Internal Revenue
bulletin

Bulletin No. 2003–12
March 24, 2003

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

T.D. 9043, page 611.
Final regulations under section 874 of the Code relate to the disallowance of deductions and credits for nonresident alien individuals and foreign corporations that fail to file a timely U.S. income tax return.

T.D. 9045, page 610.
Final regulations under section 32 of the Code were published in the Federal Register on March 13, 1980. Due to subsequent statutory amendments in the applicable tax law, substantial portions of the regulations are no longer in conformity with current legislative provisions. These regulations remove and amend portions of the existing regulations to conform with statutory changes.

REG–104385–01, page 634.
Proposed regulations under section 168 of the Code provide guidance on the normalization requirements applicable to electric utilities that benefit (or have benefitted) from accelerated depreciation methods or from the investment tax credit permitted under pre-1991 law. A public hearing is scheduled for June 25, 2003.

EMPLOYEE PLANS

Notice 2003–17, page 633.
Weighted average interest rate update. The weighted average interest rate for March 2003 and the resulting permissible range of interest rates used to calculate current liability for purposes of the full funding limitation of section 412(c)(7) of the Code are set forth.

Announcement 2003–16, page 641.
This document contains corrections to final regulations (T.D. 9021, 2002–51 I.R.B. 973) relating to loans made from a qualified employer plan to plan participants or beneficiaries.

ADMINISTRATIVE

T.D. 9046, page 614.
Final regulations provide the disclosure requirements relating to reportable transactions under section 6011 of the Code, the registration requirements for confidential corporate tax shelters under section 6111(d), and the list maintenance requirements under section 6112.

Announcements of Disbarments and Suspensions begin on page 637.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are consolidated semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The first Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the first Bulletin of the succeeding semiannual period, respectively.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 32.—Earned Income

26 CFR 1.32–2: Earned income credit for taxable years beginning after December 31, 1978.

T.D. 9045

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Earned Income Credit for Taxable Years Beginning After December 31, 1978

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the earned income credit. The regulations reflect changes in the law since the existing regulations were published in the **Federal Register** on March 13, 1980. Due to subsequent statutory changes in the applicable tax law, substantial portions of the regulations are no longer in conformity with current law. Accordingly, portions of the existing regulations are removed. These regulations apply to individual taxpayers claiming the earned income credit.

DATES: *Effective Date:* These regulations are effective, March 6, 2003.

FOR FURTHER INFORMATION CONTACT: Shoshanna Tanner at (202) 622–6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) under section 32 of the Internal Revenue Code (Code). Section 32 allows a refundable credit to low-income taxpayers who meet certain income and eligibility requirements. Section 43 (the predecessor of section 32) was added to the Code by the Tax Reduction Act of 1975 (Public Law 94–12, 89 Stat. 26) and made permanent by the Revenue Act of 1978 (Public Law 95–600, 92 Stat. 2763). Final regulations (T.D. 7683, 1980–1, C.B. 3 [45 FR 16174]) under section 43 were published in the **Federal Register** on March 13, 1980. Section 43 was redesignated as section 32 by the Tax Reform Act of 1984 (Public Law 98–369, 98 Stat. 494). Section 1.43–2 was redesignated as §1.32–2 in Treasury Decision 8448 (1992–2 C.B. 21 [57 FR 54919]) on November 23, 1992.

Section 1.32–2(b)(2) of the existing regulations refers to section 143 for an explanation of the term "married individual." The provisions of section 143 were reenacted as section 7703 by the Tax Reform Act of 1986 (Public Law 99–514, 100 Stat. 2085).

In addition, portions of the existing regulations are inconsistent with changes made by the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508, 104 Stat. 1388), the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107–16, 115 Stat. 38), and various other legislative enactments.

Explanation of Provisions

To comport with the redesignation of section 43 to section 32 and §§1.43–2 to 1.32–2, these final regulations replace references to section 43 with references to section 32. Similarly, these regulations replace the references to section 143 in §1.32–2(b)(2) with references to section 7703. These regulations also remove the inconsistent provisions in the existing regulations.

Special Analyses

It has been determined that these final regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also 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), these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Shoshanna Tanner of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Department of Treasury participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.32–2 is amended as follows:

1. Paragraphs (a), (b)(1), (c)(1), and (d) are removed and reserved.

2. Paragraphs (b)(2), (b)(3), (c)(2), and (e)(2) are revised.

The revisions read as follows:

§1.32–2 Earned income credit for taxable years beginning after December 31, 1978.

(a) [Reserved].

(b) * * * (1) [Reserved].

(2) *Married individuals.* No credit is allowed by section 32 in the case of an eligible individual who is married (within the meaning of section 7703 and the regulations thereunder) unless the individual and spouse file a single return jointly (a joint return) for the taxable year (see section 6013 and the regulations thereunder relating to joint returns of income tax by husband and wife). The requirements of the preceding sentence do not apply to an eligible individual who is not considered as married under section 7703(b) and the regulations thereunder (relating to certain married individuals living apart).

(3) *Length of taxable year.* No credit is allowed by section 32 in the case of a taxable year covering a period of less than 12 months. However, the rule of the preceding sentence does not apply to a taxable year closed by reason of the death of the eligible individual.

(c) * * * (1) [Reserved].

(2) *Earned income.* For purposes of this section, earned income is computed without regard to any community property laws which may otherwise be applicable. Earned income is reduced by any net loss in earnings from self-employment. Earned income does not include amounts received as a pension, an annuity, unemployment compensation, or workmen's compensation, or an amount to which section 871(a) and the regulations thereunder apply (relating to income of nonresident alien individuals not connected with United States business).

(d) [Reserved].

(e) * * * (1) * * *.

(2) *Reconciliation of payments advanced and credit allowed.* Any additional amount of tax under paragraph (e)(1) of this section is not treated as a tax imposed by chapter 1 of the Internal Revenue Code for purposes of determining the amount of any credit (other than the earned income credit) allowable under part IV, subchapter A, chapter 1 of the Internal Revenue Code.

David A. Mader,
Assistant Deputy Commissioner of Internal Revenue.

Approved February 11, 2003.

Pamela F. Olson,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on March 5, 2003, 8:45 a.m., and published in the issue of the Federal Register for March 6, 2003, 68 F.R. 10655)

Section 874.—Allowance of Deductions and Credits

26 CFR 1.874–1: Allowance of deductions and credits to nonresident alien individuals.

T.D. 9043

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Disallowance of Deductions and Credits for Failure to File Timely Return

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the disallowance of deductions and credits for nonresident alien individuals and foreign corporations (collectively, foreign taxpayers) that fail to file a timely U.S. income tax return. The regulations affect foreign taxpayers that fail to file a return by the appropriate deadlines.

DATES: *Effective Date:* These regulations are effective March 10, 2003.

Applicability Date: For dates of applicability, see §§1.874–1(b)(4) and 1.882–4(a)(3)(iv) of these regulations.

FOR FURTHER INFORMATION CONTACT: Nina E. Chowdhry, (202) 622–3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1. On January 29, 2002, final and temporary regulations (T.D. 8981, 2002–7 I.R.B. 496 [67 FR 4173]) relating to the disallowance of deductions and credits for foreign taxpayers that fail to file a timely U.S. income tax return under sections 874 and 882 of the Internal Revenue Code (Code) were published in the **Federal Register**. A notice of proposed rulemaking (REG–107100–00, 2002–7 I.R.B. 529 [67 FR 4217]) cross-referencing the temporary regulations was also published in the **Federal Register**. No public hearing was requested or held. No written or electronic comments responding to the notice of proposed rulemaking were received. The proposed regulations are adopted by this Treasury decision, and the corresponding temporary regulations are removed.

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 has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Nina Chowdhry of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entries for "Section 1.874–1T" and "Section 1.882–4T" and adding entries in numerical order to read in part as follows:

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

Section 1.874–1 also issued under 26 U.S.C. 874. * * *

Section 1.882–4 also issued under 26 U.S.C. 882(c). * * *

Par. 2. Section 1.874–1, paragraphs (b)(2) through (b)(4) are revised to read as follows:

§1.874–1 Allowance of deductions and credits to nonresident alien individuals.

* * * * *

(b) * * *

(2) *Waiver.* The filing deadlines set forth in paragraph (b)(1) of this section may be waived if the nonresident alien individual establishes to the satisfaction of the Commissioner or his or her delegate that the individual, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return (including a protective return (as described in paragraph (b)(6) of this section)). For this purpose, a nonresident alien individual shall not be considered to have acted reasonably and in good faith if the indi-

vidual knew that he or she was required to file the return and chose not to do so. In addition, a nonresident alien individual shall not be granted a waiver unless the individual cooperates in determining his or her U.S. income tax liability for the taxable year for which the return was not filed. The Commissioner or his or her delegate shall consider the following factors in determining whether the nonresident alien individual, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return—

(i) Whether the individual voluntarily identifies himself or herself to the Internal Revenue Service as having failed to file a U.S. income tax return before the Internal Revenue Service discovers the failure to file;

(ii) Whether the individual did not become aware of his or her ability to file a protective return (as described in paragraph (b)(6) of this section) by the deadline for filing the protective return;

(iii) Whether the individual had not previously filed a U.S. income tax return;

(iv) Whether the individual failed to file a U.S. income tax return because, after exercising reasonable diligence (taking into account his or her relevant experience and level of sophistication), the individual was unaware of the necessity for filing the return;

(v) Whether the individual failed to file a U.S. income tax return because of intervening events beyond the individual's control; and

(vi) Whether other mitigating or exacerbating factors existed.

(3) *Examples.* The following examples illustrate the provisions of paragraph (b). In all examples, A is a nonresident alien individual and uses the calendar year as A's taxable year. The examples are as follows:

Example 1. Nonresident alien individual discloses own failure to file. In Year 1, A became a limited partner with a passive investment in a U.S. limited partnership that was engaged in a U.S. trade or business. During Year 1 through Year 4, A incurred losses with respect to A's U.S. partnership interest. A's foreign tax advisor incorrectly concluded that because A was a limited partner and had only losses from A's partnership interest, A was not required to file a U.S. income tax return. A was aware neither of A's obligation to file a U.S. income tax return for those years nor of A's ability to file a protective return for those years. A had never filed a U.S. income tax return before. In Year 5, A began realizing a profit rather than a loss with respect to the partnership interest and, for this reason, engaged a U.S. tax advisor to handle A's responsibility to file U.S. income tax returns. In preparing A's U.S. income tax return for Year 5, A's U.S. tax advisor discovered that returns were not filed for Year 1 through Year 4. Therefore, with respect to those years for which applicable filing deadlines in paragraph (b)(1) of this section were not met, A would be barred by paragraph (a) of this section from claiming any deductions that otherwise would have given rise to net operating losses on returns for these years, and that would have been available as loss carryforwards in subsequent years. At A's direction, A's U.S. tax advisor promptly contacted the appropriate examining personnel and cooperated with the Internal Revenue Service in determining A's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 through Year 4 and by making A's books and records available to an Internal Revenue Service examiner. A has met the standard described in paragraph (b)(2) of this section for waiver of any applicable filing deadlines in paragraph (b)(1) of this section.

Example 2. Nonresident alien individual refuses to cooperate. Same facts as in *Example 1*, except that while A's U.S. tax advisor contacted the appropriate examining personnel and filed the appropriate income tax returns for Year 1 through Year 4, A refused all requests by the Internal Revenue Service to provide supporting information (for example, books and records) with respect to those returns. Because A did not cooperate in determining A's U.S. tax liability for the taxable years for which an income tax return was not timely filed, A is not granted a waiver as described in paragraph (b)(2) of this section of any applicable filing deadlines in paragraph (b)(1) of this section.

Example 3. Nonresident alien individual fails to file a protective return. Same facts as in *Example 1*, except that in Year 1 through Year 4, A also consulted a U.S. tax advisor, who advised A that it was uncertain whether U.S. income tax returns were necessary for those years and that A could protect A's right subsequently to claim the loss carryforwards by filing protective returns under paragraph (b)(6) of this section. A did not file U.S. income tax returns or protective returns for those years. A did not present evidence that intervening events beyond A's control prevented A from filing an income tax return, and there were no other mitigating factors. A has not met the standard described in paragraph (b)(2) of this section for waiver of any applicable filing deadlines in paragraph (b)(1) of this section.

