

## Section 6112.— Organizers and Sellers of Potentially Abusive Tax Shelters Must Keep Lists of Investors

26 CFR 301.6112–1T: Questions and answers relating to the requirement to maintain a list of investors in potentially abusive tax shelters (Temporary).

T.D. 8875

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 301 and 602

#### Requirements to Maintain List of Investors in Potentially Abusive Tax Shelters

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations requiring the maintenance of lists of investors in potentially abusive tax shelters described in section 6112. The temporary regulations affect organizers of potentially abusive tax shelters. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in REG–103736–00, page 768.

DATES: *Effective date.* These temporary regulations are effective February 28, 2000.

*Applicability date.* For dates of applicability, see A-22 of §301.6112–1T of these regulations.

FOR FURTHER INFORMATION CONTACT: Richard Castanon, (202) 622-3080, or Mary Beth Collins, (202) 622-3070, (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

**Paperwork Reduction Act**

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in these regulations have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1686. Responses to these collections of information are mandatory.

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.

For further information concerning these collections of information, and where to submit comments on the collections of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking REG–103736–00, page 768.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

#### Background

This document amends 26 CFR part 301 regarding the requirement to maintain lists of investors in potentially abusive tax shelters under section 6112. Section 6708 provides penalties for failing to maintain the investor list under section 6112.

The temporary regulations have been drafted in question and answer format. No inference should be drawn regarding issues not raised or because certain questions and not others are included. The temporary regulations contained in this document will remain in effect until additional temporary or final regulations are

published in the **Federal Register**.

#### Explanation of Provisions

##### I. Potentially Abusive Tax Shelter

Section 6112 provides that any person who organizes or sells any interest in a potentially abusive tax shelter must maintain a list identifying each person who was sold an interest in such shelter. A potentially abusive tax shelter under section 6112 includes any investment that is required to be registered with the IRS as a tax shelter under section 6111, and any other entity, plan, or arrangement, if specified in regulations, that has a potential for tax avoidance or evasion. Any person who is required to maintain a list under section 6112 must make the list available for inspection upon request by the Secretary of the Treasury, and generally must retain any information required to be included on the list for seven years. References in these regulations to the term “transaction” include all of the factual elements necessary to support the tax benefits that are expected to be claimed with respect to any entity, plan, or arrangement, including any series of related steps carried out as part of a pre-arranged plan.

Section 6112 authorizes the Secretary of the Treasury to specify in regulations transactions other than those subject to registration under section 6111 that have a potential for tax avoidance or evasion. The conference report accompanying section 6112 explains that “in designating these other arrangements, the Secretary may, for example, specifically identify types of investments, or may provide that any investment falling within a modified form of the definition of tax shelter for registration purposes is subject to the listing requirement.” H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 982 (1984).

Concurrent with the addition of these amendments to the temporary regulations

under section 6112, the Service has issued temporary and proposed regulations under section 6111(d) relating to the registration of confidential corporate tax shelters. These regulations under section 6112 follow a modified form of the definition of a confidential corporate tax shelter under section 6111(d)(1) for purposes of defining the potentially abusive tax shelters that are subject to the list requirement under section 6112. Under the modified definition, as under section 6111(d)(1)(A), the term “potentially abusive tax shelter” includes a transaction for which a significant purpose of the structure of the transaction is the avoidance or evasion of Federal income tax. The rules set forth in the temporary regulations under section 6111(d) are applicable in determining whether a significant purpose of the structure of a transaction is the avoidance or evasion of Federal income tax.

For purposes of section 6112, the definition of tax shelter under section 6111(d)(1) has been modified in two respects: (1) the limitation of section 6111(d)(1)(B) to transactions offered to any potential participant under conditions of confidentiality does not apply for purposes of section 6112; and (2) the limitation of section 6111(d)(1)(C) to transactions in which the promoters may receive fees in excess of \$100,000 does not apply for purposes of section 6112. Therefore, certain categories of transactions that are not subject to registration under section 6111 may be subject to the list requirement of section 6112, including any non-confidential transactions offered directly or indirectly to corporate participants a significant purpose of the structure of which is the avoidance or evasion of Federal income tax within the meaning of section 6111(d) and the regulations thereunder.

Section 301.6111-2T provides a procedure for obtaining rulings as to whether a transaction is subject to registration under §301.6111-2T. The same procedure shall be available to a person who is uncertain whether a transaction constitutes a potentially abusive tax shelter for which a list must be maintained under section 6112, and the requirement to maintain a list available for inspection by the Secretary shall be suspended during the period that such ruling request is pending and for

sixty days thereafter.

## II. *Organizer Also Includes Promoter*

The regulations provide that for purposes of the list requirement, an organizer includes a promoter as defined in section 6111(d)(2), as well as any person designated as an organizer under the existing temporary regulations. A promoter is any person who participates in the organization, management, or sale of the tax shelter or any related person (within the meaning of section 267 or 707).

