

pension, etc., plans), the transaction must be disclosed in the manner stated in such published guidance.

(b) *Effective date.* This section applies to transactions entered into on or after January 1, 2003.

PART 56—PUBLIC CHARITY EXCISE TAXES

Par. 13. The authority citation for part 56 continues to read in part as follows:

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

Par. 14. Section 56.6011-4T is added to read as follows:

§ 56.6011-4T *Requirement of statement disclosing participation in certain transactions by taxpayers (temporary).*

(a) *In general.* If a transaction is identified as a “listed transaction” as defined in § 1.6011-4T of this chapter by the Commissioner in published guidance (see § 601.601(d)(2) of this chapter), and the listed transaction involves an excise tax under chapter 41 of subtitle D of the Internal Revenue Code (relating to public charities), the transaction must be disclosed in the manner stated in such published guidance.

(b) *Effective date.* This section applies to transactions entered into on or after January 1, 2003.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 15. The authority citation for part 301 continues to read in part as follows:

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

Par. 16. Section 301.6111-2T is amended as follows:

1. Paragraphs (a)(3) and (b)(3)(i) are revised.

2. Paragraph (c)(3) is amended by adding a sentence at the end of the paragraph.

3. Paragraph (h) is amended by revising the paragraph heading and removing the third sentence through the last sentence and adding two new sentences in their place.

The revisions and additions read as follows:

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

(a) * * *

(3) For purposes of this section, references to the term “transaction” include all of the factual elements relevant to the ex-

pected tax treatment of any investment, entity, plan, or arrangement, and include any series of steps carried out as part of a plan. For purposes of this section, 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 registration. For examples, see § 1.6011-4T(c)(4) of this chapter.

* * * * *

(b) * * *

(3) * * *

(i) The potential participant is expected to participate in the transaction in the ordinary course of its business in a form consistent with customary commercial practice (a transaction involving the acquisition, disposition, or restructuring of a business, including the acquisition, disposition, or other change in the ownership or control of an entity that is engaged in a business, or a transaction involving a recapitalization or an acquisition of capital for use in the taxpayer’s business, shall be considered a transaction carried out in the ordinary course of a taxpayer’s business); and

* * * * *

(c)

(3) * * * This presumption is available only in cases in which the written authorization to disclose is effective without limitation of any kind from the commencement of discussions.

* * * * *

(h) *Effective dates.* * * * However, paragraphs (a)(3), (b)(3)(i), and (c)(3) of this section apply to confidential corporate tax shelters in which any interests are offered for sale on or after January 1, 2003. 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 December 31, 2002, are contained in § 301.6111-2T in effect prior to January 1, 2003 (see 26 CFR part 301 revised as of April 1, 2002, and 2002-28 I.R.B. 91 (see § 601.601(d)(2) of this chapter)).

Robert E. Wenzel,
*Deputy Commissioner
of Internal Revenue.*

Approved October 15, 2002.

Pamela F. Olson,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on October 17, 2002, 3:10 p.m., and published in the issue of the Federal Register for October 22, 2002, 67 F.R. 64799)

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

301.6112-1T: *Requirement to prepare, maintain, and furnish lists with respect to potentially abusive tax shelters (temporary).*

T.D. 9018

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 301

Requirement to Maintain a List of Investors in Potentially Abusive Tax Shelters

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: These temporary regulations relate to the preparation, maintenance, and furnishing of lists of persons in potentially abusive tax shelters under section 6112. These regulations apply to organizers and sellers 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 on page 834 of this Bulletin.

DATES: *Effective Date:* These temporary regulations are effective January 1, 2003.

Applicability date: For dates of applicability, see § 301.6112-1T(j).

FOR FURTHER INFORMATION CONTACT: Charlotte Chyr, Tara P. Volungis, or Danielle M. Grimm, 202-622-3070 (not a toll-free number).

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 published in this issue of the Bulletin.

Books and 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 persons for potentially abusive tax shelters under section 6112. Section 6708 provides penalties for failing to maintain a list under section 6112.

On February 28, 2000, the IRS issued temporary and proposed regulations regarding section 6112 (T.D. 8875, 2000–1 C.B. 761; REG–103736–00, 2000–1 C.B. 768). The February regulations were published in the **Federal Register** (65 FR 11211; 65 FR 11271) on March 2, 2000. On August 11, 2000, the IRS issued temporary and proposed regulations regarding section 6112 (T.D. 8896, 2000–2 C.B. 249; REG–103736–00, 2000–2 C.B. 258). The August 2000 regulations were published in the **Federal Register** (65 FR 49909; 65 FR 49955) on August 16, 2000, modifying the previous regulations.

