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January 2013

Marketing Tax Insurance to Public Companies

> *"Taxes are an important expense, and like any important expense, management responsible will try to control it. In the case of taxes, controlling it can expose the company to challenge, which can result in reputational damage and perhaps large, unexpected expenses. ... You, the board, have to oversee how management manages it."* IRS Commissioner Doug Shulman addressing the National Association of Corporate Directors Governance Conference on Oct. 19, 2009.

The Organization for Economic Cooperation and Development has charted a worldwide trend of increased boardroom attention to issues of taxation.

Most board members are not tax experts. How does the board assess the strength of its tax department and outside tax advisors? Does the board truly understand the degree by which a tax position is not merely uncertain but overly aggressive? Can the board be assured it has adequate tax reserves?

How does the board keep abreast of developments in tax regulation? For instance, on Schedule UTP of tax returns filed in 2013 for calendar year 2012, the asset threshold for reporting uncertain tax positions has decreased from $100M to $50M and will be $10M in 2014 and thereafter. Schedule UTP requires that a concise narrative description of every uncertain tax position and a relative ranking of such positions by size be disclosed to the IRS. Tax credits derived from investment may not be uncertain, but nonetheless subject to recapture in future years due to events outside your control.

D&O insurance policies universally exclude taxes, whether from the definition of "loss" or "claim" or via express exclusion.

Tax insurance covers taxes. Policies can be for six or more years covering specified tax issues associated with any tax return. Alternatively, a policy can cover a particular tax position over a series of future returns, though change of law is generally excluded. Generally, tax jurisdiction must be the U.S. or a U.S. state or locality. A policy may cover U.S. transfer pricing. However a policy cannot insure a reportable transaction.

Concord's Distinctive Value Proposition. Concord differentiates itself from its competitors by Concord's speed, creativity and flexibility. Concord does not require a tax opinion. Concord provides loss mitigation services. Concord listens.

** This article is intended only as a general discussion of these issues. It is not to be construed as or intended to replace legal advice. Pursuant to U.S. Treasury Department Circular 230, unless we expressly state otherwise, any tax advice contained in this communication was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another party any matter(s) addressed therein. No part of this publication may be reproduced, in whole or in part, in any form, without our prior written consent.*