

Section 6111.— Registration of Tax Shelters

26 CFR 301.6111–2T: Confidential corporate tax shelters (Temporary).

T.D. 8876

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 301 and 602

Corporate Tax Shelter Registration

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations requiring the registration of confidential corporate tax shelters pursuant to section 6111(d) as amended by section 1028(a) of the Taxpayer Relief Act of 1997 (the Act). The temporary regulations affect persons responsible for registering confidential corporate tax shelters. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in REG–110311–98, page 767.

DATES: *Effective date.* These temporary regulations are effective February 28, 2000.

Applicability date. For dates of applicability, see §301.6111–2T(h) of these regulations.

FOR FURTHER INFORMATION CONTACT: Richard Castanon, (202) 622-3080, or Mary Beth Collins, (202) 622-3070; concerning international issues Rebecca Rosenberg, (202) 622-3870 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued

without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in these regulations have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1687. Responses to these collections of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

For further information concerning these collections of information, and where to submit comments on the collections of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

In enacting section 6111(d), Congress added confidential corporate tax shelters as a type of tax shelter that must be registered under section 6111. Congress intended the provision to improve tax compliance by giving the Treasury Department earlier notification of transactions that may not comport with Federal tax law and by discouraging taxpayers from entering into questionable transactions. See H.R. REP. NO. 148, 105th Cong., 1st Sess. 469 (1997); S. REP. NO. 33, 105th Cong., 1st Sess. 148 (1997).

Section 1028(e)(1) of the Act provides

that the registration requirements of section 6111 and the penalty provisions of section 6707 for failing to comply with the registration requirements apply to confidential corporate tax shelters in which interests are offered to potential participants after the IRS issues guidance on the registration requirements. These regulations provide the guidance necessary to activate the registration requirements of section 6111 and the penalty provisions of section 6707 for confidential corporate tax shelters.

These temporary regulations relate to disclosure obligations for tax shelter organizers and promoters under section 6111. Although the terms of section 6111(d)(1)(A), which are part of the definition of a confidential corporate tax shelter, are similar to the definition of tax shelter under section 6662(d)(2)(C)(iii), these temporary regulations are not intended to define a tax shelter for purposes of section 6662, which relates to the imposition of penalties.

Explanation of Provisions

I. In General

Under section 6111(d)(1) and the temporary regulations, a confidential corporate tax shelter is any entity, plan, arrangement, or transaction that satisfies the following three requirements: (1) a significant purpose of the structure of the transaction is the avoidance or evasion of Federal income tax for a direct or an indirect corporate participant; (2) the transaction is offered to any potential participant under conditions of confidentiality; and (3) the tax shelter promoters may receive fees in excess of \$100,000 in the aggregate.

II. Significant Purpose of Tax Avoidance or Tax Evasion

Under the temporary regulations, there are three categories of transactions for

which the avoidance or evasion of Federal income tax is considered a significant purpose of the structure of the transaction.

First, the avoidance or evasion of Federal income tax is considered a significant purpose of the structure of a transaction if the transaction is the same as or substantially similar to one of the specified types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction for purposes of section 6111.

Second, the avoidance or evasion of Federal income tax is generally considered a significant purpose of the structure of a transaction if the present value of the participant's reasonably expected pre-tax profit (after taking into account foreign taxes as expenses and transaction costs) from the transaction is insignificant relative to the present value of the participant's expected net Federal income tax savings from the transaction. However, if the substance of the transaction is the borrowing of money or the acquisition of financial capital by a corporate participant, the transaction falls within this second category if the present value of the Federal income tax deductions of the taxpayer to whom the loan or financial capital is provided significantly exceeds the present value of the pre-tax return of the person providing the loan or financial capital.

Third, the avoidance or evasion of Federal income tax is generally considered to be a significant purpose of the structure of a transaction if the transaction has been structured to produce Federal income tax benefits that constitute an important part of the intended results of the transaction and the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably expects the transaction to be presented (in the same or substantially similar form) to more than one potential participant. However, a transaction does not come within this third category if the promoter reasonably determines that the potential participant is expected to participate in the transaction in the ordinary course of its business in a form consistent with customary commercial practice, and the promoter reasonably determines that there is a long-standing and generally accepted

understanding that the expected Federal income tax benefits from the transaction (taking into account any combination of intended tax consequences) are allowable under the Code for substantially similar transactions.

Except for listed transactions, the avoidance or evasion of Federal income tax will not be considered a significant purpose of the structure of a transaction if the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably determines that there is no reasonable basis under Federal tax law for denial of any significant portion of the expected Federal income tax benefits from the transaction.

