IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI, Appellant, v. PRICEWATERHOUSECOOPERS, LLP, Respondent.	Electronically Filed Apr 08 2024 10:29 PM Elizabeth A. Brown Clerk of Supreme Court Supreme Court No: 86317 87375 87835

Appeal from the District Court of Clark County, Nevada

District Court Case No. A-16-735910-B

APPELLANT'S APPENDIX TO OPENING BRIEF

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on this 8th day of April, 2024, I caused service of a true and correct copy of the above and APPELLANT'S APPENDIX TO OPENING BRIEF pursuant to the Supreme Court Electronic Filing System to the following:

ALL COUNSEL ON SERVICE LIST

/s/ Kaylee Conradi
An employee of Hutchison & Steffen PLLC

me in November of 2007, I was told that Fortrend -- we were always wondering why Midcoast dropped out.

And I was told that Fortrend claimed a million dollar deduction on one of their tax returns. And after they investigated it, they determined that the million dollars was paid to Midcoast to get out of the deal.

THE COURT: Oh, I see. So nobody from your side paid Midcoast?

THE WITNESS: Oh, no, no, no, no, no, no. Fortrend paid Midcoast to back away from the deal. Matter of fact --

THE COURT: And you learned that relatively recently?

THE WITNESS: I learned that in 2000- -- well, I learned that, yeah, way after the transaction was done. If I would have known that, you know, could a, would a, should a.

THE COURT: Okay. And just a couple questions about the purchase price for Westside. As I understand it at the point the stock sale closed, Westside had no assets except about $40.5 million of cash and it had tax liabilities?

THE WITNESS: Correct.

THE COURT: And they were computed to be

about 16.8 million?

THE WITNESS: Well, that's what our guys computed --

THE COURT: Right.

THE COURT: -- them to be.

THE COURT: So that would mean that it had a shareholder equity of 23.7 million, give or take?

THE WITNESS: If -- assuming that there were no other deductions or setoffs or anything else.

THE COURT: Well, I think they had to be taken into account. I think our guys had plugged in a small bad debt deduction and other stuff and they determined that your liability -- Westside's liability would have been 16.8 million.

THE WITNESS: Yeah. If we would have -- if we would --

THE COURT: If you had, right.

THE WITNESS: -- if we would have done it, yes, it would have been that.

THE COURT: Now, why did you think that Fortrend was willing to pay you 34.6 million, which is 11 million more than the value of the company?

THE WITNESS: Because we believed that they had some type of strategy for reducing the $16 million down to some lower number. And we were told

that they were in the debt collection business. And I know a little bit about bad debt. You know, I collected a lot of bad debt in my time and I got stuck with a lot of bad debt, too. So I know that on many occasions, bad debt is deductible.

So, you know, and that's -- again, that's the reason why I hired PWC and why I hired Hahn Loesure was to basically figure that out. Tell me what -- make sure that this is okay, you know what I mean?

THE COURT: You know, a lot of times companies will pay premiums to buy ongoing companies with good technology. But why would a company pay an $11 million premium to buy a company whose only asset was cash?

THE WITNESS: Well, I know that if, for example -- and I'll give you an example. If I had a lot of loss trapped somewhere and I wanted to cash out my loss, that would be a way to do it.

THE COURT: So you'd buy a tax liability, you're saying?

THE WITNESS: Basically. I don't know how that would work technically to be able to make it work. But that would -- that would certainly allow you to do that.

THE COURT: And why did Fortrend tell you that they wanted to buy your company?

THE WITNESS: Why -- they never told me why they wanted to buy it. They just came to me and said we want to buy your company. My guess was that they were looking for a way to cash out losses.

THE COURT: And I think you said your understanding was that Nob Hill, the acquisition vehicle, was going -- initially you thought was going to borrow all the money to acquire Westside.

THE WITNESS: That was my understanding originally, yeah. I didn't find out about the 5 million until this case.

THE COURT: But Westside's only asset was cash. Why would somebody want to borrow $34 million in cash to acquire cash?

THE WITNESS: Well, they were getting more cash than they were borrowing. They were getting 5-some million dollars more --

THE COURT: And they had a --

THE WITNESS: -- than they were borrowing.

THE COURT: -- $16 million tax liability --

THE WITNESS: I understand. But if they could have reduced the $16 million tax liability to 4, they would have been a million ahead and they

would have cashed out a million dollars' worth of losses.

So it's not for me to explain. I mean, I'll try the best I can. But I don't know what was behind the door there. I do know that people have propriety strategies for dealing with hazardous waste, for dealing asbestos removal. And there are a lot of situations where people buy companies that have, for example, large obligations and will pay more than what the obligation is because they have a technology for reducing the obligation.

THE COURT: Companies sometimes will write off assets if I owned a company. But writing up a liability seems very unusual why you would -- you would voluntarily incur a liability of $16 million.

THE WITNESS: That's a question --

THE COURT: If you only get $5 million for it.

THE WITNESS: That's a question that if they were in this courtroom today, that would be a question that you could ask them.

THE COURT: But you're a sophisticated guy. Didn't any of this seem fishy to you?

THE WITNESS: That's why I -- that's why I hired one of the largest accounting firms in the

country. That's why I hired an accounting -- or a law firm that I had been with for 20 years was to look at this. That's exactly why I did it.

Otherwise, I would have just -- if it didn't seem fishy to me, I would have just done the deal and I wouldn't have spent what I spent in terms of analyzing the deal.

So, you know, you scratch your head and you look and you say could a, would a, should a. What -- what more could I have done to vet this deal?

I go to the largest -- one of the largest accounting firms in the country, Big 4. I go to my lawyer for 20 years. They both tell me it's a good deal. There's nothing wrong with it. We don't see any problem with it.

I'm not a tax guy. Tax law is like Chinese to me. So when I go -- if I don't understand something, I hire somebody that does. And I did. And not only did I hire one person, but I hired two and I got the same response from both of them.

THE COURT: Well, didn't PWC tell you that the apparent plan by Nob Hill or Fortrend involved a very aggressive tax strategy that's vulnerable to IRS challenge?

THE WITNESS: They didn't tell me that.

(Whereupon, page 202 and continuing are attached under separate cover.)

CERTIFICATE OF TRANSCRIBER AND PROOFREADER

CASE NAME: Michael A. Tricarichi v. Commissioner

DOCKET NO.: 23630-12

We the undersigned, do hereby certify that the foregoing pages, numbers 101 through 201, inclusive, are the true, accurate and complete transcript prepared from the verbal recording made by electronic recording by Natasha Thomas on June 9, 2014, before the United States Tax Court at its session in Washington, DC, in accordance with the applicable provisions of the current verbatim reporting contract of the Court, and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.

Lisa Beauchamp 7/2/14

Lisa Beauchamp July 2, 2014

(Transcriber) (Date)

Connie Armstrong 7/8/14

Connie F. Armstrong 7/8/14

(Proofreader) (Date)

EXHIBIT 6

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MICHAEL A. TRICARICHI, TRANSFEREE
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 23630-12

COMMISSIONER OF INTERNAL REVENUE,
Respondent

SIMULTANEOUS ANSWERING BRIEF

SERVED Nov 13 2014

UNITED STATES TAX COURT

MICHAEL A. TRICARICHI, TRANSFEREE,	)	
	)	
Petitioner,	)	Docket No. 23630-12
	)	
v.	)	**Judge Albert G. Lauber**
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	**Filed Electronically**
Respondent.	)	

PETITIONER'S SIMULTANEOUS ANSWERING BRIEF

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PETITIONER'S OBJECTIONS TO RESPONDENT'S PROPOSED FINDINGS OF FACT

In accordance with Tax Court Rule 151(e)(3), petitioner submits the following objections to respondent's proposed findings of fact and, where appropriate, sets forth alternative proposed findings of fact.

1-10.	No objection.
11.	Petitioner objects on the basis that the proposed finding is not supported by the record.
12.	No objection, but clarifying that West Side realized taxable income rather than taxable gains.
13.	Petitioner objects on the basis that the proposed finding is a legal conclusion.
14.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that West Side, petitioner, and their attorneys knew that the PUCO settlement proceeds could result in a substantial tax liability for West Side unless reduced by appropriate deductions or credits.
15.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that petitioner understood that if West Side was liquidated two levels of taxation could be incurred unless reduced by appropriate deductions or credits.
16-21.	No objection.
22.	No objection but clarifying that Hahn Loeser began its work on the potential tax implications of the PUCO Litigation as the PUCO settlements were not reached until April 2003.
23-30.	No objection.
31.	No objection but clarifying that Hahn Loeser did not bill petitioner for work through January 27, 2003, rather than through January 30, 2003.
32-35.	No objection.
36.	No objection but clarifying that Hahn Loeser resumed billing petitioner for work starting on January 28, 2003, rather than on January 31, 2003.
37.	No objection.
38.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
39-41.	No objection.

42.	No objection but clarifying that Mr. Simms resumed research on January 28, 2003, rather than on January 31, 2003.
43.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
44.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
45-52.	No objection.
53.	No objection but clarifying that the fourth issue that petitioner needed assistance with was other steps to mitigate the tax liability if the stock was not sold and West Side continued to operate.
54-59.	No objection.
60.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that Fortrend explained to petitioner that it could offset the taxable income with losses thereby reducing it to a level that would be paid. (Tr. 173:25 to 174:20)
61-63.	No objection.
64.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that petitioner crossed out the language to ensure that both PWC and Hahn Loeser would consider the issue of whether the stock sale would be a reportable transaction. (Tr. 192:1 to 192:22)
65.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that Hahn Loeser did in fact research and consider whether the stock sale would be a reportable transaction. (Ex. 102-J, at 5, 7)
66-79.	No objection.
80.	No objection but clarifying that the facts assumed by PWC were hypothetical.
81.	No objection.
82.	No objection but clarifying that the facts assumed by PWC were hypothetical.
83.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that PWC stated that the loss generated by the hypothetical transaction "was subject to IRS challenge," in that the IRS could "push the deduction" to a post-stock sale time period or challenge the character of the loss. (Ex. 25-J, at 3).
84.	No objection but clarifying that PWC made a statement based on hypothetical facts.

85.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
86.	No objection.
87.	No objection but clarifying that PWC also could not provide an opinion on the legitimacy of the bad debt deduction because the transaction was not consummated until two months after the stock sale. (Ex. 66-J, at 9)
88.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
89.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
90.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
91-92.	No objection.
93.	No objection but clarifying that PWC's understanding was with respect to Notice 2001-16 generally and not with respect to the proposed stock sale transaction.
94.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
95.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
96-101.	No objection.
102.	No objection, but clarifying that the risk was with respect to whether the IRS would respect the proposed stock sale for federal income tax purposes, with the consequence if it did not being that a portion of the stock sale proceeds could be subject to tax at ordinary rates.
103-106.	No objection.
107.	No objection but clarifying that the interests were actual, not ostensible.
108-110.	No objection.
111.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that from petitioner's perspective the percentage of estimated tax liabilities was a result of, rather than the determinant of, the negotiated stock purchase price. (Tr. 154:9 to 154:21)
112-113.	No objection.
114.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that from petitioner's perspective, the Fortrend premium was a result of, rather than the determinant of, the negotiated stock purchase price. (Tr. 154:9 to 154:21)

115.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
116-124.	No objection.
125.	No objection but clarifying that the loans were bona fide shareholder loans, not purported loans.
126.	No objection but clarifying that the loans were bona fide shareholder loans, not purported loans.
127.	No objection but clarifying that the transfers were pursuant to bona fide loans, not purported loans.
128.	No objection.
129.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence as no evidence was presented that Nob Hill was a special purpose shell entity.
130-134.	No objection.
135.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence as no evidence was presented that Nob Hill's only asset consisted of its newly created bank account at Rabobank.
136-147.	No objection.
148.	No objection but clarifying that the Rabobank loan was a bona fide loan, rather than a purported loan.
149-154.	No objection.
155.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
156-157.	No objection.
158.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
159.	No objection.
160.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
161.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
162.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
163.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
164.	No objection but clarifying that when effective, the West Side control agreement did not constitute a "transfer" from West Side under the Ohio Fraudulent Transfer Act.
165.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
166.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
167-171.	No objection.

172.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
173.	No objection.
174.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
175.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
176.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
177-182.	No objection.
183.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
184-185.	No objection.
186.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
187.	No objection.
188.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
189-190.	No objection.
191.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
192.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
193.	No objection.
194.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
195-198.	No objection.
199.	Petitioner objects on the basis that the proposed finding is a legal conclusion.
200-212.	No objection.
213.	Petitioner objects on the basis that the proposed findings are legal conclusions.
214.	Petitioner objects on the basis that the proposed findings are legal conclusions.
215.	Petitioner objects on the basis that the proposed findings are legal conclusions.
216.	Petitioner objects on the basis that the proposed findings are legal conclusions.
217.	Petitioner objects on the basis that the proposed findings are legal conclusions.
218.	Petitioner objects on the basis that the proposed findings are legal conclusions.
219.	Petitioner objects on the basis that the proposed findings are legal conclusions.
220.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.

221.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
222.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
223-225.	No objection.
226.	No objection but clarifying that the date was March 28, 2008, rather than March 28, 2006.
227.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
228.	No objection.
229.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
230-232.	No objection.
233.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
234.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
235.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
236.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
237.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
238-239.	No objection.
240.	No objection but clarifying that petitioner engaged Hahn Loeser and PWC to analyze the stock sale proposals and, after conducting their review, the advisors concluded that it was a good deal. (Tr. 199:12 to 199:16)
241.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
242.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
243.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
244-248.	No objection.
249.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
250.	No objection.
251.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
252.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
253.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.

254.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
255.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
256.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
257.	No objection.
258.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
259-260.	No objection.
261.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
262.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
263.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
264.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
265.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
266.	No objection, but clarifying that West Side was solvent at the time petitioner was paid for his West Side stock. (Tr. 873:5 to 873:12)
267.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
268.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
269.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
270.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
271.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
272-274.	No objection.
275.	No objection, but clarifying that if respondent intended to state that petitioner did not conduct any due diligence on MidCoast or Fortrend, that proposed finding mischaracterizes the evidence.
276-278.	No objection.
279.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
280-281.	No objection.

282.	No objection, but clarifying that petitioner knew it was a possibility that the IRS could assert that the transaction was not a stock sale but instead a liquidation and that the consequence would be a recharacterization of a portion of the stock sale proceeds as ordinary income rather than capital gain taxed at preferential long-term capital gain rates.
283.	No objection, but clarifying that PWC's business purpose inquiry properly focused on petitioner's purpose for selling his stock.
284.	Petitioner objects on the basis that the proposed finding is not supported by the record.
285.	Petitioner objects on the basis that the proposed finding is not supported by the record.
286.	Petitioner objects on the basis that the proposed finding is not supported by the record.
287.	Petitioner objects on the basis that the proposed finding is based on opinion and not fact.
288.	No objection but clarifying that PWC's belief was only with respect to a hypothetical transaction.
289-290.	No objection.
291.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
292-298.	No objection.
299.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that Mr. Klink identified a covenant regarding the buyer agreeing not to engage in a reportable transaction as a "key remaining open issue." (Ex. 99-J, at 146)
300-309.	No objection
310.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
311.	No objection to the first sentence. Petitioner objects to the second sentence on the basis that the proposed finding is a legal conclusion.
312.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
313-317.	No objection.
318.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence.
319-325.	No objection.

326.	Petitioner objects on the basis that the proposed finding mischaracterizes the evidence and submits that section 3(y) of the stock purchase agreement relates to reportable transactions generally, not "listed" transactions and that the concern expressed was with respect to reportable "loss transactions" and reportable "significant book-tax difference transactions," not "listed transactions."
327-332.	No objection.
333.	Petitioner objects on the basis that the proposed finding is a legal conclusion.
334.	Petitioner objects on the basis that the proposed finding is not supported by the record.
335.	Petitioner objects on the basis that the proposed finding is not supported by the record.
336.	Petitioner objects on the basis that the proposed finding is not supported by the record
337.	Petitioner objects on the basis that the proposed finding is not supported by the record and is a legal conclusion.
338.	Petitioner objects on the basis that the proposed finding is not supported by the records and is a legal conclusion.
339.	Petitioner objects on the basis that the proposed finding is not supported by the record and is a legal conclusion.

ARGUMENT

Respondent's opening brief advances three theories for holding petitioner liable for West Side's unpaid taxes, but fails to address key facts unique to this case that preclude imposition of transferee liability. Most notably, respondent fails to address the fact that petitioner was paid for his West Side stock before the allegedly fraudulent transfer of funds from West Side, which was made solely at the direction of the company's new owner. Because petitioner was paid before the West Side transfer, he did not receive "property . . . of a taxpayer" in connection with the stock sale as required by Code section 6901(a)(1)(A)(i). Accordingly, respondent's direct and transferee-of-transferee theories of recovery must fail.

The factual disconnect in respondent's case cannot be overcome by his alternative liquidation in substance theory because the evidence is uniform in showing that petitioner sold his West Side stock to maximize the return on his investment, not for the sole purpose of tax avoidance. This, together with uncontested evidence of West Side's post-stock sale business activities, defeats respondent's effort to invoke the substance over form doctrine to recharacterize the stock sale as a liquidation of West Side. Even if there was, in substance, a liquidating distribution from West Side, petitioner was not the recipient of that distribution. Finally, respondent's substance

over form theory is precluded by Ohio law because respondent cannot show actual or constructive knowledge of Fortrend's entire scheme to avoid payment of West Side's taxes.

I. Petitioner Did Not Receive "Property Of A Taxpayer" In Connection With The Sale Of His West Side Stock

In order to hold a person liable as a transferee for the unpaid income tax of "a taxpayer," respondent has the burden of proving that the person was in fact a transferee of property from that taxpayer. I.R.C. § 6901(a)(1)(A)(i). Thus, unless the substance over form doctrine applies (which it does not), in order to prevail in this case respondent must trace the purchase price petitioner received for his West Side stock to West Side, either directly or through Nob Hill under a transferee-of-transferee theory of liability. *See, e.g., Julia R. Swords Trust v. Comm'r*, 142 T.C. No. 19, slip op. at 57, 2014 U.S. Tax Ct. LEXIS 20, at *62 (May 29, 2014) (holding that no "transfer" occurred when the buyer "did not use [the corporation's] cash or its assets to purchase the stock from petitioner trusts; instead, it borrowed the funds from a third-party lender"). In other words, respondent must show that the $34,621,594.06

purchase price[1] paid to petitioner for his West Side stock was "property of West Side." It was not.

The record is unequivocal in showing that:

1. On September 8 and 9, 2003, $34.9 million in loan proceeds from Rabobank ($29.9 million) and Moffat International ($5 million) were deposited into a Nob Hill account at Rabobank (Stip. ¶¶ 71, 73; Exs. 43-J, 44-J, and 45-J);

2. On September 9, 2003, petitioner was paid $34,621,594.06 for his West Side stock through a transfer of funds from the Nob Hill account at Rabobank (Stip. ¶¶ 71, 73, 86);

3. The source of the stock purchase price was the Rabobank and Moffat International loan proceeds (Stip. ¶¶ 71, 73, 86);

4. Payment of the stock purchase price triggered the release from escrow of petitioner and Barbara Tricarichi's resignations as officers and directors of West Side (Stip. ¶¶ 84, 91; Ex. 1-J, at 110 to 114; Exs. 49-J and 50-J);

5. The resignations of petitioner and Barbara Tricarichi allowed the new owner of West Side to appoint John McNabola as the company's sole director and officer (Stip. ¶¶ 93, 95; Ex. 1-J, at 179 to 180 and 182-183); and

6. Mr. McNabola, in his newly secured position as president of West Side, (a) authorized and directed the transfer of $35 million in West Side funds to Nob Hill, its sole shareholder (Stip. ¶¶ 97, 98), and (b) encumbered West Side's assets with a security interest in favor of Rabobank (Stip. ¶ 70).

Because the only transfers and encumbrances of West Side's assets were made at the direction of Mr. McNabola, and because Mr. McNabola had no ability to act on behalf of West Side until

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[1]As discussed *infra*, the consideration petitioner received for his West Side stock included satisfaction of a $577,777.77 shareholder loan. For convenience, the $34,621,594.06 purchase price net of the loan satisfaction is referenced here in order to focus this discussion on the funds actually transferred in connection with the stock sale.

after payment of the stock purchase price to petitioner, it cannot be disputed that in form petitioner was paid for his stock with unencumbered loan proceeds, not with "property of West Side" as required by Code section 6901(a)(1)(A)(i).

Ohio law confirms that there was no "transfer" of West Side's property until after petitioner was paid for his stock. When petitioner was paid, West Side's assets (including funds in its Rabobank account) remained subject to perfection of claims against West Side by the company's creditors. Accordingly, at the time petitioner was paid for his stock, no "transfer" had been made by West Side within the meaning of Ohio Rev. Code Ann. § 1336.06(A)(1)(b). Under that statute, a "transfer" of property other than real property occurs only when "the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this [fraudulent transfer] chapter that is superior to the interest of the transferee." *Id.* No "transfer" of West Side's cash sufficient to defeat the creation of a security interest by West Side's creditors had occurred when petitioner was paid for his stock. *See* Exhibit 176-P, at 7 to 10. This, as a matter of state law, precludes any determination that payment of the stock purchase price was a "transfer" of West Side's property to petitioner. Moreover, under controlling Ohio law, Mr. McNabola's post-stock sale attempt to encumber West Side's assets never constituted a

"transfer" from West Side because no U.C.C. filing statement was ever filed. *Comer v. Calim*, 716 N.E.2d 245, 249 (Ohio Ct. App.) ("We hold, therefore, that, for purposes of the Ohio Fraudulent Transfer Act, the transfer of the asset to the trust did not occur until the filing of the U.C.C. financing statement."), *discretionary appeal denied*, 700 N.E.2d 334 (Ohio 1998).

Because payment of the stock purchase price to petitioner was not made, either directly or through Nob Hill, with "property . . . of a taxpayer" as required by Code section 6901(a)(1)(A)(i), respondent's theory of direct transferee liability must fail. Similarly, because respondent's transferee-of-transferee theory is premised on a showing that "property . . . of a taxpayer" was first transferred from West Side to Nob Hill and then transferred to petitioner, the fact that petitioner was paid for his stock with third-party loan proceeds prior to the initial transfer also defeats respondent's theory of transferee-of-transferee liability. Precedent from the Court of Appeals of Ohio requires that respondent show "sequential transfers" of West Side's property in order to recover from a "subsequent transferee." Specifically, the Court of Appeals of Ohio has held that in order for there to be a "subsequent transferee" within the meaning of Ohio Rev. Code Ann. § 1336.08, "there must have been a predecessor transferee"

with respect to the same property. *Eastern Savings Bank v. Bucci*, 2008 Ohio 6363, 2008 Ohio App. LEXIS 5319, at *33 (Dec. 4, 2008); *see also* Petitioner's Opening Brief, at 60-62 and the cases cited therein.[2]

A. Respondent's "Indirect Transfer" Arguments Are Misplaced

1. Respondent's Ordering of the Transfers is Wrong

Respondent first attempts to address the timing disconnect in his case by suggesting, in his proposed findings, a misleading and incorrect ordering of the events of September 9, 2003, which has cash being transferred from West Side to Nob Hill before petitioner was paid for his stock. Respondent's Request for Findings of Fact, ¶ 183. Respondent adopts the same

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[2]*But see Cullifer v. Comm'r*, T.C. Memo 2014-208, slip op. at 66, n.37 (noting that "[o]ur use of the words 'initial' and 'subsequent' does not signify a temporal relationship," and finding transferee-of-transferee liability notwithstanding the fact that the "'subsequent transfer' occurred *before* the 'initial transfer.'"). In *Cullifer*, the Court cited no authority for its holding on this point and did not address the definition of "transfer" under applicable state law or the fact that the temporal disconnect meant that no "property . . . of a taxpayer" was transferred to the petitioner, either directly or indirectly, as required by Code section 6901(a)(1)(A)(i). The statement in *Cullifer* is also inconsistent with the Court of Appeals of Ohio's decision in *Eastern Savings Bank*, discussed *supra*, and with this Court's expressed view at trial (which respondent acknowledged to be accurate) that transferee-of-transferee liability is predicated on a showing of "two sequential transfers." (Tr. 33:4 to 34:23). *See also Swords Trust*, 142 T.C. No. 19, slip op. at 57, 2014 U.S. Tax Ct. LEXIS 20, at *62 (declining to find a "transfer" where loan proceeds, rather than cash or other assets of the taxpayer, were used to acquire petitioner's stock).

misleading and incorrect ordering on brief. Respondent's Opening Brief, at 130.

Respondent's ordering of the transfers is simply wrong. The only transfer of West Side's assets was the transfer of cash to Nob Hill's account at Rabobank, which was authorized and directed only by the buyer's representative, Mr. McNabola, and which petitioner had nothing to do with, having already sold his West Side stock. (Stip. ¶¶ 97, 98; Exs. 43-J, 56-J and 58-J). As respondent has stipulated (Stip. ¶ 91), Mr. McNabola had no ability or authority to act on behalf of West Side in transferring or encumbering the company's assets until after petitioner was paid for his stock.

2. There Was No "Indirect" Transfer of West Side's Property to Petitioner or Transfer of West Side's Assets "for the Benefit of" Petitioner

Respondent next tries to overcome the timing disconnect by arguing, in two separate sections of his opening brief, that an "indirect transfer" was made by West Side for the benefit of petitioner. More specifically, respondent argues that, "[e]ven without recharacterizing the purported stock sale, West Side indirectly transferred" the stock purchase price to petitioner and, relatedly, argues that petitioner received the "benefit" of a transfer from West Side. Respondent's Opening Brief, at 86-89 and 128-32.

To make his indirect transfer argument, respondent cites a series of loan documents that he claims "stripped West Side of its control over the funds in its Rabobank account," thereby allowing the Court to disregard Nob Hill, Rabobank and Moffat International as the actual recipients of West Side's funds and somehow place those funds in petitioner's hands in the form of the stock purchase price. Respondent's Opening Brief, at 86-87 (citing Exs. 36-J, 37-J, 38-J, 39-J, 40-J, 41-J, 42-J, 56-J and 58-J). Because no U.C.C. financing statement was ever filed, these post-stock sale loan documents were never a "transfer" from West Side under the Ohio fraudulent transfer act. *Comer*, 716 N.E.2d at 249. Moreover, the referenced loan documents were all signed by Mr. McNabola who, as noted above, had no ability or authority to act on behalf of West Side until after petitioner was paid for his stock. Accordingly, the documents had no legal or practical effect at all until after the stock sale, breaking any connection between West Side's funds and the stock purchase price paid to petitioner.

Petitioner introduced expert evidence at trial conclusively establishing that, from a lending industry perspective, Nob Hill's lenders had no interest in West Side's cash or other assets until after the stock sale closed and petitioner had been paid. *See* Ex. 176-P, at 7 to 10. At trial, respondent not only

failed to refute or challenge this evidence, he declined even to examine it. (Tr. 1017:15 to 1017:16).

The case law cited by respondent does nothing to change the irrefutable fact that there was no "indirect transfer" of West Side's cash to petitioner. An indirect transfer can give rise to transferee liability if made for the benefit of a transferee, even if the transferee itself did not receive the taxpayer's property. For example, where a taxpayer's property is transferred to a creditor of the transferee to pay down the transferee's debt (or a debt guaranteed by the transferee), or the taxpayer's property is pledged or otherwise used to secure such a debt, an avoidable indirect transfer may exist. *See, e.g., Terry v. Meredith (In re Meredith)*, 527 F.3d 372, 375 (4th Cir. 2008); *In Permasteelisa CS Corp. v. Airolite Co.*, Case No. 2:06-cv-569, 2007 U.S. Dist. LEXIS 95860, at *17 n.3 (S.D. Ohio Dec. 31, 2007) (debtor corporation sold its assets and used the proceeds, in part, to pay off a corporate loan guaranteed by the alleged transferee). Those facts are not present here, nor is there any evidence that petitioner received a benefit of any kind from Mr. McNabola's transfer of West Side's cash to Nob Hill, or the attempted encumbrance of West Side's assets, given that petitioner had already been paid.

In a further effort to overcome the fatal timing disconnect, respondent cites a line of cases arising under the

Bankruptcy Code in support of a "dominion or control" test that has some surface similarity to the indirect transfer rule discussed above. In cases arising under 11 U.S.C. § 550,[3] courts have developed the "dominion or control" test to allow a court to disregard an entity that is in form the "initial transferee" of the debtor's property, thereby barring a trustee's recovery from that entity under 11 U.S.C. § 550. Rather than allowing recovery against an indirect transferee (which 11 U.S.C. § 550(a)(2) already does), the dominion or control test, where it applies, bars recovery from an initial transferee who would otherwise be liable under 11 U.S.C. § 550(a)(1) where the initial transferee can show that it received property of the debtor only in a custodial or fiduciary capacity and therefore never had an ownership interest in, or control over, that property.

Since this case does not involve an initial transferee seeking to escape liability under 11 U.S.C. § 550(a)(1), the relevance of the dominion or control test is unclear. Regardless, the cases cited by respondent illustrate that the test cannot apply to reorder the transfer from West Side and somehow connect it to the stock purchase price petitioner previously received for his stock. *See, e.g., Security First*

[3]Title 11 U.S.C. § 550 allows a bankruptcy trustee to avoid certain transfers made by a debtor and is similar to the remedies provided for under Ohio Rev. Code Ann. § 1336.08.

National Bank v. Brunson (In re Coutee), 984 F.2d 138 (5th Cir. 1993) ("dominion or control" test applied to deny recovery from a law firm that in form received debtor's funds as an "initial transferee" but held them in its client trust account with no "legal dominion or control" over them).

It cannot be disputed that, in form, petitioner was paid prior to the transfer from West Side authorized by Mr. McNabola and that, when paid, neither Nob Hill, Rabobank, nor Moffat International had any interest whatsoever in West Side's cash. Respondent concedes as much on brief. Respondent's Opening Brief, at 88 ("Because Nob Hill had no rights in West Side's cash, it cannot have been a transferor.") Accordingly, there was no transfer of "property of a taxpayer" to petitioner, nor did petitioner, in receiving the stock purchase price, ever have the benefit of (or dominion or control over) West Side's cash or other assets.

II. Respondent's Challenge to the $577,000 Shareholder Loan is Misplaced

Acknowledging his inability to show a transfer of West Side's property to petitioner in connection with the stock sale, respondent focuses significant attention in his Opening Brief on a $577,000 loan that West Side extended to petitioner in early 2003 for the purpose of purchasing a home in Las Vegas. While advances made pursuant to this loan were, unlike the stock sale,

a "transfer" from West Side, they provide no basis for transferee liability.

The $577,000 loan is typical of loans that closely-held companies routinely make to their shareholders. Respondent makes no argument on brief that the loan should be disregarded. *See, e.g., Estate of Chism v. Comm'r*, 322 F.2d 956, 960-61 (9th Cir. 1963) (existence of a bona fide shareholder loan turns on subjective intent of the parties regarding repayment); *Teymourian v. Comm'r*, T.C. Memo 2005-232 (citing *Estate of Chism* and other cases).

Under applicable law, the loan was bona fide in that it was evidenced by a written promissory note,[4] bore market-rate interest (interest that was in fact accrued and ultimately paid), and petitioner was fully capable of repaying the loan according to its terms. At all relevant times, both petitioner and West Side expected the loan to be repaid and the loan was in

[4]The promissory note is for $500,000 and does not reflect an additional $75,000 that West Side advanced to petitioner prior to the stock sale. The additional balance was, however, documented on West Side's balance sheet. (Ex. 1-J, at 40). A shareholder loan need not be evidenced by a promissory note to be a bona fide loan if, as in this case, the intent of the parties is clear that the loan would be repaid. *See Wentworth v. Comm'r*, T.C. Memo 1966-167, slip op. at 20 ("The presence or absence of notes, however, is not controlling.").

fact repaid in connection with the stock sale.[5] (Tr. 130:22 to 131:17) Under the subjective intent test, the loan was bona fide and cannot be ignored. *Estate of Chism*, 322 F.2d at 960-61.

Because petitioner and West Side entered into a bona fide loan arrangement in connection with the transfer, "reasonably equivalent value" was received by West Side in advancing funds to petitioner pursuant to the shareholder loan and those advances provide no basis for a finding of transferee liability. Ohio Rev. Code Ann. § 1336.03; *see also In re Jones*, 305 B.R. 276, 280 (Bankr. S.D. Ohio 2003)("Fair consideration is an absolute defense to a fraudulent conveyance action under Ohio law.").

While the existence of reasonably equivalent value alone defeats any theory of transferee liability with respect to the $577,000 loan, even if it did not, there is no basis for finding a fraudulent conveyance under Ohio law. West Side was, at the time the loan proceeds were advanced, fully solvent; respondent has not argued or shown otherwise. Nor has respondent argued or shown that West Side was, at the time of the advances, considering any kind of transaction that might leave it unable

[5]The fact that, after the stock sale, West Side and its new managers and owners failed to negotiate the check that petitioner endorsed over to satisfy the loan (Ex. 1-J, at 129), has no bearing on the subjective intent of the parties to the loan agreement at the time it was entered into.

to pay its debts as they became due. There is also no argument or evidence of an actual intent by West Side to defraud any creditor in connection with the loan advances. Ohio Rev. Code Ann. §§ 1336.04 and 1336.05.

