



Section of Taxation

10th Floor
740 15th Street N.W.
Washington, DC 20005-1022
(202) 662-8670
FAX: (202) 662-8682
E-mail: tax@abanet.org

March 5, 2007

The Honorable Mark W. Everson
Commissioner of Internal Revenue
Internal Revenue Service
Room 5226
1111 Constitution Avenue NW
Washington, DC 20224

Re: Comments Concerning the Proposed Regulations Under Sections 6011, 6111,
and 6112

Dear Commissioner Everson:

Enclosed are comments concerning the Proposed Regulations under Sections 6011, 6111,
and 6112. These comments represent the views of the American Bar Association Section of
Taxation. They have not been approved by the Board of Governors or the House of Delegates of
the American Bar Association and should not be construed as representing the policy of the
American Bar Association.

Sincerely,

Susan P. Serota
Chair, Section of Taxation

Enclosure

Cc: Donald L. Korb, Chief Counsel, Internal Revenue Service
Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury
Michael J. Desmond, Tax Legislative Counsel, Department of the Treasury
Clarissa C. Potter, Deputy Chief Counsel (Technical), Internal Revenue Service

CHAIR

Susan P. Serota
New York, NY

CHAIR-ELECT

Stanley L. Blend
San Antonio, TX

VICE CHAIRS

Administration

Rudolph R. Ramelli
New Orleans, LA

Committee Operations

Elaine K. Church
Washington, DC

Communications

Gregory F. Jenner
Washington, DC

Government Relations

William M. Paul
Washington, DC

Professional Services

Elinore J. Richardson
Toronto, Canada

Publications

Louis Mezzullo
Rancho Sante Fe, CA

SECRETARY

Christine L. Agnew
Houston, TX

ASSISTANT SECRETARY

Armando Gomez
Washington, DC

COUNCIL

Section Delegates to the

House of Delegates

Paul J. Sax
San Francisco, CA

Richard M. Lipton
Chicago, IL

Immediate Past Chair

Dennis B. Drapkin
Dallas, TX

MEMBERS

Ellen P. Aprill
Los Angeles, CA

Samuel L. Braunstein
Fairfield, CT

Glenn R. Carrington
Washington, DC

Peter J. Connors
New York, NY

Richard S. Gallagher
Milwaukee, WI

Sharon Stern Gerstman
Buffalo, NY

Helen M. Hubbard
Washington, DC

Emily A. Parker
Dallas, TX

Priscilla E. Ryan
Chicago, IL

Charles A. Pulaski, Jr.
Phoenix, AZ

Stephen E. Shay
Boston, MA

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

Barbara Spudis de Marigny
San Antonio, TX

**COMMENTS CONCERNING PROPOSED
REGULATIONS UNDER SECTIONS 6011, 6111, AND 6112**

These comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

These comments were prepared as a project of the Section of Taxation's Administrative Practice Committee. Members of the Partnerships and LLCs Committee and the Tax Shelter Task Force also participated in preparing these comments. Principal responsibility was exercised by Ronald L. Buch, Jr., Paul D. Carman, Rochelle L. Hodes, George C. Howell III, and Julian Y. Kim. The comments were reviewed by Thomas J. Callahan, Chair of the Committee on Administrative Practice, Robert E. McKenzie of the Section's Committee on Government Submissions, and Charles A. Pulaski, Jr., Council Director for the Committee on Administrative Practice.

Although some of the members of the Tax Section who participated in preparing these Comments have clients who would be affected by the procedures addressed by these Comments or have advised clients on the application of such procedures, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact Person:

Ronald L. Buch, Jr.
(202) 327-2078
rbuch@mckeenelson.com

Date: March 5, 2007

EXECUTIVE SUMMARY

On November 1, 2006, the Internal Revenue Service (“IRS”) and the Department of Treasury (“Treasury”) issued proposed regulations (the “Proposed Regulations”) under Internal Revenue Code sections 6011, 6111, and 6112¹ concerning “reportable transactions” and requested public comment, particularly concerning “how the regulations can be targeted to capture useful information about potentially abusive transactions while minimizing the burden imposed on taxpayers and material advisors.”² The IRS and Treasury also amended temporary and final regulations under sections 6011, 6111, and 6112 relating to the process for obtaining a ruling concerning whether a transaction is reportable.³ The following comments (“Comments”) address issues relating to the requirements of sections 6011, 6111, and 6112, as set forth in the Proposed Regulations, and offer suggestions for reducing the burden of compliance and improving disclosure. These Comments also address the changes to the ruling process and its corresponding effect on reporting obligations.