The IRS may make a determination, by published guidance, individual ruling, or otherwise, that a transaction is not required to be registered under the temporary regulations. If a tax shelter promoter (or other person who would be responsible for registration under this section) is uncertain whether a transaction is properly classified as a confidential corporate tax shelter or is otherwise uncertain whether registration is required under this section, that person may, on or before the date that registration would otherwise be required under this section, submit a request to the IRS for a ruling as to whether the transaction is subject to the registration requirements of this section. If the request fully discloses all relevant facts relating to the transaction, that person's potential obligation to register the transaction will be suspended during the period that the ruling request is pending and, if the Service subsequently concludes that the transaction is a confidential corporate tax shelter subject to registration under this section, until the sixtieth day after the issuance of the ruling (or, if the request is withdrawn, sixty days from the date that the request is withdrawn). In the alternative, that person may register the transaction in accordance with the requirements of this section and append a statement to the Form 8264, "Application for Registration of a Tax Shelter," which states that the person is uncertain whether the transaction is required to be registered as a confidential corporate tax shelter, and that the Form 8264 is being filed on a protective basis.

III. *Conditions of Confidentiality*

Section 6111(d)(2) describes when an offer is made under conditions of confidentiality. The determination of whether an offer is made under conditions of confidentiality is based on all the facts and circumstances surrounding the offer, including prior conduct of the parties. If an offeree's disclosure of the structure or tax aspects of the transaction is limited in any way by an express or implied understanding or agreement with or for the benefit of a tax shelter promoter, an offer is considered made under conditions of confidentiality, whether or not such understanding or agreement is legally binding. An offer will also be considered made under conditions of confidentiality in the absence of any such understanding or agreement if any tax shelter promoter knows or has reason to know the transaction is protected from disclosure or use in any other manner, such as where the transaction is claimed to be proprietary to the tax shelter promoter or any party other than the offeree. An offeree's privilege to maintain the confidentiality of a communication relating to a tax shelter in which the taxpayer might participate or has agreed to participate, including an offeree's confidential communication with the offeree's attorney, is not itself a condition of confidentiality.

The temporary regulations provide that, unless facts and circumstances clearly indicate otherwise, an offer is not considered made under conditions of confidentiality if the tax shelter promoter enters into a written agreement with each person who participates or discusses participation in the transaction and such agreement expressly authorizes such persons to disclose every aspect of the transaction to any and all persons, without limitation of any kind.

IV. *Fees*

The third requirement that must be satisfied for a transaction to be treated as a confidential corporate tax shelter is that the tax shelter promoters, whether or not related, may receive fees in excess of \$100,000 in the aggregate. In determining whether the tax shelter promoters may receive fees in excess of \$100,000, all the facts and circumstances surrounding the transaction are considered. For this purpose, all consideration that may be received by the tax shelter promoters is

taken into account, including contingent fees, fees in the form of equity interests, and fees the promoters may receive for other transactions as consideration for promoting the tax shelter.

For example, if a tax shelter promoter may receive a fee for arranging a transaction that is a confidential corporate tax shelter and/or a separate fee for another transaction that is not a confidential corporate tax shelter, part or all of the fee paid with respect to the other transaction may be treated as a fee paid with respect to the confidential corporate tax shelter if the facts and circumstances indicate that the fee paid for the other transaction is in consideration for the confidential corporate tax shelter. For purposes of determining whether the tax shelter promoters may receive fees in excess of \$100,000, the fees from all substantially similar transactions are considered part of the same tax shelter and must be aggregated.

V. Registration Requirements

To register a confidential corporate tax shelter, the person responsible for registering the tax shelter must file Form 8264, "Application for Registration of a Tax Shelter." (Form 8264 is also used to register tax shelters defined in section 6111(c).) The exemptions from the registration requirements contained in the instructions to the current Form 8264 apply only to tax shelters defined in section 6111(c). Form 8264 will be revised and will include specific requirements and instructions for registering confidential corporate tax shelters. Until that time, persons responsible for registering confidential corporate tax shelters should follow the registration procedures outlined in these regulations.

The temporary regulations provide that the person registering a confidential corporate tax shelter must provide a detailed description of the tax shelter, including the structure of the tax shelter and the tax benefits. Any written materials presented in connection with an offer to participate in the shelter are required to be submitted with the registration form.

Consistent with the registration requirements for tax shelters defined in section 6111(c), the temporary regulations provide that any transactions involving similar business assets or similar plans or arrangements that are offered to corporate

taxpayers by the same person or by related persons are aggregated and treated as a single tax shelter. However, in contrast with the registration requirements applicable to tax shelters defined in section 6111(c), the temporary regulations allow the tax shelter promoter to file a single Form 8264 with respect to any such aggregated tax shelter, provided an amended Form 8264 is filed to reflect any material changes and to include any additional or revised written materials presented in connection with an offer to participate in the shelter. Furthermore, the temporary regulations require all transactions that are part of the same tax shelter and that are to be carried out by the same corporate participant (or one or more other members of the same affiliated group within the meaning of section 1504) to be registered on the same Form 8264.