III. Respondent's Transferee-of-Transferee Theory is Barred Because Respondent Failed to Avoid the Transfer from West Side to Nob Hill

To prevail on his transferee-of-transferee theory, respondent must meet his burden of proof on each element of two separate cases, one involving the transfer from West Side to Nob Hill, the other involving the earlier transfer of the stock purchase price from Nob Hill to petitioner. *Pert v. Comm'r*, T.C. Memo 1997-150. Even assuming respondent could overcome the timing defect in his case, his transferee-of-transferee theory must be rejected because he never sought, much less secured, avoidance of the "initial" transfer from West Side to Nob Hill.

Respondent cites the First Circuit's decision in *Frank Sawyer Trust of May 1992 v. Comm'r*, 712 F.3d 597 (1st Cir. 2013), *rev'g* T.C. Memo 2011-298, to support his transferee-of-transferee theory of recovery. In *Sawyer Trust*, the First Circuit reversed a prior decision of this Court and remanded the case for consideration of whether respondent had a transferee liability theory of recovery against the stock purchaser as the "initial" transferee that could be bootstrapped into a transferee-of-transferee theory of recovery against the

petitioner as the "subsequent" transferee. There is no indication in the case that respondent ever pursued the stock purchaser as the initial transferee, nor did the First Circuit discuss the large body of case law considering whether prevailing against the initial transferee is a prerequisite to pursuing recovery against a subsequent transferee. The First Circuit did, however, recognize that state fraudulent transfer law controls. *Id.* at 607-08 (evaluating transferee-of-transferee liability under applicable Massachusetts state law).

Courts interpreting the fraudulent transfer provisions in 11 U.S.C. § 550 and parallel provisions in the Uniform Fraudulent Transfer Act have reached conflicting conclusions over whether a trustee or creditor must first (or simultaneously) prevail in an action against the initial transferee before it can recover against a subsequent transferee. A number of courts have concluded that this is a prerequisite to pursuing a claim against a subsequent transferee. *Tibble v. Farmers Grain Express, Inc. (In re Mich. Biodiesel, LLC)*, 510 B.R. 792, 797 (Bankr. W.D. Mich. 2014) ("[C]ourts have generally read [11 U.S.C.] § 550 as requiring a trustee to avoid the underlying transfer before (or at least while) seeking to recover the property or its value from a subsequent transferee."); *see also Official Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc. v. JP Morgan Chase Bank*

(In re M. Fabrikant & Sons, Inc.), 394 B.R. 721, 741-42 (Bankr. S.D.N.Y. 2008) (collecting cases). Other courts have reached the opposite conclusion, holding that a creditor or trustee need only show that the initial transfer "was avoidable" before pursuing a subsequent transferee. *Id.* at 742-43 (collecting cases). Respondent acknowledges the relevance of bankruptcy case law in interpreting and applying Ohio fraudulent transfer law. Respondent's Opening Brief, at 81.

The only court to have considered this issue in the context of Ohio's fraudulent transfer law held that a creditor or trustee must bring and actually prevail on a claim against the initial transferee before pursuing recovery against a subsequent transferee. *Greenwald v. Latham & Watkins (In re Trans-End Technology, Inc.)*, 230 B.R. 101, 105 (Bankr. N.D. Ohio 1998) ("[B]ased upon the plain language of 11 U.S.C. § 550, . . . a prerequisite to recovery from any transferee is that the initial transfer must first be avoided rather than merely proven to be avoidable.");[6] *see also SKK Liquidation Trust v. Green & Green, LPA (In re Spinnaker Indus., Inc.)*, 328 B.R. 755, 762-63 (Bankr. S.D. Ohio 2005) (distinguishing *Trans-End* in a case involving a

[6]The *Trans-End* court's holding is framed by reference to 11 U.S.C. § 550, but the case also involved parallel causes of action brought by the trustee under Ohio and California fraudulent transfer law, which the court found to be analogous to bankruptcy law and subject to the same analysis. *Trans-End*, 230 B.R. at 103 n.2.

direct transfer to the defendant as a joint payee, rather than an initial and subsequent transfer).

It is undisputed that respondent never pursued, much less prevailed on, a fraudulent transfer claim against Nob Hill as an initial transferee of West Side. (Stip. ¶¶ 221, 222). Accordingly, under the *Trans-End* court's interpretation of 11 U.S.C. § 550 and parallel provisions in Ohio's uniform fraudulent transfer law, respondent's transferee-of-transferee theory must be rejected.[7]

IV. The Substance Over Form Doctrine Does Not Allow The Stock Sale To Be Recharacterized As A Liquidating Distribution

Because there was no direct or indirect (through Nob Hill or otherwise) transfer of West Side's property to petitioner, the only remaining basis for holding petitioner liable as a transferee of West Side is respondent's theory that the stock sale should, in substance, be recharacterized as a liquidating distribution from West Side to petitioner. In order to prevail on that theory, respondent must prove that the stock sale was,

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[7]Respondent's failure to meet the requirement to first prevail on a claim against Nob Hill is not excused by the merger of Nob Hill into West Side. (Stip. ¶ 106). While West Side may have assumed responsibility for Nob Hill's debts as a matter of law pursuant to the merger, this did not eliminate or render moot the theory of direct transferee liability against Nob Hill and respondent expressly relies on that theory here as part of his transferee-of-transferee theory of recovery. Respondent's Opening Brief, at 135 (noting that under the transferee-of-transferee theory "Respondent became a creditor of Nob Hill" as a result of the transfer from West Side).

in substance, a liquidation of West Side under federal law and must also prove that a basis for liability exists under applicable Ohio law notwithstanding the acknowledged form of the transaction as a stock sale.[8] Respondent cannot meet his burden of proof on either of these independent requirements.

A. The Requirements Under Federal Law for Invoking the Substance Over Form Doctrine Are Not Met

In his Opening Brief, respondent fails to address the threshold requirement for invoking the substance over form doctrine by showing that petitioner's "sole purpose" for selling his West Side stock was to avoid tax. *See, e.g., Stewart v. Comm'r*, 714 F.2d 977, 987 (9th Cir. 1983).[9]

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[8]On brief, respondent appears to suggest that he can ignore the requirement to show a "transfer" under federal law, citing *Stanko v. Comm'r*, 209 F.3d 1082, 1085 n.2 (8th Cir. 2000) for the proposition that "anyone liable as a transferee under state law is considered a transferee for purposes of section 6901(h)." Respondent's Opening Brief, at 80-81. This and other courts have repeatedly rejected that position and held that respondent must meet the requirements of both state and federal law in order to impose transferee liability under section 6901. *See, e.g., Swords Trust*, 142 T.C. No. 19, slip op. at 33-38 (citing *Commissioner v. Stern*, 357 U.S. 39, 41-42 (1958), *Sawyer Trust*, 712 F.3d at 604-05 and *Starnes v. Comm'r*, 680 F.3d 417, 427, 430 (4th Cir. 2012)).

[9]Elsewhere in his Opening Brief, respondent notes that petitioner had an interest in reducing the double tax that could result from a liquidation of West Side, although he does not and cannot cite this as the "sole" purpose of the stock sale, nor does he cite it as a basis for invoking the substance over form doctrine. Respondent's Opening Brief, at 100-02. Petitioner's interest in reducing double taxation does not refute the fact that his overriding purpose for selling the West Side stock was to maximize the return on his investment. It certainly does not prove that the "sole" purpose of the stock sale was to (cont'd)

In the three cases cited by respondent for the proposition that a stock sale can be recharacterized as a liquidating distribution, respondent was able to prove that the sole purpose for structuring the transaction as a stock sale was tax avoidance. In each case, the corporation planned a taxable disposition of its assets followed by a liquidation. Notwithstanding that plan, an intermediary stock purchaser was inserted into the middle of the asset sale/liquidation transaction for the sole purpose of tax avoidance. *Owens v. Comm'r*, 568 F.2d 1233, 1239 (6th Cir. 1977) (finding that the taxpayer failed to show that the "only purpose served" by a sale of stock following corporation's disposition of appreciated cattle "[wa]s not tax avoidance"); *Enbridge Energy Co. v. United States*, 553 F. Supp. 2d 716, 730-31 (S.D. Tex. 2008) (disregarding an intermediary corporation that was "in substance, a mere shell" whose "sole purpose" was to step up the basis in the taxpayer's assets), *aff'd mem.*, 354 F. App'x 15 (5th Cir. 2009); *Feldman v. Comm'r*, T.C. Memo 2011-297 (applying substance over form doctrine where corporation sold its assets, adopted a plan of liquidation and then changed course and

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avoid tax, particularly where the evidence is uncontested that there was a perfectly acceptable path for petitioner to avoid double tax altogether, *i.e.*, by paying one tax at the corporate level and using West Side as a vehicle for making other investments without distributing the corporation's income. (Tr. 91:24 to 91:25 and 92:1 to 92:2; Ex. 103-J, at 2)

executed a "stock sale" through an intermediary corporation for no purpose other than tax avoidance); *see also Commissioner v. Court Holding Co.*, 324 U.S. 331, 333-34 (1945) (applying substance over form doctrine where corporation reached an oral agreement for the sale of its assets, called off the sale, and made a "liquidating dividend" that was a "mere formalit[y] designed 'to make the transaction appear to be other than what it was' in order to avoid tax liability"). Because the intermediary stock purchaser in each of these cases was grafted onto an existing asset sale/liquidation transaction for the sole purpose of tax avoidance, the substance over form doctrine applied. Those facts are not present here.

In this case, there was no prearranged asset sale and liquidation with an intermediary stock purchaser grafted into the middle of that transaction for the sole purpose of tax avoidance. The wholesale provider settlements that generated West Side's taxable income were unconnected to petitioner's decision to sell his West Side stock and had independent legal significance. *See Griffin v. Comm'r*, T.C. Memo 2011-61, slip op. at 17-18 (declining to apply the substance over form doctrine where corporation's taxable disposition of assets and petitioner's later stock sale "had independent legal significance" and there was no "preconceived plan" to sell the stock). Accordingly, the record is unambiguous in showing that

petitioner's overriding purpose for selling his stock was to maximize the return on his investment in a fully taxable transaction.[10] (Stip. ¶¶ 38, 41; Tr. 97:12 to 97:23 and 112:7 to 112:18)

Petitioner's bona fide, non-tax purpose for selling his stock defeats application of the substance over form doctrine to recharacterize the stock sale as a liquidation. *Griffin v. Comm'r*, T.C. Memo 2011-61, slip op. at 15-16.

B. West Side Was Not "In Substance" Liquidated Until Years After the Stock Sale

Beyond failing to prove that petitioner's sole purpose for selling his stock to Nob Hill was the avoidance of tax, respondent makes no effort to address the extensive evidence of West Side's post-stock sale activities. That evidence also defeats any argument that the corporation "in substance" liquidated on September 9, 2003. Those activities included protracted, multi-million dollar excise tax disputes with the very entity that now claims that West Side liquidated in September 2003. They also included an ongoing debt collection business and meaningful investments made by West Side in other companies, as reported to respondent on West Side's federal

[10]Petitioner paid over $5 million in long-term capital gain tax on the stock sale. (Stip. ¶ 163) *Compare Cullifer v. Comm'r*, T.C. Memo 2014-208, slip op. at 27 & n.22 (noting that the petitioner failed to report gain from the sale of stock and related income items on his personal tax return).

income tax returns for years after the stock sale closed. (Exs. 66-J, 67-J, 68-J, 69-J, 70-J)

The extensive evidence of West Side's post-stock sale activities is summarized in petitioner's Opening Brief and, since respondent does nothing to address it in his Opening Brief, it need not be restated here. It is worth noting, however, that these activities again distinguish this case from the cases cited by respondent for invoking the substance over form doctrine to recharacterize a stock sale as a liquidating distribution. In each of those cases, not only was a stock purchaser grafted into the middle of an existing asset sale/liquidation transaction for the sole purpose of tax avoidance, but the subject corporation also had no activity whatsoever immediately after the stock sale, confirming that the transaction was, in substance and as originally planned, a corporate liquidation. *Owens*, 568 F.2d at 1239 (noting that the corporation "carried on no business activity and thus was a lifeless shell at the time of the purported sale of stock"); *Enbridge Energy*, 553 F. Supp. 2d at 730 ("After the transaction, [the corporation created to purchase the stock] engaged in virtually no business activity and was, in substance, a mere shell."); *Feldman v. Comm'r*, T.C. Memo 2011-297, slip op. at 32 (noting that "[f]rom the time of the purported stock sale, [the corporation] carried on no business activity").

C. Even if the Substance Over Form Doctrine Applied, It Would Not Result in a Transfer to Petitioner

Even assuming the federal substance over form doctrine could apply to recharacterize the stock sale as a liquidating distribution, it does not result in a "transfer" from West Side to petitioner and therefore provides no basis for transferee liability. Where it does apply, the substance over form doctrine permits "[t]he collapsing of a multilateral transaction into a single transaction," but it is "appropriate only where the outcomes of the multilateral transaction and the recast transaction are substantively similar." *Cullifer*, T.C. Memo 2014-208, slip op. at 60-61.

The outcome of the "liquidation" recast sought by respondent, which would require the Court to ignore Nob Hill, Rabobank and Moffat International in order to place West Side's cash in petitioner's hands, bears little resemblance to the outcome under the form of the transaction as structured.

Immediately prior to the stock sale, the economic positions of petitioner and West Side were as follows:

- Petitioner held stock in West Side valued (according to respondent) at $23,717,993; and
- West Side held cash and other assets valued at $23,723,771, net of tax liabilities.

Immediately after the stock sale, the economic positions of petitioner and West Side positions were:

- Petitioner held $35,199,356 in cash; and
- West Side continued to hold cash and other assets valued at $23,723,771, net of tax liabilities.

While West Side's new owner later removed West Side's cash without petitioner's knowledge or consent, that cash did not go to petitioner. Accordingly, and as this Court held in *Cullifer*, T.C. Memo 2014-208, slip op. at 60-61, a liquidating distribution from West Side does not reflect the "substance" of the stock sale and subsequent transactions, even if the substance over form doctrine could apply. *See also Rushing v. Comm'r*, 441 F.2d 593 (5th Cir. 1971) (refusing to recharacterize an installment sale of stock as a liquidating dividend where sale vested control over the corporation and the liquidation proceeds with a third-party), *aff'g* 52 T.C. 888 (1969). Although recharacterizing the stock sale as a liquidation might provide some basis for recovery against Nob Hill or its subsequent transferees Rabobank or Moffat International, it does not place West Side's funds in petitioner's hands and therefore provides no basis for recovery against petitioner.

D. The Stock Sale Cannot Be Collapsed Under State Law Because Petitioner Did Not Have Actual or Constructive Knowledge of Fortrend's "Entire Scheme" to Avoid Payment of West Side's Tax

Even if the substance over form doctrine applied and the sale of petitioner's West Side stock could be deemed a "transfer" within the meaning of section 6901 (in the form of a liquidating distribution to petitioner), respondent would still need to demonstrate a basis for liability under applicable Ohio state law. *See, e.g., Swords Trust*, 142 T.C. No. 19, slip op. at 46-47.

Applying fraudulent conveyance statutes enacted by various states, this Court has consistently held that in order to collapse a stock sale transaction and deem it to be a liquidating corporate distribution, respondent must prove that the putative transferee had actual or constructive knowledge of the "entire scheme" to avoid payment of tax. *Cullifer*, T.C. Memo 2014-208, slip op. at 60 (applying Texas law); *Swords Trust*, 142 T.C. No. 19, slip op. at 44-46 (applying Virginia law);[11] *Salus Mundi Found. v. Comm'r*, T.C. Memo 2012-61, slip op. at 28-29 (applying New York law), *rev'd & remanded sub nom. Diebold Found., Inc. v. Comm'r*, 736 F.3d 172 (2d Cir. 2013);

[11]Virginia is somewhat unique in that it has not enacted the Uniform Fraudulent Transfer Act, although in *Swords Trust* this Court nonetheless assumed that a knows or has reason to know of the entire scheme standard would apply. *Swords Trust*, 142 T.C. No. 19, slip op. at 44-46.

Frank Sawyer Trust of May 1992 v. Comm'r, T.C. Memo 2011-298, slip op. at 35-36 (applying Massachusetts law), *rev'd and remanded on other grounds*, 712 F.3d 597 (1st Cir. 2013); *Starnes v. Comm'r*, T.C. Memo 2011-63, slip op. at 24-25 (applying North Carolina law), *aff'd*, 680 F.3d 417 (4th Cir. 2012). Courts applying Ohio law have similarly imposed a "knowledge of the entire scheme" requirement in order to collapse a stock sale into a corporate liquidation. *Official Comm. of Unsecured Creditors of Grand Eagle Cos. v. Asea Brown Boveri, Inc.*, 313 B.R. 219, 229-31 (N.D. Ohio 2004).

On brief respondent does not discuss the requirements under Ohio law for recasting a transaction. Instead, he notes his disagreement with this Court's holding in *Starnes* and other cases requiring respondent to prove "knowledge of the entire scheme." Respondent's Opening Brief, at 91-93.[12] Nonetheless respondent goes on to assert, based entirely on inferences drawn from e-mails and internal memoranda prepared by petitioner's advisors, that petitioner had actual or constructive knowledge

[12]On this issue, respondent confuses state law on constructive fraud with state law on collapsing a stock sale as a precursor to applying state law on constructive fraud. As this Court has explained, "[w]hile intent is generally irrelevant in a constructive fraud action under [New York law], when a party is seeking to recharacterize a transaction or series of transactions . . . the party must prove that the multiple transactions were linked and that the transferee had actual or constructive knowledge of the entire scheme." *Salus Mundi*, T.C. Memo 2012-61, slip op. at 28.

of Fortrend's entire scheme to avoid payment of West Side's income taxes.

Contrary to respondent's assertions, in September 2003 petitioner did not have, and could not have had, actual or constructive knowledge of Fortrend's entire scheme to avoid payment of West Side's tax because the distressed debt transaction that was the central element of that scheme was not implemented by Fortrend until two months later. (Ex. 66-J, at 9). Petitioner's advisors were generally aware of a hypothetical transaction Fortrend suggested could be used to satisfy West Side's tax. (Ex. 25-J, at 1-2). Because it was only a hypothetical that could be used and in all events was not a transaction that petitioner would be a party to, petitioner's advisors were not in a position to opine on it. As a hypothetical there were, contrary to respondent's assertions, no "facts" that petitioner was or could have been aware of, or that petitioner or his advisors could have made further inquiry on.

Ultimately, petitioner's advisors recognized that Fortrend's hypothetical distressed debt strategy, if implemented, was aggressive and subject to challenge by respondent. The "challenge" petitioner's advisors were concerned with, however, was with respect to the timing of the hypothetical deduction and the character of that deduction. (Ex. 25-J, at 3). This is a far cry from respondent's assertion

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that petitioner's advisors knew "that the buyer was using illegitimate methods to purportedly offset West Side's taxable income." Respondent's Opening Brief, at 99. Rather, the advisors simply reached the same conclusion that this Court has reached in similar contexts: That there are legitimate, if perhaps aggressive, ways for a corporation to reduce its income tax liability. *Swords Trust*, 142 T.C. No. 19, slip op. at 53 ("This Court has acknowledged that there are legitimate tax planning strategies involving built-in gains and losses and that it was not unreasonable, in the absence of contradictory information, for the representatives to believe that the buyer had a legitimate tax planning method.").

Beyond the fact that on September 9, 2003 there was no "transaction" that petitioner or his advisors knew or could have known would lead to the non-payment of West Side's tax liability, when placed in proper context, the record is clear that petitioner did not have either actual or constructive knowledge of Fortrend's entire scheme to avoid payment of that liability.

1. The Proper Context For Evaluating Petitioner's Due Diligence Is A Sale Of Stock For All Cash

Before addressing the factual assertions that respondent points to in arguing that petitioner knew or had reason to know that Fortrend would not satisfy West Side's tax liability, the

transaction must be placed in the proper context of an all-cash stock sale.

Although the proper due diligence standard was a focus of both parties' expert reports and expert testimony presented at trial, it is not referenced in respondent's opening brief. Respondent's failure to raise the issue is understandable given that his own expert conceded that a limited due diligence standard applies when, as in this case, stock is sold for all cash. (Tr. 802:5 to 803:2) As petitioner's expert established, a seller's due diligence in the context of an all-cash sale is limited to ensuring that the purchase price will be paid and that the seller is not dealing with a criminal enterprise. (Ex. 174-P, ¶¶ 44-45, at 15-16). When evaluated in this context, it is clear that the work done by petitioner and his advisors exceeded any applicable inquiry standard and that there was nothing more that could have been done, or should have been

done, to vet Fortrend's promise to "satisfy fully" West Side's 2003 income tax liability.[13]

2. Applying The Proper Due Diligence Standard, Respondent Failed To Meet His Burden Of Proving That Petitioner Knew Or Had Reason To Know Of Fortrend's Entire Scheme

There are a number of facts that distinguish this case from the few others where courts have found a putative transferee to have constructive knowledge of a stock purchaser's "entire scheme" sufficient to treat a stock sale as a liquidating distribution.[14]

First, petitioner and his advisors negotiated terms in the Stock Purchase Agreement that not only required the buyer to "satisfy fully" West Side's income tax, but that also put net

[13]Cases where this and other courts arguably imposed a higher due diligence standard can be distinguished because they did not involve a straight sale of stock for all cash. Rather, they involved a broader "transaction" that included a taxable sale of corporate assets followed by a liquidation but with a purported intermediary stock purchaser grafted into the middle of the transaction. Here, the facts show that settlement of the wholesale provider litigation was unconnected to the competing all-cash offers for petitioner's stock and that petitioner weighed those offers against the option of keeping West Side in business to make other investments. *See Griffin*, T.C. Memo 2011-61, slip op. at 15-16.

[14]This and other courts have struggled with the question of whether constructive knowledge requires an "active avoidance of the truth," or merely ordinary diligence. *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 187 (2d Cir. 2013) (concluding that petitioner had constructive knowledge under either test). While petitioner submits that the former is the proper test, under either standard respondent has failed to meet his burden of proof.

worth and ongoing business activity safeguards in place to help ensure that those terms would be satisfied. (Ex. 1-J, at 23) In a similar context, this Court has pointed to such terms in finding that there was no knowledge of the buyer's "entire scheme" to avoid payment of tax. *Griffin*, T.C. Memo 2011-61, slip op. at 16 (noting that the petitioner negotiated and obtained a tax agreement and indemnity clause from the buyer). The continuing existence and net worth terms negotiated here go beyond simply assigning contractual responsibility for payment of the tax to require meaningful ongoing corporate activity, helping to ensure that the buyer's contractual obligation to "satisfy fully" West Side's tax would be met. *Compare Diebold*, 736 F.3d at 189-90 (noting that allocation of liability term in a stock purchase agreement was not sufficient to defeat a finding of constructive knowledge).[15]

[15]Respondent's reliance on the absence of a parent company guarantee and other facts to question the viability of the buyer's representations regarding satisfaction of West Side's tax is misplaced. Respondent's Opening Brief, at 109. The effectiveness of the buyer's representations (or lack thereof) is in part a result of respondent taking nearly five years to assess the tax due from West Side for 2003, during which time the corporation did have meaningful assets and business activity. (Exs. 66-J, 67-J, 68-J, 69-J, 70-J) The due diligence inquiry properly focuses on the work that petitioner and his advisors did leading up to September 9, 2003 and the effectiveness of negotiated terms in the Stock Sale Agreement provisions should not be dismissed due to respondent's delay in pursuing West Side and his failure to ever pursue West Side's new owners.

Second, focusing on the central element of an all-cash stock seller's due diligence requirement, *i.e.*, assurance that petitioner would be paid, the role of Rabobank in the stock sale proves that that requirement was met. While not referenced in his original or rebuttal report, respondent's expert conceded at trial that petitioner's advisors made an appropriate inquiry into Rabobank as the source of funding for the stock sale. (Tr. 865:18 to 867:14) Rabobank's role also establishes the only other aspect of an all-cash stock seller's due diligence, *i.e.*, that he is not dealing with a criminal enterprise. Knowing that a multi-billion dollar global financial institution was working with the buyer to provide funding unsecured by West Side's assets reasonably provided petitioner and his advisors with a high level of comfort that they were not dealing with a criminal enterprise.

Third, petitioner's conduct with respect to West Side's multi-million dollar excise tax liability proves that neither he, nor his advisors, had any intent to avoid payment of a legitimate corporate tax debt and also proves that they did not have actual or constructive knowledge of Fortrend's scheme to avoid such a debt. From petitioner's perspective, the net "benefit" of selling his West Side stock to Fortrend, rather than using the corporation as a vehicle for other investments,

was approximately $6 million.[16] Petitioner had a strong argument (one ultimately conceded by respondent in Notice 2006-50, 2006-1 C.B. 1141) for West Side not paying more than $3 million in telephone excise taxes, yet he insisted that those taxes be paid in advance of the stock sale in order to ensure that there would be no later problems. (Stip. ¶¶ 142, 143, 144, 145) Against this backdrop, respondent's assertion that petitioner knew or reasonably should have known that West Side's tax liability would not be satisfied does not hold up. Respondent's suggestion that petitioner was blinded by a desire to avoid tax is illogical and wrong, given that petitioner had, but chose not to pursue, a ready path for avoiding more than $3 million in excise taxes. Simply put, if petitioner had any inclination (*i.e.*, actual or constructive knowledge) that Fortrend would fail to honor its contractual commitment to satisfy fully West Side's taxes, he would never have sold his stock.

Fourth, the "unique" nature of Fortrend's offer to purchase petitioner's stock, which took into consideration the buyer's ability to satisfy or reduce West Side's income tax liability,

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[16]Had petitioner maintained his ownership of West Side and used the company to pursue alternative investments, the net effect would be $29 million available for reinvestment, versus the $35.1 million stock purchase price. The net result includes, (1) payment of West Side's estimated $16.8 million in federal, state and local tax, leaving $23.7 million in cash and other assets in the company (Ex. 1-J, at 40, 42); and (2) "avoidance" of $5.3 million in long term capital gain tax paid by petitioner on the sale of his stock. (Ex. 97-J, at 2)

does not provide a basis for concluding that petitioner knew or had reason to know that the income tax would not be satisfied.[17] To the contrary, because of the unique nature of the transaction, petitioner went out of his way to obtain every possible assurance that the transaction was legitimate, engaging his long-time advisors at Hahn Loeser and separately engaging one of the world's largest accounting firms to spend months vetting the proposed stock sale. Respondent has not alleged that either firm had any conflict of interest or relationship with Fortrend that impeded the validity or credibility of their work or petitioner's ability to rely on it. While respondent can, more than 10 years later, try and point to holes in the advisors' work, this does nothing to establish that in 2003 petitioner could have done anything more to assure himself that he was engaging in a legitimate stock sale transaction. Whatever the applicable standard of due diligence, hiring two

[17]Recent decisions from this Court illustrate, as petitioner and his advisors knew back in 2003, that there were numerous established, independent companies that thought they could realize value through a reduction in corporate income tax liabilities using a contribution of distressed debt strategy. The legitimate beliefs and expectations of petitioner and his advisors regarding those strategies must be evaluated at the time of the stock sale, not taking into consideration information that has become available, and cases decided, since September 2003. Respondent's arguments regarding the "implausibility of the business purpose" for Fortrend's hypothetical strategy, even if relevant, must be evaluated from the perspective of 2003, not 2014. Respondent's Opening Brief, at 109-110.

reputable, independent firms to spend months vetting a proposed stock sale meets that standard.

Fifth, petitioner's interest in avoiding or minimizing double taxation provides no support for a finding that he knew or should have known that West Side's taxes would not be satisfied. Respondent goes so far as to describe this as a "non-statutory" badge of fraud. As respondent acknowledges, from the beginning petitioner instructed his advisors to consider "'what, if any'" planning could be done to minimize tax. Respondent's Request for Findings of Fact, ¶ 20. Moreover, contrary to respondent's proclamation of "fraud," avoiding double taxation is a routine part of business planning and one that the tax law firmly embraces, with entire subchapters of the Internal Revenue Code designed to facilitate it. *See* Internal Revenue Code, Chapter 1, Subchapter K (partners and partnerships), Subchapter M (regulated investment companies and real estate investment trusts) and Subchapter S (S corporations). As respondent concedes (Respondent's Opening Brief, at 100-01), independent of the stock sale, petitioner had a simple path for avoiding double taxation by maintaining ownership of West Side and using the company as an investment vehicle going forward. The record makes clear that this option was seriously considered as an alternative to the stock sale. (Ex. 103-J, at 2). This "strategy" would have easily avoided

the double taxation that respondent alleges petitioner was so fixed on avoiding, in a manner that would have been beyond reproach.

In sum, considered in the proper context of due diligence standards applicable to an all-cash sale of stock, given the extensive work done by petitioner and his advisors in the time period leading up to the September 9, 2003 stock sale, it simply cannot be said that petitioner had actual or constructive knowledge that Fortrend would fail to meet its contractual obligation to "satisfy fully" West Side's income tax liability.

3. Respondent Mischaracterizes the Evidence In A Misplaced Effort to Prove Constructive Knowledge

Considered in the context of an all-cash stock sale and the extensive work done by petitioner and his advisors, respondent cannot meet his burden of proving that petitioner knew or should have known that West Side's 2003 income tax liability would not be satisfied fully or knew or should have known of Fortrend's "entire scheme." While this alone should end the inquiry, a number of factual assertions respondent points to on brief should be clarified and corrected.

First, contrary to respondent's assertions on brief, petitioner and his advisors did not, and could not, "understand" or "know" that Fortrend "was using illegitimate methods to purportedly offset West Side's taxable income." Respondent's

Opening Brief, at 99. To the contrary, because it could not research or opine on a transaction that had yet to be implemented and that, in all events, their client would not be a party to, PWC properly focused its work on the actual risks faced by their client and worked with Mr. Folkman to ensure that those risks were mitigated through provisions in the Stock Purchase Agreement. This conduct is fully consistent with the seller-side due diligence requirements for an all-cash sale of stock.

PWC's internal memorandum summarizing its work and other evidence makes clear that the tax risks PWC evaluated were independent of Fortrend's hypothetical distressed debt transaction. In particular, PWC raised a concern that the IRS might audit petitioner and take the position that a portion of the stock purchase price should be recharacterized as ordinary income. (Ex. 25-J, at 3 (referencing risk that $9.6 million could be recharacterized as ordinary income, rather than long-term capital gain)).[18] Second, PWC raised a concern that

[18]This is evidenced by the case cited by PWC, *Lowndes v United States*, 258 F. Supp. 193 (D. Md. 1966), *aff'd*, 384 F.2d 635 (4th Cir. 1967), which involved application of the substance over form doctrine to recharacterize income as ordinary, rather than capital gain. (Ex. 25-J, at 10) In commenting on this risk, Mr. Lohnes noted that he "would still do the transaction 10 times out of 10." (Ex. 104-J, at 9) PWC also noted that petitioner could mitigate the risk by reporting receipt of the stock sale proceeds as ordinary income and filing a claim for refund. (Ex. 25-J, at 3)

Fortrend, after it purchased the West Side stock, might fold the company into a consolidated group for federal income tax purposes, thereby splitting the 2003 tax year and isolating income into the pre-stock sale tax period where, under the terms of the Stock Purchase Agreement, petitioner might be held liable for it. (Ex. 25-J, at 3; Ex. 103-J, at 45, 59, 61, 70). These tax risks both pertain directly to petitioner (PWC's client), not the third-party buyer (not PWC's client), and illustrate PWC's adherence to proper seller due diligence standards in an all-cash transaction.

In its internal memorandum and workpapers PWC also made reference to theoretical issues, including application of Code section 269, that could arise if Fortrend did implement the hypothetical distressed debt transaction, but those issues were not, and could not be, vetted further because the transaction was purely hypothetical. A reference to possible issues that could be raised with respect to a third-party transaction that had not been and perhaps never would be implemented are a far cry from an "understanding" or "knowledge" of an illegitimate transaction to avoid payment of tax. At most, PWC simply (and accurately) noted that if Fortrend did implement the transaction, there was audit risk. In the context of the due diligence standard applicable to an all-cash sale of stock, PWC

did everything it needed to do to vet the risks to petitioner associated with the proposed stock sale.

Second, the observation in an internal e-mail from PWC's Tim Lohnes that Fortrend's hypothetical transaction was "a very aggressive tax motivated transaction" was not a conclusion, opinion, or "acknowledgment" by PWC regarding Fortrend's distressed debt transaction and indeed could not be because the transaction it references was purely hypothetical. When placed in context, this statement highlights the disconnect between petitioner and the hypothetical transaction that Fortrend said it might implement, a disconnect that results from the fact the transaction was purely hypothetical, not as respondent suggests, from PWC seeking to distance itself from the transaction. Notably, the comment is made in connection with section 8.2 of the Stock Purchase Agreement, which required future cooperation from petitioner in preparing West Side's 2003 financial statements. (Ex. 103-J, at 69) In that context, Mr. Lohnes' comment simply reinforces the fact that petitioner would not be a party to or even aware of any post-stock sale transactions that the purchaser might engage in, "aggressive" or otherwise.

