

AN ALERT FROM THE BDO FEDERAL TAX PRACTICE

BDO KNOWS:

FEDERAL TAX

► SUBJECT

IRS CONSIDERING INCREASED REPORTING OF TAXPAYERS' UNCERTAIN TAX POSITIONS

► AFFECTING

Taxpayers with assets over \$10 million and with at least one uncertain tax position that is required to be disclosed on the proposed new form

► DETAILS

IRS CONSIDERING HEIGHTENED DISCLOSURE OF TAXPAYERS' UNCERTAIN TAX POSITIONS

On January 26, 2010, the Internal Revenue Service issued Announcement 2010-9, in which the Service has indicated that it is considering changes to reporting requirements regarding certain taxpayers' uncertain tax positions. The Service is developing a new tax-reporting schedule with which taxpayers would report with their annual federal income tax return their uncertain tax positions and the potential magnitude of tax positions.

In announcing the changes it is considering, the Service refers to the requirement under Financial Accounting Standards Board Interpretation No. 48, Accounting for Uncertainty in Income Taxes, an Interpretation of FASB Statement No. 109 ("FIN 48"),¹ that taxpayers identify and quantify their uncertain tax positions for financial accounting purposes. The Service believes that the information reported under FIN 48 would assist in the examination of tax returns by bringing to light areas of interest or magnitude to warrant further inquiry, as well as assisting examination teams in identifying all issues more efficiently.

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¹ Under the codification of accounting standards, the relevant portions of FIN 48 are not contained in Accounting Standards Codification subtopic 740-10, *Income Taxes*. FASB ASC 740-10.



CONTACT:

TODD SIMMENS

Partner, National Tax Services
90 Woodbridge Center Drive, Suite 400
Woodbridge, NJ 07095
tsimmens@bdo.com - 732-491-4170

KEVIN ANDERSON

Partner, National Tax Services
7101 Wisconsin Avenue, Suite 800
Bethesda, MD 20814
kanderson@bdo.com - 301-634-0222

LES WILLIFORD

Partner, Tax Services
1100 Peachtree Street, Suite 700
Atlanta, GA 30309
twilliford@bdo.com - 404-979-7140

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The Service is developing a schedule to be filed with the taxpayer's corporate income (or other business) tax return, which would require taxpayers to provide the following information:

- (1) a concise description of each uncertain tax position for which the taxpayer or a related entity has recorded a reserve in its financial statements, and
- (2) the maximum amount of potential federal tax liability attributable to each uncertain tax position (determined without regard to the taxpayer's risk analysis regarding its likelihood of prevailing on the merits).

In addition to positions disclosed by taxpayers under FIN 48, the Service's new policy would require taxpayers to disclose positions where the taxpayer has not recorded a tax reserve because either it expects to litigate the position or it has determined that the Service has an administrative practice or precedent not to examine the position.

Currently, the Service expects the description of any uncertain tax position to contain the following information:

- (1) The Code sections potentially implicated by the position;
- (2) A description of the taxable year or years to which the position relates;
- (3) A statement that the position involves an item of income, gain, loss, deduction, or credit against tax;
- (4) A statement that the position involves a permanent inclusion or exclusion of any item, the timing of that item, or both;
- (5) A statement whether the position involves a determination of the value of any property or right; and
- (6) A statement whether the position involves a computation of basis.

In addition, the Service would require that the taxpayer indicate for each uncertain tax position what would be the entire amount of federal income tax that would be due if the uncertain tax position were disallowed in its entirety.

The Service is also evaluating whether to recommend to Congress new penalties for taxpayers that do not file the schedule or adequately disclose their uncertain tax positions.

The new schedule would be required of taxpayers with assets greater than \$10 million and at least one uncertain tax position. (These taxpayers are subject to the jurisdiction of the Large and Mid-Size Business Division of the Service.) While it is unclear from the Announcement when the first such schedules will be required to be filed by taxpayers, the Commissioner indicated on January 26 during a press briefing call that the new reporting regime "certainly won't be in effect for this filing season." See "Shulman Says IRS to Propose Reporting of Uncertain Tax Positions with Returns," 16 DTR GG-1 (BNA Daily Tax Report, Jan. 27, 2010).

IRS POLICY OF RESTRAINT WOULD REMAIN IN FORCE

Under the Service's "policy of restraint," examination personnel generally will not request a taxpayer's tax accrual workpapers unless there are "unusual circumstances" (such as the need for additional facts), the taxpayer has participated in listed transactions, or there are reported financial irregularities with respect to the taxpayer. (The Service's current tax accrual workpaper policy is contained in Internal Revenue Manual section 4.10.20, which is available on the IRS Web site.)

Announcement 2010-9 provides that, although the Service is developing reporting schedules for taxpayer disclosure of uncertain tax positions, the Service does not intend to depart from its policy of restraint in requesting taxpayers' tax accrual workpapers.

To expedite the development of this reporting schedule and to allow for reporting as soon as the new schedule is published, the Service has requested public comments by March 29, 2010, regarding the kinds of information that should be sought by the Service and the content of a new reporting schedule.

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PRIVILEGE CASE PURSUED IN SUPREME COURT

In further developments related to the Service's requests for tax accrual workpapers, in *United States v. Textron*, the United States Court of Appeals for the First Circuit (based in Boston) in August 2009 denied Textron's claim of work product protection as to certain documents contained in Textron's 2001 tax accrual workpapers, which were sought by the Service. On December 24, 2009, Textron filed a petition for certiorari asking the Supreme Court to weigh in. Amicus briefs have been filed by several outside interests including the Tax Executives Institute, Inc., the Council on State Taxation, the Chamber of Commerce of the United States of America, the American Bar Association, the Association of Corporate Counsel, and one law firm.

To ensure compliance with Treasury Department regulations, we wish to inform you that any tax advice that may be contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

Material discussed in this tax alert is meant to provide general information and should not be acted on without professional advice tailored to your firm's individual needs.