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August 9, 2007

Treasury Releases Final 2007 Regulations on Disclosure of Reportable Transactions

[21438]

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TO: 529 PLAN MEMBERS No. 10-07
ACCOUNTING/TREASURERS MEMBERS No. 25-07
ADVISER DISTRIBUTOR TAX ISSUES TASK FORCE No. 11-07
TAX MEMBERS No. 33-07
UNIT INVESTMENT TRUST MEMBERS No. 16-07 RE: TREASURY RELEASES FINAL 2007
REGULATIONS ON DISCLOSURE OF REPORTABLE TRANSACTIONS

Treasury has released final tax shelter disclosure regulations under Code sections 6011, 6111 and 6112 ("2007 regulations"). The 2007 regulations eliminate two categories of reportable transactions ("transactions with a significant book-tax difference" and "brief asset holding period" transactions) [\[1\]](#) and add a new category of reportable transactions called "transactions of interest." The 2007 regulations provide a 60-day disclosure deadline and separate relief rule for owners of pass-through entities. The 2007 regulations also adopt a shorter 90-day disclosure deadline for reporting listed transactions (and transactions of interest) published after the filing of a taxpayer's tax return.

Transactions of Interest

A "transaction of interest" is a transaction that the Internal Revenue Service ("IRS") and Treasury Department believe has a potential for tax avoidance or evasion, but for which they lack sufficient information to determine whether the transaction should be identified specifically as a tax avoidance transaction (i.e., a listed transaction). A transaction that is the same or substantially similar to a transaction identified by notice, regulation or other

published guidance as a transaction of interest will be reportable under the new category.

Although regulated investment companies (“RICs”) are exempt from most of the reportable transaction rules, RICs are required to report listed transactions (pursuant to 2003 regulations) [\[2\]](#) and transactions of interest (pursuant to the 2007 regulations). The penalties added by AJCA for failure to report a reportable transaction (penalties are \$200,000 for listed transactions and \$50,000 for all other reportable transactions) apply to failures to report transactions of interest. [\[3\]](#)

Disclosure Forms and Deadlines

The 2007 regulations require that a taxpayer file a disclosure statement on Form 8886 (“Reportable Transaction Disclosure Statement”) by attaching the statement to the taxpayer’s tax return for each taxable year that a taxpayer participates in a reportable transaction. Form 8886 also must be submitted to the Office of Tax Shelter Analysis (“OTSA”) at the same time that the disclosure statement is first filed for a particular reportable transaction. The 2007 regulations reflect changes to section 6111 made by AJCA by eliminating the requirement to report tax shelter registration numbers on Form 8271. The tax shelter registration number may now be reported solely on Form 8886.

The 2007 regulations provide a disclosure deadline for a taxpayer who holds an interest in a partnership, S corporation or trust and receives a timely Schedule K-1 less than ten calendar days before the due date of the taxpayer’s return (including extensions) showing the taxpayer’s participation in a reportable transaction. Specifically, the 2007 regulations provide that the disclosure statement will not be considered late if the taxpayer files the statement with OTSA within 60 calendar days after the due date of the taxpayer’s return (including extensions). Because owners of pass-through entities may not know that they have participated in a reportable transaction, the 2007 regulations give the IRS the discretion to issue in published guidance other disclosure provisions under section 6011.

The 2007 regulations adopt a special rule for disclosing listed transactions and transactions of interest published after the filing of a taxpayer’s return (including an amended return) and before the end of the limitations period for assessment of tax for any taxable year in which the taxpayer participated in a listed transaction or transactions of interest. Specifically, the taxpayer must file a disclosure statement with OTSA within 90 calendar days after the date on which the transaction became a listed transaction or transaction of interest. This filing requirement applies regardless of whether the taxpayer participated in the listed transaction or transaction of interest in the year that the transaction is published.

The 90-day rule in the 2007 regulations differs from guidance under the 2003 regulations, which requires that a taxpayer disclose a listed transaction in an attachment to the tax return next filed after the transaction is listed. Compliance with the 2007 regulations’ 90-day disclosure rule will require taxpayers to monitor the publication of listed transactions

(and transactions of interest) more frequently than required under the 2003 regulations' annual return disclosure rule.

Taxpayers may request a ruling on the merits of a particular transaction or regarding whether a transaction is a reportable transaction. The Commissioner has the discretion to determine that such ruling requests satisfy the reporting requirements under section 6011.

Effective Dates

The 2007 regulations are generally applicable to transactions entered on or after August 3, 2007. The 2007 regulations apply to transactions of interest entered into on or after November 2, 2006 (the date proposed regulations were published). The 2007 regulations apply to ruling requests regarding specific transactions received on or after November 1, 2006. The 2003 final regulations continue to apply to transactions entered into prior to August 3, 2007.

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[Attachment](#)

endnotes

[\[1\]](#) The elimination of the “transactions with a significant book-tax difference” category under Reg. § 1.6011-4(b)(6) reflects interim guidance published in Notice 2006-6, 2006-5 I.R.B. 385. Information sufficient to satisfy the disclosure requirements under section 6011 regarding book-tax differences now is required to be reported on Form 1120's Schedule M-3 (“Net Income (Loss) Reconciliation for Corporations with Total Assets of \$ 10 Million or More”). The brief asset holding period category was eliminated because of changes to section 901 enacted by the American Jobs Creation Act of 2004 (“AJCA”) and taxpayer comments.

[\[2\]](#) See Institute [Memorandum](#) (15707) to 529 Plan Advisory Committee No. 14-03, Accounting/Treasurers Members No. 13-03, Adviser Distributor Tax Issues Task Force No. 5-03, Tax Members No. 15-03 and Unit Investment Trust Members No. 9-03, dated March 7, 2003. Final regulations under sections 6011, 6111 and 6112 issued in 2003 (“2003 regulations”), reflecting suggestions made by the Institute (See Institute [Memorandum](#) (15499) to Accounting/Treasurers Members No. 55-02, Adviser Distributor Tax Issues Task Force No. 4-02, Tax Members No. 56-02 and Unit Investment Trust Members No. 41-02, dated December 31, 2002), provided an express exemption from reporting any transaction, other than a listed transaction, for RICs and investment vehicles owned 95 percent or more by one or more RICs at all times during the course of the transaction.

[3] Section 6707A imposes lesser penalties on individuals for failure to report reportable transactions (\$100,000 for listed transactions and \$10,000 for all other reportable transactions). AJCA also enacted penalties for tax understatements related to reportable transactions. See section 6662A and Institute [Memorandum](#) (18115) to Tax Members No. 42-04, International Members No. 55-04 and Accounting/Treasurers Members No. 35-04, dated October 19, 2004.

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