Example 4. Nonresident alien with effectively connected income. In Year 1, A, a computer programmer, opened an office in the United States to market and sell a software program that A had developed outside the United States. A had minimal business or tax experience internationally, and no such experience in the United States. Through A's personal efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. A, however, did not file U.S. income tax returns for Year 1 or Year 2. A was aware neither of A's obligation to file a U.S. income tax return for those years, nor of A's ability to file a protective return for those years. A had never filed a U.S. income tax return before. In November of Year 3, A engaged U.S. counsel in connection with licensing software to an unrelated U.S. company. U.S. counsel reviewed A's U.S. activities and advised A that A should have filed U.S. income tax returns for Year 1 and Year 2. A immediately engaged a U.S. tax advisor who, at A's direction, promptly contacted the appropriate examining personnel and cooperated with the Internal Revenue Service in determining A's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by making A's books and records available to an Internal Revenue Service examiner. A has met the standard described in paragraph (b)(2) of this section for waiver of any applicable filing deadlines in paragraph (b)(1) of this section.

Example 5. IRS discovers nonresident alien's failure to file. In Year 1, A, a computer programmer, opened an office in the United States to market and sell a software program that A had developed outside the United States. Through A's personal efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. A had extensive experience conducting similar business activities in other countries, including making the appropriate tax filings. A, however, was aware neither of A's obligation to file a U.S. income tax return for those years, nor of A's ability to file a protective return for those years. A had never filed a U.S. income tax return before. Despite A's extensive experience conducting similar business activities in other countries, A made no effort to seek advice in connection with A's U.S. tax obligations. A failed to file either U.S. income tax returns or protective returns for Year 1 and Year 2. In November of Year 3, an Internal Revenue Service examiner asked A for an explanation of A's failure to file U.S. income tax returns. A immediately engaged a U.S. tax advisor, and cooperated with the Internal Revenue Service in determining A's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by making A's books and records available to the examiner. A did not present evidence that intervening events beyond A's control prevented A from filing a return, and there were no other mitigating factors. A has not met the standard described in paragraph (b)(2) of this section for waiver of any applicable filing deadlines in paragraph (b)(1) of this section.

Example 6. Nonresident alien with prior filing history. A began a U.S. trade or business in Year 1 as a sole proprietorship. A's tax advisor filed the appropriate U.S. income tax returns for Year 1 through Year 6, reporting income effectively connected with A's U.S. trade or business. In Year 7, A replaced this tax advisor with a tax advisor unfamiliar with U.S. tax law. A did not file a U.S. income tax return for any year from Year 7 through Year 10, although A had effectively connected income for those years. A was aware of A's ability to file a protective return for those years. In Year 11, an Internal Revenue Service examiner contacted A and asked for an explanation of A's failure to file income tax returns after Year 6. A immediately engaged a U.S. tax advisor and cooperated with the Internal Revenue Service in determining A's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 7 through Year 10 and by making A's books and records available to the examiner. A did not present evidence that intervening events beyond A's control prevented A from filing a return, and there were no other mitigating factors. A has not met the standard described in paragraph (b)(2) of this section for waiver of any applicable filing deadlines in paragraph (b)(1) of this section.

(4) *Effective date.* Paragraphs (b)(2) and (3) of this section are applicable to open

years for which a request for a waiver is filed on or after January 29, 2002.

* * * * *

§1.874–1T [Removed]

Par. 3. Section 1.874–1T is removed.

Par. 4. Section 1.882–4, paragraphs (a)(3)(ii) through (a)(3)(iv) are revised to read as follows:

§1.882–4 Allowance of deductions and credits to foreign corporations.

(a) * * *

(3) * * *

(ii) The filing deadlines set forth in paragraph (a)(3)(i) of this section may be waived if the foreign corporation establishes to the satisfaction of the Commissioner or his or her delegate that the corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return (including a protective return (as described in paragraph (a)(3)(vi) of this section)). For this purpose, a foreign corporation shall not be considered to have acted reasonably and in good faith if it knew that it was required to file the return and chose not to do so. In addition, a foreign corporation shall not be granted a waiver unless it cooperates in the process of determining its income tax liability for the taxable year for which the return was not filed. The Commissioner or his or her delegate shall consider the following factors in determining whether the foreign corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return—

(A) Whether the corporation voluntarily identifies itself to the Internal Revenue Service as having failed to file a U.S. income tax return before the Internal Revenue Service discovers the failure to file;

(B) Whether the corporation did not become aware of its ability to file a protective return (as described in paragraph (a)(3)(vi) of this section) by the deadline for filing a protective return;

(C) Whether the corporation had not previously filed a U.S. income tax return;

(D) Whether the corporation failed to file a U.S. income tax return because, after exercising reasonable diligence (taking into account its relevant experience and level of sophistication), the corporation was unaware of the necessity for filing the return;

(E) Whether the corporation failed to file a U.S. income tax return because of intervening events beyond its control; and

(F) Whether other mitigating or exacerbating factors existed.

(iii) The following examples illustrate the provisions of this section. In all examples, FC is a foreign corporation and uses the calendar year as its taxable year. The examples are as follows:

Example 1. Foreign corporation discloses own failure to file. In Year 1, FC became a limited partner with a passive investment in a U.S. limited partnership that was engaged in a U.S. trade or business. During Year 1 through Year 4, FC incurred losses with respect to its U.S. partnership interest. FC's foreign tax director incorrectly concluded that because it was a limited partner and had only losses from its partnership interest, FC was not required to file a U.S. income tax return. FC's management was aware neither of FC's obligation to file a U.S. income tax return for those years, nor of its ability to file a protective return for those years. FC had never filed a U.S. income tax return before. In Year 5, FC began realizing a profit rather than a loss with respect to its partnership interest and, for this reason, engaged a U.S. tax advisor to handle its responsibility to file U.S. income tax returns. In preparing FC's income tax return for Year 5, FC's U.S. tax advisor discovered that returns were not filed for Year 1 through Year 4. Therefore, with respect to those years for which applicable filing deadlines in paragraph (a)(3)(i) of this section were not met, FC would be barred by paragraph (a)(2) of this section from claiming any deductions that otherwise would have given rise to net operating losses on returns for those years, and that would have been available as loss carryforwards in subsequent years. At FC's direction, its U.S. tax advisor promptly contacted the appropriate examining personnel and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 through Year 4 and by making FC's books and records available to an Internal Revenue Service examiner. FC has met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 2. Foreign corporation refuses to cooperate. Same facts as in *Example 1*, except that while FC's U.S. tax advisor contacted the appropriate examining personnel and filed the appropriate income tax returns for Year 1 through Year 4, FC refused all requests by the Internal Revenue Service to provide supporting information (for example, books and records) with respect to those returns. Because FC did not cooperate in determining its U.S. tax liability for the taxable years for which an income tax return was not timely filed, FC is not granted a waiver as described in paragraph (a)(3)(ii) of this section of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 3. Foreign corporation fails to file a protective return. Same facts as in *Example 1*, except that in Year 1 through Year 4, FC's tax director also consulted a U.S. tax advisor, who advised FC's tax director that it was uncertain whether U.S. income tax returns were necessary for those years and that FC could protect its right subsequently to claim the loss carryforwards by filing protective returns under paragraph (a)(3)(vi) of this section. FC did not file U.S. income tax returns or protective returns for those years. FC did not present evidence that intervening events beyond FC's control prevented it from filing an income tax return, and there were no other mitigating factors. FC has not met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 4. Foreign corporation with effectively connected income. In Year 1, FC, a technology company, opened an office in the United States to market and sell a software program that FC had developed outside the United States. FC had minimal business or tax experience internationally, and no such experience in the United States. Through FC's direct efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. FC, however, did not file U.S. income tax returns for Year 1 or Year 2. FC's management was aware neither of FC's obligation to file a U.S. income tax return for those years, nor of its ability to file a protective return for those years. FC had never filed a U.S. income tax return before. In January of Year 4, FC engaged U.S. counsel in connection with licensing software to an unrelated U.S. company. U.S. counsel reviewed FC's U.S. activities and advised FC that it should have filed U.S. income tax returns for Year 1 and Year 2. FC immediately engaged a U.S. tax advisor who, at FC's direction, promptly contacted the appropriate examining personnel and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by making FC's books and records available to an Internal Revenue Service examiner. FC has met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 5. IRS discovers foreign corporation's failure to file. In Year 1, FC, a technology company, opened an office in the United States to market and sell a software program that FC had developed outside the United States. Through FC's direct efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. FC had extensive experience conducting similar business activities in other countries, including making the appropriate tax filings. However, FC's management was aware neither of FC's obligation to file a U.S. income tax return for those years, nor of its ability to file a protective return for those years. FC had never filed a U.S. income tax return before. Despite FC's extensive experience conducting similar business activities in other countries, it made no effort to seek advice in connection with its U.S. tax obligations. FC failed to file either U.S. income tax returns or protective returns for Year 1 and Year 2. In January of Year 4, an Internal Revenue Service examiner asked FC for an explanation of FC's failure to file U.S. income tax returns. FC immediately engaged a U.S. tax advisor, and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by mak-

ing FC's books and records available to the examiner. FC did not present evidence that intervening events beyond its control prevented it from filing a return, and there were no other mitigating factors. FC has not met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 6. Foreign corporation with prior filing history. FC began a U.S. trade or business in Year 1. FC's tax advisor filed the appropriate U.S. income tax returns for Year 1 through Year 6, reporting income effectively connected with FC's U.S. trade or business. In Year 7, FC replaced its tax advisor with a tax advisor unfamiliar with U.S. tax law. FC did not file a U.S. income tax return for any year from Year 7 through Year 10, although it had effectively connected income for those years. FC's management was aware of FC's ability to file a protective return for those years. In Year 11, an Internal Revenue Service examiner contacted FC and asked its chief financial officer for an explanation of FC's failure to file U.S. income tax returns after Year 6. FC immediately engaged a U.S. tax advisor and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 7 through Year 10 and by making FC's books and records available to the examiner. FC did not present evidence that intervening events beyond its control prevented it from filing a return, and there were no other mitigating factors. FC has not met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

(iv) Paragraphs (a)(3)(ii) and (iii) of this section are applicable to open years for which a request for a waiver is filed on or after January 29, 2002.

* * * * *

§1.882–4T [Removed]

Par. 5. Section 1.882–4T is removed.

David A. Mader,
Assistant Deputy Commissioner of Internal Revenue.

Approved January 17, 2003.

Pamela F. Olson,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on March 7, 2003, 8:45 a.m., and published in the issue of the Federal Register for March 10, 2003, 68 F.R. 11313)

Section 6011.—General Requirement of Return, Statement, or List

26 CFR 1.6011–4: Requirement of statement disclosing participation in certain transactions by taxpayers.

T.D. 9046

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 1, 20, 25, 31, 53, 54, 56, 301, and 602

Tax Shelter Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: These regulations finalize the rules relating to the filing by certain taxpayers of a disclosure statement with their federal tax returns under section 6011(a), the rules relating to the registration of confidential corporate tax shelters under section 6111(d), and the rules relating to the list maintenance requirements under section 6112. These regulations affect taxpayers participating in reportable transactions, persons responsible for registering confidential corporate tax shelters, and organizers and sellers of potentially abusive tax shelters.

DATES: *Effective Date:* These regulations are effective February 28, 2003.

Applicability Date: For dates of applicability, see §1.6011–4(h), §20.6011–4(b), §25.6011–4(b), §31.6011–4(b), §53.6011–4(b), §54.6011–4(b), §56.6011–4(b), §301.6111–2(h), and §301.6112–1(j).

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

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control numbers 1545–1685, 1545–1687, and 1545–1686. Responses to these collections of information are mandatory. Form 8886, "*Reportable Transaction Disclosure Statement*", reflects the collection of information relating to the disclosure of reportable transactions for the regulations under §1.6011–4, and was approved by OMB under control number 1545–1800. Form 8264, "*Application for Registration of a Tax Shelter*", reflects the collection of information relating to the registration of tax shelters for the regulations under §301.6111–2 and §301.6111–1T, and was approved by OMB under control number 1545–0865.

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 assigned by the Office of Management and Budget.

The estimated annual burden per respondent/recordkeeper for the collection of information in §1.6011–4 will be reflected on Form 8886. The estimated annual burden for the collection of information in Form 8886 is 3,770 hours and the estimated number of respondents/recordkeepers is 500. The estimated annual burden per respondent/recordkeeper for the collection of information in §301.6111–2 is reflected on Form 8264. The estimated annual burden for the collection of information in Form 8264 is 14,382 hours and the estimated number of respondents/recordkeepers is 350. The estimated annual burden per recordkeeper for the collection of information in §301.6112–1 is 100 hours and the estimated number of recordkeepers is 500.

