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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 20, 25, 31, 53, 54, 56, and 301

[TD 9017]

RIN 1545-BB32

Tax Shelter Disclosure Statements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: These temporary regulations modify the rules relating to the filing by certain taxpayers of a disclosure statement with their Federal tax returns under section 6011(a) and include conforming changes to the rules relating to the registration of confidential corporate tax shelters under section 6111(d). These regulations affect taxpayers participating in reportable transactions and persons responsible for registering confidential corporate 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 January 1, 2003.

Applicability Date: For dates of applicability, see §1.6011-4T(h), §20.6011-4T(b), §25.6011-4T(b), §31.6011-4T(b), §53.6011-4T(b), §54.6011-4T(b), §56.6011-4T(b), and §301.6111-2T(h).

FOR FURTHER INFORMATION CONTACT: Tara P. Volungis, Danielle M. Grimm, or Charlotte Chyr, 202-622-3070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in these regulations have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control numbers 1545-1685 and 1545-1687. 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.

For further information concerning these collections of information, and where to submit comments on the collections of information and the accuracy of the estimated burden, and

suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books and 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 reportable transactions by certain taxpayers on their Federal income tax returns under section 6011 and includes conforming changes to the rules regarding the registration of confidential corporate tax shelters under section 6111. This document also amends 26 CFR parts 20, 25, 31, 53, 54, and 56 to provide rules for purposes of estate, gift, employment, and pension and exempt organizations excise taxes requiring the disclosure of listed transactions by certain taxpayers on their Federal tax returns under section 6011.

On February 28, 2000, the IRS issued temporary and proposed regulations regarding sections 6011 and 6111 (TD

8877, REG-103735-00; TD 8876, REG-110311-98)) (the February 2000 regulations). The February 2000 regulations were published in the **Federal Register** (65 FR 11205, 65 FR 11269; 65 FR 11215, 65 FR 11272) on March 2, 2000. On August 11, 2000, the IRS issued temporary and proposed regulations modifying the rules under sections 6011 and 6111 (TD 8896, REG-103735-00, REG-110311-98) (the August 2000 regulations). The August 2000 regulations were published in the **Federal Register** (65 FR 49909, 65 FR 49955) on August 16, 2000. On August 2, 2001, the IRS issued temporary and proposed regulations modifying the rules under sections 6011 and 6111 (TD 8961, REG-103735-00, REG-110311-98) (the August 2001 regulations). The August 2001 regulations were published in the **Federal Register** (66 FR 41133, 66 FR 41169) on August 7, 2001. On June 14, 2002, the IRS issued temporary and proposed regulations modifying the rules under sections 6011 and 6111 (TD 9000, REG-103735-00, REG-110311-98) (the June 2002 regulations). The June 2002 regulations were published in the **Federal Register** (67 FR 41324, 67 FR 41362) on June 18, 2002.

The rules under sections 6011, 6111, and 6112 for disclosure, registration, and list maintenance are intended to provide the IRS and Treasury with information needed to

evaluate potentially abusive transactions. The IRS and Treasury have considered and evaluated compliance with those rules, and have determined that certain additional changes to the current temporary and proposed regulations are necessary to improve compliance and to carry out the purposes of sections 6011, 6111, and 6112. On March 20, 2002, Treasury released its Plan to Combat Abusive Tax Avoidance Transactions (PO-2018), which describes changes to the rules under sections 6011, 6111, and 6112 that will establish a more effective disclosure regime and improve compliance. See <http://www.treas.gov/press/releases/po2018.htm>.

The amended temporary regulations under section 6011 revise the categories of transactions that must be disclosed on returns. Certain conforming changes are being made to the temporary regulations under section 6111. Concurrent with these amended temporary regulations under sections 6011 and 6111, the IRS and Treasury are publishing elsewhere in this issue of the **Federal Register** temporary regulations under section 6112. The amendments to the temporary regulations under section 6112 generally require organizers and sellers (material advisors) to maintain lists of persons for transactions required to be registered under section 6111 and for reportable transactions subject to disclosure under

§1.6011-4T, 20.6011-4T, 25.6011-4T, 31.6011-4T, 53.6011-4T, 54.6011-4T, or 56.6011-4T.

