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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9352]

RIN 1545-BE28

AJCA Modifications to the Section 6112 Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 6112 of the Internal Revenue Code that provide the rules relating to the obligation of material advisors to prepare and maintain lists with respect to reportable transactions. These regulations affect 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:

Paperwork Reduction Act

The collections of information contained in this final regulation have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1686.

Responses to these collections of information are mandatory. 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 assigned by the Office of Management and Budget.

The estimated annual burden per recordkeeper for the collection of information in §301.6112-1 is 100 hours and the estimated number of recordkeepers is 500.

Comments concerning the accuracy of these burden estimates and suggestions for reducing these burdens should be sent to **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224, and to the **Office of Management and Budget**, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books and records relating to these collections 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 information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final regulations that amend 26 CFR part 301 by amending the rules relating to the list maintenance requirements of material advisors with respect to reportable transactions under section 6112.

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 6112 to provide that each material advisor (as defined in section 6111, as amended by the AJCA) with respect to any reportable transaction is required to maintain a list (in such manner as the Secretary may by regulations prescribe) identifying each person with respect to whom the advisor acted as a material advisor with respect to the

transaction, and containing other information as the Secretary may by regulations require. Section 815 of the AJCA is effective for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004. Prior to the amendments to section 6111 made by the AJCA, the definition of material advisor was in §301.6112-1 of the Procedure and Administration Regulations.

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

Furnishing of Lists

The proposed regulations provided that each material advisor must prepare and maintain a list for each reportable transaction. The proposed regulations also provided that each list must include three components: an itemized statement, a description of the transaction, and documents. Further, the proposed regulations provided that each

material advisor responsible for maintaining a list must, upon written request by the IRS, make each component of the list available to the IRS by furnishing each component of the list to the IRS within 20 business days from the day on which the request is provided. The proposed regulations stated that each component of the list must be furnished to the IRS in a form that enables the IRS to determine without undue delay or difficulty the information required to be on the list. If any component of the list is not in such form, the material advisor will not be considered to have complied with the list maintenance provisions of section 6112 and the regulations thereunder.

Several commentators recommended that the proposed regulations should provide the IRS with flexibility to determine, based on the amount of information required, a production schedule that will be sufficient to avoid the imposition of penalties. Two commentators suggested providing a phased disclosure procedure. One commentator recommended that the 20 business days begin after the advisor had an adequate opportunity to gather the required information. Another commentator recommended amending the proposed regulations to provide a substantial compliance standard.

The IRS and Treasury Department believe that providing the IRS the ability to determine an alternative production schedule will benefit both taxpayers and the IRS. These final regulations remove the language regarding the period for furnishing a list or the components of the list to the IRS because that period will be addressed in forthcoming published guidance under section 6708. In addition, an alternative schedule for furnishing the list or the components of the list will be addressed in published guidance under section 6708.

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. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that most of the information is already required to be reported under the current regulations; the clarifications and new information required by the final regulations add little or no new burden to the existing requirements. Therefore, 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, 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 continues to read, in part, as follows:

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

Par. 2. Section 301.6112-1 is revised to read as follows:

§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 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 and/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 as a material advisor with respect to the reportable transaction. However, a material advisor

is not required to identify a person on the list if the person entered into a listed transaction or a transaction of interest more than 6 years before the transaction was identified in published guidance as a listed transaction or a transaction of interest.

(3) Contents. Each list must include the three components described in paragraph (b)(3)(i), (ii), and (iii) of this section.

(i) Statement. An itemized statement containing the following information--

(A) The name of each reportable transaction, the citation to the published guidance number identifying the transaction if the transaction is a listed transaction or a transaction of interest, and the reportable transaction number obtained under section 6111;

(B) The name, address, and TIN of each person required to be included on the list;

(C) The date on which each person required to be included on the list entered into each reportable transaction, if known by the material advisor;

(D) The amount invested in each reportable transaction by each person required to be included on the list, if known by the material advisor;

(E) A summary or schedule of the tax treatment that each person is intended or expected to derive from participation in each reportable transaction; and

(F) The name of each other material advisor to the transaction, if known by the material advisor.

(ii) Description of the transaction. A detailed description of each reportable transaction that describes both the tax structure of the transaction and the purported tax treatment of the transaction.

