

TD 9350. AJCA Modifications to the Section 6011 Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 6011 of the Internal Revenue Code that modify the rules relating to the disclosure of reportable transactions under section 6011. These regulations affect taxpayers participating in reportable transactions under section 6011, material advisors responsible for disclosing reportable transactions under section 6111, and material advisors responsible for keeping lists under section 6112.

DATES: Effective Date: These regulations are effective August 3, 2007.

FOR FURTHER INFORMATION CONTACT: Charles D. Wien, Michael H. Beker, or Tolsun N. Waddle, 202-622-3070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations that amend 26 CFR part 1 by modifying and clarifying the rules relating to the disclosure of reportable transactions under section 6011. This document also contains final regulations that amend 26 CFR parts 20, 25, 31, 53, 54, and 56 by modifying the rules for purposes of estate, gift, employment, and pension and exempt organizations excise taxes that require the disclosure of listed transactions by certain taxpayers on their Federal tax returns under section 6011.

The American Jobs Creation Act of 2004, Public Law 108-357, (118 Stat. 1418), (AJCA) was enacted on October 22, 2004. The AJCA revised sections 6111 and 6112, thereby necessitating changes to the rules under section 6011. On November 1, 2006, the IRS and Treasury Department issued a notice of proposed rulemaking and temporary and final regulations under sections 6011, 6111, and 6112 (REG-103038-05, REG-103039-05, REG-103043-05, TD 9295) (the November 2006 regulations). The November 2006 regulations were published in the Federal Register (71 FR 64488, 71 FR 64496, 71 FR 64501, 71 FR 64458) on November 2, 2006.

The IRS and Treasury Department received written public comments responding to the proposed regulations and held a public hearing regarding the proposed rules on March 20, 2007. After consideration of the comments received and the comments made at the hearing, the proposed regulations are adopted as revised by this Treasury decision. These final regulations generally retain the provisions of the proposed regulations but include some modifications based on the recommendations made in the public comments.

Summary of Comments and Explanation of Provisions

Nine written comments were received in response to the NPRM. All comments were considered and are available for public inspection upon request.

Transactions of Interest

The proposed regulations identified transactions of interest as a new reportable transaction category. As stated in the preamble to the proposed regulations, a transaction of interest is a transaction that the IRS and Treasury Department believe has a potential for tax avoidance or evasion, but for which the IRS and Treasury Department lack enough information to determine whether the transaction should be identified specifically as a tax avoidance transaction. These final regulations adopt the language in the proposed regulations regarding transactions of interest without modification. This language provides that a transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest. These final regulations also retain the language in the proposed regulations that provide that a taxpayer's participation in a transaction of interest will be determined in the published guidance which identifies the transaction of interest.

Several commentators requested more specificity and guidance on the definition of what constitutes a transaction of interest. Specifically, the commentators recommended that the term "participation," for purposes of determining whether a taxpayer participated in a transaction of interest, be defined in the regulations rather than in the published guidance identifying the transaction of interest. The commentators also requested that the published guidance describing a transaction of interest be crafted in a clear and specific manner, thereby enabling taxpayers to determine whether they participated in a transaction of interest. One commentator also recommended providing a list of factors in the regulations that the IRS would consider when identifying a transaction of interest. Further, several commentators requested that the IRS and Treasury Department provide notice to taxpayers that the IRS and Treasury Department are considering designating a particular transaction as a transaction of interest and requesting comments prior to publishing guidance identifying a transaction as a transaction of interest.

The IRS and Treasury Department believe that providing a specific definition for the transactions of interest category in the regulations would unduly limit the IRS and Treasury Department's ability to identify transactions that have the potential for tax avoidance or evasion. In order to maintain flexibility in identifying a transaction of interest, the description of a transaction of interest will be provided in the published guidance that identifies the transaction of interest. The published guidance identifying a transaction of interest will provide taxpayers with the information necessary to determine whether a particular transaction is the same as or substantially similar to the transaction described in the published guidance and to determine who participated in the transaction.

The IRS and Treasury Department do not believe that the regulations should be amended to include language requiring the IRS and Treasury Department to provide advance notice for transactions of interest as suggested by the commentators. However, the IRS and Treasury Department may choose to publish advance notice and request comments in certain circumstances. The determination of whether to provide advance notice and a request for comments will be made on a transaction by transaction basis.

The proposed regulations also provide that upon publication of the final regulations, the transactions of interest category of reportable transaction will apply to transactions entered into on or after November 2, 2006. These final regulations adopt the effective date stated in the proposed regulations.

The preamble to the proposed regulations provides that when the IRS and Treasury Department have gathered enough information to make an informed decision as to whether a particular transaction of interest is a tax avoidance type of transaction, the IRS and Treasury Department may take one or more actions, including removing the transaction from the transaction of interest category in published guidance, designating the transaction as a listed transaction, or providing a new category of reportable transaction. Several commentators recommended that the period during which a transaction may be considered a transaction of interest be limited to twenty-four months, unless the IRS and Treasury Department affirmatively act to extend the designation for an additional twenty-four months with no limit on the number of permissible extensions. One commentator suggested that the length of the period be limited to twenty-four months, with no extensions.