Pending legislation would modify section 6111 to require registration of transactions that are required to be disclosed under section 6011. The IRS and Treasury intend to revise the regulations under section 6111 when such legislation is enacted.

Explanation of Provisions

1. In General

Section 1.6011-4T generally provides that certain taxpayers must disclose their direct or indirect participation in reportable transactions when they file their Federal income tax returns. Under the current temporary regulations, in the case of a partnership or an S corporation that participates in a listed transaction, that partnership or S corporation must disclose its participation and the partners and shareholders also must disclose their participation in the listed transaction. A reportable transaction is either: (1) a listed transaction, or (2) a transaction that meets two of five characteristics, satisfies a projected tax effect test, and does not satisfy any of the exceptions provided in the regulations. The IRS and Treasury have found that taxpayers are interpreting the five characteristics in an overly narrow

manner and are interpreting the exceptions in an overly broad manner.

These new temporary regulations provide more objective rules. The regulations redefine a reportable transaction as a transaction that satisfies any one of six categories of transactions. The regulations also eliminate the projected tax effect test and the general exceptions. The six categories of reportable transactions are: listed transactions, confidential transactions, transactions with contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period. Further, the new temporary regulations require disclosure of participation in reportable transactions by all direct and indirect participants. Disclosure must be made on Form 8886, "Reportable Transaction Disclosure Statement", which will be available when these regulations become effective.

A provision has been added to §1.6011-4T allowing taxpayers to request a ruling as to whether a transaction must be disclosed under §1.6011-4T. A transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction, if the Commissioner makes a determination, by published guidance,

individual ruling under §1.6011-4T, or otherwise, that the transaction is not subject to the disclosure requirements of §1.6011-4T. While some exceptions to the disclosure requirements are included in these regulations, the IRS and Treasury specifically request comments on particular types of transactions that should be either treated as not subject to the disclosure requirements of §1.6011-4T or excluded from an individual category of reportable transaction.

The major changes to the categories of reportable transactions are discussed below.

2. Confidential Transactions

A confidential transaction is a transaction that is offered under conditions of confidentiality, unless the presumption in the regulations regarding written authorization to disclose the structure and tax aspects of the transaction is satisfied. These regulations clarify, however, that the presumption is available only in cases in which the written authorization to disclose is effective without limitation of any kind from the commencement of discussions.

3. Loss Transactions

A loss transaction is any transaction resulting in, or that is reasonably expected to result in, a loss under section 165 of at least: \$10 million in any single taxable year or \$20

million in any combination of taxable years for corporations; \$5 million in any single taxable year or \$10 million in any combination of taxable years for partnerships or S corporations, whether or not any losses flow through to one or more partners or shareholders; \$2 million in any single taxable year or \$4 million in any combination of taxable years for individuals or trusts, whether or not any losses flow through to one or more beneficiaries; and \$50,000 in any single taxable year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership, if the loss arises with respect to a section 988 transaction (as defined in section 988(c)(1) relating to foreign currency transactions). In determining the monetary thresholds, the amount of a section 165 loss is adjusted for any salvage value and for any insurance or other compensation received. However, a section 165 loss does not take into account offsetting gains or other income or limitations.

A section 165 loss includes an amount deductible by virtue of a provision that treats a transaction as a sale or other disposition, or otherwise results in a deduction under section 165. A section 165 loss includes, for example, a loss resulting from a sale or exchange of a partnership interest under section 741 and a loss resulting from a section 988

transaction. Under these regulations, casualty losses and losses resulting from involuntary conversions are not subject to the disclosure requirements under §1.6011-4T.

The IRS and Treasury also are considering adding two other exceptions. One exception would be for losses resulting from a sale of securities on an established securities market within the meaning of §1.7701-1(b), but only if the amount of basis used in computing the amount of the loss is equal to the amount of cash paid by the taxpayer for the securities. The other potential exception would be for losses claimed under section 475(a) or section 1296(a). The IRS and Treasury specifically request comments on whether these or other exceptions should be added to the regulations.

4. Transactions with a Significant Book-Tax Difference

A transaction with a significant book-tax difference is a transaction where the treatment for Federal income tax purposes of any item or items from the transaction differs, or is reasonably expected to differ, by more than \$10 million on a gross basis from the treatment of the item or items for book purposes in any taxable year. When making this determination, offsetting items are not netted for either tax or book purposes. Book income is determined by applying U.S. generally accepted accounting principles (GAAP) for worldwide

income.

