SHINE A LIGHT AND STOP AGGRESSIVE TAX PLANS: Disclosure Obligations for Advisors in Europe and the U.S.

Date: Thursday, October 19, 2017
Time: 12:30 p.m.–1:50 p.m.
Location: New York Law School, W400
           185 West Broadway, New York, NY 10013
RSVP: www.nyls.edu/taxlawrsvp
CLE: 1.5 credits in Areas of Professional Practice
Contact: ashley.oliver@nyls.edu • 212.431.2147

Disclosure requirements have existed in the U.S. for many years and are now being adopted in Europe. This program will explain the following:

• Transactions that must be reported as tax shelters
• Forms required to make a disclosure compliant with tax regulations
• Information that must be maintained by material advisors and participants
• Penalties for recalcitrant taxpayers

Guest speakers are attorneys from Ruchelman P.L.L.C:
• Stanley C. Ruchelman, Chairman
• A. Fanny Karaman ‘12 LL.M., Associate Attorney
• Sheryl Shah, Associate Attorney
SHINE A LIGHT AND STOP AGGRESSIVE TAX PLANS

DISCLOSURE OBLIGATIONS FOR TAXPAYERS, ADVISERS, AND FACILITATORS IN THE U.S. AND EUROPE

Stanley C. Ruchelman
Fanny Karaman
Sheryl Shah

Ruchelman P.L.L.C.
New York, NY U.S.A.
Mandatory Disclosure

• Three distinct sets of rules in the U.S.:
  • Abusive Tax Shelters
  • Corporations with Financial Statements Prepared under G.A.A.P.
  • Transactions without Economic Substance

• Upcoming Rules in the E.U.
REPORTABLE TRANSACTIONS
Reportable Transactions

1. Partnership funded by investors and loan
2. Heavy First Year Depreciation
3. Reduced overall taxes by 50%

Promoter’s fee: ½ of tax savings

- Tax-Exempt (Plates)
- Sale for minimal cash & large note

Promoter
Reportable Transactions

• The obligations and penalties arising from reportable transactions are:
  • Directed at financial products
  • Designed by “financial engineers”
  • Within five categories (and a proposed sixth)
  • Presented to taxpayers in circumstances that were common in the tax shelter industry
Reportable Transactions

- Categories of Reportable Transactions
  - **Listed Transactions**
    - Transactions of a kind that has been determined to be a tax avoidance transaction by the I.R.S.
  - **Confidential Transactions**
    - Transactions that are offered to a taxpayer under conditions of confidentiality for the benefit of the advisor and involving a minimum fee charged to the taxpayer, which is $250,000 when taxpayer is a corporation.
  - **Transactions with Contractual Protection**
    - The taxpayer has the right to a full or partial refund of fees if the intended tax consequences from the transaction are not sustained.
Reportable Transactions

- Categories (Cont’d)
  - Substantial Loss Transactions
    - Projected losses exceed a certain threshold that is greater for a corporation and lower for individuals
      - $10 million in any single taxable year or $20 million in any combination of taxable years for corporations;
      - $10 million in any single taxable year or $20 million in any combination of taxable years for partnerships that have only corporations as partners;
      - $2 million in any single taxable year or $4 million in any combination of taxable years for all other partnerships;
      - $2 million in any single taxable year or $4 million in any combination of taxable years for individuals, S corporations, or trusts;
      - $50,000 in any single taxable year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership, if the loss arises with respect to a section 988 transaction (as defined in section 988(c)(1) relating to foreign currency transactions).
Reportable Transactions

• Categories (Cont’d)
  • Transactions of Interest to the I.R.S.
    • The transaction is identified as having the potential for tax avoidance or evasion, but the Office of Tax Shelter Analysis lacks sufficient information to make a conclusive determination

• Proposed Category
  • Patented Transactions
    • By legislation, patents are no longer granted for tax plans.
Reportable Transactions

• Why do we care?
  • Reporting obligations
  • Record keeping obligations
  • Penalties
    • Taxpayer
    • Material advisor
    • Abusive tax shelter promoters
    • Tax-exempt facilitators
Reportable Transactions

• Reporting by Participating Taxpayers
  • A disclosure statement must be made:
    • A fully complete Form 8886 (Reportable Transaction Disclosure Statement) must be attached to the tax return.
    • The first Form 8886 must be mailed to O.T.S.A.
    • To be complete, it must describe the transaction in sufficient detail for the I.R.S. to be able to understand the tax structure of the reportable transaction and the identity of all parties involved in the transaction.
Reportable Transactions
Reportable Transactions

[Image of Form 8889 (Rev. 3-2011)]
Reportable Transactions

• Reporting by Taxpayer – Penalties for Failing to Report:
  • When?
    • Failure to file Form 8886
    • Failure to include information required by Form 8886
    • Failure to mail a copy to O.T.S.A. (Office of Tax Shelter Analysis)
  • How much?
    • 75% of the decrease in tax but limitations apply
Reportable Transactions

