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This newsletter is designed to discuss recent state and local tax developments and was prepared by our firm's SALT Practice Group. It should not be construed as providing legal advice or legal opinions on any specific fact situation. Comments and suggestions are welcomed and may be forwarded to any member of the SALT Practice Group.

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Proposed Unitary Business Regulation Raises Questions

The Alabama Department of Revenue ("ADOR") has issued a proposed regulation that would provide interpretative guidance on the definition of a "unitary business." The public hearing on this proposed regulation will be held on Friday, May 7, at 10 a.m. at the ADOR's headquarters in Montgomery. Written comments must be submitted to the ADOR on or before the hearing date or by delivery at the hearing.

The proposed regulation is stated to be in response to the recent amendment to the Multistate Tax Commission's General Allocation and Apportionment Regulation, revised January 15, 2004, which added a discussion on and definition of the "unitary business principle." Last February the ADOR proposed a similar regulation, based on the then draft version of the MTC's regulation. After a public hearing on the proposed regulation, the ADOR allowed the proposed regulation to go final and then immediately issued a new regulation that deleted all references to the unitary business principle.

According to ADOR officials, the new proposal, and its Spring 2003 predecessor, were sparked by the Administrative Law Division's 2002 pro-taxpayer ruling in *Perelman v. Alabama Department of Revenue*. In that case, Chief Administrative Law Judge Bill Thompson set forth the Division's own interpretation of the unitary business concept since Alabama has no statutory or regulatory definition. The proposed new rule would create an unquestionably broader definition of a unitary business.

Part of the concerns about the 2003 proposed regulation stemmed from the fact that it was based on the *draft* MTC proposal, which could (and did) change materially before going final. Thus, the timing of the proposal was questioned.

The more fundamental concern of the business community, however, relates to the scope of the proposed regulation, which implies that the state permits or is authorized to force unitary combined

reporting. Alabama is considered a separate reporting state, and Judge Thompson has so concluded in at least two of his rulings.

Thus, there is some confusion on the part of the business community as to the scope of the proposed rule since it appears that it should be limited to situations where the unitary business principle is applied to separate divisions or activities of a single corporation, or perhaps to the question whether a single member LLC, treated as a division under the Check-the-Box Regulations, should be aggregated with other divisions or SMLLCs owned by the same parent corporation.

Although no legislation implementing combined reporting has been introduced in this legislative session, there have been attempts in past sessions to enact such a provision. It is possible that this new rule is a precursor to another legislative effort in these days of corporate tax "loophole-closing." Some also believe that the ADOR may be setting the stage for implementing forced unitary combined reporting as part of its powers granted under the recently enacted quasi-section 482 statute, *Ala. Code* § 40-2A-17.

If you would wish to participate in drafting comments on the proposed rule through a coalition effort or if you have any questions about the proposal or the process, please contact either Bruce Ely or Chris Grissom (at their email address or telephone number listed in the left-hand column) as soon as possible.