

TD 9351. AJCA Modifications to the Section 6111 Regulations.

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 6111 of the Internal Revenue Code that provide the rules relating to the disclosure of reportable transactions by material advisors. These regulations affect 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 301 by providing rules relating to the disclosure of reportable transactions by material advisors under section 6111.

The American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418), (AJCA) was enacted on October 22, 2004. Section 815 of the AJCA amended section 6111 to require each material advisor with respect to any reportable transaction to make a return (in such form as the Secretary may prescribe) setting forth: (1) information identifying and describing the transaction; (2) information describing any potential tax benefits expected to result from the transaction; and (3) such other information as the Secretary may prescribe. Section 6111(a), as amended, also provides that the return must be filed not later than the date specified by the Secretary. Section 6111(b)(1), as amended, provides a definition for the term material advisor and includes as part of that definition a requirement that the material advisor derive certain threshold amounts of gross income that the Secretary may prescribe. The AJCA amendments to section 6111 also authorize the Secretary to prescribe regulations that provide: (1) that only one person shall be required to meet the requirements of section 6111(a) in cases in which two or more persons would otherwise be required to meet such requirements; (2) exemptions from the requirements of section 6111; and (3) rules as may be necessary or appropriate to carry out the purposes of section 6111. Section 815 of the AJCA is effective for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004.

In response to the AJCA, the IRS and Treasury Department issued interim guidance on section 6111 in Notice 2004-80 (2004-2 CB 963); Notice 2005-17 (2005-1 CB 606); Notice 2005-22 (2005-1 CB 756); and Notice 2006-6 (2006-5 IRB 385) (see

§601.601(d)(2)). 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 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 recommendations 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.

Reportable Transaction Number

The proposed regulations provide that a material advisor must provide a reportable transaction number to all taxpayers and material advisors to whom the material advisor makes or provides tax statements. Many commentators commented that the requirement to provide the reportable transaction number to all taxpayers and material advisors to whom the material advisor makes or provides tax statements is overly broad and suggested, instead, that the reportable transaction number only be required to be furnished to those for whom the taxpayer acted as a material advisor. One commentator recommended that the regulation be amended to remove the obligation to provide a reportable transaction number. Another commentator recommended that a material advisor should be required to provide the reportable transaction number to taxpayers only in the case of marketed transactions. The commentator also commented that in a purely one-on-one, non-abusive transaction, the use of the reportable transaction number may infringe upon the attorney-client relationship.

The IRS and Treasury Department attempted to balance the need for disclosure of reportable transactions with the resulting burden imposed upon taxpayers. The IRS and Treasury Department do not believe that requiring a material advisor to provide a reportable transaction number to certain taxpayers and material advisors imposes an undue burden upon taxpayers in light of the benefit to tax administration. However, the IRS and Treasury Department recognize that requiring the reportable transaction number to be provided to all persons for whom the material advisor made a tax statement may be unnecessary. Therefore, these final regulations state that a material advisor is required to provide a reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor.

Material Advisor Fee Threshold Language

The proposed regulations provide, in general, that a lower threshold amount of gross income applies in the case of a reportable transaction when substantially all of the tax benefits are provided to natural persons (looking through any partnerships, S corporations, or trusts). The IRS and Treasury Department received comments asking for clarification of the term "substantially all of the tax benefits."

The final regulations provide that the determination of whether the lower threshold amount applies is based on the facts and circumstances. Generally, unless the facts and circumstances prove otherwise, if 70 percent or more of the tax benefits from a reportable transaction are provided to natural persons (looking through any partnerships, S corporations, or trusts) then substantially all of the tax benefits will be considered to be provided to natural persons.

Material Advisor Disclosure of the Identity of Other Material Advisors

The proposed regulations provide that a material advisor who is required to file a disclosure statement must also disclose the identity of other material advisors. Two commentators recommended that these final regulations be amended to provide that a material advisor must provide the identity of other material advisors only if the material advisor has actual knowledge of such other material advisors.

After carefully considering the recommendation by the commentators, these final regulations provide that a material advisor must provide the identities of any material advisor(s) who the material advisor knows or has reason to know acted as a material advisor with respect to the transaction.

Designation Agreements

The proposed regulations provide that if more than one material advisor is required to disclose a reportable transaction under section 6111, the material advisors may designate by written agreement a single material advisor to disclose the transaction. The designation of one material advisor to disclose the transaction does not relieve the other material advisors of their obligation to disclose the transaction to the IRS in accordance with section 6111, if the designated material advisor fails to disclose the transaction to the IRS in a timely manner. One commentator recommended that a good faith participation in a designation agreement be treated as if the non-designated material advisor has satisfied the advisor's obligations under section 6111 and/or section 6112. The commentator also suggested that if the previous recommendation is not adopted, that these final regulations prohibit designation agreements entirely.