The list maintenance rules under section 6112, along with the rules relating to disclosure of reportable transactions under section 6011 and the rules for registration of tax shelters under section 6111, are intended to provide the IRS and Treasury with information needed to evaluate potentially abusive transactions. The IRS and Treasury have considered and evaluated compliance with these rules and have determined that certain additional changes to the current temporary and proposed regulations are necessary to improve compliance and to carry out the purposes of sections 6011, 6111, and 6112. On March 20, 2002, Treasury released its Plan to Combat Abusive Tax Avoidance Transactions (PO–2018), which describes changes to the rules under sections 6011, 6111, and 6112 that will establish a more effective disclosure regime and improve compliance. See <http://www.treas.gov/press/releases/po2018.htm>.

These amendments to the temporary regulations under section 6112 generally require organizers and sellers (material advisors) to maintain lists of persons for transactions required to be registered under section 6111 and for reportable transactions defined in § 1.6011–4T(b) of the Income Tax Regulations.

Concurrent with these amended temporary regulations under section 6112, the IRS and Treasury are publishing elsewhere in this issue of the Bulletin amended temporary regulations under section 6011. The amended temporary regulations under section 6011 revise the categories of transactions that must be disclosed on returns.

Pending legislation would modify section 6111 to require registration of transactions that are required to be disclosed under section 6011. The IRS and Treasury intend to revise the regulations under section 6111 when such legislation is enacted.

Explanation of Provisions

A. 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 and containing any other information required by regulations. A potentially abusive tax shelter under section 6112 includes any tax shelter that is required to be registered with the

IRS as a tax shelter under section 6111, and any transaction that has a potential for tax avoidance or evasion.

Under these regulations, a transaction has the potential for tax avoidance or evasion if it is a listed transaction or if a potential material advisor, at the time the transaction is entered into, knows or has reason to know that the transaction is otherwise a reportable transaction as defined in § 1.6011–4T. For purposes of section 6112, listed transactions that involve Federal estate, gift, employment, and pension and exempt organizations excise taxes are also potentially abusive tax shelters that require list maintenance. If a transaction that involves Federal income taxes becomes a listed transaction on or after January 1, 2003, it is a potentially abusive tax shelter for purposes of section 6112 and, whether or not the material advisor is already required to maintain a list, the material advisor must begin, at the time of listing, to include on the list those persons who acquired an interest in the transaction after February 28, 2000.

B. Organizer and Seller (Material Advisor)

The regulations provide that a person is an organizer of, or a seller of any interest in, a transaction that is a potentially abusive tax shelter if that person is a material advisor with respect to that transaction. In general, a material advisor is any person who (i) receives, or expects to receive, at least a minimum fee in connection with a transaction that is a potentially abusive tax shelter, and (ii) who makes or provides any statement, oral or written, to any person as to the potential tax consequences of that transaction. The Internal Revenue Service and Treasury are considering whether the minimum fee requirement should be eliminated with respect to listed transactions.

The minimum fee is \$250,000 for a transaction that is a potentially abusive tax shelter if all persons who acquire an interest, directly or indirectly, in the transaction are corporations (other than S corporations). The minimum fee for any other transaction that is a potentially abusive tax shelter is \$50,000. In calculating the minimum fee, each transaction that is a potentially abusive tax shelter is evaluated separately to determine whether the minimum fee threshold is satisfied with re-

spect to that particular transaction. If the minimum fee threshold is satisfied with respect to one transaction that is a potentially abusive tax shelter, but not with respect to another separate transaction (whether or not it is substantially similar), a person is a material advisor with respect to only the transaction for which the minimum fee threshold is satisfied. Accordingly, the list required to be maintained includes only those persons who are participants in the transaction for which the minimum fee threshold is satisfied.

C. Preparing, Maintaining and Furnishing Lists

In general, a material advisor must prepare and maintain a separate list of persons for each transaction that is a potentially abusive tax shelter. However, to ensure that the IRS is able to identify all of the persons who are participants in potentially abusive tax shelters that are substantially similar, the regulations further provide that the material advisor must keep one list for all transactions that are substantially similar and are potentially abusive tax shelters.

