

# In The Corner



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## Check 21

*Effective on October 28, 2004*

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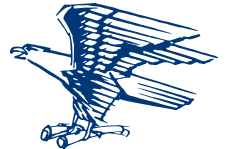
A Federal law and implementing rules that will become effective October 28, 2004, "The Check Clearing for the 21st Century Act ('Check 21')" may well necessitate a review of company and agency check stock and the float on arrangements with depository institutions for escrow funds. Check 21 was signed by the President on October 28, 2003 and became effective on October 28, 2004. The Act

is intended to encourage banks to handle check processing more efficiently. It allows banks to create "substitute checks" which are images of the check, including the payment information, and transmit it electronically. While it does not directly affect the time periods established under Federal statutes and rules for cashing local and non-local checks, implementation of the Act will eventually shorten the time period for check clearance. The Federal Reserve Board expects that "substitute checks" will be used by larger institutions first, while smaller institutions may adopt this practice gradually over the next few years. As adoption will be uneven and institution-specific, title companies should contact the entity which holds their real estate transaction escrow accounts, including money market accounts if disbursements are made through bank checks, to discuss clearance procedures and times.

Check 21 was the result of efforts by the Federal Reserve to promote electronic check presentment. The purposes of the Act and regulatory provisions are to facilitate check truncation, foster innovation in the check payment system without mandating receipt of checks in an electronic format, and to improve the overall efficiency of the payment system.

The Act creates a new negotiable instrument, called a "substitute check," which is the "legal equivalent" of and can be processed in the same manner as the original paper check. A substitute check is a reproduction of the original check that contains an image of the front and back of the original check,

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# Refinancing Before and After an Exchange

■ Contributed by Old Republic Exchange Facilitator Company

For taxpayers intending to refinance, either before or after exchanging property, it is extremely important to recognize that refinance proceeds could be considered taxable boot, unless the taxpayer can establish that the refinancing had an economic significance independent of the exchange and was not for tax avoidance.

## REFINANCING BEFORE EXCHANGING

If debt is refinanced just before property is exchanged, the IRS might argue that cash received from the refinance constitutes cash boot received. In other words, a loan obtained against property that is the subject of an exchange, just prior to the exchange that results in cash to a taxpayer, may be viewed simply as a mechanism to cash out some equity

and decrease the cash required for the acquisition of the replacement property.

For example, what if a taxpayer intends to exchange property and anticipates receiving \$150,000 in cash proceeds? However, he only wants to reinvest \$100,000 cash into new replacement property. In anticipation of this situation, the taxpayer arranges a refinance, before exchanging, to increase the mortgage on his property by \$50,000 and thereby reduce his required cash infusion to the replacement property. The result may be what the taxpayer intended – i.e., \$50,000 cash in his pocket and a higher loan amount – but certainly not what the IRS will allow.

## REFINANCING AFTER AN EXCHANGE

If debt is refinanced just after exchange property (replacement property) is acquired, the same result may occur. For example, if a taxpayer exchanges into replacement property with a loan of \$100,000, but shortly thereafter increases the loan to \$125,000 simply to obtain \$25,000 cash, the IRS will consider the refinance proceeds as cash boot. The circumstances are equivalent to a taxpayer failing to invest all of his net cash proceeds and instead obtaining a higher loan amount against the replacement property.

## WHAT THE IRS AND THE TAX COURTS SAY ABOUT REFINANCING IN CONJUNCTION WITH AN EXCHANGE

In considering the validity of any mortgage adjustment close in time to the date of the exchange, the documents and the transaction as a whole should be carefully scrutinized to make sure that the form accurately

reflects the substance. See Arthur E. Long v. Commission, (1981) 77 T.C. 1045, @ p.1077. Any reallocation of existing liabilities prior to the exchange must have economic substance and must not be undertaken solely for tax avoidance purposes. 77 T.C. at 1080.

In Private Letter Ruling 109817-99, the taxpayers at issue were six limited partnerships, all with the same general and limited partners. The partnerships' relinquished property consisted of several mobile home parks. Approximately 7 months prior to contemplating the exchange, the taxpayers refinanced the mortgages on the relinquished properties to take advantage of lower interest rates and some of the proceeds of the refinancing were distributed to the partners who purchased more properties.

