February 3, 2003

The Honorable Pamela F. Olson
Assistant Secretary (Tax Policy)
Department of the Treasury
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1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Robert E. Wenzel
Acting Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Temporary and Proposed Regulations Under IRC §§6011 and 6112

Dear Ms. Olson and Mr. Wenzel:

On behalf of the Section of Taxation of the American Bar Association, I appreciate the opportunity to submit the following comments on temporary and proposed regulations under sections 6011 and 6112 of the Internal Revenue Code. The comments were developed by members of the Section’s Tax Shelter Task Force, reflect input from numerous members of the Section, and have been reviewed and approved by the Section’s Council. However, they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.
I. INTRODUCTION

We commend the Treasury Department and the Internal Revenue Service for their continuing effort to strengthen the effectiveness of the regulations prescribing disclosure and investor list maintenance requirements. We applaud your aggressive stance in the ongoing battle to halt abusive tax shelters, and continue to support the notion that ample sunshine is the most powerful way to achieve that goal.

We also welcomed the recent announcement in Notice 2003-11 to defer the effective date of the new list maintenance rules, and to permit taxpayers to elect to apply the return disclosure provisions in the forthcoming final regulations retroactively to January 1, 2003. Although these regulations are an important tool in the battle against tax shelters, they have the potential for imposing significant recordkeeping and other administrative burdens on taxpayers and their advisors in connection with a wide range of non-abusive transactions. Those burdens should not be imposed without carefully considering the various issues that have been raised with respect to the scope and mechanics of the revised regulations, and appropriately addressing those issues in the final regulations.

In general, we believe that the most recent versions of the disclosure and listing regulations represent a significant improvement over earlier versions. Nonetheless, as described below, we think that some aspects of the regulations are overly broad and unduly burdensome for taxpayers, and may prove very difficult for the IRS to administer in an efficient and effective manner. We think that this is especially so with respect to the proposed trigger for book-tax differences.

We also are very concerned that the combination of (i) the broad disclosure regulations, (ii) large statutory penalties for nondisclosure (the near-term enactment of which is likely), and (iii) the elimination or severe cutback of IRS authority to grant waivers from such penalties may result in serious and unexpected economic consequences for otherwise compliant taxpayers who inadvertently fail to disclose non-abusive, but technically reportable transactions.¹ These concerns can be sufficiently alleviated, we believe, only by adding significant additional safety-valves to the regulations, along the lines suggested below.

II. SUMMARY OF RECOMMENDATIONS

Our principal recommendations with respect to changes that should be reflected in the final regulations are as follows:

- Include a general exception for any transaction the tax treatment of which was the subject of and consistent with a private letter ruling issued to the taxpayer.

- Provide a definition of “participation” in a reportable transaction that requires a participant to receive a significant tax benefit and to know or have reason to know that the transaction in question was a reportable transaction.

¹ Bills introduced last year -- the Tax Shelter Transparency Act (S. 2498) and the American Competitiveness and Corporate Accountability Act (H.R. 5095) -- would impose nondisclosure penalties for non-listed reportable transactions of up to $100,000, an amount which exceeds the average 1999 tax liability ($76,000) of profitable corporations with assets between $5 million and $10 million. See Patrice Treubert, Corporation Income Tax Returns, 1999, Table 3, at irs.gov/tax stats. For the average taxpayer in this category, the inadvertent failure to disclose a reportable transaction could thus be more costly than a fraudulent failure to pay any tax at all (since the fraud penalty is limited to 75 percent of any fraudulent underpayment).
• Provide that purchasing securities in a public offering will not be considered “participation” in a reportable transaction.

• Apply an aggregation rule only where a significant purpose of the taxpayer for engaging in multiple transactions is to avoid the relevant dollar thresholds for disclosure.

• Expand the exceptions from treatment as a confidential transaction and a transaction with contractual protection, and incorporate minimum dollar thresholds for the reporting of those transactions.

• Expand the exceptions to treatment as a “section 165 loss” transaction.

