

(B) Within 90 days after beginning such discussions, the person obtains and reasonably relies on both—

(1) A written statement from one of the tax shelter promoters that such promoter has registered the tax shelter under this section; and

(2) A copy of the registration.

(iii) *Determination of foreign status.* For purposes of this paragraph (g)(2), a person must presume that all tax shelter promoters are foreign persons unless the person either—

(A) Discusses participation in the tax shelter with a promoter that is a United States person; or

(B) Obtains and reasonably relies on a written statement from one of the promoters that at least one of the promoters is a United States person.

(iv) *Discussion.* Discussing participation in a transaction includes discussing such participation with any person that conveys the tax shelter promoter's proposal. For purposes of this paragraph (g)(2), any person that participates directly or indirectly in a transaction will be treated as having discussed participation in the transaction not later than the date of the agreement to participate. Thus, a tax shelter participant will be treated as having discussed participation in the transaction even if all discussions were conducted by an intermediary and the agreement to participate was made indirectly through another person acting on the participant's behalf (for example, through an intermediary empowered to commit the participant to participate in the shelter).

(v) *Special rule for controlled entities.* A person (first person) will be treated as participating indirectly in a confidential corporate tax shelter if a foreign person controlled by the first person participates in the shelter, and a significant purpose of the shelter is the avoidance or evasion of the first person's Federal income tax. For purposes of this paragraph (g)(2)(v), control of a foreign corporation or partnership will be determined under the rules of section 6038(e)(2) and (3), except that such section shall be applied by substituting "10" for "50" each place it appears and "at least" for "more than" each place it appears. In addition, section 6038(e)(2) shall be applied for these pur-

poses without regard to the constructive ownership rules of section 318 and by treating stock as owned if it is owned directly or indirectly. Section 6038(e)(3) shall be applied for these purposes without regard to the last sentence of section 6038(e)(3)(B). Any beneficiary with a 10 percent or more interest in a foreign trust or estate shall be treated as controlling that trust or estate for purposes of this paragraph (g)(2)(v).

(vi) *Other rules.* (A) For purposes of the registration requirements under section 6111(d)(3), it is presumed that the tax shelter promoters will receive fees in excess of \$100,000 in the aggregate unless the person responsible for registering the tax shelter can show otherwise.

(B) Any person treated as a tax shelter promoter under section 6111(d) solely by reason of being related (within the meaning of section 267 or 707) to a foreign promoter will be treated as a foreign promoter for purposes of this paragraph (g)(2).

(h) *Effective dates.* This section applies to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. If an interest is sold after February 28, 2000, it is treated as offered for sale after February 28, 2000, unless the sale was pursuant to a written binding contract entered into on or before February 28, 2000. However, paragraphs (a) through (g) of this section apply to confidential corporate tax shelters in which any interests are offered for sale on or after February 28, 2003, and to transactions described in paragraph (e)(1)(ii) of this section. The rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, and before February 28, 2003, are contained in §301.6111-2T in effect prior to February 28, 2003 (see 26 CFR part 301 revised as of April 1, 2002, 2002-28 I.R.B. 91, and 2002-45 I.R.B. 823 (see §601.601(d)(2) of this chapter)).

[T.D. 9046, 68 FR 10170, Mar. 4, 2003]

§ 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, 26.6011-4, 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, 26.6011-4, 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, 26.6011-4, 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, 26.6011-4, 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), 26.6011-4, 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), 26.6011-4, 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

§ 301.6112-1

26 CFR Ch. I (4-1-21 Edition)

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 this section on or after November 2, 2006. Paragraphs (b)(2)(i)(A), (b)(3)(i)(B), (c)(2), and (c)(13) of this section apply to transactions with respect to which a material advisor makes a tax statement under this section after November 14, 2011. Paragraph (h) of this section applies to ruling requests received on or after November 2, 2006.

Otherwise, the rules that apply on or before November 14, 2011 are contained in this section in effect prior to November 14, 2011 (see 26 CFR part 301 revised as of April 1, 2011).

(2) [Reserved]

[T.D. 9351, 72 FR 43159, Aug. 3, 2007, as amended by T.D. 9556, 76 FR 70341, Nov. 14, 2011]

§ 301.6112-1 Material advisors of reportable transactions must keep lists of advisees, etc.

(a) *In general.* Each material advisor, as defined in § 301.6111-3(b), with respect to any reportable transaction, as defined in § 1.6011-4(b) of this chapter, shall prepare and maintain a list in accordance with paragraph (b) of this section and shall furnish such list to the Internal Revenue Service (IRS) in accordance with paragraph (e) of this section.

(b) *Preparation and maintenance of lists—(1) In general.* A separate list must be prepared and maintained for each reportable transaction. However, one list must be maintained for substantially similar transactions. A material advisor will have 30 calendar days from the date the list maintenance requirement first arises (see § 301.6111-3(b)(4) and paragraph (a) of this section) with respect to a reportable transaction to prepare the list that must be maintained under this section with respect to that transaction. The Commissioner in his discretion also may provide in published guidance designating a transaction as a reportable transaction a list preparation time period greater than 30 calendar days. If a list is requested under this section during the list preparation time period, the request for the list will be treated as having been made on the day after the list preparation time period ends. A list must be maintained in a form that enables the IRS to determine without undue delay or difficulty the information required in paragraph (b)(3) of this section. The Commissioner in his discretion may provide in published guidance a form or method for maintaining or furnishing the list.

(2) *Persons required to be included on lists.* A material advisor is required to maintain a list identifying each person with respect to whom the advisor acted