The IRS and Treasury Department believe that limiting the length of time a transaction may be designated a transaction of interest would be contrary to the purpose of the transactions of interest category of reportable transaction and would hinder the ability of the IRS and Treasury Department to efficiently and effectively gather the necessary information to determine whether a particular transaction is a tax avoidance type of transaction. Accordingly, these final regulations do not adopt these suggestions.

Disclosure of Reportable Transactions by Owners of a Pass-through Entity

I. Timing of disclosures

The proposed regulations provide that if a taxpayer who is a partner in a partnership, a shareholder in an S corporation, or a beneficiary of a trust receives a timely Schedule K-1 less than 10 calendar days before the due date of the taxpayer's return (including extensions) and, based on receipt of the timely Schedule K-1, the taxpayer determines that the taxpayer participated in a reportable transaction, the disclosure statement will not be considered late if the taxpayer discloses the reportable transaction by filing a disclosure statement with the Office of Tax Shelter Analysis (OTSA) within 45 calendar days after the due date of the taxpayer's return (including extensions). Several commentators requested that the proposed regulations not limit relief to taxpayers who receive a timely Schedule K-1 before the due date of their return. Others believed the 45 day disclosure period was too short. One commentator recommended that the provision apply to late disclosures that were inadvertent or non-abusive. One commentator recommended that the 10 day period be extended to 30 days and the 45 day disclosure period be extended to 90 days. With respect to the date the disclosure period begins, two commentators commented that the disclosure period should begin on the date the taxpayer receives the timely Schedule K-1.

The IRS and Treasury Department agree that the 45 day disclosure period should be extended. These final regulations extend the disclosure period to 60 calendar days. The IRS and Treasury Department believe that this additional period will provide taxpayers with ample time to review the entity's return and comply with any administrative and regulatory requirements before filing their disclosure statement. It should be noted that if a taxpayer receives a timely Schedule K-1 after the due date of the taxpayer's return (including extensions), the taxpayer will have received the timely Schedule K-1 less than 10 calendar days before the due date of the return and will have 60 calendar days after the due date of the taxpayer's return (including extensions) to file the disclosure statement.

II. Pass-through owners

Several commentators have suggested that the disclosure obligations of owners of a pass-through entity that participates in a reportable transaction be amended to provide that only certain owners of the pass-through entity are required to disclose their participation in the reportable transaction. One commentator suggested that an owner of a pass-through entity should be removed from this disclosure obligation when (1) the owner did not know and should not have known that the pass-through entity engaged in the reportable transaction; and (2) the pass-through entity failed to disclose timely its participation in the reportable transaction on its return to OTSA. The commentator also recommends that if the owner knew or reasonably should have known of the pass-through entity's participation in the reportable transaction, the owner should be required to file a disclosure statement even if the pass-through entity did not disclose the transaction to the owner. A different commentator suggested that an owner of a pass-through entity not be required to disclose the owner's participation in a reportable transaction, even if the owner knew or should have known of the pass-through entity's participation in the reportable transaction.

Several commentators also suggested adopting a de minimis ownership rule exempting taxpayers owning less than a certain percentage of the pass-through entity from the disclosure requirements. One commentator suggested exempting owners of 5 percent or less of the outstanding interests in the pass-through entity that participates in a reportable transaction.

The IRS and Treasury Department are aware that certain partners, shareholders, and beneficiaries may file income tax returns that reflect the tax consequences, tax benefits, or tax strategy of a reportable transaction even though the taxpayer is unaware that the pass-through entity engaged in the reportable transaction. The IRS and Treasury Department recognize the concerns of the commentators. In light of the potential monetary penalties for failing to disclose participation in a reportable transaction and in order to maintain flexibility in determining who should be subject to the disclosure requirements for a particular transaction, these final regulations amend the proposed regulations to add language providing flexibility to the IRS and Treasury Department to issue other provisions for disclosure under §1.6011-4 in published guidance.

Time Period for Disclosing Participation in a Listed Transaction and Transaction of Interest

Under the proposed regulations if a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer's tax return (including an amended return) reflecting the taxpayer's participation in the listed transaction or transaction of interest and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed, regardless of whether the taxpayer participated in the listed transaction or transaction of interest in the year the transaction became a listed transaction or a transaction of interest, with OTSA within 60 calendar days after the date on which the transaction became a listed transaction or a transaction of interest. The proposed regulations also provide that the Commissioner may determine the time for disclosure of listed transactions and transactions of interest in the published guidance identifying the transaction.

Many commentators suggested that the current rule, which requires the disclosure of subsequently identified listed transactions on the taxpayer's next filed tax return be retained in light of the potential monetary penalties and potential administrative burden due to the shortened disclosure period. One commentator recommended that the taxpayer be required to file the disclosure statement by the later of the taxpayer's next filed tax return or within 60 calendar days after the date on which the transaction becomes a listed transaction or transaction of interest.