In reviewing the transaction, the IRS determined that the refinancing had an *economic significance independent from the exchange* (i.e., the taxpayers received lower interest rates on the loans and the refinance proceeds were used by the partners to purchase more properties). Thus, the IRS determined that it would not treat the proceeds of the refinancing as payment of boot in the exchange transaction.

The IRS relied upon two U.S. Tax Court cases for its determination as to whether the refinancing had an *economic significance independent of the exchange*. Those two cases are Garcia, Phillip M., (1983) 80 T.C. 491 and Frederick, Fred L., T.C. Memo. 1994-27.

In Garcia, Phillip M., (1983) 80 T.C. 491, the taxpayers required the sellers of the replacement property to obtain a higher mortgage (for the

*Continued on page 5—*

# Employment Practices - Time Management 101

■ Cheryl A. Jones, SVP, Corporate Human Resources & Communications  
Old Republic National Title Insurance Company, Minneapolis, MN

Heavy workloads in the last three years have wreaked havoc on the title insurance business, testing the limits of how much work can be accomplished each day. How unexpected interruptions, telephone calls, visitors and distractions are handled impacts our productivity and determine how effectively our time and daily tasks at work are managed.

The old adage is true: always give more work to the busiest people, as they are the best time managers and will get the work done! Most of us have high expectations of what we can accomplish daily; however, when we try to do too much in too little time, we may be setting ourselves up for failure, disappointment and higher levels of stress.

*Do any of these stress indicators apply to you?*

- Irritability
- Difficulty getting along with others
- Erratic sleep patterns
- Fatigue
- Increased eating, drinking and/or smoking
- Inability to concentrate
- Memory lapses
- Making more mistakes than normal
- Increased self-doubt
- Poor decision

If you checked one or more, you could use some time-management help. Although not all of the following tips may work for you, if implemented, they will help maximize your productivity at work and reduce job stress.

**CREATE A TO DO LIST.** It doesn't have to be fancy or be legible to anyone else but you, but it should be comprehensive and maintained daily. Don't put tasks requiring less than two minutes to complete on your TO DO LIST – just do them. Striking through the tasks when they are completed will give you a sense of progress.

**SET PRIORITIES.** Before you start your tasks, prioritize them, 1 through 4, ranked by level of urgency. 1 = Critical,

goal-related must be finished within 24 hours. 2 = Important, goal-orientated, must be finished in the next ten days, but not today. 3 = Important, goal-orientated, must be finished during the next 30-90 days. 4 = It can wait for a few days, may not be a high priority or goal-orientated, may be business or personal and is easy, quick and pleasing to accomplish.

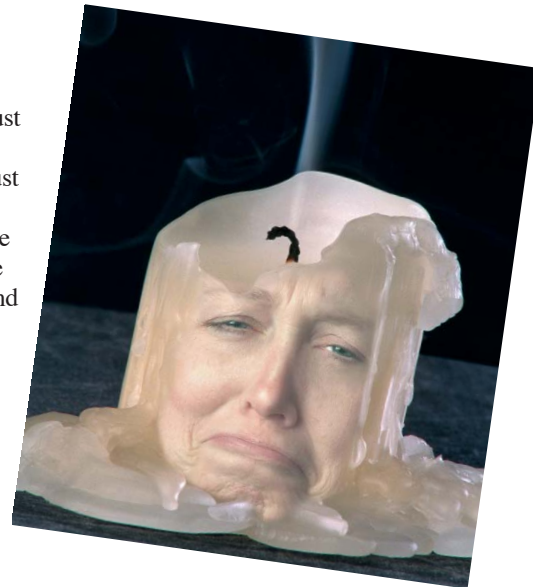
**USE COLORED FOLDERS** to organize long-term projects and to make the information easy to find. Associate priority tasks with folder colors, i.e., priority 1 task, a red folder; priority 2 task, a yellow folder; and so on.

**ORGANIZE** materials for a meeting the day before, so that you have more time to prepare and accomplish other tasks on the day of the meeting.

**PLAN YOUR WORK-RELATED TELEPHONE CALLS** so that they are short, productive and you can quickly get to the points you wish to make; then get off the phone. Don't multi-task when you should be concentrating on the conversation. Stand up when you talk on the telephone (using a headset if possible to help you have shorter, more effective calls). Refer to your phone's minute timer (if available) as you are speaking to monitor call length. The way you begin your call affects the way you end it. You can start by stating, "Hi, Susan, I only have five minutes to talk, but I do need to speak with you about this important matter because ..."

