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## HISTORIC IRS PROPOSAL WOULD FORCE CORPORATE TAXPAYERS TO FILE DETAILED “ROAD MAP” FOR UNCERTAIN TAX POSITIONS

On January 26, 2010, IRS Commissioner Douglas Shulman announced a sweeping and unprecedented proposal that would require corporate taxpayers to disclose their “uncertain tax positions” on a new schedule that would be attached to their federal tax returns. The schedule would be required to accompany a corporate taxpayer’s Form 1120, and would require a concise description of any uncertain tax positions as well as information about their magnitude. The IRS is also evaluating whether to seek legislation that would impose a penalty for failure to file the schedule or to make adequate disclosure. The general background and intended scope of the IRS’ proposal is set forth in Announcement 2010-9, and the IRS is seeking comments on the proposal by March 29, 2010.

The Commissioner has reportedly stated that the plan is intended to help the IRS determine the nature and materiality of a taxpayer’s uncertain tax positions when making audit decisions. The Commissioner has further indicated that the proposed schedule would seek only brief descriptions of a taxpayer’s uncertain positions, and that the anticipated incremental burden should not be excessive for taxpayers that have already complied with FASB Interpretation No. 48 (FIN 48) or other similar accounting standards. Although the effective date for the proposal is currently unclear, the Commissioner also stated that the proposal would not be in effect for the current filing season.

According to Announcement 2010-9, the schedule would require (i) a concise description of each uncertain tax position for which the taxpayer or a related entity has recorded a reserve under FIN 48 or other accounting standards in its financial statements and (ii) 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, the proposed schedule would require disclosure of uncertain tax positions for which a taxpayer or related entity has not recorded a reserve because either the taxpayer expects to litigate the position, or the taxpayer has determined that the IRS has a general administrative practice not to litigate the position. A related entity for these purposes will be determined under IRC Sections 267(b), 318(a), or 707(b), and the IRS has indicated that the filing requirements will apply to taxpayers with total assets in excess of \$10 million if the taxpayer has one or more uncertain tax positions of the type required to be disclosed on the schedule.

As generally noted above, the proposed schedule would require a concise description of each uncertain tax position in sufficient detail so that the IRS can determine the nature of the issue. Also, according to Announcement 2010-9, the concise description must contain the rationale for the position and a general statement of the reasons for determining that the position is an “uncertain tax position.” To be sufficient, the description must also contain:

- the Internal Revenue Code Sections potentially implicated by the position;
- a description of the taxable year or years to which the position relates;
- a statement that the position involves an item of income, gain, loss, deduction, or credit against tax;
- a statement that the position involves a permanent inclusion or exclusion of any item, the timing of that item, or both;

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- a statement whether the position involves a determination of the value of any property or right; and
- a statement whether the position involves a computation of basis.

In Announcement 2010-9, the IRS also acknowledges that a wide range of significant and difficult issues will need to be clarified to enable taxpayers to properly prepare the schedule, including:

- how the maximum tax adjustment should be reflected on the schedule (e.g., specific dollar amount or a range);
- whether the calculation of the maximum tax adjustment should relate solely to the tax period for which the return is filed or to all periods to which the position relates, and whether net operating losses or excess credits should be taken into account in determining the maximum tax adjustment;
- whether the \$10 million total asset threshold is appropriate, and how it should be modified or applied to either include or exclude certain business taxpayers;
- how the related entity rules should be applied; and
- how the schedule should be applied to taxpayers that initially did not record a reserve for an issue, but in later years do record a reserve.

At this point, the proposal is in its infancy, and significant ongoing commentary and outcry from the corporate taxpayer community can be expected in the coming months. In addition, the proposal appears to represent an attempt by the IRS to effectively create an end-run around its historic “policy of restraint” as applied to tax accrual workpapers and the recent string of intense litigation over that policy in the highly publicized *Textron* case and other cases.

Now, more than ever, taxpayers should ensure that they have established rigorous procedures and best practices through which they can ensure both the continuous identification of all “tax positions,” as well as the ongoing “level” of such positions in light of applicable law.

Please feel free to contact HRO tax partner David Strong (contact information listed in the margin of this Alert) to discuss the general background and scope of Announcement 2010-9, and what affected corporate taxpayers can do now to properly prepare for the significant changes that may ultimately flow from it.

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