This category of transaction generally applies to taxpayers that are reporting companies under the Securities Exchange Act of 1934 (15 USCS 78a) (and related business entities) and to business entities that have \$100 million or more in gross assets. Specific rules are provided for taxpayers that file consolidated returns, foreign persons, disregarded entities, partnerships, and shareholders of certain foreign corporations. For example, where a taxpayer is considered to participate in a transaction indirectly through a partnership or foreign corporation, items from the transaction that otherwise may be considered items of the partnership or foreign corporation (for tax or book purposes) are treated as items of the taxpayer (to the extent of the taxpayer's allocable share). The mere fact that an item may be reported by different persons for tax and book purposes (e.g., on the taxpayer's U.S. tax return and on the entity's books and records), without more, is not considered a significant book-tax difference in such cases. Instead, the taxpayer must test such items for a book-tax difference in the same manner as items from a transaction in which the taxpayer participated directly.

The regulations provide various exceptions for this

category of transaction. The IRS and Treasury specifically request comments on the exceptions and whether other exceptions should be provided.

5. Transactions Involving a Brief Asset Holding Period

A transaction involving a brief asset holding period is a transaction resulting in, or that is reasonably expected to result in, a tax credit exceeding \$250,000 (including a foreign tax credit) if the underlying asset giving rise to the credit is held by the taxpayer for less than 45 days. For purposes of determining the holding period, the principles in section 246(c)(3) and (c)(4) apply.

6. Application of Section 6011 to Estate, Gift, Employment, and Pension and Exempt Organizations Excise Taxes

A listed transaction that involves Federal estate, gift, employment, or pension or exempt organizations excise taxes must be disclosed in accordance with published guidance identifying such transaction as a listed transaction.

Effective Date

These regulations apply to transactions entered into on or after January 1, 2003.

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. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these 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 authors of these regulations are Tara P. Volungis, Danielle M. Grimm, and Charlotte Chyr, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 20

Estate tax, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

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

26 CFR Part 53

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

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 56

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

26 CFR Part 301

Administrative practice and procedure, 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, 20, 25, 31, 53, 54, 56, 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 revised to read as follows:

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

(a) In general. Every taxpayer 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 (e) of this section a disclosure statement in the form prescribed by paragraph (d) of this section. The fact that a transaction is a reportable transaction shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper.

(b) Reportable transactions--(1) In general. A reportable transaction is a transaction described in any of the paragraphs (b)(2) through (7) of this section. The term transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan, and any series of substantially similar transactions entered into in the same taxable year. There are six categories of reportable transactions: listed transactions, confidential transactions, transactions with

contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period.

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

(3) Confidential transactions--(i) In general. A confidential transaction is a transaction that is offered under conditions of confidentiality. All the facts and circumstances relating to the transaction will be considered when determining whether a transaction is offered under conditions of confidentiality, including the prior conduct of the parties. If a taxpayer'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 person who makes or provides a statement, oral or written, (or for whose benefit a statement is made or provided) as to the potential tax consequences that may result from the transaction, a transaction is considered offered under conditions of confidentiality, whether or not such

understanding or agreement is legally binding. A transaction also will be considered offered under conditions of confidentiality if the taxpayer knows or has reason to know that the taxpayer's use or disclosure of information relating to the structure or tax aspects of the transaction is limited in any other manner (such as where the transaction is claimed to be proprietary or exclusive) for the benefit of any person, other than the taxpayer, who makes or provides a statement, oral or written, (or for whose benefit a statement is made or provided) as to the potential tax consequences that may result from the transaction.

(ii) Privilege. A taxpayer's privilege to maintain the confidentiality of a communication relating to a reportable transaction in which the taxpayer might participate or has agreed to participate, including a taxpayer's confidential communication with the taxpayer's attorney, is not itself a condition of confidentiality.

(iii) Securities law exception. A transaction is not considered offered 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.

