

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 8896]

RIN 1545-AY37

Modification of Tax Shelter Rules

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: These temporary regulations modify the rules relating to the filing by certain corporate taxpayers of a statement with their Federal corporate income tax returns under section 6011(a), the registration of confidential corporate tax shelters under section 6111(d), and the maintenance of lists of investors in potentially abusive tax shelters under section 6112. These regulations provide the public with additional guidance needed to comply with the disclosure rules, the registration requirement, and the list maintenance requirement applicable to tax shelters. The temporary regulations affect corporations participating in certain reportable transactions, persons responsible for registering confidential corporate tax shelters, and organizers of potentially abusive tax shelters. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Effective Date: These temporary regulations are effective August 11, 2000.

Applicability Date: For dates of applicability, see §§1.6011-4T(g), 301.6111-2T(h), and 301.6112-1T, A-22.

FOR FURTHER INFORMATION CONTACT: Catherine Moore, (202) 622-3080, (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these regulations previously have been reviewed and approved by the Office of Management and Budget under control numbers 1545-1685 and 1545-1686. No material changes to these collections of information are made by these regulations.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document amends 26 CFR parts 1 and 301 to provide modified rules relating to the disclosure of certain tax shelters by corporate investors on their Federal corporate income tax returns under section 6011, the registration of confidential corporate tax shelters under section 6111, and the maintenance of lists of investors in potentially abusive tax shelters under

section 6112.

On February 28, 2000, the IRS issued temporary and proposed regulations regarding section 6011 (TD 8877, REG-103735-00), section 6111 (TD 8876, REG-110311-98), and section 6112 (TD 8875, REG-103736-00). The regulations were published in the **Federal Register** (65 FR 11205, 65 FR 11215, 65 FR 11211) on March 2, 2000.

Based on comments that have been received, the IRS and Treasury have determined that certain interim changes to the temporary and proposed regulations are warranted. The changes in the proposed rules are published elsewhere in this issue of the **Federal Register**. The interim changes are intended to clarify certain provisions of the regulations, address certain practical problems relating to compliance with the regulations, and make certain other changes relating to the scope of the regulations.

It is anticipated that other changes will be made in the final regulations. The IRS and Treasury have determined that additional time is needed to evaluate a number of the comments and recommendations. The IRS and Treasury continue to invite comments on all provisions of the temporary and proposed regulations, including provisions modified by this document. Furthermore, to the extent that taxpayers or other persons believe that there are specific types of transactions for which disclosure is required under the regulations, and that such disclosure is not consistent with the purposes of the regulations, the IRS and Treasury solicit comments that identify

such types of transactions and explain those concerns. Such comments will be taken into account in establishing the scope of the final regulations and will also assist the IRS and Treasury in determining whether there are classes of transactions that should be specifically excepted from disclosure under the final regulations.

Explanation of Provisions

1. Disclosure Statement Required for Certain Corporate Taxpayers

The temporary regulations under section 6011 provide that every taxpayer that is required to file a return for a taxable year with respect to any tax imposed under section 11 and that has participated, directly or indirectly, in a reportable transaction shall attach a disclosure statement to its return for each taxable year for which the taxpayer's Federal income tax liability is affected by its participation in the reportable transaction. It has come to the attention of the IRS and Treasury that the temporary regulations under section 6011 may have technically failed to include insurance companies and mutual savings banks conducting life insurance business. The IRS and Treasury intended those corporations to be subject to the disclosure requirement in the regulations. The regulations are amended accordingly.

2. Record Retention Requirement for Certain Reportable Transactions

The temporary regulations under section 6011 provide that a taxpayer must retain all documents relating to a reportable

transaction until the expiration of the statute of limitations for the first taxable year for which a disclosure statement is filed with the taxpayer's tax return.

The IRS and Treasury seek to clarify the record retention requirement. As modified, the temporary regulations provide that a 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 facts of the transaction, the expected tax treatment of the transaction, or the corporation's decision to participate in the transaction.

3. Confidentiality

Under section 6111(d), a confidential corporate tax shelter must be registered. In describing confidentiality, the temporary regulations under section 6111(d) provide that if an offeree's disclosure of the structure or tax aspects of the transaction is limited in any way by an express or implied understanding or agreement with or for the benefit of any tax shelter promoter, an offer is considered made under conditions of confidentiality, whether or not such understanding or agreement is legally binding. An offer will also be considered made under conditions of confidentiality in the absence of any such understanding or agreement if any tax shelter promoter knows or has reason to know that the transaction is protected from disclosure or use in any other manner. However, unless the facts and circumstances clearly indicate otherwise, an offer is not considered made under conditions of confidentiality if the tax shelter promoter enters

into a written agreement with each person who participates or discusses participation in the transaction and such agreement expressly authorizes such persons to disclose every aspect of the transaction with any and all persons, without limitation of any kind.

