

sold before September 1, 1984, is a substantial investment?

A-60. The determination of whether an investment is a substantial investment will be made by taking into account only the interests that are offered for sale on or after September 1, 1984. An investment will be considered a substantial investment if there are expected to be 5 or more investors on or after September 1, 1984, and the aggregate amount offered for sale on or after September 1, 1984 is expected to exceed \$250,000. Amounts received from the sale of interests before September 1, 1984, however, are taken into account in computing the amount of the penalty for failure to register.

(Secs. 6111 and 7805, Internal Revenue Code of 1954 (98 Stat. 678, 26 U.S.C. 6111; 68A Stat. 917, 26 U.S.C. 7805); secs. 6111, 6112 and 7805, Internal Revenue Code of 1954 (98 Stat. 678, 98 Stat. 681, 68A Stat. 917; 26 U.S.C. 6111, 6112 and 7805))

[T.D. 7964, 49 FR 32713, Aug. 15, 1984, as amended by T.D. 7990, 49 FR 43641, Oct. 31, 1984; T.D. 7964, 49 FR 44461, Nov. 7, 1984; T.D. 8078, 51 FR 7440, Mar. 25, 1986]

**§ 301.6111-2T Confidential corporate tax shelters (temporary).**

(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 necessary to support the tax benefits that are expected to be claimed with respect to any entity, plan, or arrangement, in-

cluding any series of related steps carried out as part of a prearranged plan.

(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, and any other tax consequences that may reduce a taxpayer's Federal income tax liability by affecting the timing, character, or source of any item of income, gain, deduction, 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 for purposes of section 6111. 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 (including transactions described in §1.6011-4T(b)(3)(iii)) in a form consistent with customary commercial practice; 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 structure and tax treatment 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) or (ii) 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, individual ruling under paragraph (b)(5) of this section, or otherwise, that the transaction is not subject to the registration requirements of this section.

(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 the transaction will not be required to be registered 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 structure or tax aspects of the transaction is limited in any way 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. 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 structure or tax aspects 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. An offeree's privilege to maintain the confidentiality of a communication relating to a tax shelter in which the offeree might participate or has agreed to participate, including an offeree's confidential communication with the offeree's attorney, is not itself a condition of confidentiality.

(2) *Securities law exception.* An offer is not considered made under conditions of confidentiality if disclosure of the structure or tax aspects of the transaction is subject to restrictions reasonably necessary to comply with federal or state securities laws and such disclosure is not otherwise limited.

(3) *Presumption.* Unless facts and circumstances clearly 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 structure and tax aspects of the transaction, and all materials of any kind (including opinions or other tax analyses) that are provided to the offeree related to such structure and tax aspects.

(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) *Certain registrations deemed timely*—(A) *In general.* The IRS will consider a registration as timely made for a confidential corporate tax shelter in which interests are offered for sale after February 28, 2000, if the tax shelter is registered no later than August 29, 2000. If an interest in a confidential corporate tax shelter is first offered for sale after February 28, 2000 and the tax shelter also constitutes a tax shelter under section 6111(c), the persons responsible for registering the tax shelter may either complete and file Form 8264, "Application for Registration of a Tax Shelter", including the information required by paragraph (e)(2) of this section, not later than the day on which an interest in the tax shelter is first offered for sale after February 28, 2000, or complete and file Form 8264, "Application for Registration of a Tax Shelter", for the section 6111(c) tax shelter not later than the day on which an interest in the tax shelter is first offered for sale under section 6111(a) and then file an amended Form 8264 with the information required by paragraph (e)(2) of this section not later than August 29, 2000.

(B) *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 later of the next offering for sale of interests in the shelter or August 29, 2000.

(2) *Procedures for registering*—(i) *In general.* 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).) The exemptions from the registration requirements contained in the instructions to the current Form 8264 apply only to 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.