A critical factor in the ability to analyze a particular transaction is the ability to have the necessary information available in a timely manner. Thus, requiring taxpayers to file a disclosure statement with OTSA in a timely manner is essential. Because the IRS and Treasury Department recognize that compliance within 60 calendar days may be burdensome in certain circumstances, the proposed regulations are amended to provide that taxpayers have 90 calendar days to disclose their participation in a subsequently identified listed transaction or transaction of interest.

Brief Asset Holding Period Reportable Transaction Category

Due to changes in section 901 and based on comments received, the IRS and Treasury Department have determined that the brief asset holding period reportable transaction category is no longer necessary. These final regulations therefore remove this category as a reportable transaction category.

Form 8271

Before the enactment of the AJCA, section 6111 provided that tax shelter organizers were required to provide investors in tax shelters the registration number for the tax shelter. Section 301.6111-1T, Q&A 55, requires investors to report the registration number of the tax shelter to the IRS on Form 8271, "Investor Reporting of Tax Shelter Registration Number", and attach the Form 8271 to any return on which any deduction, loss, credit, or other tax benefit attributable to the tax shelter is claimed. Because only a few investors must still file Form 8271 for pre-AJCA section 6111 tax shelters and because the IRS already is aware of these transactions, the IRS and Treasury Department have decided that investors are no longer required to file Forms 8271 otherwise due on or after August 3, 2007. The Form 8271 will be obsoleted. Taxpayers required to file Form 8886, "Reportable Transaction Disclosure Statement", pursuant to §1.6011-4(d), and Form 8271 with respect to the same transaction only need to report the registration number on Form 8886.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 35) do not apply. The disclosure statement referenced in these regulations has been made available for public comment and any update to the disclosure statement will be made available for public comment in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Charles D. Wien, Michael H. Beker, and Tolsun N. Waddle, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 53

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 56

Excise taxes, Lobbying, Nonprofit organizations, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 20, 25, 31, 53, 54, and 56 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 2. Section 1.6011-4 is revised to read as follows:

Reg § 1.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. Every taxpayer that has participated, as described in paragraph (c)(3) of this section, in a reportable transaction within the meaning of paragraph (b) of this section and who is required to file a tax return must file within the time prescribed in paragraph (e) of this section a disclosure statement in the form prescribed by paragraph

(d) of this section. The fact that a transaction is a reportable transaction shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper.

(b) Reportable transactions—(1) In general. A reportable transaction is a transaction described in any of the paragraphs (b)(2) through (7) of this section. The term transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan.

(2) Listed transactions. A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

(3) Confidential transactions—(i) In general. A confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee.

(ii) Conditions of confidentiality. A transaction is considered to be offered to a taxpayer under conditions of confidentiality if the advisor who is paid the minimum fee places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that advisor's tax strategies. A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure if the advisor confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

(iii) Minimum fee. For purposes of this paragraph (b)(3), the minimum fee is—

(A) \$250,000 for a transaction if the taxpayer is a corporation;

(B) \$50,000 for all other transactions unless the taxpayer is a partnership or trust, all of the owners or beneficiaries of which are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is \$250,000.

(iv) Determination of minimum fee. For purposes of this paragraph (b)(3), in determining the minimum fee, all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction are taken into account. Fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable in light of the facts and circumstances. For purposes of this paragraph (b)(3), a taxpayer also is treated as paying fees to an advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property. The IRS will scrutinize carefully all of the facts and circumstances in determining whether consideration received in connection with a confidential transaction constitutes fees.

(v) Related parties. For purposes of this paragraph (b)(3), persons who bear a relationship to each other as described in section 267(b) or 707(b) will be treated as the same person.

(4) Transactions with contractual protection—(i) In general. A transaction with contractual protection is a transaction for which the taxpayer or a related party (as described in section 267(b) or 707(b)) has the right to a full or partial refund of fees (as described in paragraph (b)(4)(ii) of this section) if all or part of the intended tax consequences from the transaction are not sustained. A transaction with contractual protection also is a transaction for which fees (as described in paragraph (b)(4)(ii) of this section) are contingent on the taxpayer's realization of tax benefits from the transaction. All the facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation.

(ii) Fees. Paragraph (b)(4)(i) of this section only applies with respect to fees paid by or on behalf of the taxpayer or a related party to any person who makes or provides a statement, oral or written, to the taxpayer or related party (or for whose benefit a statement is made or provided to the taxpayer or related party) as to the potential tax consequences that may result from the transaction.

(iii) Exceptions—(A) Termination of transaction. A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

(B) Previously reported transaction. If a person makes or provides a statement to a taxpayer as to the potential tax consequences that may result from a transaction only after the taxpayer has entered into the transaction and reported the consequences of the transaction on a filed tax return, and the person has not previously received fees from the taxpayer relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection. This paragraph (b)(4) does not provide any substantive rules regarding when a person may charge refundable or contingent fees with respect to a transaction. See Circular 230, 31 CFR Part 10, for the regulations governing practice before the IRS.