These Comments supplement our earlier comments concerning reportable transactions and material advisors submitted by letters dated January 26, 2005 and dated February 7, 2005.⁴

Recommendations Applicable to Reportable Transaction Regulations

We welcome the addition of “transactions of interest” as a means by which to identify specific transactions without classifying them as listed transactions. While we do not recommend any changes in this regard, we encourage Treasury and the IRS to describe transactions of interest clearly and narrowly when such transactions are identified.

The Proposed Regulations would revise the existing regulations in some instances to reduce the burden of compliance. We recommend further revisions in this regard. We recommend eliminating the brief asset holding period category of reportable transactions. It is no longer necessary after recent statutory changes. We also recommend eliminating the need for duplicative disclosures by pass-through entities and by those who hold interests in them. Lastly, we recommend that the regulations, when finalized, should state unequivocally that taxpayers are only required to report information that they know or have reason to know at the time of reporting.

¹ All sections references are to the Internal Revenue Code of 1986, as amended, and to the Treasury Regulations (“Regulations”), as the context requires.

² IR-2006-167 (Nov. 1, 2006); *see also* 71 F.R. 64488-64496, 71 F.R. 64496-64500, and 71 F.R. 64501-64504.

³ *See* T.D. 9295, 2006-49 I.R.B. 1030 (Nov. 2, 2006).

⁴ *See* Letter from Kenneth W. Gideon, Chair, Section of Taxation, to The Honorable Mark W. Everson, Commissioner of Internal Revenue (January 26, 2005), *reprinted in* Tax Notes Today, 2005 TNT 18-29 (2005) and Letter from Kenneth W. Gideon, Chair, Section of Taxation, to The Honorable Mark W. Everson, Commissioner of Internal Revenue (February 7, 2005), *reprinted in* Tax Notes Today, 2005 TNT 26-19 (2005). The Section has separately submitted comments concerning the classification of patented tax strategies as a new reportable transaction.

Recommendations Applicable to Material Advisor Disclosure Regulations

Our Comments with respect to the material advisor disclosure regulations seek greater clarity for material advisors. We recommend that the Proposed Regulations, when finalized, be revised to state that a material advisor is only required to disclose what the material advisor knows or should know as of the disclosure date. The Proposed Regulations allow for amendment of a disclosure in the case of a material change⁵; however, we recommend that the Proposed Regulations, when finalized, be revised to make clear what constitutes a material change. Furthermore, we recommend the Proposed Regulations, when finalized, clarify that there is no ongoing duty for the material advisor to monitor the transaction and that amendment of the disclosure is only necessary if the material advisor has actual knowledge of the material change.

Recommendations Applicable to List Maintenance Regulations

We believe the Proposed Regulations should be modified to achieve a more appropriate balance between the IRS's need for timely information and the burden imposed upon material advisors. Achieving an appropriate balance is more important than ever because of the advent of substantial penalties for a failure to timely comply with a list request. To this end, we recommend the adoption of a phased disclosure process whereby material advisors initially provide the most meaningful information to the IRS and later fulfill the more burdensome aspects of list production. We further recommend that the Proposed Regulations, when finalized, make clear that the IRS may allow reasonable extensions of the response period. Lastly, we recommend revising the rules to limit the need for the retention and disclosure of drafts.