## III. *Information to be Included on List*

Section 6112 authorizes the Secretary of the Treasury to specify the information that organizers and sellers of interests in potentially abusive tax shelters are required to include as part of the lists of persons who were sold interests in the tax shelters. The temporary regulations modify the information that must be included as part of the lists and made available for inspection by the IRS. The regulations provide that in addition to the information currently required under A-17 of §301.6112-1T, each list must include (1) a detailed description of the tax shelter that describes both the structure of the tax shelter and the intended tax benefits for participants in the tax shelter, (2) the amount of money invested or to be invested by each person who is required to be included on the list, (3) a summary or schedule of the tax benefits that each such person is intended or expected to derive from participation in the tax shelter, if known by the organizer or seller, and (4) copies of any additional written materials, including tax analyses and opinions, relating to the tax shelter that have been given to any potential participant in the tax shelter or to any representatives, tax advisors, or agents of potential participants by the organizer or seller or by any other person who has participated in the offering of the tax shelter (excluding any written materials that the organizer or seller has never possessed).

Generally, a separate list must be maintained for each potentially abusive tax shelter. Moreover, the temporary regulations provide that interests in substantially similar tax shelter transactions that are sold to different persons generally are to be treated as interests in the same tax shelter for purposes of section 6112. To

ensure that the IRS is able to identify all of the tax shelters that have been offered by an organizer or seller and that are structured in a similar manner, the regulations further provide that the list for each tax shelter must identify each other tax shelter (if any) that the organizer or seller has offered that has not been treated as part of the same tax shelter, but that utilizes a similar structure or is intended to produce similar tax benefits.

It is recognized that, in the absence of a limitation on the disclosure obligation under section 6112, there could be situations in which section 6112 and the temporary regulations would require an organizer or a seller of a potentially abusive tax shelter to disclose information that is otherwise protected by the common law attorney-client privilege or by the privilege for confidential tax advice under section 7525(a). The temporary regulations provide that, in any case in which an organizer or a seller of a potentially abusive tax shelter believes that information required to be maintained as part of the list for that tax shelter is protected by the attorney-client privilege or constitutes confidential tax advice protected under section 7525(a), such information may be withheld from disclosure to the Service, provided that the organizer or seller provides the Service with a statement signed under penalties of perjury with information and representations required in that statement that are the same as those required by the regulations under section 6111(d) if the promoter of a confidential corporate tax shelter asserts that information required to be included with Form 8264, “Application for Registration of a Tax Shelter,” is privileged.

## IV. *Effective Date*

An organizer or a seller must maintain a list with respect to any interest acquired by an investor in a potentially abusive tax shelter after February 28, 2000. If a transaction becomes a potentially abusive tax shelter after interests are acquired by investors, an organizer or a seller must maintain a list with respect to any interest in the transaction acquired after the transaction becomes a potentially abusive tax shelter. Additionally, the IRS will not ask to inspect any list for a potentially abusive tax shelter, other than a tax shelter described in section 6111(c), until August

26, 2000. The lists required by the preceding two sentences with regard to interests acquired in potentially abusive tax shelters must contain the information required by A-17 of this section as it relates to such interests. The rules that apply with respect to interests acquired in potentially abusive tax shelters on or before February 28, 2000, are contained in 26 CFR part 301 revised as of April 1, 1999.

### 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. This certification is based upon the fact that persons responsible for maintaining the investor lists described in the regulations are principally large publicly traded corporations and the burden is not significant, as described in the preamble. 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, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Drafting Information

The principal authors of these regulations are Mary Beth Collins and Richard Castanon, Office of Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

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### Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 301 and 602 are amended as follows:

#### PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

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

Section 301.6112-1T also issued under 26 U.S.C. 6112.\* \* \*

Par. 2. Section 301.6112-1T is amended as follows:

1. The last sentence of A-3 is revised.
2. A-4 is revised.
3. Two sentences are added at the end of A-5.
4. A sentence is added at the end of A-7.
5. Paragraph (c) of A-8 is revised.
6. The first sentence of A-9 is removed and two new sentences are added in its place.
7. The second sentence of the introductory text of A-11 is revised.
8. Paragraphs (a) and (b) of A-13 are revised.
9. A-14 is revised.
10. The first sentence of the introductory text of A-15 is revised.
11. A-17 is revised.
12. Two sentences are added at the end of A-18.
13. A-22 is revised.

The additions and revisions read as follows:

*§301.6112-1T Questions and answers relating to the requirement to maintain a list of investors in potentially abusive tax shelters (temporary).*

\* \* \* \* \*

A-3. \* \* \* See §301.6111-1T for rules relating to tax shelter registration and §301.6111-2T for rules relating to confidential corporate tax shelter registration.