- Reporting by Taxpayer – Penalties for Failing to Report:
  - How much?
    - Limitations for Individuals:
      - Minimum $5,000
      - Capped at:
        - $100,000 for listed transactions
        - $10,000 for all other reportable transactions
Reportable Transactions

• Reporting by Taxpayer – Penalties for Failing to Report:
  • How much?
    • Limitations for corporations:
      • Minimum $10,000
      • Capped at:
        • $200,000 for listed transactions
        • $50,000 for all other reportable transactions
Reportable Transactions

• Document Retention
  • All documents related to a reportable transaction must be retained if material to an understanding of the tax treatment or tax structure of the transaction.
  • Retention is mandatory until S.O.L. on assessments runs.
Reportable Transactions

• Obligations of Material Advisors
  • For a person to be a material advisor, all of the following must exist:
    • The person provides material aid, assistance or advice;
    • The person directly or indirectly derives gross income in excess of a specified threshold:
      • For listed transactions: $10,000 for individuals and $25,000 for corporations;
      • Other reportable transactions: $50,000 for individual taxpayers and $250,000 when the taxpayer is a corporation; and
    • The transaction is entered into by the taxpayer.
Reportable Transactions

- Disclosure Obligations of a Material Advisor
  - Disclosure is made on Form 8918 (Material Advisor Disclosure Statement).
  - Disclosure must be filed with O.T.S.A. by the last day of the month that follows the end of the calendar quarter in which all of the following have occurred:
    - **Advice**: The advisor is a material advisor.
    - **Transaction**: He has acted as a material advisor with respect to a reportable transaction.
    - **Investment**: The taxpayer has invested in a reportable transaction.
  - I.R.S. will issue reportable transaction number
Reportable Transactions
Reportable Transactions
Reportable Transactions

• Disclosure Obligations of a Material Advisor
  • Disclosure may be aggregated by all material advisors to a reportable transaction if more than one material advisor provided advice.
  • The disclosure triggers the issuance of a reportable transaction number by the I.R.S., which must be provided to the taxpayer.
Reportable Transactions

- Penalties imposed on material advisors for failing to make adequate disclosures:
  - For unreported listed transactions, the penalty is the greater of $200,000 or 50% of the gross income derived by the material advisor, increased to 75% if the failure is intentional.
  - For other unreported reportable transactions, the penalty is $50,000.
Reportable Transactions

• Record Retention
  • For each reportable transaction, the following items are required:
    • An itemized list of taxpayers, investments, benefits, and other advisors
    • A description of the transaction
    • All written material, including each written tax analyses and opinions
Reportable Transactions

• Penalties imposed on material advisors for failing to maintain lists and to timely furnish full information to the I.R.S.:
  • The penalty of $10,000 per day is imposed after 20 days, subject to a reasonable cause exception based on:
    • Good faith
    • Ordinary business care
    • Supervening events
    • Reliance on advice of independent legal counsel
Reportable Transactions

• Abusive Tax Shelter Promoters
  • These are persons who:
    • Organize or assist in organizing a partnership or other entity or a plan or arrangement, or
    • Who participate directly or indirectly in the sale of any interest in the entity or plan.
  • These persons are penalized for making:
    • A proscribed statement
    • A proscribed valuation
  • A penalty may be imposed even if a taxpayer does not invest in the tax shelter transaction.
Reportable Transactions

• Abusive Tax Shelter Promoters
  
  • A statement is a proscribed statement when:
    • It refers to purported tax benefits that result from the transaction, and
    • Is made with knowledge or reason to know that it is false or fraudulent as to any material matter regarding the purported benefit.
  
  • A valuation is a proscribed valuation if:
    • It contains a gross valuation overstatement as to any material property or service, and
    • The value exceeds 200% percent of the amount determined to be the correct valuation.
Reportable Transactions

• Abusive Tax Shelter Promoters
  • Penalties
    • For lower paid persons, $1,000 for each entity or plan, capped at 100% of the gross income derived by the promoter.
    • For highly paid persons involved with fraudulent statements, the penalty is equal to 50% of the gross income derived by the promoter.
Reportable Transactions

• Tax-Exempt Facilitators
  • An excise tax is imposed on certain tax-exempt entities that are parties to listed transactions, confidential transactions, and transactions with contractual protection.
  • Tax-exempt entities serve as disinterested parties to a prearranged tax shelter and are allocated income that does not result in tax.