The IRS and Treasury understand that, in certain circumstances, limitations on disclosure of the structure or tax aspects of a transaction may be considered necessary to comply with Federal or state securities laws. Consequently, the temporary regulations under section 6111(d) are modified to provide an exception for restrictions on disclosure of the structure or tax aspects of the transaction reasonably necessary to comply with those securities laws.

The IRS and Treasury received comments inquiring whether an exclusivity agreement (i.e., an agreement requiring the offeree to pay a fee to a promoter if the offeree engages in the transaction, whether or not the offeree uses the services of that promoter) is a condition of confidentiality. It is the view of the IRS and Treasury that an exclusivity agreement is within the scope of section 6111(d)(2)(B) because it is a limitation on use, and the temporary regulations have been clarified to so provide. However, the regulations have also been clarified to provide that an exclusivity arrangement ordinarily will not result in an offer being treated as made under conditions of confidentiality if the tax shelter promoter provides express written authorization for disclosure. As modified, the written authorization rule is

applicable if the promoter expressly authorizes each offeree to disclose the structure and tax aspects of the transaction to any and all persons, without limitation of any kind on such disclosure.

In addition, the temporary regulations are modified to provide that, under section 6111(d)(2)(B), limitations on disclosure or use create a condition of confidentiality only if the limitations relate to the structure or tax aspects of the transaction and such limitations are for the benefit of any person other than the offeree.

4. Tax Shelter Promoter

The temporary regulations under section 6111(d) provide that the term tax shelter promoter includes a tax shelter organizer under section 6111(e)(1) and §301.6111-1T(Q&A-26 through Q&A-32) and any other person who participates in the organization, management or sale of a tax shelter (other than a person who merely performs services of the kind described in §301.6111-1T Q&A-33) or any person related (within the meaning of section 267 or 707) to such tax shelter organizer or such other person.

The IRS and Treasury recognize that the definition of a promoter as currently worded implies that a person can be a promoter by participating in the organization, management or sale of a tax shelter in a way other than as described in section 6111(e)(1) and §301.6111-1T(Q&A-26 through Q&A-32). The regulations under section 6111(d) are amended to clarify that a person is a promoter only if the person participates in the

organization, management or sale of a tax shelter under the rules in section 6111(e)(1) and §301.6111-1T(Q&A-26 through Q&A-33), or is related to such person under section 267 or 707(b).

The regulations are also modified to clarify that only promoters that are classified as organizers under section 6111(e)(1) are required to register tax shelters.

5. Investor List Requirement of Section 6112

Any person who organizes or sells an interest in a confidential corporate tax shelter must maintain a list of persons who were sold an interest in the tax shelter and such other information as required by section 6112. See §301.6112-1T. The temporary regulations under section 6112 require that, in addition to the lists required for confidential corporate tax shelters, lists must also be maintained with respect to transactions for which the avoidance or evasion of Federal income tax is considered to be a significant purpose of the structure of the transaction, as determined in section 6111(d)(1)(A) and §301.6111-2T(b), whether or not the transactions are offered under conditions of confidentiality.

Section 6111(d)(1)(A) provides that the term tax shelter includes any entity, plan, arrangement, or transaction a significant purpose of the structure of which is the avoidance or evasion of Federal income tax for a direct or indirect participant which is a corporation. The temporary regulations cross-reference section 6111(d)(1)(A) to provide the standard for determining whether the structure of a transaction has a

significant purpose of avoidance or evasion of Federal income tax. The temporary regulations are amended to provide that a transaction may be subject to the list maintenance requirement whether or not the transaction is offered to corporate investors. Thus, a list of noncorporate investors will be required to be maintained whether or not the transaction is ever offered to a corporate investor. However, as discussed below, the temporary regulations are modified to include fee and tax reduction thresholds for list maintenance.

Two additional modifications are made to the temporary regulations. First, the definitions of organizer and seller are clarified for purposes of section 6112. Second, the procedure for designating a person to maintain the list under section 6112 is modified for transactions other than section 6111(c) shelters and projected income investments.

