

disclose the transaction to the IRS in a timely manner.

(g) *Protective disclosures.* If a potential material advisor is uncertain whether a transaction must be disclosed under this section, the advisor may disclose the transaction in accordance with the requirements of this section and comply with all the provisions of this section, and indicate on the disclosure statement that the disclosure statement is being filed on a protective basis. The IRS will not treat disclosure statements filed on a protective basis any differently than other disclosure statements filed under this section. For a protective disclosure to be effective, the advisor must comply with the regulations under this section and § 301.6112-1 by providing to the IRS all information requested by the IRS under these sections.

(h) *Rulings.* If a potential material advisor requests a ruling as to whether a specific transaction is a reportable transaction on or before the date that disclosure would otherwise be required under this section, the Commissioner in his discretion may determine that the submission satisfies the disclosure rules under this section for that transaction if the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section. The potential obligation of the person to disclose the transaction under this section (or to maintain or furnish the list under § 301.6112-1) will not be suspended during the period that the ruling request is pending.

(i) *Effective/applicability date—(1) In general.* This section applies to transactions with respect to which a material advisor makes a tax statement on or after August 3, 2007. However, this section applies to transactions of interest entered into on or after November 2, 2006, with respect to which a material advisor makes a tax statement under this section on or after November 2, 2006. Paragraphs (b)(2)(i)(A), (b)(3)(i)(B), (c)(2), and (c)(13) of this section apply to transactions with respect to which a material advisor makes a tax statement under this section after November 14, 2011. Paragraph (h) of this section applies to ruling requests received on or after November 2, 2006.

Otherwise, the rules that apply on or before November 14, 2011 are contained in this section in effect prior to November 14, 2011 (see 26 CFR part 301 revised as of April 1, 2011).

(2) [Reserved]

[T.D. 9351, 72 FR 43159, Aug. 3, 2007, as amended by T.D. 9556, 76 FR 70341, Nov. 14, 2011]

§ 301.6112-1 Material advisors of reportable transactions must keep lists of advisees, etc.

(a) *In general.* Each material advisor, as defined in § 301.6111-3(b), with respect to any reportable transaction, as defined in § 1.6011-4(b) of this chapter, shall prepare and maintain a list in accordance with paragraph (b) of this section and shall furnish such list to the Internal Revenue Service (IRS) in accordance with paragraph (e) of this section.

(b) *Preparation and maintenance of lists—(1) In general.* A separate list must be prepared and maintained for each reportable transaction. However, one list must be maintained for substantially similar transactions. A material advisor will have 30 calendar days from the date the list maintenance requirement first arises (see § 301.6111-3(b)(4) and paragraph (a) of this section) with respect to a reportable transaction to prepare the list that must be maintained under this section with respect to that transaction. The Commissioner in his discretion also may provide in published guidance designating a transaction as a reportable transaction a list preparation time period greater than 30 calendar days. If a list is requested under this section during the list preparation time period, the request for the list will be treated as having been made on the day after the list preparation time period ends. A list must be maintained in a form that enables the IRS to determine without undue delay or difficulty the information required in paragraph (b)(3) of this section. The Commissioner in his discretion may provide in published guidance a form or method for maintaining or furnishing the list.

(2) *Persons required to be included on lists.* A material advisor is required to maintain a list identifying each person with respect to whom the advisor acted

as a material advisor with respect to the reportable transaction. However, a material advisor is not required to identify a person on the list if the person entered into a listed transaction or a transaction of interest more than 6 years before the transaction was identified in published guidance as a listed transaction or a transaction of interest.

(3) *Contents.* Each list must include the three components described in paragraph (b)(3)(i), (ii), and (iii) of this section.

(i) *Statement.* An itemized statement containing the following information—

(A) The name of each reportable transaction, the citation to the published guidance number identifying the transaction if the transaction is a listed transaction or a transaction of interest, and the reportable transaction number obtained under section 6111;

(B) The name, address, and TIN of each person required to be included on the list;

(C) The date on which each person required to be included on the list entered into each reportable transaction, if known by the material advisor;

(D) The amount invested in each reportable transaction by each person required to be included on the list, if known by the material advisor;

(E) A summary or schedule of the tax treatment that each person is intended or expected to derive from participation in each reportable transaction; and

(F) The name of each other material advisor to the transaction, if known by the material advisor.

(ii) *Description of the transaction.* A detailed description of each reportable transaction that describes both the tax structure of the transaction and the purported tax treatment of the transaction.

(iii) *Documents.* The following documents—

(A) A copy of any designation agreement (as described in paragraph (f) of this section) to which the material advisor is a party; and

(B) Copies of any additional written materials, including tax analyses or opinions, relating to each reportable transaction that are material to an understanding of the purported tax treat-

ment or tax structure of the transaction that have been shown or provided to any person who acquired or may acquire an interest in the transactions, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor. However, a material advisor is not required to retain earlier drafts of a document provided the material advisor retains a copy of the final document (or, if there is no final document, the most recent draft of the document) and the final document (or most recent draft) contains all the information in the earlier drafts of such document that is material to an understanding of the purported tax treatment or the tax structure of the transaction.

(c) *Definitions.* For purposes of this section, the following terms are defined as:

(1) *Material advisor.* The term *material advisor* is defined in § 301.6111-3(b).

(2) *Reportable transaction.* The term *reportable transaction* is defined in § 1.6011-4(b)(1) of this chapter.

(3) *Listed transaction.* The term *listed transaction* is defined in § 1.6011-4(b)(2) of this chapter. See also §§ 20.6011-4(a), 25.6011-4(a), 26.6011-4, 31.6011-4(a), 53.6011-4(a), 54.6011-4(a), or 56.6011-4(a) of this chapter.

