

## New IRS Rules Will Require Businesses to Disclose Uncertain Tax Positions

The Internal Revenue Service (“IRS”), on January 26, 2010, issued Announcement 2010-9, which describes its intention to require certain business taxpayers to file a schedule with their income tax returns providing information about uncertain tax positions that affect their U.S. federal income tax liability. The schedule would be filed with the Form 1120 (U.S. Corporation Income Tax Return) or other business tax returns, including, presumably, Form 1120F (for non-U.S. corporations doing business in the United States) and Form 1120-REIT. The new rules would affect business taxpayers with total assets in excess of \$10 million.

Uncertain tax positions will include:

- those with respect to which the taxpayer has recorded a tax reserve in its financial statements (under FIN 48, IFRS or other accounting standards), and
- ones for which a taxpayer or related entity has not recorded a tax reserve because:
  - the taxpayer expects to litigate the position, or
  - the taxpayer has determined that the Service has a general administrative practice not to examine the position.

The schedule will require a concise description of each uncertain tax position in sufficient detail so that the IRS can determine the nature of the issue. This will include the rationale for the position and a concise general statement of the reasons for determining that the position is an uncertain tax position. In addition, the schedule will require the taxpayer to specify, for each uncertain tax position, the maximum amount of potential U.S. federal tax liability attributable thereto (determined without regard to the taxpayer’s risk analysis regarding its likelihood of prevailing on the merits).

The IRS is considering additional options for penalties or sanctions to be imposed for failure to make adequate disclosure of the required information regarding uncertain tax positions, including seeking legislation to impose a penalty for failure to file or to make adequate disclosure. Except as described in the announcement, however, the IRS intends to retain what it describes as the “existing policy of restraint,” as disclosed in prior announcements, for requesting tax accrual workpapers during the course of an audit, subject to continuing review of this policy.

The IRS intends to publish the new schedule as quickly as possible, and is inviting comments (including as to whether there should be transitional rules or a change in the \$10 million total assets threshold, or if the type of information or methods of disclosure should be modified from what has been announced) to be submitted by March 29, 2010. The intent is to mandate that the new schedule be filed with returns filed after the release of the new schedule. Ideally, from the point of view of the IRS, this would mean

that the schedule would need to be filed beginning this year. However, the IRS Commissioner has indicated that this may be an ambitious time frame and that, realistically, the requirement may not be effective until 2011. A formal effective date announcement will be forthcoming at some point after the period for comments has expired.

Clients with questions regarding these upcoming new disclosure requirements are invited to consult a member of the Tax Department.

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