Any person to whom a material advisor makes or provides a statement, oral or written, as to the potential tax consequences of a transaction that is a potentially abusive tax shelter must be included on a list if the material advisor knows or has reason to know that the person, or any related party, participated or will participate in the transaction. A person (including any related party) is treated as having participated in a transaction that is a potentially abusive tax shelter if the material advisor knows or has reason to know that the person sold or transferred, or will sell or transfer to another person (subsequent participant) an interest in that type of transaction that, if entered into, would be a potentially abusive tax shelter. The material advisor also must list any subsequent participant if the material advisor knows or has reason to know the identity of that subsequent participant and the material advisor knows or reasonably expects that the subsequent participant will participate in, or sell or transfer to another subsequent partici-

pant an interest in that type of transaction that, if entered into, would be a potentially abusive tax shelter.

The required list must be maintained for ten years following the date on which the material advisor last made a statement, oral or written, as to the potential tax consequences that may result from the transaction that is a potentially abusive tax shelter. If a material advisor that is an entity dissolves or liquidates before the expiration of the ten-year period, the person responsible under state law for winding up the affairs of the material advisor is (or if state law does not specify any person, 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, unless the dissolved or liquidated 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.

Each material advisor must, upon written request by the IRS, furnish the list of persons to the IRS within 20 business days after the date of the request. The list may be furnished to the IRS in any form that enables the IRS to determine without undue delay or difficulty the information required to be contained in the list.

As a general rule, the name of a participant in a transaction that is a potentially abusive tax shelter is not protected by either the attorney-client privilege or by the tax practitioner privilege under section 7525. No participant in a transaction that is a potentially abusive tax shelter should have a reasonable expectation of confidentiality with respect to that person's identity. Moreover, a claim of privilege that is not based on a reasonable belief that the privilege applies may subject the material advisor to penalties under section 6708.

D. Substantially Similar Transactions

For purposes of section 6112, a substantially similar transaction 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 a transaction is not relevant to the determination of whether that 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.

E. Effective Date

These amended temporary regulations apply to transactions that are potentially abusive tax shelters entered into, or interests acquired therein, on or after January 1, 2003. However, these regulations 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 listed transaction as defined in § 1.6011-4T on or after January 1, 2003, and is subject to disclosure under § 1.6011-4T.

Special Analysis

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. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Charlotte Chyr, Tara P. Volungis, and Danielle M. Grimm, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

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

Par. 2. Section 301.6112-1T is revised to read as follows:

§ 301.6112-1T Requirement to prepare, maintain, and furnish lists with respect to potentially abusive tax shelters (temporary).

(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 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 support 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 Internal Revenue Service 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.* A transaction that has a potential for tax avoidance or evasion is any transaction that is a listed transaction as defined in § 1.6011-4T of this chapter and is subject to disclosure under § 1.6011-4T, 20.6011-4T, 25.6011-4T, 31.6011-4T, 53.6011-4T, 54.6011-4T, or 56.6011-4T of this chapter, or any trans-

action that a potential material advisor knows or has reason to know, at the time the transaction is entered into or an interest is acquired, meets one of the categories of a reportable transaction under § 1.6011-4T(b)(3) through (7) of this chapter.

(i) 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 § 1.6011-4T, 20.6011-4T, 25.6011-4T, 31.6011-4T, 53.6011-4T, 54.6011-4T, or 56.6011-4T of this chapter.

(ii) If a transaction becomes a listed transaction as defined in § 1.6011-4T of this chapter and is subject to disclosure under § 1.6011-4T of this chapter, after the transaction is entered into or an interest in the transaction is acquired, this section shall apply with respect to any interests acquired after February 28, 2000. If a transaction becomes a listed transaction as defined in § 1.6011-4T of this chapter and is subject to disclosure under § 20.6011-4T, 25.6011-4T, 31.6011-4T, 53.6011-4T, 54.6011-4T, or 56.6011-4T of this chapter, after the transaction is entered into or an interest in the transaction is acquired, this section shall apply with respect to any interests acquired on or after January 1, 2003.

(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.* A material advisor is any person who (or through its employees, shareholders, partners, or agents) receives, or expects to receive, at least a minimum fee, as defined in paragraph (c)(3) of this section, in connection with a transaction that is a potentially abusive tax shelter and who makes or provides any statement, oral or written, to any person as to the potential tax consequences of that transaction. 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.