Third, contrary to respondent's assertions, neither PWC nor Hahn Loeser "knew this transaction was the same or similar to the transaction in Notice 2001-16." Respondent's Opening Brief, at 106. Rather, both advisors reached the correct conclusion

that the stock sale was neither listed nor otherwise reportable under the reportable transaction rules that were then in effect, *e.g.*, Treas. Reg. § 1.6011-4 (2003). (Ex. 25-J, at 4).[19] To the extent that this conclusion may have been qualified in any way (*i.e.*, "a position can be taken"), it was unambiguously confirmed by PWC two months later when it evaluated an updated IRS notice describing all "listed" transactions. (Ex. 103-J, at 112). Had petitioner's advisors "known" the transaction was the same as or substantially similar to a listed transaction, they would have been subject to their own reporting requirements under the reportable transaction rules then in effect for "material advisors," I.R.C. §§ 6111 and 6112 (2003) and to meaningful penalties for failure to comply with them. I.R.C. §§ 6707, 6708 (2003). The absence of any evidence that the advisors were concerned with this issue, or of respondent ever challenging West Side, PWC or Hahn Loeser for failing to "report" the transaction, highlights the fallacy of respondent's assertion.

Respondent's mischaracterization of the work done by petitioner's advisors in vetting the stock sale takes that work

[19]As petitioner's advisors correctly determined, the stock sale was not the same as or substantially similar to the "Midco" transaction described in IRS Notice 2001-16, 2001-1 C.B. 730, because there was no "intermediary" company grafted into the middle of a planned asset sale and liquidation transaction, nor were any appreciated assets involved. Rather, it was a straight two-party stock sale.

out of context in a misplaced effort to show actual or constructive knowledge of Fortrend's "entire scheme." Considering that the central element of Fortrend's scheme was not implemented until two months after the stock sale, and that the proper context for evaluating the transaction is the due diligence standard applicable to an all-cash stock sale, it is apparent that petitioner and his advisors did everything possible to assure themselves of the bona fides of Fortrend's offer. Even if all other requirements for recharacterizing the stock sale as a liquidation were met, respondent has failed to show petitioner's actual or constructive knowledge of Fortrend's "entire scheme" as required under applicable Ohio law. For this alternative reason, there is no basis for transferee liability.

V. Respondent's Position on Penalties is Contrary to This Court's Recent Precedent

Through his Notice of Liability, respondent seeks to recover from petitioner not only West Side's unpaid income tax liability but also over $6 million in accuracy-related penalties, including the 40 percent gross valuation misstatement penalty provided for under Code section 6662(h) and interest thereon. (Stip. ¶ 167; Ex. 98-J, at 3) All but $61,851 of the penalty arises from the distressed debt transaction engaged in by West Side's new owners in an unsuccessful effort to meet their contractual obligation to satisfy fully West Side's 2003

income tax liability. That transaction was not entered into until two months after petitioner sold his West Side stock and petitioner had nothing to do with it.

As an initial matter, petitioner cannot be held liable for West Side's accuracy-related penalties for the same reason that he cannot be held liable for the underlying tax: there was no transfer to petitioner of "property--(i) of a taxpayer" as required by Code section 6901(a)(1)(A)(i). *See Estate of Glass v. Comm'r*, 55 T.C. 543, 576 (1970) (noting that "'the transferee is retroactively liable for transferor's taxes . . . and *penalties (additions to tax) and interest in connection therewith*, to the extent of the assets received from the transferor'" (quoting *Kreps v. Comm'r*, 42 T.C. 660, 670 (1964)) (emphasis in original), *aff'd per curiam, 453 F.2d 1375* (5th Cir. 1972), *acq.*, 1972-2 C.B. 2.

In circumstances similar to this case, and reflecting the equitable nature of transferee liability, this Court has recently held that a transferee is not liable for accuracy-related penalties, even where respondent otherwise meets his burden of proving transferee liability with respect to the underlying tax. *Sawyer Trust*, T.C. Memo 2014-128, slip op. at 10-12. As in *Sawyer Trust*, the conduct giving rise to the accuracy-related penalties in this case occurred months after the stock sale and respondent has not proven actual fraud in

connection with Nob Hill's payment of the stock purchase price to petitioner. Accordingly, even if respondent were to otherwise prevail, petitioner cannot be held liable for West Side's accuracy-related penalties or the interest thereon.

CONCLUSION

Each of respondent's alternative theories for holding petitioner liable as a transferee of West Side is properly rejected. Respondent has failed to meet his burden of proof to show that petitioner is liable for the unpaid tax, interest and penalties of West Side as either a direct transferee of the corporation's assets or as a transferee-of- transferee.

Dated: November 10, 2014

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EXHIBIT 7

Electronically Filed
5/31/2017 3:29 PM
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	CASE NO. A-16-735910-B DEPT NO. XV **ORDER REGARDING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT**

MAY 26 2017

Case Number: A-16-735910-B

Defendant PricewaterhouseCoopers LLP's (PwC's) Motion for Summary Judgment came on for hearing before this Court on May 10, 2017. Todd L. Moody and Scott F. Hessell appeared on behalf of Plaintiff Michael A. Tricarichi. Patrick G. Byrne, Peter B. Morrison and Winston P. Hsiao appeared on behalf of Defendant PwC.

The COURT CANNOT FIND, based on the record presently before it, that genuine issues of material fact exist, regardless of which state's law applies in this case.

The COURT NOTES that Mr. Tricarichi affirmatively says in his Affidavit on page 3, lines 10-12, "PwC's work and advice to me about proceeding with the Fortrend transaction extended into August 2003 . . . ."

THE COURT FINDS NRCP 56(f) relief as set forth in paragraph 10 of Mr. Tricarichi's Affidavit is appropriate.

Having considered the same and good cause appearing,

IT IS HEREBY ORDERED that Defendant PwC's Motion for Summary Judgment is DENIED without prejudice solely based on NRCP 56(f).

IT IS FURTHER ORDERED that Plaintiff is entitled to limited discovery necessary to oppose PwC's motion for summary judgment as set forth in Paragraph 10 of Mr. Tricarichi's Affidavit, which requested PwC documents and testimony regarding the Bishop and Marshall transactions; PwC's review, promotion or advocacy of, or other advice regarding transactions similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make Mr. Tricarichi aware of those transactions.

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IT IS FURTHER ORDERED that the parties shall meet and confer in good faith regarding the appropriate scope of the limited discovery necessary to oppose summary judgment, and if there is a dispute, the parties may seek a decision from the Court.

DATED: May 30 2017

DISTRICT COURT JUDGE

Submitted by:

/s/ Todd W. Prall

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Attorneys for Defendant PricewaterhouseCoopers LLP

EXHIBIT 8

Richard P Stovsky
11/14/2003 12:22 PM
216-875-3111
Cleveland
US

To: Timothy Lohnes/US/TLS/PwC
cc: Richard P Stovsky/US/TLS/PwC@Americas-US
Subject: Re: Updated list of "listed transactions" (Notice 2003-76)

Tim:

Thanks very much for your quick response and participation in this transaction throughout.

Rich

Timothy Lohnes

Timothy Lohnes
11/14/2003 11:47 AM
202-414-1686
Washington D.C.
US

To: Richard P Stovsky/US/TLS/PwC@Americas-US
cc:
Subject: Re: Updated list of "listed transactions" (Notice 2003-76)

Rich,

I have reviewed this list for Westside Cellular, and confirm that it contains no items that would impact their transaction, other than the items we discussed previously, namely the midco listed transaction. However, we concluded that the transaction undertaken by Westside was not substantially similar to the Midco listed transaction.

Tim

Richard P Stovsky

Richard P Stovsky
11/10/2003 08:39 AM
216-875-3111
Cleveland
US

To: Timothy Lohnes/US/TLS/PwC@Americas-US
cc:
Subject: Updated list of "listed transactions" (Notice 2003-76)

Tim:

Please take a look at the items below re: the Westside Cellular transation. It looks like there is no item that requires action by the selling shareholder (the items that relate would be the loss on a 351 transaction and 3rd party asset sale).

Please advise.

Thanks,

Rich

—— Forwarded by Richard P Stovsky/US/TLS/PwC on 11/10/2003 08:37 AM ——

TaxSource Tax Technical
Main Document

7-November-03 02:28 PM

WNTS Tax Development
WNTS Alert

Author:	Laurie E. Hoffman/US/TLS/PwC	**Topic:**	Updated list of "listed transactions" (Notice 2003-76)
Staff Level:	4 - Manager	**Industry:**	Non-Industry Specific
Home Office:	Washington (1301 K Street NW Suite 800W)	**Code Section:**	6011, 6111, 6112
Practice Unit:	CKM	**Content Type:**	WNTS Alert
-	-	-	-

This document is for internal use only and is based upon the writer's understanding of the facts and tax law existing on the date of issuance. Users should note the presence (or absence) of appropriate partner(s) review and should carefully analyze for subsequent changes to tax and case law, as well as pronouncements by the IRS and other relevant taxing authorities.

This document has not been reviewed.

[redacted]

The IRS today provided (Notice 2003-76) an updated list of "listed transactions" for purposes of Reg. Secs. 1.6011-4(b)(2) and 301.6111-2(b)(2).

[redacted]

The IRS today provided **(Notice 2003-76)** an updated list of "listed transactions" for purposes of Reg. Secs. 1.6011-4(b)(2) and 301.6111-2(b)(2). The Notice supersedes Notice 2001-51, adding transactions identified as "listed transactions" in guidance released subsequent to August 2, 2001. For transactions that are the same as or substantially similar to transactions described in the list, taxpayers may need to disclose their participation and promoters may need to register. In addition, material advisors must maintain lists of investors and other information with respect to these listed transactions.

Note that no new transactions have been added to the list other than those already identified as "listed transactions" in previous IRS releases.

Full text of Notice 2003-76:

For additional information, please contact Tim Throndson at 202.414.4574, Corina Trainer at 202.414.1328, or other members of the WNTS Tax Shelter Management Group.

WNTS 'Blue Sheet':

[redacted]

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EXHIBIT 9

Timothy Lohnes/US/TLS/PwC
12/02/2008 04:48 PM
202-414-1686
Washington D.C.
US
"Reply to All" is Disabled

To Richard P Stovsky/US/TLS/PwC@Americas-US
cc
bcc
Subject notice

I read through the Notice and agree with your assessment that it shouldn't change any of our prior analysis.

Tim

Timothy J. Lohnes | WNTS Mergers & Acquisitions | PricewaterhouseCoopers | Telephone: +1 202 414 1686 | Mobile: +1 202 375 1662 | timothy.lohnes@us.pwc.com

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This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

December 1, 2008

Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

By Sean C Pheils

Rating: (U) Useful

LoS: Tax

Doc Type: Technical & Regulatory Guidance : WNTS Alert

Use Restriction: Internal use only -- U.S. Firm use only

IRC Section: 6011, 6111, 6112

Contact: Corina M Trainer, Rochelle L Hodes

Relevant Geography:
North America, USA

Short Description:
Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

Overview

The IRS today issued **Notice 2008-111**, clarifying Notice 2001-16 regarding Intermediary Transaction Tax Shelters. The 2001 Notice identified and described such a transaction as a listed transaction under Reg. sec. 1.6011-4(b)(2). The IRS states that the new Notice defines an intermediary transaction in terms of its plan and of more objective components.

A transaction is treated as an intermediary transaction with respect to a particular person, and not with respect to another person, only if (1) that person engages in the transaction pursuant to the "plan," (2) the transaction contains four objective components indicative of an intermediary transaction, (3) and no safe harbor exception described in the guidance applies to that person. The Notice provides definitions of "plan" and describes the four objective components. The Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation, which is defined in the Notice.

Notice 2008-111 supersedes Notice 2008-20.

Effective Date

The Notice is generally effective January 19, 2001. However, this Notice stats that it imposes no requirements with respect to any obligation under sections 6011, 6111, or 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16.

The IRS states that some taxpayers may have filed tax returns "taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16," and that these taxpayers "should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action." The IRS seeks comments regarding the Notice 2008-111 definitions, components, and safe harbors "for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan."

For additional information, please contact Corina Trainer at 202.414.1328 or Rochelle Hodes at 202.312.7859.

Full text of Notice 2008-111:

WNTS 'Blue Sheet'

This content is based upon the writer's understanding of the facts and tax law existing on the date of issuance. Users must assume the responsibility for validating the content before using it for any purpose.

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AA 000332

independent legal entity.

PricewaterhouseCoopers has taken all reasonable steps to ensure that information contained herein has been obtained from reliable sources and that this publication is accurate and authoritative in all respects. However, it is not intended to give legal, tax, accounting or other professional advice. If such advice or other expert assistance is required, the services of a competent professional should be sought.

Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelters

Notice 2008-111

SECTION 1. PURPOSE AND BACKGROUND

This Notice clarifies Notice 2001-16, 2001-1 C.B. 730, and supersedes Notice 2008-20, 2008-6 I.R.B. 406, regarding Intermediary Transaction Tax Shelters. Notice 2001-16 identified the Intermediary Transaction Tax Shelter (hereafter, an "Intermediary Transaction") as a listed transaction under § 1.6011-4(b)(2) of the Income Tax Regulations. For purposes of this Notice, an Intermediary Transaction is defined in terms of its plan and in terms of more objective components. Under this Notice, a transaction is treated as an Intermediary Transaction with respect to a particular person only if that person engages in the transaction pursuant to the Plan (as defined in sections 2 and 4), the transaction contains the four objective components indicative of an Intermediary Transaction set forth in section 3, and no safe harbor exception in section 5 applies to that person. A transaction may be an Intermediary Transaction with respect to one person and not be an Intermediary Transaction with respect to another person. This Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation described in section 3.

SECTION 2. DEFINITION OF THE PLAN

An Intermediary Transaction involves a corporation (T) that would have a Federal

income tax obligation with respect to the disposition of assets the sale of which would result in taxable gain (Built-in Gain Assets) in a transaction that would afford the acquiror or acquirors (Y) a cost or fair market value basis in the assets. An Intermediary Transaction is structured to cause the tax obligation for the taxable disposition of the Built-in Gain Assets to arise, in connection with the disposition by shareholders of T (X) of all or a controlling interest in T's stock, under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-in Gain Assets will not pay that tax (hereafter, the Plan). This plan can be effectuated regardless of the order in which T's stock or assets are disposed. A transaction is not an Intermediary Transaction for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of an Intermediary Transaction, and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain (T's Built-in Gain Assets) and, as of the Stock Disposition Date (as defined in component two), T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole. The tax that would result from such sale is hereinafter referred to as T's Built-

in Tax. However, for purposes of this component, T will not be considered to have any Built-in Tax if, on the Stock Disposition Date, such amount is less than five percent of the value of the T stock disposed of in the Stock Disposition (as defined in component two). In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under § 1.6011-4(b)(2), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before any Stock Disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 80 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) has been disposed of by X in a Stock Disposition is the Stock Disposition Date.

3. Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65 percent (by value) of T's Built-in Gain Assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to

dispose of at least 65 percent (by value) of T's Built-in Gain Assets to one or more persons that are not members of such controlled group, or to partnerships not described herein.

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid.

SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

A transaction that has all four components described in section 3 is only an Intermediary Transaction with respect to a person that engages in the transaction pursuant to the Plan. A person engages in the transaction pursuant to the Plan if the person knows or has reason to know the transaction is structured to effectuate the Plan. Additionally, any X that is at least a 5% shareholder of T (by vote or value), or any X that is an officer or director of T, engages in the transaction pursuant to the Plan if any of the following knows or has reason to know the transaction is structured to effectuate the Plan: (i) any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect to the transaction; or (iii) any advisor of that X engaged by that X to advise it with respect to the transaction. For purposes of this section, if T has more than five officers then the term "officer" shall be limited to the chief executive officer of T (or an individual acting in such capacity) and the four highest compensated officers for the taxable year (other than the chief executive officer or an individual acting in such capacity). A person can engage in the transaction pursuant to the Plan even if it does not understand the mechanics of how the tax liability purportedly might be offset or avoided, or the specific financial arrangements, or relationships of other parties or of T after the Stock Disposition.

A person will not be treated as engaging in the transaction pursuant to the Plan merely because it has been offered attractive pricing terms by the opposite party to a transaction.

Thus, a transaction may be an Intermediary Transaction with respect to X but not Y, or with respect to Y but not X, in situations where one party engages in the transaction pursuant to the Plan and the other does not. A transaction may also be an Intermediary Transaction with respect to some but not all Xs and/or some but not all Ys, depending on whether they engage in the transaction pursuant to the Plan. A transaction will not be an Intermediary Transaction with respect to any person that does not engage in the transaction pursuant to the Plan regardless of the amounts reported on any return.

SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS; PARTICIPATION GENERALLY

01. Safe Harbor Exceptions for Certain Persons

A transaction is not an Intermediary Transaction with respect to the following persons under the following circumstances:

- Any X, if the only T stock it disposes of is traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and prior to the disposition X (including related persons described in section 267(b) or 707(b)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by X.
- Any X, T, or M, if, after the acquisition of the T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded on an established securities market in the United States, or is consolidated for financial reporting

purposes with such an issuer.

- Any Y, if the only Sold T Assets it acquires are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

02. Participation

If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A).

SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as "listed transactions" under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may

already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable parties may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irscounsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

Chief Counsel (Corporate). For further information regarding this notice contact Mr. Bates on (202) 622-7550 (not a toll free call).

EXHIBIT 10

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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, an individual, Plaintiff, v. PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	Case No. A-16-735910-B Dept. No. XV **PRICEWATERHOUSECOOPERS LLP'S SECOND AMENDED OBJECTIONS AND RESPONSES TO INTERROGATORIES NOS. 10 & 11 OF PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Defendant PricewaterhouseCoopers LLP ("PwC") responds to Plaintiff Michael A. Tricarichi's First Set of Interrogatories (the "Interrogatories") as follows:[1]

PRELIMINARY STATEMENT

1. PwC's Objections and Responses are solely for the purpose of this action.

[1] Unless amended below, all other responses to Plaintiff's Interrogatories remain as served on August 23, 2017.

2. PwC's Objections and Responses to the Interrogatories are set forth below. By asserting the specific responses and objections stated below, PwC does not waive its right to challenge the relevance, materiality, or admissibility of the Interrogatories and/or its responses thereto, or the use of the Interrogatories and/or its responses thereto in any subsequent proceeding or trial in this action.

3. PwC's Objections and Responses are based upon the information and documents presently available to, and known by, PwC and disclose only those contentions, which are presently asserted based upon facts now known. It is anticipated that further investigation, legal research and analysis will supply additional facts, add meaning to known facts, and lead to new factual conclusions and legal contentions, all of which may result in substantial addition to, change in, and/or variations from these contentions and responses, and supplementation of them, where appropriate. PwC reserves the right to supplement or modify any of these Objections and Responses as additional facts are recalled or ascertained, analyses are rendered, legal research is completed and contentions are made.

GENERAL OBJECTIONS

The General Objections set forth herein apply to all Interrogatories propounded by Plaintiff, and all documents that PwC will produce in this litigation. The following General Objections are continuing in nature and are hereby incorporated into the Specific Objections and Responses set forth below:

1. PwC objects to the general scope of the Interrogatories in that "any" or "all" information is requested, phrases which render the Interrogatories unduly burdensome, overbroad, unreasonable, and oppressive.

2. PwC objects to the Interrogatories to the extent they call for information outside the scope of the Court's May 30, 2017 Order ("May 30 Order") limiting Plaintiff's discovery to that "necessary to oppose PwC's summary judgment as set forth in Paragraph 10" of Plaintiff's April 7, 2017 Affidavit in opposition to PwC's Motion for Summary Judgment ("Tricarichi Affidavit") – which the Court noted was not "necessarily super clear."

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3. PwC objects to the Interrogatories to the extent they call for information that is neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

4. PwC objects to the Interrogatories to the extent they seek information or documents from a time period not relevant to the action and not reasonably calculated to lead to the discovery of admissible evidence, and/or beyond the scope of the May 30 Order.

5. PwC objects to the Interrogatories to the extent each Interrogatory is vague and ambiguous and fails to identify the requested information with sufficient particularity.

6. PwC objects to the Interrogatories insofar as they are redundant and overlapping and, therefore, are unduly burdensome.

7. PwC objects to the Interrogatories to the extent they seek to require PwC to comply with requirements beyond those imposed by the Nevada Rules of Civil Procedure, or exceed the permissible scope of discovery under the law.

8. PwC objects to the Interrogatories to the extent they seek information protected by the attorney-client privilege, the work product doctrine, the official information privilege, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada.

9. PwC objects to the Interrogatories to the extent they seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

10. PwC objects to the Interrogatories to the extent they seek information not known to PwC or in PwC's possession, custody, or control.

11. PwC objects to the Interrogatories to the extent that the information sought is obtainable from other sources, including those that are publicly available, that are more convenient, less burdensome, or less expensive.

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12. PwC objects to the Interrogatories to the extent they call for, or can be interpreted as calling for, legal conclusions.

13. No incidental or implied admissions are intended by the Objections and Responses herein. The fact that PwC has objected to any Interrogatory should not be taken as an admission that responsive information exists or that PwC accepts or admits the existence of any fact set forth or assumed by such Interrogatory, or that such objection constitutes admissible evidence.

14. Nothing contained in these Objections and Responses is intended as, nor shall in any way be deemed, a waiver of the attorney-client privilege, work product doctrine, official information privilege, the right of privacy, or any other applicable privilege or protection. Any production or disclosure of privileged information is inadvertent and shall not constitute a waiver of the privilege with respect to the subject matter addressed therein.

15. PwC is providing these Objections and Responses without waiving, or intending to waive, but on the contrary preserving, and intending to preserve: (i) the right to object, on the grounds of competency, privilege, relevance or materiality, or any other proper grounds, to the use of these Objections and Responses for any purpose, in whole or in part, in any subsequent stage or proceeding in this action; (ii) the right to object on any and all grounds, at any time, to other Interrogatories or other discovery procedures involving or relating to the subject matter of the Interrogatories to which PwC has responded herein; and (iii) the right at any time to revise, correct, add to, or clarify any of the Objections and Responses propounded herein.

16. The foregoing Preliminary Statement and General Objections are hereby expressly incorporated into each of the specific Objections and Responses below.

OBJECTIONS TO DEFINITIONS

1. PwC generally objects to the Definitions set forth in the Interrogatories to the extent they attempt to define words beyond their ordinary meaning.

2. PwC generally objects to the Definitions on the grounds and to the extent they cause the specific Interrogatories to be overbroad and unduly burdensome. PwC also objects to the Definitions to the extent they cause the Interrogatories to call for information that is

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privileged, not relevant to the subject matter involved in this action, not admissible in evidence, or not reasonably calculated to lead to the discovery of admissible evidence.

3. PwC generally objects to the Definitions to the extent they render any Interrogatory overbroad, unduly burdensome, or oppressive.

4. PwC generally objects to the Definitions to the extent they purport to place upon PwC obligations different from or greater than those imposed by Nevada statute, the Nevada Rules of Civil Procedure, and any other applicable law. Whenever the Definitions conflict with the Nevada Rules of Civil Procedure, PwC will comply with the Nevada Rules of Civil Procedure and not Plaintiff's Definitions.

5. PwC objects to Plaintiff's Definition of "You," "Your," and "PwC" to the extent Plaintiff defines these terms to include "Pricewaterhouse Coopers LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Richard Stovsky and Timothy Lohnes." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "You," "Your," and "PwC" to the extent that it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege.

6. PwC objects to Plaintiff's Definition of "Plaintiff" to the extent Plaintiff defines that term to include "Michael A. Tricarichi and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; is vague and ambiguous; and is unduly burdensome.

7. PwC objects to Plaintiff's Definition of "Seyfarth Shaw" to the extent Plaintiff defines that term to include "Seyfarth Shaw LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Graham R. Taylor and John E. Rogers." Such a

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boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

8. PwC objects to Plaintiff's Definition of "Rabobank" to the extent Plaintiff defines that term to include "Cooperatieve Rabobank U.A. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

9. PwC objects to Plaintiff's Definition of "Utrecht" to the extent Plaintiff defines that term to include "Utrecht-America Finance Co. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

10. PwC objects to Plaintiff's Definition of "Taylor" to the extent Plaintiff defines that term to include "Graham R. Taylor and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

11. PwC objects to Plaintiff's Definition of "Fortrend" to the extent Plaintiff defines that term to include "Fortrend International LLC and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including John P. McNabola and Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu")." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

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12. PwC objects to Plaintiff's Definition of "Midcoast" to the extent Plaintiff defines that term to include "Midcoast Credit Corp. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

13. PwC objects to Plaintiff's Definition of "Midco" to the extent Plaintiff defines that term to include "the concept, strategy, or use of an intermediary entity to facilitate a business transaction and/or to reduce the tax implications of the transaction to the buyer and/or seller, by which an intermediary entity acquires stock from the selling party and subsequently transfers assets to the buying party." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Midco" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Midco" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

14. PwC objects to Plaintiff's Definition of "Midco Transaction" to the extent Plaintiff defines that term to include "a transaction employing or consistent with the Midco concept or strategy, or consistent with or substantially similar to the transaction(s) described in IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession,

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custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Midco Transaction" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Midco Transaction" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

15. PwC objects to Plaintiff's Definition of "Fortrend Transaction" to the extent Plaintiff defines that term to include "a Midco Transaction or the transaction in which the Plaintiff participated, as described in Plaintiff's Complaint, which was found to be a Midco Transaction." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Fortrend Transaction" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Fortrend Transaction" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

16. PwC objects to Plaintiff's Definition of "Listed Transaction" to the extent Plaintiff defines that term to include "a transaction that is the same or substantially similar to one of the types of transactions previously or subsequently determined by the IRS to be a tax avoidance transaction by being identified as such by notice, regulation, or other form of published guidance." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks

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documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Listed Transaction" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Listed Transaction" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

17. PwC objects to Plaintiff's Definition of "Document" to the extent it goes beyond the requirements of the Nevada Rules of Civil Procedure.

OBJECTIONS TO INSTRUCTIONS

1. PwC generally objects to the Instructions set forth in the Interrogatories to the extent they attempt to define words beyond their ordinary meaning.

2. PwC generally objects to the Instructions on the grounds and to the extent they cause the specific Interrogatories to be overbroad and unduly burdensome. PwC also objects to the Instructions to the extent they cause the Interrogatories to call for information that is privileged, not relevant to the subject matter involved in this action, not admissible in evidence, or not reasonably calculated to lead to the discovery of admissible evidence.

3. PwC generally objects to the Instructions to the extent they render any Interrogatory overbroad, unduly burdensome, or oppressive.

4. PwC generally objects to the Instructions to the extent they purport to place upon PwC obligations different from or greater than those imposed by Nevada statute, the Nevada Rules of Civil Procedure, and any other applicable law. Whenever the Instructions conflict with the Nevada Rules of Civil Procedure, PwC will comply with the Nevada Rules of Civil Procedure and not Plaintiff's Instructions.

5. PwC objects to the Instructions to the extent they cause the Interrogatories to seek information from a time period not relevant to the action and not reasonably calculated to lead to the discovery of admissible evidence, and/or beyond the scope of the May 30 Order.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

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INTERROGATORY NO. 10:

Have you complied with AICPA Statement on Standards for Tax Services No. 6, with respect to the Fortrend Transaction? State the basis for Your answer.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) it is vague, ambiguous and overbroad as to the phrase "complied"; (ii) to the extent it calls for a legal conclusion; (iii) to the extent it assumes facts not in evidence; (iv) to the extent it seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (v) to the extent it seeks information beyond the scope of the May 30 Order; (vi) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (vii) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (viii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

Statement on Standards for Tax Services No. 6, titled "Knowledge of Error: Return Preparation and Administrative Proceedings," "sets for the applicable standards for a member [of the AICPA] who becomes aware of (a) an error in a taxpayer's previously filed tax return; (b) an error in a return that is the subject of an administrative proceeding, such as an examination by a taxing authority or an appeals conference; or (c) a taxpayer's failure to file a required tax return." It provides that "[a] member should inform the taxpayer promptly upon becoming aware of an

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error in a previously filed return, an error in a return that is the subject of an administrative proceeding, or a taxpayer's failure to file a required return." From April 2003, when Plaintiff first engaged PwC, through June 2012, the point at which Plaintiff asserts he became of aware of potential claims against PwC because he received a notice of transferee liability from the IRS (*see* MSJ Opp. at 16; MSJ hearing tr. at 36-37), PwC complied with AICPA Statement on Standards for Tax Services No. 6 because PwC did not "becom[e] aware of an error in a previously filed return, an error in a return that is the subject of an administrative proceeding, or a taxpayer's failure to file a required return" in connection with the transaction at issue in this action.

INTERROGATORY NO. 11:

Have you complied with Section 10.21 of Treasury Circular No. 230, with respect to the Fortrend Transaction? State the basis for Your answer.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) it is vague, ambiguous and overbroad as to the phrase "complied"; (ii) to the extent it calls for a legal conclusion; (iii) to the extent it assumes facts not in evidence; (iv) to the extent it seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (v) to the extent it seeks information beyond the scope of the May 30 Order; (vi) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (vii) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (viii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an

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evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

Section 10.21 of Treasury Circular No. 230 provides: "A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the facts of such noncompliance, error, or omission" and the "consequences as provided under the Code and regulations of such noncompliance, error, or omission." From April 2003, when Plaintiff first engaged PwC, through June 2012, the point at which Plaintiff asserts he became of aware of potential claims against PwC because he received a notice of transferee liability from the IRS (*see* MSJ Opp. at 16; MSJ hearing tr. at 36-37), PwC complied with Section 10.21 of Treasury Circular No. 230 because PwC did not "know[] that [Plaintiff] ha[d] not complied with the revenue laws of the United States or ha[d] made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States" in connection with the transaction at issue in this action.

Dated: March 30, 2018

SNELL & WILMER L.L.P.

By: */s/ Patrick G. Byrne*
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Las Vegas, NV 89169
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PricewaterhouseCoopers LLP

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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Corina M. Trainer, being first duly sworn upon other, deposes and says that she is the Tax Quality and Risk Management, Management Director of Defendant PricewaterhouseCoopers LLP and that he/she has read the foregoing **PRICEWATERHOUSECOOPERS LLP'S AMENDED RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**, knows the contents thereof, and that the responses are, upon information and belief, and to the knowledge of Affiant, just and true.

Dated this 28th day of March, 2018.

[Signature]

CORINA M. TRAINER
Corina M. Trainer, Tax Quality and Risk Management, Managing Director

SUBSCRIBED AND SWORN to before me this 28 day of March, 2018.

Notary Public in and for
Said County and State

My Commission Expires:

My Commission Expires
January 14, 2019

ARNITA BERRY NOTARY PUBLIC Expiration Jan 14, 2019 DISTRICT OF COLUMBIA

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing: **PRICEWATERHOUSECOOPERS LLP'S SECOND AMENDED OBJECTIONS AND RESPONSES TO INTERROGATORIES NOS. 10 & 11 OF PLAINTIFF'S FIRST SET OF INTERROGATORIES**, by the method indicated:

☐	i) **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	ii) **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	iii) **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	iv) **BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
☐	v) **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
X	vi) **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

and addressed to the following:

Todd L. Moody, Esq.
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Attorneys for Plaintiff

Dated: March 30, 2018

*/s/ Winston P. Hsiao*_____
Winston P. Hsiao

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EXHIBIT 11

Docket 86317 Document 2024-12344

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR,

Defendants.

Case No.: A-16-735910-B
Dept. No.: XV

AFFIDAVIT OF RICHARD STOVSKY IN SUPPORT OF DEFENDANT PRICEWATERHOUSECOOPERS LLP'S RENEWED MOTION FOR SUMMARY JUDGMENT FOLLOWING LIMITED RULE 56(f) DISCOVERY

RICHARD STOVSKY, being first duly sworn, deposes and says that he has personal knowledge and is competent to testify to the following:

1. I am a tax partner and former Vice Chairman, Mid Central Region, of Defendant PricewaterhouseCoopers LLP ("PwC"). I have been a PwC tax partner since 1992.

2. I am over the age of 18. Based on my personal knowledge, experience as a PwC professional during the time period relevant to this action, and my review of relevant documents, I have knowledge of the facts stated in this Affidavit and, if sworn as a witness, am competent to testify to them.

3. I make this affidavit pursuant to NRS 52.460 and in support of PwC's Renewed Motion for Summary Judgment Following Limited Rule 56(f) Discovery ("Motion").

4. All facts stated herein are based upon my personal knowledge or are derived from the business records of PwC.

5. PwC's headquarters and principal place of business are in New York, New York.

6. I was the engagement partner on PwC's April 2003 engagement with Plaintiff Michael A. Tricarichi concerning his possible transaction with Fortrend International, LLC for the sale of Mr. Tricarichi's shares in Westside Cellular Inc. (the "Transaction").

7. In April 2003, I, on behalf of PwC, sent Mr. Tricarichi an engagement letter and attached Terms of Engagement to Provide Tax Services (the "Engagement Agreement"). Mr. Tricarichi returned a copy of the Engagement Agreement with a signature dated April 25, 2003.

8. I have examined the Engagement Agreement referenced in the Motion, and have made, or caused to be made, a true and exact copy of it. Attached as **Exhibit 1** to the Motion is a true and correct reproduction of the original Engagement Agreement, produced in this action by PwC with the bates-stamp PwC-001212.

9. Pursuant to the Engagement Agreement, a group of PwC individuals, including Timothy Lohnes and me, performed work and provided advice to Plaintiff pursuant to the Engagement Agreement.

10. In November 2003, Mr. Lohnes and I discussed over e-mail whether IRS Notice 2003-76, which provided an updated list of listed transactions, required any action by Mr.

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Tricarichi with regard to the Transaction. Mr. Lohnes stated: "I have reviewed this list for Westside Cellular, and confirm that it contains no items that would impact their transaction, other than the items we discussed previously, namely the [M]idco listed transaction. However, we concluded that the transaction undertaken by Westside was not substantially similar to the Midco listed transaction." Attached as **Exhibit 8** to the Motion is a true and correct reproduction of the November 10 through November 14, 2003 e-mail exchange between Mr. Lohnes and me, produced in this action by PwC with the bates-stamp PwC-000278.