(5) Loss transactions—(i) In general. A loss transaction is any transaction resulting in the taxpayer claiming a loss under section 165 of at least—

(A) \$10 million in any single taxable year or \$20 million in any combination of taxable years for corporations;

(B) \$10 million in any single taxable year or \$20 million in any combination of taxable years for partnerships that have only corporations as partners (looking through any partners that are themselves partnerships), whether or not any losses flow through to one or more partners; or

(C) \$2 million in any single taxable year or \$4 million in any combination of taxable years for all other partnerships, whether or not any losses flow through to one or more partners;

(D) \$2 million in any single taxable year or \$4 million in any combination of taxable years for individuals, S corporations, or trusts, whether or not any losses flow through to one or more shareholders or beneficiaries; or

(E) \$50,000 in any single taxable year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership, if the loss arises with respect to a section 988 transaction (as defined in section 988(c)(1) relating to foreign currency transactions).

(ii) Cumulative losses. In determining whether a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of taxable years as described in paragraph (b)(5)(i) of this section, only losses claimed in the taxable year that the transaction is entered into and the five succeeding taxable years are combined.

(iii) Section 165 loss—(A) For purposes of this section, in determining the thresholds in paragraph (b)(5)(i) of this section, the amount of a section 165 loss is adjusted for any salvage value and for any insurance or other compensation received. See §1.165-1(c)(4). However, a section 165 loss does not take into account offsetting gains, or other income or limitations. For example, a section 165 loss does not take into account the limitation in section 165(d) (relating to wagering losses) or the limitations in sections 165(f), 1211, and 1212 (relating to capital losses). The full amount of a section 165 loss is taken into account for the year in which the loss is sustained, regardless of whether all or part of the loss enters into the computation of a net operating loss under section 172 or a net capital loss under section 1212 that is a carryback or carryover to another year. A section 165 loss does not include any portion of a loss, attributable to a capital loss carryback or carryover from another year, that is treated as a deemed capital loss under section 1212.

(B) For purposes of this section, a section 165 loss includes an amount deductible pursuant to a provision that treats a transaction as a sale or other disposition, or otherwise results in a deduction under section 165. A section 165 loss includes, for example, a loss resulting from a sale or exchange of a partnership interest under section 741 and a loss resulting from a section 988 transaction.

(6) Transactions of interest. A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest.

(7) [Reserved].

(8) Exceptions—(i) In general. A transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction under paragraphs (b)(3) through (7) of this section, if the Commissioner makes a determination by published guidance that the transaction is not subject to the reporting requirements of this section. The Commissioner may make a determination by individual letter ruling under paragraph (f) of this section that an individual letter ruling request on a specific transaction satisfies the reporting requirements of this section with regard to that transaction for the taxpayer who requests the individual letter ruling.

(ii) Special rule for RICs. For purposes of this section, a regulated investment company (RIC) as defined in section 851 or an investment vehicle that is owned 95 percent or more by one or more RICs at all times during the course of the transaction is not required to disclose a transaction that is described in any of paragraphs (b)(3) through (5) and (b)(7) of this section unless the transaction is also a listed transaction or a transaction of interest.

(c) Definitions. For purposes of this section, the following definitions apply:

(1) Taxpayer. The term taxpayer means any person described in section 7701(a)(1), including S corporations. Except as otherwise specifically provided in this section, the term taxpayer also includes an affiliated group of corporations that joins in the filing of a consolidated return under section 1501.

(2) Corporation. When used specifically in this section, the term corporation means an entity that is required to file a return for a taxable year on any 1120 series form, or successor form, excluding S corporations.

(3) Participation—(i) In general—(A) Listed transactions. A taxpayer has participated in a listed transaction if the taxpayer's tax return reflects tax consequences or a tax strategy described in the published guidance that lists the transaction under paragraph (b)(2) of this section. A taxpayer also has participated in a listed transaction if the taxpayer knows or has reason to know that the taxpayer's tax benefits are derived directly or indirectly from tax consequences or a tax strategy described in published guidance that lists a transaction under paragraph (b)(2) of this section. Published guidance may identify other types or classes of persons that will be treated as participants in a listed transaction. Published guidance also may identify types or classes of persons that will not be treated as participants in a listed transaction.

(B) Confidential transactions. A taxpayer has participated in a confidential transaction if the taxpayer's tax return reflects a tax benefit from the transaction and the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in paragraph (b)(3) of this section. If a partnership's, S corporation's or trust's disclosure is limited, and the partner's, shareholder's, or beneficiary's disclosure is not limited, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the confidential transaction.