(3) *Minimum fee—(i) In general.* For purposes of this paragraph (c), the minimum fee is \$250,000 for a transaction that is a potentially abusive tax shelter if all persons who acquire an interest, directly or in-

directly, are corporations (other than S corporations), and \$50,000 for any other transaction that is a potentially abusive tax shelter.

(ii) *Determination of fees.* In determining whether the minimum fee threshold is satisfied, all fees for advice (whether or not tax advice) regarding, or for implementation of, a transaction that is a potentially abusive tax shelter are taken into account. For purposes of this section, fees include consideration in whatever form paid, whether in cash or in kind, and whether paid or denominated as fees for tax advice or for some other function such as the preparation of documentation or tax return preparation. The Internal Revenue Service 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 the receipt of 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 trans-

action. 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.

(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.

(2) *Persons required to be included on lists*. (i) A material advisor is required to list each person to whom the material advisor makes or provides a statement, oral or written, as to the potential tax consequences of a transaction that is a potentially abusive tax shelter, if the material advisor knows or has reason to know that the person or any related party participated in or will participate in the transaction (or a substantially similar transaction that is a potentially abusive tax shelter).

(ii) A material advisor shall treat a person (including any related party) as having participated in a transaction that is a potentially abusive tax shelter if the material advisor knows or has reason to know that the person sold or transferred, or will sell or transfer, to another person (subsequent participant) an interest in that type of transaction that, if entered into, would be a potentially abusive tax shelter. The material advisor also must list any subsequent participant if the material advisor knows or has reason to know the identity of that subsequent participant, and the material advisor knows or reasonably expects that the subsequent participant will participate in, or sell or transfer to another subsequent participant an interest in that type of transaction that, if entered into, would be a potentially abusive tax shelter.

(iii) The following examples illustrate the provisions of this section:

Example 1. An investment firm provides a statement describing the potential tax consequences of a type of transaction to three taxpayers: Corporation X, Corporation Y, and Corporation Z. Each taxpayer agrees to pay the investment firm \$300,000 in con-

nection 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 has reason to know, 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 § 1.6011-4T(b)(2), (3), (4), (6) or (7) of this chapter. All the persons who acquired an interest directly or indirectly in the transactions are C corporations.

(i) *Transaction X*. At the time transaction X is entered into, the investment firm does not know, or have reason to know, that the transaction is a reportable transaction, because the \$9 million loss does not satisfy the \$10 million threshold under § 1.6011-4T(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 three requirements for being a material advisor with respect to transaction Y and with respect to transaction Z. First, both of the transactions are potentially abusive tax shelters with respect to the investment firm because the investment firm knows, or has reason to know, at the time the transactions are entered into, that the losses for each of Corporation Y and Z are expected to exceed the \$10 million threshold and, thus, the transactions are reportable transactions under § 1.6011-4T(b)(5) of this chapter (relating to loss transactions). Second, the investment firm provides a statement as to the potential tax consequences of the transactions. Third, the investment firm receives \$300,000 in connection with each 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 statement to Corporation N describing the potential tax consequences of a type of transaction. Corporation N pays Corporation M \$90,000 for the information about that type of transaction. Corporation M knows that Corporation N will sell the information to Taxpayer O (a corporation) and Taxpayer P (an individual), and reasonably expects Taxpayer O and Taxpayer P to participate in transactions of the type that Corporation M described to Corporation N. Corporation N, in turn, provides a statement as to the potential tax consequences of that type of transaction to Taxpayer O and Taxpayer P. Each taxpayer agrees to pay Corporation N \$80,000 in connection with their respective transactions, 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, or have reason to know, that the transactions are reportable transactions under § 1.6011-4T(b) of this chapter. All the persons who acquire an interest directly or indirectly in transaction O are C corporations.

(ii) Corporation N is not a material advisor with respect to transaction O because Corporation N receives only \$80,000 in connection with transaction O, which is less than the minimum fee for that transaction (\$250,000). Corporation N is a material advisor with respect to transaction P. First, at the time transaction P is entered into, Corporation N knows, or has reason to know, that transaction P is a reportable transaction and, thus, is a potentially abusive tax shelter. Second, Corporation N provides a statement as to the potential tax consequences of transaction P. Third, Corporation N receives \$80,000 in connection with transaction P, which exceeds the minimum fee for that transaction (\$50,000). Accordingly, Corporation N must keep a list with respect to transaction P. The list must contain information about Taxpayer P (see paragraph (e)(2)(ii) of this section).