11. In December 2008, Mr. Lohnes and I discussed over e-mail whether IRS Notice 2008-111, in which the IRS clarified the definition of Midco transactions under IRS Notice 2001-16, impacted the advice previously given to Mr. Tricarichi regarding the Transaction. Mr. Lohnes wrote to me on December 2, 2008 stating: "I read through the Notice and agree with your assessment that it shouldn't change any of our prior analysis." Attached as **Exhibit 9** to the Motion is a true and correct reproduction of the December 2, 2008 e-mail from Mr. Lohnes to me, produced in this action by PwC with the bates-stamp PwC-001371.

Richard P. Stovsky

RICHARD STOVSKY

Subscribed and sworn to (or affirmed) before me, a Notary Public,

on this 14th day of June, 2018, by RICHARD STOVSKY.

Tammy Bittel

NOTARY PUBLIC in and for COUNTY

OF CUYAHOGA, STATE OF OHIO

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EXHIBIT 12

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR,

Defendants.

Case No.: A-16-735910-B
Dept. No.: XV

AFFIDAVIT OF WINSTON P. HSIAO IN SUPPORT OF DEFENDANT PRICEWATERHOUSECOOPERS LLP'S RENEWED MOTION FOR SUMMARY JUDGMENT FOLLOWING LIMITED RULE 56(f) DISCOVERY

WINSTON P. HSIAO, being first duly sworn, deposes and says that he has personal knowledge and is competent to testify to the following:

1. I am an attorney admitted to practice before the courts of the State of California and have been admitted *pro hac vice* to this Court. I am an associate in the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, counsel for Defendant PricewaterhouseCoopers LLP ("PwC").

2. I am over the age of 18. Based on my personal knowledge, role as PwC counsel, and my review of relevant documents, I have knowledge of the facts stated in this Affidavit and, if sworn as a witness, am competent to testify to them.

3. I make this affidavit in support of PwC's Renewed Motion for Summary Judgment Following Limited Rule 56(f) Discovery ("Motion").

4. Attached as **Exhibit 2** to the Motion is a true and correct copy of the Affidavit of Michael A. Tricarichi in Support of Plaintiff's Opposition to Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment, filed in this action on April 10, 2017.

5. Attached as **Exhibit 3** to the Motion is a true and correct copy of the transcript of the hearing on PwC's original Motion for Summary Judgment, held in this action on May 10, 2017.

6. Attached as **Exhibit 4** to the Motion is a true and correct copy of a document produced by Plaintiff Michael A. Tricarichi ("Plaintiff") in this action, bates-stamped TRICAR-NV0006613. The version produced by Plaintiff contains a bates-stamp at the bottom-right corner of the document in illegibly sized font.

7. Attached as **Exhibit 5** to the Motion is a true and correct copy of Plaintiff's testimony before the United States Tax Court on June 9, 2014 in the matter of Michael A. Tricarichi v. Commissioner of Internal Revenue, No. 23630-12, which was attached to PwC's Request for Judicial Notice in Support of PwC's Motion to Dismiss as Exhibit 4.

8. Attached as **Exhibit 6** to the Motion is a true and correct copy of Plaintiff's answering brief filed before the United States Tax Court on November 10, 2014 in the matter of

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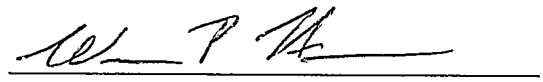
Michael A. Tricarichi v. Commissioner of Internal Revenue, No. 23630-12, which was attached to PwC's Request for Judicial Notice in Support of PwC's Motion to Dismiss as Exhibit 1.

9. Attached as **Exhibit 7** to the Motion is a true and correct copy of the Order Regarding Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment, entered by the Court in this action on May 31, 2017.

10. Attached as **Exhibit 10** to the Motion is a true and correct copy of PwC's Second Amended Objections and Responses to Interrogatories Nos. 10 & 11 of Plaintiff's First Set of Interrogatories, served in this action on March 30, 2018.

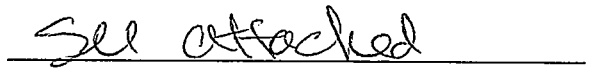
11. Plaintiff propounded document requests and interrogatories on May 30, 2017. After a meet-and-confer process regarding the interrogatories and scope of document production, PwC served interrogatory responses and produced over 2,000 documents totaling over 30,000 pages on August 23, 2017 and March 30, 2018. Plaintiff did not request any additional discovery and pursuant to the parties' stipulated schedule, Rule 56(f) discovery closed on May 15, 2018.



WINSTON P. HSIAO

Subscribed and sworn to (or affirmed) before me, a Notary Public,

on this 14th day of June, 2018, by WINSTON P. HSIAO.



NOTARY PUBLIC in and for COUNTY

OF LOS ANGELES, STATE OF CALIFORNIA

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CALIFORNIA JURAT WITH AFFIANT STATEMENT **GOVERNMENT CODE § 8202**

☒ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–6 to be completed only by document signer[s], *not* Notary)

1 _____
2 _____
3 _____
4 _____
5 _____
6 _____

Signature of Document Signer No. 1 *Signature of Document Signer No. 2 (if any)*

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 14th day of June, 2018, by (1) Winston P. Hsiao (and (2) _____),

Date *Month* *Year*

Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

CANDICE A. SPOON
Notary Public – California
Los Angeles County
Commission # 2217832
My Comm. Expires Oct 12, 2021

Signature _____

Place Notary Seal Above *Signature of Notary Public*

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

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EXHIBIT 1

Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transactions Tax Shelter

Notice 2001-16

The Internal Revenue Service and the Treasury Department have become aware of certain types of transactions, described below, that are being marketed to taxpayers for the avoidance of federal income taxes. The Service and Treasury are issuing this notice to alert taxpayers and their representatives of certain responsibilities that may arise from participation in these transactions.

These transactions generally involve four parties: seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T. Pursuant to a plan, the parties undertake the following steps. X purports to sell the stock of T to M. T then purports to sell some or all of its assets to Y. Y claims a basis in the T assets equal to Y's purchase price. Under one version of this transaction, T is included as a member of the affiliated group that includes M, which files a consolidated return, and the group reports losses (or credits) to offset the gain (or tax) resulting from T's sale of assets. In another form of the transaction, M may be an entity that is not subject to tax, and M liquidates T (in a transaction that is not covered by § 337(b)(2) of the Internal Revenue Code or § 1.337(d)-4) of the Income Tax Regulations, resulting in no reported gain on M's sale of T's assets.

Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds, including but not limited to one of the following: (1) M is an agent for X, and consequently for tax purposes T has sold assets while T is still owned by X, (2) M is an agent for Y, and consequently for tax purposes Y has purchased the stock of T from X, or (3) the transaction is otherwise properly recharacterized (e.g., to treat X as having sold assets or to treat T as having sold assets while T is still owned by X). Alternatively, the Service may examine M's consolidated group to determine whether it may properly offset losses (or credits) against the gain (or tax) from the sale of assets.

The Service may impose penalties on participants in these transactions, or, as applicable, on persons who participate in the promotion or reporting of these transactions, including the accuracy-related penalty under § 6662, the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701.

Transactions that are the same as or substantially similar to those described in the Notice 2001-16 are identified as "listed transactions" for the purposes of § 1.6011-4T(b)(2) of the Temporary Income Tax Regulations and § 301.6111-2T(b)(2) of the Temporary Procedure and Administration Regulations. See also § 301.6112-1T, A-4. It should be noted that, independent of their classification as "listed transactions" for purposes of §§ 1.6011-4T(b)(2) and 301.6111-2T(b)(2), such transactions may already be subject to the tax shelter registration and list maintenance requirements of §§ 6111 and 6112 under the regulations issued in February 2000 (§§ 301.6111-2T and

301.6112-1T, A-4). Persons required to register these tax shelters who have failed to register the shelters may be subject to the penalty under § 6707(a) and to the penalty under § 6708(a) if the requirements of § 6112 are not satisfied.

For further information regarding this notice, contact Theresa Abell, of the Office of Associate Chief Counsel (Corporate), on (202)622-7700 (not a toll-free call).

EXHIBIT 2

Message

From: Thomas J Palmisano ["cn=thomas j palmisano/ou=us/ou=tls/o=pwc"]
Sent: 10/30/2003 12:16:44 AM
To: Mike J. Morris ["cn=mike j. morris/ou=us/ou=tls/o=pwc@americas-us"]; Mark A Thompson ["cn=mark a thompson/ou=us/ou=tls/o=pwc@americas-us"]; Pat Berrigan ["cn=pat berrigan/ou=us/ou=tls/o=pwc@americas-us"]
Subject: Confidential Client Info tax shelter/reportable transaction discussion
Attachments: _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png

I spoke to David about a mtg with either Confidential Client Info It's not great timing due to the earnings release. Therefore, he would like to have a call in the next couple of weeks to discuss. Let me know if you are interested in participating in this call. Attached is some comprehensive info on the topice

tjp

Thomas J. Palmisano
PricewaterhouseCoopers LLP
1201 Louisiana, Suite 3200
Houston, Texas 77002
Office: (713) 356-8264
Cell: (713) 302-4914
Fax: (813) 741-4136

----- Forwarded by Thomas J Palmisano/US/TLS/PwC on 10/29/2003 06:16 PM -----

Dennis R. McErlean/US/TLS/PwC
10/29/2003 09:38 AM

To	Troy Collman/US/TLS/PwC@Americas-US, Bobby Marandi/US/TLS/PwC@Americas-US, Greg Lawton/US/TLS/PwC@Americas-US, Thomas J Palmisano/US/TLS/PwC@Americas-US, Byron Ratliff/US/TLS/PwC@Americas-US, David W. Lucks/US/TLS/PwC@Americas-US, David C Meyer/US/TLS/PwC@Americas-US, J. David Anders/US/TLS/PwC@Americas-US, David McDonald/US/TLS/PwC@Americas-US, Matthew Martina/US/TLS/PwC@Americas-US
cc	Kimberly J DeWeese/US/TLS/PwC@Americas-US, Tim Throndson/US/TLS/PwC@Americas-US, Barbara Reeder/US/TLS/PwC@Americas-US, Amy Stowell/US/TLS/PwC@Americas-US, Brandon Mark/US/TLS/PwC@Americas-US, Niloufar Molavi/US/TLS/PwC@Americas-US, Crissy Collett/US/TLS/PwC@Americas-US
Subject	For the 10 am call: Five Days Out - Tax Shelter Meetings week of November 3rd

All:

AA 000372

Below please find, for the call at 10 am.

1. Under **blue** heading, PwC's point of view regarding Tax Shelter Compliance
2. Under green heading, proposed talking points for next week's meetings
3. Under **red** heading, the contents of the initial note that I sent to begin our efforts in setting up these client meetings.

Regards,

Dennis

PwC Point of View re Tax Shelter Compliance

- We in the process of memorializing PwC's long-held "Point of View" with regard to tax shelter compliance. The first draft of the POV is attached below. Please let me know if you have any thoughts or comments.

PwC Point of View

1. Congress and the IRS are very serious in their attempts to curtail potentially abusive transactions.
2. Taxpayers found that the provisions of the February 2000 proposed regulations (and subsequent modifications) were easy to avoid. Therefore, they would not be effective in curtailing potentially abusive transactions. In addition, taxpayers found the related penalty regime to be "toothless."
3. Based on the above, we made three very early predictions, two of which have come to pass and one which will come to pass shortly:
   - We predicted that the IRS would become steadfast in its resolve to put an immediate stop to abusive transactions.
   - We predicted that the final regulations would be over-inclusive and unavoidable and that these regulations would create a major compliance headache for corporate America.
   - We predicted that Treasury and the IRS would push Congress to implement a draconian penalty regime and that states would follow shortly thereafter.
7. Nearly every person who files a US income tax return would be impacted by the final regulations and the related penalty regime
8. The impact on our large corporate clients would be significant and would require companies to implement new reporting processes, procedures and systems to comply with the regulations.
9. We believe that all companies must undertake some process to:
   - Educate all stakeholders on the particulars of the regulations. The educational process will differ by stakeholder group.
   - Search for all potentially reportable transactions.
   - Analyze the transactions and determine which transactions the company will report.
   - Report transactions on a complete, accurate and comprehendible Form 8886.
   - Develop a process for retaining the appropriate documentation.
   - Finally, many companies will want to develop a process for identifying and analyzing transactions on a contemporaneous basis.
16. We have recently expanded our point of view to include our belief that companies must revolutionize the way they deal with the IRS and with IRS examinations. Companies must strive to decrease audit related time and effort. Likewise, the IRS has the same interest because of its limited resources. In dealing appropriately with compliance with the tax shelter regulations, companies can demonstrate to the IRS that they are serious about reducing the amount of financial and personnel resources dedicated to the audit function by the IRS and the company.
17. The benefits of undertaking a more extensive tax shelter compliance effort include:
   - Minimization of reputational risk.
   - Avoidance of the penalty provisions.
   - How a company deals with tax shelter compliance in 2003 will set the tone for tax shelter audits in following years. A taxpayer can reduce the amount of time spent by the company and the IRS on the audit, provided that the company can demonstrate to the that it has taken the regulations seriously and has made a good faith attempt to comply by performing a self-audit and preparing audit-ready files.
   - How a company deals with tax shelter compliance will set the tone for the broader IRS audit as well. So far, we have learned of two clients who told us that when the IRS discovered that they missed reporting a transaction, the audit immediately took a contentious turn.
   - Compliance with the provisions of the Sarbanes Oxley Act.
   - A better understanding of, and more involvement in, the business operations by the tax department.

24. With respect to compliance efforts, companies can do as much or as little of the work as they would like. In the end, the company should take a reasonable business approach when designing and planning their tax shelter compliance efforts.

Talking Points for Client Meeting

These are the talking points that we have used for an initial call on RTDA. The focus is the process for compliance. This is a very straight forward discussion covering:

- Their activities to day
- Our observation of what other clients are doing
- IRS activities
- Our recommendations

Introduction and Background of Presenters

Queries (use any of the following, where appropriate)

1. Have you received the model IDR?

IRS - Tax Shelter Audit Guide.pdf

IDR 4564 ALL.pdf

Response to the IRS Model IDR. You might find the following links to the Model IDR helpful:

1. IDR Page 1
2. IDR Page 2
3. IDR Page 3
4. IDR Page 4
5. IDR FAQs

- If yes, what process did you use to gather information for your response? Do you plan to use that same process for 2003 compliance?
- If no, expect it and be ready to respond.

8. What steps have you taken to comply with the regulations?
9. Where does the company stand on its Sarbanes Oxley 404 efforts and what has been the Tax Department's role?
10. In what areas are you struggling?
11. Has any other firm been here to talk to you about tax shelter compliance?

Things Going On In The Marketplace

1. IRS Enforcement
- Promoter audits
- Database and extrapolation
- Retrained auditors

5. Sarbanes Oxley
- Audit Committee becoming concerned
- CFO concerned
- Tax shelters control objective
- Auditors are concerned
- Reputational risk

11. Penalty Provisions
- Federal penalties
- California penalties
- Other states
- Information sharing among states
- Information sharing among states and IRS

17. Post 9-15 Compliance Activity Focused On:

- Sarbanes Oxley 404 compliance
- Tax shelter compliance
- Improving the compliance process and incorporating the two initiatives

21. Our Conversations With IRS and Treasury

- Developed a process and reviewed the process with them
- They agree that corporate taxpayers need to implement a process like the one we reviewed with them
- Those taxpayers that have put a process in place and have made a reasonable attempt to comply will be looked upon much more favorably.

Every Taxpayer Must Develop A Compliance Process

1. Taxpayers must also develop appropriate policies, procedures and systems as well.
2. We have been sharing our model process with clients and helping them develop a process tailored to their company
3. Must take a reasonable business approach
4. Process consists of four phases:

- Phase I - Education and identification of areas where transactions may arise

- Describe 4 hour CE course

- Tax department develops a slide deck from the materials and educates all relevant stakeholders in the organization

- During CE, identify where transactions may arise

- At end of phase, develop a plan for compliance

- Phase II - 2003 compliance

- Find all "potentially reportable" transactions

- Identify an "owner" in each area of the business where transactions arise

- Decide which transactions will be reported - sometimes requires assistance from deep technical experts

- Complete Form 8886 for each reportable transactions

- Address documentation requirements

- Document policies and procedures in accordance with Sarbanes Oxley 404 provisions

- Phase III - Develop a process to capture transactions on a contemporaneous basis
- Phase IV - Regularly update policies, procedures and systems.

- Monitor compliance - often assisted by Internal Audit

Where To Start

1. Most of our clients are starting with the CE Session
2. Form a committee - include individuals from areas where transactions may arise
3. Develop a plan for compliance
4. Absolute minimum that must be done:

- Review Model IDR and make sure the company is ready to respond
- Review IRS tax shelter audit guide (currently out of date, so they need to update it first) and do a self-review prior to an IRS exam.

7. Start now - compliance process takes time

Done - Ask Client For Reactions and Say No More

1. The above presentation should take no more than 30-40 minutes and preferably 25 minutes.

CONTENTS OF INITIAL NOTE SENT BY DENNIS MCERLEAN ON 9/30/03

RTDA Sales Cycle:

Create an awareness, as targets and clients must understand the regulations, proposed penalties, IRS enforcement activities, and potential impact on their company before they make their buying decision

Step 1: Contact each priority C2 target within the next 30 days with the goal to schedule 1 hour meetings (conference call or in person).

Step 2: Conduct initial meeting, set the tax shelter regulations in the broader Sarbanes Oxley context, explain the regulations, penalties, IRS enforcement activity and discuss potential impact upon the target company. Assess client's current level of understanding of the regulations and the company's compliance activities to date.

Goal of this meeting is to sell a client service opportunity based on their compliance activities underway and level of understanding of the regulations:

- RTDA Phase One;
- Potential reportable transaction risk analysis assistance;
- Brainstorming session;
- Formal CE; or
- Scheduled follow-up with more information (see steps 4 and 5).

Follow-up with additional information on the importance and impact of regulations

Step 3: Share IRS Audit Guide, IRS Super IDR, CE outline, IntoPwC articles, California legislation update and/or federal penalty update

Step 4: Follow-up meeting in person or conference call to share insights into what other companies are doing, level of effort involved, and to discuss the information previously provided.

Goal of this meeting is the same as above, providing services to the client for a fee consistent with one of the five bullets listed above.

Discuss and sell next phases of compliance methodology

Step 5: First Year Compliance

Step 6: Ongoing Process and Procedures for Compliance

Slide Presentation

RTDA - Central Region Rollout - Conference Call.ppt

RTDA Placemat.ppt

RTDA One-Pager - FINAL 5-12-03.pdf

Tax Executive Article.pdf

Link to Pinnacle Idea # 4550 {doclink : document = '003A7070309DA4D185256CCA006AA552' view = '1D7D3F6DA6A71D7985256C2C004982B0' database = '8525632A00656E1E' }

Link to Placemat and External One Pager {doclink : document = 'F16BA1FD2744035F85256CED0060C5BB' view = '0E6B36BE46B5169385256BA90071832C' database = '85256B73007A00BB' }

AA 000376

1. Reportable Transactions Disclosure Analysis (RTDA) - Phase One. Phase One of a multi-phase process is designed to provide company stakeholders with an overview and common understanding of the reporting requirements. PwC will also work with you to identify and document your company's information flows, policies, and procedures related to the recording, authorizing, and documenting of certain transactions. The result of this phase is an action plan specific to your client for meeting the compliance requirements. They may engage us to continue with Phases II, III, and IV as necessary.

COST: Time &Materials - NOTE: For a muli-national company with several CFCs, the fee range is between $75,000 - $100,000.

- Internal use only FAQs

RTDA FAQs - 5-12-03.doc

- Internal use only Talking Points

RTDA Talking Points 5-12-03.doc

2. Potential Reportable Transaction Risk Analysis Assistance - This assistance would involve a review of the client's tax return, including significant book-tax differences, to provide a risk spectrum for transactions that should be reported under the new regulations. PwC will not provide a specific opinion on the merits of the transactions but limit the scope to highlighting transactions that would be reportable. **COST: Time &Materials**

3. Brainstorming Session - In this session, PwC will meet with the client to identify areas of concerns specific to your company related to complying with the tax shelter regulations. This session is similar to the Phase One opportunity listed above but limited in scope and time. The PwC team will comprise of technical subject matter specialists, business process specialists, and most importantly, the engagement partner who knows and understands the client's areas of concern. **COST: Time &Materials**

4. Formal Continuing Education (CE) session - The CE session is an excellent opportunity to educate not only the tax personnel about the tax shelter/reportable transaction disclosure rules but also the key non-tax personnel and executives about the requirements for disclosure. This is a four-hour session where a PwC team will provide the background for the regulations, the differences between the temporary and final regulations, proposed penalty provisions, including the SEC reporting provision, document retention requirements, and IRS enforcement activity under the regulations.**COST: FIXED FEE - $10,000**

- Talking points for use in your discussions with clients

tax shelter CE - TALKING POINTS 09-23-2003.doc

- A model client letter describing the initiative

Tax Shelter CE - Introductory Cover Letter 9-22-03.doc

- A course overview (not to be shared with clients without prior approval by Elaine Church or Barbara Reeder)

tax shelter CE course Outline.doc

EMERGING TAX SHELTER COMPLIANCE OBLIGATIONS

I. INTRODUCTION (5 minutes)

II. OVERVIEW OF COURSE (5 minutes)

- **Implications of Failure to Identify and Disclose**
- **Background**
- **Overview of New Tax Shelter Rules**
- **IRS Implementation Initiatives**
- **Implementation Issues And Concerns**

III. COURSE OBJECTIVES (5 minutes)

- **Gain an awareness of Treasury and IRS initiatives with respect to tax shelter compliance obligations**
- **Develop an understanding of temporary regulations involving tax shelter disclosure obligations**
- **Identify issues and concerns with implementing the temporary regulations**
- **Gain an awareness of proposed legislation in this area**

IV. IMPLICATIONS OF FAILURE TO IDENTIFY AND DISCLOSE (20 minutes)

- **Failure to identify and/or disclose a "listed" or "substantially similar" transaction**
  - **Exposure of all tax accrual workpapers if one listed or substantially similar transaction not disclosed or multiple investments in listed transactions are claimed on a tax return [Notice 2002-63]**
  - **IRS may terminate participation in LIFE process if taxpayer fails to disclose an abusive tax shelter or listed transaction**
  - **Proposed legislation provides for a $200,000 penalty that could not be rescinded and would be subject to SEC disclosure**
  - **Proposed legislation provides for a 6 year statute of limitations for the entire tax return**
- **Failure to identify and/or disclose a "reportable transaction" (including listed or substantially similar transactions)**
  - **May cause the taxpayer to violate the record retention requirements applicable to reportable transactions**

- **Preclude reliance on an opinion or advice to satisfy reasonable cause and good faith exception under section 6664(c) [Proposed regulations issued December 30, 2002][Effective for tax returns filed after December 30, 2002 for transactions entered into on or after January 1, 2003]**
- **Lack of disclose is a factor to be considered in determining whether a taxpayer has satisfied the reasonable cause and good faith exception under section 6664(c) regardless of when a transaction was entered into [Proposed regulations issued December 30, 2002]**
- **Proposed legislation provides that a 30% accuracy related penalty for listed transactions or 25% for other reportable transactions if a significant purpose of transaction is avoidance or evasion of federal income tax ("reportable avoidance transaction") that would be subject to SEC disclosure and with abatement of penalty only allowed by agreement of IRS Commissioner or the head of the Office of Tax Shelter Analysis. Calculation of penalty is amount of difference in taxable income times highest rate of tax.**

- **Failure to disclose an other reportable transaction (excluding listed transaction) or a transaction lacking economic substance**
  - **Proposed legislation provides for up to a $100,000 penalty that could only be rescinded or abated by the IRS Commissioner under exceptional circumstances and would be subject to SEC disclosure**

V. BACKGROUND (30 minutes)

- **July 1999 "The Problem of Corporate Tax Shelters"**
- **February 28, 2000 Temporary Regulations**
- **December 20, 2001 – Larry Langdon memo to field on "Consideration of Penalties in Listed Transactions and Other Abusive Tax Shelter Cases"**
- **Announcement 2002-2 – Disclosure Initiative**
- **March 20, 2002 "Plan to Combat Abusive Tax Avoidance Transaction"**
- **June 14, 2002 Temporary Regulations**
  - **Define "substantially similar"**

VI. OVERVIEW OF NEW TAX SHELTER RULES (90 minutes)

- **Three Categories of Transactions**
  - **Listed transaction – 1.6011-4T(b)(2)**
  - **Reportable transaction _ 1.6011-4T(b)**
  - **"Noneconomic Substance" transactions – Proposed Legislation**

- **Listed Transaction**
  - **A listed transaction is the same as or "substantially similar" to a transaction identified as a tax avoidance transaction by the IRS in published guidance**
  - **See attached list of 23 Listed Transactions**
  - **Taxpayer required to disclose listed transactions on Form 8886**
  - **See also Standard IDR for IRS audit**

- **"Reportable Transactions"**
  - **Background – October 22, 2002 regulations replace current disclosure regulations with more objective rules and apply to transactions entered into on or after January 1, 2003. Transactions entered into before January 1, 2003 will continue to be subject to the current disclosure regulations. Hearing date for comments is December 11, 2002**
  - **Reportable transaction Overview**
  - **Discussion of Other Reportable Transaction**
    - **Confidential transactions**
    - **Transactions with contractual protection or indemnity against failure of the tax benefits**
    - **Certain loss transactions under Section 165**
    - **Transactions with a significant (more than $10 million) book-tax difference**
    - **Transactions involving a brief asset holding period**
    - **Application of disclosure regulations to U.S. shareholders of CFCs**
  - **U.S. shareholders must disclose reportable transactions of their CFCs**
    - **Regardless of whether current U.S. tax effect (?)**
  - **Special rule for book-tax differences**
    - **Book-tax difference from transaction of CFC reportable by U.S. shareholder only if Subpart F inclusion if reduced**
  - **Indirect participation in reportable transactions**
    - **Passthrough entities; transferees**
      - **Indirect participation in a reportable transaction**
      - **Transferees who know or have reason to know tax benefits are from a reportable transaction**

- Form 8886 – "Reportable transaction disclosure statement"
  - Must be filed for each taxable year affected by taxpayer's participation in the transaction; copy must be filed with OTSA
- Non-economic Substance Transactions – Proposed Legislation
  - H.R. 5095 – American Competitiveness and Corporate Accountability Act of 2002 ("Thomas bill")
    - Proposal would provide that Treasury would implement provision
  - Senate Finance Committee - Small business and Farm Economic Recovery Act of 2002
    - Proposal would provide detailed statutory rules for determining "non-economic substance transactions"

VII. IRS TAX SHELTER INITIATIVES TO ENCOURAGE COMPLIANCE and IDENTIFY POTENTIALLY ABUSIVE TRANSACTIONS (20 minutes)

- Model IDR
  - January 29, 2002 Larry Langdon memo to field
  - Form 4564 – Model IDR on "Listed Transactions"
  - FAQs on Model IDR – dated July 15, 2002

- Penalty Initiatives
  - December 20, 2001 – Larry Langdon memo to field on "Consideration of Penalties in Listed Transactions and Other Abusive Tax Shelter Cases"
  - Currently failure to disclose relevant to "reasonable cause and good faith" exception under Sec. 6664(c)
  - Preclude reliance on an opinion or advice to satisfy reasonable cause and good faith exception under section 6664(c) [Proposed regulations issued December 30, 2002][Effective for tax returns filed after December 30, 2002 for transactions entered into on or after January 1, 2003]

- Disclosure Obligations
  - February 28, 2000 temporary regulations
  - June 14, 2002 temporary regulations
  - October 22, 2002 temporary regulations

- Tax Workpapers
  - Larry Langdon memo to field on IRS Policy on Requesting Tax Accrual Workpapers

- **Announcement 2002-63**
  - **IRS will routinely seek tax accrual workpapers of taxpayers entering into listed transactions**
    - **If disclosed, IRS will only request the tax accrual work papers for the listed transaction**
    - **If not disclosed, IRS will request all tax accrual workpapers**
    - **If multiple investments in listed transactions, IRS will request all tax accrual workpapers, regardless if they were disclosed**
- **Tax Accrual Workpapers FAQs**

VIII. IMPLEMENTATION ISSUES AND CONCERNS (60 minutes)

- **Definition of "substantially similar" transactions**
  - **"Substantially Similar" includes "any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar strategy"**
    - **Broadly construed in favor of disclosure**
    - **Examples**

- **Company's obligation to identify, evaluate and report transactions of all CFCs**
  - **Interaction of two sets of disclosure regulations**
  - **Determining whether a transaction is "entered into" before or after January 1, 2003**
  - **Identifying transactions within each of the "Other Reportable Transactions" categories**
  - **How does taxpayer demonstrate/document the evaluation of whether a "transaction" is reportable?**

- **Administrative Burdens and System Issues**
  - **Dollar Thresholds for Loss Transactions**
  - **Transactions that involve Book-Tax Differences**
    - **Developing "angel" lists;**
  - **Transaction by Transaction Reporting Obligation**
  - **Lack of GAAP financial statements for CFCs**
  - **Developing process/policies to review/evaluate ordinary & customary transactions for possible reporting**
  - **Impact of exposure of Tax Accrual Workpapers**

- **Record Retention Requirements**
  - **Taxpayers required to retain "all documents and other records" relating to reportable transactions until statute of limitations has run**
    - **Includes marketing materials, written analysis, correspondence with advisors & others, analysis of tax benefits, documents relating to business purpose, internal e-mails**

IX. WRAP-UP (15 minutes)

PRICEWATERHOUSECOOPERS

PricewaterhouseCoopers LLP
Suite 800W
1301 K St., N.W.
Washington DC 20005-3333
Telephone (202) 414 1000
Facsimile (202) 414 1301

<Insert Name>
<Address 1>
<Address 2>

<Date>

Re: Tax Shelter Regulations Update CE Course

Dear <Name>

Enclosed please find a one-page description of the PricewaterhouseCoopers LLP tax shelter continuing education course. This course will provide you and other members of your tax department with an update on the tax shelter disclosure regulations along with our analysis, comments and insights. This course is intended to help your company comply with the regulations by identifying appropriate and practical solutions.

Final tax shelter regulations were issued on February 28, 2003. These regulations, like the temporary and proposed regulations, require companies to disclose many routine business transactions, including those affecting CFCs. We also expect further penalty legislation to be enacted and made effective for FY 03 returns (and all transactions entered into on or after January 1, 2003). Under proposed legislation now under consideration, penalties that could be imposed include the following:

- Up to $200,000 per transaction per year for failure to disclose a listed (or substantially similar) transaction, which penalty could not be waived under any circumstances and must be disclosed on SEC filings;

- Up to $100,000 per transaction per year for failure to disclose a reportable transaction (other than a listed transaction), which penalty could be waived only under extremely limited circumstances; and

- For either a listed or other reportable transaction that triggers audit adjustments that are sustained, significantly increased accuracy-related penalties that are imposed at a 20% rate if the transaction is disclosed and 30% if the transaction is not disclosed, with any 30% penalties subject to SEC disclosure.

Since much of the information required by the tax department to comply with the tax shelter disclosure regulations will need to be obtained from other departments, we encourage you to invite the CFO, Treasurer, Corporate Counsel and/or Controller to attend a 45-60 minute executive briefing prior to the more comprehensive continuing education class.

The cost of the CE course is <insert $7,500 east of the Mississippi and $10,000 for classes west of the Mississippi or, if appropriate one of the alternative pricing structures >.

I will call you within the next week to discuss this important issue with you. In the meantime, please do not hesitate to call me at <telephone number> with any questions.

Sincerely,

<PwC Partner>

TALKING POINTS

Clients need to understand the scope of the new tax shelter disclosure requirements because

- Recent changes to the disclosure regulations dramatically expand the scope of required disclosures. In fact, the final regulations will require disclosure of many non-abusive transactions – e.g., every section 165 loss exceeding $10 million, most book-tax differences exceeding $10 million, etc.

- Compliance will not be delayed or eliminated. Instead, the Service has enhanced a number of its enforcement initiatives to encourage compliance and Congress is poised to enact sweeping new penalties to penalize taxpayers that fail to disclose listed or other reportable transactions and to increase sanctions on transactions that the Service finds abusive. In addition California recently anticipated federal legislation by enacting tax shelter penalty legislation.

- Specifically, Treasury has implemented a number of administrative changes to penalize taxpayers who fail to disclose, even if the failure is inadvertent.

    - The Service will routinely request all tax accrual workpapers with respect to a listed or substantially similar transaction and, if a taxpayer fails to disclose a listed or substantially similar transaction, **all** tax accrual workpapers.
    - The Service will not allow a taxpayer that fails to disclose any Reportable Transaction (i.e., a Listed Transaction or an Other Reportable Transaction) to rely on an opinion or advice to satisfy the reasonable cause and good faith exceptions to accuracy-related penalties.

- Under pending federal legislation expected to be enacted and effective with respect to FY 03 returns, significant additional penalties may be applied.

    - *Per se*, non-waivable penalties of up to $200,000 could be imposed for failure to disclose a Listed Transaction ($100,000 for failure to disclose an Other Reportable Transaction).