(C) Transactions with contractual protection. A taxpayer has participated in a transaction with contractual protection if the taxpayer's tax return reflects a tax benefit from the transaction and, as described in paragraph (b)(4) of this section, the taxpayer has the right to the full or partial refund of fees or the fees are contingent. If a partnership, S corporation, or trust has the right to a full or partial refund of fees or has a contingent fee arrangement, and the partner, shareholder, or beneficiary does not individually have the right to the refund of fees or a contingent fee arrangement, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the transaction with contractual protection.

(D) Loss transactions. A taxpayer has participated in a loss transaction if the taxpayer's tax return reflects a section 165 loss and the amount of the section 165 loss equals or exceeds the threshold amount applicable to the taxpayer as described in paragraph (b)(5)(i) of this section. If a taxpayer is a partner in a partnership, shareholder in an S corporation, or beneficiary of a trust and a section 165 loss as described in paragraph (b)(5) of this section flows through the entity to the taxpayer (disregarding netting at the entity level), the taxpayer has participated in a loss transaction if the taxpayer's tax return reflects a section 165 loss and the amount of the section 165 loss that flows through to the taxpayer equals or exceeds the threshold amounts applicable to the taxpayer as described in paragraph (b)(5)(i) of this section. For this purpose, a tax return is deemed to reflect the full amount of a section 165 loss described in paragraph (b)(5) of this section allocable to the taxpayer under this paragraph (c)(3)(i)(D), regardless of whether all or part of the loss enters into the computation of a net operating loss under

section 172 or net capital loss under section 1212 that the taxpayer may carry back or carry over to another year.

(E) Transactions of interest. A taxpayer has participated in a transaction of interest if the taxpayer is one of the types or classes of persons identified as participants in the transaction in the published guidance describing the transaction of interest.

(F) [Reserved].

(G) Shareholders of foreign corporations—(1) In general. A reporting shareholder of a foreign corporation participates in a transaction described in paragraphs (b)(2) through (5) and (b)(7) of this section if the foreign corporation would be considered to participate in the transaction under the rules of this paragraph (c)(3) if it were a domestic corporation filing a tax return that reflects the items from the transaction. A reporting shareholder of a foreign corporation participates in a transaction described in paragraph (b)(6) of this section only if the published guidance identifying the transaction includes the reporting shareholder among the types or classes of persons identified as participants. A reporting shareholder (and any successor in interest) is considered to participate in a transaction under this paragraph (c)(3)(i)(G) only for its first taxable year with or within which ends the first taxable year of the foreign corporation in which the foreign corporation participates in the transaction, and for the reporting shareholder's five succeeding taxable years.

(2) Reporting shareholder. The term reporting shareholder means a United States shareholder (as defined in section 951(b)) in a controlled foreign corporation (as defined in section 957) or a 10 percent shareholder (by vote or value) of a qualified electing fund (as defined in section 1295).

(ii) Examples. The following examples illustrate the provisions of paragraph (c)(3)(i) of this section:

Example 1. Notice 2003-55 (2003-2 CB 395), which modified and superseded Notice 95-53 (1995-2 CB 334) (see §601.601(d)(2) of this chapter), describes a lease stripping transaction in which one party (the transferor) assigns the right to receive future payments under a lease of tangible property and treats the amount realized from the assignment as its current income. The transferor later transfers the property subject to the lease in a transaction intended to qualify as a transferred basis transaction, for example, a transaction described in section 351. The transferee corporation claims the deductions associated with the high basis property subject to the lease. The transferor's and transferee corporation's tax returns reflect tax positions described in Notice 2003-55. Therefore, the transferor and transferee corporation have participated in the listed transaction. In the section 351 transaction, the transferor will have received stock with low value and high basis from the transferee corporation. If the transferor subsequently transfers the high basis/low value stock to a taxpayer in another transaction intended to qualify as a transferred basis transaction and the taxpayer uses the stock to generate a loss, and if the taxpayer knows or has reason to know that the tax loss claimed was derived indirectly from the lease stripping transaction, then the taxpayer has participated in the listed transaction. Accordingly, the taxpayer must disclose the transaction and the manner of the taxpayer's participation in the transaction under the rules of this section. For purposes of this example, if a bank lends money to the transferor, transferee corporation, or taxpayer for use in their transactions, the bank has not participated in the listed transaction because the bank's tax return does not reflect tax consequences or a tax strategy described in the listing notice (nor does the bank's tax return reflect a tax

benefit derived from tax consequences or a tax strategy described in the listing notice) nor is the bank described as a participant in the listing notice.

Example 2. XYZ is a limited liability company treated as a partnership for tax purposes. X, Y, and Z are members of XYZ. X is an individual, Y is an S corporation, and Z is a partnership. XYZ enters into a confidential transaction under paragraph (b)(3) of this section. XYZ and X are bound by the confidentiality agreement, but Y and Z are not bound by the agreement. As a result of the transaction, XYZ, X, Y, and Z all reflect a tax benefit on their tax returns. Because XYZ's and X's disclosure of the tax treatment and tax structure are limited in the manner described in paragraph (b)(3) of this section and their tax returns reflect a tax benefit from the transaction, both XYZ and X have participated in the confidential transaction. Neither Y nor Z has participated in the confidential transaction because they are not subject to the confidentiality agreement.