(iii) Corporation M is not a material advisor with respect to transaction O because Corporation M receives only \$90,000 in connection with transaction O, which is less than the minimum fee for that transaction (\$250,000). Corporation M is a material advisor with respect to transaction P. First, at the time transaction P is entered into, Corporation M knows, or has reason to know, that transaction P is a reportable transaction and, thus, is a potentially abusive tax shelter. Second, Corporation M provides a statement as to the potential tax consequences of transaction P, and Corporation M receives \$90,000 in connection with transaction P, which exceeds the minimum fee for that transaction (\$50,000). Accordingly, Corporation M must keep a list with respect to transaction P. The list must contain information about Corporation N (see paragraph (e)(2)(ii) of this section) and Taxpayer P (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;

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

(F) The amount invested in each transaction by each person required to be included on the list;

(G) A detailed description of each transaction that describes both the structure and its expected tax consequences;

(H) A summary or schedule of the tax consequences 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 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; and

(J) For each person, 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) *Claims of privilege.* 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 required to be disclosed under this paragraph (e)(3) 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 Internal Revenue Service, as provided in paragraph (g) of this section, the material advisor may assert a privilege claim subject to the requirements of this paragraph (e)(3)(ii).

(A) 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 paragraph (e)(3)(ii)(B) of this section) the nature of each document or category of information that is not produced which will allow the Service 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 or category of information for which the privilege is claimed—

(1) 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 662(d)(2)(iii)); and

(2) Specifically represent that 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.

(B) Identification and description of a document or category of information includes, but is not limited to—

(1) The date appearing on such document or, if it has no date, the date or approximate date that such document was created;

(2) 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

(3) 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.

(f) *Retention of lists.* Each material advisor must maintain the list described in paragraph (e) of this section for ten years following the date on which the material advisor last made a statement, oral or written, as to the potential tax consequences of the transaction. 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 ten-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: Internal Revenue Service, 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.* Each material advisor and person responsible for maintaining a list of persons must, upon written request by the Internal Revenue Service, furnish the list to the Internal Revenue Service within 20 business days after the date of the request. The request is not required to be in the form of an administrative summons. The list may be furnished to the Internal Revenue Service on paper, card file, magnetic media, or in any other form, provided the method of furnishing the list enables the Internal Revenue Service to determine without undue delay or difficulty the information required in paragraph (e)(3) of this section.

(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 Internal Revenue Service in accordance with paragraph (g) of this section. The fact that a material advisor is unable to obtain the list from any designated material advisor, the fact that any designated material advisor did not maintain a list, or the fact that the list maintained by any designated material advisor is not complete, will not relieve any material advisor from the requirements of this section.

(i) *Procedure for obtaining rulings.* A person may submit a request to the Internal Revenue Service for a ruling as to whether a transaction is 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 such ruling request is pending and for 60 days thereafter; however, if it is ultimately determined that the transaction is a potentially abusive tax shelter, 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 January 1, 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 listed transaction as defined in § 1.6011-4T of this chapter on or after January 1, 2003, and is subject to disclosure under § 1.6011-4T of this chapter. Otherwise, the rules that apply with respect to any other transaction that is a potentially abusive tax shelter entered into, or any interest acquired therein, on or before De-

ember 31, 2002, are contained in § 301.6112-1T in effect prior to December 31, 2002 (see 26 CFR part 301 revised as of April 1, 2002).

Robert E. Wenzel,
*Deputy Commissioner
of Internal Revenue.*

Approved October 15, 2002.

Pamela F. Olson,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on October 17, 2002, 3:10 p.m., and published in the issue of the Federal Register for October 22, 2002, 67 F.R. 64807)

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2002. See Rev. Rul. 2002-74, page 814.

Section 7701.—Definitions

26 CFR 301.7701-3: Classification of certain business entities.

How do taxpayers treat, for federal tax purposes, an entity that is owned solely by a husband and wife as community property under the laws of a state, a foreign country, or a possession of the United States? See Rev. Proc. 2002-69, page 831.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of November 2002. See Rev. Rul. 2002-74, page 814.