



Duty to Disclose in SEC Reports Certain Penalties Imposed Under the Internal Revenue Code

January 28, 2014

The Internal Revenue Code of 1986, as amended (the “Code”), generally requires companies filing periodic reports with the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 to disclose in such reports the imposition of certain tax penalties.¹ Under Section 6707A(e) of the Code, such companies must disclose in their periodic reports any penalties imposed for:

1. Failing to properly disclose a “listed transaction” to the Internal Revenue Service (the “Service”). Listed transactions are generally transactions that are the same as, or substantially similar to, certain tax-avoidance transactions officially identified as such by the Department of the Treasury.²
2. Underpayments of tax that are attributable to “listed transactions” or “reportable transactions” with a tax avoidance purpose, where such transactions were not properly disclosed to the Service. Reportable transactions are certain transactions officially identified by the Department of the Treasury as having a potential for tax avoidance or evasion.³
3. Underpayments of tax that are attributable to a “gross valuation misstatement” on any federal tax return. A gross valuation misstatement may involve a significant overstatement or, in certain situations, a significant understatement, in the value of property or services rendered.

Each company subject to one of these penalties is required to disclose the penalty in Item 3 (Legal Proceedings) of its Form 10-K relating to the fiscal year in which it received a notice and demand for payment of the penalty from the Service.⁴ A company’s failure to make the

¹ Companies that are required to be consolidated with other persons for purposes of these periodic reporting requirements must also disclose such penalties.

² See IRS Notice 2009-59, 2009-31 I.R.B. 170 (identifying listed transactions as of the date of this memorandum).

³ Reportable transactions generally include listed transactions, transactions offered under the condition of confidentiality to protect a tax advisor’s tax strategies, transactions in which a tax advisor has agreed to fully or partially refund its fees if the intended tax consequences of the transaction are not sustained, transactions where a taxpayer claims certain substantial tax losses, and certain other transactions of interest identified by the Department of the Treasury. See Treasury Regulations Section 1.6011-4(b).

⁴ Among other things, the company must describe the nature of the penalty, disclose its amount, and indicate whether it has been paid in full. In certain situations, such disclosure may be required on forms other than Form 10-K. See Revenue Procedure 2007-25, 2007-1 C.B. 761.

requisite penalty disclosure in its periodic filings could result in the imposition of an additional penalty pursuant to Section 6707A(e) of the Code, and the imposition of such a penalty must itself be reported in the company's subsequent periodic filings. Consequently, public companies should ensure that they promptly disclose in their Form 10-Ks any penalties under Section 6707A(e) of the Code to which they are subject, as well as any penalties imposed on them for previously omitting mandatory penalty disclosure from their filings.

* * *

If you have any questions or would like additional information, please do not hesitate to contact [Yafit Cohn](mailto:yafit.cohn@stblaw.com) at (212) 455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm's Public Company Advisory Practice.

This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.

Treasury Department 230 Disclosure: To ensure compliance with requirements imposed by the Service, we inform you that any tax advice contained in this memorandum was not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties under federal, state or local tax law.

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication.

UNITED STATES**New York**

425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston

2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE**London**

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA**Beijing**

3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul

West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo

Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA**São Paulo**

Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000