Questions remain as to what is required to satisfy a list request, and we recommend the Proposed Regulations, when finalized, clarify what is expected. For example, while we commend the removal of the provisions concerning the assertion of privilege, we recommend that Treasury and the IRS clarify their expectations concerning how and when the privilege should be asserted.

Recommendation Applicable to Reportable Transaction, Material Advisor Disclosure, and List Maintenance Regulations

The Temporary Regulations provide a mechanism by which a ruling can be sought as to whether a transaction must be disclosed or a list must be maintained.⁶ Prior to November 1, 2006, the reporting obligation was suspended while the ruling request was pending. This latter provision was removed with the November 1 Temporary Regulations. We urge Treasury and the IRS to reconsider this change.

⁵ See Prop. Reg. §301.6011-3(d)(1)

⁶ See Temp. Reg. §§1.6011-4T(f)(1) and 301.6112-1T(i)

COMMENTS

The reportable transaction regulations under section 6011, the disclosure regulations under section 6111, and the list maintenance regulations under section 6112 contain considerable overlap. While we have organized most of our Comments by the principal section to which they relate, these Comments often apply to multiple regulation sections.

I. Recommendations Applicable to Reportable Transaction Regulations

The proposed revisions to the reportable transactions regulations demonstrate an effort by Treasury and the IRS to reduce or eliminate unnecessary burdens imposed on taxpayers. We commend Treasury for these efforts and as described below, offer additional suggestions for guidance or to reduce unnecessary burdens.

A. Clearly Describe Transactions of Interest

The Proposed Regulations under section 6011 would add a new category of reportable transactions called “transactions of interest.” A transaction of interest is defined as a “transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest.” The preamble to the Proposed Regulations (the “Preamble”) states that this new category will permit the Treasury Department and the IRS to obtain disclosures of transactions that have the potential for tax avoidance or evasion. After further evaluation of a transaction of interest, Treasury and the IRS may remove the designation of that transaction as a transaction of interest, identify that transaction as a listed transaction, or create a new category of reportable transaction for that type of transaction.⁷ The Proposed Regulations state that they will apply to transactions of interest entered into on or after November 2, 2006.

We commend the creation of the transaction of interest category because it will permit Treasury and the IRS to obtain information on specific types of transactions that are perceived as potentially abusive without subjecting taxpayers or their advisors to the consequences that accompany listed transactions. Prior to these Proposed Regulations, Treasury and the IRS could require disclosure of a type of transaction that did not fall within one of the “objective” filters only by identifying it as a listed transaction.

Since the passage of the American Jobs Creation Act of 2004,⁸ only sale-in/lease-out (SILO) transactions have been identified as listed transactions. We commend Treasury and the IRS for carefully considering the consequences of listing a transaction in light of recent changes to the substantive and procedural rules applicable to listed transactions. These rules, principally

⁷ We support this approach. We also respectfully suggest that, in order to avoid unnecessary reports concerning transactions of interest, at the time when a particular transaction is designated as a transaction of interest, the IRS should adopt a deadline by which its evaluation of the transaction should be completed or, as appropriate, formally extended.

⁸ Pub. L. No. 108-357, 118 Stat. 1418 (“Jobs Act”)

enacted through the Jobs Act, may have diminished the flexibility that the listed transaction category originally was intended to provide. The transaction of interest category will restore this flexibility while allowing Treasury and the IRS to later designate, in appropriate cases, a transaction of interest as a listed transaction.

However, under the Proposed Regulations, a transaction of interest is treated as equivalent to a listed transaction for purposes of disclosure. The duty of disclosure, for example, is essentially the same. It applies not only to the type of transaction described in the IRS published guidance designating that transaction as a transaction of interest but also to all “substantially similar” transactions. The Proposed Regulations retain the two-part definition of the term “substantially similar” that currently applies to listed transactions as well as the admonition that this term is to be construed broadly in favor of disclosure. In addition, as is the case with listed transactions, taxpayers may be required to disclose transactions of interest even if a taxpayer’s transaction was entered into before it was designated as a transaction of interest. A similar rule applies to material advisors. In light of these expansive rules, we respectfully submit the following suggestions in connection with the new transaction of interest category.

