

January 26, 2010

IRS Announces It Will Require the Disclosure of Uncertain Tax Positions

In a speech today before the New York State Bar Association, IRS Commissioner Douglas Shulman announced that, for certain corporations and other business taxpayers, it will require disclosure of uncertain tax positions on tax returns, but that it is otherwise retaining its policy of restraint on requesting tax accrual workpapers. In Announcement 2010-9 (Jan. 26, 2010), which was released contemporaneously with the text of the Commissioner's speech, the IRS stated that the new requirement would apply to corporations and other business taxpayers who have assets of more than \$10 million and who prepare (or are included in) financial statements for which U.S. federal income tax reserves are determined under FIN 48 or other similar accounting standards.

Taxpayers impacted by the Announcement will be required to annually disclose uncertain tax positions with their tax returns. Uncertain tax positions include those for which a reserve must be established under FIN 48 or other accounting standards, as well as other positions related to the determination of any federal income tax liability for which a taxpayer (or a related entity under Internal Revenue Code § 267(b), 318(a) or 707(b)) has not recorded a tax reserve because: (1) the taxpayer expects to litigate the position; or (2) the taxpayer has determined that the IRS has a general administrative practice not to examine the position.

The description of each uncertain tax position must contain: (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. For each uncertain tax position, the taxpayer must also disclose the entire amount of federal income tax that would be due if the position were disallowed in its entirety on audit; i.e., the maximum tax adjustment for the position reflecting all changes to items of income, gain, loss, deduction or credit if the position is not sustained.

The IRS will publish a Notice of Proposed Rulemaking and may seek legislation imposing a penalty for failure to file the schedule or to make adequate disclosure. The IRS intends to publish the new schedule as quickly as possible, and will mandate its use for returns filed after the release of the schedule. The IRS has solicited comments on the proposal described in the Announcement, which must be submitted by March 29, 2010.

The Announcement is the latest salvo in the battle over tax accrual workpapers, and comes while Textron's petition for certiorari is still pending in the U.S. Supreme Court. A response to Textron's petition is due February 26, 2010. *Textron v. Commissioner*, Dkt. No. 09-750. If the Supreme Court agrees to review the *Textron* decision, it could impact the IRS's ability to require the disclosure specified in the Announcement. But any decision on the merits is unlikely to be issued in 2010, meaning that for 2009 returns filed after the issuance of the new schedule, disclosure likely will be required even though the work-product issues involved would not have been definitively resolved.

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If you have any questions regarding this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Jerome B. Libin	202.383.0145	jerome.libin@sutherland.com
Michael R. Miles	202.383.0204	michael.miles@sutherland.com
Mary E. Monahan	202.383.0641	mary.monahan@sutherland.com
Christopher Ocasal	202.383.0818	chris.ocasal@sutherland.com
Marc A. Simonetti	212.389.5015	marc.simonetti@sutherland.com
Carol P. Tello	202.383.0769	carol.tello@sutherland.com