Comments concerning the accuracy of these burden estimates and suggestions for reducing these burdens should be sent to the **Internal Revenue Service,** Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP, Washington, DC 20224, and 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.

Books and records relating to these collections 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 part 1 to provide rules relating to the disclosure of reportable transactions by certain taxpayers on their federal tax returns under section 6011, and 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. This document amends 26 CFR part 301 to provide rules regarding the registration of confidential corporate tax shelters under section 6111(d) and rules relating to the list maintenance requirements under section 6112.

On February 28, 2000, the IRS issued temporary and proposed regulations regarding sections 6011, 6111, and 6112 (T.D. 8877, 2000–1 C.B. 747, REG–103735–00, 2000–1 C.B. 770; T.D. 8876, 2000–1 C.B. 753, REG–110311–98, 2000–1 C.B. 767; T.D. 8875, 2000–1 C.B. 761, REG–103736–00, 2000–1 C.B. 768) (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; 65 FR 11211, 65 FR 11271) on March 2, 2000. On August 11, 2000, the IRS issued temporary and proposed regulations modifying the rules under sections 6011, 6111, and 6112 (T.D. 8896, 2000–2 C.B. 249, REG–103735–00, REG–110311–98, REG–103736–00, 2000–2 C.B. 258) (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 (T.D. 8961, 2001–2 C.B. 194, REG–103735–00, REG–110311–98, REG–103736–00, 2001–2 C.B. 204) (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 (T.D. 9000, 2002–28 I.R.B. 87, REG–103735–00, REG–110311–98, 2002–28 I.R.B. 109) (the June 2002 regulations). The June 2002 regulations were published in the **Federal Register** (67 FR 41324, 67 FR 41362) on June 18, 2002. On October 17, 2002, the IRS issued temporary and proposed regulations modifying the rules under sections 6011, 6111, and 6112 (T.D. 9017, 2002–45 I.R.B. 815, REG–103735–00, REG–154117–02, REG–154116–02, REG–154115–02, REG–154429–02, REG–154423–02, REG–154426–02, REG–110311–98, 2002–45 I.R.B. 832; T.D. 9018, 2002–45 I.R.B. 823, REG–103736–00, 2002–45 I.R.B. 834) (the October 2002 regulations). The October 2002 regulations were published in the **Federal Register** (67 FR 64799, 67 FR 64840; 67 FR 64807, 67 FR 64842) on October 22, 2002. On December 11, 2002, and on January 7, 2003, the IRS and Treasury Department held a public hearing on these regulations. Written and electronic comments responding to the temporary regulations and the notices of proposed rulemaking were received. After consideration of all the statements and comments, the proposed regulations are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed. The revisions are discussed below.

Explanation and Summary of Comments

1. *In General*

These regulations finalize the rules for disclosure of reportable transactions, registration of confidential corporate tax shelters, and list maintenance of potentially abusive tax shelters. Sections 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, 56.6011–4, and 301.6111–2 finalize each corresponding proposed regulation with few, if any, changes. Sections 1.6011–4 and 301.6112–1 modify and finalize each corresponding proposed regulation.

The IRS and Treasury Department received numerous comments relating to the October 2002 temporary regulations regarding disclosure under §1.6011–4T and list maintenance under §301.6112–1T. All comments were reviewed thoroughly. In particular, the IRS and Treasury Department reviewed the commentators' suggested clarifications to the rules pertaining to loss transactions and transactions with a significant book-tax difference, and to the rules pertaining to who must disclose transactions under section 6011. The IRS and Treasury Department also focused specifically on the comments relating to the rules pertaining to material advisors and the rules pertaining to the persons who must be included on lists under section 6112. In response to the commentators' suggested clarifications, the final regulations have been revised to tailor more narrowly the scope of the transactions for which disclosure and maintenance of information under sections 6011 and 6112 is required. The major changes to the regulations are described below.

2. *Section 6011—Participants*

The definition of participation has been clarified in the final regulations. Reporting of transactions by RICs and reporting of certain leasing transactions have been excluded from the requirements under §1.6011–4, provided that the transactions are not listed transactions.

3. *Section 6011—Confidential Transactions*

A confidential transaction is a transaction that is offered under conditions of confidentiality. The regulations generally provide a presumption of non-confidentiality if the taxpayer receives written authorization to disclose the tax treatment and tax structure of the transaction. Some commentators suggested the following changes to the regulations: (1) clarification regarding when the written authorization to disclose has to be effective, (2) clarification regarding whether proprietary transactions are confidential if there is a written authorization to disclose, and (3) an exception for certain merger and acquisition transactions. In response to those comments, the IRS and Treasury Department have made modifications to the factors for a confidential transaction in the final regulation.

The final regulations delete the clarification, under the definition of a confidential transaction for purposes of both section 6011 and section 6111, that a privilege held by the taxpayer does not cause a transaction to be confidential. The IRS and Treasury Department believe that this clarification is not necessary because the attorney-client privilege (or the confidentiality privilege of section 7525(a)) does not affect whether a transaction is confidential. A claim of privilege does not restrict the taxpayer's ability to disclose the tax treatment or tax structure of a transaction.

4. *Section 6011—Transactions with Contractual Protection*

Commentators indicated that it is inappropriate to require the reporting of a transaction for which the taxpayer obtains tax insurance. Other commentators suggested that the contractual protection factor would require the reporting of numerous non-abusive types of transactions, such as legitimate business transactions with tax indemnities or rights to terminate the trans-

action in the event of a change in tax law. In response to these comments, the IRS and Treasury Department changed the focus of the contractual protection factor to whether fees are refundable or contingent. However, if it comes to the attention of the IRS and Treasury Department that other types of contractual protection, including tax insurance or tax indemnities, are being used to facilitate abusive transactions, changes to the regulations will be considered.

5. *Section 6011—Loss Transactions*

Many commentators suggested that the loss transaction factor was over broad and would require disclosure of a significant number of transactions occurring in the ordinary course of business. In response to these comments, exceptions to the loss transaction factor will be issued in separate published guidance.

6. *Section 6011—Transactions with a Significant Book-Tax Difference*

The IRS and Treasury Department received many comments on the use of U.S. GAAP, the manner in which gross assets are to be calculated, and the potential exclusion of items for purposes of the book-tax difference factor. In response, the final regulations revise the book-tax difference factor to provide that if a taxpayer in the ordinary course of its business keeps books on a basis other than U.S. GAAP and does not use U.S. GAAP for any purpose, then the taxpayer may determine the treatment of a book item by using the books maintained by the taxpayer, provided the books are kept on the same basis consistently from year to year. In addition, the final regulations increase the requisite gross asset amount to $250 million or more and specify that the amount of gross assets is determined by ascertaining whether the gross assets equaled or exceeded $250 million for book purposes at the end of any financial accounting period that ends with or within the entity's taxable year in which the transaction occurs.

In response to comments that the scope of the book-tax difference factor was over broad, the IRS and Treasury Department have revised the exceptions to this factor. The exceptions to the book-tax difference factor have been removed from the regulations and will be issued in separate published guidance.

7. *Section 6011—Form 8886*

Taxpayers will disclose reportable transactions under the final regulations on Form 8886. Reportable transactions entered into on or after January 1, 2003, and prior to February 28, 2003, for which the taxpayer does not choose to apply the final regulations, may be disclosed on Form 8886 or as provided in §1.6011–4T(c) as published in the **Federal Register** (67 FR 41324) on June 18, 2002. Form 8886 will allow taxpayers to aggregate substantially similar transactions on one form for disclosure purposes.

8. *Section 6112*

Commentators requested clarification on the definition of a material advisor and the threshold fee requirement. In response to those comments, the final regulations provide that a person is a material advisor if the person is required to register a transaction under section 6111, or the person receives at least a minimum fee with respect to the transaction and makes a tax statement to certain taxpayers. In addition, the IRS and Treasury Department have clarified that fees are defined as all fees for services for advice (whether or not tax advice) or for the implementation of a transaction that is a potentially abusive tax shelter.

In the final regulations, the IRS and Treasury Department have clarified that the procedures for asserting a privilege claim apply to information required to be maintained in §301.6112–1(e)(3)(i)(I) that might be privileged. This change reflects the IRS and Treasury Department's belief that the other information covered by these regulations is not privileged. These procedures neither expand nor contract the scope of items that may be privileged.

Effective Date

Regulations §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, 56.6011–4, 301.6111–2, and 301.6112–1 apply to transactions entered into on or after February 28, 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. 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. With regard to disclosure and registration, this certification is based upon the fact that the time required to prepare or retain the disclosure or registration is not lengthy and will not have a significant impact on those small entities that are required to provide disclosure or to register. With regard to list maintenance, this certification is based upon the fact that the number of respondents is small, those persons responsible for maintaining the list described in the regulations are principally sophisticated businesses, including accounting firms and law firms, and very few respondents, if any, are likely to be small businesses. 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, the notice of proposed rulemaking preceding these regulations was 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 and Charlotte Chyr of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 20, 25, 31, 53, 54, 56, 301, and 602 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 1.6011–4 is added to read as follows:

§1.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* Every taxpayer that has participated, as described in paragraph (c)(3) of this section, in a reportable transaction within the meaning of paragraph (b) of this section and who is required to file a tax return 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. 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 (IRS) 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 to a taxpayer under conditions of confidentiality. A transaction is considered offered to a taxpayer under conditions of confidentiality if the taxpayer's disclosure of the tax treatment or the 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 person who makes or provides a statement, oral or written, to the taxpayer (or for whose benefit a statement is made or provided to the taxpayer) as to the potential tax consequences that may result from the transaction, whether or not such understanding or agreement is legally binding. A transaction also will be considered offered to a taxpayer 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 tax treatment or tax structure 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, to the taxpayer (or for whose benefit a statement is made or provided to the taxpayer) as to the potential tax consequences that may result from the transaction. All the facts and circumstances relating to the transaction will be considered when determining whether a transaction is offered to a taxpayer under conditions of confidentiality, including the prior conduct of the parties.

(ii) *Exceptions*—(A) *Securities law.* A transaction is not considered offered to a taxpayer 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.

(B) *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 a confidential transaction under this paragraph (b)(3) if the taxpayer 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 an agreement (with or without conditions) to enter into the transaction. However, this exception is not available where the taxpayer'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.

(iii) *Presumption.* Unless the facts and circumstances indicate otherwise, a transaction is not considered offered to a taxpayer under conditions of confidentiality if every person who makes or provides a statement, oral or written, to the taxpayer (or for whose benefit a statement is made or provided to the taxpayer) as to the potential tax consequences that may result from the transaction, provides express written authorization to the taxpayer in substantially the following form: "the taxpayer (and each employee, representative, or other agent of the taxpayer) may 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 taxpayer relating to such tax treatment and tax structure." Except as provided in paragraph (b)(3)(ii) of this section, this presumption is available only in cases in which each written authorization permits the taxpayer to disclose the tax treatment and tax structure of the transaction immediately upon commencement of discussions with the person providing the authorization and each written authorization is given no later than 30 days from the day the person providing the written authorization first makes or provides a statement to the taxpayer regarding the tax consequences of the transaction. A transaction that is claimed to be exclusive or proprietary to any party other than the taxpayer will not be considered a confidential transaction under this paragraph (b)(3) if written authorization to disclose is provided to the taxpayer in accordance with this paragraph (b)(3)(iii) and the transaction is not otherwise confidential.

(4) *Transactions with contractual protection*—(i) *In general.* A transaction with contractual protection is a transaction for which the taxpayer or a related party (as described in section 267(b) or 707(b)) has the right to a full or partial refund of fees (as described in paragraph (b)(4)(ii) of this section) if all or part of the intended tax consequences from the transaction are not sustained. A transaction with contractual protection also is a transaction for which fees (as described in paragraph (b)(4)(ii) of this section) are contingent on the taxpayer's realization of tax benefits from the transaction. All the facts and circumstances relating to the transaction will be considered when determin-

ing whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation.

(ii) *Fees.* Paragraph (b)(4)(i) of this section only applies with respect to fees paid by or on behalf of the taxpayer or a related party to any person who makes or provides a statement, oral or written, to the taxpayer or related party (or for whose benefit a statement is made or provided to the taxpayer or related party) as to the potential tax consequences that may result from the transaction.

(iii) *Exceptions*—(A) *Termination of transaction.* A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

(B) *Previously reported transaction.* If a person makes or provides a statement to a taxpayer as to the potential tax consequences that may result from a transaction only after the taxpayer has entered into the transaction and reported the consequences of the transaction on a filed tax return, and the person has not previously received fees from the taxpayer relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection. This paragraph (b)(4)(iii)(B) does not provide any substantive rules regarding when a person may charge refundable or contingent fees with respect to a transaction. See Circular 230, 31 CFR Part 10, for the regulations governing practice before the IRS.