    - Increased "accuracy related" penalties equal to 25-30 % of the tax benefit related to the non-disclosed Reportable Transaction (calculated at the maximum marginal rate) could be imposed.

    - If a taxpayer failed to disclose a Listed Transaction, the statute of limitations for the year of the transaction could be extended from 3 to 6 years.

  - If a taxpayer failed to disclose any reportable transaction, no deduction would be permitted for any interest attributable to any related deficiency.

- The final regulations, while nominally objective, actually include numerous ambiguities that may make it difficult to comply, especially with respect to listed transactions, where, in addition to the (currently 28) specific transactions described by the Service, taxpayers must identify all "substantially similar transactions".

- Even where the regulations succeed in providing objective definitions (e.g., with respect to certain section 165 losses and/or book-tax differences) they appear to be over-inclusive. In many cases, existing systems and processes may not capture the required data on a discrete transaction basis. For example, many systems do not separately capture gross losses or each transaction that gives rise to a book-tax difference. Because transaction-specific data is needed, taxpayers may have to amend processes and systems in order to ensure compliance.

- These expansive new regulations generally require disclosure of all transactions occurring on or after January 1, 2003.

- Compliance will require a company –wide commitment to identify and evaluate potentially affected transactions. Treasury support will be needed to monitor hedging and other financial transactions; business unit support (including support from CFCs) will be required to ensure compliance by all related entities.

- To ensure that all affected parties understand the regulations, their impact on the company and the company's compliance obligations, taxpayers will need to understand the regulations and their impact.

- PwC has been working closely with key Service and Congressional players to understand the policy goals, help to develop settlement initiatives, and, through its comprehensive comments on the October 2002 regulations, work to convince the Service to limit unnecessary administrative burdens.

- Our tax shelter team has an in-depth knowledge of the regulations, recommended changes, and pending legislative proposals as well as an understanding of how these regulations could affect your business operations.

- For $7500 (east of the Mississippi) or $10,000 (west of the Mississippi), our team will provide a four-hour training session for your entire Tax Department (and invited management or Treasury personnel of your choice), leaving behind not only presentation materials but a permanent reference guide.

- Participation will ensure that you understand the regulations, proposed changes and proposed legislation, as well as their potential impact on Tax Department and company operations.

- Participation will be eligible for CE credits under NASBA rules.

Reportable Transaction Disclosure Analysis
Talking Points

I. Share Insight

A. Market Drivers

Refer to "Market Drivers" on the Placemat

- As part of recent U.S. legislative and regulatory efforts to stifle the use of abusive corporate tax shelters, companies face stringent document retention and disclosure requirements
- The tax shelter regulations contain provisions that require disclosure of common commercial transactions found in many companies
- The final tax shelter regulations identify 6 categories of Reportable Transactions **(See List of Subject Matter Experts for the Listed Transactions and the Other Reportable Transactions)**
- Compliance with the regulations is not isolated to the tax department; it impacts such functions as: Accounting / Finance, Legal, Human Resources, Treasury, Mergers & Acquisitions, Information Technology, Operations, etc.
- The tax shelter regulations have created several challenges within a company, which have led to increased risks:
  - Lack of resources needed to manage the added responsibility of interpreting the tax shelter regulations
  - Inaccurate assumption that the regulations only apply to companies that have implemented "abusive" tax shelter transactions; final regulations apply objective tests which will require disclosure of many common commercial transactions
  - Significant penalties for non-compliance, if enacted
- Treasury enforcement procedures
  - The IRS will routinely request tax accrual work papers in certain situations
  - The IRS is issuing a standard IDR for Listed Transactions (or substantially similar transactions) that includes a request for executives (e.g. CFO, Treasurer) to be available to be interviewed by the IRS within two weeks relating to identified transactions
  - Under proposed regulations, the IRS will not allow a taxpayer that fails to disclose any reportable transaction (i.e., a Listed Transaction or an other reportable transaction) to rely on an opinion or other advice to satisfy the reasonable cause and good faith exceptions to accuracy-related penalties
  - The IRS may terminate the taxpayer's participation in the new streamlined audit process (LIFE) for failure to disclose a Listed Transaction
  - A taxpayer that fails to identify and disclose any reportable transaction may inadvertently violate the related record retention requirements
  - Failure to disclose may limit participation in, or penalty relief offered under, any Tax Shelter Resolution Initiatives

- Proposed legislative penalties
  - Non-waivable penalties of up to $200,000 (if applied to a large entity) for failure to disclose each Listed Transaction and $100,000 (if applied to a large entity) for failure to disclose each other reportable transaction
  - Increased accuracy-related penalties related to the non-disclosed Listed and Other Reportable Transactions
  - Accuracy penalty calculated at the maximum marginal rate without regard to actual tax liability
    - Accuracy penalty would be 30% for non-disclosed Listed Transactions and 20% for disclosed Listed Transactions
    - Accuracy penalty would be 30% for non-disclosed Reportable Transactions and 20% for disclosed Reportable Transactions
  - Taxpayers would be required to disclose the $200,000 penalty, as well as any 30% accuracy related penalties, in the company's SEC filings
  - If a Listed Transaction was not disclosed, the statute of limitations for the year of the transaction may be extended from 3 to 6 years

Refer to "Opportunity" on the Placemat

B. Your Opportunity

Identify and analyze potentially reportable transactions by helping you understand how the regulations may affect your business operations and provide methodology and tools necessary to comply with the regulations

II. Validate

- Are you aware of the complexities and exceptions with the tax shelter regulations?
- Are you aware of the wide range of penalties for failing to disclose reportable transactions?
- Does your company have an adequately staffed tax department to maintain and manage the necessary documentation?
- Are you aware of any reportable transactions within the tax department?
- Are you aware of any reportable transactions that may have occurred in other parts of your organization such as HR, Finance / Accounting, Legal, Treasury, and in foreign locations?
- Does your company have adequate controls in place to identify, record, and document potentially reportable transactions?

III. Co-Develop

After we have validated your issues and needs, we will work with you to determine which of the following phases best meets your needs:

Education and Identification

Refer to "Approach" on the Placemat

The purpose of this phase is to provide an overview of reporting requirements and gather information to identify and document your overall corporate profile with respect to information flows, policies, and procedures for recording and authorizing transactions, as well as maintaining required documentation under Treasury Regulation Section 1.6011-4(g). This will be conducted via an interdepartmental workshop, which should include members from Tax, Accounting / Finance, Legal, Human Resources, Treasury, Mergers & Acquisitions, Information Technology, Operations, etc. The deliverable includes a summary of our findings, documenting the internal policies and procedures related to the recording, authorization, and documentation of potentially reportable transactions. We will also discuss any obstacles and issues you may face in trying to implement a compliance process and an action plan for compliance for your company.

Year One Compliance

The purpose of this phase is to gather information to help you identify and analyze transactions or items that may be reportable transactions entered into after January 1, 2003 (when mutually agreed, specific transactions entered into in prior years may also be analyzed). We will provide you with a standard Information Document Request to facilitate the information gathering process. The deliverable includes a recommendation, based upon a reasoned discussion, with respect to potentially reportable transactions of each mutually agreed-upon transaction for analysis (including reporting rationale and technical analysis). The responsibility for identification of reportable transactions entered into by your company remains with your management, and we cannot provide any assurances that all reportable transactions entered into will be identified. We will also assist in the preparation of the Form 8886 - Reportable Transaction Disclosure Statement by utilizing the information available to us. Additional information may be necessary to complete the Form 8886 prior to filing.

Ongoing Compliance

The purpose of this phase is to help you develop processes, procedures, and systems for ongoing compliance with the regulations. This will involve comparing information flows, policies, and procedures to "best practices" and identifying potential gaps. We will also recommend enhancements to your existing information flows, policies and procedures with respect to identifying reportable transactions. The deliverable includes documentation of internal policies & procedures for identifying reportable transactions and a discussion of "best practices" for designing internal policies and procedures. However, due to independence restrictions, there may be limitations on the services we can provide to attest clients with respect to designing and implementing tailored policies, procedures, and systems related to potentially reportable transactions.

Periodic Maintenance

The purpose of this phase is to assist you in monitoring the reporting process and provide updates on new legislation, new listing requirements, regulatory, administrative, judicial developments, and any other changes with respect to tax shelter rules. We will assist the company to modify policies and procedures for new listed transactions and any changes in company facts. However, due to independence restrictions, there may be limitations on the services we can provide to attest clients with respect to modifying policies and procedures for new transactions and changes in company facts.

IV. Define Relationship Going Forward

A. Benefits

Refer to "Benefits" on the Placemat

The benefits may include:

- Enhanced understanding of reportable transaction disclosure rules
- Improved compliance with the law and regulations
- Decreased exposure to penalties and sanctions
- Reduced administrative burden
- Dynamic process to identify and track reportable transactions

B. Next Steps

How can we help you with your issues and needs to make sure you comply with the tax shelter rules?

Reportable Transaction Disclosure Analysis
Frequently Asked Questions

Internal Questions

Sales Approach

1. ***Who is needed to sell the Reportable Transaction Disclosure Analysis engagement?***

   The IEP and other members of the Reportable Transaction Disclosure Analysis Core Team should be involved in the sales efforts of the engagement. In addition, a member of the WNTS Tax Shelter Team may also need to be involved in the initial sales meeting. This team has an in-depth knowledge of the regulations, recommended changes, the Reportable Transaction Disclosure Analysis engagement standards and tools, and pending legislative proposals, as well as an understanding of how these regulations could affect a company's business operations.

2. ***What is the time frame of a typical Reportable Transaction Disclosure Analysis engagement?***

   This solution has been developed to be flexible in order to meet a variety of company demands -- from a large, thorough analysis of a decentralized, multi-business unit, multi-national conglomerate to providing tax shelter disclosure consultation on a single, discreet transaction. It is designed in a four-phase approach (Education and Identification, Year One Compliance, Ongoing Compliance, and Periodic Maintenance) that is estimated to take between 8 to 16 weeks to complete. One or all of the phases may be applied to a company based on individual needs.

   The Education and Identification phase will take approximately 4 weeks to complete depending on the size and complexity of the organization. Depending on the facts and circumstances of the client, the Year One Compliance phase may take from 2 to 8 weeks to complete. However, if the engagement is entered into prior to the end of a company's tax year, the Year One Compliance will be conducted throughout the year and will be ongoing until the end of the tax year, using the policies and procedures developed in the Ongoing Compliance phase. The Ongoing Compliance phase will take approximately 4 weeks to complete. The final phase of the engagement, Periodic Maintenance, is an ongoing service, with legislative and administrative updates provided by the Washington Tax Service within WNTS, to monitor and convey to the company any new developments in the legislative, administrative, regulatory, or judicial arenas. To the extent changes in the law and rules or changes in the companies facts require a modification of the policies and procedures designed in the Ongoing Compliance phase these changes would be addressed in the Periodic Maintenance phase.

   These time guidelines are approximate as the time to complete the project varies depending on the size of the company, number of locations where records are located, and scope of the analysis.

3. ***Why is it important to discuss this solution with clients now?***

   This idea is time sensitive because the reportable transaction regulations were finalized on February 28, 2003 and applies to transactions entered into on or after that date. Taxpayers can, however, elect to apply the final disclosure rules for transactions entered into on or after January 1, 2003, which generally should be done given that the final regulations are more favorable than the previous temporary regulations. Because of the complex reporting requirements and stringent document retention requirements, this solution should be discussed with clients soon so they can begin developing compliance processes for transactions entered into as of the effective date of the regulations. PwC can assist the company in this process. The longer a company waits, the more retroactive "catch-up" work the company will have to do.

4. ***How is a Reportable Transaction Disclosure Analysis engagement different from the Tax Shelter CE initiative?***

Complying with the disclosure regulations is not simply an educational or one-time effort, nor is compliance directed merely at the most aggressive (i.e., "listed") transactions. Instead the regulations require disclosure of many common commercial transactions. The client CE session is the starting point for complying with these regulations.

Accordingly, we have developed the Reportable Transaction Disclosure Analysis solution to assist companies with the identification and analysis of potentially reportable transactions. This service offering is designed to help companies understand how these regulations may affect their business operations and provide the methodology and tools necessary to help them comply with the regulations.

The Tax Shelter CE is designed to train a company's tax department on the final tax shelter disclosure regulations. The CE will help companies understand the regulations, but the Reportable Transaction Disclosure Analysis solution will assist companies to comply with the law and regulations. The Tax Shelter CE will serve as an introduction to this area of compliance and allow PwC the opportunity to introduce the Reportable Transaction Disclosure Analysis service offering as a valuable engagement that will assist companies to comply with the regulations.

5. ***What are the cross-selling opportunities?***

Additional opportunities related to a Reportable Transaction Disclosure Analysis engagement would include various advisory and dispute resolution services specific to individual transactions. Tax R_X: Targeted Tax Health Assessment & Solutions (PINNACLE Idea # 4300) may be another ideal service as companies become aware of the potential risk existing tax positions may pose. In addition, to improve the document retention process, Tax Knowledge Manager (TKM) (PINNACLE Idea # 1993) can be implemented. In addition, a Sarbanes-Oxley 404 Advisory Service can help a client's tax department identify the appropriate internal control procedures within the tax department to comply with Section 404 of the Sarbanes-Oxley Act.

6. ***Is this solution appropriate for attest clients?***

The Reportable Transaction Disclosure Analysis engagement can be conducted for attest clients, but in certain phases of the engagement that involve the design and implementation of tailored policies, procedures, and systems, PwC may be limited due to independence restrictions. For attest clients, the ABAS partner should be consulted during the discussions related to the implementation of policies, procedures, and systems.

Target Profile

7. ***What are the key indicators that would make a company an appropriate target?***

Some of the key indicators within a company that would make the company an appropriate target would be outsourcing their tax function, decentralized functions, multi-business unit operations, numerous locations / facilities, foreign operations, partnerships in their structure, lack of policies and procedures for document retention, documentation and agreements in various departments and locations, and lack of resources to manage the complexities involved with complying with the tax shelter regulations. All of these indicators do not have to be present to make the company an appropriate target, but the more indicators that are present, the more appropriate the target would be for this solution.

8. Who are the buyers of this solution?

The initial buyer of a Reportable Transaction Disclosure Analysis engagement would be the tax director, but in light of newly proposed legislation, including monetary penalties as well as SEC disclosure, the CFO should be involved in the initial decision. In addition, proposed legislation also requires the CEO to sign the tax return, so the CEO may now be more directly involved with the tax function and will need to be involved in the decision to move forward with this solution.

Competition

9. Who is our competition?

We are not aware of any comprehensive solutions in the market place currently. However, law firms and the other Big 4 firms could easily enter this market.

Results and Risks

10. What are the benefits of the Reportable Transaction Disclosure Analysis Solution?

The Reportable Transaction Disclosure Analysis solution will help companies determine if they have engaged in or executed (whether purposefully or incidentally) a reportable transaction as defined by IRC Reg. Sec. 1.6011-4. The tax shelter regulations contain provisions which expand the scope of disclosures that must be made by taxpayers and will provide them with additional guidance needed to comply with the disclosure rules contained in IRC Reg. Sec. 1.6011-4.

The benefits resulting from a Reportable Transaction Disclosure Analysis engagement may include:

- Enhanced understanding of the reportable transaction disclosure rules
- Improved compliance with the law and regulations
- Decreased exposure to penalties and sanctions
- Reduced administrative burden
- Appropriate document management and retention procedures
- Dynamic process and best practices to track reportable transactions

11. What are the available pricing arrangements?

The fees for the Education and Identification phase will be based on our customary hourly rates. Additional fees for the remaining phases will depend on the scope of the engagement, but it is anticipated that the remaining phases of the engagement will also be based on our customary hourly rates. Fees for all of the phases of the engagement will depend on the client's facts and circumstances and the complexity of the engagement.

12. Will implementation of this solution impact the client's other tax attributes (favorably or negatively) or any other aspect of the client's business?

The analysis portion of this solution will be focused solely on the disclosure requirements contained within Section 1.6011-4 of the IRS regulations. No analysis of the substantive merits of the transaction will be performed. Clearly, as the IRS intended, the disclosure of reportable transactions may increase the scrutiny of such transactions.

Resources

13. Will PwC need a member of the core team to implement a Reportable Transaction Disclosure Analysis or can local staff be utilized to perform the engagement?

Local office staff, TPDG, and WNTS (TPDG and WNTS members comprise the core team) should be a part of all implementation engagements. In situations where circumstances and relationships warrant their involvement, the core team must be involved. Circumstances that warrant their involvement are clients with large, decentralized, and international operations, and where we expect the first three phases of the engagement to be implemented. The TPDG teams will be able to leverage off of the knowledge and experience gained by TPDG project teams from previous Reportable Transaction Disclosure Analysis projects; provide quality, using consistent methodologies on technical issues with WNTS; and provide overall project management. For smaller engagements, both technical and computational assistance can and will be provided upon request to the practice offices.

Contact the TPDG regional Leader to discuss any questions about the potential engagement. The TPDG regional Leader will also be knowledgeable about the competitions' service offering. The Core Team ***must*** be involved in appropriate sales efforts related to large Reportable Transaction Disclosure Analysis studies. Additionally, they will help make sure value is delivered to our clients and that PwC receives appropriate value for this engagement. Ultimately, we must make sure that PricewaterhouseCoopers brings the best and most appropriate resources on any such opportunity.

External Questions

Expectations

1. ***What benefits can a client expect from the Reportable Transaction Disclosure Analysis?***

   The Reportable Transaction Disclosure Analysis solution will help companies determine if they have engaged in or executed (whether purposefully or incidentally) a reportable transaction as defined by IRC Reg. Sec. 1.6011-4. The tax shelter regulations contain provisions that expand the scope of disclosures that must be made by taxpayers and will provide them with additional guidance needed to comply with the disclosure rules contained in IRC Reg. Sec. 1.6011-4.

   The benefits resulting from a Reportable Transaction Disclosure Analysis engagement may include:

   - Enhanced understanding of the reportable transaction disclosure rules
   - Improved compliance with the law and regulations
   - Decreased exposure to penalties and sanctions
   - Reduced administrative burden
   - Appropriate document management and retention procedures
   - Dynamic process and best practices to track reportable transactions

2. ***Why use PwC for a Reportable Transaction Disclosure Analysis engagement?***

   As part of recent U.S. legislative and regulatory efforts to stifle the use of abusive corporate tax shelters, companies face stringent documentation and disclosure requirements. Proposed legislation would also impose significant penalties for non-compliance. Many companies may lack the resources with the time and experience needed to manage the added responsibility of interpreting the tax shelter regulations. In addition, many companies may inaccurately assume that the regulations do not apply to them because they have not implemented "abusive" tax shelter transactions. However, the regulations contain provisions that require disclosure of common commercial transactions found in many companies.

   To assist companies with the identification and analysis of potentially reportable transactions, PwC has developed Reportable Transaction Disclosure Analysis to help companies understand how these regulations may affect business operations and to help companies comply with the regulations.

   In addition, this issue affects more than just the Tax Department. Compliance will require a company-wide commitment to assist to identify and evaluate potentially affected transactions. For example, treasury support will be needed to identify hedging and other financial transactions and business unit support (including support from CFCs) will be required to make sure that all related entities are in compliance.

3. ***What are the implementation phases for the Reportable Transaction Disclosure Analysis engagement and what are the deliverables within each phase?***

   There are four phases to the Reportable Transaction Disclosure Analysis engagement. The phases and their corresponding deliverables are:

   Education and Identification

   - Deliverable: Summary of our findings documenting the internal policies and procedures related to the recording, authorization, and documentation of potentially reportable transactions

Year One Compliance

- Deliverable: Recommendation with respect to potentially reportable transactions of each mutually agreed-upon transaction for analysis (including reporting rationale and technical analysis)
- Deliverable: Assistance with the preparation of the Form 8886 - Reportable Transaction Disclosure Statement

Ongoing Compliance

- Deliverable: Documentation of internal policies & procedures for identifying reportable transactions and discussion of "best practices" for designing internal policies & procedures

Periodic Maintenance

- Deliverable: Updates on new legislation; new listing requirements; regulatory, administrative, and judicial developments; and any other changes with respect to tax shelter rules
- To the extent changes in the law and rules or changes in the company's facts require a modification of the policies and procedures designed in the Ongoing Compliance phase, these changes would be addressed in the Periodic Maintenance phase.

4. ***What is the time frame for a typical Reportable Transaction Disclosure Analysis engagement?***

This solution has been developed to be flexible in order to meet a variety of company demands -- from a large, thorough analysis of a decentralized, multi-business unit conglomerate to providing tax shelter disclosure consultation on a single, discreet transaction. It is designed in a four-phase approach (Education and Identification, Year One Compliance, Ongoing Compliance, and Periodic Maintenance) that is estimated to take between 6 to 14 weeks to complete. One or all of the phases may be applied to a company based on individual needs.

The Education and Identification phase will take approximately 2 weeks to complete depending on the size and complexity of the organization. Depending on the facts and circumstances of the client, the Year One Compliance phase may take from 2 to 8 weeks to complete. However, if the engagement is entered into prior to the end of a company's tax year, the Year One Compliance will be conducted throughout the year and will be ongoing until the end of the tax year, using the policies and procedures developed in the Ongoing Compliance phase. The Ongoing Compliance phase will take approximately 2 weeks to complete. The final phase of the engagement, Periodic Maintenance, is an ongoing service, ideally provided by the Washington Tax Service within WNTS, to monitor and convey to the company any new developments in the legislative, administrative, regulatory, or judicial arenas.

These time guidelines are approximate as the time to complete the project varies depending on the size of the company, number of locations where records are located, and scope of the analysis.

5. ***What tax years will be analyzed to identify reportable transactions?***

The final regulations generally apply to transactions entered into on or after February 28, 2003. Taxpayers can, however, elect to apply the final disclosure rules for transactions entered into on or after January 1, 2003. Additionally, the February 28, 2000 temporary regulations (as amended) are still applicable for periods up to the time that taxpayers adopt the final regulations.

We will assist companies with the identification and analysis of potentially reportable transactions for transactions entered into on or after January 1, 2003. However, when mutually agreed, specific transactions entered into in prior years may also be analyzed because the February 28, 2000 temporary regulations are still applicable for certain transactions.

Client Impact

6. What documents or information are needed from the client?

After the Education and Identification phase is completed, an Information Document Request will be sent to the client to facilitate the information gathering process. Several types of documents will be requested from the client in order to identify and analyze transactions or items that may be reportable transactions.

Information to identify transactions will be gathered from various internal client documents and publicly available documents (e.g., annual reports, 10-Ks, 8-Ks, etc.). The client will be asked to provide minutes from board and audit committee meetings, contracts and agreements related to tax activities, tax work papers, tax returns, IRS related materials (including IDRs), and any other internal memoranda. Detailed accounting information will need to be accessible for analysis of book-tax differences. We may gather additional information through interviews with various employees within the company involved in the various transactions. We will also request information related to outside service providers, including contact information, engagement letters, marketing materials, opinions/memos, and any appropriate presentation or communication documents.

7. Why should the client have PwC conduct this analysis/service as opposed to performing the analysis internally?

Many companies may lack the resources with the time and experience needed to manage the added responsibility of interpreting the tax shelter regulations, including the ability to understand the stringent document retention and disclosure requirements.
By assisting the client to perform a Reportable Transaction Disclosure Analysis, they can devote their resources to other important tax matters. Also, we will assist the company to design policies, procedures, and systems to track reportable transactions on an ongoing basis so the compliance process will be effective for the tax department in the future.

In addition, through our comprehensive comments on the October 2002 regulations, PwC has worked to convince the IRS to limit unnecessary administrative burdens. As a result, our tax shelter team has an in-depth knowledge of the regulations, recommended changes, and pending legislative proposals, as well as an understanding of how these regulations could affect the company's business operations.

8. What is expected from the client's employees during a Reportable Transaction Disclosure Analysis engagement?

During the Education and Identification phase, it is expected that the client's employees will participate in the interdepartmental workshop to identify and document their current control structure with respect to reportable transactions, including document retention. Employees from a variety of departments should be involved in this workshop, including Tax, Accounting / Finance, Legal, Human Resources, Treasury, Mergers & Acquisitions, Information Technology, Operations, etc.

During the Year One Compliance phase, PwC may interview several of the employees to obtain additional information about the potentially reportable transactions. Interviews may be conducted with the Tax Director, CFO, General Counsel, Human Resources Director, and other appropriate employees. We will also provide the company with an Information Document Request that will facilitate the information gathering process. Several of the employees in the appropriate departments may need to be involved to help gather the required information. It is also critical that given the interdepartmental implications these regulations create that tax departments secure management support before initiating this process.

During the Ongoing Compliance and Periodic Maintenance phases, we may assist with the development of policies, procedures, and systems to identify and disclose the reportable transactions on an ongoing basis, unless such services are prohibited by the Sarbanes–Oxley Act. Representatives from a variety of departments including Human Resources, Information Technology, Legal, and Tax will be needed to make sure the intended processes are implemented.

9. ***Why should the client be concerned with any inadvertent failure to disclose some reportable transactions if, to the best of their knowledge, they do not engage in any abusive tax shelter transactions?***

Treasury has implemented a number of administrative changes to penalize taxpayers who fail to disclose, even if the failure is inadvertent.

- The IRS routinely will request tax accrual work papers from a taxpayer in certain situations
- The IRS is issuing a standard IDR for Listed Transactions (or substantially similar transactions) that includes a request for executives (e.g., CFO, Treasurer) to be available to be interviewed by the IRS within two weeks relating to identified transactions
- Under proposed regulations, the IRS will not allow a taxpayer that fails to disclose any reportable transaction (i.e., a Listed Transaction or an other reportable transaction) to rely on an opinion or other advice to satisfy the reasonable cause and good faith exceptions to accuracy-related penalties
- The IRS may terminate the taxpayer's participation in the new streamlined audit process (LIFE) for failure to disclose a Listed Transaction
- A taxpayer that fails to identify and disclose any reportable transaction may inadvertently violate the related record retention requirements
- Failure to disclose may limit participation in, or penalty relief offered under, any Tax Shelter Resolution Initiatives

Additionally, under pending legislation that is likely to be enacted in 2003, significant additional penalties may be applied for failure to disclose:

- Per se, non-waivable penalties of up to $200,000 (if applied to a large entity) could be imposed for failure to disclose each Listed Transaction and $100,000 (if applied to a large entity) for failure to disclose each other reportable transaction
- Increased "accuracy related" penalties equal to 30% of the tax benefit related to the non-disclosed Listed Transactions and for non-disclosed other reportable transactions. For disclosed Listed Transactions and Other Reportable Transactions, the accuracy related penalties would be 20%. The accuracy related penalty is calculated at the maximum marginal rate without regard to the company's actual tax liability
- Taxpayers would be required to disclose the $200,000 penalty, as well as any 30% accuracy related penalties for non-disclosed transactions in the company's SEC filings
- If a Listed Transaction was not disclosed, the statute of limitations for the year of the transaction may be extended from 3 to 6 years

10. ***Why should the client use PwC for a Reportable Transaction Disclosure Analysis as opposed to filing a ruling request with the IRS on certain transactions?***

Many companies may lack the resources with the time and experience needed to manage the added responsibility of interpreting the tax shelter regulations. In addition, many companies may inaccurately assume that the regulations do not apply to them because they have not implemented "abusive" tax shelter transactions. However, the regulations contain provisions that require disclosure of common commercial transactions found in many companies.

In addition, this issue affects more than just the Tax Department. Compliance will require a company-wide commitment to assist to identify and evaluate potentially affected transactions. For example,

treasury support will be needed to identify hedging and other financial transactions and business unit support (including support from CFCs) will be required to make sure that all related entities are in compliance.

It may be appropriate and beneficial for the client to file a ruling request with the IRS to address a certain transaction. However, there are many other common transactions that may also be reportable that the client is not aware of. The Reportable Transaction Disclosure Analysis can assist the client to comply with the regulations and accurately disclose the reportable transactions, in addition to the abusive transactions that are covered under the ruling request.

Regulatory Considerations

11. Does the Sarbanes-Oxley Act prevent PwC from providing this type of service, if PwC is currently the client's auditor?

No, the Sarbanes-Oxley Act does not prohibit PwC from providing this type of service to any client, including one that is currently audited by PwC. The Sarbanes-Oxley Act makes permissible the provision of "non-audit services, including tax services," by the auditor to audit clients if those services are not on the list of prohibited services and the audit committee provides the necessary pre-approval.

However, due to independence restrictions, there are limitations on the services we can provide to attest clients with respect to designing and implementing tailored policies and procedures related to potentially reportable transactions and with respect to modifying policies and procedures for new transactions and changes in company facts.

Timing

12. When should a client call PwC to enhance the impact of a Reportable Transaction Disclosure Analysis?

Many companies have concluded that they need to begin now to make changes to policies, procedures, and systems in order to capture data and to conduct analyses needed to comply with the regulations. The longer a company waits, the more retroactive "catch-up" the company will have to do.

A client may benefit by contacting PwC immediately so that the analysis of their current policies and procedures can begin as soon as possible. PwC can identify the gaps in the client's current policies, procedures, and systems applicable to reportable transactions and assist the client to comply with the regulations on an ongoing basis.

13. Why is now a good time to conduct a Reportable Transaction Disclosure Analysis engagement?

This idea is time sensitive because the reportable transaction regulations were finalized on February 28, 2003 and will apply to transactions entered into on or after that date. Taxpayers can, however, elect to apply the final disclosure rules for transactions entered into on or after January 1, 2003, which generally should be done given that the final regulations are more favorable than the previous temporary regulations. Because of the complex reporting requirements and stringent document retention requirements, this solution should be considered soon so companies can begin developing compliance processes for transactions entered into as of the effective date of the regulations. PwC can assist companies in this process.

Billing

14. What are the fees for a Reportable Transaction Disclosure Analysis engagement?

The fees for the Education and Identification phase will be based on our customary hourly rates. Additional fees for the remaining phases will depend on the scope of the engagement, but it is anticipated that the remaining phases of the engagement will also be based on our customary hourly rates. Fees for all of the phases of the engagement will depend on the client's facts and circumstances and the complexity of the engagement.

PRICEWATERHOUSECOOPERS

Failure to Comply with Tax Shelter Disclosure Regulations — What's at Stake?

By David Shurberg, David Gilbertson, and Bruce Larsen

As part of its ongoing efforts to curb the use of corporate tax shelters, on February 28, 2003, the Department of the Treasury promulgated final tax shelter disclosure regulations. These regulations adopt the comprehensive definitions proposed in October 2002, requiring disclosure of six broad categories of transactions. Although the final regulations have considerably narrowed the scope of these categories, many non-abusive commercial transactions will be required to be disclosed, presenting serious compliance challenges for taxpayers.

This article summarizes the disclosure requirements under the recently issued final regulations, highlighting the breadth and ambiguous scope of several of the categories of reportable transactions. Next, it outlines the administrative, regulatory, and statutory penalties that the Internal Revenue Service, Treasury, and Congress have proposed or announced for taxpayers that fail to comply with such regulations. Finally, the article considers the compliance challenges facing corporate tax executives and tax departments under this expanded disclosure regime. Any compliance strategy will need to be broad in its approach, because compliance with the tax shelter disclosure regulations will require the cooperation, support, and input of personnel from the treasury, legal, information technology, and other departments within a corporation.

The final tax shelter disclosure regulations are applicable to transactions entered into on or after February 28, 2003, and may, at the taxpayer's option, be applied to transactions entered into on or after January 1, 2003, and prior to February 28, 2003. Because the final regulations generally contain narrower disclosure requirements than the temporary regulations, most taxpayers will find it beneficial to elect to apply the final regulations to all transactions entered into on or after January 1, 2003.

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I. Disclosure Regulations

A. History and Requirements of the Corporate Tax Shelter Disclosure Provisions

To address concerns about the perceived proliferation of corporate tax shelters, in February 2000 the Treasury issued temporary regulations under section 6011 requiring disclosure of participation in certain tax shelter transactions by corporate taxpayers.[1] From the IRS's perspective, these temporary regulations proved ineffective. The IRS believed that taxpayers narrowly construed the five factors requiring disclosure and broadly construed the regulatory exceptions. Dissatisfied with the paucity of disclosures, the Treasury comprehensively amended the regulations in October 2002. Prior to release of the Treas. Reg. § 1.6011-4 on February 28, 2003,[2] the temporary regulations had been amended four times[3] as the Treasury and IRS strove to balance a number of competing goals, including (1) creating definitions that are broad enough to require disclosure of known abusive tax shelters; (2) having clear and objective definitions that minimize the uncertainty and controversy about what transactions are subject to disclosure; and (3) crafting definitions that minimize the number of non-abusive transactions entered into in the ordinary course of business that must be disclosed by taxpayers.

The final regulations, like the October 2002 temporary regulations, represent a fundamental rethinking of the balance between over-inclusiveness and clarity struck in the original temporary regulations issued in February 2000 and subsequent amendments. Earlier versions generally attempted to avoid over-inclusiveness by providing exceptions for, among other things, transactions entered into in the ordinary course of business in a form consistent with customary commercial practice where there was a generally held understanding that the tax benefits were available.[4] Applying these exceptions, however, required a high degree of subjective judgment. Taxpayers often were frustrated that they could not achieve a high degree of confidence that an exception applied, and the government became frustrated when taxpayers often resolved the resulting uncertainties in their favor. Furthermore, despite IRS statements that disclosure of a transaction would not affect the merits of a transaction, many taxpayers and practitioners feared that failure to avail oneself of this exception could be viewed as an admission against interest on the merits.