The temporary regulations provide that in cases in which an attorney or federally authorized tax practitioner acts as a tax shelter promoter with respect to a client's participation in a confidential corporate tax shelter and believes that information which would otherwise be required to be disclosed on Form 8264 is protected by the common law attorney-client privilege or the confidentiality privilege under section 7525(a), such promoter may omit the information believed to be privileged from Form 8264 if the promoter attaches a statement to the Form 8264 as described in these temporary regulations.

Section 6111(a)(1) requires a tax shelter to be registered not later than the day on which the first offering for sale of interests in such shelter occurs. Section 6111(d)(4) provides that an offer to participate in a confidential corporate tax shelter shall be treated as an offer for sale.

Registration under these temporary regulations will be limited to confidential corporate tax shelters that are offered for sale after February 28, 2000. If interests in a confidential corporate tax shelter were first offered for sale on or before February 28, 2000, the first offer for sale of interests in the shelter that occurs after February 28, 2000, shall be considered the first offer for sale under this section. The temporary regulations provide that the IRS will consider a registration as timely made for a confidential corporate tax shelter in which interests are offered

for sale after February 28, 2000, if the confidential corporate tax shelter is registered no later than August 26, 2000.

If a transaction becomes a confidential corporate tax shelter (e.g., because of a change in the law or factual circumstances, or because the transaction becomes a listed transaction) subsequent to the first offering for sale after February 28, 2000, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section if interests are offered for sale after the transaction becomes a confidential corporate tax shelter. The transaction must be registered by the later of the next offering for sale of interests in the shelter or August 26, 2000. However, because transactions identified as listed transactions are generally considered to have been structured for a significant tax avoidance purpose, such transactions ordinarily will have been subject to registration under this section before becoming listed transactions.

The temporary regulations provide that if an interest in a confidential corporate tax shelter is first offered for sale after February 28, 2000, and that shelter is also a tax shelter under section 6111(c), the person responsible for registering the shelter may either (1) complete and file Form 8264, including the information required by these temporary regulations for confidential corporate tax shelters, not later than the day on which an interest in the shelter is first offered for sale after February 28, 2000, or (2) complete and file Form 8264 for the section 6111(c) tax shelter not later than the day on which an interest in the tax shelter is first offered for sale under section 6111(a) and then file an amended Form 8264 with the information required by these temporary regulations not later than August 26, 2000.

VI. Tax Shelter Promoter and Person Required to Register

The temporary regulations provide that the term "tax shelter promoter" as described in section 6111(d)(2) includes a tax shelter organizer under section 6111(e)(1) and §301.6111-1T(Q&A-26 through Q&A-32) and any other person who participates in the organization, management or sale of a tax shelter (other

than a person who merely performs services of the kind described in Q&A-33 of §301.6111-1T) or any person related (within the meaning of section 267 or 707) to such tax shelter organizer or such other person.

In addition to the registration rules in section 6111, the rules in §301.6111-1T(Q&A-34 through Q&A-39) apply for determining who must register a confidential corporate tax shelter.

The temporary regulations specify that, if all of the tax shelter promoters of a confidential corporate tax shelter are foreign persons and none of such promoters registers the shelter, any person who discusses participation in the shelter must register the shelter under section 6111(a). Pursuant to the authority in section 6111(f)(4), under limited circumstances, the temporary regulations apply to foreign as well as United States persons. For example, a foreign corporation that participates in a tax shelter with a significant purpose of reducing its United States taxes would be required to register the tax shelter if there were no U.S. promoters and the other requirements of the temporary regulations were satisfied.

Under the temporary regulations, if all the tax shelter promoters of a confidential corporate tax shelter are foreign persons, any person who discusses participation in the confidential corporate tax shelter with a tax shelter promoter must register the shelter within 90 days of beginning such discussions unless one or more of the following occurs: (1) the person does not participate in the shelter and notifies the promoter in writing, within the 90-day period, that the person will not participate; or (2) within the 90-day period, the person obtains and reasonably relies on both a written statement from one of the tax shelter promoters that such promoter has registered the tax shelter under this section and a copy of the registration.

To prevent avoidance of the purposes of section 6111(d)(3), the temporary regulations treat any person that participates in a shelter as having discussed that participation. Such discussion will be treated as occurring on the date of the agreement to participate or, if earlier, any other date the person is treated as having discussed participation under any other provision of these regulations. Thus, the participant is treated as having discussed participation

in the shelter even if the agreement to participate is made without direct discussions by the participant. This might occur, for example, if participation is agreed to through an intermediary acting on the participant's behalf.