(5) *Loss transactions*—(i) *In general.* A loss transaction is any transaction resulting in the 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) $10 million in any single taxable year or $20 million in any combination of taxable years for partnerships that have only corporations as partners (looking through any partners that are themselves partnerships), whether or not any losses flow through to one or more partners; or $2 million in any single taxable year or $4 million in any combination of taxable years for all other partnerships, whether or not any losses flow through to one or more partners;

(C) $2 million in any single taxable year or $4 million in any combination of taxable years for individuals, S corporations, or trusts, whether or not any losses flow through to one or more shareholders or 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) *Cumulative losses.* In determining whether a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of taxable years as described in paragraph (b)(5)(i) of this section, only losses claimed in the taxable year that the transaction is entered into and the five succeeding taxable years are combined.

(iii) *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). The full amount of a section 165 loss is taken into account for the year in which the loss is sustained, regardless of whether all or part of the loss enters into the computation of a net operating loss under section 172 or a net capital loss under section 1212 that is a carryback or carryover to another year. A section 165 loss does not include any portion of a loss, attributable to a capital loss carryback or carryover from another year, that is treated as a deemed capital loss under section 1212.

(B) For purposes of this section, a section 165 loss includes an amount deductible pursuant to 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.

(6) *Transactions with a significant book-tax difference*—(i) *In general.* A transaction with a significant book-tax difference is a transaction where the amount for tax purposes of any item or items of income, gain, expense, or loss from the transaction differs by more than $10 million on a gross basis from the amount 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), the amount of an item for book purposes is determined by applying U.S. generally accepted accounting principles (U.S. GAAP) for worldwide income. However, if a taxpayer, in the ordinary course of its business, keeps books for reporting financial results to shareholders, creditors, or regulators on a basis other than U.S. GAAP, and does not maintain U.S. GAAP books for any purpose, then the taxpayer may determine the amount of a book item for purposes of this paragraph (b)(6) by using the books maintained by the taxpayer, provided the books are kept on the same basis consistently from year to year. 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 USC 78a) and related business entities (as described in section 267(b) or 707(b)); or

(*2*) Business entities that have $250 million or more in gross assets for book purposes at the end of any financial accounting period that ends with or within the entity's taxable year in which the transaction occurs (for purposes of this determination, 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, gain, loss, or expense 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, gain, loss, or expense 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).

(7) *Transactions involving a brief asset holding period.* A transaction involving a brief asset holding period is any transaction resulting in the taxpayer claiming 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 45 days or less. For purposes of determining the holding period, the principles of sections 246(c)(3) and (c)(4) apply. Transactions resulting in a foreign tax credit for withholding taxes or other taxes imposed in respect of a dividend that are not disallowed under section 901(k) (including transactions eligible for the exception for securities dealers under section 901(k)(4)) are excluded from this paragraph (b)(7).

(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)(3) through (7) of this section, if the Commissioner makes a determination by published guidance that the transaction is not subject to the reporting requirements of this section. The Commissioner may make a determination by individual letter ruling under paragraph (f) of this section that an individual letter ruling request on a specific transaction or type of transaction satisfies the reporting requirements of this section with regard to that transaction or type of transaction for the taxpayer who requests the individual letter ruling.

(ii) *Special rule for RICs.* For purposes of this section, a regulated investment company (RIC) as defined in section 851 or an investment vehicle that is owned 95 percent or more by one or more RICs at all times during the course of the transaction are not required to disclose a transaction that is described in any of paragraphs (b)(3) through (7) of this section unless the transaction is also a listed transaction.

(iii) *Special rule for lease transactions.* For purposes of this section, leasing transactions of the type excepted from the registration requirements under section 6111(d) of the Code and the list maintenance requirements under section 6112 as described in Notice 2001–18, 2001–1 C.B. 731 (see §601.601(d)(2) of this chapter), are excluded from paragraphs (b)(3) through (7) 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. Except as otherwise specifically provided in this section, the term *taxpayer* also includes 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) *Participation*—(i) *In general*—(A) *Listed transactions.* A taxpayer has participated in a listed transaction if the taxpayer's tax return reflects tax consequences or a tax strategy described in the published guidance that lists the transaction under paragraph (b)(2) of this section. A taxpayer also has participated in a listed transaction if the taxpayer knows or has reason to know that the taxpayer's tax benefits are derived directly or indirectly from tax consequences or a tax strategy described in published guidance that lists a transaction under paragraph (b)(2) of this section. Published guidance may identify other types or classes of persons that will be treated as participants in a listed transaction.

(B) *Confidential transactions.* A taxpayer has participated in a confidential transaction if the taxpayer's tax return reflects a tax benefit from the transaction and the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in paragraph (b)(3) of this section. If a partnership's, S corporation's, or trust's disclosure is limited, and the partner's, shareholder's, or beneficiary's disclosure is not limited, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the confidential transaction.

(C) *Transactions with contractual protection.* A taxpayer has participated in a transaction with contractual protection if the taxpayer's tax return reflects a tax benefit from the transaction and, as described in paragraph (b)(4) of this section, the taxpayer has the right to the full or partial refund of fees or the fees are contingent. If a partnership, S corporation, or trust has the right to a full or partial refund of fees or has a contingent fee arrangement, and the partner, shareholder, or beneficiary does not individually have the right to the refund of fees or a contingent fee arrangement, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the transaction with contractual protection.

(D) *Loss transactions.* A taxpayer has participated in a loss transaction if the taxpayer's tax return reflects a section 165 loss and the amount of the section 165 loss equals or exceeds the threshold amount applicable to the taxpayer as described in paragraph (b)(5)(i) of this section. If a taxpayer is a partner in a partnership, shareholder in

an S corporation, or beneficiary of a trust and a section 165 loss as described in paragraph (b)(5) of this section flows through the entity to the taxpayer (disregarding netting at the entity level), the taxpayer has participated in a loss transaction if the taxpayer's tax return reflects a section 165 loss and the amount of the section 165 loss that flows through to the taxpayer equals or exceeds the threshold amounts applicable to the taxpayer as described in paragraph (b)(5)(i) of this section. For this purpose, a tax return is deemed to reflect the full amount of a section 165 loss described in paragraph (b)(5) of this section allocable to the taxpayer under this paragraph (c)(3)(i)(D), regardless of whether all or part of the loss enters into the computation of a net operating loss under section 172 or net capital loss under section 1212 that the taxpayer may carry back or carry over to another year.

(E) *Transactions with a significant book-tax difference.* A taxpayer has participated in a transaction with a significant book-tax difference if the taxpayer's tax treatment of an item from the transaction differs from the book treatment of that item as described in paragraph (b)(6) of this section. In determining whether a transaction results in a significant book-tax difference for a taxpayer, differences that arise solely because a subsidiary of the taxpayer is consolidated with the taxpayer, in whole or in part, for book purposes, but not for tax purposes, are not taken into account.

(F) *Transactions involving a brief asset holding period.* A taxpayer has participated in a transaction involving a brief asset holding period if the taxpayer's tax return reflects items giving rise to a tax credit described in paragraph (b)(7) of this section. If a taxpayer is a partner in a partnership, shareholder in an S corporation, or beneficiary of a trust and the items giving rise to a tax credit described in paragraph (b)(7) of this section flow through the entity to the taxpayer (disregarding netting at the entity level), the taxpayer has participated in a transaction involving a brief asset holding period if the taxpayer's tax return reflects the tax credit and the amount of the tax credit claimed by the taxpayer exceeds $250,000.

(G) *Shareholders of foreign corporations—*(*1*) *In general.* A reporting shareholder of a foreign corporation participates in a transaction described in paragraphs (b)(2) through (5) and (b)(7) of this section if the foreign corporation would be considered to participate in the transaction under the rules of this paragraph (c)(3) if it were a domestic corporation filing a tax return that reflects the items from the transaction. A reporting shareholder participates in a transaction described in paragraph (b)(6) of this section only if the foreign corporation would be considered to participate in the transaction under the rules of this paragraph (c)(3) if it were a domestic corporation and the transaction reduces or eliminates an income inclusion that otherwise would be required under section 551, 951, or 1293. A reporting shareholder (and any successor in interest) is considered to participate in a transaction under this paragraph (c)(3)(i)(G) only for its first taxable year with or within which ends the first taxable year of the foreign corporation in which the foreign corporation participates in the transaction, and for the reporting shareholder's five succeeding taxable years.

(*2*) *Reporting shareholder.* 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).

(ii) *Examples.* The following examples illustrate the provisions of paragraph (c)(3)(i) of this section:

Example 1. 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 transferred basis transaction, for example, a transaction described in section 351. The transferee corporation claims the deductions associated with the high basis property subject to the lease. The transferor's and transferee corporation's tax returns reflect tax positions described in Notice 95–53. Therefore, the transferor and transferee corporation have participated in the listed transaction. In the section 351 transaction, the transferor will have received stock with low value and high basis from the transferee corporation. If the transferor subsequently transfers the high basis/low value stock to a taxpayer in another transaction intended to qualify as a transferred 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 indirectly from the lease stripping transaction, then the taxpayer has participated in the listed transaction. Accordingly, the taxpayer must disclose the transaction and the manner of the taxpayer's participation in the transaction under the rules of this section. If a bank lends money to the transferor, transferee corporation, or taxpayer for use in their transactions, the bank has not participated in the listed transaction because the bank's tax return does not reflect tax consequences or a tax strategy described in the listing notice (nor does the bank's tax return reflect a tax benefit derived from tax consequences or a tax strategy described in the listing notice), nor is the bank described as a participant in Notice 95–53.

Example 2. XYZ is a limited liability company treated as a partnership for tax purposes. X, Y, and Z are members of XYZ. X is an individual, Y is an S corporation, and Z is a partnership. XYZ enters into a confidential transaction under paragraph (b)(3) of this section. X is bound by the confidentiality agreement, but Y and Z are not bound by the agreement. As a result of the transaction, XYZ, X, Y, and Z all reflect a tax benefit on their tax returns. Because XYZ's and X's disclosure of the tax treatment and tax structure are limited in the manner described in paragraph (b)(3) of this section and their tax returns reflect a tax benefit from the transaction, both XYZ and X have participated in the confidential transaction. Neither Y nor Z has participated in the confidential transaction because they are not subject to the confidentiality agreement.

Example 3. Partnership AB has gross assets with a book value of over $250 million. Partner A is an SEC reporting company and partner B is an individual. AB enters into a transaction that results in a book-tax difference for AB of $25 million. The transaction is a reportable transaction for AB under paragraph (b)(6) of this section because the book-tax difference exceeds $10 million. As a result of A's partnership interest in AB and the allocation of items relating to the transaction to A, A has a book-tax difference of $11 million. The transaction is a reportable transaction for A under paragraph (b)(6) of this section because the $11 million book-tax difference exceeds $10 million. However, even though $14 million of the book-tax difference would be allocated to B, the transaction is not a reportable transaction for B under paragraph (b)(6) of this section because B, an individual, is not subject to paragraph (b)(6) of this section.

Example 4. (i) P corporation, the parent corporation of a group of corporations that file a consolidated tax return, owns 60% of the stock of T corporation. T files its own tax return and is not included as a member of the P group on the P group consolidated tax return. For book purposes, some or all of T's income is included by the group of corporations that includes P. T engages in a transaction that results in items of book income but does not result in items of income for tax purposes. P and T are SEC reporting companies.

(ii) T participated in the transaction. T has no items of taxable income but has items of book income. If items from the transaction result in a book-tax difference determined in accordance with paragraph (b)(6) of this section of $10 million in any single year, T will be required to file Form 8886. The P group did not participate in the transaction, and does not have a book-tax difference for purposes of paragraph (b)(6) of this section because, even if the P group included $10 mil-

lion in book income, the book tax difference arises solely because T is not part of P's consolidated group for tax purposes.

(iii) If the facts were changed so that P corporation owned 80% of the stock of T and T was a member of the P consolidated group for tax purposes, the P group would be the taxpayer that participated in the transaction. If, in any single year, the transaction produced items of income for book purposes of $10 million but no items of taxable income, P would be required to file Form 8886. This result would not change if T separately reported its items for book purposes, if P reported none of T's items on its consolidated financial statements, or if the P consolidated financial statements included only part of a $10 million book-tax difference relating to items from T's transaction.