Both the October 2002 and the final regulations attempt to avoid these interpretational issues by using broad, objectively defined categories of transactions to be disclosed. Because these categories are not defined in terms of specific tax abuses, this approach will require the disclosure of many non-abusive transactions entered into by

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taxpayers in the ordinary course of business. This over-inclusiveness may be a cost of a more objective regime, even though the final regulations contain numerous objectively defined exceptions to key categories of reportable transactions. The Treasury and IRS appear to have determined that avoiding uncertainty and controversy over which transactions must be disclosed is more important than minimizing the number of disclosures.

What's at Stake?

If Proposed Legislation Is Enacted:

- $200,000 penalty for each undisclosed listed transaction
- $100,000 penalty for each undisclosed reportable transaction
- Doubling of the statute of limitations from 3 to 6 years
- Required SEC disclosure when certain penalties are imposed
- 40-percent penalty (for undisclosed) and 20-percent penalty (for disclosed) transactions lacking economic substance
- Denial of deduction for interest paid to the IRS
- New 30-percent accuracy-related penalty (20-percent if transaction was disclosed)
- Extremely limited ability to have penalties waived or rescinded

According to Recently Announced IRS Policy:

- Requirement to provide tax accrual workpapers to the IRS
- Inability to participate LIFE program
- Inability to rely on an adviser's opinion for penalty protection

B. Disclosure and Document Retention Requirements

A taxpayer that has participated in a reportable transaction must attach Form 8886 to its return for each taxable year[5] in which the taxpayer participates in the transaction. In addition, a copy of Form 8886 must be sent to the IRS Office of Tax Shelter Analysis for the first year a taxpayer participates in the transaction.[6] The taxpayer is also required to retain copies of all documents and other records that are relevant to an understanding of the tax treatment of a reportable transaction until the statute of limitations has run.[7]

C. Categories of Reportable Transactions

The final regulations contain the same six categories of reportable transactions provided in the October 2002 temporary regulations: (1) listed transactions; (2) confidential transactions; (3) transactions providing contractual protection to the participant; (4) section 165 losses that exceed certain dollar thresholds; (5) transactions generating a significant book-tax difference; and (6) transactions generating at least a $250,000 tax credit and involving an asset held briefly. If a transaction is described in any one of these categories, it is a reportable transaction. There follows a description of the six categories, including highlights of changes in the final regulations; most of the changes are favorable to taxpayers.

1. Listed Transactions

A listed transaction is a transaction that is the same as or "substantially similar" to one of the transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.[8]

The final regulations do not make any significant modifications to the listed transaction category. The listed transactions regime is intended to give taxpayers notice that the IRS has identified *specific* transactions as abusive. The success of this regime depends upon the IRS providing "bright line" standards so that taxpayers can decide, on a principled basis, whether a given transaction is the same or substantially similar to a listed transaction. Of the 23 transactions currently on the list, most are defined with a reasonable degree of precision. The defini-

Questions remaining to be answered under the "substantially similar" standard include:

- How should a taxpayer determine whether its international tax planning structure is "substantially similar" to the transactions described in Notice 98-5?
- When are transactions that rely on section 318 to qualify a stock redemption as a section 302(d) redemption considered substantially similar to the transactions described in Notice 2001-45?

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tions of several of the transactions on the list, however, are sufficiently vague to be troubling. It is to be hoped that as the IRS maintains the list and adds transactions to the list, it will identify with precision the specific abuse involved in the listed transaction and clearly articulate why it considers the transaction to be abusive. A clear articulation of the rationale for listing a transaction will help tax executives determine whether a given transaction is "substantially similar" to the listed transaction.

2. Confidential Transactions

A confidential transaction is a transaction offered to a taxpayer under conditions of confidentiality. This category of reportable transaction is aimed at advisers seeking confidentiality with respect to the tax aspects of a transaction and not at taxpayers seeking protection for their own commercial information. Thus, disclosure will not be required unless 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 any individual that provides tax advice with respect to the transaction.[9]

The final regulations retain (and expand) the exception in the October 2002 regulations for confidentiality provisions required to comply with securities laws, making it applicable to all securities laws and not merely U.S. federal and state securities laws.[10]

In response to comments received, the IRS added an important exception for confidentiality agreements with respect to mergers and acquisitions. This exception allows certain mergers and acquisitions to remain confidential and not create a disclosure obligation if the taxpayer is permitted to disclose the tax treatment and tax structure of the transaction no later than the earliest of (1) the date of the public announcement of discussions relating to the transaction, (2) the date of the public announcement of the transaction, and (3) the date of the execution of an agreement (with or without conditions) to enter into the transaction. A taxpayer may not employ this exception, however, if its ability to consult any tax adviser regarding the tax treatment or tax structure of the transaction is limited in any way.[11]

Obtaining a written statement permitting disclosure is a best practice that tax executives may wish to adopt.

The final regulations provide that the IRS may infer the existence of a confidentiality agreement from the behavior of the parties to a transaction. To avoid being forced to prove the non-existence of an agreement to maintain confidentiality, it will be important for taxpayers to avail themselves of a presumption in the regulations that a transaction is not confidential if the taxpayer receives written authorization to disclose the tax structure from all tax advisers to the transaction. The final regulations provide that a transaction will be presumed not to be confidential if the taxpayer receives from every adviser who makes a statement to the taxpayer about the federal income tax consequences of the transaction, within 30 days from the day such adviser first makes such statement, a written authorization in substantially the following form:

> "The taxpayer (and each employee, representative, or other agent of the taxpayer) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transaction and all materials of any kind (including opinions or other tax analyses) that are provided to the taxpayer relating to such tax treatment and tax structure."[12]

3. Transactions with Contractual Protection

Under the final regulations, a transaction with contractual protection is a transaction in which fees paid to a tax adviser are contingent upon the intended tax consequences being sustained.[13]

The IRS substantially narrowed the contractual protection definition in the final regulations. The earlier regulations had broadly defined contractual protection to include "contractual protection against the possibility that . . . the intended tax consequences of the transaction will not be sustained, including . . . rescission rights, . . . a tax indemnity or similar arrangement."[14] This broader definition would have required taxpayers to disclose many routine transactions merely because of customary commercial terms governing the transactions. The revised definition in the final regulations targets more precisely the type of transaction that the IRS wants to see disclosed.

Obtaining a written statement permitting disclosure is a best practice that tax executives may wish to adopt.

The final regulations generally do not consider a transaction to have contractual protection in situations where a person provides advice about the tax consequences of a transaction on a contingent fee basis only after the taxpayer has reported the transaction on a filed tax return.[15]

4. Loss Transactions

The final regulations generally require corporate taxpayers to disclose any transaction producing a section 165 loss of at least $10 million in a single year or $20 million in any combination of taxable years.[16] In determining whether a transaction results in a taxpayer claiming a loss that meets the $20 million threshold over a combination of taxable years, only losses claimed in the taxable year that the transaction is entered into and the five succeeding taxable years are taken into account.[17]

Given the number of transactions affected by this general rule, the final regulations give the IRS authority to exclude common types of loss transactions, as was announced in Rev. Proc. 2003-24. The use of revenue procedures to provide exceptions within categories of reportable transactions gives the IRS the flexibility to update these exceptions periodically without going through formal rulemaking procedures.

Among the most important exceptions to the section 165 loss category provided by Rev. Proc. 2003-24 is one for

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a loss from the sale or exchange of an asset with a "qualifying basis."[18] Generally, "qualifying basis" is basis determined by and equal to cash paid, as adjusted for improvements and depreciation.[19] A qualifying basis also includes a basis determined under (1) section 358 by reason of a transaction under section 355 or section 368 where carryover basis is determined by reference to qualifying basis of prior holder, (2) section 1014 (basis of property acquired from a decedent), (3) section 1015 (basis of property acquired by gifts and transfers in trust), or (4) section 1031(d) (certain exchanges of like-kind property).[20]

Rev. Proc. 2003-24 also excludes a number of other types of section 165 losses. These include (1) certain losses arising from any mark-to-market treatment of an item under certain provisions, (2) a loss arising from a properly identified hedging transaction described in section 1221(b) or from a mixed straddle account under Treas. Reg. § 1.092(b)-4T, (3) a loss attributable to increases to basis of a REMIC holder arising from taxable income during such holder's ownership, (4) a loss from the abandonment of depreciable assets by a qualifying taxpayer, (5) a loss from the bulk sale of inventory if the basis of the inventory is determined under section 263A, (6) a loss that is equal to, and is determined solely by reference to, a payment of cash by the taxpayer, (7) casualty and theft losses, and (8) certain involuntary conversions.

5. Transactions with a Significant Book-Tax Difference

Under the final regulations, taxpayers generally must disclose a transaction when the amount for tax purposes of any item or items of income, gain, expense, or loss from the transaction differs by more than $10 million on a gross basis from the amount of the item or items for book purposes in any taxable year. Offsetting items shall not be netted for either tax or book purposes.[21] The significant book-tax difference category only applies to taxpayers that are (1) reporting companies under the Securities Exchange Act of 1934 and certain related entities or (2) business entities that have $250[22] million or more in gross assets.[23]

This category of reportable transaction will likely be the most problematic for taxpayers to apply in practice. Large book-tax differences can arise from myriad transactions, most of which have nothing to do with tax abuse. The IRS has attempted to ease the disclosure burden by providing exceptions for specific types of book-tax differences. In connection with the final regulations, the IRS increased the number of exceptions from 13[24] in the October 2002 regulations to 30.[25] The exceptions are currently contained in Rev. Proc. 2003-25, which allows the IRS to revise the list of exceptions periodically without going through formal rulemaking procedures.[26] Despite this effort to expand the list of exceptions, many common transactions that few would consider a tax shelter will be required to be disclosed under this category. For example, taxpayers exporting under the extra-territorial income regime (section 114) must disclose the resulting book-tax differences if they exceed $10 million dollars.

6. Transactions Involving a Brief Asset Holding Period

The last category of reportable transactions requires taxpayers to disclose transactions similar to those litigated in the *Compaq* or *IES* cases.[27] This category consists of transactions where the taxpayer claims a tax credit exceeding $250,000 (including a foreign tax credit) and the credit arises from holding an asset for 45 days or less.[28]

In finalizing this rule, the Treasury provided a helpful clarification by stating that "transactions resulting in a foreign tax credit for withholding taxes or other taxes imposed in respect of a dividend that are not disallowed under section 901(k) (including transactions eligible for the exception for securities dealers under section 901(k)(4)) are not considered transactions involving a brief asset holding period."

Taxpayers will need to review their document retention policies in light of the requirements under the final tax shelter disclosure regulations.

7. Application to Transactions of Controlled Foreign Corporations

The final regulations provide that United States shareholders of controlled foreign corporations must generally disclose reportable transactions entered into by their controlled foreign corporations.[29] Some relief is given with respect to the category of transactions giving rise to book-tax differences, in that a transaction of a controlled foreign corporation must be tested for book–tax differences only if the transaction reduces the amount of a subpart F inclusion to the reporting United States shareholder.[30] The need to monitor the activities of foreign subsidiaries on a transaction-by-transaction basis to comply with the tax shelter disclosure regime will be a major compliance burden on tax departments of U.S.-based multinational groups.

D. Document Retention Requirements

Taxpayers will need to review their document retention policies in light of the requirements under the final tax shelter disclosure regulations.

Under the regulations, a taxpayer must retain a copy of all documents and other records related to a transaction subject to disclosure that are material to an understanding of the tax treatment or tax structure of the transaction.[31]

The documents required to be retained may include marketing materials related to the transaction; written analyses used in decision-making related to the transaction; correspondence and agreements between the taxpayer and any adviser, lender, or other party to the reportable transaction that relate to the transaction; documents discussing, referring to, or demonstrating the purported or

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claimed tax benefits arising from the reportable transaction; and documents, if any, referring to the business purposes for the reportable transaction.[32] Such documents include electronic mail and other forms of electronic communications.

The taxpayer is not required to retain earlier drafts of a document if the taxpayer retains a copy of the final document (or more recent draft) and such document contains all the information in the earlier drafts material to an understanding of the purported tax treatment or tax structure of the transaction.[33] Taxpayers will need to review their document retention policies to make sure that the record retention requirements of the final regulations are met.

II. Penalties for Failure To Disclose Reportable Transactions

Given the breadth of the disclosures required under the final regulations, it is important to understand the consequences of the failure to disclose reportable transactions, including both the current law consequences stemming from a series of recent IRS enforcement initiatives and the penalties under proposed legislation.

> "Properly and judiciously used, penalties enhance voluntary compliance."
>
> —*Larry R. Langdon, LMSB Commissioner (December 2001)*

A. Overview of Existing Law and Proposed Penalties

There are no specific statutory penalties for failure to disclose a reportable transaction under current law. In order to encourage compliance with the disclosure requirements, the Treasury has proposed regulations that would limit the defenses to imposition of the accuracy-related penalty when taxpayers fail to disclose reportable transactions. The IRS has also adopted administrative policies that sanction taxpayers that fail to disclose a listed transaction by (i) preventing their participation in new Limited Issue Focus Examination (LIFE) audit procedures and (ii) routinely requesting their tax accrual workpapers on audit. To address the current lack of statutory penalties for failure to disclose, Congress is considering legislation to impose severe statutory sanctions on taxpayers that fail to disclose reportable transactions.

> "Because taxpayers rely on opinions for assurance that transactions are proper and will not be subject to penalties, Treasury and the IRS believe that tax opinions regarding tax avoidance transactions need to be regulated."
>
> — *Mark A. Weinberger, Assistant Secretary of the Treasury for Tax Policy (March 2002)*

B. Current Administrative Sanctions

1. Prop. Reg. §§ 1.6662-3 and 1.6664-4

Generally, under current law, the accuracy-related penalty equals 20 percent of the "underpayment amount."[34] This penalty can be imposed when underpayments of tax are caused by negligence or disregard of the tax laws,[35] or when the understatements are substantial.[36] An understatement is substantial if it exceeds the greater of 10 percent of the tax required to be shown on the return, or $10,000 for corporations.[37] Under section 6664(c), taxpayers have been able to avoid the accuracy-related penalty if they establish, among other things, that they had reasonable cause for the underpayment and acted in good faith.[38] Taxpayers have often relied upon favorable opinions of professional tax advisers to establish that they acted with reasonable cause and in good faith.

Convinced that many taxpayers have relied improperly on tax opinions (often opinions prepared by promoters), the Treasury issued proposed regulations to preclude such reliance in certain cases. Under the proposed regulations (to be effective for returns filed after December 31, 2002, with respect to transactions entered into on or after January 1, 2003), taxpayers that fail to disclose a reportable transaction could not rely on an adviser's opinion to satisfy the reasonable cause and good faith exceptions to present-law accuracy-related penalties.[39] The proposed regulations would also provide that a taxpayer may not rely on the "realistic possibility" standard under section 6662 to avoid the accuracy-related penalty for negligence or disregard of rules or regulations with respect to a reportable transaction if the taxpayer's position is contrary to a revenue ruling or notice.

2. Tax Accrual Workpapers

As part of its effort to encourage disclosure of and to combat tax shelters, the IRS has changed its longstanding policy regarding when it will request copies of a taxpayer's tax accrual workpapers. For returns filed after July 1, 2002, the IRS routinely will request tax accrual workpapers under the following circumstances:

- If a listed transaction was not disclosed;
- If the taxpayer has entered into more than one listed transaction, regardless of whether the listed transactions were disclosed; or
- If there are reported financial accounting irregularities (such as those requiring earnings restatement) in connection with a return under examination that includes tax benefits from a disclosed, listed transaction.

With respect to an original return filed before July 1, 2002, the IRS can request tax accrual workpapers whenever it determines that there was a tax benefit claimed on the return from a transaction that was a listed transaction. This request, however, will be limited to the tax accrual workpapers pertaining to the listed transaction.

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"The change in the tax accrual workpapers policy is designed to . . . increase the cost of bad risk analysis . . . [and] to increase the cost of buying into listed transactions."

—*B. John Williams, IRS Chief Counsel (January 2003)*

3. Inability to Participate in a LIFE Audit

While the Large and Mid-Size Business Division is moving to streamline audit procedures, most notably through the recently announced LIFE program, a taxpayer may be barred from participating in that program if the IRS learns that the taxpayer has failed to disclose a reportable transaction or has failed to provide some or all of its tax accrual workpapers, when requested.

A taxpayer denied participation in LIFE will lose this program's benefits, including increased communication with the IRS, the limited scope of the LIFE examination, and the reduced time span of the examination. The benefits of increased communication with the IRS consist of greater involvement in the planning of the examination, enhanced discussion of Information Document Requests before issuance, and development of an outline of key aspects of the examination. The scope of a LIFE audit is limited because certain administrative requirements of an examination may be waived, and there generally are fewer examined issues. Furthermore, IRS's ability to expand the audit is limited.

C. Proposed Legislative Penalties

1. Penalty for Failure to Disclose Reportable Transactions

The CARE Act of 2003,[40] as approved in February by the Senate Finance Committee, would create a new penalty for any person that fails to include, with any return or statement, any required information about a reportable transaction. If enacted, the new penalty would apply without regard to whether the transaction ultimately results in an understatement of tax and in addition to any accuracy-related penalty that may be imposed.[41] In the case of large corporations, the proposed penalty for failing to disclose a reportable transaction is $100,000; the proposed penalty is increased to $200,000 if the undisclosed transaction is a listed transaction.[42]

The penalty, as proposed, could not be waived with respect to a listed transaction, and for other reportable transactions could be rescinded or abated only in extremely limited circumstances by the IRS Commissioner personally or by the head of the Office of Tax Shelter Analysis. In addition to the proposed penalty for failing to disclose a listed transaction, the CARE Act also provides that the taxpayer must disclose the imposition of such penalty in reports filed with the SEC.

The penalties for failure to disclose reportable transactions in the CARE Act:

- Are identical to the failure-to-disclose penalties in S. 9, Pension Protection and Expansion Act as introduced January 7, 2003 by Senate Minority Leader Thomas Daschle (D-SD);
- Closely resemble penalties in H.R. 5095 introduced in the 107th Congress by House Ways and Means Committee Chairman Bill Thomas (R-CA) (the Thomas Bill); and
- Are similar to penalties proposed in President Bush's Budget for Fiscal Year 2004, which goes further by proposing, with respect to failure to disclose listed transactions, a five-percent penalty above the $200,000 penalty.

The severe limitations on the ability of the IRS to waive or rescind penalties in the proposed legislation make it important for tax executives to adopt internal controls and procedures that ensure their organizations can identify reportable transactions.

While each of the current bills and the President's Budget would require SEC disclosure by publicly held corporations of failures to disclose listed transactions, SEC disclosure requirements vary in the pending legislation and administrative proposals for penalties assessed for failure to properly disclose other reportable transactions.

2. Modifications to the Accuracy-Related Penalties for Listed Transactions and Reportable Transactions Having a Significant Tax Avoidance Purpose

a. Current Provisions

Currently, the accuracy-related penalty for income taxes applies to the portion of any underpayment that is attributable to negligence or a substantial understatement. For most corporations, a substantial understatement is the greater of (1) the excess above 10 percent of the correct tax or (2) $10,000. The amount of the accuracy-related penalty is 20 percent of the underpayment. With respect to understatements attributable to corporate tax shelters,[43] the only defense against the penalty is the reasonable cause and good faith exception of section 6664(c). Current regulations provide that reasonable reliance on a qualified opinion from a tax adviser is a helpful, but not decisive, factor in establishing that a taxpayer acted with reasonable cause and in good faith.[44]

b. Legislative Proposals

The CARE Act would replace the current understatement penalty rules applicable to tax shelters with new provisions that would apply to listed transactions and reportable transactions with a significant tax avoidance purpose ("reportable avoidance transactions"). The penalty rate and potential defenses would vary depending on whether the transaction was disclosed. A 20-percent accuracy-related penalty would apply to understate-

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ments arising from *disclosed* transactions unless a "strengthened reasonable cause and good faith exception" applied. A taxpayer could not rely on an opinion of a material tax adviser to a transaction for purposes of establishing this strengthened reasonable cause and good faith exception. If a listed transaction or reportable avoidance transaction *is not disclosed,* the penalty rate would be raised to 30 percent and no defenses would be available. The understatement amount would be calculated by multiplying the transaction-related deduction or loss by the maximum marginal tax rate (regardless of whether the taxpayer received a cash tax benefit from the transaction).

Once a 30-percent penalty has been asserted in a Revenue Agent's Report, the penalty could not be compromised for purposes of a settlement without the personal approval of the Commissioner of Internal Revenue or the head of the Office of Tax Shelter Analysis. In addition, a public corporation would have to disclose any 30-percent penalty in reports to the SEC.

3. Penalty for Understatements from Transactions Lacking Economic Substance

In addition to the existing categories of accuracy-related penalties, the CARE Act would add the category of "non-economic substance transaction," *(i.e.,* transactions that do not meet the economic substance test proposed in the CARE Act).[45] The proposed penalty rate for these transactions would be 40 percent if not disclosed and 20 percent if adequately disclosed. The understatement amount is calculated by multiplying the transaction-related deduction or loss by the maximum marginal rate (regardless of whether the taxpayer received a cash tax benefit with respect to the transaction). Again, the proposal creates a strict-liability penalty because there would be no exceptions. Once a penalty has been included in the Revenue Agent's Report, the penalty could not be compromised for purposes of a settlement without the personal approval of the Commissioner or the head of the Office of Tax Shelter Analysis. A public entity required to pay this penalty also would have to report this to the SEC.

The CARE Act would extend the statute of limitations to six years for the entire tax return if a taxpayer failed to adequately disclose a listed transaction on the return.

With respect to penalties on non-economic substance transactions, the CARE Act tracks the provisions of the Thomas Bill, except that the CARE Act also would require SEC reporting of penalties imposed. Neither S. 9 nor the President's Budget Proposal propose to codify the economic substance doctrine.

4. Extend Statute of Limitations for Certain Undisclosed Transactions

In general, the Code requires that taxes be assessed within three years after the date a return is filed.[46] If there has been a substantial omission of items of gross income that total more than 25 percent of the amount of gross income shown on the return, the period during which an assessment must be made is extended to six years.[47] The CARE Act would extend the statute of limitations to six years for the entire tax return if a taxpayer failed to adequately disclose a listed transaction on the return.

5. Deny Deduction for Interest Paid to IRS on Underpayments Involving Certain Tax-Motivated Transactions

The CARE Act would disallow any deduction for interest paid or accrued within a taxable year on any portion of an underpayment of tax that is attributable to an understatement arising from an undisclosed listed or reportable avoidance transaction or a transaction that lacks economic substance.

III. Meeting the Challenge of Complying with the Disclosure Regime

The operational challenges of complying with the final disclosure regulations will be formidable and the consequences of failure to comply fully will be serious. The following observations may help tax executives as they consider implementing systems and procedures to meet this challenge.

A. Effective Compliance Will Require Awareness and Support from Throughout the Organization

Coping with the final disclosure regulations should not be the sole responsibility of the tax department. One clear priority in dealing with the disclosure regime is to avoid inadvertently or unnecessarily triggering disclosure obligations. To this end, the legal department and transactional groups within a taxpayer should be educated about how their activities can trigger disclosure obligations. Such groups should be made aware of the effects of entering into confidentiality agreements with respect to tax structures and the need to obtain consent authorizations to come within the presumption that a transaction is not confidential. Such groups should also be educated about the disclosure consequences of contingent fee arrangements. As transactional groups within taxpayers evaluate potential transactions, a standard part of the analysis should be whether the transaction would be a reportable transaction, and advisers to the transaction should be asked whether they consider the transaction reportable for list maintenance purposes. If it is concluded that a transaction is reportable, procedures should be put in place to ensure that the tax department captures the relevant information regarding the transaction and prepares the required Form 8886. By educating and working with the transactional side of the organization, a tax department should be able to minimize the number of reportable transactions and increase the chances of capturing the necessary information with respect to reportable transactions that are done.

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A second major potential source of reportable transactions is the treasury function. The tax department should work with members of the treasury function to identify the disclosure consequences of various choices of financing and the importance of proper hedging identifications in minimizing reportable losses and book-tax differences. Working closely with the legal department and information technology groups in reviewing and revising a taxpayers' document retention policies will also be important to comply with the broad retention requirements under the final disclosure regulations. To gain the cooperation and support from these groups throughout the organization, it will be necessary to educate the relevant personnel on the scope of a taxpayer's disclosure and document retention obligations and the severe consequences of a failure to meet these obligations.

B. The Adequacy of a Taxpayer's Information Systems Should Be Reviewed

Reliably capturing the information required to identify reportable transactions may well be beyond the capabilities of the current information systems available to the tax departments of many taxpayers. Many tax departments do not routinely receive information about gross items of loss or tax-book differences on an item-by-item, transaction-by-transaction basis. Receiving such detailed information would be particularly unusual with respect to the transactions of foreign subsidiaries, joint ventures and partnerships.

C. Taxpayers Should Consider Establishing Documented Compliance Procedures and Controls

A large organization will likely find it impossible to achieve a high level of compliance with the final tax shelter disclosure and document retention regulations without establishing procedures and processes (i) to collect and centralize information regarding potentially reportable transactions, (ii) to analyze such information to determine which transactions are in fact reportable, (iii) to prepare the appropriate disclosure documentation with respect to such transactions, and (iv) to preserve all relevant documentation with respect to the identified reportable transactions. These processes will require a tax staff with a strong working knowledge of the disclosure regulations, the current revenue procedures containing exceptions to the categories of reportable transactions, and the distinguishing factors of the transactions on the current list of listed transactions. A solid understanding of the interaction of financial accounting and tax accounting rules as applied to the taxpayer's business will also be necessary. Both formal training programs and access to appropriate reference materials, technical resources, and templates would be helpful in implementing such systems and procedures.

Although implementing such procedures and processes will be indispensable in achieving a good level of compliance with the disclosure and documentation requirements of the final regulations, perfect compliance may be impossible given the operational challenges and unresolved interpretational issues under the regulations. For this reason, taxpayers should fully document their compliance procedures. By documenting its systems and procedures for capturing information regarding potential reportable transactions and recording why a given transaction was or was not reportable, a taxpayer will be in a better position to establish its good faith efforts to comply with the disclosure and document retention regimes notwithstanding occasional failures to capture and disclose every reportable transaction.

The penalties proposed in the CARE Act of 2003 for failure to disclose a reportable transaction could be waived only if (1) the taxpayer on which the penalty is imposed has a history of complying with the federal tax laws, (2) it is shown that the violation is due to an unintentional mistake of fact, (3) imposing the penalty would be against equity and good conscience, and (4) rescinding the penalty would promote compliance with the tax laws and effective tax administration.[48] The establishment and documentation of well-developed policies and procedures could help a taxpayer satisfy the first two requirements for penalty waiver. It would be up to the IRS to decide whether the last two requirements are satisfied. A well-documented effort to comply with the regulations could well be persuasive to the IRS as it considers whether the last two requirements were satisfied if a taxpayer that fails to identify and disclose a reportable transaction.

D. Coordination with Sarbanes-Oxley Compliance

Finally, tax shelter compliance issues should be considered in the broader context of Sarbanes-Oxley Act compliance. Creating effective tools to ensure tax shelter compliance can be viewed as an integral part of the broader Sarbanes-Oxley Act compliance initiatives underway at most SEC registrants. Of particular interest are sections 404 and 302 of the Act, which generally require that management establish and maintain an adequate internal control structure and assess the adequacy of the internal control structure. Additionally, an independent auditor must attest to, and report on, management's assessment of its internal control structure. The heightened interest in internal controls caused by the Sarbanes-Oxley Act – coupled with the events that brought about its passage, the proposed penalties related to these regulations, and the proposed CEO signature of corporate tax returns — has created an environment where the implementation of a tax shelter compliance process will be an important objective for tax executives during the next year.

Given the current efforts companies are making to comply with the internal control requirements of Sarbanes-Oxley, properly informed senior management will support the tax department's effort to implement internal policies and procedures aimed at identifying and disclosing reportable transactions.

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footnotes begin on page 134

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1 Temp. Reg. § 1.6011-4T (T.D. 8877, 65 Fed. Reg. 11,205 (Mar. 2, 2000)).

2 Treas. Reg. § 1.6011-4 (T.D. 9046, 68 Fed. Reg. 10,161 (Mar. 4, 2003)).

3 T.D. 8877, 65 Fed. Reg. 11,205 (Mar. 2, 2000) was amended by T.D. 8896, 65 Fed. Reg. 49,909 (Aug 16, 2000); T.D. 8961, 66 Fed. Reg. 41,133 (Aug. 7, 2001); T.D. 9000, 67 Fed. Reg. 41,324 (June 18, 2002); and T.D. 9017, 67 Fed. Reg. 64,799 (Oct. 22, 2002).

4 Temp. Reg. § 1.6011-4T(b)(3)(ii) (as amended by T.D. 9000, 67 Fed. Reg. 41,324 (June 18, 2002)). This provision was eliminated with the amendment of Temp. Reg. § 1.6011-4T on October 17, 2002 (T.D. 9017, 67 Fed. Reg. 64,799 (Oct. 22, 2002)).

5 Treas. Reg. § 1.6011-4(e)(1) (2003). If a reportable transaction results in a loss that is carried back to a prior year, the Form 8886 for the reportable transaction must be attached to the taxpayer's application for tentative refund.

6 Treas. Reg. § 1.6011-4(e)(1) (2003)

7 Treas. Reg. § 1.6011-4(g)(2003).

8 Treas. Reg. §1.6011-4(b)(2) (2003). The IRS has identified 23 listed transactions. A comprehensive discussion of these listed transactions is beyond the scope of this article. The listed transactions can be found by visiting the IRS website (*available at* http://www.irs.gov), selecting "Businesses" from the contents menu, then "Corporations" from the contents menu, and then "Abusive Tax Shelters and Transactions" under the heading "Tax Information for Corporations." In addition to the listed transactions, tax executives will find a wide range of information on the IRS's strategy to deal with corporate tax shelters in this portion of the IRS website.

9 Treas. Reg. § 1.6011-4(b)(3) (2003).

10 The securities law exception is contained in Treas. Reg. § 1.6011-4(b)(3)(ii)(A) (2003). Such exception, introduced in the October 2002 regulations, provides that a transaction is not considered to be offered to a taxpayer under conditions of confidentiality if disclosure of the tax treatment or tax structure of the transaction is subject to restrictions reasonably necessary to comply with securities laws and such disclosure is not otherwise limited.

11 Treas. Reg. § 1.6011-4(b)(3)(ii)(B) (2003).

12 Treas. Reg. § 1.6011-4(b)(3)(iii) (2003).

13 Treas. Reg. § 1.6011-4(b)(4) (2003).

14 Temp. Reg. § 1.6011-4T(b)(4) (as amended in 2002). This temporary regulation was repealed with the promulgation of the final regulations on February 28, 2003.

15 Treas. Reg. § 1.6011-4(b)(4)(iii)(B) (2003).

16 Treas. Reg. § 1.6011-4(b)(5)(i)(A) (2003).

17 Treas. Reg. § 1.6011-4(b)(5)(ii) (2003).

18 Rev. Proc. 2003-24, § 4.01. In addition to the requirement that the basis of the asset (for purposes of determining the loss) is a "qualifying basis," in order to qualify from the loss disclosure rules, the asset generating the loss cannot be an interest in a passthrough entity (within the meaning of section 1260(c)(2)), such loss cannot be treated as ordinary pursuant to section 988, the asset generating the loss cannot have been separated from any portion of the income it generates, and the asset generating the loss is not, and has never been, part of a straddle within the meaning of section 1092(c), excluding a mixed straddle under Treas. Reg. § 1.1092(b)-4T.

19 *See* Rev. Proc. 2003-24 for the types of losses that cannot qualify for this exception.

20 Rev. Proc. 2003-24. It is worth noting that the IRS did not treat property acquired in a section 1032 transaction (where the corporation uses its own stock to acquire property) as generating qualifying basis.

21 Treas. Reg. § 1.6011-4(b)(6) (2003).

22 The October 2002 temporary regulations used $100 million as the threshold. Treas. Reg. § 1.6011-4T(b)(6)(ii)(A)(2) (as amended in 2002). Such regulation was repealed upon the issuance of the final regulations on February 28, 2003.

23 Treas. Reg. §§ 1.6011-4(b)(6)(ii)(A)(1) and (2) (2003).

24 The temporary regulations originally had 13 categories of transactions. Reference should be made to T.D. 9017 (October 17, 2002) for the list of these 13 categories of transactions. In addition to adding 18 categories of transactions, the IRS removed a category of transaction where the item could not be deducted for federal income tax purposes. This category was duplicative of the first category which now reads: "Items to the extent a book loss or expense is reported before or without a loss or deduction for federal income tax purposes."