• Revise Schedule M to provide additional disclosure and eliminate the book-tax difference trigger or, less preferably, expand the exceptions to the book-tax difference trigger.

• Revise the definition of “material advisor” to exclude a tax advisor who has no entrepreneurial stake in the transaction and receives a fee that is commensurate with a reasonable, hourly-based fee for the particular services involved.

• Consider raising the minimum fee thresholds for purposes of the material advisor rules, but aggregating fees for substantially similar transactions that occur during a specified time period.

• Consider adopting a uniform material advisor fee threshold for all types of taxpayers and non-listed transactions.

• Provide that tax disclosure included in a public offering document for a securities offering should not be treated as a statement by a material advisor that gives rise to a list maintenance requirement.

III. TAX RETURN DISCLOSURE REGULATIONS

A. In General.

Section 1.6011-4T(b)(1) of the tax return disclosure regulations provides that a transaction will be a “reportable transaction” if it is described in one of six trigger categories. As stated in our prior comment letters, the Section applauds the creation of an objective test in the disclosure regulations to determine which transactions other than listed transactions must be disclosed by taxpayers. In the interest of broadening disclosure, we support (i) elimination of the dollar thresholds for listed transactions; (ii) conversion of the “2 out of 5 filter test” into a “1 out of 5 filter test”; and (iii) extension of the reportable transaction requirements to non-corporate taxpayers and taxes other than the income tax.

We also support the decision to eliminate the several general disclosure exceptions that were provided in the prior regulations. We recognize that, because of their inherent subjective nature, these exceptions were susceptible to aggressive taxpayer interpretation -- which is unfortunate, because if properly applied, they would have protected numerous routine and non-abusive transactions from unnecessary disclosure. Again, however, if those transactions are now categorized as “reportable” under the regulations, the absence of a flexible waiver mechanism for any newly enacted nondisclosure penalties will leave little, if any, room for inadvertent foot-faults by otherwise compliant taxpayers. We therefore urge that IRS carefully monitor the types of routine or otherwise clearly legitimate transactions for which disclosures are being made, and that, as contemplated by
Temp. Reg. §1.6011-4T(b)(8)(i), it frequently issue published guidance excusing specific types or categories of such transactions from disclosure.\(^2\)

We believe that a general exception should be added for any transaction the tax treatment of which was the subject of a private letter ruling issued to the taxpayer, provided the ruling letter is attached to the taxpayer’s return and the actual treatment of the item or items involved is consistent with such ruling. In these circumstances, imposing the disclosure requirement and associated administrative burdens is unnecessary because the IRS is already aware of the transaction and there is no dispute as to the proper tax treatment.\(^3\)

**B. “Participation” in a Reportable Transaction.**

The disclosure regulations apply to any direct or indirect participant in a reportable transaction. They provide that a taxpayer will have indirectly participated in a reportable transaction if (i) the taxpayer’s federal tax liability is affected by the transaction, even if the taxpayer is not a direct party to the transaction; or (ii) the taxpayer knows or has reason to know that the tax benefits claimed from a transaction are derived from a reportable transaction. We support the proposition that taxpayers should be required to disclose reportable transactions if they directly or indirectly receive material tax benefits from them. However, we believe that the critical concept of “participation,” as presently formulated, is unclear and potentially overbroad. The regulations should provide a definition of “participation” in a reportable transaction requiring that a participant (i) receive a significant tax benefit, and (ii) know or have reason to know that the transaction in question was a reportable transaction. A “significant tax benefit” might reasonably be defined for this purpose to include (i) any tax benefit received in connection with a listed transaction; and (ii) a tax benefit of at least $25,000 for individuals, and $100,000 for entities, received in connection with a non-listed transaction.

We also recommend that the final regulations provide the following additional “participation” exceptions:

- Initial and secondary market purchasers of securities in a public offering that otherwise is a non-listed reportable transaction (including an offering by a government-sponsored entity such as FNMA). This exclusion is appropriate because of the large number of investors in a typical public offering, the difficulty of obtaining information regarding the identity of the investors, and the extremely low probability that investors in a public offering will receive abusive tax benefits.

