

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-103043-05]

RIN 1545-BE28

AJCA Modifications to the Section 6112 Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

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

DATES: Written or electronic comments and requests for a public hearing must be received by January 31, 2007.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-103043-05), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m.

and 4 p.m. to CC:PA:LPD:PR (REG-103043-05), Courier's Desk, Internal Revenue Service, Crystal Mall 4 Building, 1901 S. Bell St., Arlington, VA., or sent electronically, via the IRS Internet site at www.irs.gov/regs or via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-103043-05).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations,

Tara P. Volungis or Charles Wien, 202-622-3070; concerning the submissions of comments and requests for hearing, Kelly Banks, 202-622-0392 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by January 2, 2007.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in §301.6112-1(b) and (d). This information is required in order for a material advisor to comply with the list maintenance rules under section 6112. This information will be used to improve compliance with the tax laws by giving the IRS earlier notification of transactions that may not comport with the tax laws. The collection of information is mandatory. The likely respondents are business or other for-profit institutions or individuals.

Estimated total annual reporting burden: 50,000 hours.

Estimated average annual burden hours per respondent: 100 hours.

Estimated number of respondents: 500.

Estimated annual frequency of responses: on occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or 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 proposes to amend 26 CFR part 301 by amending the rules relating to the list maintenance requirements of material advisors with respect to reportable transactions under section 6112.

The American Jobs Creation Act of 2004, Public Law 108-357, 118 Stat. 1418, (AJCA) was enacted on October 22, 2004. Section 815 of the AJCA amended section 6112 to provide that each material advisor (as defined in section 6111, as amended by the AJCA) with respect to any reportable transaction is required to maintain a list (in such manner as the Secretary may by regulations prescribe) identifying each person with respect to whom the advisor acted as a material advisor with respect to the transaction, and containing other information as the Secretary may by regulations require. Section 815 of the AJCA is effective for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004. Prior to the amendments to section 6111 made by the AJCA, the definition of material advisor was in §301.6112-1 of the Procedure and Administration Regulations.

In response to the AJCA, the IRS and Treasury Department issued interim guidance affecting section 6112 in Notice 2004-80, 2004-2 C.B. 963; Notice 2005-17, 2005-1 C.B. 606; Notice 2005-22, 2005-1 C.B. 756; and Notice 2006-6, 2006-5 I.R.B. 385 (see §601.601(d)(2)). The IRS and Treasury Department have received various comments and questions regarding the application of section 6112 under the AJCA. Consequently, the IRS and Treasury Department propose amendments to the rules relating to the list maintenance obligation of material advisors under section 6112.

Explanation of Provisions

A. In General

These proposed regulations are being issued concurrently with proposed regulations under §1.6011-4 and §301.6111-3 published elsewhere in the **Federal Register**. The definition of material advisor is provided in the proposed regulations

under §301.6111-3(b). The definition of reportable transaction is provided in the proposed regulations under §1.6011-4(b)(1). Under these proposed regulations, each material advisor for any reportable transaction must maintain a list identifying each person with respect to whom the advisor acted as a material advisor and containing other information described in the regulations.

B. The List

The information that must be contained in the list under these proposed regulations is similar to the information required to be included on the list under the current §301.6112-1 regulations, with some additions or clarifications, such as, the name of each other material advisor to the transaction, if known by the material advisor, and any designation agreement to which the material advisor is a party. The IRS and Treasury Department believe that this information is required to be provided under the current regulations. However, due to questions raised by material advisors under the current regulations, these proposed amendments clarify that the name of other material advisors and designation agreements are required to be maintained.

To date, the IRS has received lists under the current regulations that are not in a form that enables the IRS to determine without undue delay or difficulty the information required under the regulation. Some material advisors have merely produced boxes of documents rather than a list as required under §301.6112-1. Under section 6708 as amended by the AJCA, any person who is required to maintain a list under section 6112(a) who fails to make the list available to the Secretary upon written request within 20 business days after the date of the request, must pay a penalty of \$10,000 for each day of such failure. Failure to maintain the list in accordance with these regulations also

subjects a person to the penalty under section 6708. The proposed regulations specifically clarify that the list to be maintained by the material advisor and furnished to the IRS upon request consists of three separate components: (1) an itemized statement of information, (2) a detailed description of the transaction, and (3) copies of documents relating to the transaction. The itemized statement of information must contain all of the requested information in a form that is easy to understand (for example, in a format such as a list, spreadsheet, or table). In order for the material advisor to be in compliance with its obligations under section 6112, the material advisor must maintain and furnish in the time prescribed the itemized statement of information, the description of the transaction, and the copies of documents. Under the proposed regulations, the Secretary, in published guidance, may provide a form or method for maintaining and/or furnishing a list.