These final regulations do not adopt the recommendation of the commentator. The purpose of the designation agreement language is to reduce the burden on material advisors in complying with the disclosure and list maintenance regulations while balancing the need of the IRS and Treasury Department to receive the necessary information described in sections 6111 and 6112. The designation agreement allows material advisors, if they choose, to have one material advisor comply with the disclosure and list maintenance obligations rather than multiple advisors maintaining duplicative lists. Inherent in the language is the assumption that the designated material advisor will comply with the requirements. Absolving the non-designated material advisors from the obligations listed in sections 6111 and 6112 for good faith designation agreements would require the IRS to determine whether the designation agreement was entered into in good faith and would increase the burdens on tax administration.

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. However, these final regulations continue to require that material advisors must provide the reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor.

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 return referenced in these regulations 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 in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding entries in numerical order to read, in part, as follows:

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

Section 301.6111-3 also issued under 26 U.S.C. 6111. Par. 2. Section 301.6111-3 is added to read as follows:

Reg § 301.6111-3.

§301.6111-3 Disclosure of reportable transactions.

(a) In general. Each material advisor, as defined in paragraph (b) of this section, with respect to any reportable transaction, as defined in §1.6011-4(b) of this chapter, must file a return as described in paragraph (d) of this section by the date described in paragraph (e) of this section.

(b) Material advisor—(1) In general. A person is a material advisor with respect to a transaction if the person provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross income in excess of the threshold amount as defined in paragraph (b)(3) of this section for the material aid, assistance, or advice. 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) Material aid, assistance, or advice—(i) In general. Except as provided in paragraph (b)(5) of this section, a person provides material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any transaction if the person makes or provides a tax statement to or for the benefit of—

(A) A taxpayer who either is required to disclose the transaction under §§1.6011-4, 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, or 56.6011-4 of this chapter because the transaction is a listed transaction or a transaction of interest, or would have been required to disclose the transaction under §§1.6011-4, 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, or 56.6011-4 of this chapter if the transaction had become a listed transaction or a transaction of interest within the period of limitations in §1.6011-4(e) of this chapter;

(B) A taxpayer who the potential material advisor knows is or reasonably expects to be required to disclose the transaction under §1.6011-4 of this chapter because the transaction is or is reasonably expected to become a transaction described in §1.6011-4(b)(3) through (5) or (7) of this chapter;

(C) A material advisor who is required to disclose the transaction under this section because it is a listed transaction or a transaction of interest; or

(D) A material advisor who the potential material advisor knows is or reasonably expects to be required to disclose the transaction under this section because the transaction is or is reasonably expected to become a transaction described in §1.6011-4(b)(3) through (5) or (7) of this chapter.

(ii) Tax statement—(A) In general. A tax statement is any statement (including another person's statement), oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction as defined in §1.6011-4(b)(2) through (7) of this chapter. A tax statement under this section includes tax result protection that insures some or all of the tax benefits of a reportable transaction.

(B) Confidential transactions. A statement relates to a tax aspect of a transaction that causes it to be a confidential transaction if the statement concerns a tax benefit related to the transaction and either the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in §1.6011-4(b)(3) of this chapter by or for the benefit of the person making the statement, or the person making the statement knows the taxpayer's disclosure of the tax structure or tax aspects of the transaction is limited in the manner described in §1.6011-4(b)(3) of this chapter.

(C) Transactions with contractual protection. A statement relates to a tax aspect of a transaction that causes it to be a transaction with contractual protection if the statement concerns a tax benefit related to the transaction and either—

(1) The taxpayer has the right to a full or partial refund of fees paid to the person making the statement or the fees are contingent in the manner described in §1.6011-4(b)(4) of this chapter; or

(2) The person making the statement knows or has reason to know that the taxpayer has the right to a full or partial refund of fees (described in §1.6011-4(b)(4)(ii) of this chapter) paid to another if all or part of the intended tax consequences from the transaction are not sustained or that fees (as described in §1.6011-4(b)(4)(ii) of this chapter) paid by the taxpayer to another are contingent on the taxpayer's realization of tax benefits from the transaction in the manner described in §1.6011-4(b)(4) of this chapter.

