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)).

[T.D. 9046, 68 FR 10170, Mar. 4, 2003]

§ 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;

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

(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 Office 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.

[T.D. 9046, 68 FR 10173, Mar. 4, 2003]

§ 301.6114–1 Treaty-based return positions.

(a) *Reporting requirement*—(1) *General rule.* (i) Except as provided in paragraph (c) of this section, if a taxpayer takes a return position that any treaty of the United States (including, but not limited to, an income tax treaty, estate and gift tax treaty, or friendship, commerce and navigation treaty) overrules or modifies any provision of the Internal Revenue Code and thereby effects (or potentially effects) a reduction of any tax incurred as any time, the taxpayer shall disclose such return position on a statement (in the form required in paragraph (d) of this section) attached to such return.

(ii) If a return of tax would not otherwise be required to be filed, a return must nevertheless be filed for purposes of making the disclosure required by this section. For this purpose, such return need include only the taxpayer's name, address, taxpayer identifying number, and be signed under penalties of perjury (as well as the subject disclosure). Also, the taxpayer's taxable year shall be deemed to be the calendar year (unless the taxpayer has previously established, or timely chooses for this purpose to establish, a different taxable year). In the case of a disclosable return position relating solely to income subject to withholding (as defined in § 1.1441–2(a) of this chapter), however, the statement required to be filed in paragraph (d) of this section must instead be filed at times and in accordance with procedures published by the Internal Revenue Service.

(2) *Application.* (i) A taxpayer is considered to adopt a ''return position'' when the taxpayer determines its tax liability with respect to a particular item of income, deduction or credit. A taxpayer may be considered to adopt a return position whether or not a return is actually filed. To determine whether a return position is a ''treaty-based return position'' so that reporting is required under this paragraph (a), the taxpayer must compare:

(A) The tax liability (including credits, carrybacks, carryovers, and other tax consequences or attributes for the current year as well as for any other affected tax years) to be reported on a return of the taxpayer, and

(B) The tax liability (including such credits, carrybacks, carryovers, and other tax consequences or attributes) that would be reported if the relevant treaty provision did not exist.

If there is a difference (or potential difference) in these two amounts, the position taken on a return is a treaty-based return position that must be reported.

(ii) In the event a taxpayer's return position is based on a conclusion that a treaty provision is consistent with a Code provision, but the effect of the treaty provision is to alter the scope of the Code provision from the scope that it would have in the absence of the treaty, then the return position is a treaty-based return position that must be reported.

(iii) A return position is a treaty-based return position unless the taxpayer's conclusion that no reporting is required under paragraphs (a)(2) (i) and (ii) of this section has a substantial probability of successful defense if challenged.

(3) *Examples.* The application of section 6114 and paragraph (a)(2) of this section may be illustrated by the following examples:

Example 1: X, a Country A corporation, claims the benefit of a provision of the income tax treaty between the United States and Country A that modifies a provision of the Code. This position does not result in a change of X's U.S. tax liability for the current tax year but does give rise to, or increases, a net operating loss which may be