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TITLE 26--INTERNAL REVENUE

CHAPTER I--INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
(CONTINUED)

records, statements, and special returns--Table of Contents

Sec. 301.6111-2 Confidential corporate tax shelters.

(a) In general.--(1) Under section 6111(d) and this section, a confidential corporate tax shelter is treated as a tax shelter subject to the requirements of sections 6111 (a) and (b).

(2) A confidential corporate tax shelter is any transaction--

(i) A significant purpose of the structure of which is the avoidance or evasion of Federal income tax, as described in paragraph (b) of this section, for a direct or indirect corporate participant;

(ii) That is offered to any potential participant under conditions of confidentiality, as described in paragraph (c) of this section; and

(iii) For which the tax shelter promoters may receive fees in excess of \$100,000 in the aggregate, as described in paragraph (d) of this section.

(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

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in favor of registration. For examples, see Sec. 1.6011-4(c)(4) of this chapter.

(4) A transaction described in paragraph (b) of this section is for a direct or an indirect corporate participant if it is expected to provide Federal income tax benefits to any corporation (U.S. or foreign)

whether or not that corporation participates directly in the transaction.

(b) Transactions structured for avoidance or evasion of Federal

income tax--(1) In general. The avoidance or evasion of Federal income tax will be considered a significant purpose of the structure of a transaction if the transaction is described in paragraph (b) (2) or (3) of this section. However, a transaction described in paragraph (b) (3) of this section need not be registered if the transaction is described in paragraph (b) (4) of this section. For purposes of this section, Federal income tax benefits include deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from Federal income taxation, and any other tax consequences that may reduce a taxpayer's Federal income tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

(2) Listed transactions. A transaction is described in this paragraph (b) (2) if the transaction is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction. If a transaction becomes a listed transaction after the date on which registration would otherwise be required under this section, and if the transaction otherwise satisfies the confidentiality and fee requirements of paragraphs (a) (2) (ii) and (iii) of this section, registration shall in all events be required with respect to any interests in the transaction that are offered for sale after the transaction becomes a listed transaction. However, because a transaction identified as a listed transaction is generally considered to have been structured for a significant tax avoidance purpose, such a transaction ordinarily will have been subject to registration under this section before becoming a listed transaction if the transaction previously satisfied the confidentiality and fee requirements of paragraphs (a) (2) (ii) and (iii) of this section.

(3) Other tax-structured transactions. A transaction is described in this paragraph (b) (3) if it has been structured to produce Federal income tax benefits that constitute an important part of the intended results of the transaction and the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably expects the transaction to be presented in the same or substantially similar form to more than one potential participant, unless the promoter reasonably determines that--

(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

(ii) There is a generally accepted understanding that the expected Federal income tax benefits from the transaction (taking into account any combination of intended tax consequences) are properly allowable under the Internal Revenue Code for substantially similar transactions. There is no minimum period of time for which such a generally accepted understanding must exist. In general, however, a tax shelter promoter (or other person who would be responsible for registration under this section) cannot reasonably determine whether the intended tax treatment of a transaction has become generally accepted unless information relating to the tax treatment and tax structure of such transactions has been in the public domain (e.g., rulings, published articles, etc.) and widely known

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for a sufficient period of time (ordinarily a period of years) to provide knowledgeable tax practitioners and the IRS reasonable opportunity to evaluate the intended tax treatment. The mere fact that one or more knowledgeable tax practitioners have provided an opinion or advice to the effect that the intended tax treatment of the transaction should or will be sustained, if challenged by the IRS, is not sufficient to satisfy the requirements of this paragraph (b) (3) (ii).

(4) Excepted transactions. The avoidance or evasion of Federal income tax will not be considered a significant purpose of the structure of a transaction if the transaction is described in either paragraph (b) (4) (i), (ii), or (iii) of this section.

