

Temporary Rules Under Sections 6111 and 6112

Notice 2005-22

The purpose of this notice is to clarify and modify Notice 2004-80, 2004-50 I.R.B. 963, to provide additional guidance for material advisors who are required to comply with §§ 6111 and 6112 of the Internal Revenue Code, as amended, and to grant an extension of time for material advisors to comply with the new filing requirements under § 6111.

BACKGROUND

Section 6111, as amended by the American Jobs Creation Act of 2004, P.L. 108-357, 118 Stat. 1418 (the Act), requires that each material advisor with respect to any reportable transaction make a return setting forth information identifying and describing the transaction and any potential tax benefits expected to result from the transaction no later than the date specified by the Secretary. Notice 2004-80 announced that the Internal Revenue Service and the Treasury Department intend to issue regulations providing rules under § 6111.

Notice 2004-80 also provides interim rules implementing the requirements of § 6111 until the Secretary prescribes regulations. Under Notice 2004-80, each material advisor with respect to a reportable transaction must file a return on Form 8264, *Application for Registration of a Tax Shelter*, within 30 days after the date on which the person becomes a material advisor. Notice 2004-80 also provides transitional relief in the case of a person who becomes a material advisor after October 22, 2004, and on or before December 31, 2004, that allows the material advisor to file the return before February 1, 2005. Notice 2005-17, 2005-8 I.R.B. 606, released on January 28, 2005, grants additional transitional relief allowing a person who becomes a material advisor after October 22, 2004, and on or before January 29, 2005, to file the return before March 1, 2005.

Since the issuance of Notice 2004-80, questions have arisen regarding the application of the interim rules to material ad-

visors. In addition, Notice 2005-17 states that the Service and Treasury intend to provide further guidance on the issue of the date on which a person becomes a material advisor with respect to a reportable transaction (including whether the obligation of a material advisor arises only when a reportable transaction is entered into by a taxpayer). This notice provides additional interim rules that will apply until further guidance is issued and grants additional transitional relief.

ADDITIONAL INTERIM PROVISIONS

1. *Completion of Form 8264*

Notice 2004-80 provides that each material advisor required under § 6111, as amended, to file a return with respect to a reportable transaction must complete Parts I (except item 1(b)), IV, and V of Form 8264. In completing Form 8264, the form and instructions are to be read to apply, by substituting: (1) “reportable transaction” each place “tax shelter” or “confidential corporate tax shelter” appears; (2) “material advisor” each place “organizer” or “principal organizer” appears; and (3) “Date the material advisor became a material advisor with respect to the reportable transaction” in place of “Date an interest in the tax shelter was first offered for sale” in Part I, line 7, of the form.

Questions have arisen whether a material advisor is required to modify the Form 8264 by striking or replacing lines or fields. A material advisor may not make modifications to the Form 8264. A material advisor must simply complete the form as if it had been modified to read as described in Notice 2004-80.

2. *Material Advisors and Transitional Relief*

Notice 2004-80 provides that a material advisor who is required to file a return under § 6111 must file the return within 30 days after the date on which the person becomes a material advisor. Notice 2004-80 provides that a material advisor is defined in § 301.6112-1(c)(2). Notice 2004-80 also provides that a material advisor may file a single Form 8264 for substantially similar transactions. A material advisor is required to supplement informa-

tion disclosed on Form 8264 if the information provided is no longer accurate, or if additional information that was not disclosed on Form 8264 becomes available.

Questions have arisen regarding when a person becomes a material advisor. Section 301.6112-1(c)(2) defines a material advisor as a person who makes a tax statement and receives or expects to receive a minimum fee with respect to a reportable transaction. Section 301.6112-1(c)(2)(B) provides that a material advisor includes a person who makes a tax statement to or for the benefit of 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.

Until further guidance is issued, a material advisor will be treated as becoming a material advisor under § 6111 when all of the following events have occurred: (1) the material advisor makes a tax statement, (2) the material advisor receives (or expects to receive) the minimum fees, and (3) the transaction is entered into by the taxpayer. Material advisors, including those who cease providing services prior to the time the transaction is entered into, must make reasonable and good faith efforts to determine whether the taxpayer entered into the transaction.

Moreover, the time for providing disclosure as provided in Notice 2004-80 is amended by this notice. Until further guidance is issued, a material advisor will meet its return filing obligation under § 6111 if the Form 8264 is filed by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor. Also, the transitional relief provided in Notice 2004-80 and Notice 2005-17 for disclosure of a transaction under § 6111 is extended. Accordingly, if a person becomes a material advisor after October 22, 2004, and on or before March 31, 2005, that material advisor must file the return on or before April 30, 2005.

Once a material advisor has filed a Form 8264 with respect to a transaction, the material advisor is not required to file an additional Form 8264 for each additional taxpayer that subsequently enters into the same transaction or to file a Form 8264 for a separate transaction that is the

same as or substantially similar to the transaction for which the material advisor has filed a Form 8264.

Questions also have arisen regarding whether the tolling provisions of § 1.6011-4(f) would apply to requests from a potential material advisor for a letter ruling. Until further guidance is issued, if the advisor submits a request for a letter ruling on or before the date the return under § 6111 is due and fully discloses all relevant facts relating to the transaction, the obligation of the potential material advisor to disclose the transaction will be suspended as provided in § 1.6011-4(f). However, a request for a letter ruling by a potential material advisor will not toll the disclosure provisions of § 1.6011-4 for taxpayers who participate in the transaction. See § 1.6011-4(f) for tolling provisions applicable to material advisors and taxpayers.

Finally, questions have arisen regarding the nature of the statement relating to the financial accounting treatment of the item(s) giving rise to a significant book-tax difference described in § 1.6011-4(b)(6). In addition, some practitioners have erroneously concluded that Notice 2004-80 was intended to exclude persons who do not provide accounting advice. The financial accounting statement described in Notice 2004-80 includes statements made by any material advisor, including accountants, lawyers, or investment advisors.

3. *Effective Date of Notice 2004-80*

Notice 2004-80 is effective for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004. Questions have arisen regarding the definition of material aid, assistance, or advice provided after October 22, 2004. For purposes of the disclosure required by § 6111, disclosure is required for reportable transactions with respect to which a material advisor makes a tax statement (other than post-filing advice described in § 301.6112-1(c)(2)(iv)(A)) after October 22, 2004, regardless of whether any portion of the fee was received before October 22, 2004, or whether the transaction was entered into before October 22, 2004. (For the timing of the disclosure, see Section 2 of this notice, above.)

EFFECTIVE DATE

This notice is effective February 24, 2005, the date this notice was released to the public.

EFFECT ON OTHER DOCUMENTS

This document clarifies and modifies Notice 2004-80 and Notice 2005-17.

DRAFTING INFORMATION

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