6. Tax Reduction and Fee Thresholds for Investor List Requirement of Section 6112

The temporary regulations under section 6112 do not limit the investors who must be included on the list. In response to comments, the IRS and Treasury have determined that in certain cases organizers and sellers of interests in potentially abusive tax shelters should be required to include on the list only investors that meet fee and tax reduction thresholds. Accordingly, the temporary regulations under section 6112 are amended to provide that, for a potentially abusive tax shelter that is not required to be registered under section 6111, is not

a listed transaction described in §301.6111-2T(b)(2), and is not a projected income investment as described in §301.6111-1T A-57A, an organizer or seller of an interest in a shelter may, but is not required to, list an investor if the total consideration paid to all organizers and sellers with respect to such investor's acquisition of the interest is less than \$25,000, or if the organizer reasonably believes that such investor's acquisition of the interest will not result in a reduction of the Federal income tax liability of any corporation or corporations that exceeds, or exceeds in the aggregate, \$1 million in any single taxable year or a total of \$2 million for any combination of taxable years and will not result in a reduction of the Federal income tax liability of any noncorporate taxpayer or taxpayers that exceeds, or exceeds in the aggregate, \$250,000 in any single taxable year or a total of \$500,000 for any combination of taxable years.

7. Effective Date

The regulations are applicable August 11, 2000. However, in general, taxpayers may rely on the regulations after February 28, 2000.

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 has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because these regulations impose no new

collection of information on small entities, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Catherine Moore, 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 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 parts 1 and 301 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 1.6011-4T is amended as follows:

1. The first sentence of paragraph (a) is revised.

2. Paragraph (d)(1), second sentence, is amended by removing the language "LM:PF" and adding "LM:PFTG:OTSA" in its place.

3. Paragraphs (e) and (g) are revised.

The revisions read as follows:

§1.6011-4T Requirement of statement disclosing participation in certain transactions by corporate taxpayers (Temporary).

(a) In general. Every taxpayer that is required to file a return for a taxable year with respect to a tax imposed under section 11, 594, 801, or 831 and that has participated, directly or indirectly, in a reportable transaction within the meaning of paragraph (b) of this section must attach to its return for the taxable year described in paragraph (d) of this section a disclosure statement in the form prescribed by paragraph (c) of this section. * * *

* * * * *

(e) Retention of documents. 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 facts of the transaction, the expected tax treatment of the transaction, or the corporation's decision to participate in the transaction. Such documents must be retained until the expiration of the statute of limitations applicable to the first taxable year for which disclosure of the transaction was made in accordance with the requirements of this section.

(This document retention requirement is in addition to any

document retention requirements that section 6001 generally imposes on the taxpayer.) Such documents generally include, but are not limited to, the following: marketing materials related to the transaction; written analyses used in decision-making related to the transaction; correspondence and agreements between the taxpayer and any promoter, advisor, lender, or other party to the reportable transaction that relate to the transaction; documents discussing, referring to, or demonstrating the tax benefits arising from the reportable transaction; and documents, if any, referring to the business purposes for the reportable transaction.

* * * * *

(g) Effective date. This section applies to Federal corporate income tax returns filed after February 28, 2000. However, paragraphs (a) and (e) of this section apply to Federal corporate income tax returns filed after August 11, 2000 and to documents and other records that the taxpayer acquires, prepares, or has in its possession on or after August 11, 2000. Taxpayers may rely on the rules in paragraphs (a) and (e) of this section for Federal corporate income tax returns filed after February 28, 2000, and for documents and other records that the taxpayer acquires, prepares, or has in its possession on or after February 28, 2000. Otherwise, the rules that apply with respect to Federal corporate income tax returns filed after February 28, 2000, and records that the taxpayer acquires, prepares, or has in its possession prior to August 11, 2000, are contained in

§1.6011-4T in effect prior to August 11, 2000 (see 26 CFR part 1 revised as of April 1, 2000).

PART 301--PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 continues to read in part as follows:

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

Par. 4. Section 301.6111-2T is amended as follows:

1. Paragraph (b)(3)(ii) is amended by removing the word "corporate".
2. Paragraph (c) is amended as follows:
 - a. The last two sentences of paragraph (c)(1) are revised.
 - b. Paragraph (c)(2) is revised.
 - c. Paragraph (c)(3) is added.
3. Paragraphs (f) and (g)(1) are revised.
4. Paragraph (h) is amended by adding three sentences at the end of the paragraph.

The revisions and additions read as follows:

§301.6111-2T Confidential corporate tax shelters (temporary).

