OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

Betty Ireland
Secretary of State

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

June 30, 2006

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Tax Department

RULE: New Rule, 110CSR10J, Abusive Tax Shelters

DATE FILED AS AN EMERGENCY RULE: June 2, 2006
DATE FIRST EMERGENCY AMENDMENT FILED: July 25, 2006

DECISION NO. 14-06

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

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EMERGENCY RULE DECISION
(ERD 14-06)

AGENCY: State Tax Department
RULE: New Rule, 110CSR10J, Abusive Tax Shelters
FILED AS AN EMERGENCY RULE: June 2, 2006
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par. 1 The State Tax Department (Department) has filed the above emergency amendment to a new emergency rule.

par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Department filed this emergency rule with supporting documents with the Secretary of State July 25, 2006 and with the LRMRC July 25, 2006.

par. 7 It is the determination of the Secretary of State that the Department has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §11-10E-2(b) reads:

(b) The department is authorized to adopt rules (including interpretive and emergency rules), issue forms and instructions, issue administrative notices, and take such other actions as it deems necessary to implement the provisions of this article.

par. 9 It is the determination of the Secretary of State that the Department has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Department are as follows:

On June 2, 2006, emergency legislative rule 110CSR10J, Abusive Tax Shelters, was filed for public comment. The purpose of the rule is to provide the structure for audit guidelines and necessary information to affected taxpayers who invest in tax shelters.

Affected taxpayers need to have appropriate notice so as to enable them to properly manage their respective affairs. Even though the legislative rule will not go through the legislature until the 2007 session, taxpayers need to have the Tax Department's applicable policies for the relevant time frames in order to legally avoid substantial penalties. Those time frames commence well before the 2007 Legislative Session. Because the rights and property interests of some taxpayers will be affected by the regulation of tax shelters, it is necessary for this rule to be effective on an emergency basis.

While no actual comments were received during the comment period, questions were raised during telephone conversations with taxpayer representatives and representatives of material advisors that while monetary penalties may be imposed for failure to maintain investor lists, there was very little if any guidance as to just what comprised an investor list. Because this raised questions as to basic fairness and could have affected the validity of the rule, a definition of "investor lists" was incorporated into the rule. This will provide to taxpayers notice that is appropriate and guidance that will assist in avoiding monetary penalties. Additionally, so as to preclude any confusion between the Commissioner of Internal Revenue and the State Tax Commissioner, a definition for "'Commissioner' and 'Tax Commissioner'" was also incorporated into the rule.

Finally, it also was noted during telephone conversations with taxpayer representatives and representatives of material advisors that the rule was requiring the filing of materials that under certain circumstances were substantially in excess of the filing requirements imposed by the Internal Revenue Service. As a result, Subdivision 8.2.1 was amended to require the filing of the materials that were filed with the I.R.S., therefore providing the procedure for compliance with the requirements of West Virginia Code §11-10E-8.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 14-06 or ERD 14-06 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the State Tax Department, the Attorney General and the Legislative Rule Making Review Committee.

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