

TAX SHELTER DISCLOSURE FOR CONFIDENTIALITY AGREEMENTS

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The IRS recently finalized regulations requiring taxpayers to disclose, and promoters and tax advisers to keep lists with respect to, transactions that fall into any one of six categories. One of the categories is transactions that are offered to taxpayers under conditions of confidentiality; the IRS is apparently concerned that confidentiality imposed for the benefit of a tax adviser indicates potential abuse (i.e., a confidentiality agreement designed to protect a marketed tax strategy). The regulations as drafted, however, define conditions of confidentiality in a very broad manner. Under these regulations, a transaction is deemed confidential if "the taxpayer's disclosure of the tax treatment or the tax structure of the transaction is limited in any manner by an express or implied understanding or agreement with or for the benefit of any person who makes or provides a statement...to the taxpayer...as to the potential tax consequences that may result from the transaction..."

There is a safe harbor for M&A transactions whereby a transaction will not be deemed confidential if "the taxpayer is permitted to disclose the tax treatment and tax structure of the transaction no later than the earlier of the date of the public announcement of discussions relating to the transaction, the date of the public announcement of the transaction, or the date of the execution of an agreement (with or without conditions) to enter into the transaction." Thus, the following language, to be inserted in M&A confidentiality agreements, is intended to make the transaction fall within the scope of this safe harbor, in which case the transaction will not be deemed confidential, and taxpayers will not have disclosure obligations (and tax advisers and promoters will not have listing requirements).

Notwithstanding anything herein to the contrary, any party to this Agreement (and any employee, representative, or other agent of any party to this Agreement) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement (the "Transactions") and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure; provided, however, that such disclosure may not be made (i) until the earlier of (x) the date of the public announcement of discussions relating to the Transactions, (y) the date of the public announcement of the Transactions and (z) the date of the execution of an agreement to enter into the Transactions and (ii) to the extent required to be kept confidential to comply with any applicable federal or state securities laws.

The new regulations apply to transactions entered into on or after March 4, 2003. You may be working on transactions that have not yet been entered into, but for which confidentiality agreements have already been signed (without the above language). In such event, the above highlighted language should be incorporated into the next agreement entered into with respect to the transaction. If that agreement entered into is the execution of the definitive transaction agreement then the following language should be used for that document.

Notwithstanding anything herein to the contrary, any party to this Agreement (and any employee, representative, or other agent of any party to this Agreement) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure. However, any such information relating to the tax treatment or tax structure is required to be kept confidential to the extent necessary to comply with any applicable federal or state securities laws.

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