The temporary regulations also state that a person (first person) will be treated as participating indirectly in (and therefore as discussing) a tax shelter if a foreign person in which the first person has at least a 10 percent interest participates in the shelter with a significant purpose of avoiding or evading the first person's Federal income tax. For example, if a foreign corporation participates in a confidential corporate tax shelter with a significant purpose of reducing its 10 percent corporate shareholder's Federal income taxes, the temporary regulations would require the shareholder to register the tax shelter if all promoters are foreign.

For purposes of the registration requirements under section 6111(d)(3), it is presumed that the tax shelter promoters may receive fees in excess of \$100,000 in the aggregate unless the person who would be responsible for registering the tax shelter can show otherwise.

VII. *Investor List Requirement of Section 6112*

Any person who organizes or sells an interest in a confidential corporate tax shelter must maintain a list of persons who were sold an interest in the tax shelter and such other information as required by section 6112. See §301.6112-1T. Amendments to the temporary regulations under section 6112 have been published concurrently with the temporary regulations under section 6111(d). Among other things, the amended temporary regulations under section 6112 require lists to be maintained with respect to transactions for which the avoidance or evasion of Federal income tax is considered to be a significant purpose of the structure of the transaction, as determined in these temporary regulations under section 6111(d)(1)(A), whether or not the transactions are offered under conditions of confidentiality.

VIII. *Effective Date*

The regulations apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the persons responsible for promoting and registering the transactions described in these regulations are principally large publicly traded corporations, and the burden is not significant as described earlier in the preamble. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Mary Beth Collins and Richard Castanon, Office of Chief Counsel (Passthroughs and Special Industries) and Rebecca Rosenberg, Office of Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 301 and 602 are amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read as follows:

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

Section 301.6111-2T also issued under 26 U.S.C. 6111(f)(4). * * *

Par. 2. Section 301.6111-2T is added to read as follows:

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

(a) *In general*—(1) Under section 6111(d) and this section, a confidential corporate tax shelter is treated as a tax shelter subject to the requirements of sections 6111(a) and (b).

(2) A confidential corporate tax shelter is any transaction—

(i) A significant purpose of the structure of which is the avoidance or evasion of Federal income tax, as described in paragraph (b) of this section, for a direct or indirect corporate participant;

(ii) That is offered to any potential participant under conditions of confidentiality, as described in paragraph (c) of this section; and

(iii) For which the tax shelter promoters may receive fees in excess of \$100,000 in the aggregate, as described in paragraph (d) of this section.

(3) For purposes of this section, references to the term *transaction* include all of the factual elements necessary to support the tax benefits that are expected to be claimed with respect to any entity, plan, or arrangement, including any series of related steps carried out as part of a prearranged plan.

(4) A transaction described in paragraph (b) of this section is for a direct or an indirect corporate participant if it is expected to provide Federal income tax benefits to any corporation (U.S. or foreign) whether or not that corporation participates directly in the transaction.

(b) *Transactions structured for avoidance or evasion of Federal income tax*—

(1) *In general*. The avoidance or evasion of Federal income tax will be considered a significant purpose of the structure of a transaction if the transaction is described in paragraph (b)(2), (3), or (4) of this section. However, a transaction described in paragraph (b)(3) or (4) of this section need not be registered if the transaction is described in paragraph (b)(5) of this section. For purposes of this section, Federal income tax benefits include deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, and any other tax consequences that may reduce a taxpayer's Federal income tax liability by affecting the timing, character, or source of any item of income, gain, deduction, loss, or credit.

(2) *Listed transactions*. A transaction is described in this paragraph (b)(2) if the transaction is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction for purposes of section 6111. If a transaction becomes a listed transaction after the date on which registration would otherwise be required under this section, and if the transaction otherwise satisfies the confidentiality and fee requirements of paragraphs (a)(2)(ii) and (iii) of this section, registration shall in all events be required with respect to any interests in the transaction that are offered for sale after the transaction becomes a listed transaction. However, because a transaction identified as a listed transaction is generally considered to have been structured for a significant tax avoidance purpose, such a transaction ordinarily will have been subject to registration under this section before becoming a listed transaction if the transaction previously satisfied the confidentiality and fee requirements of paragraphs (a)(2)(ii) and (iii) of this section.

(3) *Transactions lacking economic substance*—(i) Except as provided in paragraph (b)(3)(ii) of this section, a transaction is described in this paragraph (b)(3) if the present value of the participant's reasonably expected pre-tax profit (after taking into account foreign taxes as expenses and transaction costs) from the transaction is insignificant relative to the present value of the participant's expected net Federal income tax savings from the transaction.