• Excise Tax
  • 35% of the net income of the entity that is derived from its participation, or if greater, applied to 75% of the proceeds received by the entity from its participation
  • If the tax-exempt entity participates knowingly, the tax is equal to all of the net income from its participation or if greater 75% of the proceeds
  • Entity managers face a $20,000 excise tax
  • Reporting: Form 4720
Reportable Transactions

1. Partnership funded by investors and loan
2. Heavy First Year Depreciation
3. Reduced overall taxes by 50%

Promoter’s fee: ½ of tax savings

Investor A → TEVYE Lithograph plates → Investor C
Tax-Exempt (Plates)
Sale for minimal cash & large note
SCHEDULE UTP
Schedule UTP

• Code §7602 –

For the purpose of ascertaining the correctness of any return * * * [and] determining the liability of any person for * * * tax * * *, the [I.R.S.] is authorized -- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; [and] (2) To summon the person liable for tax * * * to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *. 
Schedule UTP

• SFAS 109 (Accounting for Income Taxes)
  • Financial accounting concepts of income recognition differ from
    U.S. tax accounting concepts.
    • Example 1: Sale of depreciable property in return for a purchaser’s note
      • Immediate recognition of net income for financial accounting purposes and tax
        expense is recorded immediately.
      • Deferred recognition for income tax purposes means that tax will be due in
        later years.
      • Deferred tax is treated as a deferred tax asset for financial accounting.
      • The amount of gain may differ because of differences in depreciation
        expense.
Schedule UTP

• SFAS 109 (Accounting for Income Taxes)
  • Example 2: Investment in tax shelter
    • Immediate use of losses reduces the tax reported on a tax return.
    • But, for financial accounting purposes, should there be an immediate recognition of a tax benefit – the reduction in tax expense otherwise would be due on operating income unrelated to the shelter?
    • The tax reserve measures the amount of the benefit and the likelihood that it will be realized, measured as a percentage.
Schedule UTP

• FIN 48 (Accounting for Uncertain Tax Positions)
  • An interpretation of SFAS109 regarding the calculation and disclosure of reserves for uncertain tax positions
  • The validity of the loss is viewed as a tax position for financial statement purposes.
  • FIN 48 is the standard under which a tax benefit is recognized, and if it is, the amount of the benefit for accounting purposes
Schedule UTP
Schedule UTP

- **Arthur Young v. U.S.**
  - Financial statement auditors have a responsibility to users of financial statement information.
  - This responsibility can create an adverse relationship between the company and its auditors.
  - Facilitating flow of information to auditors to maintain integrity of capital markets does not override the proper computation of tax.

- **Announcement 2002-63**
  - Focus of work paper analysis limited to listed transactions unless:
    - Listed transaction not properly disclosed
    - Investments are made in more than one listed shelter, or
    - Accounting irregularities (ex: those resulting in an earnings restatement)
Third Party Lender Taxpayer Overview of SILO Transaction

- Head Lease/Sale
  - term > useful life of asset
  - treated as a sale for U.S. tax purposes
  - Depreciation for Taxpayer

- Nonrecourse loan to Taxpayer via grantor trust
  - interest deduction for Taxpayer

- Upfront payment of entire Head Lease (Equity Contribution + Nonrecourse loan)

- Sublease: made in advance of the actual payment terms

- Grantor Trust

- Equity Payment

- Debt Payment

- Undertaker

Schedule UTP
Schedule UTP
Schedule UTP

- *Textron Case*
  - Textron’s accrual analysis was prepared by its attorneys.
  - It claimed the analysis is privileged under the attorney work product doctrine.
  - Ultimately, the appellate court disagreed.
    - Records prepared in the ordinary course of business are not protected by the attorney work product doctrine.
    - The immediate motive for the tax accrual work papers was to fix the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor.
    - Merely because Textron wanted to be adequately reserved in the event of tax litigation does not mean that the work papers were prepared for use in possible litigation.
Schedule UTP

• FIN 48 (Accounting for Uncertain Tax Positions)

  • Step 1
    • Is it more likely than not that a tax position will be sustained upon examination based on the technical merits of the position?
    • If not, no benefit is given in the financial statements.
    • In answering the question, the company presumes that the taxing authority has full knowledge of all relevant information.

  • Step 2
    • Determine the largest amount of tax benefit that is likely to be realized upon final resolution.
    • A company accrues tax, interest and penalties where warranted with respect to unrecognized tax benefits.
Schedule UTP

- Goals of Schedule UTP
  - To reduce the time it takes the I.R.S. to find issues and complete an audit
  - To assist the I.R.S. in prioritizing selection of issues and taxpayers for examination

- Four conditions that trigger application of Schedule UTP:
  - A corporate tax return is required to be filed
  - A $10 million asset threshold is met
  - Audited financial statements are prepared under U.S. G.A.A.P., I.F.R.S., a foreign country’s G.A.A.P.
  - A reserve is recorded for a tax position or not recorded because of a decision to litigate the tax position
Schedule UTP

Uncertain Tax Position Statement

Part I

Uncertain Tax Positions for the Current Tax Year. See instructions for how to complete columns (a) through (q).