Example 5. Domestic corporations X and Y each own 50 percent of the voting stock of CFC, a controlled foreign corporation. X, Y, and CFC each use the calendar year as their taxable year. CFC is not engaged in the conduct of a trade or business within the United States and has no U.S. source income. Accordingly, CFC is not required to file a U.S. federal income tax return. *See* §1.6012–2(g). Under paragraph (c)(3)(i)(G)(*2*) of this section, X and Y are reporting shareholders with respect to CFC. CFC purchases a Euro-denominated bond on June 1, 2003, for 104,400,000 Euros. The bond matures on June 7, 2003, and CFC collects 104,500,000 Euros, equal to the bond's 100,000,000 Euro face amount plus 5,000,000 Euros of accrued but unpaid interest, less a 10% foreign withholding tax of 500,000 Euros. The average dollar-Euro exchange rate for the year is $.80 = 1 Euro, so CFC adds $400,000 to its post-1986 foreign income taxes pool as a result of the transaction. *See* sections 986(a)(1) and 902(c)(2). Under paragraph (c)(3)(i)(G)(*1*) of this section, X and Y have each participated in a transaction involving a brief asset holding period described in paragraph (b)(7) of this section for their taxable years 2003 through 2008 because both X and Y are reporting shareholders of CFC, and CFC would have been considered to have participated in a reportable transaction if it were a domestic corporation.

(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.

(5) *Tax.* For purposes of this section, the term *tax* means federal income tax.

(6) *Tax benefit.* A tax benefit includes 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.

(7) *Tax return.* For purposes of this section, the term *tax return* means a federal income tax return and a federal information return.

(8) *Tax treatment.* The tax treatment of a transaction is the purported or claimed federal income tax treatment of the transaction.

(9) *Tax structure.* 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.

(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 8886 is the disclosure statement required under this section. 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 tax return for each taxable year for which a taxpayer participates in a reportable 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 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 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 tax return for each taxable year in which the partnership or S corporation participates in the transaction under the rules of paragraph (c)(3)(i) of this section.

(2) *Special rules*—(i) *Listed transactions.* If a transaction becomes a listed transaction after the filing of the taxpayer's final tax return reflecting either tax consequences or a tax strategy described in the published guidance listing the transaction (or a tax benefit derived from tax consequences or a tax strategy described in the published guidance listing the transaction) and before the end of the statute of limitations period for that return, then a disclosure statement must be filed as an attachment to the taxpayer's tax return next filed after the date the transaction is listed.

(ii) *Loss transactions.* If a transaction becomes a loss transaction because the losses

equal or exceed the threshold amounts as described in paragraph (b)(5)(i) of this section, a disclosure statement must be filed as an attachment to the taxpayer's tax return for the first taxable year in which the threshold amount is reached and to any subsequent tax return that reflects any amount of section 165 loss from the transaction.

(3) *Multiple disclosures.* 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).

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

Example. In January of 2004, F, a domestic calendar year corporation, enters into a transaction that is not a listed transaction when entered into and is not a transaction described in any of the paragraphs (b)(3) through (7) of this section. All the tax benefits from the transaction are reported on F's 2004 tax return. On March 1, 2008, 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. The statute of limitations for F's 2004 taxable year is still open. F is required to file Form 8886 for the transaction as an attachment to F's next filed federal income tax return and must send a copy of Form 8886 to OTSA. If F's 2007 federal income tax return has not been filed on or before the date the Service identifies the transaction as a listed transaction, Form 8886 must be attached to F's 2007 return and at that time a copy of Form 8886 must be sent to OTSA.

(f) *Rulings and protective disclosures*—(1) *Requests for ruling.* A 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 a 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). Furthermore, in that taxpayer's individual ruling, the Commissioner in his discretion may determine that the submission satisfies the disclosure rules under this section for that particular transaction or type of transaction.

(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.

(3) *Rulings on the merits of a transaction.* If a taxpayer requests a ruling on the merits of a specific transaction on or before the date that disclosure would otherwise be required under this section, and receives a favorable ruling as to the transaction, the disclosure rules under this section will be deemed to have been satisfied by that taxpayer with regard to that transaction, so long as the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section.

(g) *Retention of documents.* In accordance with the instructions to Form 8886, 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 tax treatment or tax structure of the transaction. The 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 required under this section. (This document retention requirement is in addition to any document retention requirements that section 6001 generally imposes on the taxpayer.) The documents may include 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 purported or claimed tax benefits arising from the reportable transaction; and documents, if any, referring to the business purposes for the reportable transaction. A taxpayer is not required to retain earlier drafts of a document if the taxpayer 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 the document that is material to an understanding of the purported tax treatment or tax structure of the 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 February 28, 2003. All the rules in paragraphs (a) through (g) of this section may be relied upon for transactions entered into on or after January 1, 2003, and before February 28, 2003. Otherwise, the rules that apply with respect to transactions entered into before February 28, 2003, are contained in §1.6011–4T in effect prior to February 28, 2003 (see 26 CFR part 1 revised as of April 1, 2002, 2002–28 I.R.B. 90, and 2002–45 I.R.B. 818 (see §601.601(d)(2) of this chapter)).

§1.6011–4T [Removed]

Par. 3. Section 1.6011–4T is removed.

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 4. The authority citation for part 20 continues to read in part as follows:

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

Par. 5. Section 20.6011–4 is added to read as follows:

§20.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 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.

§20.6011–4T [Removed]

Par. 6. Section 20.6011–4T is removed.

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

Par. 7. The authority citation for part 25 continues to read in part as follows:

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

Par. 8. Section 25.6011–4 is added to read as follows:

§25.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 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.

§25.6011–4T [Removed]

Par. 9. Section 25.6011–4T is removed.

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

Par. 10. The authority citation for part 31 continues to read in part as follows:

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

Par. 11. Section 31.6011–4 is added to read as follows:

§31.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 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.

§31.6011–4T [Removed]

Par. 12. Section 31.6011–4T is removed.

PART 53—FOUNDATION AND SIMILAR EXCISE TAXES

Par. 13. The authority citation for part 53 continues to read as follows:

Authority: 26 U.S.C. 7805

Par. 14. Section 53.6011–4 is added to read as follows:

§53.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 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.

§53.6011–4T [Removed]

Par. 15. Section 53.6011–4T is removed.

PART 54—PENSION EXCISE TAXES

Par. 16. The authority citation for part 54 continues to read in part as follows:

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

Par. 17. Section 54.6011–4 is added to read as follows:

§54.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 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.

§54.6011–4T [Removed]

Par. 18. Section 54.6011–4T is removed.

PART 56—PUBLIC CHARITY EXCISE TAXES

Par. 19. The authority citation for part 56 continues to read in part as follows:

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

Par. 20. Section 56.6011–4 is added to read as follows:

§56.6011–4 Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 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.

§56.6011–4T [Removed]

Par. 21. Section 56.6011–4T is removed.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 22. The authority citation for part 301 continues to read in part as follows:

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

Par. 23. Section 301.6111–2 is added as follows:

§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 in favor of registration. For examples, see §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 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 §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 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 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 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 §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 §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 §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 §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 §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 §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 §601.601(d)(2) of this chapter)).

§301.6111–2T [Removed]

Par. 24. Section 301.6111–2T is removed.

Par. 25. Section 301.6112–1 is added as follows:

§301.6112–1 Requirement to prepare, maintain, and furnish lists with respect to potentially abusive tax shelters.

(a) *In general.* Each organizer and seller, as described in paragraph (c) of this section, of a transaction that is a potentially abusive tax shelter, as described in paragraph (b) of this section, shall prepare and maintain a list of persons in accordance with paragraph (e) of this section and upon request shall furnish such list to the Internal Revenue Service (IRS) in accordance with paragraph (g) of this section.

(b) *Potentially abusive tax shelters.* For purposes of this section, a potentially abusive tax shelter is any transaction that is a section 6111 tax shelter, as described in paragraph (b)(1) of this section, or that has a potential for tax avoidance or evasion, as described in paragraph (b)(2) 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.

(1) *Transaction that is a section 6111 tax shelter.* A section 6111 tax shelter is any transaction that is required to be registered with the IRS under section 6111, regardless of whether that tax shelter is properly registered pursuant to section 6111.

(2) *Transaction that has a potential for tax avoidance or evasion*—(i) *In general.* A transaction that has a potential for tax avoidance or evasion includes—

(A) Any listed transaction as defined in §1.6011–4(b)(2) of this chapter that is subject to disclosure under §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter;

(B) Any transaction that a potential material advisor (at the time the transaction is entered into or an interest is acquired) knows is or reasonably expects will become a reportable transaction under §1.6011–4(b)(3) through (7) of this chapter; and

(C) Any interest in a type of transaction that is transferred if the transferor knows or reasonably expects that the transferee will sell or transfer an interest in that type of transaction to another transferee (subsequent participant), and the type of transaction would be a listed transaction under §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter, or a transaction described in §1.6011–4(b)(3) through (7) of this chapter assuming that the relevant thresholds are met.

(ii) The determination of whether a transaction has the potential for tax avoidance or evasion does not depend upon whether the transaction is properly disclosed pursuant to §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter.

(iii) If a transaction becomes a potentially abusive tax shelter on or after February 28, 2003, because it is a listed transaction as defined in §1.6011–4 of this chapter and is subject to disclosure under §1.6011–4 of this chapter this section shall apply with respect to any such transaction entered into or any interest acquired therein after February 28, 2000 (including interests acquired before the transaction becomes a listed transaction). If a transaction becomes a listed transaction as defined in §1.6011–4 of this chapter and is subject to disclosure under §§20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter, this section shall apply with respect to any such transaction entered into or any interest acquired therein on or after January 1, 2003 (including interests acquired before the transaction becomes a listed transaction).

(c) *Organizer and seller*—(1) *In general.* A person is an organizer of, or a seller of an interest in, a transaction that is a potentially abusive tax shelter if that person is a material advisor, as described in paragraph (c)(2) of this section, with respect to that transaction.

(2) *Material advisor*—(i) *In general.* A person is a material advisor with respect to a transaction that is a potentially abusive tax shelter if the person is required to register the transaction under section 6111; or the person receives or expects to receive at least a minimum fee (as defined in paragraph (c)(3) of this section) with respect to the transaction, and the person makes a tax statement (as defined in paragraph (c)(2)(iii) of this section) to or for the benefit of—

(A) A taxpayer who is required to disclose the transaction under §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter because the transaction is a listed transaction or who would have been required to disclose a listed transaction under §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter if the transaction had become a listed transaction within the statute of limitations period in §1.6011–4(e)(2);

(B) A taxpayer who the potential material advisor (at the time the transaction is entered into) knows is or reasonably expects to be required to disclose the transaction under §1.6011–4 because the transaction is or is reasonably expected to become a transaction described in §1.6011–4(b)(3) through (7);

(C) A person who is required to register the transaction under section 6111; or

(D) A person who purchases (or otherwise acquires) an interest in a section 6111 tax shelter;

(E) A transferee of an interest if the interest is described in paragraph (b)(2)(i)(C) of this section.

(ii) *Special rules.* A material advisor generally does not include a person who makes a tax statement solely in the person's capacity as an employee, shareholder, partner or agent of another person. Any tax statement made by that person will be attributed to that person's employer, corporation, partnership or principal. However, a person shall be treated as a material advisor if that person forms or avails of an entity with the purpose of avoiding the rules of section 6111 or 6112 or the penalties under section 6707 or 6708.

(iii) *Tax statement*—(A) *In general.* A tax statement means any statement, oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction as defined in §1.6011–4(b)(2) through (7) or a tax shelter as described in section 6111.

(B) *Confidential transactions.* A tax statement relates to an aspect of a transaction that causes it to be a confidential transaction if the statement concerns a tax benefit related to the transaction and either the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in §1.6011–4(b)(3) of this chapter by or for the benefit of the person making the statement, or the person making the statement knows the taxpayer's disclosure of the tax structure or tax aspects of the transaction is limited in the manner described in §1.6011–4(b)(3) of this chapter.

(C) *Transactions with contractual protection.* A tax statement relates to an aspect of a transaction that causes it to be a transaction with contractual protection if the statement concerns a tax benefit related to the transaction and either—

(*1*) The taxpayer has the right to a full or partial refund of fees paid to the person making the statement or if these fees are contingent in the manner described in §1.6011–4(b)(4) of this chapter; or

(*2*) The person making the statement knows that the taxpayer has the right to a full or partial refund of fees (as described in §1.6011–4(b)(4)(ii)) paid to another if all or part of the intended tax consequences from the transaction are not sustained or that fees (as described in §1.6011–4(b)(4)(ii)) paid by the taxpayer to another are contingent on the taxpayer's realization of tax benefits from the transaction in the manner described in §1.6011–4(b)(4) of this chapter.

