EXHIBIT 2
Contested Issues in Accountant Noncompete Cases Across the United States

Clients

- In *BDO Seidman v. Hirshberg* [93 N.Y. 2d 382 (1999)], the New York Court of Appeals held that:
  - This national firm could *not* protect its entire Buffalo office client base against competition from Hirshberg.
  - BDO's interest did not extend to personal clients that came to the firm as a result of Hirshberg's own contacts and recruitment efforts, because BDO did not spend its own resources to develop the goodwill.
  - Protection was granted only to those relationships developed and maintained by BDO and to those relationships in which the employee provided direct, substantive accounting services during the course of employment when the clients were not developed or maintained by BDO as part of a client development program.
- Similarly, courts in Texas [*Peat Marwick Main & Co. v. Haas*, 818 S.W.2d 381 (1991)], Nebraska [*Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123 (1982)], Georgia [*Singer v. Habif, Arogeti & Wynne, P.C.*, 250 Ga. 376 (1983)], and New Hampshire [*Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679 (1979)] have either reformed or invalidated noncompete clauses that were overbroad for including future clients, former clients, or clients not serviced by the accountant during employment.

Geography

- An accountant was enjoined from accounts payable auditing in six states for two years in any business in competition with the company [*Schultz v. Ingram*, 38 N.C. App. 422 (1978)].
- In contrast, the Georgia Supreme Court refused to enforce a similar clause, in part because there was no justification for the geographic area [*Howard Schultz & Associates, Inc., v. Broniec*, 239 Ga. 181 (1977)].
- Some jurisdictions, such as Missouri, will enforce a covenant even if the geographic limitation is missing, as long as it is very specific as to which clients cannot be served [*Schott v. Beussink*, 950 S.W. 2d 621 (Mo.App. E.D., 1997)].

Time

- Several states have upheld one- to two-year practice bans or reimbursement clauses [*Schott v. Beussink, supra.* (1997); *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392 (1985); *Foti v. Cook*, 220, Va. 800 (1980)].
- A Tennessee court upheld a three-year 50-mile practice ban [*Money & Tax Help, Inc. v. Moody*, 180 S.W. 3d 561 (Tenn.Ct.App. 2005)].
- A Colorado court upheld a five-year practice ban [*Fuller v. Brough*, 411 P.2d 18 (Colo. 1966)]; a Maryland court more recently found that five years was unreasonable [*Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1990)].
- Some states have legislation that sets guidelines or maximums. Florida law provides that a restraint against a former employee of six months or less is presumed reasonable, and a restraint of more than two years is presumed unreasonable; a restraint against a seller of an equity interest in a professional partnership is presumed reasonable if for three years or less and unreasonable if for more than seven years; and restraints pertaining to trade secrets are presumed reasonable for five years and unreasonable if greater than 10 years (FSA section 542.335). Under South Dakota law, an employee may agree not to engage in the same profession or to solicit existing customers for a period not to exceed two years within a specified area (SDCL section 53-9-11).

Reimbursement or Damages Clause

- In *Varney Business Services, Inc. v. Pottroff* [275 Kan. 20, 59 P.3d 1003 (2002)], the Kansas court allowed fees earned by the withdrawn partner to be paid to the firm on a declining percentage scale for five years, starting at 35% and declining to 10% in year 5.
- In *Engel v. Ernst* [102 Nev. 390 (1986)], the court applied Colorado law and held that damages of the average one-year fee was a valid liquidated-damages provision based on evidence that client accounts are generally valued at 100%–125% of the client's annual fee in third-party acquisitions.
- In *Cherry, Bekaert & Holland v. LaSalle* [413 So. 2d 436 (Fla.App.3D, 1982)], the Florida appellate court found that a payment of 200% of fees charged by the firm to the client during the 12 months prior to termination of employment was unenforceable as an excessive penalty.

Consideration and Misconduct

- In *Faw, Casson & Co. v. Cranston* [375 A.2d 463 (Del.Ch., 1977)], the Delaware court held that signing a noncompete clause in exchange for promotion to manager was valid.
- The New York *BDO Seidman* (1999) decision indicated that signing for initial or continued employment was a factor that weighed against reforming an overbroad covenant.
- In *Smith, Batchelder & Rugg v. Foster* (1979), the largest accounting firm in both New Hampshire and Vermont tried to enforce its liquidated-damages provisions against accountants who competed after termination. The covenant was too broad because it covered New Hampshire and Vermont and former clients. The Supreme Court of New Hampshire refused to reform the covenant because the employer did not show good faith in implementing it. The employer's failure to fully make the terms of the restrictions clear before the employer hired accountants was fatal to enforcement. The employer had verbally offered employment to the accountants with either no discussion of the noncompete clause or only a general reference to it. After the employees were hired, the firm presented written agreements with noncompete covenants banning the employees from providing services to clients for three years after termination.

Ethics/Public Policy

- In *Pottroff*, an accountant argued that the damages provision was contrary to the Kansas Board of Accountancy's Code of Professional Conduct because a CPA cannot pay a commission to a third party. The Kansas Supreme Court rejected this argument because the accountant was not paying to obtain the client but was paying the firm for taking a client away (*Varney Business Services, Inc. v. Pottroff, supra.* 2002).
- The Maryland Court of Appeals rejected the argument that reimbursement clauses are against public policy and per se unlawful [*Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1990)].
- Even though clients reveal personal and confidential information, the Delaware Supreme Court rejected the analogy to lawyers, whose profession prohibits noncompetes, because there is no similar rule for accountants [*Faw, Casson & Co. v. Cranston*, 375 A.2d 463 (Del.Ch. 1977)].

Choice of Law

- In *Engel v. Ernst* (1986), the firm was headquartered in Denver and had offices around the country. Ernst was promoted to manager and signed a two-year noncompete clause. He later entreated the managing partner to waive his noncompetition clause. The partner refused. Ernst solicited some clients before leaving and after joining another firm. His former firm sought to enforce its damages provision. The Nevada court agreed to apply Colorado law because it was reasonable for a national firm to choose a single set of laws. The firm was not trying to evade the Nevada law, and the firm was headquartered in Colorado.
- Alabama's legislation against noncompete clauses for professionals was the deciding factor in *Cherry, Bekaert & Holland v. Brown* [582 So.2d 502 (Ala. 1991)], where the court refused to apply North Carolina law. Brown was a partner in the Mobile, Ala., office of CBH, which was headquartered in North Carolina. CBH's partnership agreement provided that it was governed by North Carolina law. Accountants could not solicit or perform services for three years, nor provide services for any firm client without CBH's prior written consent. If the covenant was invalid under Alabama law, Brown would have to purchase the clients he serviced. The Alabama court held that this "buy-sell" of clients was tantamount to a noncompete provision; that the parties were clearly trying to circumvent Alabama law; and that Alabama had a materially greater interest than North Carolina because the covenant was against an Alabama resident.