- Shareholders of a domestic C corporation, a REIT or a RIC should not be treated as direct or indirect participants in a reportable transaction that occurs at the entity level.

- Requiring disclosure of a transaction engaged in by a pass-through entity at both the entity and the owner levels would be duplicative and unnecessarily burdensome. Consequently, the final regulations should clarify that only the entity is required to file Form 8886. The entity, however, should be required to notify its owners that it has engaged in a reportable transaction. The owners,

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\(^2\) Some Section members believe that the integrity and overall effectiveness of the regulations would not be impaired by including a general exception for transactions which the IRS would have a less than 10 percent chance of challenging successfully -- i.e., the tax treatment of which, taking all pertinent facts and legal authorities and doctrines into account, would be supportable by a “will” opinion (as opposed to a “should,” “more likely than not” or “substantial authority” opinion). This factor should at least be considered in exercising any administrative waiver authority with respect to ultimately enacted nondisclosure penalties.

\(^3\) A similar exception might be considered where a revenue procedure outlines the requirements for obtaining a private letter ruling on a particular type of transaction, and the taxpayer clearly satisfies all of such requirements (even though a ruling is not sought).
in turn, should be permitted to satisfy any disclosure obligations by filing the notification from the entity with their returns.

- Persons who are not required to file U.S. federal tax returns, such as disregarded entities and certain foreign persons, should not be treated as participants in reportable transactions.

C. “Substantially Similar” Transactions/Aggregation Rule.

For purposes of the disclosure rules, a “transaction” would include any series of substantially similar transactions entered into in the same taxable year. A “substantially similar” transaction is “any transaction that is either factually similar or based on the same or similar tax strategy.” The regulations further state that “the term substantially similar must be broadly construed in favor of disclosure.” As a result, the regulations presumably would treat a series of transactions of a similar nature, even though with different and unrelated parties, as a single transaction for purposes of determining whether such transactions are reportable.

We believe that it is appropriate to prevent taxpayers from avoiding disclosure by engaging in multiple smaller but similar transactions, each of which falls below the minimum threshold for reporting. However, a rule that aggregates all transactions that are “substantially similar” strikes us as too broad and ambiguous. Instead, aggregation should be required only where a significant purpose for engaging in multiple transactions is to avoid the relevant dollar thresholds for disclosure. Where a significant purpose of avoiding disclosure is present, it would be appropriate, we believe, to aggregate transactions occurring not only in the same tax year, but in multiple tax years as well.

D. Confidential Transactions.

We believe that the existence of confidentiality conditions is an important factor to consider in determining whether a transaction is a “reportable transaction.” However, it must be kept in mind that business in the United States is generally conducted in private and, even if not the subject of an express agreement, the confidentiality of negotiations is generally understood to be the norm. Furthermore, business exigencies often will prevent the parties from taking advantage of a nonconfidentiality presumption where express permission to disclose is provided from the commencement of discussions.

To address these business realities, and to prevent required disclosure of many routine commercial transactions the tax aspects of which are not confidential, we believe that the regulations should be clarified to limit a “confidential transaction” to one where an organizer or seller restricts one or more other parties to the transaction from disclosing the structure or tax aspects of the transaction (excluding a restriction under the securities laws or based on the attorney-client privilege). We also recommend removal of the condition that written authorization to disclose be in place from the commencement of discussions.

In addition, we recommend that the regulations incorporate minimum dollar thresholds for the reporting of a confidential transaction. We suggest that a confidential transaction be treated as a reportable transaction only if the taxpayer expects to receive a tax benefit from the transaction of (i) at least $100,000 in a single taxable year, or $200,000 in multiple years, in the case of non-corporate taxpayers; or (ii) $1 million or $2 million, respectively, in the case of corporate taxpayers.

4 Temp. Reg. §1.6011-4T(c)(4). In addition, transactions which are substantially similar to “listed transactions” are treated as reportable transactions. Although the two examples in the regulations appear to apply the “substantially similar to listed transaction” concept in a reasonable manner, the “similar tax strategy” component has the potential for overbroad application in cases involving fact patterns which are entirely or substantially dissimilar. An additional example illustrating application of the concept in that context would be helpful.
E. Transactions with Contractual Protection.