(iv) Presumption. Unless the facts and circumstances indicate otherwise, a transaction is not considered offered under conditions of confidentiality if every person who makes or provides a statement, oral or written, (or for whose benefit a statement is made or provided) as to the potential tax consequences that may result from the transaction, provides express written authorization to the taxpayer permitting the taxpayer (and each employee, representative, or other agent of such taxpayer) to disclose to any and all persons, without limitation of any kind, the structure and tax aspects of the transaction, and all materials of any kind (including opinions or other tax analyses) that are provided to the taxpayer related to such structure and tax aspects. This presumption is available only in cases in which the written authorization to disclose is effective without limitation of any kind from the commencement of discussions.

(4) Transactions with contractual protection. A transaction with contractual protection is a transaction for which the taxpayer has obtained or been provided with contractual protection against the possibility that part or all of the intended tax consequences from the transaction will not be sustained, including, but not limited to, rescission rights, the right to a full or partial refund of fees paid to

any person, fees that are contingent on the taxpayer's realization of tax benefits from the transaction, insurance protection with respect to the tax treatment of the transaction, or a tax indemnity or similar agreement (other than a customary indemnity provided by a principal to the transaction that did not participate in the promotion or offering of the transaction to the taxpayer). Notwithstanding the foregoing, a transaction will not be considered to have contractual protection solely because the issuer of a debt instrument agrees to pay additional interest to compensate the holder of such debt instrument for withholding tax imposed on interest paid on the debt instrument, or because the requirement to pay such additional interest entitles the issuer to redeem the debt instrument.

(5) Loss transactions--(i) In general. A loss transaction is any transaction resulting in, or that is reasonably expected to result in, a taxpayer claiming a loss under section 165 of at least--

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

(B) \$5 million in any single taxable year or \$10 million in any combination of taxable years for partnerships or S corporations, whether or not any losses flow through to one or

more partners or shareholders;

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

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

(ii) Section 165 loss. (A) For purposes of this section, in determining the thresholds in paragraph (b)(5)(i) of this section, the amount of a section 165 loss is adjusted for any salvage value and for any insurance or other compensation received. See §1.165-1(c)(4). However, a section 165 loss does not take into account offsetting gains or other income or limitations. For example, a section 165 loss does not take into account the limitation in section 165(d)(relating to wagering losses) or the limitations in sections 165(f), 1211, and 1212 (relating to capital losses).

(B) For purposes of this section, a section 165 loss includes an amount deductible by virtue of a provision that treats a transaction as a sale or other disposition, or

otherwise results in a deduction under section 165. A section 165 loss includes, for example, a loss resulting from a sale or exchange of a partnership interest under section 741 and a loss resulting from a section 988 transaction.

(iii) Exceptions. Transactions that result in the following losses under section 165 are not loss transactions under this paragraph (b)(5)--

(A) A loss from fire, storm, shipwreck, or other casualty, or from theft, as defined in section 165(c)(3); or

(B) A loss from a compulsory or involuntary conversion as described in section 1231(a)(3)(A)(ii) and section 1231(a)(4)(B).

(6) Transactions with a significant book-tax difference--

(i) In general. A transaction with a significant book-tax difference is a transaction where the treatment for Federal income tax purposes of any item or items from the transaction differs, or is reasonably expected to differ, by more than \$10 million on a gross basis from the treatment of the item or items for book purposes in any taxable year. For purposes of this determination, offsetting items shall not be netted for either tax or book purposes. For purposes of this paragraph (b)(6), book income is determined by applying U.S. generally accepted accounting principles (GAAP) for worldwide income.

Adjustments to any reserve for taxes are disregarded for purposes of determining the book-tax difference.

(ii) Applicability--(A) In general. This paragraph (b)(6) applies only to--

(1) Taxpayers that are reporting companies under the Securities Exchange Act of 1934 (15 USCS 78a) and related business entities (as described in section 267(b) or 707(b)); or

(2) Business entities that have \$100 million or more in gross assets (the assets of all related business entities (as defined in section 267(b) or 707(b)) must be aggregated).

(B) Consolidated returns. For purposes of this paragraph (b)(6), in the case of taxpayers that are members of a group of affiliated corporations filing a consolidated return, transactions solely between or among members of the group will be disregarded. Moreover, where two or more members of the group participate in a transaction that is not solely between or among members of the group, items shall be aggregated (as if such members were a single taxpayer), but any offsetting items shall not be netted.