Example 3. P, a corporation, has an 80% partnership interest in PS, and S, an individual, has a 20% partnership interest in PS. P, S, and PS are calendar year taxpayers. In 2006, PS enters into a transaction and incurs a section 165 loss (that does not meet any of the exceptions to a section 165 loss identified in published guidance) of \$12 million and offsetting gain of \$3 million. On PS' 2006 tax return, PS includes the section 165 loss and the corresponding gain. PS must disclose the transaction under this section because PS' section 165 loss of \$12 million is equal to or greater than \$2 million. P is allocated \$9.6 million of the section 165 loss and \$2.4 million of the offsetting gain. P does not have to disclose the transaction under this section because P's section 165 loss of \$9.6 million is not equal to or greater than \$10 million. S is allocated \$2.4 million of the section 165 loss and \$600,000 of the offsetting gain. S must disclose the transaction under this section because S's section 165 loss of \$2.4 million is equal to or greater than \$2 million.

(4) Substantially similar. The term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure. For example, a transaction may be substantially similar to a listed transaction even though it involves different entities or uses different Internal Revenue Code provisions. (See for example, Notice 2003-54 (2003-2 CB 363), describing a transaction substantially similar to the transactions in Notice 2002-50 (2002-2 CB 98), and Notice 2002-65 (2002-2 CB 690).) The following examples illustrate situations where a transaction is the same as or substantially similar to a listed transaction under paragraph (b)(2) of this section. (Such transactions may also be reportable transactions under paragraphs (b)(3) through (7) of this section.) See §601.601(d)(2)(ii)(b) of this chapter. The following examples illustrate the provisions of this paragraph (c)(4):

Example 1. Notice 2000-44 (2000-2 CB 255) (see §601.601(d)(2)(ii)(b) of this chapter), sets forth a listed transaction involving offsetting options transferred to a partnership where the taxpayer claims basis in the partnership for the cost of the purchased options but does not adjust basis under section 752 as a result of the partnership's assumption of the taxpayer's obligation with respect to the options. Transactions using short sales, futures, derivatives or any other type of offsetting obligations to inflate basis in a partnership interest would be the same as or substantially similar to the transaction described in Notice 2000-44. Moreover, use of the inflated basis in the partnership interest to diminish gain that would otherwise be recognized on the transfer of a partnership asset would also be the same as or substantially similar to the transaction described in Notice 2000-44. See §601.601(d)(2)(ii)(b).

Example 2. Notice 2001-16 (2001-1 CB 730) (see §601.601(d)(2)(ii)(b) of this chapter), sets forth a listed transaction involving a seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and a buyer (Y) who desires to purchase the assets (and not the stock) of T. M agrees to facilitate the sale to prevent the recognition of the gain that T would otherwise report. Notice 2001-16 describes M as a member of a consolidated group that has a loss within the group or as a party not subject to tax. Transactions utilizing different intermediaries to prevent the recognition of gain would be the same as or substantially similar to the transaction described in Notice 2001-16. An example is a transaction in which M is a corporation that does not file a consolidated return but which buys T stock, liquidates T, sells assets of T to Y, and offsets the gain on the sale of those assets with currently generated losses. See §601.601(d)(2)(ii)(b).

(5) Tax. The term tax means Federal income tax.

(6) Tax benefit. A tax benefit includes deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from Federal income taxation, and any other tax consequences that may reduce a taxpayer's Federal income tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

(7) Tax return. The term tax return means a Federal income tax return and a Federal information return.

(8) Tax treatment. The tax treatment of a transaction is the purported or claimed Federal income tax treatment of the transaction.

(9) Tax structure. The tax structure of a transaction is any fact that may be relevant to understanding the purported or claimed Federal income tax treatment of the transaction.

(d) Form and content of disclosure statement. A taxpayer required to file a disclosure statement under this section must file a completed Form 8886, "Reportable Transaction Disclosure Statement" (or a successor form), in accordance with this paragraph (d) and the instructions to the form. The Form 8886 (or a successor form) is the disclosure statement required under this section. The form must be attached to the appropriate tax return(s) as provided in paragraph (e) of this section. If a copy of a disclosure statement is required to be sent to the Office of Tax Shelter Analysis (OTSA) under paragraph (e) of this section, it must be sent in accordance with the instructions to the form. To be considered complete, the information provided on the form must describe the expected tax treatment and all potential tax benefits expected to result from the transaction, describe any tax result protection (as defined in §301.6111-3(c)(12) of this chapter) with respect to the transaction, and identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction and the identity of all parties involved in the transaction. An incomplete Form 8886 (or a successor form) containing a statement that information will be provided upon request is not considered a complete disclosure statement. If the form is not completed in accordance with the provisions in this paragraph (d) and the instructions to the form, the taxpayer will not be considered to have complied with the disclosure requirements of this section. If a taxpayer receives one or more reportable transaction numbers for a reportable transaction, the taxpayer must include the reportable transaction number(s) on the Form 8886 (or a successor form). See §301.6111-3(d)(2) of this chapter.