C. Other Clarifications and Modifications

The proposed regulations remove the provision detailing how a privilege is claimed with regard to certain information on the list. The regulations continue to require that if a claim of privilege is made, the material advisor must continue to maintain the list in accordance with these regulations.

Similar to provisions in the current §301.6112-1 regulations, material advisors under the proposed regulations may have a designation agreement authorizing one material advisor to maintain and furnish the list. However, the designation agreement does not relieve the other material advisors of their obligation to furnish the list if the designated material advisor fails to furnish the list in a timely manner. Thus, parties to a designation agreement may still be liable for the penalty under section 6708.

Contrary to the provisions in the current regulations under §301.6112-1, these proposed regulations contain no provision to toll the requirement for maintaining the list when a potential material advisor requests a private letter ruling on a specific transaction.

The IRS and Treasury Department believe that removing the tolling provision will promote effective tax administration. Consequently, potential material advisors may request a ruling on a transaction, as provided in the temporary regulations under §301.6111-3T(h), under the regular procedures for requesting a ruling, provided the ruling request is not factual or hypothetical, but the requirement for disclosing the transaction under section 6111 and maintaining the list under section 6112 will not be tolled. Final regulations removing the tolling provision are being issued concurrently with these proposed regulations. The removal of the tolling provision is effective for all ruling requests received on or after November 1, 2006.

D. Effective Date

Generally, when these proposed regulations become final, they will apply to transactions with respect to which a material advisor makes a tax statement on or after the date the regulations are published as final regulations in the **Federal Register**. However, upon publication the final regulations will apply to transactions of interest entered into on or after November 2, 2006 with respect to which a material advisor makes a tax statement under §301.6111-3 on or after November 2, 2006.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the

Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that most of the information is already required to be reported under the current regulations; the clarifications and new information required by the proposed regulations add little or no new burden to the existing requirements.

Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules, how they can be made easier to understand, and the administrability of the rules in the proposed regulations. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that submits timely written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Tara P. Volungis and Charles Wien, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However,

other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

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

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

§301.6112-1 Material advisors of reportable transactions must keep lists of advisees, etc.

(a) In general. Each material advisor, as defined in §301.6111-3(b), with respect to any reportable transaction, as defined in §1.6011-4(b) of this chapter, shall prepare and maintain a list in accordance with paragraph (b) of this section and shall furnish such list to the Internal Revenue Service (IRS) in accordance with paragraph (e) of this section.

(b) Preparation and maintenance of lists--(1) In general. A separate list must be prepared and maintained for each reportable transaction. However, one list must be maintained for substantially similar transactions. A list must be maintained in a form that enables the IRS to determine without undue delay or difficulty the information

required in paragraph (b)(3) of this section. The Secretary may, by publication in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), provide a form or method for maintaining and/or furnishing a list.

(2) Persons required to be included on lists. A material advisor is required to maintain a list identifying each person with respect to whom the advisor acted as a material advisor with respect to the reportable transaction. However, a material advisor is not required to identify a person on the list if the person entered into a listed transaction or a transaction of interest more than 6 years before the transaction was identified in published guidance as a listed transaction or a transaction of interest.

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

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

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

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

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

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

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

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

advisor.

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

(iii) Documents. The following documents--

(A) A copy of any designation agreement (as described in paragraph (f) of this section) to which the material advisor is a party; and

(B) Copies of any additional written materials, including tax analyses or opinions, relating to each reportable transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction that have been shown or provided to any person who acquired or may acquire an interest in the transactions, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor. However, a material advisor is not required to retain earlier drafts of a document provided the material advisor retains a copy of the final document (or, if there is no final document, the most recent draft of the document) and the final document (or most recent draft) contains all the information in the earlier drafts of such document that is material to an understanding of the purported tax treatment or the tax structure of the transaction.