(D) *Loss transactions.* A tax statement relates to an aspect of a transaction that causes it to be a loss transaction if the statement concerns an item that gives rise to a loss described in §1.6011–4(b)(5) of this chapter.

(E) *Transactions with a significant book-tax difference.* A tax statement relates to an aspect of a transaction that causes it to be a transaction with a significant book-tax difference if the statement concerns an item that gives rise to a book-tax difference described in §1.6011–4(b)(6) of this chapter.

(F) *Transactions involving a brief asset holding period.* A tax statement relates to an aspect of a transaction involving a brief asset holding period if the statement concerns an item that gives rise to a tax credit described in §1.6011–4(b)(7) of this chapter.

(iv) *Exceptions*—(A) *Post-filing advice.* A person will not be considered to be a material advisor with respect to a transaction if that person does not make or provide a tax statement regarding the transaction until after the first tax return reflecting tax benefit(s) of the transaction is filed with the IRS.

(B) *Publicly-filed statements.* A tax statement with respect to a transaction that includes only information about the transaction contained in publicly-available documents filed with the Securities and Exchange Commission no later than the close of the transaction will not be considered a tax statement to or for the benefit of a person described in paragraph (c)(2)(i)(A) through (E) of this section.

(3) *Minimum fee*—(i) *In general.* The minimum fee is $250,000 for a transaction if every person to whom or for whose benefit the potential material advisor makes or provides a tax statement with respect to the transaction is a corporation. The minimum fee is $50,000 for a transaction if any

person to whom or for whose benefit a potential material advisor makes or provides a tax statement with respect to the transaction is a partnership or trust, unless all owners or beneficiaries are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is $250,000. For all other transactions, the minimum fee is $50,000. For purposes of this paragraph (c)(3)(i), a corporation means a corporation other than an S corporation.

(ii) *Listed transactions.* For listed transactions described in §§1.6011–4(b)(2), 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, the minimum fees in paragraph (c)(3)(i) of this section are reduced from $250,000 to $25,000 and from $50,000 to $10,000.

(iii) *Determination of fees.* In determining whether the minimum fee threshold is satisfied, all fees for services for advice (whether or not tax advice) or for the implementation of a transaction that is a potentially abusive tax shelter are taken into account. For purposes of this section, the minimum fee threshold must be met independently for each transaction that is a potentially abusive tax shelter and aggregation of fees among transactions is not required. Fees for advice or implementation include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable in light of all of the facts and circumstances. The IRS will scrutinize carefully all of the facts and circumstances in determining whether consideration received in connection with a transaction that is a potentially abusive tax shelter constitutes fees for purposes of this section.

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

(1) *Interest*. The term *interest* includes, but is not limited to, any right to participate in a transaction by reason of a partnership interest, a shareholder interest, or a beneficial interest in a trust; any interest in property (including a leasehold interest); the entry into a leasing arrangement or a consulting, management or other agreement for the performance of services; or any interest in any other investment, entity, plan, or arrangement. The term *interest* includes any interest that purportedly entitles the direct or indirect holder of the interest to any tax consequence (including, but not limited to, a deduction, loss, or adjustment to tax basis in an asset) arising from the transaction. An *interest* also includes information or services regarding the organization or structure of the transaction if the information or services are relevant to the potential tax consequences of the transaction.

(2) *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 list maintenance.

(3) *Person.* The term *person* means any person described in section 7701(a)(1), including an affiliated group of corporations that join in the filing of a consolidated return under section 1501.

(4) *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 or 707.

(5) *Tax.* For purposes of this section, the term *tax* means federal tax.

(6) *Tax benefit.* A tax benefit includes 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 tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

(7) *Tax return.* For purposes of this section, the term *tax return* means a federal tax return and a federal information return.

(8) *Tax treatment.* The tax treatment of a transaction is the purported or claimed federal tax treatment of the transaction.

(9) *Tax structure.* The tax structure of a transaction is any fact that may be relevant to understanding the purported or claimed federal tax treatment of the transaction.

(e) *Preparation and maintenance of lists*—(1) *In general.* A separate list of persons must be prepared and maintained for each transaction that is a potentially abusive tax shelter. However, one list must be maintained for substantially similar transactions that are potentially abusive tax shelters. A list may be maintained on paper, card file, magnetic media, or in any other form, provided the method of maintaining the list enables the IRS to determine without undue delay or difficulty the information required in paragraph (e)(3) of this section.

(2) *Persons required to be included on lists*—(i) *In general.* A material advisor is required to list each person described in paragraphs (c)(2)(i)(A) through (D) of this section to whom (or for whose benefit) the material advisor makes or provides a tax statement with respect to a transaction that is a potentially abusive tax shelter. However, a material advisor is not required to list a person described in paragraph (c)(2)(i)(A) of this section if that person entered into, or acquired an interest in, a listed transaction more than 6 years before the transaction was listed.

(ii) *Subsequent participant.* A material advisor must list any subsequent participant if the material advisor knows the identity of that subsequent participant, and the material advisor knows that the subsequent participant either entered into a transaction that must be disclosed under §1.6011–4(b) of this chapter or sold or transferred to another subsequent participant an interest in that type of transaction.

(iii) *Section 6111 registrant.* A material advisor required to register a transaction under section 6111 also must list each person who purchases (or otherwise acquires) an interest in the transaction.

(iv) *Examples.* The following examples illustrate the provisions of this section:

Example 1. An investment firm provides a tax statement as to a type of transaction to three taxpayers: Corporation X, Corporation Y, and Corporation Z (all of which are C corporations). Each taxpayer agrees to pay the investment firm $300,000 in connection with the transaction, and each taxpayer engages in a separate transaction (transaction X, transaction Y, and transaction Z, respectively). At the time the transactions are entered into, the investment firm knows or reasonably expects that the transactions will result in a single taxable year loss of $9 million for Corporation X, $15 million for Corporation Y, and $12 million for Corporation Z. The transactions do not satisfy

the definitions of a reportable transaction under §1.6011–4(b)(2), (3), (4), (6), or (7) of this chapter.

(i) *Transaction X.* At the time transaction X is entered into, the investment firm does not know or reasonably expect that the transaction is a reportable transaction, because the $9 million loss associated solely with transaction X does not satisfy the $10 million threshold under §1.6011–4(b)(5) of this chapter (relating to loss transactions). Accordingly, transaction X is not a potentially abusive tax shelter. The investment firm is not required to maintain a list with respect to transaction X.

(ii) *Transactions Y and Z.* The investment firm satisfies the requirements for being a material advisor with respect to transaction Y and transaction Z. First, both of the transactions are potentially abusive tax shelters with respect to the investment firm because the investment firm knows, or reasonably expects, at the time the transactions are entered into, that the losses for each of Corporation Y and Z will exceed the $10 million threshold and, thus, the investment firm knows or reasonably expects that the transactions are or will become reportable transactions under §1.6011–4(b)(5) of this chapter (relating to loss transactions). Second, the investment firm provides a tax statement to Corporation Y and Corporation Z as to the transactions. Third, the investment firm receives $300,000 in connection with each transaction (viewed independently of each other and without regard to any other transaction), which exceeds the minimum fee with respect to each transaction ($250,000). Accordingly, the investment firm must maintain a list with respect to transactions Y and Z. Because transactions Y and Z are based on the same or similar tax strategy, transactions Y and Z are substantially similar transactions, and the investment firm must keep one list with respect to both transactions. The list must contain information about Corporation Y and Corporation Z (see paragraph (e)(2)(i) of this section).

Example 2. (i) Corporation M provides a tax statement to Corporation N (a C corporation) describing the potential loss from a type of transaction. Corporation N pays Corporation M $300,000 for the information about that type of transaction. Corporation M knows that Corporation N will sell the information to Taxpayer O (a C corporation) and Taxpayer P (an individual), and that Taxpayer O and Taxpayer P will participate in transactions of the type that Corporation M described to Corporation N. Corporation N, in turn, provides a tax statement as to that type of transaction to Taxpayer O and Taxpayer P. Each taxpayer agrees to pay Corporation N $250,000 in connection with its transaction, and each taxpayer engages in a separate transaction (transaction O and transaction P, respectively). At the time the transactions are entered into, both Corporation M and Corporation N know that the transactions are or will become reportable transactions under §1.6011–4(b)(5) of this chapter.

(ii) Corporation N is a material advisor with respect to transaction O and transaction P. First, at the time the transactions are entered into, Corporation N knows that the transactions are reportable transactions. Thus, the transactions are potentially abusive tax shelters. Second, Corporation N provides a tax statement to Taxpayer O and Taxpayer P as to the transactions. Third, Corporation N receives $250,000 in connection with transaction O and transaction P (each viewed independently of any other transaction), which equals or exceeds the minimum fee for those transactions ($50,000 and $250,000, respectively). Accordingly, Corporation N must keep a list with respect to transaction O and transaction P. The list must contain information about Taxpayer P (see paragraph (e)(2)(i) of this section). Because transactions O and P are based on the same or similar tax strategy, transactions O and P are substantially similar transactions, and Corporation N must keep one list with respect to both transactions. The list must contain information about Taxpayer O and Taxpayer P (see (e)(2)(i) of this section).

(iii) Corporation M's tax statement to Corporation N constitutes a potentially abusive tax shelter under paragraph (b)(2)(C) of this section. Corporation M transferred information to Corporation N regarding the potential tax consequences of a type of transaction that, if entered into and if the relevant thresholds are met, would be a reportable transaction described in §1.6011–4(b)(5). In addition, Corporation M knew that Corporation N would transfer that information to another person. Corporation M is a material advisor with respect to that potentially abusive tax shelter. Corporation M made a tax statement to Corporation N and Corporation M received $300,000 in connection with the potentially abusive tax shelter, which exceeds the minimum fee for that transaction ($250,000). Accordingly, Corporation M must keep a list with respect to that potentially abusive tax shelter. The list must contain information with respect to Corporation N (see paragraph (e)(2)(i) of this section). The list must also contain information about Taxpayer O and Taxpayer P because Corporation M knows the identity of Taxpayer O and Taxpayer P, and Corporation M knows that Taxpayer O and Taxpayer P entered into transaction O and transaction P, respectively (see paragraph (e)(2)(ii) of this section).

(3) *Contents*—(i) *In general.* Each list must contain the following information—

(A) The name of each transaction that is a potentially abusive tax shelter and the registration number, if any, obtained under section 6111;

(B) The TIN (as defined in section 7701(a)(41)), if any, of each transaction;

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

(D) If applicable, the number of units (*i.e.*, percentage of profits, number of shares, etc.) acquired by each person required to be included on the list, if known by the material advisor;

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

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

(G) A detailed description of each transaction that describes both the tax structure and its expected tax treatment;

(H) A summary or schedule of the tax treatment that each person is intended or expected to derive from participation in each transaction, if known by the material advisor;

(I) Copies of any additional written materials, including tax analyses or opinions, relating to each 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; and

(J) For each person required to be on the list, if the interest in the transaction was not acquired from the material advisor maintaining the list, the name of the person from whom the interest was acquired.

(ii) [Reserved].

(f) *Retention of lists.* Each material advisor must maintain the list described in paragraph (e) of this section 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 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 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 the list on behalf of the entity, unless the entity submits the list to the Of-

fice of Tax Shelter Analysis (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 may be sent to: IRS 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.

(g) *Furnishing of lists*—(1) *In general.* Each material advisor and person responsible for maintaining a list of persons must, upon written request by the IRS, furnish the list to the IRS within 20 days from the day on which the request is provided. The request is not required to be in the form of an administrative summons. The list may be furnished to the IRS on paper, card file, magnetic media, or in any other form, provided the method of furnishing the list enables the IRS to determine without undue delay or difficulty the information required in paragraph (e)(3) of this section.

(2) *Claims of privilege*—(i) In any case in which an attorney or federally authorized tax practitioner within the meaning of section 7525 is required to maintain a list with respect to a transaction that is a potentially abusive tax shelter, and that person has a reasonable belief that information specified in paragraph (e)(3)(i)(I) required to be furnished under this paragraph (g) is protected by the attorney-client privilege or by the confidentiality privilege of section 7525(a), the attorney or federally authorized tax practitioner must still maintain the list of persons pursuant to the requirements of this section. When the list is requested by the IRS, as provided in paragraph (g)(1) of this section, the material advisor may assert a privilege claim as to the information specified in paragraph (e)(3)(i)(I) subject to the requirements of this paragraph (g)(2).