* * * * *

(c) * * * (1) * * * Pursuant to section 6111(d)(2)(B), an offer will also be considered made under conditions of confidentiality in the absence of any such understanding or agreement if any tax shelter promoter knows or has reason to know that the offeree's use or disclosure of information relating to the structure or tax aspects of the transaction is limited for the benefit of any person other than the offeree in any other

manner, such as where the transaction is claimed to be proprietary or exclusive to the tax shelter promoter or any party other than the offeree. An offeree's privilege to maintain the confidentiality of a communication relating to a tax shelter in which the offeree might participate or has agreed to participate, including an offeree's confidential communication with the offeree's attorney, is not itself a condition of confidentiality.

(2) Securities law exception. An offer is not considered made under conditions of confidentiality if disclosure of the structure or tax aspects of the transaction is subject to restrictions reasonably necessary to comply with federal or state securities laws and such disclosure is not otherwise limited.

(3) Presumption. Unless facts and circumstances clearly indicate otherwise, an offer is not considered made under conditions of confidentiality if the tax shelter promoter provides express written authorization to each offeree permitting the offeree (and each employee, representative, or other agent of such offeree) to disclose the structure and tax aspects of the transaction to any and all persons, without limitation of any kind on such disclosure.

* * * * *

(f) Definition of tax shelter promoter. For purposes of section 6111(d)(2) and this section, the term tax shelter promoter includes a tax shelter organizer and any other person who participates in the organization, management or sale of a tax shelter (as those persons are described in section 6111(e)(1) and

§301.6111-1T (Q&A-26 through Q&A-33) or any person related (within the meaning of section 267 or 707) to such tax shelter organizer or such other person.

(g) Person required to register--(1) Tax shelter promoters. The rules in section 6111(a) and (e) and §301.6111-1T (Q&A-34 through Q&A-39) determine who is required to register a confidential corporate tax shelter. A promoter of a confidential corporate tax shelter must register the tax shelter only if it is a person required to register under the rules in section 6111(a) and (e) and §301.6111-1T (Q&A-34 through Q&A-39).

* * * * *

(h) * * * However, paragraphs (b)(3)(ii), (c)(1),(2) and (3), (f), and (g)(1) of this section apply to confidential corporate tax shelters in which any interests are offered for sale after August 11, 2000. The rules in paragraphs (b)(3)(ii), (c)(1),(2) and (3), (f), and (g)(1) of this section may be relied upon for confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. Otherwise, the rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, are contained in §301.6111-2T in effect prior to August 11, 2000 (see 26 CFR part 301 revised as of April 1, 2000).

Par. 5. Section 301.6112-1T is amended as follows:

1. A-4(a) is revised.
2. The last two sentences of A-5 are removed and a new

sentence is added in their place.

3. A-6 is amended as follows:

a. Paragraph (b) is amended by removing the language "and" at the end of the paragraph.

b. Paragraph (c) is amended by removing the period at the end of the paragraph and adding "; and" in its place.

c. Paragraph (d) is added immediately after paragraph (c).

4. The last sentence of A-7 is revised.

5. A-8 is amended as follows:

a. In A-8, introductory text and paragraphs (a) through (e) are redesignated as paragraph (a) introductory text and paragraphs (a)(1) through (a)(5), respectively.

b. New paragraph (b) is added immediately after Example (2) in newly designated paragraph (a)(5).

6. The last two sentences of A-9 are amended by removing the language "paragraph (e)" and adding "paragraph(a)(5)" in its place.

7. One sentence is added at the end of A-10.

8. A-11 is amended as follows:

a. In A-11, introductory text and paragraphs (a) and (b) are redesignated as paragraph (a) introductory text and paragraphs (a)(1) and (a)(2), respectively.

b. New paragraph (b) is added.

9. A-17 is amended as follows:

a. Paragraph (a)(3) is revised.

b. Paragraph (c) is added.

10. The first and second sentences of A-19 are amended by removing the language "paragraph (d) or paragraph (e)" and adding "paragraph (a)(4) or (5)" in its place.

11. A-22 is amended by adding three sentences before the last sentence.

The additions and revisions read as follows:

§301.6112-1T Questions and answers relating to the requirement to maintain a list of investors in potentially abusive tax shelters (temporary).

* * * * *

A-4.(a) Yes; for purposes of the list requirement, a tax shelter includes any tax shelter that is a projected income investment, as defined in §301.6111-1T A-57A, and any transaction a significant purpose of the structure of which is the avoidance or evasion of Federal income tax within the meaning of section 6111(d)(1)(A) and §301.6111-2T(b) (whether or not offered to any direct or indirect corporate participant). For this purpose, as under §301.6111-2T, the term transaction includes all of the factual elements necessary to support the tax benefits that are expected to be claimed with respect to any entity, plan, or arrangement, including any series of related steps carried out as part of a prearranged plan.