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

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

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

(3) Listed transaction. The term listed transaction is defined in §1.6011-4(b)(2) of this chapter. See also §§20.6011-4(a), 25.6011-4(a), 31.6011-4(a), 53.6011-4(a),

54.6011-4(a), or 56.6011-4(a) of this chapter.

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

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

(6) Related party. A person is a related party with respect to another person if such person bears a relationship to such other person described in section 267(b) or 707(b).

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

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

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

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

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

(12) Transaction of interest. The term transaction of interest is defined in §1.6011-4(b)(6) of this chapter. See also §§20.6011-4(a), 25.6011-4(a), 31.6011-4(a), 53.6011-4(a), 54.6011-4(a), or 56.6011-4(a) of this chapter.

(d) Retention of lists. Each material advisor must maintain each component of the list described in paragraph (b)(3) of this section in a readily accessible form for seven years following the earlier of the date on which the material advisor last made a tax statement relating to the transaction, or the date the transaction was last entered into, if known. If the material advisor required to prepare, maintain, and furnish the list is a corporation, partnership, or other entity (entity) that has dissolved or liquidated before completion of the seven-year period, the person responsible under state law for winding up the affairs of the entity must prepare, maintain and furnish each component of the list

on behalf of the entity, unless the entity submits the list to the Office of Tax Shelter Analysis (OTSA) within 60 days after the dissolution or liquidation. If state law does not specify any person as responsible for winding up the affairs, then each of the directors of the corporation, the general partners of the partnership, or the trustees, owners, or members of the entity are responsible for preparing, maintaining and furnishing each component of the list on behalf of the entity, unless the entity submits the list to the OTSA within 60 days after the dissolution or liquidation. The responsible person must also provide notice to OTSA of such dissolution or liquidation within 60 days after the dissolution or liquidation. The list and the notice provided to OTSA must be sent to: Internal Revenue Service, OTSA Mail Stop 4915, 1973 North Rulon White Blvd., Ogden, Utah 84404, or to such other address as provided by the Commissioner.

(e) Furnishing of lists--(1) In general. Each material advisor responsible for maintaining a list must, upon written request by the IRS, make each component of the list described in paragraph (b)(3) of this section available to the IRS by furnishing each component of the list to the IRS within 20 business days from the day on which the request is provided. The 20 business-day period shall begin on the first business day following the earlier of the date that the IRS 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 hand-delivers the written request in person. Business days include every calendar day other than Saturdays, Sundays, or legal holidays. For purposes of this paragraph (e), legal holiday shall have the same meaning provided in section 7503. The request is not required to be in the form of an administrative summons. Each component of the list must be furnished to the IRS in a form that enables the IRS to determine

without undue delay or difficulty the information required in paragraph (b)(3) of this section. If any component of the list is not in a form that enables the IRS to determine without undue delay or difficulty the information required in paragraph (b)(3) of this section, the material advisor will not be considered to have complied with the list maintenance provisions in section 6112 and this section.

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

(f) Designation agreements. If more than one material advisor is required to maintain a list of persons for a reportable transaction, in accordance with paragraph (b) of this section, the material advisors may designate by written agreement a single material advisor to maintain the list or a portion of the list. The designation of one material advisor to maintain the list does not relieve the other material advisors from their obligation to furnish the list to the IRS in accordance with paragraph (e)(1) of this section, if the designated material advisor fails to furnish the list to the IRS in a timely manner. A material advisor is not relieved from the requirement of this section because a material advisor is unable to obtain the list from any designated material advisor, any designated material advisor did not maintain a list, or the list maintained by any designated material advisor is not complete.

(g) Effective date. In general, this section applies to transactions with respect to which a material advisor makes a tax statement under §301.6111-3 on or after the date these regulations are published as final regulations in the **Federal Register**. However,

upon the publication of final regulations, this section will apply to transactions of interest entered into on or after November 2, 2006 with respect to which a material advisor makes a tax statement under §301.6111-3 on or after November 2, 2006.

Mark E. Matthews

Deputy Commissioner for Services and Enforcement.