(C) Foreign persons. In the case of a taxpayer that is a foreign person (other than a foreign corporation that is

treated as a domestic corporation for Federal tax purposes under section 269B, 953(d), 1504(d) or any other provision of the Internal Revenue Code), only assets that are U.S. assets under §1.884-1(d) shall be taken into account for purposes of paragraph (b)(6)(ii)(A)(2) of this section, and only transactions that give rise to income that is effectively connected with the conduct of a trade or business within the United States (or to losses, expenses, or deductions allocated or apportioned to such income) shall be taken into account for purposes of this paragraph (b)(6).

(D) Owners of disregarded entities. In the case of an eligible entity that is disregarded as an entity separate from its owner for Federal tax purposes, items of income, loss, expense, or deduction that otherwise are considered items of the entity for book purposes shall be treated as items of its owner, and items arising from transactions between the entity and its owner shall be disregarded, for purposes of this paragraph (b)(6).

(E) Partners of partnerships. In the case of a taxpayer that is a member or a partner of an entity that is treated as a partnership for Federal tax purposes, items of income, loss, expense, or deduction that are allocable to the taxpayer for Federal tax purposes but otherwise are considered items of the

entity for book purposes shall be treated as items of the taxpayer, for purposes of this paragraph (b)(6).

(F) Shareholders of certain foreign corporations. To the extent that a taxpayer is considered under paragraph (c)(3)(ii) of this section to have indirectly participated in a transaction to which a foreign corporation is a direct party, all items from the transaction that otherwise are considered items of the foreign corporation for Federal tax purposes or book purposes shall be considered items of the taxpayer for purposes of this paragraph (b)(6).

(iii) Exceptions. Items listed in paragraphs (b)(6)(iii)(A) through (M) of this section are not items for which reporting is required under this paragraph (b)(6).

(A) Items to the extent a book loss or expense is reported before or without a loss or deduction for Federal income tax purposes.

(B) Items to the extent income or gain for Federal income tax purposes is reported before or without book income or gain.

(C) Depreciation, depletion, and amortization relating solely to differences in methods, lives (for example, useful lives, recovery periods), or conventions.

(D) Bad debts or cancellation of indebtedness income.

(E) Federal, state, local, and foreign taxes.

(F) Compensation of employees and independent contractors, including stock options and pensions.

(G) Items that for Federal tax purposes cannot be deducted or capitalized, such as certain payments for meals and entertainment, and certain fines and penalties.

(H) Charitable contributions of cash or tangible property.

(I) Tax exempt interest, including municipal bond interest.

(J) Dividends, including amounts treated as dividends under section 78, distributions of previously taxed income under sections 959 and 1293, and income inclusions under sections 551, 951, and 1293.

(K) Items resulting from transactions under section 1033.

(L) Gains and losses arising under section 475 or section 1296.

(M) Section 481 adjustments.

(7) Transactions involving a brief asset holding period.

A transaction involving a brief asset holding period is a transaction resulting in, or that is reasonably expected to result in, a tax credit exceeding \$250,000 (including a foreign tax credit) if the underlying asset giving rise to the

credit is held by the taxpayer for less than 45 days. For purposes of determining the holding period, the principles in section 246(c)(3) and (c)(4) apply.

(8) Exceptions--(i) In general. A transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction under paragraphs (b)(2) through (7) of this section, if the Commissioner makes a determination, by published guidance, individual ruling under paragraph (f) of this section, or otherwise, that the transaction is not subject to the reporting requirements of this section.

(ii) Special rules for RICs. For purposes of this section, a regulated investment company as defined in section 851 is not required to disclose transactions described in paragraph (b)(5) or (6) of this section.

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

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

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

(3) Indirect participation--(i) In general. A taxpayer will have indirectly participated in a reportable transaction if the taxpayer's Federal tax liability is affected (or in the case of a partnership or an S corporation, if a partner's or shareholder's Federal tax liability is reasonably expected to be affected) by the transaction even if the taxpayer is not a direct party to the transaction (e.g., the taxpayer participates as a partner in a partnership, as a shareholder in an S corporation, or through a trust or a controlled entity). Moreover, a taxpayer will have indirectly participated in a reportable transaction if the taxpayer knows or has reason to know that the tax benefits claimed from the taxpayer's transaction are derived from a reportable transaction.