**AVOID E-MAIL** if a telephone call would be faster. Typing, editing and rewriting e-mail messages takes more time than you may think. E-mail can be a wonderful business tool, but only when used judiciously.

**AVOID INTERRUPTIONS.** Block out a "do not disturb" period each work day, if possible, given the scope of your job duties and responsibilities. Use this time to focus on #1 priority tasks and projects or as the designated time to respond to your e-mail and/or important telephone calls.



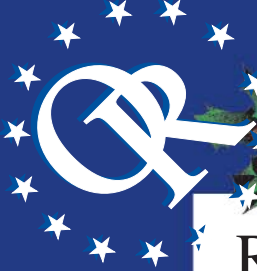
**BREAK BIG PROJECTS THAT CAN BE COMPLETED IN PHASES INTO SMALLER, MORE MANAGEABLE ONES.** Set target completion dates for each phase of the project.

**REMOVE DISTRACTIONS.** List things at work that are distracting and decide what is not necessary. For example, if your desk is a mess, remove the clutter and clean off the desk. Tell family and friends that calling you at work should be kept to an absolute minimum.

**DELEGATE** whenever possible. Assigning tasks to others who can handle them gives you more time to focus on those tasks that only you can do. Delegating multiplies your time, which is the ultimate time management technique.

**DISCIPLINE** yourself to do today what you want to do tomorrow. Make a daily CATCH-UP LIST of tasks you have avoided or put on the back burner and rank them from most to least important. Resolve to finish at least one task from your CATCH-UP LIST each day.

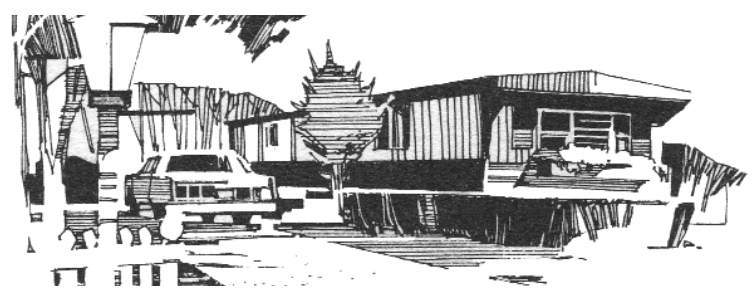
Systematic application of these tips takes discipline, but will help you take charge of the time available to you at work. Effective time management promotes efficiency in the workplace and ultimately maximizes your productivity.



# Retiring the Mobile Home Certificate of Title

■ *Linda M. Hernandez, Florida State Underwriter*

Recently, the Florida Legislature passed Section 319.261, Florida Statutes. This statute sets out the requirements and procedures necessary to retire a mobile home certificate of title. Why, may you ask, do we care about this statute? The effect of such a “retirement” is that the mobile home can then be conveyed and insured with the land—as is any other permanent improvement. Below is a summary of the two statutory requirements and procedures necessary to effectuate retirement of the mobile home title.



## REQUIREMENT 1:

**The mobile home must be permanently affixed to the real property.**

Generally, this means that you must be furnished proof (in any of the ways listed below) that the mobile home is or will be taxed as “real property” and, hence, has been given (RP) status by the tax assessor.

a. **RP TAG/STICKER:** This is the best proof because its issuance indicates that the owner has already proven to the Tax Assessor (by any or all of the alternative forms of proof listed here) that the mobile home is permanently affixed to the land.

b. **SURVEY:** A survey that indicates the mobile home has been placed on a concrete foundation and that the wheels and axle have been removed.

c. **AFFIDAVIT:** An affidavit from the owner and buyer, as applicable, that the mobile home is set on a foundation and has no wheels or axle, plus assurances that it will remain that way, is often used to bolster the proof.