(ii) The claimed privilege must be supported by a statement that is signed by the attorney or federally authorized tax practitioner under penalties of perjury, must identify and describe (as set forth in this paragraph (g)(2)) the nature of each document that is not produced which will allow the IRS to determine the applicability of the privilege or protection claimed, without revealing the privileged information itself, and must include the following representations with respect to each document for which the privilege is claimed—

(A) Specifically represent that the information was a confidential practitioner-client communication and, in the case of information which a federally authorized tax practitioner claims is privileged under section 7525, that the omitted information was not part of tax advice that constituted the promotion of the direct or indirect participation of a corporation in any tax shelter (as defined in section 6662(d)(2)(C)(iii)); and

(B) Specifically represent that to the best of such person's knowledge and belief, that the person and all others in possession of the omitted information did not disclose the omitted information to any person whose receipt of such information would result in a waiver of the privilege.

(iii) Identification and description of a document includes, but is not limited to—

(A) The date appearing on such document or, if it has no date, the date or approximate date that such document was created;

(B) The general nature, description, and purpose of such document and the identity of the person who signed such document, and, if it was not signed, the identity of each person who prepared it; and

(C) The identity of each person to whom such document was addressed and the identity of each person, other than such addressee, to whom such document, or a copy thereof, was given or sent.

(h) *Designation agreements.* If more than one material advisor is required to maintain a list of persons, in accordance with paragraph (e) of this section, for a potentially abusive tax shelter, 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 (g)(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.

(i) *Procedure for obtaining rulings.* A person may submit a request to the IRS for a ruling as to whether a specific transaction will be considered a potentially abusive tax shelter for purposes of this section and whether that person is a material advisor with respect to that transaction. If the request fully discloses all relevant facts relating to the transaction (including all facts relevant to the person's relationship to such transaction), then the requirement to maintain a list shall be suspended for that person during the period that the ruling request is pending and for 60 days thereafter; however, if it is ultimately determined that the transaction is a potentially abusive tax shelter and that the person is a material advisor with respect to that transaction, the pendency of such a ruling request shall not affect the requirement to maintain the list, nor shall it affect the persons required to be included on the list (including persons who acquired interests in the potentially abusive tax shelter prior to and during the pendency of the ruling request), or the other information required to be included as part of the list.

(j) *Effective date.* This section applies to any transaction that is a potentially abusive tax shelter entered into, or any interest acquired therein, on or after February 28, 2003. However, this section shall apply to any transaction that was entered into, or in which an interest was acquired, after February 28, 2000, if the transaction becomes a potentially abusive tax shelter on or after February 28, 2003, because it is a listed transaction as defined in §1.6011–4 of this chapter, and is subject to disclosure under §1.6011–4 of this chapter. This section also shall apply to any transaction that was entered into, or in which an interest was acquired, after January 1, 2003, if the transaction becomes a listed transaction as defined in §1.6011–4 of this chapter and is subject to disclosure under §§20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4 or 56.6011–4 of this chapter. The rules in §301.6112–1T as contained in 2002–45 I.R.B. 826 (see §601.601(d)(2) of this chapter) apply only to a transaction entered into, or an interest acquired therein, on or after January 1, 2003, and before February 28, 2003, if the transaction is a listed transaction as defined in §1.6011–4 of this chapter or a section 6111 tax shelter. Otherwise, the rules that apply with respect to any transaction

that is a potentially abusive tax shelter entered into, or any interest acquired therein, before January 1, 2003, are contained in §301.6112–1T in effect prior to January 1, 2003 (see 26 CFR part 301 revised as of April 1, 2002). Additionally, the IRS will not ask to inspect any list for a potentially abusive tax shelter that is entered into, or any interest acquired therein, on or after January 1, 2003, until June 1, 2003, unless the potentially abusive tax shelter is a listed transaction as defined in §1.6011–4 of this chapter or a transaction that is a section 6111 tax shelter.

§301.6112–1T [Removed]

Par. 26. Section 301.6112–1T is removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 27. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 28. In §602.101, paragraph (b) is amended as follows:

1. The following entries to the table are removed:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.6011–4T	1545–1685
* * * * *	
301.6111–2T	1545–0865
	1545–1687
301.6112–1T	1545–0865
	1545–1686
* * * * *	

2. The following entries are added in numerical order to the table:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.6011–4	1545–1685
* * * * *	
301.6111–2	1545–0865
	1545–1687
301.6112–1	1545–0865
	1545–1686
* * * * *	

David A. Mader,
Assistant Deputy Commissioner of Internal Revenue.

Approved February 26, 2003.

Pamela F. Olson,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on February 28, 2003, 10:47 a.m., and published in the issue of the Federal Register for March 4, 2003, 68 F.R. 10161)

Part III. Administrative, Procedural, and Miscellaneous

Weighted Average Interest Rate Update

Notice 2003–17

Sections 412(b)(5)(B) and 412(l)(7)(C)(i) of the Internal Revenue Code provide that the interest rates used to calculate current liability for purposes of determining the full funding limitation under § 412(c)(7) and the required contribution under § 412(l) must be within a permissible range around the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year.

Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability for the purpose of the full funding limitation of § 412(c)(7) of the Code.

Section 417(e)(3)(A)(ii)(II) defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)–1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual interest rate on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury Securities for February 2003 is 4.81 percent. Pursuant to Notice 2002–26, 2002–15 I.R.B. 743, the Service has determined this rate as the monthly average of the daily determination of yield on the 30-year Treasury bond maturing in February 2031.

Section 405 of the Job Creation and Worker Assistance Act of 2002 amended § 412(l)(7)(C) of the Code to provide that for plan years beginning in 2002 and 2003 the permissible range is extended to 120 percent.

The following rates were determined for the plan years beginning in the month shown below.

Month	Year	Weighted Average	90% to 110% Permissible Range	90% to 120% Permissible Range
March	2003	5.49	4.94 to 6.03	4.94 to 6.58

Drafting Information

The principal authors of this notice are Tony Montanaro and Paul Stern of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Montanaro may be reached at 1–202–283–9714 and Mr. Stern may be reached at 1–202–283–9703. The telephone numbers in the preceding sentence are not toll-free.

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Application of Normalization Accounting Rules to Balances of Excess Deferred Income Taxes and Accumulated Deferred Investment Tax Credits of Public Utilities Whose Generation Assets Cease to be Public Utility Property

REG–104385–01

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance on the normalization requirements applicable to electric utilities that benefit (or have benefitted) from accelerated depreciation methods or from the investment tax credit permitted under pre-1991 law. The proposed regulations permit a utility whose electricity generation assets cease to be public utility property to return to their ratepayers the normalization reserves for excess deferred income taxes (EDFIT) and accumulated deferred investment tax credits (ADITC) with respect to those assets. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by June 2, 2003. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for June 25, 2003, at 10 a.m. must be received by June 2, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–104385–01), room 5226, Internal Revenue Service, Post Office Box 7604, Ben Franklin Station,Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:PA:RU (REG–104385–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically by submitting comments directly to the IRS Internet site at *www.irs.gov/regs*. The public hearing will be held in the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, David Selig, at (202) 622–3040; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Treena Garrett, at (202) 622–7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) relating to the normalization requirements of sections 168(f)(2) and 168(i)(9) of the Internal Revenue Code (Code), section 203(e) of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2146), and former section 46(f) of the Code. The proposed regulations respond to changes in the electric power industry resulting from deregulation of electricity generation facilities.

Section 168 of the Code permits the use of accelerated depreciation methods. Section 168(f)(2) provides, however, that accelerated depreciation is permitted with respect to public utility property only if the taxpayer uses a normalization method of accounting for ratemaking purposes.

Under a normalization method of accounting, a utility calculates its ratemaking tax expense using depreciation that is no more accelerated than its ratemaking depreciation (typically straight-line). In the early years of an asset's life, this results in ratemaking tax expense that is greater than actual tax expense. The difference between the ratemaking tax expense and the actual tax expense is added to a reserve (the accumulated deferred federal income tax reserve, or ADFIT). The difference between ratemaking tax expense and actual tax expense is not permanent and reverses in the later years of the asset's life when the ratemaking depreciation method provides larger depreciation deductions and lower tax expense than the accelerated method used in computing actual tax expense.

This accounting treatment prevents the immediate flowthrough to utility ratepayers of the reduction in current taxes resulting from the use of accelerated depreciation. Instead, the reduction is treated as a deferred tax expense that is collected from current ratepayers through utility rates, and thus is available to utilities as cost-free investment capital. When the accelerated method provides lower depreciation deductions in later years, only the ratemaking tax expense is collected from ratepayers and the difference between actual tax expense and ratemaking tax expense is charged to ADFIT, depleting the utility's stock of cost-free capital.

Excess Deferred Income Tax

The Tax Reform Act of 1986 reduced the highest corporate tax rate from 46 percent to 34 percent. The excess deferred federal income tax (EDFIT) reserve is the balance of the deferred tax reserve immediately before the rate reduction over the balance that would have been held in the reserve if the 34 percent rate had been in effect for prior periods. The EDFIT reserves were amounts that utilities had collected from ratepayers to pay future taxes that, as a result of the reduction in corporate tax rates, would not have to be paid.

Section 203(e) of the Tax Reform Act of 1986 specifies the manner in which the EDFIT reserve can be flowed through to ratepayers under a normalization method of accounting. It provides that the EDFIT reserve may be reduced, with a corresponding reduction in the cost of service the utility collects from ratepayers, no more rapidly than the EDFIT reserve would be reduced under the average rate assumption method (ARAM). For taxpayers that did not have adequate data to apply the average rate assumption method, subsequent guidance permitted use of the reverse South Georgia method as an alternative. In general, both the average rate assumption method and the reverse South Georgia method spread the flowthrough of the EDFIT reserve over the remaining lives of the property that gave rise to the excess.

Accumulated Deferred Investment Tax Credits (ADITC)

Former section 46 of the Code similarly limited the ability of ratepayers to benefit from the investment tax credit determined under that section. Under former section 46(f)(2), an electing utility could flow through the investment credit ratably (that is, could reduce the cost of service collected from ratepayers by a ratable portion of the credit) over the investment's regulatory life. The balance of the credit remaining to be flowed through to ratepayers would be held in a reserve for accumulated deferred investment tax credits (ADITC). If the utility elected ratable flowthrough of the credit, the rate base (the amount on which the utility is permitted to collect a return from ratepayers) could not be reduced by reason of any portion of the credit.

Deregulation of Generation Assets

When the normalization provisions were added to the Internal Revenue Code, electric utilities were vertically integrated to include generation, transmission, and distribution functions. Accelerated depreciation, investment credits, and normalization enhanced the cash flow needed to acquire and construct new generation assets. Driven by changes in technology and economics, however, the electric industry has been undergoing substantial changes. Many utilities have been selling generation assets to new entities that are not subject to rate of return regulation and are becoming transmission and distribution (or distribution-only) companies. In many cases, the deregulation of generation assets is occurring before the EDFIT and ADITC reserves associated with those assets have been flowed through to ratepayers.

The Service has issued a number of private letter rulings holding that flowthrough of the EDFIT and ADITC reserves associated with an asset is not permitted after the asset's deregulation, whether by disposition or otherwise. These rulings were based on the principle that flowthrough is permitted only over the asset's regulatory life and when that life is terminated by deregulation no further flowthrough is permitted. After further consideration, the Service and Treasury have concluded that neither former section 46(f)(2) nor section 203(e) of the Tax Reform Act suggests that the EDFIT and ADITC reserves should not ultimately be flowed through to ratepayers. Instead, Congress provided a schedule for flowing through the reserves so that utilities would have the benefit of cost-free capital for a predictable period.

The proposed regulations provide that utilities whose generation assets cease to be public utility property, whether by disposition, deregulation, or otherwise, may continue to flow through EDFIT and ADITC reserves associated with those assets without violating the normalization rules. The rate of flowthrough is limited, however, to the rate that would have been permitted if the assets had remained public utility property and the taxpayer had continued to use a normalization method of accounting (or ratable flowthrough of the credit) with respect to the assets. This result does not impose on utilities any burden unanticipated prior to deregulation and provides the flowthrough originally anticipated by ratepayers, utility commissions, and utilities.