\* \* \* \* \*

A-4. (a) Yes. For purposes of the list requirement, a tax shelter includes any tax shelter that is a projected income investment, as defined in A-57A of §301.6111-1T, and any transaction a significant purpose of the structure of which is the avoidance or evasion of Federal income tax within the meaning of section 6111(d)(1)(A) and §301.6111-2T(b). For this purpose, as under §301.6111-2T, the term *transaction* includes all of the factual elements necessary to support the tax benefits that are expected to be claimed with respect to any entity, plan, or arrangement, including any series of related steps carried out as part of a pre-arranged plan.

(b) Section 301.6111-2T provides a procedure for obtaining rulings as to whether a transaction is subject to registration under §301.6111-2T. The same procedure shall be available to a person who is uncertain whether a transaction constitutes a tax shelter for which a list must be maintained under this section. The requirement to make a list which contains the information required by this section available for inspection by the Secretary shall be suspended during the period that such ruling request is pending and for sixty days thereafter; however, if it is ultimately determined that the transaction is a tax shelter, the pendency of such a ruling request shall not affect the requirement to maintain the list or limit the participants required to be included on the list or the other information required to be included as part of the list.

\* \* \* \* \*

A-5. \* \* \* An organizer also includes a promoter described in section 6111(d)(2). Under section 6111(d)(2), a promoter is any person who participates in the organization, management, or sale of the tax shelter or any related person (within the meaning of section 267 or 707).

\* \* \* \* \*

A-7. \* \* \* In addition, in any case in which a person has directly or indirectly paid consideration to an organizer or seller for the right to participate in a tax shelter, for services necessary to the organization or structure of such tax shelter, or for information that is integral to participation in such tax shelter, the participant shall be considered to have acquired an interest in the tax shelter and to have been sold an interest in the tax shelter by the organizer or seller.

\* \* \* \* \*

A-8. \* \* \* (c) Any transfer of an interest made by or through a person related (as defined in section 465(b)(3)(C)) to the organizer or the tax shelter (provided the organizer is involved in the tax shelter on the date of the transfer);

\* \* \* \* \*

A-9. An organizer has a duty to make a reasonable inquiry only with respect to transfers of interests in the tax shelter made by a seller described in paragraph (a) of A-6 of this section who acquired the interests from the organizer or a person related (as defined in section 465(b)(3)(C)) to the organizer, or the tax

shelter or a person related (as defined in section 465(b)(3)(C)) to the tax shelter (provided the organizer is involved in the tax shelter on the date the interest is transferred to the seller). See Q&A-8 of this section. \* \* \*

\* \* \* \* \*

A-11. \* \* \* Organizers and sellers may not designate one person to maintain a list for the tax shelter, however, unless the tax shelter is timely and properly registered under section 6111 or unless the tax shelter is described in Q&A-4 of this section. \* \* \*

\* \* \* \* \*

A-13. (a) If the tax shelter is required to be registered under section 6111 at the time an agreement under A-12 of this section is signed, a seller or an organizer who signs the agreement shall not be subject to penalty under section 6708 for failing to maintain a list provided that the seller or organizer—

(1) Submits to the designated person all of the information that the organizer or seller otherwise would be required to maintain on a list (as described in A-8, A-10, and A-17 of this section); and

(2) Provides to each investor (within the meaning of paragraph (c) of A-6 of this section) otherwise required to be included on a list maintained by such organizer or seller a notice in the form prescribed in paragraph (c) of this A-13.

(b) If the tax shelter is described in A-4 of this section at the time an agreement under A-12 of this section is signed, a seller or an organizer who signs the agreement shall not be subject to penalty under section 6708 for failing to maintain a list provided that the seller or organizer submits to the designated person all of the information that the organizer or seller otherwise would be required to maintain on a list (as described in A-8, A-10, and A-17 of this section). If the tax shelter ceases to be a projected income investment under A-57G of §301.6111-1T, or the tax shelter becomes subject to the registration requirements under section 6111, the designated person must provide to each investor (within the meaning of paragraph (c) of A-6 of this section) required to be included on the list an explanation that the tax shelter has ceased to be projected income investment or that the tax shelter is subject to the registration requirements of section 6111, whichever applies, and a

notice substantially in the form prescribed in paragraph (c) of this A-13.

