

WHAT'S INSIDE

How the Airline Industry Is Responding to COVID-19's Crippling Punch

Report from the Front Lines: COVID-19 M&A Litigation in Delaware

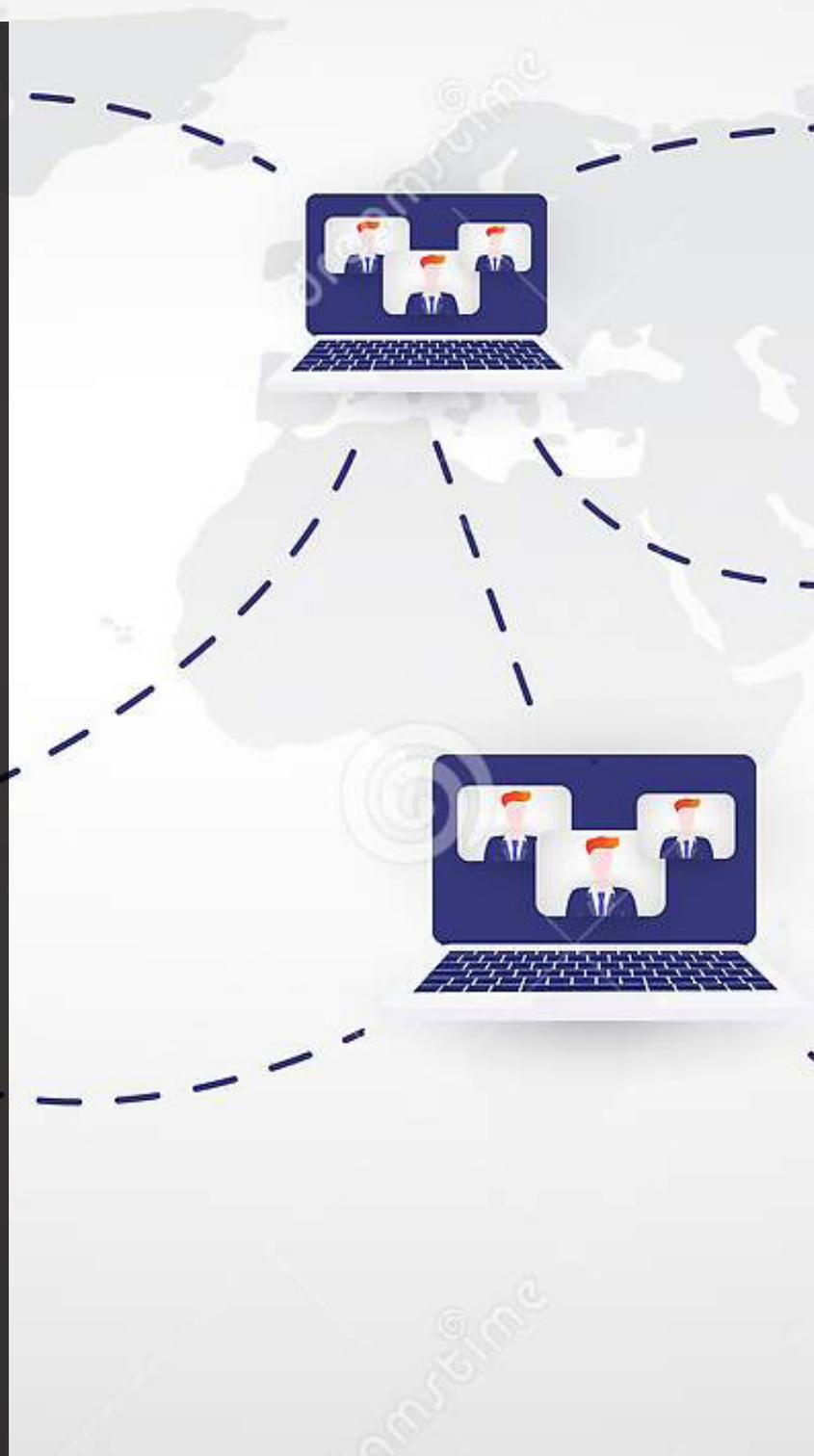
How the COVID-19 Pandemic Has Impacted the Commercial Real Estate Landscape

Conserving Conservatorship

Chapter 11 Bankruptcy and IRS Form 8937: Report of Organizational Actions Affecting Basis of Securities

Solvency Opinions and Concerns About Fraudulent Conveyance in Leveraged Transactions

A Primer on Transfer Pricing for Restructuring Professionals: Situation Analysis



CHAPTER 11 BANKRUPTCY AND IRS FORM 8937: REPORT OF ORGANIZATIONAL ACTIONS AFFECTING BASIS OF SECURITIES

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In a typical single-debtor Chapter 11 bankruptcy reorganization, secured creditors acquire majority ownership of the reorganized corporation pursuant to the bankruptcy plan of reorganization.¹ In most cases, prior equity holders receive no equity in the reorganized corporation; however, in some bankruptcy reorganizations prior equity holders receive new equity in the reorganized corporation.² In either case, the reorganization may trigger a Form 8937 filing requirement for the reorganized corporation.