(e) Time of providing disclosure—(1) In general. The disclosure statement for a reportable transaction must be attached to the taxpayer's tax return for each taxable year for which a taxpayer participates in a reportable transaction. In addition, a disclosure statement for a reportable transaction must be attached to each amended return that reflects a taxpayer's participation in a reportable transaction. A copy of the disclosure statement must be sent to OTSA at the same time that any disclosure statement is first filed by the taxpayer pertaining to a particular reportable transaction. If a reportable transaction results in a loss which is carried back to a prior year, the disclosure statement for the reportable transaction must be attached to the taxpayer's application for tentative refund or amended tax return for that prior year. In the case of a taxpayer that is a partner in a partnership, a shareholder in an S corporation, or a beneficiary of a trust, the disclosure statement for a reportable transaction must be attached to the partnership, S corporation, or trust's tax return for each taxable year in which the partnership, S corporation, or trust participates in the transaction under the rules of paragraph (c)(3)(i) of this section. If a taxpayer who is a partner in a partnership, a shareholder in an S corporation, or a beneficiary of a trust receives a timely Schedule K-1 less than 10 calendar days before the due date of the taxpayer's return (including extensions) and, based on receipt of the timely Schedule K-1, the taxpayer determines that the taxpayer participated in a reportable transaction within the meaning of paragraph (c)(3) of this section, the disclosure statement will not be considered late if the taxpayer discloses the reportable transaction by filing a disclosure statement with OTSA within 60 calendar days after the due date of the taxpayer's return (including extensions). The Commissioner in his discretion may issue in published guidance other provisions for disclosure under §1.6011-4.

(2) Special rules—(i) Listed transactions and transactions of interest. In general, if a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer's tax return (including an amended return) reflecting the taxpayer's participation in the listed transaction or transaction of interest and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed, regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction or a transaction of interest, with OTSA within 90 calendar days after the date on which the transaction became a listed transaction or a transaction of interest. The Commissioner also may determine the time for disclosure of listed transactions and transactions of interest in the published guidance identifying the transaction.

(ii) Loss transactions. If a transaction becomes a loss transaction because the losses equal or exceed the threshold amounts as described in paragraph (b)(5)(i) of this section, a disclosure statement must be filed as an attachment to the taxpayer's tax return for the first taxable year in which the threshold amount is reached and to any subsequent tax return that reflects any amount of section 165 loss from the transaction.

(3) Multiple disclosures. The taxpayer must disclose the transaction in the time and manner provided for under the provisions of this section regardless of whether the taxpayer also plans to disclose the transaction under other published guidance, for example, §1.6662-3(c)(2).

(4) Example. The following example illustrates the application of this paragraph (e):

Example. In January of 2008, F, a calendar year taxpayer, enters into a transaction that at the time is not a listed transaction and is not a transaction described in any of the paragraphs (b)(3) through (7) of this section. All the tax benefits from the transaction are reported on F's 2008 tax return filed timely in April 2009. On May 2, 2011, the IRS

publishes a notice identifying the transaction as a listed transaction described in paragraph (b)(2) of this section. Upon issuance of the May 2, 2011 notice, the transaction becomes a reportable transaction described in paragraph (b) of this section. The period of limitations on assessment for F's 2008 taxable year is still open. F is required to file Form 8886 for the transaction with OTSA within 90 calendar days after May 2, 2011.

(f) Rulings and protective disclosures—(1) Rulings. If a taxpayer requests a ruling on the merits of a specific transaction on or before the date that disclosure would otherwise be required under this section, and receives a favorable ruling as to the transaction, the disclosure rules under this section will be deemed to have been satisfied by that taxpayer with regard to that transaction, so long as the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section. If a taxpayer requests a ruling as to whether a specific transaction is a reportable transaction on or before the date that disclosure would otherwise be required under this section, the Commissioner in his discretion may determine that the submission satisfies the disclosure rules under this section for the taxpayer requesting the ruling for that transaction if the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section. The potential obligation of the taxpayer to disclose the transaction under this section will not be suspended during the period that the ruling request is pending.

(2) Protective disclosures. If a taxpayer is uncertain whether a transaction must be disclosed under this section, the taxpayer may disclose the transaction in accordance with the requirements of this section and comply with all the provisions of this section, and indicate on the disclosure statement that the disclosure statement is being filed on a protective basis. The IRS will not treat disclosure statements filed on a protective basis any differently than other disclosure statements filed under this section. For a protective disclosure to be effective, the taxpayer must comply with these disclosure regulations by providing to the IRS all information requested by the IRS under this section.