As we have stated in prior comments, we agree that a transaction in which the promoter has offered taxpayer protection against the loss of tax benefits should generally be reportable. However, we believe that the new regulations are overbroad in this respect because they require reporting of any transaction in which the taxpayer receives protection against loss of tax benefits, regardless of the identity of the person providing such protection. We suggest that the exceptions to treatment as a transaction with contractual protection be expanded to include the following:

- A contractual provision permitting a party to a transaction to terminate the transaction if a change in federal tax statutes or regulations occurs.
- Mergers and acquisitions in which customary protection against loss is provided by a principal or a shareholder of a principal with respect to the previously reported tax liabilities of an entity that was actively engaged in a bona fide trade or business.
- Customary withholding tax gross-up provisions with respect to dividends, swap agreements, derivatives, securities lending transactions, and other routine financial transactions.
- Customary tax gross-up provisions with respect to the receipt of unrelated business taxable income.
- Customary indemnities of foreign investors against an obligation to pay U.S. tax as a result of breaching a contractual duty to take or refrain from taking actions that cause an issuer to be treated as engaged in a U.S. trade or business.

In addition, we suggest that the final regulations incorporate the same minimum dollar thresholds for reporting a transaction with contractual protection as suggested above with respect to confidential transactions.

F. Loss Transactions.

We support the treatment of transactions resulting in section 165 losses as “reportable transactions,” because many abusive transactions are designed to generate losses. However, we believe that certain ambiguities in the coverage of this trigger need to be clarified; that the exceptions to the loss trigger should be expanded; and that lower dollar thresholds may be warranted.

The final regulations should clarify whether section 165 losses are reportable irrespective of whether the loss is capital or ordinary or the transaction involves a “sale or exchange.” Clarification as to whether the section 165 loss trigger is intended to cover losses claimed under Code provisions such as sections 475, 1231, 1234A and 1296(a) would also be helpful, as would guidance regarding when a transaction will be “reasonably expected to produce a loss.” This latter element of the section 165 loss trigger is especially ambiguous. We suggest that a transaction that may produce one or more section 165 losses in the future should be treated as reasonably expected to produce a loss if (i) a significant purpose for entering into the transaction was to generate the loss; and (ii) there is at least a 50 percent likelihood that a loss in excess of the dollar threshold will be generated. If this test were not met, the transaction would not be reportable until a section 165 loss in excess of the applicable threshold was actually recognized.

We also recommend that the exceptions to application of the section 165 loss trigger be expanded to include the following:
A sale of property for which the taxpayer has a cost basis, provided the sale consideration consists solely of cash.\(^5\)

A sale of property for which the taxpayer’s basis is determined pursuant to section 1014 or 1015, i.e., as the result of inheritance or a gift, where the sale consideration consisted solely of cash.

A sale of publicly traded stock for cash, provided the taxpayer has a carryover or substituted basis because the stock was received pursuant to a reorganization described in section 368(a) or as a distribution that qualified for tax-free treatment under section 355 or section 305.

A bulk sale of inventory assets.

A transfer of a noneconomic REMIC residual interest, where the residual interest has been both acquired and disposed of pursuant to one of the safe harbors in section 1.860E-1(c)(4) of the regulations.\(^6\)

Losses generated as a result of litigation settlements or judgments.

Losses attributable to an abandonment of depreciable property used in a trade or business.

In addition, we recommend that the regulations incorporate an exception for identified hedging transactions that permits taxpayers to take into account offsetting income and gains from a hedged position in determining the amount of a section 165 loss from a transaction. Thus, a hedged position ought not be reportable if one leg of the transaction produces a loss in excess of the applicable threshold, but the taxpayer realizes either a net gain or a net loss that is below the threshold from the transaction as a whole.