\* \* \* \* \*

A-14. Yes. Any seller described in paragraph (a) of A-6 of this section who does not sign a designation agreement under A-12 of this section (including organizers who are such sellers) with respect to a tax shelter that is required to be registered under section 6111 must provide a notice to all investors (within the meaning of paragraph (c) of A-6 of this section) who acquire interests in the tax shelter from the seller. The notice must be substantially in the form prescribed in paragraph (c) of A-13 of this section except that the notice must include the name and address of the designated person. In the case of a tax shelter described in A-4 of this section, a notice to investors need not be provided until such time, if any, as the tax shelter ceases to be a projected income investment under A-57G of §301.6111-1T, or the tax shelter becomes subject to the registration requirements under section 6111. In such a case, the seller shall provide, with the notice, an explanation that the tax shelter has ceased to be a projected income investment, or that the tax shelter has otherwise become subject to the registration requirements under section 6111, whichever applies.

\* \* \* \* \*

A-15. An investor who retransfers an interest in a tax shelter that is described in A-4 of this section, is not required to maintain a list with respect to the retransfer unless prior to the retransfer the tax shelter ceases to be a projected income investment under A-57G of §301.6111-1T or otherwise becomes subject to the registration requirements under section 6111.

\* \* \* \* \*

A-17. (a) A list must contain the following information—

(1) The name of the tax shelter and the registration number, if any, obtained under section 6111;

(2) The TIN (as defined in section 7701(a)(41)), if any, of the tax shelter;

(3) The name, address, and TIN (as defined in section 7701(a)(41)) of each person who is required to be included on the list under A-8 or A-10 of this section and, in the case of a tax shelter that is a transaction described in section 6111(d)(1)(A) and §301.6111-2T(b), the name, address, and TIN of any indirect corporate partici-

pant in the shelter if known to the organizer or seller;

(4) If applicable, the number of units (i.e., percentage of profits, number of shares, etc.) acquired by each person who is required to be included on the list;

(5) The date on which each interest was acquired;

(6) The amount of money invested in the tax shelter by each person required to be included on the list under A-8 or A-10 of this section;

(7) A detailed description of the tax shelter that describes both the structure of the tax shelter and the intended tax benefits for participants in the tax shelter;

(8) A summary or schedule of the tax benefits that each person is intended or expected to derive from participation in the tax shelter, if known by the organizer or seller;

(9) Copies of any additional written materials, including tax analyses or opinions, relating to the tax shelter that have been given to any potential participants in the tax shelter or to any representatives, tax advisors, or agents of such potential participants by the organizer or seller or by any other person who has participated in the offering of the tax shelter (excluding any written materials that the organizer or seller has never possessed);

(10) If the interest was not acquired from the person maintaining the list, the name of the person from whom the interest was acquired; and

(11) The name and address of each agent of the person maintaining the list who is described in paragraph (b) of A-6 of this section.

(b) In any case in which an organizer or a seller of a potentially abusive tax shelter believes that information required to be maintained as part of the list for that tax shelter is protected by the attorney-client privilege or constitutes confidential tax advice protected under section 7525(a), such information may be withheld from disclosure to the Service, provided that the organizer or seller provides the Service with a statement signed under penalties of perjury with information and representations required in that statement that are the same as those required by §301.6111-2T if the promoter of a confidential corporate tax shelter asserts that information required to be included with Form 8264, "Application for Registration

of a Tax Shelter,” is privileged.

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A-18. \*\*\* Interests in substantially similar tax shelter transactions that are sold to different persons generally are to be treated as interests in the same tax shelter for purposes of this section. Further, the list for each tax shelter must identify each other tax shelter (if any) that the organizer or seller has offered that has not been treated as part of the same tax shelter, but that utilizes a similar structure or is intended to produce similar tax benefits.

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A-22. An organizer or seller must maintain a list with respect to any interest acquired by an investor (within the meaning of paragraph (c) of A-6 of this section) in a potentially abusive tax shelter after February 28, 2000. If a transaction be-

comes a potentially abusive tax shelter after interests are acquired by investors, an organizer or a seller must maintain a list with respect to any interest in the transaction acquired after the transaction becomes a potentially abusive tax shelter. Additionally, the Internal Revenue Service will not ask to inspect any list for a potentially abusive tax shelter, other than a tax shelter described in section 6111(c), until August 26, 2000. The lists required by the preceding two sentences with regard to interests acquired in potentially abusive tax shelters must contain the information required by A-17 of this section as it relates to such interests. The rules that apply with respect to interests acquired in potentially abusive tax shelters acquired on or before February 28, 2000, are contained in 26 CFR part 301 revised as of April 1, 1999.

Par. 3. In §602.101, paragraph (b) is amended by revising the entry for §301.6112-1T to read as follows:

§602.101 OMB Control numbers.

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(b) \*\*\*

Charles O. Rossotti,  
*Commissioner of Internal Revenue.*

Approved February 23, 2000.

Jonathan Talisman,  
*Acting Assistant Secretary  
of the Treasury.*

(Filed by the Office of the Federal Register on February 28, 2000, 8:45 a.m. , and published in the issue of the Federal Register for March 2, 2000, 65 F.R. 11211)

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CFR Part or Section Where  
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