## REQUIREMENT 2:

**The person(s) named on the mobile home certificate of title**

**must hold fee title or a leasehold interest in the land for a term of 30 years or more.**

## PROCEDURE 1:

**The owner or lien holder (with a power of attorney from the owner) must record the following documents with the Clerk of the Court in the county where the land is located.**

a. The original title to the mobile home or manufacturers’ certificate of origin (for a new home), which includes a description of the mobile home—model, year, make, width, length and vehicle identification number—and a statement by any recorded lien holder that the security interest has been released or will be released upon retirement of the title;

b. The legal description of the real property or, in the case of a leasehold interest, a copy of the lease; and

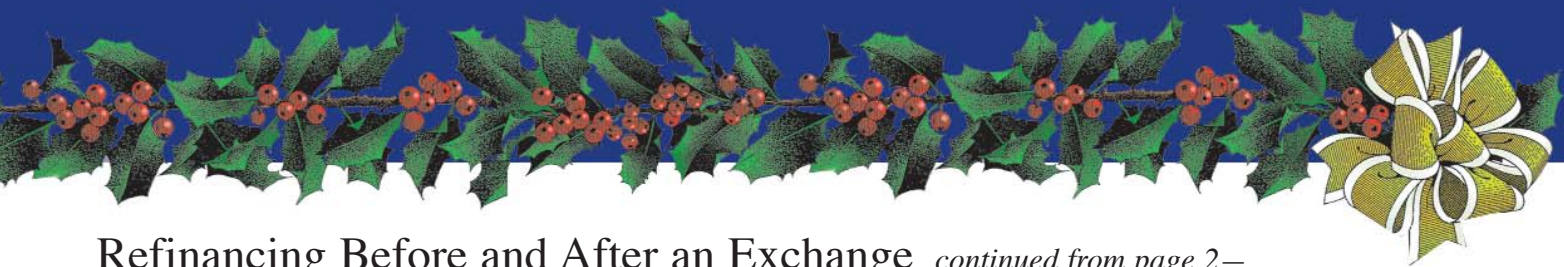
c. A sworn statement by the owner of the real property (or lessee) that he is also the owner of the mobile home and that the home is permanently affixed to the land.

## PROCEDURE 2:

**After recording, the owner (or lien holder with power of attorney from the owner) files an application for retirement of the mobile home, together with copies of the items listed above, with the Florida Department of Highways and Motor Vehicles who will notify the applicant of the retirement.**

For title insurance purposes, once the Department issues the retirement notification, we can issue a title commitment and policy without further requirement or exception regarding the mobile home or certificate of title. If you are handling a closing where the certificate is going to be retired, we can insure the land (as improved) before the Department issues its notification, but only if you undertake responsibility for recording the documents listed above and for filing the application with the Department. Of course, if the mobile home certificate has not been retired, you should continue to follow the requirements and procedures for insurance we have set forth in the past.

A copy of the Department’s power of attorney form can be obtained from their web site at:  
<http://www3.hsmv.state.fl.us/Intranet/dmv/forms/BTR/82053.pdf>  
 The Department’s retirement application form can also be obtained from their web site at:  
<http://www.hsmv.state.fl.us/html/forms.html>



## Refinancing Before and After an Exchange *continued from page 2—*

taxpayer's later assumption) for the purpose of evening up the liabilities on both sides of the exchange. The IRS argued that the new loan was an artificial attempt to reallocate liabilities for the purpose of tax avoidance. The U.S. Tax Court disagreed with the IRS and found that there was an assumption of debt that had an independent economic substance aside from tax avoidance (i.e., to even up the liabilities in the exchange), and the fact that the debt was created at the taxpayers' request was simply irrelevant.

In Fredericks, Fred L., T.C. Memo. 1994-27, the taxpayer refinanced the relinquished property one week after entering into an agreement to sell it and

received cash. The IRS argued that the taxpayer "cashed out" of his exchange property. The Tax Court disagreed with the IRS and found that the taxpayer had reasons for refinancing the mortgage that were unrelated to the exchange. The taxpayer was attempting to secure permanent long-term financing and a more favorable interest rate because his current loan was coming due.

What the foregoing authorities establish is the necessity of carefully structuring any refinance that is done close in time to an exchange; and that refinancing may be permissible where the taxpayer meets the following criteria:

Avoid integrating the refinance transaction with the exchange transaction;

Wait as long as possible before refinancing before or after exchanging;

When the refinance is close in time to the exchange, scrutinize the documents and the transaction as a whole to make sure that the form accurately reflects the substance of the transaction;

Make sure that the loan has an *economic significance independent of the exchange* (e.g., lower interest rate, more favorable terms, pre-existing need to refinance); and

Never reallocate existing liabilities for the sole purpose of tax avoidance.

