, P.A., a partner in the Miami office of the law firm of Broad & Cassel, is a frequent writer and speaker on international tax and trade topics.*

by jacquelyn horkan, editor

# Pursuit of Happiness

*To you from failing hands we throw*
*The torch; be yours to hold it high.*

In Flanders Fields *by John McCrae (1872-1918)*

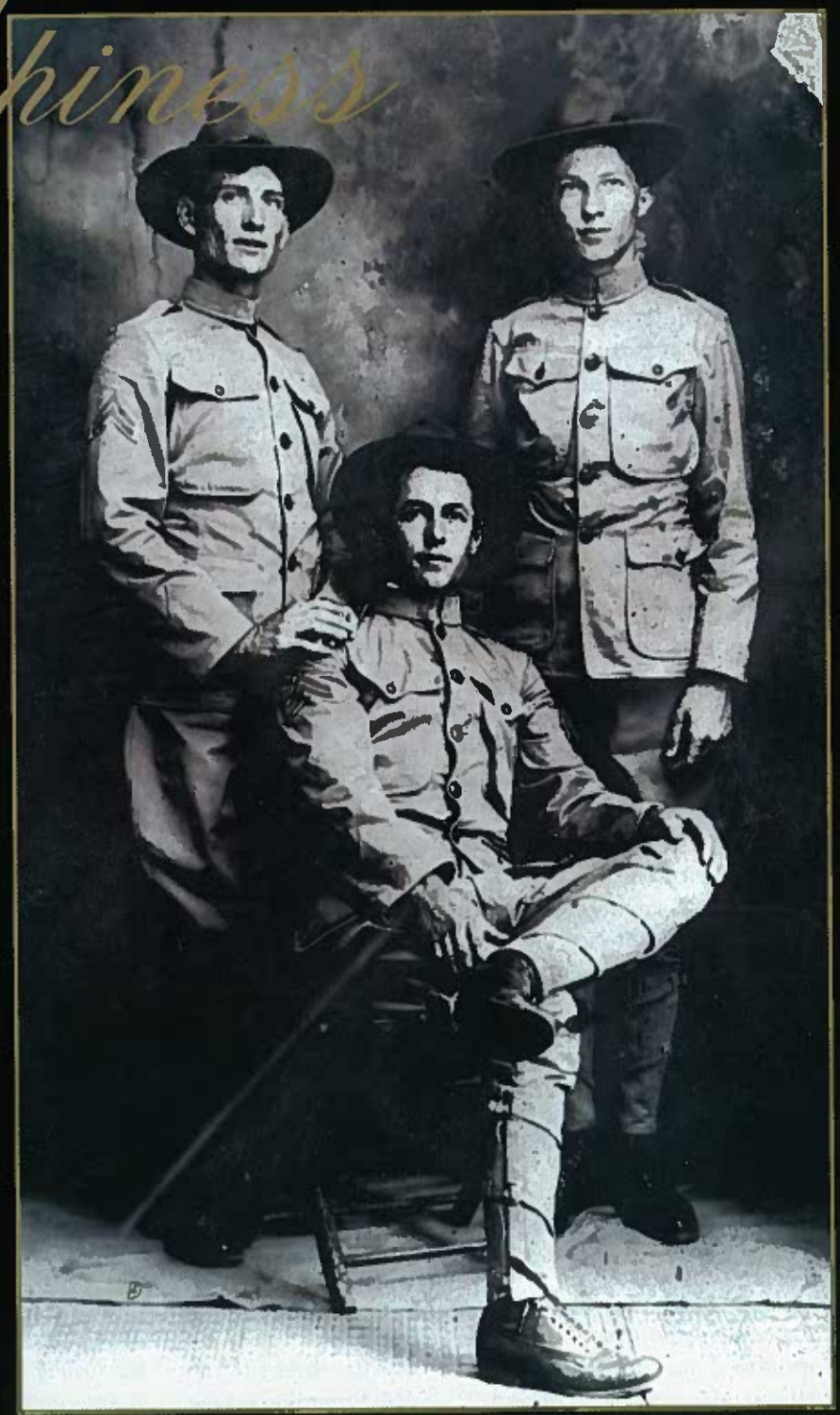


PHOTO: FLORIDA STATE ARCHIVES

They were the doughboys, young men who left their farms and towns and cities to fight civilization's first world war. They held the bridges at Chateau-Thierry, stormed the Saint-Mihiel salient, and watched friends die in the Argonne Forest. They revolutionized the art of war with planes, machine guns, and submarines.

Back home, wives, parents, and girlfriends obeyed government war posters urging them to "Beat Back the Hun with Liberty Bonds." They sang patriotic songs to the accompaniment of John Philip Sousa and his Navy band. They bought the sheet music for George M. Cohan's hit song *Over There*. On the cover was a drawing by a young unknown artist named Norman Rockwell.

When the fighting ended on Nov. 11, 1918, 126,000 doughboys were dead, members of the poignant regiment of 8.3 million who lost their lives during the four years of war.

They are a fading generation, America's veterans of World War I. Today, there are fewer than 4,400 left, asking if their youth, courage, and sacrifice will be remembered after the last one of them is gone. ■

*Hickory driver and shaft, circa 1895.*

*Persimmon driver with enamel-coated shaft, circa 1935.*

*Persimmon driver with steel shaft, 1955.*

*Laminated wood driver with steel shaft, 1976.*

*Graphite driver and shaft, 1988.*

*Oversized, perimeter-weighted metal driver, 1994.*

# Reach Your Full Business Potential


Whether it's assisting with a new business venture or representing clients before state government, our multi-disciplined law practice is experienced in developing strategies that help our clients achieve their objectives.

By basing our services on the principles of knowledge, commitment, dedication and skill, we keep the focus of our efforts on our clients and provide them with comprehensive support through aggressive representation and plain hard work.

For more information on how we can help you achieve your full business potential, contact our primary office in Tampa or one of our other offices throughout Florida.

## Stiles, Taylor, & Grace, PA,
## Attorneys and Counselors at Law

Corporate & Business Law • Legislative & Administrative Agency Representation
Employment & Labor Law • Insurance & Personal Injury Defense • Workers' Compensation

| BOCA RATON | MIAMI | ORLANDO | TALLAHASSEE | TAMPA |
|---|---|---|---|---|
| 980 North Federal Highway<br>Suite 305<br>Boca Raton, FL 33432<br>Phone: (561) 393-7600<br>Fax: (561) 393-7038 | 1101 Brickell Avenue<br>Suite 403, North Tower<br>Miami, FL 33131<br>Phone: (305) 358-3556<br>Fax: (305) 358-7210 | 111 N. Orange Avenue<br>Suite 850<br>Orlando, FL 32801<br>Phone: (407) 843-9900<br>Fax: (407) 843-9808 | Markham-Stiles House<br>317 North Calhoun Street<br>Tallahassee, FL 32301<br>Phone: (850) 222-2229<br>Fax: (850) 561-3642 | Spafford-Stiles House<br>315 Plant Avenue<br>Tampa, FL 33606<br>Phone: (813) 251-2880<br>Fax: (813) 254-9073 |

*The hiring of a lawyer is an important decision that should not be based solely upon advertisements.*