
New Tax Disclosure Requirements May Require the Reporting of Confidential Licensing and Other Intellectual Property Transactions

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The Internal Revenue Service (IRS) recently issued [final regulations](#) that impose new tax reporting requirements with respect to certain "reportable transactions." The regulations are intended to force the disclosure of potentially abusive tax shelters, but are so broadly written that they may require the reporting of routine licensing or other intellectual property transactions (as well as many other types of transactions) which include confidentiality restrictions.

Under the new regulations, a reportable confidential transaction is one in which "the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in any manner by an express or implied understanding or agreement with or for the benefit of any person who makes or provides a statement... to the taxpayer... as to the potential tax consequences that may result from the transaction..." A participant in a reportable confidential transaction is required to report the transaction on [IRS Form 8886](#) with its annual federal income tax return for the year in which the transaction occurs.

As an example, if a statement as to tax consequences is made about a license agreement, or the agreement itself contains a tax "gross up" clause or some other provision relating to the tax consequences of the transaction, the license will be considered a reportable transaction **if** the parties are restricted from disclosing information about the tax treatment and tax structure of the transaction. This would normally be the case if the agreement also contains a general confidentiality clause, under which the terms of the agreement are deemed to be confidential information. Similarly, if parties enter into a separate Confidentiality Agreement and then discuss the tax consequences of a transaction that is later consummated, that transaction may be reportable even if there is no statement as to tax consequences in the final agreement.

To avoid the reporting obligation, the scope of the confidentiality clause or agreement could be limited to the underlying intellectual property and financial terms of the transaction. If a confidentiality clause or agreement is drafted so as to allow the disclosure of the tax treatment and tax structure of the transaction, then the transaction will not be a reportable confidential transaction, and the participant will generally not be required to file Form 8886. Of course, the benefits of avoiding the

filing of Form 8886 with the IRS should be weighed against the loss of confidentiality for the tax-related information.

In order to make clear that disclosure of tax treatment and tax structure is permitted, one should consider adding contractual language based on the new regulations' presumption that a transaction is not a reportable confidential transaction if the participant otherwise required to report is authorized in writing to disclose tax-related information. For example, an agreement might provide that:

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

It is not clear that the IRS intended the new regulations to apply to licensing and other intellectual property transactions simply because they are subject to confidentiality restrictions. The potential for tax abuse in such transactions is remote. Hopefully, the IRS will recognize this fact and modify the regulations either by amendment or an interpretive Revenue Procedure. Until the regulations are modified, however, parties to licensing and other intellectual property agreements should re-evaluate their confidentiality provisions, or else prepare to file Form 8886 with the IRS with respect to their reportable confidential transactions. If a transaction is reportable, then "material advisors" on the transaction, including legal counsel, may have an obligation to create and maintain a list of certain information about the transaction and the participants and to disclose that information to the IRS upon request.

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