* * * * *

A-5. * * * In addition, an organizer is any other person who participates in the organization or management of the tax shelter within the meaning of §301.6111-1T A-28 or A-29, except those

persons whose activities do not constitute participation in the organization or management of a tax shelter under §301.6111-1T A-30 or A-33.

* * * * *

A-6. * * *

(d) Any other person who receives consideration in connection with another person's right to participate in a tax shelter, for services necessary to the organization or structure of such tax shelter (other than services that do not constitute participation in the organization or management of a tax shelter under §301.6111-1T A-30 or A-33), or for information that is integral to participation in such tax shelter.

* * * * *

A-7. * * * In addition, in any case in which a person has directly or indirectly paid consideration to an organizer or seller for the right to participate in a tax shelter, for services necessary to the organization or structure of such tax shelter (other than services that do not constitute participation in the organization or management of a tax shelter under §301.6111-1T A-30 or A-33), or for information that is integral to participation in such tax shelter, the participant shall be considered to have acquired an interest in the tax shelter and to have been sold an interest in the tax shelter by the organizer or seller.

* * * * *

A-8. * * *

(b) An organizer may, but is not required to, list a person that acquired an interest in a potentially abusive tax shelter if the shelter is not subject to registration under section 6111, is not a listed transaction described in §301.6111-2T(b)(2), and is not a projected income investment described in §301.6111-1T A-57A, if the total consideration paid to all organizers and sellers with respect to such person's acquisition of the interest is less than \$25,000, or if the organizer reasonably believes that such person's acquisition of the interest will not result in a reduction of the Federal income tax liability of any corporation or corporations that exceeds, or exceeds in the aggregate, \$1 million in any single taxable year or a total of \$2 million for any combination of taxable years and will not result in a reduction of the Federal income tax liability of any noncorporate taxpayer or taxpayers that exceeds, or exceeds in the aggregate, \$250,000 in any single taxable year or a total of \$500,000 for any combination of taxable years. For purposes of this paragraph (b), the fees paid by or to, and the tax savings of, persons related within the meaning of section 267 or section 707(b) are aggregated.

* * * * *

A-10. * * * However, a seller may, but is not required to, list a person that is described in A-8(b) of this section.

* * * * *

A-11. * * *

(b) In the case of a confidential corporate tax shelter

under section 6111(d) and §301.6111-2T or a tax shelter described in Q&A-4 of this section (other than one required to be registered under section 6111(c) or a projected income investment as described in §301.6111-1T A-57A), the rules contained in A-11(a)(1), A-13(a)(2), the second sentence of A-13(b), A-13(c) and A-14 of this section do not apply.

* * * * *

A-17. (a) * * *

(3) The name, address, and TIN (as defined in section 7701(a)(41)) of each person who is required to be included on the list under A-8 or A-10 of this section and, in the case of a tax shelter that is a transaction described in section 6111(d)(1)(A) and §301.6111-2T(b) whether or not the direct or indirect participant is a corporation, the name, address, and TIN of each investor and any indirect corporate participant in the shelter if known to the organizer or seller;

* * * * *

(c) No information needs to be included on a list with regard to any tax shelter for which no person is an investor required to be included on the list under A-8(b) or A-10 of this section.

* * * * *

A-22. * * * However, the rules in A-4(a), A-5, A-6(d), A-7, A-8(b), A-10, A-11(b), and A-17(a)(3) and (c) of this section apply to any interest acquired by an investor (within the meaning of paragraph (c) of A-6 of this section) in a potentially abusive

tax shelter after August 11, 2000. The rules in A-4(a), A-5, A-6(d), A-7, A-8(b), A-10, A-11(b), and A-17(a)(3) and (c) of this section may be relied upon for any interest acquired by an investor (within the meaning of paragraph (c) of A-6 of this section) in a potentially abusive tax shelter after February 28, 2000. Otherwise, the rules that apply with respect to interests acquired in potentially abusive tax shelters after February 28, 2000, are contained in §301.6112-1T in effect prior to August 11, 2000 (see 26 CFR part 301 revised as of April 1, 2000). * * *

Robert E. Wenzel

Deputy Commissioner of Internal Revenue

Approved: **8-8-00**

Jonathan Talisman

Acting Assistant Secretary of the Treasury