25 Book-tax differences arising by reason of the following items are not taken into account in determining whether a transaction has a significant book-tax difference under Treas. Reg. § 1.6011-4(b)(6) and Rev. Proc. 2003-25: (1) Items to the extent a book loss or expense is reported before or without a loss or deduction for federal income tax purposes, (2) Items to the extent income or gain for federal income tax purposes is reported before or without book income or gain, (3) Depreciation, depletion under code section 612, and amortization relating solely to differences in methods, lives (for example, useful lives, recovery periods), or conventions as well as differences resulting from the application of sections 168(k), 1400I, or 1400L(b), (4) Percentage depletion under section 613 or section 613A, and intangible drilling costs deductible under section 263(c), (5) Capitalization and amortization under sections 195, 248, and 709, (6) Bad debts or cancellation of indebtedness income, (7) Federal, state, local, and foreign taxes, (8) Compensation of employees and independent contractors, including stock options and pensions, (9) Charitable contributions of cash or tangible property, (10) Tax-exempt interest, including municipal bond interest, (11) Dividends as defined in section 316 (including any dividends received deduction), amounts treated as dividends under section 78, distributions of previously taxed income under sections 959 and 1293, and income inclusions under section 551, 951, and 1293, (12) A dividends paid deduction by a publicly traded REIT, (13) Patronage refunds or dividends of cooperatives without a section 267 relationship to the taxpayer, (14) Items resulting from the application of section 1033, (15) Items resulting from the application of sections 354, 355, 361, 367, 368, or 1031, if the taxpayer fully complies with the filing and reporting requirements for these sections, including any requirement in the regulations or in forms, (16) Items resulting from debt-for-debt exchanges, (17) Items resulting solely from the treatment as a sale, purchase, or lease for book purposes and as a financing arrangement for tax purposes, (18) Treatment of a transaction as a sale for book purposes and as a nontaxable transaction under section 860F(b)(1)(A) for tax purposes, not including differences resulting from the application of different valuation methodologies to determine the relative value of REMIC interests for purposes of allocating tax basis among those interests, (19) Items resulting from differences solely due to the use of hedge accounting for book purposes but not for tax purposes, the use of hedge accounting under Treas. Reg. 1.446-4 for tax purposes but not for book purposes, or the use of different hedge accounting methodologies for book and tax purposes, (20) Items resulting solely from (i) the use of a mark-to-market method of accounting for book purposes and not for tax purposes, (ii) the use of a mark-to-market method of accounting for tax purposes but not for book purposes, or (iii) in the case of a taxpayer who uses mark-to-market accounting for both book purposes and tax purposes, the use of different methodologies for book purposes and tax purposes, (21) Items resulting from the application of section

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1286, (22) Inside buildup, death benefits, or cash surrender value of life insurance or annuity contracts, (23) Life insurance reserves determined under section 807 and non-life insurance reserves determined under section 832(b), (24) Capitalization of policy acquisition expenses of insurance companies, (25) Imputed interest income or deductions under sections 483, 1274, 7872, or Treas. Reg. § 1.1275-4, (26) Gains and losses arising under sections 986(c), 987, and 988, (27) Items excluded under sections 883, 921, or an applicable treaty from a foreign corporation's income that would otherwise be subject to tax under section 882, (28) Section 481 adjustments, (29) Inventory valuation differences whether attributable to differences in last-in, first-out (LIFO) computations or obsolescence reserves, and (30) Section 198 deductions for environmental remediation costs.

26 A detailed discussion of these 30 exceptions to transactions with a significant book-tax difference is beyond the scope of this article.

27 *Compaq Computer Corp. v. Commissioner*, 277 F.3d 778 (5th Cir. 2001); *IES Industries, Inc. v. U.S.*, 253 F.3d 350 (8th Cir. 2001).

28 Treas. Reg. § 1.6011-4(b)(7) (2003).

29 Treas. Reg. § 1.6011-4(c)(3)(i)(G) (2003).

30 A transaction that reduces an income inclusion under section 551 or section 1293 also is subject to such testing.

31 Treas. Reg. § 1.6011-4(g) (2003).

32 Treas. Reg. § 1.6011-4(g) (2003).

33 Treas. Reg. § 1.6011-4(g) (2003).

34 I.R.C. § 6662(a).

35 I.R.C. § 6662(b)(1).

36 I.R.C. § 6662(b)(2).

37 I.R.C. § 6662(d)(1).

38 Treas. Reg. § 1.6662-1 (1995).

39 Prop. Reg. § 1.6664-4(c)(2).

40 S. 476, 108th Cong., 1st Sess. (2003).

41 For an explanation of the CARE Act provisions, see S. Rep. No. 108-11, 108th Cong., 1st Sess. 83 (2003).

42 A large entity is defined as any entity with gross receipts in excess of $10 million in the year of the transaction or in the preceding year.

43 Broadly defined for this purpose in section 6662(d)(2)(C)(iii) to include any entity, investment plan or arrangement a significant purpose of which is the avoidance of Federal income tax.

44 Treas. Reg. §§ 1.6662-4(g)(4)(i)(B) (1998) and 1.6664-4(c) (1998).

45 The bill provides that a transaction has economic substance (and thus satisfies the economic substance doctrine) only if the taxpayer establishes that (1) the transaction changes in a meaningful way (apart from Federal income tax consequences) the taxpayer's economic position, and (2) the taxpayer has a substantial non-tax purpose for entering into such transaction and the transaction is a reasonable means of accomplishing such purpose.

46 I.R.C. § 6501(a).

47 I.R.C. § 6501(e).

48 S. 476, *supra,* note 41.

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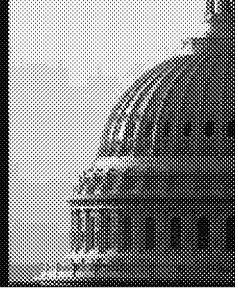
Reportable Transaction Disclosure Analysis



Business Drivers

As part of recent U.S. legislative and regulatory efforts to stifle the use of abusive corporate tax shelters, companies face stringent documentation and disclosure requirements. Proposed legislation would also impose significant penalties for non-compliance.

Complying with the tax shelter regulations presents significant challenges. The compliance effort will require cross-functional (e.g., tax, accounting, legal, human resources, treasury, M&A) support and participation throughout the company. Many companies lack the resources with the time and experience needed to manage the added responsibility of interpreting and applying the tax shelter regulations. Other companies inaccurately assume that the regulations only apply to taxpayers that have entered into "abusive" tax shelter transactions, while the regulations contain provisions that require disclosure of common commercial transactions found in many companies.

Opportunity

To assist you with the identification and analysis of potentially reportable transactions, PricewaterhouseCoopers (PwC) has developed Reportable Transaction Disclosure Analysis. This service offering is designed to help you understand how these regulations may affect your business operations and help you comply with the regulations. The analysis includes four phases:

- **Phase I - Education and Identification:** This phase is designed to provide company stakeholders with an overview and common understanding of the reporting requirements. We will also work with you to identify and document your company's information flows, policies, and procedures related to the recording, authorizing and documenting of certain transactions. Finally, we will work with you to develop an action plan specific to your company.
- **Phase II - Year One Compliance**: During this phase we will gather information to help you identify and analyze transactions or items that may be considered reportable transactions. In addition, we will assist you in completing the Reportable Transaction Disclosure Statement.
- **Phase III - Ongoing Compliance**: Complying with the regulations is an ongoing process. In this phase, we will compare the company's existing information flows, policies, and procedures to those considered to be "best practices" for tax shelter reporting purposes, assist in identifying gaps, and recommend enhancements, as appropriate.
- **Phase IV - Periodic Maintenance**: We will provide you with updates on related legislation, regulatory, administrative, and judicial developments on a regular basis and provide recommendations to your existing compliance process, as appropriate.

Impact

Possible benefits include:

- Enhanced understanding of reportable transaction disclosure rules
- Improved compliance with the law and regulations
- Decreased exposure to penalties and sanctions
- Reduced administrative burden
- Dynamic process to track reportable transactions

Contacts

For more information, please contact **Dwight Littlefield**, Initiative Leader, at (202) 414-1570 or **Tim Throndson** at (202) 414-4574.

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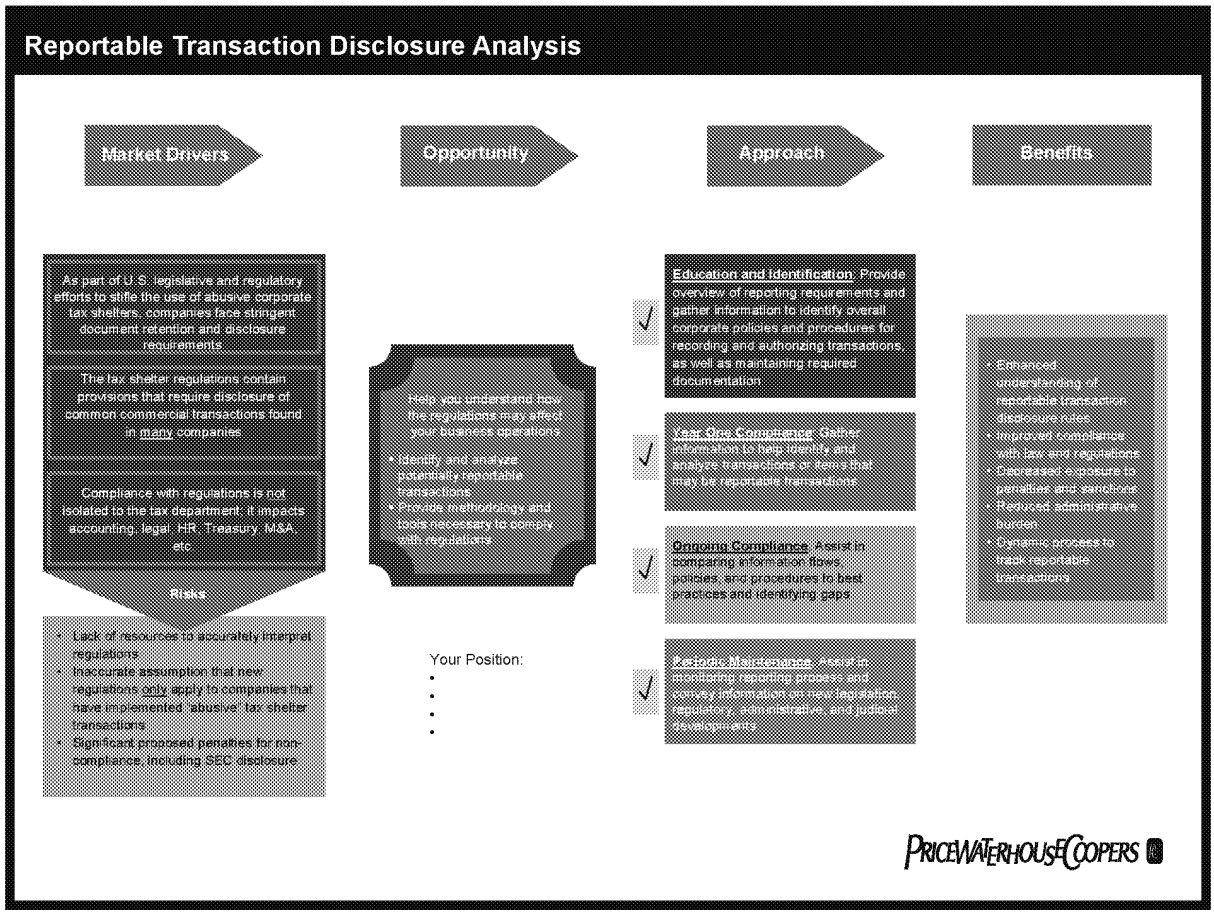
Reportable Transaction Disclosure Analysis
Market Drivers
Opportunity
Approach
Benefits
As part of U.S. legislative and regulatory efforts to stifle the use of abusive corporate tax shelters, companies face stringent document retention and disclosure requirements
The tax shelter regulations contain provisions that require disclosure of common commercial transactions found in many companies
Compliance with regulations is not isolated to the tax department. It impacts accounting, legal, HR, Treasury, M&A, etc
Risks
• Lack of resources to accurately interpret regulations
• Inaccurate assumption that new regulations only apply to companies that have implemented "abusive" tax shelter transactions
• Significant proposed penalties for non-compliance, including SEC disclosure
Help you understand how the regulations may affect your business operations
• Identify and analyze potentially reportable transactions
• Provide methodology and tools necessary to comply with regulations
Your Position:
•
•
•
•
Education and Identification: Provide overview of reporting requirements and gather information to identify overall corporate policies and procedures for recording and authorizing transactions, as well as maintaining required documentation
Look-Back Compliance: Gather information to help identify and analyze transactions or items that may be reportable transactions
Ongoing Compliance: Assist in comparing information flows, policies, and procedures to best practices and identifying gaps
Periodic Maintenance: Assist in monitoring reporting process and using information to help maintain regulatory compliance and process improvement
• Enhanced understanding of reportable transaction disclosure rules
• Improved compliance with law and regulations
• Exposure exposure to penalties and sanctions
• Reduced administrative burden
• Dynamic process to track reportable transactions
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Central Region Business Solution Rollout

June 20, 2003

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Reportable Transaction Disclosure Analysis (RTDA) PINNACLE Idea # 4550

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Reportable Transaction Disclosure Analysis
Agenda

- **Market Drivers**
- **Why Now?**
- **Opportunity**
- **Process & Methodology**
- **Potential Benefits**
- **Target Profile**
- **Sales Information**
- **Next Steps – Targeting**
- **Success Stories**
- **Contacts**

Reportable Transaction Disclosure Analysis
Market Drivers

Current Environment

- U.S. legislative and regulatory efforts have placed increased scrutiny on use of abusive tax shelters, including exposure of tax accrual workpapers to IRS scrutiny
- Companies face stringent document retention and disclosure requirements
- Tax shelter regulations contain provisions that require disclosure of common commercial transactions found in **many** companies; not just abusive tax shelter transactions, as many companies inaccurately assume
- Compliance with regulations is **not** isolated to tax department; it impacts such functions as: Accounting / Finance, Legal, Human Resources, Treasury, Mergers & Acquisitions, Information Technology, Operations, etc.
- Companies may not have adequate resources to accurately interpret and respond to regulations

Reportable Transaction Disclosure Analysis
Market Drivers

Proposed Penalties for Noncompliance

- Non-waivable penalty of up to $200,000 for failure to disclose each Listed Transaction and $100,000 penalty (waivable in extremely limited circumstances) for failure to disclose each Other Reportable Transaction
- Increased accuracy-related penalties related to non-disclosed Listed and Other Reportable Transactions
  - Accuracy penalty calculated at the maximum marginal rate **without** regard to actual tax liability:

    1. Accuracy penalty would be 30% for non-disclosed Listed Transactions and 20% (current law) for disclosed Listed Transactions
    2. Accuracy penalty would be 30% for non-disclosed Reportable Transactions and 20% (current law) for disclosed Reportable Transactions

Reportable Transaction Disclosure Analysis
Market Drivers

Proposed Penalties for Noncompliance

- Taxpayers would be required to disclose $200,000 penalty, as well as **any** 30% accuracy related penalties, in company's SEC filings
- If Listed Transaction was **not** disclosed, statute of limitations for year of transaction may be extended from 3 to 6 years
- IRS will not allow a taxpayer that fails to disclose any reportable transaction to rely on an opinion or other advice to satisfy the reasonable cause and good faith exceptions to accuracy-related penalties (under proposed regulations)

Reportable Transaction Disclosure Analysis
Why Now?

- Given January 1, 2003 effective date, compliance will, in all events, include some level of forensic activity to identify and evaluate transactions beginning on or after that date.
- Existing tax systems may not capture information required to analyze transactions
- Existing record retention protocols and/or systems may not satisfy the more stringent requirements

Reportable Transaction Disclosure Analysis
Why Now?

What Do Clients Need to Do Now?

Devise and implement compliance strategy that:

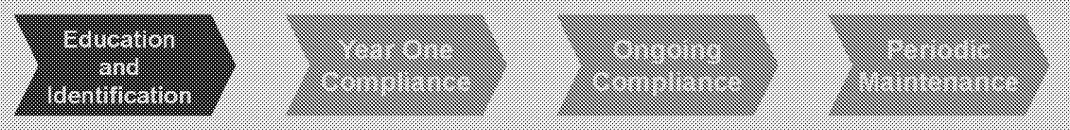
- ✓ Demonstrates that they have procedures in place to identify relevant transactions
- ✓ Documents whether a transaction is disclosable
- ✓ Satisfies document retention requirements
- ✓ Makes required changes to existing policies, procedures, and systems
- ✓ Takes into account Sarbanes-Oxley requirements related to internal controls

Reportable Transaction Disclosure Analysis
Opportunity

Reportable Transaction Disclosure Analysis can:

- Help clients understand impact of how regulations affect their business operations
- Help clients identify and analyze potentially reportable transactions
- Provide methodology and tools to help clients comply with disclosure regulations

RTDA Process & Methodology
Four-Phase Approach



How can PwC help?

- **Provide overview of tax shelter compliance requirements**
- **Identify and document reportable transaction stakeholders**
- **Determine groups from which support is needed, obstacles to support, and executive approval process**
- **Identify and document sources and availability of accounting information**
- **Gather information from parties involved to identify and document processes, information flows, and documents related to specific categories of transactions**
- **Develop options and create client specific action plan for tax shelter disclosure compliance**

RTDA Process & Methodology
Four-Phase Approach

Education and Identification → **Year One Compliance** → Ongoing Compliance → Periodic Maintenance

How can PwC help?

- **Gather and analyze information to identify and support analysis of potentially reportable transactions**
- **Assist in gathering documents required for tax shelter document retention**
- **Analyze and summarize potentially reportable transactions and make disclosure recommendations**
- **Complete Reportable Transaction Disclosure Statement, IRS Form 8886, for all reportable transactions**

RTDA Process & Methodology
Four-Phase Approach

Education and Identification → Year One Compliance → **Ongoing Compliance** → Periodic Maintenance

How can PwC help?

- **Update and finalize identification and documentation of information flows related to:**
  - **Transactions (e.g. who executes, information process, confidentiality, contractual protection, entities involved, etc.)**
  - **Authorization, legal review, audit committee involvement, etc.**
  - **Existing document retention policies**
- **Perform gap analysis against best practices and develop recommendations**
- **Assist with design and implementation of tailored tax shelter compliance policies and procedures that will assist the company to identify potentially reportable transactions, gather relevant information and documents, and disclose reportable transactions on an ongoing basis.**

RTDA Process & Methodology
Four-Phase Approach

Education and Identification → Year One Compliance → Ongoing Compliance → **Periodic Maintenance**

How can PwC help?

- **Provide timely updates reflecting changes in laws, rules, regulations, and listed transactions**
- **Determine scope of changes to laws, rules, and regulations related to tax shelters, business environment and new business entities, and new book-tax differences**
- **Evaluate adequacy of existing controls**
- **Assist with design and implementation of modified tax shelter compliance policies and procedures to reflect changes in law or company's facts**

Reportable Transaction Disclosure Analysis
Potential Benefits

- Enhanced understanding of reportable transaction disclosure rules
- Improved compliance with law and regulations
- Decreased exposure to penalties and sanctions
- Reduced administrative burden
- Dynamic process to track reportable transactions

Reportable Transaction Disclosure Analysis
Target Profile

Initial Targets

- Companies who have completed, scheduled, or are in process of scheduling PwC provided four-hour Tax Shelter CE session

Priority Target Opportunities

- Large companies with international operations
- Any company involved in a large number of transactions
- Companies concerned with treatment of specific transactions under tax shelter regulations
- Companies with multi-business unit operations
- Companies concerned with the significant document retention requirements
- Companies with limited resources and decentralized functions

Reportable Transaction Disclosure Analysis
Sales Information

Buyer

- Initial buyer would be Tax Director, however, monetary penalties and SEC disclosure would also involve CFO
- Additionally, proposed legislation requiring CEO's signature on the tax return would warrant CEO's involvement

Fees

- Fees for Education and Identification phase will be based on our customary hourly rates
- Additional fees depend on the scope of engagement
- Fees will depend on client's facts and circumstances and complexity of engagement

Competition

- We are not aware of any comprehensive solutions in the market place currently. However, law firms and other Big 4 firms could easily enter this market.

Reportable Transaction Disclosure Analysis
Next Steps - Targeting

- Review national target list for Central Region targets
- Refine target list through conversations with Industry professionals, SBD, and RTDA team
  - SBD and RTDA team will contact engagement teams throughout next 30 days to refine target list
  - Target list will be prioritized (tiered) based on opportunity for RTDA solution at target
- RTDA and SBD team will work together with engagement teams to create action plans around targets to introduce RTDA within next 60 days

Reportable Transaction Disclosure Analysis
Success Stories

RTDA Engagement In-Process

Confidential Client Info

Tax Shelter CE Sessions Completed and/or Scheduled

Confidential Taxpayer Info

AA 000434

Reportable Transaction Disclosure Analysis
Contacts

Regional Contacts

Tom Palmisano, Houston	(713) 356-8264
Chet Joshi, Chicago	(312) 298-3312

National Contacts

Dwight Littlefield, Washington, D.C.	(202) 414-1570
Tim Throndson, Washington, D.C.	(202) 414-4574

Business Solutions Team

Brandon Mark, Washington, D.C.	(202) 414-4684

Reportable Transaction Disclosure Analysis
Q&RM Contacts

If you have an issue regarding the Firm's listing or registration requirements, please contact a member of the Firm's national Quality & Risk Management (Q&RM) group or consult the ARMOR database for related materials:

Dan Mendelson, Washington, D.C.	(202) 414-1034
Paul Eldridge, New York	(646) 394-4223
Dan Noakes, Washington, DC	(202) 414-4386
Jim Emilian, Washington, DC	(202) 414-1761
David Gilbertson, Washington, DC	(202) 414-4428

Questions?

Your worlds Our people

CONFIDENTIAL

Form **4564** (Rev. June 1988)	Department of the Treasury — Internal Revenue Service **Information Document Request**	Request number XXX - Page 1 of 4

To: *(Name of Taxpayer and Company Division or Branch)*

Subject: LISTED TRANSACTIONS

SAIN number | Submitted to:

Dates of previous requests

Please return Part 2 with listed documents to requester identified below

Description of documents requested

The Internal Revenue Service has identified certain transactions as "listed transactions" for purposes of §1.6011-4T(b)(2) of the temporary Income Tax Regulations. The IRS considers transactions that are the same as or substantially similar to listed transactions to be tax avoidance transactions. Attached below is a summary of the listed transactions as of the date of this IDR.

The purpose of this IDR is to determine whether [Taxpayer] has directly or indirectly participated in transactions that are the same as or substantially similar to any listed transaction. Please list each transaction that is the same as or substantially similar to a listed transaction in which [Taxpayer] directly or indirectly participated and that affects [Taxpayer's] Federal income tax liability for any year under examination. The rules of §1.6011-4T apply to determine whether a taxpayer has directly or indirectly participated in a transaction and whether a transaction is the same as or substantially similar to a listed transaction.

A taxpayer will have indirectly participated in a listed transaction if the taxpayer's Federal income tax liability is affected (or in the case of a partnership or S corporation, if a partner's or shareholder's Federal income tax liability is reasonably expected to be affected) by the transaction even if that taxpayer is not a direct party to the transaction. Moreover, a taxpayer will have indirectly participated in a listed transaction if the taxpayer knows or has reason to know that the tax benefits claimed from the taxpayer's transaction are derived from a listed transaction. See §1.6011-4T(a)(1) and (2).

The term substantially similar includes any transaction that is expected to obtain the same or similar types of claimed tax benefits and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion concluding that the tax benefits from [Taxpayer's] transaction are allowable is not relevant to the determination of whether [Taxpayer's] transaction is the same as or substantially similar to a listed transaction. The term substantially similar must be broadly construed in favor of disclosing under this IDR. See §1.6011-4T(b)(1)(i)

For each transaction identified, please provide the following:

1. A description of the transaction, including all material facts.
2. A description of [Taxpayer's] tax treatment of the transaction, including tax benefits claimed on the return. In describing the tax treatment, include all tax rules or mechanics that affect, give rise to, or result in the claimed tax benefit.
3. Information identifying the amounts involved and the General Ledger accounts affected by any part of the transaction. Please trace all identified items and amounts as line items on the tax returns.
4. All contracts and other transactional documents, including agreements, instruments, and schedules. If such information is too voluminous, then, in the alternative, provide an index that lists and describes all such contracts and transactional documents.
5. Complete copies of all documents and other materials, including legal opinions and memoranda, provided by any party that promoted, solicited, or recommended [Taxpayer's] participation in the transaction.
6. All internal documents used by [Taxpayer] in its decision making process, including, if applicable, information presented to [Taxpayer's] Board of Directors, Audit and Finance Committee, and any other committee.
7. Complete and unredacted minutes of the Board of Directors, Audit and Finance Committee, and any other committees that related, directly or indirectly, to the transaction.
8. All legal, accounting, financial, and economic opinions and memoranda secured by or on behalf of [Taxpayer] in connection with the transaction.
9. A list of all participants and their roles in the transaction.
10. The names and addresses of all parties who promoted, solicited, or recommended [Taxpayer's] participation in the transaction and to whom [Taxpayer] paid fees or other compensation in connection with [Taxpayer's] decision to participate in the transaction.

Information due by _____ At next appointment ☐ Mail in ☐

From:	Name and title of requester	Employee ID number	Date
	Office location		Telephone number

Form **4564** (Rev. June 1988)	Department of the Treasury — Internal Revenue Service **Information Document Request**	Request number XXX - Pg 2 of 4

To: *(Name of Taxpayer and Company Division or Branch)*

Subject: LISTED TRANSACTIONS

SAIN number | Submitted to:

Dates of previous requests

Please return Part 2 with listed documents to requester identified below

Description of documents requested

11. The name(s) and job titles of officers and other employees of [Taxpayer] familiar with the transaction and who are available to meet with the audit team within two weeks of the date of this IDR.

Privilege

For each document withheld because of a claim of privilege, please provide the following:

a. The name and title of the author;
b. The date of the document;
c. The names, titles, and addresses of all recipients of the documents;
d. The subject matter of the document;
e. The privilege claimed;
f. The portions of the document for which there is no claim of privilege; and
g. For any opinion or memoranda described in item 8 above, the conclusions reached in the opinion or memorandum.

Definitions and other instructions

a. [Taxpayer] means all (1) entities that form a part of the consolidated group, and (2) entities over which [Taxpayer] exercises legal or effective control.
b. Provide full and complete documents. Also, provide non-identical copies of all items requested in this IDR. Please note and explain any deviation or difference between the original and the copy.
c. This request applies to the years [years].

Summary of listed transactions -- See Notice 2001-51, 2001-34, I.R.B. 190 (August 20, 2001) (identifying all listed transactions through Notice 2001-45). The transactions listed in Notice 2002-51 and later transactions are summarized below.

(1) Rev. Rul. 90-105, 1990-2 C.B. 69 (transactions in which taxpayers claim deductions for contributions to a qualified cash or deferred arrangement or matching contributions to a defined contribution plan where the contributions are attributable to compensation earned by plan participants after the end of the taxable year).

(2) Notice 95-34, 1995-1 C.B. 309 (certain trust arrangements purported to qualify as multiple employer welfare benefit funds exempt from the limits of §§ 419 and 419A of the Internal Revenue Code).

(3) Notice 95-53, 1995-2 C.B. 334 (certain multiple-party transactions intended to allow one party to realize rental or other income from property or service contracts and to allow another party to report deductions related to that income (often referred to as "lease strips")).

(4) Part II of Notice 98-5, 1998-1 C.B. 334 (transactions in which the reasonably expected economic profit is insubstantial in comparison to the value of the expected foreign tax credits).

Information due by _____ At next appointment ☐ Mail in ☐

From:	Name and title of requester	Employee ID number	Date
	Office location		Telephone number

Catalog No. 23145K

AA 000440

Form **4564** (Rev. 6-1988)

Form 4564 (Rev. June 1988)	Department of the Treasury — Internal Revenue Service **Information Document Request**	Request number XXX - Pg 3 of 4

To: *(Name of Taxpayer and Company Division or Branch)*

Subject: LISTED TRANSACTIONS

SAIN number | Submitted to:

Dates of previous requests

Please return Part 2 with listed documents to requester identified below

Description of documents requested

(5) Transactions substantially similar to those at issue in ASA Investerings Partnership v. Commissioner, 201 F.3d 505 (D.C. Cir. 2000), and ACM Partnership v. Commissioner, 157 F.3d 231 (3d Cir. 1998) (transactions involving contingent installment sales of securities by partnerships in order to accelerate and allocate income to a tax-indifferent partner, such as a tax-exempt entity or foreign person, and to allocate later losses to another partner).

(6) Treas. Reg. § 1.643(a)-8 (transactions involving distributions described in §1.643(a)-8 from charitable remainder trusts).

(7) Rev. Rul. 99-14, 1999-1 C.B. 835 (transactions in which a taxpayer purports to lease property and then purports to immediately sublease it back to the lessor (that is, lease-in/lease-out or LILO transactions)).

(8) Notice 99-59, 1999-2 C.B. 761 (transactions involving the distribution of encumbered property in which taxpayers claim tax losses for capital outlays that they have in fact recovered).

(9) Treas. Reg. §1.7701(l)-3 (transactions involving fast-pay arrangements as defined in §1.7701(l)-3(b)).

(10) Rev. Rul. 2000-12, 2000-11 I.R.B. 744 (certain transactions involving the acquisition of two debt instruments the values of which are expected to change significantly at about the same time in opposite directions).

(11) Notice 2000-44, 2000-36 I.R.B. 255 (transactions generating losses resulting from artificially inflating the basis of partnership interests).

(12) Notice 2000-60, 2000-49 I.R.B. 568 (transactions involving the purchase of a parent corporation's stock by a subsidiary, a subsequent transfer of the purchased parent stock from the subsidiary to the parent's employees, and the eventual liquidation or sale of the subsidiary).

(13) Notice 2000-61, 2000-49 I.R.B. 569 (transactions purporting to apply §935 to Guamanian trusts).

(14) Notice 2001-16, 2001-9 I.R.B. 730 (transactions involving the use of an intermediary to sell the assets of a corporation).

(15) Notice 2001-17, 2001-9 I.R.B. 730 (transactions involving a loss on the sale of stock acquired in a purported §351 transfer of a high basis asset to a corporation and the corporation's assumption of a liability that the transferor has not yet taken into account for federal income tax purposes).

(16) Notice 2001-45, 2001-33 I.R.B. 129 (certain redemptions of stock in transactions not subject to U.S. tax in which the basis of the redeemed stock is purported to shift to an U.S. taxpayer).

(17) Notice 2002-21, 2002-14 I.R.B. 730 (April 8, 2002) (transactions involving the use of a loan assumption agreement to claim an inflated basis in assets acquired from another party).

(18) Notice 2002-35, 2002-14 I.R.B. 992 (May 28, 2002) (transactions involving a notional principal contract to claim current deductions for periodic payments while disregarding the accrual of a right to receive offsetting payments in the future).

Information due by _____ At next appointment ☐ Mail in ☐

From:	Name and title of requester	Employee ID number	Date
	Office location		Telephone number

Catalog No. 23145K

AA 000441

Form 4564 (Rev. 6-1988)

Form **4564** (Rev. June 1988)	Department of the Treasury — Internal Revenue Service **Information Document Request**	Request number XXX - Pg 4 of 4

To: *(Name of Taxpayer and Company Division or Branch)*

Subject: LISTED TRANSACTIONS

SAIN number | Submitted to:

Dates of previous requests

Please return Part 2 with listed documents to requester identified below

Description of documents requested

(19) Rev. Rul. 2002-46, 2002-29 I.R.B. 1 (June 28, 2002) (identifying as substantially similar to Rev. Rul. 90-105 a transaction in which a taxpayer makes contributions to a qualified cash or deferred arrangement under §401(k) or a defined contribution plan as matching contributions under §401(m) and the contributions are designated as satisfying a liability established before the end of the taxable year but are attributable to compensation earned by plan participants after the end of that taxable year). See Notice 2002-48, 2002-29 I.R.B. 1 (July 22, 2002) for certain variations to Rev. Rul. 90-105 that are not listed transactions.

(20) Notice 2002-50, 2002-28 I.R.B. 1 (July 15, 2002) (transactions involving economic straddles within a tiered partnership structure and a transitory partner to allocate income tax deductions to the taxpayer - often referred to as the Partnership Straddle Tax Shelter).

(21) Notice 2002-65, 2002-41 I.R.B 1 (Sep 25, 2002) (transactions using a straddle, one or more transitory shareholders, and the rules of subchapter S to allow the taxpayer to claim an immediate loss, while deferring an offsetting gain in the taxpayer's investment in the S corporation).

(22) Notice 2002-70, 2002-44 I.R.B. 1 (Nov 4, 2002) transactions used for shifting income from taxpayers to related companies purported to be insurance companies that are subjected to little or no income tax. These tyransactions often do not generate benefits that taxpayers claim are allowable for tax purposes.

Information due by _____ At next appointment ☐ Mail in ☐

From:	Name and title of requester	Employee ID number	Date
	Office location		Telephone number

Catalog No. 23145K

~~AA 000~~442

Form **4564** (Rev. 6-1988)

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C. Characteristics of Abusive Tax Shelters
D. Known Abusive Tax Shelter Arrangements

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2. Listed Transactions
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3. ASA
4. SABA
5. Winn-Dixie
6. C.M. Holdings, Inc.
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EXHIBIT 3

Message

From: Stuart Finkel ["cn=stuart finkel/ou=us/ou=tls/o=pwc"]
Sent: 2/22/2004 5:10:12 PM
To: rtda network
CC: Elaine Church ["cn=elaine church/ou=us/ou=tls/o=pwc@americas-us"]; Tim Throndson ["cn=tim throndson/ou=us/ou=tls/o=pwc@americas-us"]; Keith Booth ["cn=keith booth/ou=us/ou=tls/o=pwc@americas-us"]; Corina M Trainer ["cn=corina m trainer/ou=us/ou=tls/o=pwc@americas-us"]; Dwight Littlefield ["cn=dwight littlefield/ou=us/ou=tls/o=pwc@americas-us"]
Subject: Welcome to the WNTS Tax Shelter Technical TEam
Attachments: _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png; _.png

Below is an excellent compendium of Tax Shelter related legislative guidance and articles gathered by Elaine Church. While many of you have already seen a number of the documents - there have also been a number of additions to the RTDA Network during the last couple of months.