We urge that published guidance identifying transactions of interest (or listed transactions) clearly describe the facts, tax strategy, and tax consequences that, in Treasury’s and the IRS’s view, cause the transaction to be a transaction of interest (or a listed transaction). Taxpayers and advisors need to be able to readily determine whether they have disclosure obligations under the tax shelter regulations. Published guidance that does not provide taxpayers with clear notice of the relevant facts, tax strategy, and tax consequences of a transaction of interest (or a listed transaction) will inevitably lead to over-disclosure.⁹

Clearly describing transactions of interest (and listed transactions) is particularly important because taxpayers and advisors must review past transactions, often over several years. We commend prior clarifications of which transactions are listed transactions. We believe that the need for such clarifications can be minimized through the careful description of the transactions that are identified as transactions of interest. We further believe that the process of identifying the relevant facts, tax strategy, and tax consequences might be improved if Treasury and the IRS solicited the comments of potentially affected taxpayer groups and professional tax organizations. This might be accomplished by publishing advance notice and allowing a comment period concerning transactions that are being considered as potential transactions of interest. Such comments might alert Treasury and the IRS to potential ambiguities in the proposed description or otherwise avoid the use of overly inclusive criteria. Such comments would also serve as an additional source of information and further assist Treasury and the IRS to appreciate the range of transactions that may be covered and to describe more clearly the transactions that truly are of interest.

⁹ Government officials have commented in the past that over-disclosure hinders the IRS’s identification of disclosures that warrant further scrutiny. See Crystal Tandon, *IRS Seeing Overdisclosure of Reportable Transactions*, *Officials Say*, Tax Notes Today, Oct. 12, 2006.

B. Eliminate the Brief Holding Period

Under the Proposed Regulations, transactions involving a brief asset holding period and generating tax credits exceeding \$250,000 are retained as a type of reportable transaction, with the exclusion of transactions relating to foreign tax credits. Although we commend Treasury for removing foreign tax credits as a trigger for the brief asset holding period reportable transaction classification, we suggest that, after the amendments to section 901, the brief asset holding period category is no longer necessary.

Other provisions that may result in tax credits contain rules addressing brief holding periods that mitigate the need for this category of reportable transactions. The Puerto Rico Economic Activity Credit under section 30A has its own time limitation, which is in excess of 45 days. The low-income housing credits under section 42 accrue ratably over the 10-year credit period and are allocated among holders under section 42(f)(4) according to the time held, so there would be little incentive to acquire the property on a short-term basis. The new markets tax credit under section 45D spreads the credits over seven years and provides for a recapture within seven years. The rehabilitation credit under section 47, the energy credit under section 48, the qualifying advanced coal project credit under section 48A, and the qualifying gasification project credit under section 48B are all subject to 100% recapture under section 50 if disposed of prior to the first full year after being placed in service.

The recapture and other limitations described in the previous paragraph make it unlikely that a transaction involving a brief asset holding period would generate over \$250,000 of credits. However, taxpayers may inadvertently stumble into such a situation. Although developers of credit investment partnerships generally prefer to be fully subscribed by the beginning of the credit period, as Q&A 5 of Rev. Rul. 91-38, 1991-2 C.B. 3, indicates, sometimes the developer may not be fully subscribed by the time the credit period starts. If a developer of a rehabilitation tax credit transaction (or any of the other credits subject to a full recapture during the first year on a sale of an interest) failed to sell-out the subscriptions prior to the time the project was placed in service and decided to take the units into inventory by meeting the subscription requirement for the unsold units, Reg. § 1.1223-3 would cause a portion of the developer's holding period to begin as of the date of the contribution. If the developer successfully sold a portion of the interest held in inventory within forty-five days, the transaction would appear to be a transaction with a brief asset holding period (if sufficient credits were allocated to the units held by the developer) even though the developer obtains no net benefit (after recapture) for the tax credit.