We further believe that the dollar thresholds for reporting a section 165 loss may be too high. Consideration should be given to reducing the thresholds to $5 million and $10 million for corporations, $2.5 million and $5 million for partnerships and S corporations, and $1 million and $2 million for individuals and trusts. Although lower thresholds will generate more disclosures of section 165 losses, we believe that the additional exceptions suggested above, if adopted, would result in a substantial net overall reduction in the number of unnecessary disclosures of non-abusive transactions.

The regulations also should provide further guidance regarding how the various dollar thresholds interrelate when a pass-through entity engages in a section 165 loss transaction. For example, if all of the partners in a partnership are domestic C corporations and the partnership recognizes a section 165 loss above the pass-through entity threshold, but below the threshold for C corporations, are the partners required to disclose the transaction? Similarly, if the partners are individuals and the allocable share of the section 165 loss for at least one partner exceeds the individual threshold, is the pass-through entity required to disclose the transaction? The most logical approach might be to eliminate the separate thresholds for pass-through entities and provide that a pass-through entity is required to disclose only if the threshold is exceeded for one of its owners.

\(^5\) We see no reason to limit this exception to sales of traded securities. If thought necessary, Treasury might condition such an exception on the sale being a true stand-alone transaction, i.e., not part of a larger transaction or a series of planned or related transactions. A similar exception might be considered for losses recognized under a mark-to-market provision (e.g., section 475) or other applicable “deemed sale” provision.

\(^6\) In determining whether the creation of, or offering of interests in, a REMIC must be disclosed under this filter, transfers of REMIC residual interests other than in connection with the creation of and offering of interests in a REMIC should not be taken into account.
G. **Significant Book-Tax Difference.**

The regulations include as reportable transactions for public companies and other large business entities (those with gross assets of $100 million or more) transactions that result in a book-tax difference in excess of $10 million, unless such book-tax difference results from certain specified tax attributes such as amortization or depreciation. While we appreciate that abusive tax transactions often reflect book-tax differences, we are concerned that the proposed book-tax trigger, as presently formulated, is too broad, of uncertain application, and will prove to be unduly burdensome for taxpayers from a compliance standpoint.

The several exceptions provided are certainly welcomed, but as the “angel list” items suggested to date by other commentators demonstrate, there are countless technical items that justifiably might be excepted as well. Having a long list of narrow exceptions will add complexity and lead to continuing pressures to expand the list, thus watering down the effectiveness of the trigger even further. The special rules for pass-thru and foreign entities may be conceptually defensible, but also add significant complexity. Moreover, to the extent that the precise GAAP treatment of a particular item may be unclear, taxpayers may have difficulty determining whether the prescribed dollar threshold has been met.

For these reasons, we suggest that serious consideration be given to eliminating the book-tax trigger and, in its stead, undertaking a significant revision of Schedule M along the lines proposed by other commentators.\(^7\)

Nevertheless, if the book-tax trigger is retained, we believe that entities that do not use GAAP financial statements should not have to prepare such statements in order to determine whether a reportable book-tax difference exists. Instead, such entities should be permitted to use their actual financial statements to make such determinations, provided that such statements are prepared in a manner consistent with some form of customary accounting practice.

We also question whether the $10 million threshold is appropriate for all taxpayers that are subject to the book-tax difference filter. The threshold may be too low for certain large public companies or too high for other companies.\(^8\) In any event, the final regulations should clarify whether the dollar threshold applies to the transaction at issue or to each taxpayer that participates in the transaction.

A transaction should not be reportable by reason of the book-tax trigger, we believe, unless the taxpayer has a reasonable expectation at the time the transaction is entered into that a significant book-tax difference will be generated. Moreover, a transaction with respect to which a significant book-tax was not expected when the transaction was entered should not become reportable if the GAAP treatment of the transaction subsequently changes so as to result in the creation of a significant book-tax difference.

Finally, we suggest that the specific exceptions from treatment as a significant book-tax difference be expanded to include the following.\(^9\)

- Temporary timing differences of less than two years.
- Differences attributable to the use of “purchase accounting” for a tax-free acquisitive reorganization.