(ii) Shareholders of foreign corporations--(A) In general. A taxpayer that is a shareholder in a foreign corporation will not be considered to have participated indirectly in a transaction to which the foreign corporation is a direct party merely because the taxpayer is a shareholder

in the foreign corporation unless the taxpayer is a reporting shareholder (as defined in paragraph (c)(3)(ii)(B) of this section) and the transaction either is described in any of the paragraphs (b)(2) through (5) or in paragraph (b)(7) of this section, or reduces or eliminates an income inclusion that otherwise would be required under section 551, 951, or 1293.

(B) Reporting shareholder. For purposes of paragraph (c)(3)(ii)(A) of this section, the term reporting shareholder means a United States shareholder (as defined in section 551(a)) in a foreign personal holding company (as defined in section 552), a United States shareholder (as defined in section 951(b)) in a controlled foreign corporation (as defined in section 957), or a 10 percent shareholder (by vote or value) of a qualified electing fund (as defined in section 1295).

(iii) Example. The following example illustrates the provisions of paragraph (c)(3)(i) of this section:

Example. Notice 95-53 (1995-2 C.B. 334) (see §601.601(d)(2) of this chapter), describes a lease stripping transaction in which one party (the transferor) assigns the right to receive future payments under a lease of tangible property and receives consideration which the transferor treats as current income. The transferor later transfers the property subject to the lease in a transaction intended to qualify as a substituted basis transaction, for example, a transaction described in section 351. In return, the transferor receives stock (with low value and high basis) from the transferee corporation. The transferee corporation claims the deductions associated with the high basis property subject

to the lease. The transferor and transferee corporation have directly participated in the listed transaction. If the transferor subsequently transfers the high basis/low value stock to a taxpayer in another transaction intended to qualify as a substituted basis transaction and the taxpayer uses the stock to generate a loss, and if the taxpayer knows or has reason to know that the tax loss claimed was derived from the lease stripping transaction, then the taxpayer is indirectly participating in a reportable transaction. Accordingly, the taxpayer must disclose the reportable transaction and the manner of the taxpayer's indirect participation in the reportable transaction under the rules of this section.

(4) Substantially similar. The term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure. The following examples illustrate situations where a transaction is the same as or substantially similar to a listed transaction under paragraph (b)(2) of this section. (Such transactions may also be reportable transactions under paragraphs (b)(3) through (7) of this section.) The following examples illustrate the provisions of this paragraph (c)(4):

Example 1. Notice 2000-44 (2000-2 C.B. 255) (see §601.601(d)(2) of this chapter), sets forth a listed

transaction involving offsetting options transferred to a partnership where the taxpayer claims basis in the partnership for the cost of the purchased options but does not adjust basis under section 752 as a result of the partnership's assumption of the taxpayer's obligation with respect to the options. Transactions using short sales, futures, derivatives or any other type of offsetting obligations to inflate basis in a partnership interest would be the same as or substantially similar to the transaction described in Notice 2000-44. Moreover, use of the inflated basis in the partnership interest to diminish gain that would otherwise be recognized on the transfer of a partnership asset would also be the same as or substantially similar to the transaction described in Notice 2000-44.

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

(d) Form and content of disclosure statement. The IRS will release Form 8886, "Reportable Transaction Disclosure Statement" (or a successor form), for use by taxpayers in accordance with this paragraph (d). A taxpayer required to file a disclosure statement under this section must file a completed Form 8886 in accordance with the instructions to the form. The form must be attached to the appropriate tax

returns as provided in paragraph (e) of this section. If a copy of a disclosure statement is required to be sent to the Office of Tax Shelter Analysis (OTSA) under paragraph (e) of this section, it must be sent to: Internal Revenue Service LM:PFTG:OTSA, Large & Mid-Size Business Division, 1111 Constitution Ave., NW., Washington, DC 20224, or to such other address as provided by the Commissioner.

