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Tax Shelters

**Witness to Urge Tax Insurance Carve-Out
Under Abusive Shelter Disclosure Rules**

Tax shelter rules (T.D. 9017, T.D. 9018) requiring mandatory disclosure of transactions with contractual protection of tax benefits will have a chilling effect on the tax insurance industry, a practitioner is expected to tell the Internal Revenue Service Dec. 11.

David De Berry, vice president of The Hartford, a tax insurer in New York, is expected to ask IRS to carve out most tax insurance from the definition of a contractual protection that would automatically trigger disclosure.

Issued in October, the comprehensive guidance requires disclosure and registration of abusive corporate tax shelters, and mandates that promoters maintain investor lists under Internal Revenue Code Sections 6011, 6111, and 6112 (201 DTR GG-1, 10/17/02; 202 DTR GG-2, Text Supplement, 10/18/02).

Under the regime set out by the proposed rules, taxpayers would have to disclose any transaction that falls into one of six categories, including transactions with contractual protections that ensure benefits to the participants--such as indemnity in the event that the claimed tax benefits are not sustained.

Taxpayers also would have to reveal:

- listed transactions, or those that have been specifically identified by IRS as tax avoidance transactions;

- transactions marketed under conditions of confidentiality;
- transactions generating specific amounts of tax losses;
- transactions resulting in a book-tax difference exceeding \$10 million, with several technical exceptions; and
- transactions generating a tax credit when the underlying asset is held for a brief period of time.

Narrower Scope Urged

De Berry is expected to tell IRS he is opposed to the blanket inclusion of tax insurance under language that would force disclosure of any transaction involving contractual protections if expected tax benefits do not materialize.

"Mandatory disclosure will have a chilling effect on the tax insurance industry, which will be detrimental to our economy," De Berry said in Dec. 2 comments to IRS.

He implied that the regulation could threaten the viability of the industry as a whole, and added the implementation of such a rule would create a wave of unnecessary disclosures.

"To the extent that tax insurance remains viable after the effective date of the temporary regulation, the reporting of the transaction solely as a result of the purchase of tax insurance will serve only to burden IRS with reviewing complex transactions that are not tax shelters," De Berry wrote.

In addition, he said, the regulations contain ambiguities that could confuse taxpayers, possibly resulting in "administrative efficiencies and/or unnecessary litigation for all concerned."

Carve-Out Suggested

De Berry is expected to ask IRS to exclude customary tax indemnity provisions and tax insurance from the definition of "contractual protection" unless issued in connection with a reportable shelter or unless refund rights exist against a non-party to the transaction.

The tax insurance provider said in comments that IRS also should not view as a disclosure trigger the provision of a debt instrument requiring additional interest and/or redemption rights as compensation for the collection of withholding taxes.

De Berry said IRS should differentiate between practitioners who generate fees by "creative application" of the tax code and tax insurance underwriters, who generally are expected to provide "a conservative, prudent analysis of a tax position," he said.

In fact, De Berry argued, tax insurers generally refuse to provide coverage for tax shelters, abusive schemes, and weakly supported tax positions. In turn, he said, this "helps to cultivate a culture of compliance in which corporate tax shelters are less often created."

The 10 a.m. hearing is in room 6718 of the main Internal Revenue Building, 1111 Constitution Ave., N.W., Washington, D.C.

De Berry's comment to IRS is in BNA TaxCore. 📄🗨️

By Alison Bennett

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