REQUIREMENT TO FILE A FORM 8937 PURSUANT TO A CHAPTER 11 RECAPITALIZATION

Many corporate actions can trigger the requirement for the corporation to file a Form 8937, Report of Organizational Actions Affecting Basis of Securities. Such actions include corporate distributions in excess of earnings and profits, certain merger and acquisition transactions, and exchanges of stock-for-stock or stock-for-debt, as described further below.

The Form 8937 requirement arises under section 6045B and Reg. section 1.6045B-1, and stems from Congress' expansion of tax basis reporting requirements in 2008 legislation.³ Section 6045B requires corporate issuers of certain securities to report information to the IRS and its shareholders following certain actions that affect the security's basis. Congress enacted the provision to improve tax compliance resulting from the proper determination of the basis of securities.

¹ A bankruptcy reorganization of this sort, involving exchange of debt for equity of a corporate debtor, may qualify as a recapitalization under Internal Revenue Code ("IRC") section 368(a)(1)(E) (an "E Reorganization"), and may also qualify as a reorganization under IRC section 368(a)(1)(G) (a "G Reorganization"). Parties to E Reorganizations and G Reorganizations generally qualify for tax-free treatment with respect to exchanges of stock or securities in the reorganization. By contrast, no exchange of debt for equity of a corporate debtor typically occurs in a Bankruptcy Code section 363 asset sale. Nonetheless, a section 363 asset sale may also qualify as a G Reorganization. All references herein to "section" or "Reg. section" refer to the IRC and the regulations promulgated thereunder, unless a specific reference is made to the Bankruptcy Code.

² For example, in the American Airlines bankruptcy, former equity holders received new equity in the reorganized company. *In re AMR Corporation, et al., Case No. 11-15463 (SHL), (Jointly Administered)*, (Bankr. S.D.N.Y.).

³ Section 403 of the Energy Improvement and Extension Act of 2008, Div. B of Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008) (the "2008 Act"), amended the broker reporting rules in section 6045. As amended by the 2008 Act, section 6045(g) generally requires a broker, when reporting the sale of a covered security to the Internal Revenue Service, to report the customer's adjusted basis for the security. The 2008 Act also added two new sections to the IRC: (1) section 6045A, which requires a broker transferring certain securities to report basis and other information to the receiving broker; and (2) section 6045B, which requires an issuer of certain securities to file a Form 8937 to describe the issuer's actions that affect the basis of the security.

For example, a corporation that exchanges all of its outstanding notes for corporate stock in a Chapter 11 reorganization treated as a recapitalization generally must file a Form 8937. The form would serve to inform the prior note holders regarding their basis in the shares of stock received in exchange for their notes, and would make the same basis information available to brokers (if any) that hold such stock for customers. If prior equity holders also receive new equity in the reorganized corporation, the Form 8937 will also apprise the prior equity holders of the basis in the shares of the stock received in exchange for their prior equity interests, and would again make the same basis information available to brokers.

The filing requirement only applies upon certain "organizational actions" taken by an issuer of a "specified security."⁴ We will next discuss the organizational action and specified security concepts in turn.

ORGANIZATIONAL ACTION

Only organizational actions that affect the basis of all holders of a security or class of a security trigger the section 6045B reporting requirements.⁵ Organizational actions generally subject to the reporting requirement include:

- Distribution of cash or stock in excess of current and accumulated earnings and profits.
- Certain mergers and acquisitions.
- Exchange of notes for stock, or stock for a different class of stock.
- The issuance of a debt instrument in a recapitalization, including a recapitalization resulting from a significant modification or a bankruptcy reorganization.
- Nontaxable stock split or reverse stock split.

Certain actions generally do not trigger the reporting requirement, including:

- Distribution of money or stock not in excess of current and accumulated earnings and profits.
- The issuance of a debt instrument.
- The distribution of stock to someone exercising a previously granted right to purchase stock.

⁴ Section 6045B(a)(1); Reg. section 1.6045B-1(a)(1).

⁵ See Section 6045B(a)(1); Reg. section 1.6045B-1(a)(1).

