

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: John W. Cardone
Assistant Deputy Commissioner
(Compliance Integration)

from: Elizabeth Girafalco Chirich *EGC*
Chief, Branch 1
(Procedure & Administration)

subject: Authority to Mandate Machine-Readable Reportable Transaction Disclosure Forms

This memorandum responds to your question of whether the Internal Revenue Service (Service) has the authority to require that taxpayers prepare and file Forms 8886, Reportable Transaction Disclosure Statement, with the Office of Tax Shelter Analysis (OTSA) in machine-readable form? Both section 6011 and the regulations under that section support the conclusion that the Service has such authority.

BACKGROUND

When a taxpayer has participated in a reportable transaction, the taxpayer must file a Form 8886 to disclose the transaction. Treas. Reg. § 1.6011-4(a) and (d). Generally, the taxpayer must attach the Form 8886 to the return for each taxable year in which the taxpayer participated in the transaction. Treas. Reg. § 1.6011-4(e). The taxpayer must also send a copy of the disclosure statement to OTSA at the same time that the taxpayer first files with a return a disclosure statement pertaining to a particular transaction. *Id.* When a transaction becomes a reportable transaction after a taxpayer has already filed a return reflecting participation in the transaction, the taxpayer generally must file a Form 8886 with OTSA within 90 days of the transaction becoming reportable. Treas. Reg. § 1.6011-4(e)(2). The taxpayer must send the Form 8886 to OTSA in accordance with the instructions to the form. Treas. Reg. § 1.6011-4(d). Currently, the Form 8886 instructions, revised December 2019, direct taxpayers to an address to mail the form. Since October 1, 2020, however, the Service has requested taxpayers file Form 8886 with OTSA via eFax.

When the IRS receives Forms 8886 on paper or by eFax, IRS employees manually input the data into an IRS data base so that IRS agents and other IRS employees can retrieve it. Manually inputting the data is time consuming and can result in errors,

affecting both the timeliness and accuracy of information that the IRS needs. To address these concerns, the Service would like to receive Forms 8886 via eFax with a two-dimensional bar code that will be machine readable.

The bar code will allow the IRS to access and use the data on the Form 8886 more quickly, to reallocate IRS employees from data-entry tasks to other priority assignments, and to avoid any inaccuracies that might have occurred in transcribing information. It will also promote IT modernization efforts. To allow the bar code to capture the data appearing on the form, taxpayers would need to use an electronic tool, available on the IRS website, to enter data into the Form 8886. To promote efficiency of OTSA's operation, the Service would like to mandate that taxpayers use the electronic tool that produces the bar code. To do this, the Service would like to change the instructions to the Form 8886 accordingly.

LAW AND ANALYSIS

Section 6011(a) authorized the regulations that require a taxpayer to file Form 8886 to disclose participation in a reportable transaction. Section 6011(a) states that “[w]hen required by regulations prescribed by the Secretary any person made liable for any tax . . . shall make a return or statement according to the forms and regulations prescribed by the Secretary.” Section 6011(a) does not explicitly state whether the Service may require use of an electronic tool to prepare a statement. Likewise, it does not prescribe a particular method for filing a statement. Instead, the statute leaves the details of making a statement to be addressed “according to forms and regulations prescribed by the Secretary.”

Section 6011(e) suggests that the general rule in section 6011(a) for the Secretary to prescribe the making of statements and returns includes authority to require filing in magnetic media or machine-readable form because paragraph (e) affirmatively directs the Secretary to prescribe regulations regarding which returns must be filed on magnetic media or in other machine-readable form and limits the requirements that the Service may impose on returns in certain circumstances. Section 6011(e) does not address statements. Thereby, Congress left to the Secretary the discretion granted under the general rule in section 6011(a) as to the requirements applicable to taxpayers making a statement, including whether taxpayers must make statements with an electronic tool that makes the statement machine readable.

The Form 8886 does not purport to be a return. The regulations that created the Form 8886 refer to it as a statement. See Treas. Reg. § 1.6011-4(a). The form does not affect the calculation of tax reported on a return nor the legal determination of whether a taxpayer's treatment of a transaction is proper. *Id.* Although the requirement to file with OTSA is sometimes triggered by the filing of a return, other times it is not, and the Form 8886 filed with OTSA is always filed separately from a return. Treas. Reg. § 1.6011-4(d) and (e). These characteristics make Form 8886 a statement governed by section 6011(a) rather than a return under section 6011(e), which is expressly limited to narrower rules for returns.

Besides section 6011(a) expressly authorizing the Secretary to prescribe the making of a statement according to forms, regulations under section 6011(a) direct taxpayers to send Form 8886 to OTSA according to the instructions to Form 8886. Treas. Reg. § 1.6011-4(d). Under the discretion these authorities provide, the Service may prescribe in instructions that taxpayers prepare Form 8886 using an electronic tool provided by the Service in order to display a bar code that makes the form machine readable. In addition, it could require that the form be submitted to OTSA via eFax.

If a taxpayer does not properly file a Form 8886 with OTSA, a section 6707A penalty may apply. See Treas. Reg. § 301.6707A-1(c).

Please call (202) 317-5399 if you have any further questions.