(i) In the case of a transaction other than a transaction described in paragraph (b) (2) of this section, the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably determines that there is no reasonable basis under Federal tax law for denial of any significant portion of the expected Federal income tax benefits from the transaction. This paragraph (b) (4) (i) applies only if the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably determines that there is no basis that would meet the standard applicable to taxpayers under Sec. 1.6662-3(b) (3) of this chapter under which the IRS could disallow any significant portion of the expected Federal income tax benefits of the transaction. Thus, the reasonable basis standard is not satisfied by an IRS position that would be merely arguable or that would constitute merely a colorable claim. However, the determination of whether the IRS would or would not have a reasonable basis for such a position must take into account the entirety of the transaction and any combination of tax consequences that are expected to result from any component steps of the transaction, must not be based on any unreasonable or unrealistic factual assumptions, and must take into account all relevant aspects of Federal tax law, including the statute and legislative history, treaties, administrative guidance, and judicial decisions that establish principles of general application in the tax law (e.g., *Gregory v. Helvering*, 293 U.S. 465 (1935)). The determination of whether the IRS would or would not have such a reasonable basis is qualitative in nature and does not depend on any percentage or other

quantitative assessment of the likelihood that the taxpayer would ultimately prevail if a significant portion of the expected tax benefits were disallowed by the IRS.

(ii) The IRS makes a determination by published guidance that the transaction is not subject to the registration requirements of this section.

(iii) The IRS makes a determination by individual ruling under paragraph (b) (5) of this section that a specific transaction is not subject to the registration requirements of this section for the taxpayer requesting the ruling.

(5) Requests for ruling. If a tax shelter promoter (or other person who would be responsible for registration under this section) is uncertain whether a transaction is properly classified as a confidential

corporate tax shelter or is otherwise uncertain whether registration is required under this section, that person may, on or before the date that

registration 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 registration requirements of this section. If the request fully discloses all relevant facts relating to the transaction, that person's potential obligation to register 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 confidential corporate tax shelter subject to registration under this section, until the sixtieth day after the issuance of the ruling (or, if the request is withdrawn, sixty days from the date that the request is withdrawn). In the alternative, that person may register the transaction in accordance with the requirements of this section and append a statement to the Form

8264, ``Application for Registration of a Tax Shelter'', which states that the person is uncertain whether the transaction is required to be registered as a confidential corporate tax

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shelter, and that the Form 8264 is being filed on a protective basis.

(6) Example. The following example illustrates the application of paragraphs (b) (1) through (4) of this section. Assume, for purposes of the example, that the transaction is not the same as or substantially similar to any of the types of transactions that the IRS has identified as listed transactions under section 6111 and, thus, is not described in paragraph (b) (2) of this section. The example is as follows:

Example. (i) Facts. Y has designed a combination of financial instruments to be issued as a package by corporations. The financial instruments are expected to be treated as equity for financial accounting purposes and as debt giving rise to allowable interest deductions for Federal income tax purposes. Y reasonably expects to present this method of raising capital to more than one potential corporate participant. Assume that, because of the unusual nature of the combination of financial instruments, Y cannot conclude either that the transaction represented by the financial instruments is in customary

commercial form or that there is a generally accepted understanding that interest deductions are available to issuers of substantially similar combinations of financial instruments. Further, assume that Y cannot reasonably determine that the IRS would have no reasonable basis to deny the deductions.

(ii) Analysis. The transaction represented by this combination of financial instruments is a transaction described in paragraph (b) (3) of this section. However, if Y is uncertain whether this transaction is described in paragraph (b) (3) of this section, or is otherwise uncertain whether registration is required, Y may apply for a ruling under paragraph (b) (5) of this section, and Y will not be required to register the transaction while the ruling is pending or for sixty days thereafter.

(c) Conditions of confidentiality--(1) In general. All the facts and circumstances relating to the transaction will be considered when determining whether an offer is made under conditions of confidentiality as described in section 6111(d) (2), including prior conduct of the parties. Pursuant to section 6111(d) (2) (A), if an offeree's disclosure of the tax treatment or tax structure of the transaction is limited in any manner 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. The tax treatment of a transaction is the purported or claimed Federal income tax treatment of the transaction. The tax structure of a transaction is any fact that may be relevant to understanding the purported or claimed Federal income tax treatment of the transaction. 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 tax treatment or tax structure 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.