Because of the significant penalties and the limited statutory ability to waive the penalties related to a failure to report or disclose reportable transactions or to keep lists with regard to reportable transactions, we suggest that Treasury remove the brief asset holding period category from the types of reportable transactions, because after the statutory change to section 901 it seems likely that the only taxpayers covered by the category will be taxpayers that fall into the category by accident.

C. Limit Identification of Parties to those Known by the Taxpayer

Section 1.6011-4(d) of the Proposed Regulations provides more detail about the information taxpayers will be asked to provide on the reportable transaction disclosure form. One new item is the "identity of all parties involved in the transaction." As stated, this new item

seems to place an affirmative obligation on a taxpayer to determine the identity of all other parties to a transaction; however, we are doubtful that Treasury and the IRS intended to impose such an absolute duty upon individual taxpayers. Certainly, it would be unduly burdensome to require a taxpayer to provide the identity of “all” parties to the transaction when, in many cases, the taxpayer will have no knowledge about others who are involved in the transaction. Therefore, we recommend limiting this requirement to “the identity of all parties known by the taxpayer to be involved in the transaction.”

In addition, the requirement in the Proposed Regulation to identify parties “involved” in the transaction could be interpreted to require mutual funds and other widely-held investment vehicles to provide the names of all its investors on the Form 8886. Not only is this information irrelevant to the understanding of the reportable transaction, but requiring these taxpayers to identify all of their investors on the Form 8886 is unnecessarily burdensome. Therefore, the Proposed Regulations, when finalized, should clarify that a “party involved in the transaction” does not include a partner, shareholder, or beneficiary whose only involvement with the transaction arises from an ownership interest in an entity or fund involved in the transaction and whose ownership interest is less than a specified amount.

D. Extend the Notice 2006-16 Safe Harbor to All Reportable Transactions

The reportable transaction regime imposes a disclosure obligation on each taxpayer that participates in a reportable transaction. In the case of a tiered pass-through entity, this mandate can result in multiple disclosures of essentially identical information regarding the same transaction. Such multiple disclosures provide little or no additional relevant information to the IRS, but impose unnecessary burdens on the taxpayers. The IRS has the means to identify the investors in the successive pass-through entities through the Schedules K-1 that are filed with the IRS. Thus, requiring an additional, identical recitation of the reportable transaction by all investors through multiple tiers of pass-through entities is a redundant and unnecessary burden on taxpayers.

The IRS recognized the burden imposed by redundant disclosures in tiered pass-through entities in Notice 2006-16. In section 3.02 of that notice, the IRS provided a safe harbor to eliminate the disclosure requirement for taxpayers that, solely by reason of that taxpayer’s direct or indirect interest in a pass-through entity, participated in a transaction that is the same as or substantially similar to the transaction described in Notice 2002-35. This safe harbor is a reasonable alternative to repetitive, unnecessary, and burdensome disclosures. Therefore, we recommend that the Proposed Regulations, when finalized, include a safe harbor similar to the safe harbor in section 3.02 of Notice 2006-16 for all reportable transactions.

II. Recommendations Applicable to Material Advisor Disclosure Regulations

We commend the IRS’s efforts to provide guidance to material advisors with respect to the disclosure of reportable transactions. We also are pleased that the IRS is developing a separate Form 8918, “Material Advisor Disclosure Statement”; however, we believe additional guidance or clarification of certain items is necessary.

A. Clarify Compliance Standards

Section 301.6111-3(d) of the Proposed Regulations states that the Form 8918 must be completed in accordance with the disclosure requirements set forth therein and the instructions to the form or the advisor will not be considered to have complied with the disclosure requirements of the regulations. As written, the Proposed Regulations suggest that these rules impose an absolute requirement.¹⁰ By contrast, the Proposed Regulations also contemplate the submission of additional information that becomes available but was not disclosed at the time the original Form 8918 was filed.¹¹ In effect, this latter provision implies that a material advisor may be in substantial compliance even when, as a factual matter, the initial disclosure is incomplete. We reiterate our prior comments that the standards for compliance should be based on current, reasonably available information. Material advisors should only be subject to penalties for failing to disclose what they knew or reasonably should have known as of the relevant disclosure date.¹²