(ii) If the substance of the transaction is the borrowing of money or the acquisition of financial capital by a corporate participant, the transaction is described in this paragraph (b)(3) only if the present value of the Federal income tax deductions of the taxpayer to whom the loan or financial capital is provided significantly exceeds the present value of the pre-tax return of the person providing the loan or financial capital.

(4) *Other tax-structured transactions*. A transaction is described in this paragraph (b)(4) if it has been structured to produce Federal income tax benefits that constitute an important part of the in-

tended results of the transaction and the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably expects the transaction to be presented in the same or substantially similar form to more than one potential participant, unless the promoter reasonably determines that—

(i) The potential participant is expected to participate in the transaction in the ordinary course of its business (including transactions described in §1.6011-4T(b)(3)(iii)) in a form consistent with customary commercial practice; and

(ii) There is a long-standing and generally accepted understanding that the expected Federal income tax benefits from the transaction (taking into account any combination of intended tax consequences) are allowable under the Internal Revenue Code for substantially similar transactions.

(5) *Excepted transactions*. The avoidance or evasion of Federal income tax will not be considered a significant purpose of the structure of a transaction if the transaction is described in either paragraph (b)(5)(i) or (ii) of this section.

(i) In the case of a transaction other than a transaction described in paragraph (b)(2) of this section, the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably determines that there is no reasonable basis under Federal tax law for denial of any significant portion of the expected Federal income tax benefits from the transaction. Such a determination must take into account the entirety of the transaction and any combination of tax consequences that are expected to result from any component steps of the transaction, must not be based on any unreasonable or unrealistic factual assumptions, and must take into account all relevant aspects of Federal tax law, including the statute and legislative history, treaties, authoritative administrative guidance, and judicial decisions that establish principles of general application in the tax law (e.g., *Gregory v. Helvering*, 293 U.S. 465 (1935)).

(ii) The IRS makes a determination, by published guidance, individual ruling under paragraph (b)(6) of this section, or otherwise, that the transaction is not subject to the registration requirements of this section.

(6) *Requests for ruling.* If a tax shelter promoter (or other person who would be responsible for registration under this section) is uncertain whether a transaction is properly classified as a confidential corporate tax shelter or is otherwise uncertain whether registration is required under this section, that person may, on or before the date that registration would otherwise be required under this section, submit a request to the IRS for a ruling as to whether the transaction is subject to the registration requirements of this section. If the request fully discloses all relevant facts relating to the transaction, that person's potential obligation to register the transaction will be suspended during the period that the ruling request is pending and, if the IRS subsequently concludes that the transaction is a confidential corporate tax shelter subject to registration under this section, until the sixtieth day after the issuance of the ruling (or, if the request is withdrawn, sixty days from the date that the request is withdrawn). In the alternative, that person may register the transaction in accordance with the requirements of this section and append a statement to the Form 8264, "Application for Registration of a Tax Shelter," which states that the person is uncertain whether the transaction is required to be registered as a confidential corporate tax shelter, and that the Form 8264 is being filed on a protective basis.

(7) *Examples.* The following examples illustrate the application of paragraphs (b)(1) through (b)(5) of this section. Assume, for purposes of these examples, that the transactions are not the same as or substantially similar to any of the types of transactions that the IRS has identified as listed transactions for purposes of section 6111 and thus are not described in paragraph (b)(2) of this section. The examples are as follows:

Example 1—(i) Facts. Promoter organizes a transaction between X, a U.S. corporation, and FC, a foreign entity that is not subject to Federal income tax. FC contributes cash to PRS, a partnership, in exchange for a 99 percent partnership interest in PRS. Promoter is initially the only other partner in PRS. FC will receive a market rate of return on its cash contribution and a fee for participating in the transaction. PRS purchases personal property and then leases it. PRS sells its right to the lease payments in exchange for cash. PRS allocates 99 percent of the income from the sale to FC and one percent to Promoter. PRS retains the leased property. Shortly after PRS's sale of the lease payments, X buys FC's 99 percent partnership interest in PRS.

The depreciation deductions on the leased property are then allocated 99 percent to X and one percent to Promoter.

(ii) *Analysis.* The transaction is described in paragraph (b)(3)(i) of this section because the present value of X's reasonably expected pre-tax profit from the transaction is insignificant relative to the present value of X's expected net Federal income tax savings from the transaction. Therefore, unless Promoter can reasonably determine that the IRS would have no reasonable basis for denial of any significant portion of the Federal income tax benefits intended for X, the transaction is described in paragraph (b)(1) of this section.