(D) Loss transactions. A statement relates to a tax aspect of a transaction that causes it to be a loss transaction if the statement concerns an item that gives rise to a loss described in §1.6011-4(b)(5) of this chapter.

(E) [Reserved].

(iii) Special rules—(A) Capacity as an employee. A material advisor generally does not include a person who makes a tax statement solely in the person's capacity as an employee, shareholder, partner or agent of another person. Any tax statement made by that person will be attributed to that person's employer, corporation, partnership or principal. However, a person shall be treated as a material advisor if that person forms or avails of an entity with the purpose of avoiding the rules of section 6111 or 6112 or the penalties under section 6707 or 6708.

(B) Post-filing advice. A person will not be considered to be a material advisor with respect to a transaction if that person does not make or provide a tax statement regarding the transaction until after the first tax return reflecting tax benefit(s) of the transaction is filed with the IRS. However, this exception does not apply to a person who makes a tax statement with respect to the transaction if it is expected that the taxpayer will file a supplemental or amended return reflecting additional tax benefits from the transaction.

(C) Publicly filed statements. A tax statement with respect to a transaction that includes only information about the transaction contained in publicly available documents filed with the Securities and Exchange Commission no later than the close of the transaction will not be considered a tax statement to or for the benefit of a person described in paragraph (b)(2) of this section.

(3) Gross income derived for material aid, assistance, or advice—(i) Threshold amount—(A) In general. The threshold amount of gross income is \$50,000 in the case of a reportable transaction substantially all of the tax benefits from which are provided to natural persons (looking through any partnerships, S corporations, or trusts). For all other transactions, the threshold amount is \$250,000.

(B) Listed transactions and transactions of interest. For listed transactions described in §§1.6011-4, 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, or 56.6011-4 of this chapter, the threshold amounts in paragraph (b)(3)(i)(A) of this section are reduced from \$50,000 to \$10,000 and from \$250,000 to \$25,000. For transactions of interest

described in §§1.6011-4, 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, or 56.6011-4 of this chapter, the threshold amounts in paragraph (b)(3)(i)(A) of this section may be reduced as identified in the published guidance describing the transaction.

(C) [Reserved].

(D) Substantially all of the tax benefits. For purposes of this section, the determination of whether substantially all of the tax benefits from a reportable transaction are provided to natural persons is made based on all the facts and circumstances. Generally, unless the facts and circumstances prove otherwise, if 70 percent or more of the tax benefits from a reportable transaction are provided to natural persons (looking through any partnerships, S corporations, or trusts) then substantially all of the tax benefits will be considered to be provided to natural persons.

(ii) Gross income derived directly or indirectly for the material aid, assistance, or advice. In determining the amount of gross income a person derives directly or indirectly for material aid, assistance, or advice, all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a reportable 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 all of the facts and circumstances. 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 reportable transaction constitutes gross income derived directly or indirectly for aid, assistance, or advice. For purposes of this section, the threshold amount must be met independently for each transaction that is a reportable transaction and aggregation of fees among transactions is not required.

(4) Date a person becomes a material advisor—(i) In general. A person will be treated as becoming a material advisor when all of the following events have occurred (in no particular order)—

(A) The person provides material aid, assistance or advice as described in paragraph (b)(2) of this section;

(B) The person directly or indirectly derives gross income in excess of the threshold amount as described in paragraph (b)(3) of this section; and

(C) The transaction is entered into by the taxpayer to whom or for whose benefit the person provided the tax statement, or in the case of a tax statement provided to another material advisor, when the transaction is entered into by a taxpayer to whom or for whose benefit that material advisor provided a tax statement.

(ii) Determining if the taxpayer entered into the transaction. Material advisors, including those who cease providing services before the time the transaction is entered into, must make reasonable and good faith efforts to determine whether the event described in paragraph (b)(4)(i)(C) of this section has occurred.

(iii) Listed transactions and transactions of interest. If a transaction that was not a reportable transaction is identified as a listed transaction or a transaction of interest in

published guidance after the occurrence of the events described in paragraph (b)(4)(i) of this section, the person will be treated as becoming a material advisor on the date the transaction is identified as a listed transaction or a transaction of interest.

(5) Other persons designated as material advisors. Published guidance may identify other types or classes of persons as material advisors.

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

(1) Reportable transaction. The term reportable transaction is defined in §1.6011-4(b)(1) of this chapter.

(2) Listed transaction. The term listed transaction is defined in §1.6011-4(b)(2) of this chapter. See also §§20.6011-4(a), 25.6011-4(a), 31.6011-4(a), 53.6011-4(a), 54.6011-4(a), or 56.6011-4(a) of this chapter.