B. Limit the Duty to Amend

Section 301.6111-3(b)(2)(iii)(B) of the Proposed Regulations prescribes special rules for post-filing advice. Generally, a person who first provides advice after the first tax return reflecting the tax benefits of a transaction has been filed will not be deemed to be a material advisor. By contrast, the Proposed Regulations require advisors to file amended Forms 8918 if there are “material changes” to the transaction after the original Form 8918 has been filed.¹³ We agree with Treasury and the IRS that, if advice is first rendered after the filing of a return, the advisor should not be subject to the material advisor disclosure rules. Where advice is rendered with respect to a reportable transaction after the filing of a return, however, we believe Treasury and the IRS should clarify whether certain types of post-filing advice create an obligation to file or amend material advisor returns (*e.g.*, advice concerning an otherwise reportable transaction where the advice relates to an event that is not itself a reportable transaction including advice given in a restructuring of the transaction or a sale of equity interests in the entity that holds the tax benefits in the transaction). We also believe the regulations should be clarified to provide guidance as to what constitutes a “material change” to the transaction. In addition, we believe that any supplemental submission of this information should be required only if the advisor has

¹⁰ See Prop. Reg. § 301.6111-3(d)(1) (“If the form is not completed in accordance with the provisions in this paragraph (d) and the instructions to the form, the material advisor will not be considered to have complied with the disclosure requirements of this section....”).

¹¹ See Prop. Reg. § 301.6111-3(d)(1) (“An amended form must be filed ... if additional information that was not disclosed becomes available....”).

¹² In this regard, we recommend that the regulations under section 6111 be conformed to the Proposed Regulations under section 6112 with respect to disclosing the identity of other material advisors. The Proposed Regulations under section 6112 require disclosure of such information only “if known by the material advisor.” See, *e.g.*, Prop. Reg. § 301.6112-1(b)(3)(i)(C, D, and F). Moreover, as discussed in our comments to the list maintenance regulations, we do not believe that a material advisor should be required to make inquiries regarding this information if it is not known by the material advisor.

¹³ See Prop. Reg. § 301.6111-3(d)(1) (“An amended form must be filed ... if there are material changes to the transaction.”).

actual knowledge of the material change. The Proposed Regulations, when finalized, should clarify that the material advisor is under no duty to monitor subsequent developments relating to the transaction after the reportable transaction has occurred.

C. Clarify Gross Income Thresholds

The Proposed Regulations prescribe certain requirements for classification as a “material advisor.” One requirement is that the person “directly or indirectly derives gross income” in excess of a threshold amount. The Proposed Regulations define the term “derive” as “receive or expect to receive.” We are concerned that this definition fails to specify when the expectation of receipt is relevant and that it otherwise incorporates a subjective standard that may be impossible for the IRS to administer. If the IRS believes a standard other than actual receipt of the threshold amount is necessary, we recommend adopting a definition of “derives” that relies on objective facts to determine whether the advisor expects to receive the threshold amount of income. Another issue related to gross income relates to the \$50,000 threshold. It applies if “substantially all of the tax benefits” from the reportable transaction are “provided to natural persons.” It is unclear what amount of the tax benefits constitutes “substantially all.”

III. Recommendations Applicable to List Maintenance Regulations

The Proposed Regulations under Section 6112 clarify that the lists to be maintained by material advisors and furnished to the IRS upon request consist of three separate components: (1) an itemized statement of information, (2) a detailed description of the transaction, and (3) copies of documents relating to the transaction. We commend Treasury and the IRS’s efforts to clarify the list maintenance requirements and to provide additional guidance regarding their expectations as to what constitutes compliance with these requirements. Nevertheless, we believe that many of the same administrative burdens identified in our prior comments continue to exist under the Proposed Regulations and that further guidance is needed on a number of key issues.