(iii) Documents. The following documents--

(A) A copy of any designation agreement (as described in paragraph (f) of this section) to

which the material advisor is a party; and

(B) Copies of any additional written materials, including tax analyses or opinions, relating to each reportable transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction that have been shown or provided to any person who acquired or may acquire an interest in the transactions, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor. However, a material advisor is not required to retain earlier drafts of a document provided the material advisor 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 such document that is material to an understanding of the purported tax treatment or the tax structure of the transaction.

(c) Definitions. For purposes of this section, the following terms are defined as:

(1) Material advisor. The term material advisor is defined in §301.6111-3(b).

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

(3) 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.

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

(5) Person. The term person is defined in §301.6111-3(c)(4).

(6) Related party. A person is a related party with respect to another person if such person bears a relationship to such other person described in section 267(b) or

707(b).

(7) Tax. The term tax is defined in §301.6111-3(c)(6).

(8) Tax benefit. The term tax benefit is defined in §301.6111-3(c)(7).

(9) Tax return. The term tax return is defined in §301.6111-3(c)(8).

(10) Tax structure. The term tax structure is defined in §301.6111-3(c)(9).

(11) Tax treatment. The term tax treatment is defined in §301.6111-3(c)(10).

(12) 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) Retention of lists. Each material advisor must maintain each component of the list described in paragraph (b)(3) of this section in a readily accessible form for seven years following the earlier of the date on which the material advisor last made a tax statement relating to the transaction, or the date the transaction was last entered into, if known. If the material advisor required to prepare, maintain, and furnish the list is a corporation, partnership, or other entity (entity) that has dissolved or liquidated before completion of the seven-year period, the person responsible under state law for winding up the affairs of the entity must prepare, maintain and furnish each component of the list on behalf of the entity, unless the entity submits the list to the Office of Tax Shelter Analysis (OTSA) within 60 days after the dissolution or liquidation. If state law does not specify any person as responsible for winding up the affairs, then each of the directors of the corporation, the general partners of the partnership, or the trustees, owners, or members of the entity are responsible for preparing, maintaining and furnishing each component of the list on behalf of the entity, unless the entity submits the list to the

OTSA within 60 days after the dissolution or liquidation. The responsible person must also provide notice to OTSA of such dissolution or liquidation within 60 days after the dissolution or liquidation. The list and the notice provided to OTSA must be sent to: Internal Revenue Service, OTSA Mail Stop 4915, 1973 North Rulon White Blvd., Ogden, Utah 84404, or to such other address as provided by the Commissioner.

(e) Furnishing of lists--(1) In general. Each material advisor responsible for maintaining a list must, upon written request by the IRS, make each component of the list described in paragraph (b)(3) of this section available to the IRS. Each component of the list must be furnished to the IRS in a form that enables the IRS to determine without undue delay or difficulty the information required in paragraph (b)(3) of this section. If any component of the list is not 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 material advisor will not be considered to have complied with the list maintenance provisions in section 6112 and this section. A material advisor must make the list or each component of the list available to the IRS within the period prescribed in section 6708 or published guidance relating to section 6708.

(2) Claims of privilege. Each material advisor who is required to maintain a list with respect to a reportable transaction, must still maintain the list pursuant to the requirements of this section even if a person asserts a claim of privilege with respect to the information specified in paragraph (b)(3)(iii)(B) of this section.

(f) Designation agreements. If more than one material advisor is required to maintain a list of persons for a reportable transaction, in accordance with paragraph (b) of this section, the material advisors may designate by written agreement a single

material advisor to maintain the list or a portion of the list. The designation of one material advisor to maintain the list does not relieve the other material advisors from their obligation to furnish the list to the IRS in accordance with paragraph (e)(1) of this section, if the designated material advisor fails to furnish the list to the IRS in a timely manner. A material advisor is not relieved from the requirement of this section because a material advisor is unable to obtain the list from any designated material advisor, any designated material advisor did not maintain a list, or the list maintained by any designated material advisor is not complete.

(g) Effective/applicability date. In general, this section applies to transactions with respect to which a material advisor makes a tax statement under §301.6111-3 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. Otherwise, the rules that apply before August 3, 2007 are contained in §301.6112-1 in effect prior to August 3, 2007 (see 26 CFR part 301 revised as of April 1, 2007, and see also 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) of this chapter).

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

Approved: July 25, 2007.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).