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

(ii) Mergers and acquisitions. In the case of a proposed taxable or tax-free acquisition of historic assets of a corporation (other than an investment company, as defined in section 351(e), that is not publicly traded) that constitute an active trade or business the acquirer intends to continue, or a proposed taxable or tax-free acquisition of more than 50 percent of the stock of a corporation (other than an investment

company, as defined in section 351(e), that is not publicly traded) that owns historic assets used in an active trade or business the acquirer intends to continue, the transaction is not considered offered under conditions of confidentiality under paragraph (c)(1) of this section if the offeree is permitted to disclose the tax treatment and tax structure of the transaction no later than the earlier of the date of the public announcement of discussions relating to the transaction, the date of the public announcement of the transaction, or the date of the execution of

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an agreement (with or without conditions) to enter into the transaction.

However, this exception is not available where the offeree's ability to consult any tax advisor (including a tax advisor independent from all other entities involved in the transaction) regarding the tax treatment or tax structure of the transaction is limited in any way.

(3) Presumption. Unless facts and circumstances 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 to any and all persons, without

limitation of any kind, the tax treatment and tax structure of the transaction, and all materials of any kind (including opinions or other tax analyses) that are provided to the offeree related to such tax treatment and tax structure. Except as provided in paragraph (c)(2) of this section, this presumption is available only in cases in which each written authorization permits the offeree to disclose the tax treatment and tax structure of the transaction immediately upon commencement of discussions with the tax shelter promoter providing the authorization and each written authorization is given no later than 30 days from the day the tax shelter promoter commenced discussions with the offeree. A transaction that is exclusive or proprietary to any party other than the

offeree will not be considered offered under conditions of confidentiality if written authorization to disclose is provided to the offeree in accordance with this paragraph (c)(3) and the transaction is not otherwise confidential.

(d) Determination of fees. All the facts and circumstances relating to the transaction will be considered when determining the amount of fees, in the aggregate, that the tax shelter promoters may receive. For purposes of this paragraph (d), all consideration that tax shelter promoters may receive is taken into account, including contingent fees, fees in the form of equity interests, and fees the promoters may receive

for other transactions as consideration for promoting the tax shelter. For example, if a tax shelter promoter may receive a fee for arranging a

transaction that is a confidential corporate tax shelter and a separate fee for another transaction that is not a confidential corporate tax shelter, part or all of the fee paid with respect to the other transaction may be treated as a fee paid with respect to the confidential corporate tax shelter if the facts and circumstances

indicate that the fee paid for the other transaction is in consideration for the confidential corporate tax shelter. For purposes of determining whether the tax shelter promoters may receive fees in excess of \$100,000, the fees from all substantially similar transactions are considered part of the same tax shelter and must be aggregated.

(e) Registration--(1) Time for registering--(i) In general. A tax shelter must be registered not later than the day on which the first offering for sale of interests in the shelter occurs. An offer to participate in a confidential corporate tax shelter shall be treated as an offer for sale. If interests in a confidential corporate tax shelter were first offered for sale on or before February 28, 2000, the first offer for sale of interests in the shelter that occurs after February 28, 2000 shall be considered the first offer for sale under this section.

(ii) Special rule. If a transaction becomes a confidential corporate tax shelter (e.g., because of a change in the law or factual circumstances, or because the transaction becomes a listed transaction) subsequent to the first offering for sale after February 28, 2000, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section if interests are offered for sale after the transaction becomes a confidential corporate tax shelter. The transaction must be registered by the next offering for sale of interests in the shelter. If, subsequent to the first offering for sale, a transaction becomes a confidential corporate tax shelter because the transaction becomes a listed transaction on or after February 28, 2003, and the transaction was not previously

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required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section within 60 days after the transaction becomes a listed transaction/confidential corporate tax shelter if any interests were offered for sale within the previous six years.