SPECIFIED SECURITY

Specified securities include any stock and certain debt instruments issued by an entity classified as a corporation, whether foreign or domestic.⁶ Debt or equity interests issued by entities classified as partnerships for federal income tax purposes are not specified securities.⁷ Also, a security classified as stock by the issuer is treated as stock for purposes of section 6045B.

Specified securities generally include: (1) stock, (2) debt instruments, (3) options on specified securities or on financial attributes of specified securities, warrants and certain stock rights, and (4) securities futures contracts.⁸

ADDITIONAL RULES FOR FORM 8937 FILINGS AND CONTENT

Form 8937 must be filed by the earlier of: (1) 45 days after the date of the event affecting the specified security's basis,⁹ and (2) January 15 of the year following the calendar year of the event affecting the security's basis.¹⁰

If the corporation makes Form 8937 publicly available in the manner prescribed by the regulations, along with the name, address, phone number and email address of the person required to file the return, then the corporation need not file the information return or furnish statements to the holders.¹¹ The regulations state that this can be accomplished if the issuer posts Form 8937 in a readily accessible format in an area of its primary public website dedicated to this purpose and keeps the return accessible to the public for ten years on its primary public website or that of any successor organization.¹²

S corporations frequently make distributions that are treated as reductions to stock basis rather than as taxable dividends. An S corporation is deemed to satisfy the reporting requirements if the required information is included in the Schedules K-1 that are included with its tax returns when filed on a timely basis.¹³ Accordingly, the S corporation does not need to report separately under section 6045B.

⁶ Reg. section 1.16045-1(a)(14). See generally Sections 6045B(d) and 6045(g)(3)(B). The Form 8937 filing requirement applies to both domestic and foreign issuers of securities. However, the Form 8937 filing requirement does not apply where all the holders of the security are exempt recipients, as defined in Reg. section 1.6045-1(c)(3)(i)(B). Reg. section 1.6045B-1(b)(5).

⁷ See Reg. section 1.16045-1(a)(14). See also Sections 6045B(d) and 6045(g)(3)(B).

⁸ See Reg. sections 1.16045-1(a)(14), -1(m) and -1(n).

⁹ In the case of a bankruptcy reorganization, the event affecting the specified security's basis is typically the effective date of the plan of reorganization, not the confirmation date of the plan.

¹⁰ Section 6045B(b)(2).

¹¹ This is generally the case for large bankruptcies. See, for example, a Form 8937 made publicly available relating to the American Airlines bankruptcy at <https://americanairlines.gcs-web.com/static-files/f402c28b-be48-4b23-9948-f86eb01b62cf>.

¹² Section 6045B(e); Reg. section 1.6045B-1(a)(3).

¹³ Reg. section 1.6045B-1(c).

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A corporate issuer that, prior to the reporting due date, cannot determine the quantitative effect of an organizational action on basis may make reasonable assumptions regarding the relevant facts. However, for this purpose, the corporation must treat a payment that may be a dividend consistently with the corporation's treatment of the payment for purposes of determining whether it is a dividend.¹⁴ Under the rules relating to dividend treatment, for purposes of furnishing Forms 1099-DIV to report the taxable (dividend) portion of

¹⁴ Reg. section 1.6045B-1(a)(2)(ii). See also section 6042(b)(3); Reg. section 1.6042-3(c).

the distribution, a corporation is required to treat the entire distribution as a taxable dividend unless it can establish the amount that is not a dividend. Accordingly, if the entire amount of a distribution is reported as a taxable dividend, section 6045B reporting would not be required (because the distribution would not impact basis). If the corporation later determines that a portion of the distribution is not a dividend, it should amend its Forms 1099-DIV and provide the section 6045B information within forty-five days of determining the correct facts.¹⁵

In some cases, a corporation may believe that a portion of a distribution is a taxable dividend but might not know the amount with certainty. In these cases, it is appropriate to make a timely filing under section 6045B and amend

¹⁵ Reg. sections 1.6045B-1(a)(2)(ii) and 1.6045B-1(g), Example 2(iii).

it later when the correct information becomes available. As noted above, the corporation may make reasonable assumptions about facts that cannot be determined before the due date.¹⁶ The corporation must file a corrected return within 45 days of determining facts that result in a different quantitative effect on basis from what the corporation previously reported.¹⁷

CONCLUSION

Taxpayers emerging from bankruptcy reorganizations should consider whether the Form 8937 filing requirement applies to them, bearing in mind the Form 8937 filing deadline is the earlier of: (1) 45 days after the date of the reorganization, and (2) January 15 of the year following the calendar year of the reorganization.

¹⁶ Reg. section 1.6045B-1(a)(2)(ii).

¹⁷ *Id.*

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