(g) Retention of documents. (1) In accordance with the instructions to Form 8886 (or a successor form), the taxpayer must retain a copy of all documents and other records related to a transaction subject to disclosure under this section that are material to an understanding of the tax treatment or tax structure of the transaction. The documents must be retained until the expiration of the statute of limitations applicable to the final taxable year for which disclosure of the transaction was required under this section. (This document retention requirement is in addition to any document retention requirements that section 6001 generally imposes on the taxpayer.) The documents may include the following:

(i) Marketing materials related to the transaction;

(ii) Written analyses used in decision-making related to the transaction;

(iii) Correspondence and agreements between the taxpayer and any advisor, lender, or other party to the reportable transaction that relate to the transaction;

(iv) Documents discussing, referring to, or demonstrating the purported or claimed tax benefits arising from the reportable transaction; and documents, if any, referring to the business purposes for the reportable transaction.

(2) A taxpayer is not required to retain earlier drafts of a document if the taxpayer retains a copy of the final document (or, if there is no final document, the most recent

draft of the document) and the final document (or most recent draft) contains all the information in the earlier drafts of the document that is material to an understanding of the purported tax treatment or tax structure of the transaction.

(h) Effective/applicability date—(1) In general. This section applies to transactions entered into on or after August 3, 2007. However, this section applies to transactions of interest entered into on or after November 2, 2006. Paragraph (f)(1) of this section applies to ruling requests received on or after November 1, 2006. Otherwise, the rules that apply with respect to transactions entered into before August 3, 2007, are contained in §1.6011-4 in effect prior to August 3, 2007. (See 26 CFR part 1 revised as of April 1, 2007).

(2) [Reserved].

Par. 3. Section 1.6011-4T is removed.

Reg § 1.6011-4T.

§1.6011-4T [Removed]

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 4. The authority citation for part 20 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 5. Section 20.6011-4 is revised to read as follows:

Reg § 20.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. If a transaction is identified as a listed transaction or a transaction of interest as defined in §1.6011-4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2)(ii)(b) of this chapter), and the listed transaction or transaction of interest involves an estate tax under chapter 11 of subtitle B of the Internal Revenue Code, the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective/applicability date. This section applies to listed transactions entered into on or after January 1, 2003. This section applies to transactions of interest entered into on or after November 2, 2006.

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 6. The authority citation for part 25 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 7. Section 25.6011-4 is revised to read as follows:

Reg § 25.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. If a transaction is identified as a listed transaction or a transaction of interest as defined in §1.6011-4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2)(ii)(b) of this chapter), and the listed transaction or transaction of interest involves a gift tax under chapter 12 of subtitle B of the Internal Revenue Code, the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective/applicability date. This section applies to listed transactions entered into on or after January 1, 2003. This section applies to transactions of interest entered into on or after November 2, 2006.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 8. The authority citation for part 31 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 9. Section 31.6011-4 is revised to read as follows:

Reg § 31.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. If a transaction is identified as a listed transaction or a transaction of interest as defined in §1.6011-4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2)(ii)(b) of this chapter), and the listed transaction or transaction of interest involves an employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code, the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective/applicability date. This section applies to listed transactions entered into on or after January 1, 2003. This section applies to transactions of interest entered into on or after November 2, 2006.

PART 53—FOUNDATION AND SIMILAR EXCISE TAXES

Par. 10. The authority citation for part 53 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 11. Section 53.6011-4 is revised to read as follows:

Reg § 53.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. If a transaction is identified as a listed transaction or a transaction of interest as defined in §1.6011-4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2)(ii)(b) of this chapter), and the listed transaction or transaction of interest involves an excise tax under chapter 42 of subtitle D of the Internal Revenue Code (relating to private foundations and certain other tax-exempt organizations), the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective/applicability date. This section applies to listed transactions entered into on or after January 1, 2003. This section applies to transactions of interest entered into on or after November 2, 2006.

PART 54—PENSION EXCISE TAXES

Par. 12. The authority citation for part 54 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 13. Section 54.6011-4 is revised to read as follows:

Reg § 54.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. If a transaction is identified as a listed transaction or a transaction of interest as defined in §1.6011-4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2)(ii)(b) of this chapter), and the listed transaction or transaction of interest involves an excise tax under chapter 43 of subtitle D of the Internal Revenue Code (relating to qualified pension, etc., plans) the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective/applicability date. This section applies to listed transactions entered into on or after January 1, 2003. This section applies to transactions of interest entered into on or after November 2, 2006.

PART 56—PUBLIC CHARITY EXCISE TAXES

Par. 14. The authority citation for part 56 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 15. Section 56.6011-4 is revised to read as follows:

Reg § 56.6011-4.

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) In general. If a transaction is identified as a listed transaction or a transaction of interest as defined in §1.6011-4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2) of this chapter), and the listed transaction or transaction of interest involves an excise tax under chapter 41 of subtitle D of the Internal Revenue

Code (relating to public charities), the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective/applicability date. This section applies to listed transactions entered into on or after January 1, 2003. This section applies to transactions of interest entered into on or after November 2, 2006.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: July 25, 2007.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

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