

Part III - Administrative, Procedural, and Miscellaneous

Temporary Rules Under Sections 6111 and 6112

Notice 2004-80

The purpose of this notice is to alert taxpayers to recent amendments to §§ 6111, 6112, and 6708 of the Internal Revenue Code. The notice announces that the Internal Revenue Service and the Treasury Department will issue regulations under § 6111 and amend the regulations under § 6112. The regulations under § 6111 and § 6112 will apply to transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004. The Service and Treasury also will issue regulations under § 6708 that will apply to written requests made after October 22, 2004, for investor lists required to be maintained under § 6112. This notice provides guidance for material advisors who are required to comply with §§ 6111 and 6112, as amended, and who are potentially subject to penalty under § 6708, as amended. This notice also invites comments from the public regarding rules and standards relating to §§ 6111, 6112, and 6708, as amended.

BACKGROUND AND PRIOR LAW

Prior to the recent amendments, § 6111(a) required an organizer of a tax shelter to register the shelter with the Secretary not later than the day on which interests in the shelter were first offered for sale. Under former § 6111(c), a tax shelter was defined as any investment with respect to which any person could reasonably infer from the representations made in connection with the offering for sale of interests that the tax shelter ratio for any investor as of the close of any of the first five years ending after the investment was offered for sale may have been greater than two to one and which was: (1) required to be registered under federal or state securities laws; (2) sold pursuant to an exemption from registration requiring the filing of a notice with a federal or state securities agency; or (3) a substantial investment (the aggregate amount which may have been offered for sale exceeded \$250,000 and the expected involvement of at least five investors). Under former § 6111(d), other entities, plans, arrangements or transactions could be treated as tax shelters for purposes of former § 6111(a) if: (1) a significant purpose of the structure was the avoidance or evasion of federal income tax for a direct or indirect corporate participant; (2) the offer was made under conditions of confidentiality; and (3) the tax shelter promoter may have received fees in excess of \$100,000 in the aggregate.

THE AMERICAN JOBS CREATION ACT OF 2004

The American Jobs Creation Act of 2004, P.L. 108-357, 118 Stat. 1418, (the Act) was enacted on October 22, 2004. Section 815 of the Act amended § 6111 to require each material advisor with respect to any reportable transaction to make a return (in such form as the Secretary may prescribe) setting forth: (1) information identifying and describing the transaction; (2) information describing any potential tax benefits expected to result from the transaction; and (3) other information as the Secretary may prescribe. Section 6111(a), as amended, provides that the return must be filed not later than the date specified by the Secretary. Section 6111(b)(1) defines a material advisor and includes a requirement that the material advisor receive certain threshold amounts of gross income that the Secretary may prescribe.

The amendments to § 6111 authorize the Secretary to prescribe regulations that provide: (1) that only one person shall be required to meet the requirements of § 6111(a) in cases in which two or more persons would otherwise be required to meet such requirements; (2) exemptions from the requirements of § 6111; and (3) rules as may be necessary or appropriate to carry out the purposes of § 6111.

Section 815 of the Act also amended § 6112 to provide that each material advisor (as defined in new § 6111) 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 Act is effective for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004, the date of enactment of the Act.

Section 817 of the Act amended § 6708 to impose a penalty on a material advisor who fails to make available, within 20 business days after the date of a written request by the Secretary, a list required to be maintained under § 6112(a). The new amount of the penalty is \$10,000 for each day after the 20th day that the material advisor fails to provide the list. Section 6708(a)(2) provides a reasonable cause exception to the imposition of the penalty under § 6708. Section 817 of the Act is effective for requests made after October 22, 2004, the date of the enactment of the Act.

INTERIM PROVISIONS

The Service and Treasury intend to issue regulations providing rules under §§ 6111, 6112, and 6708, as amended. However, because the amendments to §§ 6111, 6112, and 6708 currently are effective, the Service and Treasury are providing the following interim rules implementing the requirements of §§ 6111, 6112, and 6708, as amended, until the Secretary prescribes regulations. The interim rules as adopted

by this notice incorporate, in part, rules in the current regulations under §§ 6011, 6111, and 6112. These interim rules will apply until further guidance is issued.

A. Disclosure by Material Advisors Under § 6111

As indicated above, section 815 of the Act amended § 6111 to require that each material advisor with respect to any reportable transaction make a return setting forth information identifying and describing the transaction and any potential tax benefits expected to result from the transaction no later than the date specified by the Secretary. Until further guidance is issued, the definition of a reportable transaction, the definition of a material advisor, and the requirements for filing a return under § 6111 are as indicated below.

1. Definition of Reportable Transaction

For purposes of new § 6111(a), a “reportable transaction” is defined in § 1.6011-4(b) of the Income Tax Regulations. In addition, the rules in § 301.6112-1(b)(2) and (c)(2) (without regard to provisions relating to a transaction required to be registered under former § 6111) will apply for purposes of determining whether a transaction is a reportable transaction with respect to a material advisor. Determinations made by public guidance pursuant to § 1.6011-4(b)(8) that a transaction will not be considered a reportable transaction or will be excluded from a category of reportable transactions, including Rev. Proc. 2004-65 (relating to transactions with contractual protection), Rev. Proc. 2004-66 (relating to loss transactions), Rev. Proc. 2004-67 (relating to transactions with a significant book-tax difference), and Rev. Proc. 2004-68 (relating to transactions with a brief asset holding period) also will apply for purposes of new §§ 6111 and 6112.

2. Definition of a Material Advisor

For purposes of new § 6111, a “material advisor” is defined in § 301.6112-1(c)(2) of the Procedure and Administration Regulations. The existing rules under § 301.6112-1(c)(2), (c)(3), and (d) (without regard to the provisions relating to a transaction required to be registered under former § 6111), including the minimum fee amounts for listed transactions under § 301.6112-1(c)(3)(ii), will apply for purposes of determining whether a person is a material advisor.