## Check 21 *continued from page 1—*

bears an MICR line containing all the information appearing on the MICR line of the original check, conforms in paper stock, dimension and other aspects with generally applicable industry standards for substitute checks, and is suitable for automated processing in the same manner as the original check.

The Act allows a substitute check meeting these standards to be considered the legal equivalent of the original check "for all purposes, including any provision of any Federal or State law, and for all persons." Such a check is subject to Federal and state laws protecting customers, including the Uniform Commercial Code.

According to the Federal Reserve, the use of substitute checks should facilitate the collection and return of checks in electronic form by permitting, for example, a depository bank in California that receives a check drawn on a bank in New York to transfer check information electronically to a collecting bank in New York which, in turn, would create a substitute check to present to the New York paying bank. Under the Act, the New York paying bank would be required to take presentment of the substitute check that

met all the legal equivalence requirements. Thus, instead of processing and transporting the original check across the country, the California bank could collect the substitute check using only local New York transportation. While banks would not be required to create electronic checks or substitute checks, they would be required to accept substitute checks from other banks instead of the original checks.

The Act does not directly affect the time periods set under the Expedited Funds Availability Act ("EFAA") and the Federal Reserve's Regulation CC for cashing local and non-local checks (e.g., providing funds to a customer in one day for a cashiers check, two days for a local check and five days for a non-local check). However, the Federal Reserve expects that Check 21 "ultimately will decrease the time needed to collect checks." The time periods under EFAA for providing funds on checks is not expected to change quickly because Check 21 implementation by banks will require some time. Bank trade groups estimate it will take up to two years for broad implementation of Check 21 standards because adoption is not required, but is optional for the processing bank.

Because adoption may be slow,

banking organizations have also indicated that the possibility that float will significantly and suddenly be reduced is not likely to occur. For banks that engage in image processing, banks believe that float may shrink for processing out-of-town checks, but local checks will clear in virtually the same time as today.

### COMMENTS:

We invite your feedback and welcome your suggestions regarding *In The Title Corner* and the publication of future articles. Address correspondence to:

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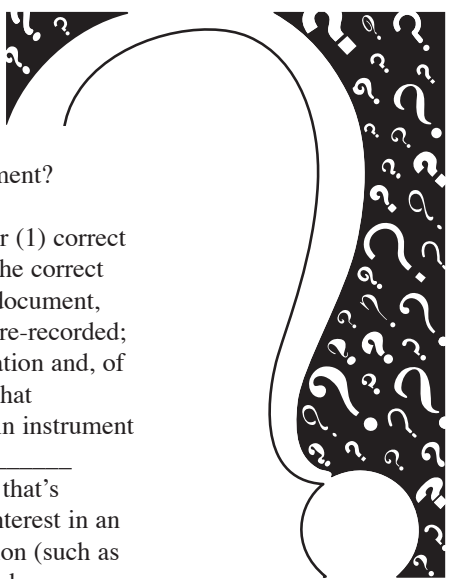


# Ask Your Underwriter

■ *Linda M. Hernandez, Florida State Underwriter*

**Question:** What is required in order to correct an error in a recorded instrument?

**Answer:** In order to correct most errors, you have a choice. You can either (1) correct the error by lining through the incorrect information and typing the correct data, have the correction initialed by the person who signed the document, and then have it re-executed, re-acknowledged, re-notarized and re-recorded; or (2) prepare a "corrective" instrument with the correct information and, of course, have it signed, acknowledged, notarized and recorded. That instrument should state that it is being given to correct that certain instrument recorded in O. R. Book \_\_\_\_, page \_\_\_\_, Public Records of \_\_\_\_\_ County, Florida. This is the proper way to correct an instrument that's already been recorded, unless the incorrect instrument vests an interest in an incorrect party or purports to convey an erroneous legal description (such as by a deed or mortgage). For instructions on how to correct a deed or mortgage, see **Eeeeeek! An Error!!!!!!** in Volume 6, Issue 2, *In the Title Corner*. That issue can be found on our website, [www.ortfl.com](http://www.ortfl.com).



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