A. Allow Reasonable Extensions of the Response Period

We believe that the IRS has the discretion to grant extensions of the 20-business day period for furnishing lists. In certain circumstances, this period does not provide a reasonable period of time for producing the required materials and ultimately affects the quality and thoroughness of the disclosure. We recommend that the Proposed Regulations, when finalized, specifically state that IRS has the discretion to extend the disclosure period under appropriate circumstances for a reasonable period of time.

B. Allow Phased Disclosure

Over-disclosure is a concern for both the government and for practitioners. We believe that certain revisions to the Proposed Regulations might avoid the problems that are identified in the preamble to the Proposed Regulations and would result in disclosures that are more helpful to the IRS. Indeed, we believe an initial submission consisting of the names, addresses, and TINs of the persons required to be maintained on the list and a detailed description of the tax treatment and tax structure of the transaction would, in many cases, provide the IRS with adequate

information for its purposes and would enable the IRS to determine more precisely what, if any, additional information or documents are needed.

For these reasons, we recommend that the Proposed Regulations be revised to provide for a less burdensome process involving multiple stages for furnishing the various components of the list. For example, we recommend that the initial stage of furnishing the list should only require the advisor to provide:

- 1) The name of the transaction, including identification of any guidance identifying the transaction as a listed transaction or a transaction of interest, and the reportable transaction number obtained under section 6111, as described in section 301.6112-1(b)(3)(i)(A);
- 2) The name, address, and TIN of each person required to be included on the list, as described in section 301.6112-1(b)(3)(i)(A);
- 3) A detailed description of the tax treatment and tax structure of the transaction in section 301.6112-1(b)(3)(ii); and
- 4) The designation agreement, if any, for the transaction.

Under this proposed approach, advisors would not be required automatically to provide copies of additional written materials at the initial stage of furnishing the list. If the IRS determines that additional information is needed, it could then request an index of documents. The IRS could use that index to identify those specific documents that would be meaningful to its review and then request those documents. In any event, we believe that blanket requests for documents should be avoided even in later stages of furnishing the list, except in limited circumstances in which the IRS specifically determines that a blanket request is appropriate. Otherwise, we suggest that IRS requests for additional written materials should be made in terms of specific documents or groups of documents. We believe that this process best serves the purposes of the list maintenance rules and minimizes the administrative burdens on advisors. We also note that, in certain circumstances, a series of multiple transactions involving the same parties and advisors may be so similar that disclosure of material documents for one of the transactions would be sufficient for the IRS to gain an understanding of the purported tax treatment or tax structure of the transaction. We recommend that the Proposed Regulations be clarified to provide for furnishing lists in this manner.

C. Limit Retention and Disclosure of Drafts

We agree with the IRS that earlier drafts of a document are not necessary for effective disclosure under the list maintenance rules and should not be required to be retained by advisors. However, we question whether the production of draft documents should be made an absolute requirement in circumstances where the advisor does not possess a copy of the final executed document. In many cases, draft documents may not reflect correctly the contents of the final executed version of the document and, in some cases, may present difficult questions of privilege. We believe the disclosure of the drafts to the IRS should be required only in the absence of copies of final documents. Moreover, we do not believe that an advisor should be required to retain drafts that do not accurately reflect the final transaction.

D. Clarify Expectations Concerning Asserting Privilege

We commend the removal of the specific requirements concerning the assertion of privilege. Privileges such as the attorney-client privilege belong to the client, and it is impracticable to prepare and submit a privilege log within narrow time constraints. By deleting the section concerning privilege logs, implicitly, the IRS will no longer require a privilege log (or the signed statement regarding the absence of a waiver of the privilege) as part of a response to a request for a list. We recommend that Treasury and the IRS clarify this in the preamble to the final regulations.