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\(^8\) We note in this regard that the book-tax threshold under the prior regulations was $5 million.

\(^9\) If thought necessary, Treasury might limit the availability of some or all of these exceptions to situations in which the transaction is not part of a larger transaction or a series of planned or related transactions.
• Differences that relate to excludable items of income under sections 101 through 138, section 1031 or section 1033.

• Transactions that are intended to qualify under section 351 or 368, and which otherwise are reported by the corporate parties in accordance with the requirements of sections 1.368-3 and 1.351-3 of the regulations.

• The purchase of stock of a target corporation with respect to which an election is made pursuant to section 338.

• Differences attributable to intangible drilling costs deductible under section 263.

• PFIC inclusions under section 1291.

• An acquisition or disposition of a noneconomic REMIC residual interest pursuant to one of the safe harbors in section 1.860E-1(c)(4) of the regulations.

• The creation of, or offering of interests in, a REMIC or FASIT.

H. Transactions Involving a Brief Asset Holding Period.

Under the new regulations, a transaction resulting in, or reasonably expected to result in, a tax credit exceeding $250,000 is reportable if the underlying asset giving rise to the credit is held by the taxpayer generally for less than 45 days. While certain transactions involving a brief asset holding period and resulting in a substantial foreign tax credit are appropriately subject to disclosure, the rule as written would subject any reasonably large manufacturer of goods in a foreign country to reporting obligations if its inventory cycle was less than 45 days. Accordingly, we suggest that an exception be created for the purchase or manufacture, and subsequent sale within 45 days, of inventory in the ordinary course of the taxpayer’s business.

IV. LIST MAINTENANCE REGULATIONS

A. Who Must Be Listed.

We suggest that the same standard of “participation” as used in the disclosure regulations (as discussed in Part II.B above) be used to determine who is required to be included on an investor list. Thus, a material advisor only should be required to include a “participant” to whom he or she makes or provides an oral or written statement regarding the potential tax consequences of the transaction.

B. Material Advisor.

The regulations define a “material advisor” as anyone who receives a minimum fee in connection with a reportable transaction and who makes or provides any statement, oral or written, to any person as to the potential tax consequences of that transaction. Consistent with our prior comments, we continue to believe that a material advisor should not include any tax advisor who (i) performs tax services for a reasonable, non-contingent, hourly-based fee (including a fixed or lump sum fee that approximates a reasonable hourly rate fee for such matter); (ii) has no entrepreneurial stake in the transaction; and (iii) has not provided tax advice regarding the transaction to any seller or organizer of the transaction. The burden would be upon the advisor to demonstrate that the fee arrangement met the requisite criteria, taking into account, among other factors, rates
normally charged by the advisor, the difficulty of the work performed, and fees charged by others in the same geographic area for comparable work.10

We further recommend that tax disclosure included in a public offering document for a securities offering not be treated as a “statement” by a material advisor that gives rise to a list maintenance requirement. Moreover, “statements” that could render a person a material advisor should be limited to statements made prior to the time that a tax return is filed with respect to a transaction, and should not include statements made by persons who provide tax advice after such filing (e.g., during audit or litigation). Finally, the regulations should clarify that, in order for a statement of tax consequences to trigger material advisor status, it must address federal tax consequences, and not merely foreign, state, or local tax issues.

Clarification also is needed regarding the application of the fee thresholds. For example, it is unclear what fee threshold applies if all direct participants in a transaction are corporations but other persons whose tax liability may be affected by the transaction are individuals or noncorporate entities. In that case, we believe that the $250,000 threshold should apply. In any case, we question whether the $250,000 and $50,000 fee thresholds may be too low. One possible approach would be to raise the fee thresholds (to say, $500,000 and $250,000, respectively), but aggregate fees received for “substantially similar” transactions that occur within a specified time period (say, 24 months). Another possible approach would be to adopt a uniform fee threshold (somewhere between $50,000 and $250,000) applicable for all non-listed transactions involving all types of taxpayers. This approach would greatly simplify the determination of whether a law firm or an accounting firm is a material advisor with respect to a particular transaction, and thereby facilitate more effective implementation and administration of these rules.