(2) Procedures for registering. To register a confidential corporate tax shelter, the person responsible for registering the tax shelter must file Form 8264, ``Application for Registration of a Tax Shelter''. (Form 8264 is also used to register tax shelters defined in section 6111(c).) Similar to the treatment provided under Q&A-22 and Q&A-48 of Sec. 301.6111-1T, transactions involving similar business assets and similar plans or arrangements that are offered to corporate taxpayers by the same person or related persons are aggregated and considered part of a single tax shelter. However, in contrast with the requirement of Q&A-48 of Sec. 301.6111-1T, the tax shelter promoter may file a single Form 8264 with respect to any such aggregated tax shelter, provided an amended Form 8264 is filed to reflect any material changes and to include any additional or revised written materials presented in

connection with an offer to participate in the shelter. Furthermore, all transactions that are part of the same tax shelter and that are to be carried out by the same corporate participant (or one or more other members of the same affiliated group within the meaning of section 1504) must be registered on the same Form 8264.

(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 Sec. 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 Sec. 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 Sec. 301.**6111**-1T (Q&A-34 through Q&A-39).

(2) Persons who discuss the transaction; all promoters are foreign persons--(i) In general. If all of the tax shelter promoters of a confidential corporate tax shelter are foreign persons, any person who discusses participation in the transaction must register the shelter under this section within 90 days after beginning such discussions.

(ii) Exceptions. Registration by a person discussing participation in a transaction is not required if either--

(A) The person does not participate, directly or indirectly, in the shelter and notifies the tax shelter promoter in writing, within 90 days

of beginning such discussions, that the person will not participate; or

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

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

(2) A copy of the registration.

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

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

(B) Obtains and reasonably relies on a written statement from one of

the promoters that at least one of the promoters is a United States person.

(iv) Discussion. Discussing participation in a transaction includes discussing such participation with any person that conveys the tax shelter promoter's proposal. For purposes of this paragraph (g)(2), any person that participates directly or indirectly in a transaction will be

treated as having discussed participation in the transaction not later than the date of the agreement to participate. Thus, a tax shelter participant will be treated as having discussed participation in the transaction even if all discussions were

conducted by an intermediary and the agreement to participate was made indirectly through another person acting on the participant's behalf (for example, through an intermediary empowered to commit the participant to participate in the shelter).

(v) Special rule for controlled entities. A person (first person) will be treated as participating indirectly in a confidential corporate tax shelter if a foreign person controlled by the first person participates in the shelter, and a significant purpose of the shelter is

the avoidance or evasion of the first person's Federal income tax. For purposes of this paragraph (g) (2) (v), control of a foreign corporation or partnership will be determined under the rules of section 6038(e) (2) and (3), except that such section shall be applied by substituting ``10'' for ``50'' each place it appears and ``at least'' for ``more than'' each place it appears. In addition, section 6038(e) (2) shall be applied for these purposes without regard to the constructive ownership rules of section 318 and by treating stock as owned if it is owned directly or indirectly. Section 6038(e) (3) shall be applied for these purposes without regard to the last sentence of section 6038(e) (3) (B). Any beneficiary with a 10 percent or more interest in a foreign trust or estate shall be treated as controlling that trust or estate for purposes of this paragraph (g) (2) (v).

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

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

(h) Effective dates. This section applies to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. If an interest is sold after February 28, 2000, it is treated as offered for sale after February 28, 2000, unless the sale was pursuant to a written binding contract entered into on or before February 28, 2000. However, paragraphs (a) through (g) of this section apply to confidential corporate tax shelters in which any interests are offered for sale on or after February 28, 2003, and to transactions described in paragraph (e) (1) (ii) of this section. The rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, and before February 28, 2003, are contained in Sec. 301.**6111**-2T in effect prior to February 28, 2003 (see 26 CFR part 301 revised as of April 1, 2002, 2002-28 I.R.B 91, and 2002-45 I.R.B. 823 (see Sec. 601.601(d) (2) of this chapter)).