Example 2—(i) Facts. Y has designed a combination of financial instruments to be issued as a package by corporations. The financial instruments are expected to be treated as equity for financial accounting purposes and as debt giving rise to allowable interest deductions for Federal income tax purposes. Y reasonably expects to present this method of raising capital to more than one potential corporate participant. Assume the transaction is not described in paragraph (b)(3) of this section. Assume that, because of the unusual nature of the combination of financial instruments, Y cannot conclude either that the transaction represented by the financial instruments is in customary commercial form or that there is a long-standing and generally accepted understanding that interest deductions are available to issuers of substantially similar combinations of financial instruments. Further, assume that Y cannot reasonably determine that the IRS would have no reasonable basis to deny the deductions.

(ii) *Analysis.* The transaction represented by this combination of financial instruments is a transaction described in paragraph (b)(4) of this section. However, if Y is uncertain whether this transaction is described in paragraph (b)(4) of this section, or is otherwise uncertain whether registration is required, Y may apply for a ruling under paragraph (b)(6) of this section, and the transaction will not be required to be registered while the ruling is pending or for sixty days thereafter.

(c) *Conditions of confidentiality—(1) In general.* All the facts and circumstances relating to the transaction will be considered when determining whether an offer is made under conditions of confidentiality as described in section 6111(d)(2), including prior conduct of the parties. Pursuant to section 6111(d)(2)(A), if an offeree's disclosure of the structure or tax aspects of the transaction is limited in any way by an express or implied understanding or agreement with or for the benefit of any tax shelter promoter, an offer is considered made under conditions of confidentiality, whether or not such understanding or agreement is legally binding. Pursuant to section 6111(d)(2)(B), an offer will also be considered made under conditions of confidentiality in the absence of any such understanding or agreement if any tax shelter promoter knows or has reason to know that the transaction is protected from dis-

closure or use in any other manner, such as where the transaction is claimed to be proprietary to the tax shelter promoter or any party other than the offeree. An offeree's privilege to maintain the confidentiality of a communication relating to a tax shelter in which the taxpayer might participate or has agreed to participate, including an offeree's confidential communication with the offeree's attorney, is not itself a condition of confidentiality.

(2) *Presumption.* Unless facts and circumstances clearly indicate otherwise, an offer is not considered made under conditions of confidentiality if the tax shelter promoter enters into a written agreement with each person who participates or discusses participation in the transaction and such agreement expressly authorizes such persons to disclose every aspect of the transaction with any and all persons, without limitation of any kind.

(d) *Determination of fees.* All the facts and circumstances relating to the transaction will be considered when determining the amount of fees, in the aggregate, that the tax shelter promoters may receive. For purposes of this paragraph (d), all consideration that tax shelter promoters may receive is taken into account, including contingent fees, fees in the form of equity interests, and fees the promoters may receive for other transactions as consideration for promoting the tax shelter. For example, if a tax shelter promoter may receive a fee for arranging a transaction that is a confidential corporate tax shelter and a separate fee for another transaction that is not a confidential corporate tax shelter, part or all of the fee paid with respect to the other transaction may be treated as a fee paid with respect to the confidential corporate tax shelter if the facts and circumstances indicate that the fee paid for the other transaction is in consideration for the confidential corporate tax shelter. For purposes of determining whether the tax shelter promoters may receive fees in excess of \$100,000, the fees from all substantially similar transactions are considered part of the same tax shelter and must be aggregated.

(e) *Registration—(1) Time for registering—(i) In general.* A tax shelter must be registered not later than the day on which the first offering for sale of interests in the shelter occurs. An offer to participate in a confidential corporate tax shelter shall be

treated as an offer for sale. If interests in a confidential corporate tax shelter were first offered for sale on or before February 28, 2000, the first offer for sale of interests in the shelter that occurs after February 28, 2000, shall be considered the first offer for sale under this section.

(ii) *Certain registrations deemed timely*—(A) *In general.* The IRS will consider a registration as timely made for a confidential corporate tax shelter in which interests are offered for sale after February 28, 2000, if the tax shelter is registered no later than August 26, 2000. If an interest in a confidential corporate tax shelter is first offered for sale after February 28, 2000, and the tax shelter also constitutes a tax shelter under section 6111(c), the persons responsible for registering the tax shelter may either complete and file Form 8264, “Application for Registration of a Tax Shelter”, including the information required by paragraph (e)(2) of this section, not later than the day on which an interest in the tax shelter is first offered for sale after February 28, 2000, or complete and file Form 8264, “Application for Registration of a Tax Shelter”, for the section 6111(c) tax shelter not later than the day on which an interest in the tax shelter is first offered for sale under section 6111(a) and then file an amended Form 8264 with the information required by paragraph (e)(2) of this section not later than August 26, 2000.