Finally, the regulations should provide guidance regarding what level of inquiry an advisor must make to determine whether a transaction is a reportable transaction. For example, does an attorney who is a material advisor have a duty to consult with an accountant in order to determine the existence and amount of a book-tax difference? What duty of inquiry does an attorney have in the case of an uncooperative client who will not provide enough information for the attorney to determine whether a transaction is reportable? We suggest that the final regulations make clear that a material advisor is required to prepare and maintain investor lists only to the best of his or her knowledge, based on information obtained from the client or readily available from public sources.

C. Claims of Privilege.

In order for an attorney or tax practitioner to assert the attorney-client privilege or the section 7525 confidentiality privilege, the new regulations require such person to furnish certain information that, in itself, may constitute privileged information. For example, the regulations require the attorney or tax practitioner to describe any document for which privilege is asserted and to disclose the identity of each person who signed and received the document. We believe that the regulations should be revised to require only the production of information that would be required to be produced in the event that such materials were sought in a civil litigation context and a privilege (or the work product doctrine) was asserted. The regulations also should clarify what will constitute “reasonable belief” by an attorney or tax practitioner that information is privileged (including the relevance of state “privilege” law to that determination).

10 While we recognize that determinations of “reasonableness” will necessarily be less than precise, our experience indicates that special fee arrangements in connection with shelter-type transactions generally yield fee amounts which are far in excess of what a reasonable hourly-based fee might be.
D. **Furnishing and Retention of Lists.**

The new regulations require that a list be furnished to the IRS within 20 business days after the request. We believe that this time period should be extended (or that the IRS be permitted to grant extensions) in appropriate circumstances, especially in light of the length of time for which investor lists must be maintained.

The new regulations also require a material advisor to maintain investor lists 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. We believe that, except in the case of listed transactions, the 10-year retention requirement seems unduly long and potentially burdensome and expensive, and that the retention window should be shortened to seven years (i.e., the statutorily prescribed period) for non-listed transactions.

Another requirement of the new regulations is that material advisors retain and list “additional written materials” relating to a transaction that have been provided by the material advisor to any person who acquired or may acquire an interest in the transaction. We believe that material advisors only should be required to retain additional written materials that relate to the structure and tax aspects of a transaction. In addition, the retention requirement should apply only to the final or executed documents (not drafts thereof), and only to documents that a material advisor has or has had in its possession or can obtain with reasonable effort.

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We hope that the foregoing comments will be helpful to you in determining the appropriate scope and content of the final regulations. Although we have suggested numerous changes to the existing version of these regulations, let me reiterate that the Section continues to support strongly the need for stringent disclosure and listing requirements with respect to transactions that involve characteristics that reasonably may be considered indicative of potentially tax-abusive behavior. We recognize that such requirements inevitably will sweep in some legitimate transactions, and that the effectiveness of the regulations will be jeopardized if they are drawn too narrowly or contain significant exceptions based on subjective-type factors that are susceptible to aggressive taxpayer interpretation. However, given especially the substantial new non-disclosure and listing-related penalties that Congress is likely soon to adopt, it is critical that the definitional parameters of “reportable” transactions be fashioned as clearly and unambiguously as possible. At the same time, the final regulations should include additional exceptions designed to minimize the types of legitimate transactions on which taxpayers and their advisors must report and maintain information. Our suggested changes, we believe, would further these objectives without compromising the overall effectiveness of the regulations. They also would relieve the IRS from mounds of unnecessary paper that could seriously threaten the administrability and enforcement of these important rules.

We would be pleased to meet with Treasury and IRS representatives to discuss these comments in further detail. Please contact the undersigned (at 202/383-0120) or Bill Wilkins, the Section’s Vice-Chair for Government Relations (at 202/663-6204), if that might be helpful.

Respectfully submitted,

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Chair, Section of Taxation
cc: Eric Solomon
    B. John Williams
    Gregory F. Jenner
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    Cary D. Pugh