Regards

Stuart

----- Forwarded by Stuart Finkel/US/TLS/PwC on 02/22/2004 11:56 AM -----

Elaine Church/US/TLS/PwC 02/18/2004 03:56 PM 202 414 1461 Washington DC US	To: Robertson Bertrand/US/TLS/PwC@Americas-US, Richard McManus/US/TLS/PwC@Americas-US, James Prettyman/US/TLS/PwC@Americas-US, Jeffrey I Rosenberg/US/TLS/PwC@Americas-US cc: Corina M Trainer/US/TLS/PwC, Dwight Littlefield/US/TLS/PwC, Stuart Finkel/US/TLS/PwC Subject: Welcome to the WNTS Tax Shelter Technical TEam

To expedite your integration into the WNTS Tax Shelter and RTDA teams, attached are some background reading materials that you may find useful (some of which I expect that you may already have but it may be helpful to have them all in one place). In addition, we will provide access to the RTDA tracking and RTDA toolkit databases.

- Final regulations:

Text of Final Regulations.pdf Rev Proc 2003-24 (Loss Trans).pdf Rev Proc 2003-25 (Book-Tax).pdf

td9108 Revised Regs (confidentiality) 12-03.pdf

AA 000446

- Description of services tax_shelter_CE_onepager_v2.pdf RTDA.pdf

- Various PwC Thought Leadership Articles:

I. Written by the tax shelter team - -

- Article published by Tax Analysts on the May 12, 2003 by Howard Schoenfeld, Barbara Reeder, Mike Repass, and Christina Moore re. the potential effect of the final tax shelter regulations on exempt organizations.

Final Regs - Exempt Orgs.pdf

- TNT articles (the top-12 series)

- Top 12 Issues/Obstacles, article by Elaine Church published by Tax Analysts in November 2004 top 10 checklist.pdf
- Top 12 Book-TAx Disclosures, article by Elaine Church and Darrell Poplock published by Tax Analysts in

December 2004 book-tax top 12 disclosures.pdf
- Impact of California Legislation, article by Michael Herbert, Barbara Reeder published by Tax Analysts State Tax

Reporter in December 2003 CA shelter article.pdf (and earlier published in Tax Notes)
- Article by Chip Harter, Michael Feder and David Shapiro on Currency Options, published in Tax Analysts

currency options article.pdf

II. Written by issue specialists

- **Transparency - Taxes, December 2003**

U of C Final Article 1-5-04.doc

III. Written by QRM

Two-part Article in the Tax Adviser by Dan Mendelson, Nayan Bhikha and Jim Emilian on the Tax Shelter Temporary Regulations issued October 22, 2002.

Tax Advisor p.1 download.doc p.1 Exhibit 1.doc

Tax Adviser p.2 download.doc

Part II - March 2003 Issue

Tax Adviser p.2 download.doc

PwC Article in The Tax Executive by David Shurberg, David Gilbertson and Bruce Larsen on the Final Tax Shelter Regulations issued February 28, 2003.

PwCArticleMA03.pdf

Article in the Tax Adviser by Dan Mendelson and Jim Emilian on the Tax Shelter Final Regulations issued February 28, 2003.

PwC Part III - Final.doc

Link to Exhibit 1: {doclink : document = 'F8D910BD18A619B6852568BD007375F5' view = '4F1F407D87B679C0802567200034DEF1' database = '802566B4003E49DB' }

Link to Exhibit 2: {doclink : document = '5B407BFCE60347A085256CB0007EB21B' view = '4F1F407D87B679C0802567200034DEF1' database = '802566B4003E49DB' }

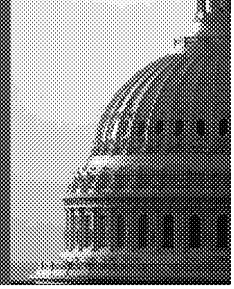
- A series of Did You Know articles pointing out unique issues, traps for the unwary, etc.

Tax shelter tools- Did You Know Series.doc

PRICEWATERHOUSECOOPERS

Tax Shelter Regulations Update

A PricewaterhouseCoopers Continuing Education Course



Background

On February 28, 2003, Treasury issued final regulations regarding disclosure, listing, and registration of tax shelter transactions. These final regulations require disclosure of (i) confidential transactions; (ii) transactions with tax advisor fees contingent on tax benefit; (iii) certain loss transactions under section 165; (iv) certain transactions with a significant (more than $10 million) book-tax difference; and (v) certain transactions involving a brief asset holding period.

Unlike the original regulations (which had provided that any transaction having two out of five enumerated factors must be disclosed), the final regulations provide that a transaction described in any one of those categories must be disclosed. Moreover (again, unlike the prior regulations), no broadly applicable exceptions apply to exempt certain transactions from disclosure. In addition, the regulations form the basis for proposed statutory changes (including significant increases to accuracy-related penalties and new penalties for non-disclosure) likely to be enacted later this year.

These regulations apply very broadly and pick up transactions in almost every company, irrespective of whether they have engaged in any Listed Transactions. Moreover, given the breadth of these regulations, compliance cannot be achieved solely by the tax department. Instead, Treasury functions, business units here and abroad, and management will need to revise policies, procedures, and possibly systems on an inter-disciplinary basis in order to ensure compliance. Failure could have a significant impact, both under current law and under pending legislation.

To help you understand the regulations and their impact, PwC has developed a four-hour CE-eligible course offering designed to train your tax department on the new tax shelter disclosure regulations. PwC has been working closely with key Service and Congressional players to understand the policy goals, help to develop settlement initiatives, and, through our comprehensive comments on the October 2002 proposed regulations, worked to convince the Service to limit unnecessary administrative burdens. As a result, our tax shelter team has an in-depth knowledge of the regulations, recommended changes, and pending legislative proposals, as well as an understanding of how these regulations could affect your business operations.

In four hours, the PwC team will provide:

- The background of Treasury efforts to curb Corporate Tax Shelters
- An overview of new tax shelter rules, with an emphasis on taxpayer disclosure obligations
- A summary of IRS enforcement initiatives
- A summary of pending legislative changes
- A discussion of implementation issues and concerns affecting your business
- Assistance to your tax department in defining needed changes.

Each participant will earn 4 hours of CPE credits. No advanced preparation or prerequisites are required.

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AA 000449

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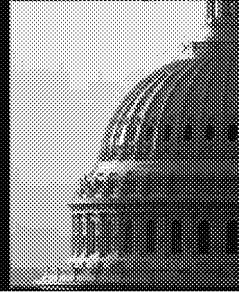
Reportable Transaction Disclosure Analysis



Business Drivers

As part of recent U.S. legislative and regulatory efforts to stifle the use of abusive corporate tax shelters, companies face stringent documentation and disclosure requirements. Proposed legislation would also impose significant penalties for non-compliance.

Complying with the tax shelter regulations presents significant challenges. The compliance effort will require cross-functional (e.g., accounting, legal, human resources, treasury, M&A) support and participation throughout the company. Many companies lack the resources with the time and experience needed to manage the added responsibility of interpreting and applying the tax shelter regulations. Other companies inaccurately assume that the regulations only apply to taxpayers that have entered into "abusive" tax shelter transactions, while the regulations contain provisions that require disclosure of common commercial transactions found in many companies.

Opportunity

To assist you with the identification and analysis of potentially reportable transactions, PricewaterhouseCoopers (PwC) has developed Reportable Transaction Disclosure Analysis. This service offering is designed to help you understand how these regulations may affect your business operations and help you comply with the regulations. The analysis includes four basic phases:

- **Phase I - Education and Assessment:** This phase is designed to provide company stakeholders with an overview and a common understanding of the reporting requirements. We will also work with you to assess the company's information flows, policies, and procedures related to the recording and authorizing of certain transactions. Finally, we will work with you to assess the adequacy of the company's policies and procedures related to the maintenance of required documentation.
- **Phase II - Year One Compliance**: During this phase we will gather information to help you identify and analyze transactions or items that may be considered reportable transactions. In addition, we will assist you in completing the Reportable Transaction Disclosure Statement.
- **Phase III - Ongoing Compliance**: Complying with the regulations is an ongoing process. In this phase, we will compare the company's existing information flows, policies, and procedures to those considered to be "best practices" for tax shelter reporting purposes, assist with the identification of gaps, and recommend enhancements, where appropriate.
- **Phase IV - Annual Maintenance**: We will provide you with updates on related legislation and regulatory, administrative, and judicial developments on a regular basis.

Impact

Possible benefits include:

- Enhanced understanding of reportable transaction disclosure rules
- Improved compliance with the law and regulations
- Decreased exposure to penalties and sanctions
- Reduced administrative burden
- Dynamic process to track reportable transactions

Contacts

For more information, please contact **Dwight Littlefield**, Initiative Leader, at (202) 414-1570 or **Tim Throndson** at (202) 414-4574.

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EXHIBIT 4

Message

From: Stuart Finkel ["cn=stuart finkel/ou=us/ou=tls/o=pwc"]
Sent: 2/23/2004 4:57:22 AM
To: rtda network
CC: Corina M Trainer ["cn=corina m trainer/ou=us/ou=tls/o=pwc@americas-us"]; Elaine Church ["cn=elaine church/ou=us/ou=tls/o=pwc@americas-us"]; Tim Throndson ["cn=tim throndson/ou=us/ou=tls/o=pwc@americas-us"]; Dwight Littlefield ["cn=dwight littlefield/ou=us/ou=tls/o=pwc@americas-us"]; Keith Booth ["cn=keith booth/ou=us/ou=tls/o=pwc@americas-us"]; Chip Lightfoot ["cn=chip lightfoot/ou=us/ou=tls/o=pwc@americas-us"]; John Clymer ["cn=john clymer/ou=us/ou=tls/o=pwc@americas-us"]; Kelley McLaughlin ["cn=kelley mclaughlin/ou=us/ou=tls/o=pwc@americas-us"]; Kimberly J DeWeese ["cn=kimberly j deweese/ou=us/ou=tls/o=pwc@americas-us"]; Amy Stowell ["cn=amy stowell/ou=us/ou=tls/o=pwc@americas-us"]; Cynthia Holzinger ["cn=cynthia holzinger/ou=us/ou=tls/o=pwc@americas-us"]; Angie Schedule ["cn=angie schedule/ou=us/ou=tls/o=pwc@americas-us"]; Dennis R. McErlean ["cn=dennis r. mcerlean/ou=us/ou=tls/o=pwc@americas-us"]; William O'Hagan ["cn=william o'hagan/ou=us/ou=tls/o=pwc@americas-us"]; Victoria Meyer ["cn=victoria meyer/ou=us/ou=tls/o=pwc@americas-us"]; Christine Zmyewski ["cn=christine zmyewski/ou=us/ou=abas/o=pwc@americas-us"]; Andrew Murray-Brown ["cn=andrew murray-brown/ou=us/ou=tls/o=pwc@americas-us"]; Debbie Mckie ["cn=debbie mckie/ou=us/ou=tls/o=pwc@americas-us"]
Subject: Fw: Listed Transaction Summaries
Attachments: _.png

During the last couple of weeks there has been a solid uptick in the market as evidenced by proposals and Wins. Great news and best of luck in your targeting and proposal activities.

With respect to the below note, Corina brings up an important point with respect to our RTDA toolkit documents and other related materials - This is our intellectual property and such materials should not be distributed electronically to our clients.

We currently have the competitive edge in the market - In a recent competitive situation, a PwC RTDA team offered to review the documents in our toolkit with a potential client. We suggested the client do the same with D&T. D&T is still getting back to the target on sharing their toolkit. The point is we are still out in front of the competition - we are meeting with a number of C2/non attest companies that share long loyalties to their attest firm (The same loyalties we share with our long standing clients). While I expect at sometime a copy of our documents to end up in the hands of the competition, we should not accelerate the process.

We should discuss on our next call at what point in an engagement do we actually provide hard copies of toolkit documents, route map, etc. Thank you for your understanding on this matter and please do not hesitate to direct any of your questions on this point to Dwight or me.

Regards

Stuart

----- Forwarded by Stuart Finkel/US/TLS/PwC on 02/22/2004 11:22 PM -----

Corina M Trainer/US/TLS/PwC@AMERICAS-US
02/22/2004 06:07 PM
(202) 414-1328
Washington DC
US

To	RTDA Network
cc	
Subject	Listed Transaction Summaries

Attached is a Summary of Listed Transactions that has been approved by Q&RM that may be shared with clients. As always, when sharing documents with clients NEVER distribute materials electronically.

These summaries have been placed in the RTDA Database. Listed Transaction Summmaries.pdf

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from any computer.

EXHIBIT 5

Message

From: Brandon Mark ["cn=brandon mark/ou=us/ou=tls/o=pwc"]
Sent: 4/15/2004 8:49:20 PM
To: Shelley Penaloza ["cn=shelley penaloza/ou=us/ou=tls/o=pwc@americas-us"]
CC: Thomas J Palmisano ["cn=thomas j palmisano/ou=us/ou=tls/o=pwc@americas-us"]
Subject: Urgent Copies Needed
Attachments: _.png

Shelley,

Can you have Mario make 10 copies of the following presentation in color and have it bound (similar to our previous presentations)? We need this by tomorrow as we have an 8:00 a.m. meeting on Monday.

Confidential Client Info Presentation.ppt

Tom, attached is the presentation. We can skip through some of the things if we need to, but I did remove some of the stuff. Let me know your thoughts, although we probably don't have time to change it since it needs to go to repro soon to get done by tomorrow.

Thanks.

Regards,

Brandon Mark
Manager, Tax Projects Delivery Group
713-356-6875 (office)
713-530-9667 (mobile)
813-288-7842 (right fax)
brandon.w.mark@us.pwc.com

Compliance Issues With Respect to the New Tax Shelter Disclosure Regime

Confidential Client Info

April 19, 2004

Tom Palmisano
(713) 356-8264
Brandon Mark
(713) 356-6875

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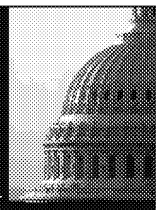
Course Objectives



At the end of this session, you will:

- Understand How the Tax Shelter Disclosure Regulations Came About
- Learn Why Each Taxpayer Should Care About These Regulations
- Develop an Understanding of What the Regulations Say
- Learn How to Implement These Regulations and Manage Risk
- Be Aware of Proposed Legislation Substantially Increasing Penalties and "Codifying" the Economic Substance Doctrine

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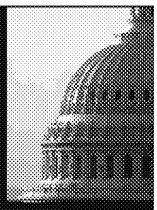
Agenda



Session	Time
Introduction	5 minutes
Putting New Tax Shelter Disclosure Requirements in Context	10 minutes
Summary of Disclosure Requirements	20 minutes
Discussion of Listed and Substantially Similar Transactions	45 minutes

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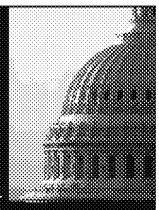
Agenda



Session	Time
Discussion of Other Reportable Transactions	60 minutes
Discussion of Proposed Legislation Increasing Penalties and to Codify the Economic Substance Doctrine	30 minutes
Wrap-Up	15 minutes
Total	3 hours

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Enforcing the New Disclosure Obligations

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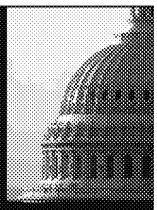
Putting New Disclosure Requirements in Context



- Although the tax shelter disclosure regulations are primarily a disclosure regime, their impact is far broader
  - The final disclosure regulations apply to all taxpayers, not merely those that engage in abusive tax shelter transactions
- Disclosure is required, not only with respect to tax-advantaged transactions, but also many common business transactions
- Failure to disclose a Listed Transaction exposes all tax accrual workpapers to IRS scrutiny
- Newly finalized Regulations make it difficult to rely on an advisor's opinion to satisfy the reasonable cause and good faith exceptions to accuracy related penalties with respect to non-disclosed transactions
- No relief is in sight; instead Congress is poised to give the Service additional hammers to compel disclosure

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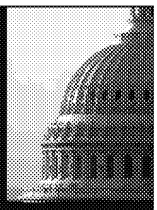
Putting New Disclosure Requirements in Context (cont'd)



- Taxpayers that fail to identify and disclose either a Listed Transaction or Other Reportable Transaction may inadvertently violate the record retention requirements applicable to all reportable transactions
- Failure to disclose a Listed Transaction may preclude and/or terminate participation in the streamlined Limited Issue Focused Examination audit program (LIFE)

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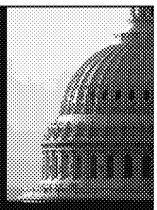
Putting New Disclosure Requirements in Context (cont'd)



- Sarbanes-Oxley Act Sections 302 and 404 generally requires management to:
  - Establish and maintain an adequate internal control structure;
  - Assess the adequacy of the internal control structure; and
  - Provide for an independent audit of management's assessment of its internal control structure
- Internal controls related to compliance with the final Reportable Transactions Disclosure Regime should figure into an overall internal control structure

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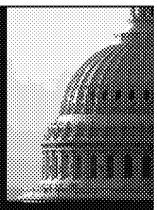
What Do You Need to Do?



- Devise and Implement a Compliance Strategy that
  - Demonstrates that you identified all relevant transactions
  - Documents your efforts to evaluate whether a transaction is disclosable
  - Ensures retention of all required documents
  - Makes required changes to existing policies, procedures, and systems
  - Takes into account the requirements of the Sarbanes-Oxley Act relevant to internal controls

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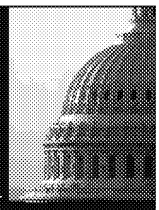
What Do You Need to Do? (cont'd)



- These new regulations reach beyond the Tax department, requiring support from the entire organization, including:
  - Treasury
  - Legal
  - Finance / Accounting
  - Human Resources

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Interaction of Various Regulations

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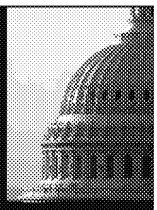
Interaction of Various Regulations



- Before defining the requirements imposed by the various regulations, consider the interaction of various regulations
- In general
  - A transaction entered into before February 28, 2000 need not be disclosed unless
    - It was not reported on a return filed before February 28, 2000, and
    - Is, or subsequently becomes, a Listed Transaction

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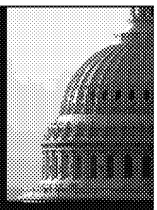
Interaction of Various Regulations (Cont'd)



- Transactions entered into after February 28, 2000 but before January 1, 2003 must be disclosed pursuant to the February 28, 2000 regulations, as modified
- Transactions entered into on or after January 1, 2003 but before February 28, 2003 must be disclosed pursuant to the October 2002 regulations unless the taxpayer elects to apply the final regulations.
- Transactions entered into on or after February 28, 2003 must be disclosed pursuant to the final regulations

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Final Tax Shelter Regulations

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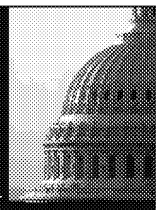
Evolution: Objective Regime



- On February 28, 2003, Treasury issued the Final Regulations, along with two Revenue Procedures:
  - Rev. Proc. 2003-24 (Providing exceptions applicable to certain loss transactions)
  - Rev. Proc. 2003-25 (Providing exceptions applicable to certain transactions with a significant book-tax difference)

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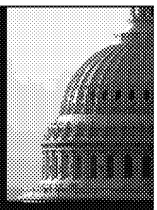
Key Definitions Under the Final Regulations



- To apply these final regulations, certain definitions are critical, including
  - The term “transaction” which is defined to “includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan”
  - The term “tax” which is defined as “Federal income tax”
  - The term “tax treatment” which is defined as “the purported or claimed Federal income tax treatment of the transaction” and

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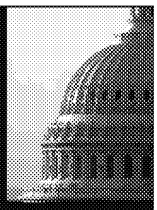
Key Definitions Under the Final Regulations (cont'd)



- The term "tax structure" which is defined as "any fact that may be relevant to understanding the purported or claimed Federal income tax treatment of the transaction"
- The term "tax benefit" which is defined to include deductions, exclusions from gross income, nonrecognition of gain, tax credits,adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from Federal income taxation, and any other tax consequences that may reduce a taxpayer's Federal tax liability by affecting the amount, timing, character or source of any item of income, gain, expense, loss or credit

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Disclosure Requirements Under the Final Regulations

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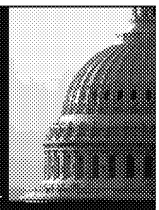
Who Is Required to Disclose Under the Final Regulations?



- Every taxpayer that has participated (specific definition for each type of transaction) in a reportable transaction and who is required to file a tax return
- The fact that a transaction is a reportable transaction shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper

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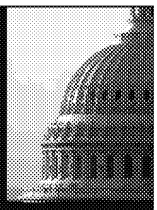
Which Transactions Must Be Disclosed Under the Final Regulations?



- These regulations require taxpayer disclosure of:
  - Reportable Transactions entered into on or after January 1, 2003, (February 28, 2003 if taxpayer elects to apply October 2002 regulations to transactions on or after January 1 and prior to March 1, 2003) and
  - Transactions that become listed after the filing of the taxpayer's final tax return reflecting either the tax consequences or a tax strategy (or a tax benefit derived from the tax consequence or tax strategy), and before the end of the statute of limitations period for that return

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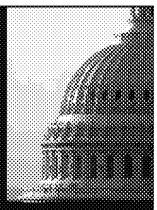
How Must the Transaction Be Disclosed Under the Final Regulations?



- Form 8886 "Reportable Transaction Disclosure Statement" must be filed for each taxable year affected by taxpayer's participation in the transaction; copy of the initial Form 8886 must be filed with OTSA
- In general, a separate Form 8886 must be filed for each transaction

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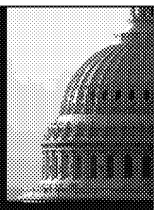
When Must a Taxpayer Disclose Under the Final Regulations?



- The disclosure statement for a reportable transaction must be attached to the taxpayer's tax return for each taxable year for which a taxpayer participates in a reportable transaction
- A taxpayer may be considered to "participate" in a transaction for periods after that in which the taxpayer "enters into" the transaction
- A copy of the first disclosure statement must be sent to the Office of Tax Shelter Analysis ("OTSA")

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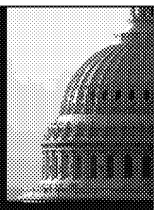
When Must a Taxpayer Disclose Under the Final Regulations? (cont'd)



- If a reportable transaction results in a loss which is carried back to a prior year, the disclosure statement must be attached to the taxpayer's application for a tentative refund or amended tax return for the prior year
- If a transaction entered into on or after February 28, 2003 (January 1, 2003 if the taxpayer so elects) subsequently becomes listed after the taxpayer files the final tax return reflecting participation in the transaction and the statute of limitations is still open for that final year, Form 8886 must be included with the first return filed after the transaction is listed

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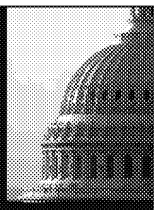
When Must a Taxpayer Disclose Under the Final Regulations? (cont'd)



- Finally, if a loss transaction not originally required to be disclosed (e.g., because the loss was less than the threshold amounts) subsequently equals or exceeds such thresholds, disclosure would be required for the first year the thresholds applied and each subsequent year in which any loss is claimed

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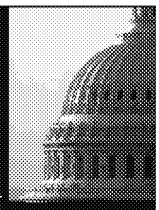
When Must a Taxpayer Disclose? (cont'd)



- In addition, Taxpayers are required to disclose Listed Transactions on audit in response to a Model IDR
  - Model IDR requires delivery of witness list and privilege log as well as transactional information
- Promoters and advisors are required to maintain list of clients by category of Listed Transactions

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Listed Transactions

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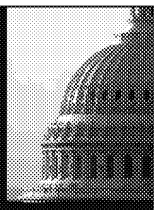
Listed Transactions

Final Reg. Sec. 1.6011-4(b)(2)



- A Listed Transaction is a transaction that is the same as or "substantially similar" to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation or other form of published guidance as a listed transaction
- To date, 31 transactions have been identified as Listed Transactions

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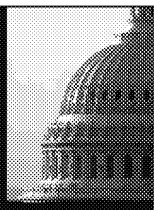
Listed Transactions



- A Taxpayer is considered to participate in a Listed Transaction
  - If a taxpayer's tax return reflects tax consequences or a tax strategy described in published guidance, or
  - If a taxpayer knows or has reason to know that the taxpayers benefits are derived directly or indirectly from tax consequences or a tax strategy described in published guidance
  - If a taxpayer is a U.S. shareholder of a CFC that enters into a listed transaction

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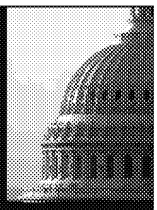
Listed Transactions (cont'd)



- Current list includes transactions described in:
  1. Rev. Rul. 90-105 – "401(k) Accelerator"
     1. See also Rev. Rul. 2002-46 – "Son of 401(k)"
  2. Notice 95-34 – Certain Trusts Purported to be Exempt Multiple Employer Welfare Funds
  3. Transactions substantially similar to ACM or ASA Investerings

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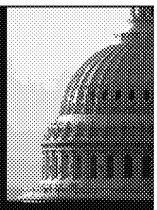
Listed Transactions (cont'd)



4. Prop. Treas. Regs. Sec. 1.643(a)-8 (Charitable Remainder Trusts)
5. Notice 99-59 – Certain Distributions of Encumbered Property "Boss Transactions"
6. Treas. Reg. Sec. 1.7701(l)-3 – "Fast Pay" Stock Structures.
7. Rev. Rul. 2000-12 – Certain Straddles Involving Contingent Debt Instruments

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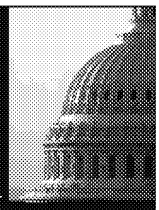
Listed Transactions (cont'd)



8. Notice 2000-44 ("Son of BOSS" Transactions – Transactions similar to those in Notice 99-59 that purport to generate tax losses for taxpayers)
9. Notice 2000-60 – Certain Affirmative Uses of Section 1.83-6(d) to Generate Capital Losses
10. Notice 2000-61 – Certain Guamanian Trusts
11. Notice 2001-16 – Certain "Midco," or Tax Exempt Intermediary, Transactions

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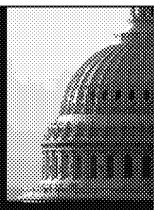
Listed Transactions (cont'd)



12. Notice 2001-17 – Certain Contingent Liability Section 351 Transactions
13. Notice 2001-45 – Certain Basis Shifting Transactions Involving Affirmative Use of Sec. 318 and 302(d)
14. Notice 2002-21 – Certain Transactions that Artificially Inflate Basis through Purported Assumptions of Liabilities
15. Notice 2002-35 – Certain Contingent Deferred Swap Transactions

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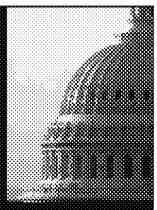
Listed Transactions (cont'd)



16. Notice 2002-50 – Certain Straddle Transactions Executed Through Tiered Partnerships
    16. See also Notice 2002-65 – Certain Pass-Thru Entity Straddle Transactions
    16. See also Notice 2003-54 – Common Trust Fund Straddle Tax Shelter
17. Rev. Rul. 2002-69 – "LILO" or "Lease-In Lease-Out Transactions"
    17. Modifies and supercedes Rev. Rul. 99-14

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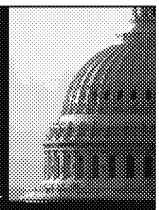
Listed Transactions (cont'd)



18. Notice 2002-70 – Certain Abusive Reinsurance Arrangements
19. Rev.Rul. 2003-6 – Certain Abusive Subchapter S ESOP Allocations
20. Notice 2003-22 – Certain Offshore Deferred Compensation Arrangements
21. Notice 2003-24 – Certain Trust Arrangements Purporting to be Collectively Bargained Welfare Benefit Plans
22. Notice 2003-47 – Transfers of Compensatory Stock Options to Related Persons

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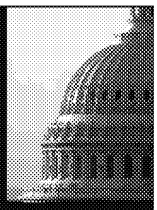
Listed Transactions (cont'd)



23. Notice 2003-55 – Accounting for Lease Strips and Other Stripping Transactions
    23. Modifies and supercedes Notice 95-53 – Lease Strips
24. Notice 2003-77 – Transfers to Trusts to Provide for the Satisfaction of Contested Liabilities
25. Notice 2003-81 – Offsetting Foreign Currency Option Contracts
26. Notice 2004-8 – Abusive Roth IRA Transactions
27. Rev. Rul. 2004-4 – Abusive Transactions involving "S Corporation ESOPs"

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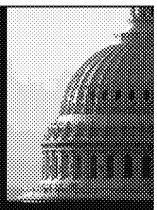
Listed Transactions (cont'd)



28. Rev. Rul. 2004-20 – Deduction for Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred Payment Plan
29. Notice 2004-20 – Abusive Foreign Tax Credit Intermediary Transaction
30. Notice 2004-30 – S Corporation, Tax Exempt Entity Transaction
31. Notice 2004-31 – Intercompany Financing Through Partnerships

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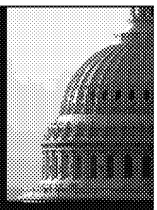
Listed Transactions (cont'd)



- Listed Transactions also include all "substantially similar" Transactions
  - The term "substantially similar" includes "any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar strategy"
  - Broadly construed in favor of disclosure
- The Service's authority permits retroactive listing of transactions entered into in prior years

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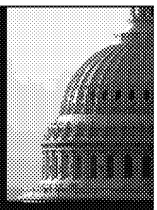
Listed Transactions (cont'd)



- To illustrate the interpretational difficulties associated with applying this "substantially similar" standard, consider
  - Notice 2000-44, Son of BOSS
  - Notice 2001-16, Midco
  - Notice 2001-45, which involves certain basis-shifting transactions
  - Notice 2002-35, which involves certain notional principal contracts

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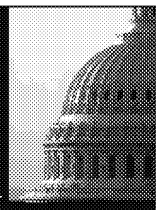
Tax Accrual Workpapers (Ann. 2002-63)



- IRS Announcement 2002-63 states that IRS will routinely seek tax-accrual workpapers of taxpayers entering into Listed Transactions
- For returns filed after July 1, 2002
  - If disclosed, IRS will only request the tax accrual workpapers for the listed transaction
  - If not disclosed, IRS will request all tax accrual workpapers

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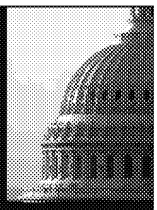
Tax Accrual Workpapers (Ann. 2002-63) (cont'd)



  - If multiple investments in listed transactions, IRS will request all tax accrual workpapers, regardless of whether they were disclosed
  - If there are reported financial accounting irregularities, the IRS, as a discretionary matter, will request all tax accrual workpapers regardless of whether they were disclosed
- In addition, for a return filed prior to July 1, 2002, that claims any tax benefit arising out of a *Listed Transaction*, the IRS may request tax accrual workpapers pertaining to the transaction if the taxpayer was required to, but failed to, disclose the transaction

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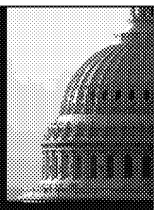
Listed Transactions: Penalties Under Proposed Legislation



- Newly finalized Regulations make it difficult to rely on an advisor's opinion to satisfy the reasonable cause and good faith exceptions to accuracy related penalties with respect to non-disclosed transactions
- With respect to Listed Transactions, S. 476 (which passed the Senate 95-5) would impose penalties of up to $200,000
  - Penalties could not be waived or rescinded
  - I.R.C. Sec. 6707A(d)(3) – No administrative or judicial review of imposition of penalty would be permitted
  - Taxpayers would be required to disclose penalties in SEC filings

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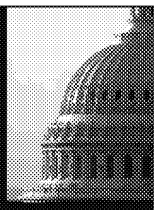
Listed Transactions: Proposed Penalty Regime (cont'd)



- S.476 would
  - Create new accuracy related penalty for Listed Transactions
    - 20% of "understatement" if disclosed; 30% if not disclosed, (with "Understatement" calculated without regard to other items on return applying highest marginal tax rate
  - Require SEC disclosure of 30% penalty,
  - Limit deductions for interest on underpayments, and
  - Extend statute of limitations

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Other Reportable Transactions

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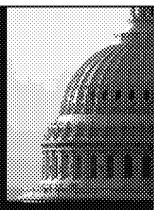
CONFIDENTIAL

Other Reportable Transactions

Final Regulations Sec. 1.6011-4 (T.D. 9046, 2/28/03)



- Taxpayers are required to disclose not only Listed Transactions, but also “Other Reportable Transactions”
- Under proposed regulations applicable to transactions entered into before January 1, 2003, these include certain transactions that are considered reportable under the 2-out-of-5 factor test
- The February 2003 Regulations replace these proposed disclosure regulations with more objective rules generally applicable to transactions entered into on or after February 28, 2003
- Taxpayers can elect to apply the February 2003 regulations retroactively to transactions entered into on or after January 1, 2003

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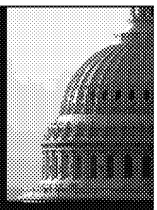
Other Reportable Transactions



1. Confidential transactions
2. Transactions with tax advisor fees contingent on tax benefit
3. Certain loss transactions under section 165
4. Certain transactions with a significant (more than $10 Million) book-tax difference
5. Certain transactions involving a brief asset holding period

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