In the case of a transaction with a significant book-tax difference described in § 1.6011-4(b)(6), a person will be considered a material advisor with regard to the transaction for purposes of §§ 6111 and 6112 only if the person who makes a tax statement described in § 301.6112-1(c)(2)(iii)(E) also makes a statement, oral or written, that relates to the financial accounting treatment of the item(s) that gives rise to a significant book-tax difference described in § 1.6011-4(b)(6).

3. Filing of Return Under § 6111

Until Form 8264, Application for Registration of a Tax Shelter, is revised, or a successor form is issued, for purposes of new § 6111(a), a material advisor required to file a return with respect to a reportable transaction must complete Form 8264 in the

following manner. A material advisor is required to complete only Parts I (except item 1(b)), IV, and V of Form 8264. In completing Form 8264, the form and instructions are to be read to apply, by substituting: (1) "reportable transaction" each place "tax shelter" or "confidential corporate tax shelter" appears; (2) "material advisor" each place "organizer" or "principal organizer" appears; and (3) "Date the material advisor became a material advisor with respect to the reportable transaction" in place of "Date an interest in the tax shelter was first offered for sale" in Part I, line 7, of the form. In Part IV, fees must be determined by applying the rules in § 301.6112-1(c)(3)(iii) instead of the instructions. In Part V, the material advisor must identify the type of reportable transaction under § 1.6011-4(b) that is being disclosed, and describe the facts of the transaction and the potential tax benefits expected to result from the transaction. Form 8264 must be signed under penalties of perjury. The form must be sent to the Internal Revenue Service Center, Ogden, UT 84201.

A material advisor may file a single Form 8264 for substantially similar transactions. A material advisor is required to supplement information disclosed on Form 8264 if the information provided is no longer accurate, or if additional information that was not disclosed on Form 8264 becomes available.

In addition, the following rules contained in § 301.6111-1T will apply: (1) Q&A-3 and 50 regarding representations made to investors about disclosures under § 6111; (2) Q&A-38 and 39 regarding designation agreements; (3) Q&A 49 regarding timely mailing; and (4) Q&A-51 through 57 regarding the furnishing of registration numbers and the reporting requirement on Form 8271, Investor Reporting of Tax Shelter Registration Number, or any successor form.

4. Due Date of Return Under § 6111

Section 6111(a), as amended, provides that the Secretary may specify the date the return must be filed by a material advisor. A material advisor, as defined in § 301.6112-1(c)(2), who is required to file a return under § 6111 must file the return within 30 days after the date on which the person becomes a material advisor. However, if a person becomes a material advisor after October 22, 2004, and on or before December 31, 2004, that material advisor must file the return before February 1, 2005. If a person is required to disclose a reportable transaction under the provisions of § 6111, as amended, and the person has registered the transaction under former § 6111 prior to October 22, 2004, that registration will satisfy the disclosure requirements for the new provisions in § 6111, provided that the material advisor amends the previous registration to reflect any information required under this notice.

B. Maintenance of Lists by Material Advisors Under § 6112

Section 815 of the Act amended § 6112 to provide that each material advisor (as defined in new § 6111(b)) with respect to any reportable transaction is required to maintain a list identifying each person with respect to whom the advisor acted as a material advisor with respect to the transaction. Section 817 of the Act amended § 6708 to impose a penalty on a material advisor who fails to make a list available upon written request within 20 business days after the date of the request.

For purposes of new § 6112, the existing rules under § 301.6112-1 (without regard to the provisions relating to a transaction required to be registered under former § 6111) relating to the preparation, maintenance, retention, and furnishing of lists will apply to material advisors required to maintain lists with respect to a reportable transaction.

For purposes of former § 6112, § 301.6112-1 will continue to apply to organizers and sellers (defined as material advisors in § 301.6112-1(c)(2)) who are required to maintain lists under former § 6112. Consequently, an organizer or seller under former § 6112 must continue to maintain any list described in § 301.6112-1(e) for the seven-year period described in § 301.6112-1(f) even if such period expires after October 22, 2004.

For purposes of § 6708, the 20 business-day period within which a person must provide the list required to be maintained under § 6112 shall begin on the first business day following the earlier of the date that the IRS: (1) mails a request for the list by certified or registered mail to the last known address of the material advisor required to maintain the list or (2) hand-delivers the written request in person. Business days include every calendar day other than Saturdays, Sundays, or legal holidays. For purposes of this notice, “legal holiday” shall have the same meaning provided in § 7503.

REQUEST FOR COMMENTS

The Service and Treasury intend to issue regulations implementing the requirements of §§ 6111, 6112, and 6708, as amended. The Service and Treasury continue to balance the benefits to the government of early and complete disclosure with the burden imposed on taxpayers and their representatives. The Service and Treasury invite interested persons to submit comments regarding the requirements of §§ 6111, 6112, and 6708, including comments on the definition of material advisor and comments on ways to reduce taxpayer burden and to improve disclosure. Comments on guidance under §§ 6111, 6112, or 6708, may be submitted to: CC:PA:LPD:PR (NOT-155984-04), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (NOT-155984-04), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS e-mail address: notice.comments@irs.counsel.treas.gov.

EFFECTIVE DATE

This notice is effective for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004. This notice is also effective for written requests made after October 22, 2004, for investor lists required to be maintained under § 6112.

DRAFTING INFORMATION

The principal author of this notice is Tara P. Volungis of the Office of the Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Ms. Volungis at (202) 622-3080 (not a toll free call).