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Revised Tax Disclosure Rules Eliminate the Reporting of Confidential Licensing and Other Intellectual Property Transactions

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In our Internet Alert of May 14, 2003 we described new Internal Revenue Service (IRS) regulations that imposed new tax reporting requirements with respect to certain "reportable transactions." These regulations were aimed at potentially abusive tax shelters, but included many routine licensing and other intellectual property transactions (as well as many other types of transactions) that are subject to confidentiality restrictions. Many practitioners (including Hale and Dorr) submitted critical comments to the IRS and urged that the regulations be modified.

On December 29, 2003, the IRS responded by issuing revised final regulations pursuant to which most routine transactions will no longer be reportable transactions, even if the parties agree to keep them confidential. Under the revised regulations, a transaction is considered a reportable confidential transaction only if *both* of the following conditions are satisfied:

1. the taxpayer pays an advisor a fee for the transaction of at least $250,000 if the taxpayer is a corporation (or a partnership or trust that has only corporations as owners or beneficiaries), or $50,000 in all other cases; *and*
2. the advisor places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that advisor's tax strategies.

The new final regulations apply to transactions entered into on or after December 29, 2003, but may be relied upon for transactions entered into on or after January 1, 2003 (the effective date of earlier versions of the regulations). ***As a result, routine commercial transactions that were reportable as confidential transactions under the previous version of the final regulations will not have to be reported to the IRS after all***. In addition, in most cases, there is no longer any need to include in confidentiality agreements waivers authorizing the disclosure of tax structure or tax treatment in order to avoid a reporting obligation.

No other changes were made to the tax shelter reporting regulations. Accordingly, certain other types of transactions remain subject to the reporting requirements, such as transactions that are the same as or substantially similar to abusive transactions identified by the IRS (so-called "listed transactions"). To date, none of the "listed transactions" involve licensing or other intellectual property transactions.

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