(4) *Substantially similar.* The term *substantially similar* is defined in § 1.6011-4(c)(4) of this chapter.

(5) *Person.* The term *person* is defined in § 301.6111-3(c)(4).

(6) *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(b) or 707(b).

(7) *Tax.* The term *tax* is defined in § 301.6111-3(c)(6).

(8) *Tax benefit.* The term *tax benefit* is defined in § 301.6111-3(c)(7).

(9) *Tax return.* The term *tax return* is defined in § 301.6111-3(c)(8).

(10) *Tax structure.* The term *tax structure* is defined in § 301.6111-3(c)(9).

(11) *Tax treatment.* The term *tax treatment* is defined in § 301.6111-3(c)(10).

(12) *Transaction of interest.* The term *transaction of interest* is defined in § 1.6011-4(b)(6) of this chapter. See also §§ 20.6011-4(a), 25.6011-4(a), 26.6011-4,

31.6011-4(a), 53.6011-4(a), 54.6011-4(a), or 56.6011-4(a) of this chapter.

(d) *Retention of lists.* Each material advisor must maintain each component of the list described in paragraph (b)(3) of this section in a readily accessible form for seven years following the earlier of the date on which the material advisor last made a tax statement relating to the transaction, or the date the transaction was last entered into, if known. If the material advisor required to prepare, maintain, and furnish the list is a corporation, partnership, or other entity (entity) that has dissolved or liquidated before completion of the seven-year period, the person responsible under state law for winding up the affairs of the entity must prepare, maintain and furnish each component of 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 each component of the list on behalf of the entity, unless the entity submits the list to the 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 must be sent to: Internal Revenue Service, OTSA Mail Stop 4915, 1973 North Rulon White Blvd., Ogden, Utah 84404, or to such other address as provided by the Commissioner.

(e) *Furnishing of lists—(1) In general.* Each material advisor responsible for maintaining a list must, upon written request by the IRS, make each component of the list described in paragraph (b)(3) of this section available to the IRS. Each component of the list must be furnished to the IRS in a form that enables the IRS to determine without undue delay or difficulty the information required in paragraph (b)(3) of this section. If any component of the list is not in a form that enables the IRS to

determine without undue delay or difficulty the information required in paragraph (b)(3) of this section, the material advisor will not be considered to have complied with the list maintenance provisions in section 6112 and this section. A material advisor must make the list or each component of the list available to the IRS within the period prescribed in section 6708 or published guidance relating to section 6708.

(2) *Claims of privilege.* Each material advisor who is required to maintain a list with respect to a reportable transaction, must still maintain the list pursuant to the requirements of this section even if a person asserts a claim of privilege with respect to the information specified in paragraph (b)(3)(iii)(B) of this section.

(f) *Designation agreements.* If more than one material advisor is required to maintain a list of persons for a reportable transaction, in accordance with paragraph (b) of this section, the material advisors may designate by written agreement a single material advisor (the designated material advisor) to maintain the list or a portion of the list. A designation agreement does not relieve material advisors from their obligation to maintain a list in accordance with paragraph (b) of this section or to furnish their list to the IRS in accordance with paragraph (e)(1) of this section, but a designation agreement may allow one material advisor to maintain a list on behalf of the other material advisors who are a party to the designation agreement. A material advisor is not relieved from the requirement of this section because a material advisor is unable to obtain the list from any designated material advisor, any designated material advisor did not maintain a list, or the list maintained by any designated material advisor is not complete. The existence of a designation agreement does not affect the ability of the IRS to request a list from any party to the designation agreement. The IRS may request a list from any party to the designation agreement, and the party receiving the request must furnish their list to the IRS in accordance with paragraph (e)(1) of this section, regardless of whether their list was maintained by another

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party pursuant to the terms of a designation agreement.

(g) *Effective/applicability date.* In general, this section applies to transactions with respect to which a material advisor makes a tax statement under § 301.6111-3 on or after August 3, 2007. However, this section applies to transactions of interest entered into on or after November 2, 2006, with respect to which a material advisor makes a tax statement under § 301.6111-3 on or after November 2, 2006. Paragraphs (b)(1), (c)(3), (c)(12), and (f) of this section apply to transactions with respect to which a material advisor makes a tax statement under § 301.6111-3 after November 14, 2011. Otherwise, the rules that apply on or before November 14, 2011 are contained in this section in effect prior to November 14, 2011 (see 26 CFR part 301 revised as of April 1, 2011).

[T.D. 9352, 72 FR 43155, Aug. 3, 2007, as amended by T.D. 9556, 76 FR 70341, Nov. 14, 2011]

§ 301.6114-1 Treaty-based return positions.

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

(ii) If a return of tax would not otherwise be required to be filed, a return must nevertheless be filed for purposes of making the disclosure required by this section. For this purpose, such return need include only the taxpayer's name, address, taxpayer identifying number, and be signed under penalties of perjury (as well as the subject disclosure). Also, the taxpayer's taxable year shall be deemed to be the calendar year (unless the taxpayer has previously established, or timely chooses for this purpose to establish, a different taxable year). In the case of a disclosable return position relating

solely to income subject to withholding (as defined in § 1.1441-2(a) of this chapter), however, the statement required to be filed in paragraph (d) of this section must instead be filed at times and in accordance with procedures published by the Internal Revenue Service.

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

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

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

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

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

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

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

Example 1: X, a Country A corporation, claims the benefit of a provision of the income tax treaty between the United States