(3) Derive. The term derive means receive or expect to receive.

(4) Person. The term person means any person described in section 7701(a)(1), including an affiliated group of corporations that join in the filing of a consolidated return under section 1501.

(5) Substantially similar. The term substantially similar is defined in §1.6011-4(c)(4) of this chapter.

(6) Tax. The term tax means Federal tax.

(7) 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 tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

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

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

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

(11) Taxpayer. The term taxpayer is defined in §1.6011-4(c)(1) of this chapter.

(12) Tax result protection. The term tax result protection includes insurance company and other third party products commonly described as tax result insurance.

(13) Transaction of interest. The term transaction of interest is defined in §1.6011-4(b)(6) of this chapter. See also §§20.6011-4(a), 25.6011-4(a), 31.6011-4(a), 53.6011-4(a), 54.6011-4(a), or 56.6011-4(a) of this chapter.

(d) Form and content of material advisor's disclosure statement—(1) In general. A material advisor required to file a disclosure statement under this section must file a completed Form 8918, "Material Advisor Disclosure Statement" (or successor form) in accordance with this paragraph (d) and 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 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 any material advisor(s) whom the material advisor knows or has reason to know acted as a material advisor as defined in paragraph (b) of this section with respect to the transaction. An incomplete form containing a statement that information will be provided upon request is not considered a complete disclosure statement. A material advisor may file a single form for substantially similar transactions. An amended form must be filed if information previously provided is no longer accurate, if additional information that was not disclosed becomes available, or if there are material changes to the transaction. A material advisor is not required to file an additional form for each additional taxpayer that enters into the same or substantially similar transaction. If the form is not completed in accordance with the provisions in this paragraph (d) and the instructions to the form, the material advisor will not be considered to have complied with the disclosure requirements of this section.

(2) Reportable transaction number. The IRS will issue to a material advisor a reportable transaction number with respect to the disclosed reportable transaction. Receipt of a reportable transaction number does not indicate that the disclosure statement is complete, nor does it indicate that the transaction has been reviewed, examined, or approved by the IRS. Material advisors must provide the reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor as defined in paragraph (b) of this section. The reportable transaction number must be provided at the time the transaction is entered into, or, if the transaction is entered into prior to the material advisor receiving the reportable transaction number, within 60 calendar days from the date the reportable transaction number is mailed to the material advisor.

(e) Time of providing disclosure. The material advisor's disclosure statement for a reportable transaction must be filed with the Office of Tax Shelter Analysis (OTSA) by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the reportable transaction or in which the circumstances necessitating an amended disclosure statement occur. The disclosure statement must be sent to OTSA at the address provided in the instructions for Form 8918 (or a successor form).

(f) Designation agreements. If more than one material advisor is required to disclose a reportable transaction under this section, the material advisors may designate by written agreement a single material advisor to disclose the transaction. The transaction must be disclosed by the last day of the month following the end of the calendar quarter that includes the earliest date on which a material advisor who is a party to the agreement became a material advisor with respect to the transaction as described in paragraph (b)(4) of this section. The designation of one material advisor to disclose the transaction does not relieve the other material advisors of their obligation to disclose the transaction to the IRS in accordance with this section, if the designated material advisor fails to disclose the transaction to the IRS in a timely manner.

(g) Protective disclosures. If a potential material advisor is uncertain whether a transaction must be disclosed under this section, the advisor 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 advisor must comply with the regulations under this section and §301.6112-1 by providing to the IRS all information requested by the IRS under these sections.

(h) Rulings. If a potential material advisor 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 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 person to disclose the transaction under this section (or to maintain or furnish the list under §301.6112-1) will not be suspended during the period that the ruling request is pending.

(i) Effective/applicability date—(1) In general. This section applies to transactions with respect to which a material advisor makes a tax statement on or after August 3, 2007. However, this section applies to transactions of interest entered into on or after November 2, 2006 with respect to which a material advisor makes a tax statement under §301.6111-3 on or after November 2, 2006. Paragraph (h) 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 Notice 2004-80 (2004-50 IRB 963); Notice 2005-17 (2005-8 IRB 606); and Notice 2005-22 (2005-12 IRB 756) (see §601.601(d)(2)(ii)(b) in effect prior to August 3, 2007).

(2) [Reserved].

Par. 3. Section 301.6111-3T is removed.

Reg § 301.6111-3T.

§301.6111-3T [Removed]

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: July 25, 2007.

Eric Solomon,

Assistant Secretary of the Treasury

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