E. Clarify Standards of Compliance

The Proposed Regulations provide little guidance regarding what constitutes compliance with the list maintenance requirements for penalty purposes. We recommend the adoption of a substantial compliance standard and we further recommend that advisors be treated as substantially complying with the list maintenance regulations if (i) they have disclosed all information that they reasonably believe is in their possession that is material to understanding the tax treatment and tax structure of the transaction and (ii) they can provide a reasonable explanation regarding the circumstances concerning any deficiencies in their list. We also reiterate our prior comments¹⁴ that material advisors should only be subject to penalties based on what they knew or reasonably should have known as of the relevant disclosure date. We further recommend that the Proposed Regulations, when finalized, clarify whether the phrase “if known by the material advisor” in the context of identification of other material advisors requires an investigation by the material advisor to discover that fact, and, in general, reiterate our comments that the IRS should establish “safe harbor” guidelines identifying the nature and extent of the inquiries that an advisor is required to make in order to comply with the rules. We note, in this regard, that a significant amount of the information required to be disclosed must be obtained from advisees (*e.g.*, TINs, current addresses, etc.) and will likely not be readily available in the advisor’s records.

IV. Recommendation Applicable to Reportable Transaction, Material Advisor Disclosure, and List Maintenance Regulations – Restore Ruling Request Safe Harbor

Regulations currently in effect for taxpayer disclosures and material advisor list maintenance contain provisions allowing the affected party to seek a ruling to determine whether reporting or list maintenance is required. *See* Temp. Reg. §§ 1.6011-4T(f)(1) and 301.6112-1T(i). Each of these provisions also suspends the reporting obligation with respect to the transaction while the ruling request is pending. *Id.* Temporary regulations released simultaneously with the Proposed Regulations retain the process for seeking a ruling regarding whether a transaction is reportable, but remove the suspension of the reporting obligation. *See* Temp. Reg. §§ 1.6011-4T(f) and 301.6111-3T(h). Moreover, the Proposed Regulations would eliminate the opportunity to seek a ruling to determine whether an advisor is subject to a list

¹⁴ Letter from Kenneth W. Gideon, Chair, Section of Taxation, to the Honorable Mark W. Everson, Commissioner of Internal Revenue Services (January 25, 2005), *reprinted in* Tax Notes Today, 2005 TNT 18-29 (2005).

maintenance obligation. For reasons discussed more fully below, we recommend that Treasury and IRS reconsider these changes.

Through the existing Regulations and the changes brought about by the Jobs Act, taxpayers and material advisors are required to provide considerable information with respect to specifically described transactions (in the case of listed transactions and transactions of interest) and broad categories of transactions (in the case of other reportable transactions). In addition, taxpayers are also required to disclose transactions that are “substantially similar” to specifically described transactions. Temp. Reg. § 1.6011-4(b)(2).

Taxpayers and material advisors are faced with a difficult balance. Substantially similar is to be “broadly construed in favor of disclosure.” Temp. Reg. § 1.6011-4(c)(4). With the recent enactment of severe penalties that accompany noncompliance, there is a strong incentive to disclose transactions, even if there is uncertainty as to whether the transaction is reportable. Yet, Treasury and IRS officials have repeatedly acknowledged the difficulties caused by over-disclosure.¹⁵ Treasury officials have acknowledged that over-disclosure places an undue burden on both taxpayers and the IRS.¹⁶

The issuance of private rulings would serve to clarify what is reportable and what is not in the context of specific fact situations. Such guidance is important because of the many complex issues raised by the reportable transaction regime. However, if the submission of a ruling request does not trigger a suspension of the applicant’s reporting or list maintenance obligation, there is little incentive for taxpayers or material advisors to seek a ruling and, thus, this potentially useful source of guidance will be wasted.

¹⁵ See, e.g., Dustin Stamper, *Guidance Coming on New Shelter Rules, Says Treasury Official*, Tax Notes Today, Nov. 3, 2004 and Crystal Tandon, *IRS Seeing Overdisclosure of Reportable Transactions, Officials Say*, Tax Notes Today, Oct. 12, 2006.

¹⁶Dustin Stamper, *Guidance Coming on New Shelter Rules, Says Treasury Official*, 2004 TNT 213-2.