(ii) *Interim registration procedure.* Until Form 8264 and its instructions are revised to incorporate the provisions of this paragraph (e)(2)(ii), the person responsible for registering a

confidential corporate tax shelter must—

(A) Type or legibly print “Confidential Corporate Tax Shelter Filed Under § 301.6111-2T” at the top of Form 8264 (Rev. 11-99), “Application for Registration of a Tax Shelter”;

(B) Complete Part I and lines 1a, 2, 3, 4, 6, and 12 in Part II of Form 8264;

(C) In the section titled “Explanation of Items” on Form 8264, provide a detailed description of the tax shelter, including a description of the structure of the tax shelter and the intended tax benefits;

(D) Attach any written materials that are presented to potential participants in connection with the offering of sales of interests in the tax shelter, including any analyses or opinions relating to the intended tax benefits of the shelter; and

(E) Sign the Form 8264 and file the form as prescribed in the instructions to the form.

(iii) *Use of subsequent versions of Form 8264.* If a person who is required to register a confidential corporate tax shelter under section 6111 uses a subsequent version of the Form 8264, the person must complete the appropriate parts of the revised form and follow the applicable instructions.

(iv) *Tax shelters that constitute both section 6111(c) and section 6111(d) tax shelters.* If a person is registering an arrangement that is both a confidential corporate tax shelter and a section 6111(c) tax shelter, the person must follow the requirements of this section and the instructions for Form 8264. In such a situation, the taxpayer must complete the entire form because the tax shelter is a section 6111(c) tax shelter and, if using Form 8264 (Rev. 11-99), type or legibly print “Confidential Corporate Tax Shelter filed under § 301.6111-2T” at the top of Form 8264 and include the information required in paragraphs (e)(2)(ii)(C) and (D) of this section because the tax shelter is also a confidential corporate tax shelter. If an arrangement is both a section 6111(c) tax shelter and a confidential corporate tax shelter and is a transaction described in the “Exemptions from Registration” section of the instructions for Form 8264 (Rev. 11-99), the person registering the arrangement

must comply with the requirements of this section to register the arrangement as a confidential corporate tax shelter.

(3) *Claims of privilege.* (i) In any case in which an attorney or federally authorized tax practitioner within the meaning of section 7525 is the person required to register a confidential corporate tax shelter, and that person believes that information required to be disclosed under paragraph (e)(2) of this section is protected by the attorney-client privilege or by the confidentiality privilege of section 7525(a), any information omitted from the Form 8264 on the basis of such a claim must be supported by a statement attached to Form 8264 which satisfies the requirements set forth in paragraph (e)(3)(ii) of this section.

(ii) A statement supporting a claim of privilege must be signed by the attorney or federally authorized tax practitioner under penalties of perjury, must identify each document or category of information for which a claim of privilege is made, and must include the following representations with respect to each document or category of information 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 a tax shelter within the meaning of section 7525(b);

(B) Specifically represent that the person required to register (and, to the best of such person's knowledge and belief, 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.

(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 date.* 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 (b)(3)(ii), (c)(1), (2) and (3), (f), and (g)(1) of this section apply to confidential corporate tax shelters in which any interests are offered for sale after August 11, 2000. The rules in paragraphs (b)(3)(ii), (c)(1), (2) and (3), (f), and (g)(1) of this section may be relied upon for confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. Otherwise, the rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, are contained in §301.6111-2T in effect prior to August 11, 2000 (see 26 CFR part 301 revised as of April 1, 2000). However, paragraphs (b)(1), (b)(3)(ii), (b)(4)(i), (b)(6) *Example* (i) and (ii), (c)(3), and (e)(2)(ii)(E) of this section apply to confidential corporate tax shelters in which any interests are offered for sale after August 2, 2001. The rules in paragraphs (b)(1), (b)(3)(ii), (b)(4)(i), (b)(6), (b)(6) *Example* (i) and (ii), (c)(3), and (e)(2)(ii)(E), of this section may be relied upon for confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. Otherwise, the rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, and on or before August 2, 2001 are contained in this §301.6111-2T in effect prior to August 2, 2001 (See 26 CFR part 301 revised as of April 1, 2001).

[T.D. 8876, 65 FR 11218, Mar. 2, 2000, as amended by T.D. 8896, 65 FR 49912, Aug. 16, 2000; T.D. 8961, 66 FR 41135, Aug. 7, 2001]

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

The following questions and answers relate to the requirement to maintain