(e) Time of providing disclosure--(1) In general. The disclosure statement for a reportable transaction must be attached to the taxpayer's Federal income tax return for each taxable year for which the taxpayer's Federal income tax liability is affected by the taxpayer's participation in the transaction. In addition, a copy of the disclosure statement must be sent to OTSA at the same time that any disclosure statement is first filed with the taxpayer's Federal income tax return. If a reportable transaction results in a loss which is carried back to a prior year, the disclosure statement for the reportable transaction must be attached to the taxpayer's application for tentative refund or amended Federal income tax return for that prior year. In the case of a taxpayer that is a partnership or S corporation, the disclosure statement for a reportable transaction must be attached to the partnership's or S corporation's Federal

income tax return for each taxable year ending with or within the taxable year of any partner or shareholder whose income tax liability is affected or is reasonably expected to be affected by the partnership's or S corporation's participation in the transaction. If a transaction becomes a reportable transaction (e.g., the transaction subsequently becomes one identified in published guidance as a listed transaction described in paragraph (b)(2) of this section, or there is a change in facts affecting the expected Federal income tax effect of the transaction such that the transaction is reportable under any of the paragraphs (b)(5) through (7)) on or after the date the taxpayer has filed the return for the first taxable year for which the transaction affected the taxpayer's or a partner's or a shareholder's Federal income tax liability, the disclosure statement must be filed as an attachment to the taxpayer's Federal income tax return next filed after the date the transaction becomes a reportable transaction (whether or not the transaction affects the taxpayer's or any partner's or shareholder's Federal income tax liability for that year). The taxpayer must disclose the transaction in the time and manner provided for under the provisions of this section regardless of whether the taxpayer also plans to disclose the transaction under other published

guidance, for example, Rev. Proc. 94-69 (1994-2 C.B. 804) (see §601.601(d)(2) of this chapter).

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

Example. In January of 2003, F, a domestic calendar year corporation, enters into a transaction that F reasonably expects will result in an \$8 million section 165 loss in a single year and a \$15 million section 165 loss over a combination of years. Assume that the transaction is not a transaction described in any of the paragraphs (b)(2) through (7) of this section, and, therefore, is not a reportable transaction under paragraph (b) of this section. On March 1, 2005, the IRS publishes a notice identifying the transaction as a listed transaction described in paragraph (b)(2) of this section. Thus, upon issuance of the notice, the transaction becomes a reportable transaction described in paragraph (b) of this section. F is required to file Form 8886 for the transaction as an attachment to F's next filed Federal income tax return. If F's 2004 Federal income tax return has not been filed on or before the date the Service identifies the transaction as a listed transaction, the disclosure statement must be attached to F's 2004 return and at that time a copy of the form must be sent to OTSA.

(f) Rulings and protective disclosures--(1) Requests for ruling. If a taxpayer is uncertain whether a transaction must be disclosed under this section, that taxpayer may, on or before the date that disclosure would otherwise be required under this section, submit a request to the IRS for a ruling as to whether the transaction is subject to the disclosure requirements of this section. If the request fully discloses all relevant facts relating to the transaction, the potential obligation of that taxpayer to disclose the transaction will

be suspended during the period that the ruling request is pending and, if the IRS subsequently concludes that the transaction is a reportable transaction subject to disclosure under this section, until the 60th day after the issuance of the ruling (or, if the request is withdrawn, 60 days after the date that the request is withdrawn).

(2) Protective disclosures. If a taxpayer is uncertain whether a transaction must be disclosed under this section, the taxpayer may disclose the transaction in accordance with the requirements of this section, and indicate on the disclosure statement that the taxpayer is uncertain whether the transaction is required to be disclosed under this section and that the disclosure statement is being filed on a protective basis.

(g) 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 taxpayer's decision to participate in the transaction. Such documents must be retained until the expiration of the statute of limitations applicable to the final taxable year for which disclosure of the transaction was 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 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.

(h) Effective dates. This section applies to Federal income tax returns filed after February 28, 2000. However, paragraphs (a) through (g) of this section apply to transactions entered into on or after January 1, 2003. The rules that apply with respect to transactions entered into on or before December 31, 2002, are contained in §1.6011-4T in effect prior to January 1, 2003 (see 26 CFR part 1 revised as of April 1, 2002 and 2002-28 I.R.B. 90 (see §601.601(d)(2) of this chapter)).

PART 20--ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER

AUGUST 16, 1954

Par. 3. The authority citation for part 20 continues to read in part as follows:

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

Par. 4. Section 20.6011-4T is added to read as follows:
§20.6011-4T Requirement of statement disclosing participation in certain transactions by taxpayers (temporary).

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

(b) Effective date. This section applies to transactions entered into on or after January 1, 2003.