(B) *Special rule.* If a transaction becomes a confidential corporate tax shelter (e.g., because of a change in the law or factual circumstances, or because the transaction becomes a listed transaction) subsequent to the first offering for sale after February 28, 2000, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section if interests are offered for sale after the transaction becomes a confidential corporate tax shelter. The transaction must be registered by the later of the next offering for sale of interests in the shelter or August 26, 2000.

(2) *Procedures for registering*—(i) *In general.* To register a confidential corporate tax shelter, the person responsible for registering the tax shelter must file Form 8264, “Application for Registration of a Tax Shelter”. (Form 8264 is also used to

register tax shelters defined in section 6111(c).) The exemptions from the registration requirements contained in the instructions to the current Form 8264 apply only to tax shelters defined in section 6111(c). Similar to the treatment provided under Q&A-22 and Q&A-48 of §301.6111-1T, transactions involving similar business assets and similar plans or arrangements that are offered to corporate taxpayers by the same person or related persons are aggregated and considered part of a single tax shelter. However, in contrast with the requirement of Q&A-48 of §301.6111-1T, the tax shelter promoter may file a single Form 8264 with respect to any such aggregated tax shelter, provided an amended Form 8264 is filed to reflect any material changes and to include any additional or revised written materials presented in connection with an offer to participate in the shelter. Furthermore, all transactions that are part of the same tax shelter and that are to be carried out by the same corporate participant (or one or more other members of the same affiliated group within the meaning of section 1504) must be registered on the same Form 8264.

(ii) *Interim registration procedure.* Until Form 8264 and its instructions are revised to incorporate the provisions of this paragraph (e)(2)(ii), the person responsible for registering a confidential corporate tax shelter must—

(A) Type or legibly print “Confidential Corporate Tax Shelter Filed Under §301.6111-2T” at the top of Form 8264 (Rev. 11-99), “Application for Registration of a Tax Shelter”;

(B) Complete Part I and lines 1a, 2, 3, 4, 6, and 12 in Part II of Form 8264;

(C) In the section titled “Explanation of Items” on Form 8264, provide a detailed description of the tax shelter, including a description of the structure of the tax shelter and the intended tax benefits;

(D) Attach any written materials that are presented to potential participants in connection with the offering of sales of interests in the tax shelter, including any analyses or opinions relating to the intended tax benefits of the shelter; and

(E) Sign the Form 8264 and send it to the Internal Revenue Service Center, Kansas City, MO 64999.

(iii) *Use of subsequent versions of Form 8264.* If a person who is required to

register a confidential corporate tax shelter under section 6111 uses a subsequent version of the Form 8264, the person must complete the appropriate parts of the revised form and follow the applicable instructions.

(iv) *Tax shelters that constitute both section 6111(c) and section 6111(d) tax shelters.* If a person is registering an arrangement that is both a confidential corporate tax shelter and a section 6111(c) tax shelter, the person must follow the requirements of this section and the instructions for Form 8264. In such a situation, the taxpayer must complete the entire form because the tax shelter is a section 6111(c) tax shelter and, if using Form 8264 (Rev. 11-99), type or legibly print “Confidential Corporate Tax Shelter filed under §301.6111-2T” at the top of Form 8264 and include the information required in paragraphs (e)(2)(ii)(C) and (D) of this section because the tax shelter is also a confidential corporate tax shelter. If an arrangement is both a section 6111(c) tax shelter and a confidential corporate tax shelter and is a transaction described in the “Exemptions from Registration” section of the instructions for Form 8264 (Rev. 11-99), the person registering the arrangement must comply with the requirements of this section to register the arrangement as a confidential corporate tax shelter.

(3) *Claims of privilege.*(i) In any case in which an attorney or federally authorized tax practitioner within the meaning of section 7525 is the person required to register a confidential corporate tax shelter, and that person believes that information required to be disclosed under paragraph (e)(2) of this section is protected by the attorney-client privilege or by the confidentiality privilege of section 7525(a), any information omitted from the Form 8264 on the basis of such a claim must be supported by a statement attached to Form 8264 which satisfies the requirements set forth in paragraph (e)(3)(ii) of this section.

(ii) A statement supporting a claim of privilege must be signed by the attorney or federally authorized tax practitioner under penalties of perjury, must identify each document or category of information for which a claim of privilege is made, and must include the following representations with respect to each document or

category of information for which the privilege is claimed—

(A) Specifically represent that the information was a confidential practitioner-client communication and, in the case of information which a federally authorized tax practitioner claims is privileged under section 7525, that the omitted information was not part of tax advice that constituted the promotion of a tax shelter within the meaning of section 7525(b);

(B) Specifically represent that the person required to register (and, to the best of such person's knowledge and belief, all others in possession of the omitted information) did not disclose the omitted information to any person whose receipt of such information would result in a waiver of the privilege.