Comments Requested

In addition to comments relating to this notice of proposed rulemaking, comments are requested on the proper disposition of tax reserves (ADFIT, EDFIT, and ADITC) under the following set of facts. Regulated transmission assets from several public utilities (related or otherwise) are transferred to a utility partnership. This partnership is created solely as a transmission company. The transaction is subject to section 721 of the Code. The transmission assets are public utility property before the transfer and will be public utility property after the transfer. Is there a normalization violation if the deferred tax reserves are transferred to the new transmission company's regulated books and are considered in setting rates for the new transmission company? Alternatively, is there a normalization violation if the deferred tax reserves remain on the transferors' regulated books and are considered in setting their rates?

In addition, the proposed regulations do not address the treatment of deregulated assets under former section 46(f)(1) (relating to the use of the investment credit to reduce the rate base of electing taxpayers). Comments are also requested on this issue.

Proposed Effective Date

The regulations are proposed to apply to property that becomes deregulated generation property after March 4, 2003. In addition, a utility may elect to apply the proposed rules to property that becomes deregulated generation property on or before March 4, 2003. The election is made by attaching a written statement to the utility's return for the tax year in which the proposed rules are published as final regulations.

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 and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the 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 Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted (in the manner described in the ADDRESSES caption) timely to the IRS. All comments will be available for public inspection and copying. Treasury and IRS specifically request comments on the clarity of the proposed regulations and how they may be made clearer and easier to understand.

A public hearing has been scheduled for June 25, 2003, at 10 a.m. in the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit comments and submit an outline of the topics to be discussed and the time to be devoted to each topic by June 2, 2003.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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 1.46–6 is amended by adding paragraph (k) to read as follows:

§1.46–6 Limitation in case of certain regulated companies.

* * * * *

(k) Treatment of accumulated deferred investment tax credits upon the deregulation of regulated generation assets—(1) *Scope.* This paragraph (k) provides rules for the application of former section 46(f)(2) of the Internal Revenue Code with respect to public utility property that is used in electric generation and ceases, whether by disposition, deregulation, or otherwise, to be public utility property (deregulated generation property).

(2) *Amount of reduction.* If public utility property of a taxpayer becomes deregulated generation property to which this section applies, the reduction in the taxpayer's cost of service permitted under former section 46(f)(2) is equal to the amount by which the cost of service could be reduced under that provision if all such property had remained public utility property of the taxpayer and the taxpayer had continued to reduce its cost of service by a ratable portion of the credit with respect to such property.

(3) *Cross reference.* See §1.168(i)–(3) for rules relating to the treatment of balances of excess deferred income taxes when utilities dispose of regulated generation assets.

(4) *Effective date*—(i) *General rule.* This paragraph (k) applies to property that becomes deregulated generation property after March 4, 2003.

(ii) *Election for retroactive application.* A utility may elect to apply this paragraph (k) to property that becomes deregulated generation property on or before March 4, 2003. The election is made by attaching the statement "ELECTION UNDER §1.46–6(k)" to the taxpayer's return for the tax year in which this paragraph (k) is published as a final regulation.

Par. 3. Section 1.168(i)–3 is added to read as follows:

§1.168(i)–(3) Treatment of excess deferred income tax reserve upon disposition of regulated generation assets.

(a) *Scope.* This section provides rules for the application of section 203(e) of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2146) with respect to public utility property that is used in electric generation and ceases, whether by disposition, deregulation, or otherwise, to be public utility property (deregulated generation property).

(b) *Amount of reduction.* If public utility property of a taxpayer becomes deregulated generation property to which this section applies, the reduction in the taxpayer's excess tax reserve permitted under section 203(e) of the Tax Reform Act of 1986 is equal to the amount by which the reserve could be reduced under that provision if all such property had remained public utility property of the taxpayer and the taxpayer had continued use of its normalization method of accounting with respect to such property.

(c) *Cross reference.* See §1.46–6(k) for rules relating to the treatment of accumulated deferred investment tax credits when utilities dispose of regulated generation assets.

(d) *Effective date*—(1) *General rule.* This section applies to property that becomes deregulated generation property after March 4, 2003.

(2) *Election for retroactive application.* A taxpayer may elect to apply this section to property that becomes deregulated generation property on or before March 4, 2003. The election is made by attaching the statement "ELECTION UNDER §1.168(i)–3" to the taxpayer's return for the tax year in which this section is published as a final regulation.

David Mader,
Assistant Deputy Commissioner of Internal Revenue.

(Filed by the Office of the Federal Register on March 3, 2003, 8:45 a.m., and published in the issue of the Federal Register for March 4, 2003, 68 F.R. 10190)

Announcement of Disciplinary Actions Involving Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries—Suspensions, Censures, Disbarments, and Resignations

Announcement 2003–15

Under Title 31, Code of Federal Regulations, Part 10, attorneys, certified public accountants, enrolled agents, and enrolled actuaries may not accept assistance from, or assist, any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter constituting practice before the Internal Revenue Service and may not knowingly aid or abet another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

To enable attorneys, certified public accountants, enrolled agents, and enrolled actuaries to identify persons to whom these restrictions apply, the Director, Office of Professional Responsibility will announce in the Internal Revenue Bulletin their names, their city and state, their professional designation, the effective date of disciplinary action, and the period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will continue to appear in the weekly Bulletins for five successive weeks.

Suspensions From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an administrative law judge, the following individuals have been placed under suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Cramer, George	Chicago, IL	CPA	January 18, 2003 to January 17, 2005

Disbarments From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an administrative law judge, the following individuals have been disbarred from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Whalley, Christopher J.	Ellsworth, ME	Attorney	July 28, 2002
Chapin, Frank L.	Sandpoint, ID	Enrolled Agent	August 13, 2002
Engstrand Jr., Edward E.	Minneapolis, MN	CPA	November 2, 2002
Fisher, Joanna	Portland, OR	Enrolled Agent	November 15, 2002

Consent Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, an attorney, certified public accountant, enrolled agent, or enrolled actuary, in order to avoid institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service, may offer his or her consent to suspension from such practice. The Director, Office of Professional Responsibility, in his discretion, may suspend an attorney, certified public accountant, enrolled agent or enrolled actuary in accordance with the consent offered.

The following individuals have been placed under consent suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Date of Suspension
Kuhajda, Ben	Plainfield, IL	CPA	August 26, 2002 to August 24, 2005
Vaughn, James A.	Albuquerque, NM	CPA	October 1, 2002 to September 29, 2004
McBroom, Byron	Manteca, CA	CPA	October 21, 2002 to October 19, 2006
Jacobs, Robert	Philadelphia, PA	Attorney	October 21, 2002 to April 20, 2006
Kwak, Jong	Beverly Hills, CA	Attorney	October 22, 2002 to October 20, 2003
Smith Frank L.	Brooksville, FL	Attorney	November 1, 2002 to October 30, 2005
Schwartz, Kenneth J.	Woodland Hills, CA	Attorney	November 1, 2002 to February 27, 2006
Agulnick, Barry W.	New York, NY	Attorney	November 1, 2002 to April 29, 2004
O'Connor, Thomas P.	Palos Park, IL	CPA	November 1, 2002 to October 20, 2003
Brand, Joe A.	Dundee, OH	CPA	November 18, 2002 to November 16, 2004
Battino, Steven	Plainview, NY	CPA	November 25, 2002 to May 23, 2004

Name	Address	Designation	Date of Suspension
Chipman, Ken	Farmington, NM	Enrolled Agent	December 1, 2002 to November 29, 2003
Kirgis, Grant A.	Rochester, MN	CPA	December 1, 2002 to May 30, 2003
Welch, Frank	Stamford, CT	CPA	Indefinite from January 31, 2003
Pickens, Valerie	Seattle, WA	CPA	January 1, 2003 to December 30, 2004
Kidd, Roger F.	Philadelphia, PA	Attorney	January 20, 2003 to April 18, 2003
Sullivan, Raymond	Sonoma, CA	Attorney	March 15, 2003 to November 14, 2003

Expedited Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, the Director, Office of Professional Responsibility, is authorized to immediately suspend from practice before the Internal Revenue Service any practitioner who, within five years from the date the expedited proceeding is instituted (1) has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause or (2) has been convicted of certain crimes.

The following individuals have been placed under suspension from practice before the Internal Revenue Service by virtue of the expedited proceeding provisions:

Name	Address	Designation	Date of Suspension
Pirro, Anthony G.	South Salem, NY	CPA	Indefinite from June 26, 2002
Scott, Roger	Buffalo, NY	Attorney	Indefinite from August 12, 2002
Patrick, George	Cheshire, CT	CPA	Indefinite from September 9, 2002
Rochon, Jason B.	Lafayette, LA	Attorney	Indefinite from September 9, 2002

Name	Address	Designation	Date of Suspension
Voccola, Edward	Hingham, MA	Attorney	Indefinite from October 18, 2002
Linn, Charles B.	Croton-on-Hudson, NY	Attorney	Indefinite from October 18, 2002
Lum, Eugene K.H.	Long Beach, CA	Attorney	Indefinite from October 18, 2002
Gwilliam, Peter	Lynn, MA	CPA	Indefinite from October 28, 2002
Herlehy, Jon L.	McHenry, IL	CPA	Indefinite from October 28, 2002
Herndon, Henry	Pikeville, NC	CPA	Indefinite from November 1, 2002
McCurry, Todd	Durham, NC	Attorney	Indefinite from November 25, 2002
Adams, James L.	Breckenridge, CO	Attorney	Indefinite from November 25, 2002
Cloer, Stewart	Plano, TX	Attorney	Indefinite from December 13, 2002
Caruso, Robert	Saddle River, NJ	CPA	Indefinite from December 16, 2002
Duru, Ike E.	Atlanta, GA	Attorney	Indefinite from January 10, 2003
Pelletier, Richard A.	Bolton, CT	CPA	Indefinite from January 10, 2003
Austin, Jack	Steamboat Springs, CO	CPA	Indefinite from January 10, 2003
Gibson, Brian M.	Monroe, NY	Attorney	Indefinite from January 10, 2003

Name	Address	Designation	Date of Suspension
Jackson, Robert	Mt. Juliet, TN	Attorney	Indefinite from January 10, 2003
Tenzer, James L.	East Meadow, NY	Attorney	Indefinite from February 4, 2003

Resignations of Enrolled Agents

Under Title 31, Code of Federal Regulations, Part 10, an enrolled agent, in order to avoid the institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service, may offer his or her resignation as an enrolled agent. The Director, Office of Professional Responsibility, in his discretion, may accept the offered resignation.

The Director, Office of Professional Responsibility, has accepted offers of resignation as an enrolled agent from the following individuals:

Name	Address	Date of Resignation
Korman, Linda	Las Vegas, NV	January 23, 2003

Loans From a Qualified Employer Plan to Plan Participants or Beneficiaries; Correction

Announcement 2003–16

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Corrections to final regulations.

SUMMARY: This document contains corrections to final regulations (T.D. 9021, 2002–51 I.R.B. 973) that were published in the **Federal Register** on Tuesday, December 3, 2002 (67 FR 71821). This document contains final regulations relating to loans made from a qualified employer plan to plan participants or beneficiaries.

DATES: This correction is effective December 3, 2002.

FOR FURTHER INFORMATION CONTACT: Vernon S. Carter (202) 622–6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections are under section 72 of Internal Revenue Code.

Need for Correction

As published, the final regulations (T.D. 9021) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (T.D. 9021), which is the subject of FR. Doc. 02–29204, is corrected as follows:

§ 1.72(p)–1 [Corrected]

1. On page 71825, column 1, § 1.72(p)–1, A–19, paragraph (a), last 2 lines in the paragraph, the language "of the Internal Revenue Code. See Q&A 16 of this section", is corrected to read "of the Internal Revenue Code. See Q&A–11 through Q&A–16 of this section".

2. On page 71825, column 3, § 1.72(p)–1, A–20, paragraph (a)(2), lines 4 and 5, the language "section (including paragraph (a)(3) of this Q&A 20 and the amount limitations", is corrected to read "section (including the amount limitations".

3. On page 71825, column 3, § 1.72(p)–1, A–20, paragraph (a)(2), the last line of the paragraph, the language "replaced loan.", is corrected to read "replacement loan.".

Cynthia E. Grigsby,
Chief, Regulations Unit,
Associate Chief Counsel
(Procedure and Administration).

(Filed by the Office of the Federal Register on February 27, 2003, 8:45 a.m., and published in the issue of the Federal Register for February 28, 2003, 68 F.R. 9532)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as"rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in law or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in the new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign Corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statements of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[2] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2002–26 through 2002–52 is in Internal Revenue Bulletin 2003–1, dated January 6, 2003.