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

Par. 5. The authority citation for part 25 continues to read in part as follows:

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

Par. 6. Section 25.6011-4T is added to read as follows:
§25.6011-4T Requirement of statement disclosing participation in certain transactions by taxpayers (temporary).

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

(b) Effective date. This section applies to transactions entered into on or after January 1, 2003.

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

Par. 7. The authority citation for part 31 continues to read in part as follows:

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

Par. 8. Section 31.6011-4T is added to read as follows:
§31.6011-4T Requirement of statement disclosing participation in certain transactions by taxpayers (temporary).

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

(b) Effective date. This section applies to transactions entered into on or after January 1, 2003.

PART 53--FOUNDATION AND SIMILAR EXCISE TAXES

Par. 9. The authority citation for part 53 continues to read as follows:

Authority: 26 U.S.C. 7805

Par. 10. Section 53.6011-4T is added to read as follows:
§53.6011-4T Requirement of statement disclosing participation in certain transactions by taxpayers (temporary).

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

(b) Effective date. This section applies to transactions entered into on or after January 1, 2003.

PART 54--PENSION EXCISE TAXES

Par. 11. The authority citation for part 54 continues to read in part as follows:

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

Par. 12. Section 54.6011-4T is added to read as follows:
§54.6011-4T Requirement of statement disclosing participation
in certain transactions by taxpayers (temporary).

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

(b) Effective date. This section applies to transactions entered into on or after January 1, 2003.

PART 56--PUBLIC CHARITY EXCISE TAXES

Par. 13. The authority citation for part 56 continues to read in part as follows:

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

Par. 14. Section 56.6011-4T is added to read as follows:
§56.6011-4T Requirement of statement disclosing participation
in certain transactions by taxpayers (temporary).

(a) In general. If a transaction is identified as a "listed transaction" as defined in §1.6011-4T of this chapter by the Commissioner in published guidance (see §601.601(d)(2)

of this chapter), and the listed transaction involves an excise tax under chapter 41 of subtitle D of the Internal Revenue Code (relating to public charities), the transaction must be disclosed in the manner stated in such published guidance.

(b) Effective date. This section applies to transactions entered into on or after January 1, 2003.

PART 301--PROCEDURE AND ADMINISTRATION

Par. 15. The authority citation for part 301 continues to read in part as follows:

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

Par. 16. Section 301.6111-2T is amended as follows:

1. Paragraphs (a)(3) and (b)(3)(i) are revised.
2. Paragraph (c)(3) is amended by adding a sentence at the end of the paragraph.
3. Paragraph (h) is amended by revising the paragraph heading and removing the third sentence through the last sentence and adding two new sentences in their place.

The revisions and additions read as follows:

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

(a) * * *

(3) For purposes of this section, references to the term "transaction" include all of the factual elements relevant to

the expected tax treatment of any investment, entity, plan, or arrangement, and include any series of steps carried out as part of a plan. For purposes of this section, the term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term "substantially similar" must be broadly construed in favor of registration. For examples, see §1.6011-4T(c)(4) of this chapter.

* * * * *

(b) * * *

(3) * * *

(i) The potential participant is expected to participate in the transaction in the ordinary course of its business in a form consistent with customary commercial practice (a transaction involving the acquisition, disposition, or restructuring of a business, including the acquisition, disposition, or other change in the ownership or control of an

entity that is engaged in a business, or a transaction involving a recapitalization or an acquisition of capital for use in the taxpayer's business, shall be considered a transaction carried out in the ordinary course of a taxpayer's business); and

* * * * *

(c)

(3) * * * This presumption is available only in cases in which the written authorization to disclose is effective without limitation of any kind from the commencement of discussions.

* * * * *

(h) Effective dates. * * * However, paragraphs (a)(3), (b)(3)(i), and (c)(3) of this section apply to confidential corporate tax shelters in which any interests are offered for sale on or after January 1, 2003. The rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, and on or before December 31, 2002, are contained in §301.6111-2T in effect

prior to January 1, 2003 (see 26 CFR part 301 revised as of April 1, 2002, and 2002-28 I.R.B. 91 (see §601.601(d)(2) of this chapter)).

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: October 15, 2002

Pamela F. Olson,

Assistant Secretary of the Treasury.