(f) *Definition of tax shelter promoter.* For purposes of section 6111(d)(2) and this section, the term "tax shelter promoter" includes a tax shelter organizer as defined in section 6111(e)(1) and §301.6111-1T(Q&A-26 through Q&A-32) and any other person who participates in the organization, management or sale of a tax shelter (other than a person who merely performs services of the kind described in Q&A-33 of §301.6111-1T) or any person related (within the meaning of section 267 or 707) to such tax shelter organizer or such other person. Any person that satisfies this requirement must comply with the requirements under section 6112.

(g) *Person required to register—(1) Tax shelter promoters.* In addition to the rules in section 6111, taxpayers must use the rules of §301.6111-1T (Q&A-34 through Q&A-39) in determining the circumstances under which a tax shelter promoter must register a confidential corporate tax shelter described in section 6111(d).

(2) *Persons who discuss the transaction; all promoters are foreign persons—*

(i) *In general.* If all of the tax shelter promoters of a confidential corporate tax shelter are foreign persons, any person who discusses participation in the transaction must register the shelter under this section within 90 days after beginning such discussions.

(ii) *Exceptions.* Registration by a person discussing participation in a transaction is not required if either—

(A) The person does not participate, directly or indirectly, in the shelter and noti-

fies the tax shelter promoter in writing, within 90 days of beginning such discussions, that the person will not participate; or

(B) Within 90 days after beginning such discussions, the person obtains and reasonably relies on both—

(I) A written statement from one of the tax shelter promoters that such promoter has registered the tax shelter under this section; and

(2) A copy of the registration.

(iii) *Determination of foreign status.* For purposes of this paragraph (g)(2), a person must presume that all tax shelter promoters are foreign persons unless the person either—

(A) Discusses participation in the tax shelter with a promoter that is a United States person; or

(B) Obtains and reasonably relies on a written statement from one of the promoters that at least one of the promoters is a United States person.

(iv) *Discussion.* Discussing participation in a transaction includes discussing such participation with any person that conveys the tax shelter promoter's proposal. For purposes of this paragraph (g)(2), any person that participates directly or indirectly in a transaction will be treated as having discussed participation in the transaction not later than the date of the agreement to participate. Thus, a tax shelter participant will be treated as having discussed participation in the transaction even if all discussions were conducted by an intermediary and the agreement to participate was made indirectly through another person acting on the participant's behalf (for example, through an intermediary empowered to commit the participant to participate in the shelter).

(v) *Special rule for controlled entities.* A person (first person) will be treated as participating indirectly in a confidential corporate tax shelter if a foreign person controlled by the first person participates in the shelter, and a significant purpose of the shelter is the avoidance or evasion of the first person's Federal income tax. For purposes of this paragraph (g)(2)(v), control of a foreign corporation or partnership will be determined under the rules of section 6038(e)(2) and (3), except that such section shall be applied by substituting "10" for "50" each place it appears

and "at least" for "more than" each place it appears. In addition, section 6038(e)(2) shall be applied for these purposes without regard to the constructive ownership rules of section 318 and by treating stock as owned if it is owned directly or indirectly. Section 6038(e)(3) shall be applied for these purposes without regard to the last sentence of section 6038(e)(3)(B). Any beneficiary with a 10 percent or more interest in a foreign trust or estate shall be treated as controlling that trust or estate for purposes of this paragraph (g)(2)(v).

(vi) *Other rules—(A)* For purposes of the registration requirements under section 6111(d)(3), it is presumed that the tax shelter promoters will receive fees in excess of \$100,000 in the aggregate unless the person responsible for registering the tax shelter can show otherwise.

(B) Any person treated as a tax shelter promoter under section 6111(d) solely by reason of being related (within the meaning of section 267 or 707) to a foreign promoter will be treated as a foreign promoter for purposes of this paragraph (g)(2).

(h) *Effective date.* This section applies to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. If an interest is sold after February 28, 2000, it is treated as offered for sale after February 28, 2000, unless the sale was pursuant to a written binding contract entered into on or before February 28, 2000.

Par. 3. In §602.101, paragraph (b) is amended by adding an entry for §301.6111-2T to read as follows:

§602.101 *OMB Control numbers.*

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(b) * * *

Charles O. Rossotti,
Commissioner of Internal Revenue.

Approved February 23, 2000.

Jonathan Talisman,
*Acting Assistant Secretary
of the Treasury.*

(Filed by the Office of the Federal Register on February 28, 2000, 8:45 a.m., and published in the issue of the Federal Register for March 2, 2000, 65 F.R. 11215)

CFR Part or Section Where
Identified and Described

Current OMB
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301.6111-2T1545-1687

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