To the editor:

I read with interest Jeremiah Coder's story entitled "Living With GAAR Lite?" (Tax Notes, June 14, 2010, p. 1187, Doc 2010-12799, 2010 TNT 113-4). The article raises serious issues about how the IRS and Treasury will apply the newly codified economic substance doctrine under section 7701(o). I am writing this letter to urge those who read this letter to comment to the government as soon as possible on how this new law needs to be administered and applied.

One point not discussed in the Coder story is the lack of significant public commentary at this date from professional service firms and organizations, law professors, and the corporate community at large about guidance that the IRS and Treasury should provide on implementation of the codified doctrine. Instead, we have heard government representatives repeat multiple times at various professional gatherings that there will be no so-called angel's list because it would be both overinclusive and underinclusive, and statements of a similar nature. There has also been public commentary by government officials that have acknowledged the need for coordination of issues raised under the codified doctrine within the IRS itself, as well as comments made by government officials acknowledging that some form of standardized process for the IRS asserting the strict liability penalty needs to be provided so that the penalty is applied to taxpayers in a fair and balanced manner.

As we all know, the codified doctrine is effective today, and transactions are occurring today where the effects of the codified doctrine need to be analyzed and applied. The government has said at various public forums that "nothing has changed" in the common-law doctrine, more or less, and that the strict liability penalty is separate from the application of the codified common-law economic substance doctrine. And yet the entire body of case law involving the economic substance doctrine involves tax shelter types of transactions, and this body of law does not provide any guidance whatsoever about the application of the doctrine to common business transactions. Such guidance is urgently needed, and yet the government has stated publicly that it is reluctant to provide it. Further, there has not been anything close to a swell of requests from the tax community, meaning law professors, professional practitioners, professional service firms, and major corporations, that such guidance be provided.

Having served at both the IRS and Treasury in the past, I know that one of the main goals of these organizations, if not the main goal, is to provide guidance so that the law can be applied in a fair and balanced manner and so that taxpayers can know the law in planning their business transactions. It seems to me that the codification of the economic substance doctrine under section 7701(o) provides a perfect opportunity for the Treasury and the IRS to quickly provide guidance on how the codified doctrine will be applied to common business transactions and thereby fulfill this organizational goal. From this writer's perspective, there does not seem to be any sense of urgency on the part of high-ranking Treasury or IRS officials in quickly providing the necessary guidance.

Must the government provide an angel's list that provides complete immunity from the doctrine in all cases? I submit that the answer to this question is no and that only general public guidance stating that the government will not challenge certain designated transactions "absent abuse" will be sufficient to allow practitioners to make
judgments about how the new law should be applied. Such guidance will also protect the interests of the
government.

Now is not the time to sit on the sidelines and to wait for others to comment on this new law. Without broad
consensus from the tax community in comments submitted to the IRS and Treasury that guidance must be
provided now, I fear that the necessary guidance will not be forthcoming absent an unfortunate occurrence with
respect to some taxpayers and the government in applying the codified doctrine and its attendant strict liability
penalty to real-life transactions. That result will be to our mutual detriment.

As stated at the beginning of this letter, I urge those who read this letter to comment to the government as soon as
possible on how this new law needs to be administered and applied. I know we are all busy, but this is an
important endeavour. In my opinion, the integrity of our tax system is at risk in the interim.

I write this letter in my personal capacity and not on behalf of any professional firm or organization.

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Tax Analysts Information

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