Check this box if the corporation was unable to obtain information from related parties sufficient to determine whether a tax position is a UTP. See instructions.

For Paperwork Reduction Act Notice, see the instructions for Form 1120.
### Schedule UTP

#### Part II: Uncertain Tax Positions for Prior Tax Years

See instructions for how to complete columns (a) through (g). Enter, in Part III, a description for each uncertain tax position (UTP).

Check this box if the corporation was unable to obtain information from related parties sufficient to determine whether a tax position is a UTP. See instructions.

<table>
<thead>
<tr>
<th>UTP No.</th>
<th>Primary IRC Sections (for example, “1.1”, “1.2”, “1.3”)</th>
<th>Primary IRC Subsections (for example, “1.1.3”)</th>
<th>UTP Timing Codes: Permanent, Temporal or Both</th>
<th>G-1 Paid Through Entity Line</th>
<th>G-2 Main Tax Position</th>
<th>G-3 Number of Tax Positions</th>
<th>G-4 Reasonable for Future Dues</th>
<th>G-5 Year of Tax Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Schedule UTP (Form 1125) 2016
Schedule UTP
Schedule UTP

- Reportable tax positions must be ranked by size and reported in order from high to low.
- Amounts involved for each tax position need not be reported.
- The ranking of each tax position is determined on an annual basis.
- A concise description should be given of each tax position, sufficient to apprise the I.R.S. of the nature of the issue.
- Risk assessment and legal analysis should not be provided.
TRANSACTIONS LACKING ECONOMIC SUBSTANCE
Transactions Lacking Economic Substance

• For over 85 years, the concept of economic substance has been part of the common law of the U.S.
  • The incidence of taxation depends upon the substance of the transaction and not mere formalism.
  • Taxation is not so much concerned with refinements of title as it is with actual command over the property.
  • A mere transfer in form, without substance, may be disregarded for tax purposes.
  • A given result at the end of a straight path is not made a different result because reached by following a devious path.
  • The doctrine of economic substance is applicable where a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings.
Transactions Lacking Economic Substance
Transactions Lacking Economic Substance

• The standard for making a determination varied among the courts.

• Some applied a conjunctive test, demanding both:
  • Economic Substance – an objective standard that looks to listed factors, and
  • Business Purpose – a subjective standard measuring the genuineness of a taxpayer’s intent to carry out a genuine transaction.

• Other courts applied a disjunctive test in which a transaction is respected if it had economic substance or the taxpayer had a business purpose.
Transactions Lacking Economic Substance

• Code § 7701(o) codifies rules for applying the economic substance doctrine.
  • The definition in the common law cases is adopted, but both aspects of the conjunctive test must be met – economic substance and business purpose must exist.

• Basic structure planning decisions can continue to be made:
  • Capitalizing a business enterprise with debt or equity
  • Using a foreign corporation rather than a domestic corporation
  • Adopting a tax-free corporate organization or reorganization rather than a sale
  • Allowing transactions between related parties to be respected when carried out under arm’s length terms
Transactions Lacking Economic Substance

- Code § 7701(o) codifies rules for applying the economic substance doctrine.
  - If profit potential is relied on to demonstrate economic substance, an objective test must be met:
    - The present value of expected pre-tax profit must exceed the present value of net tax benefits.
    - Fees, transactions costs, and under regulations to be drafted, foreign taxes, are treated as expenses.
  - Alternatives to profit potential:
    - The transaction must result in a meaningful change in the taxpayer’s economic position, or
    - The taxpayer has a substantial non-Federal-tax purpose for entering into such transaction.
Transactions Lacking Economic Substance

• Disclosure Mandate
  
  • A taxpayer participating in a transaction that does not meet the conjunctive test of economic substance faces a penalty with regard to the purported tax saving from the transaction.
    
    • If the transaction is not reported, the penalty is 40% of the disallowed reduction in tax.
    
    • If the transaction is reported, the penalty is 20%.
    
    • Reporting is effected on Form 8275 (Disclosure Statement).
European Mandatory Disclosures

- Proposal: June 21, 2017
- Content of disclosures: potentially aggressive tax planning
- Disclosure obligations on “intermediaries” (lawyers, accountants, bankers, etc.)
- Disclosure obligations may shift to taxpayer in certain circumstances
European Mandatory Disclosures

MNE (HQ)

E.U. Member State A

E.U. Member State B

NewCo (E.U. Sublicense Hub)

CaribNCo (IP Center)

Caribbean Island

Corporation tax rate: 0%

Country: “Major trade partner of the E.U.”

Royalty Payment

No WHT

Royalty Payment

Tax base eroded

No WHT
European Mandatory Disclosures

• Potentially aggressive tax plans:
  • Hallmark approach
  • Examples:
    • Plans that involve a cross-border payment to a recipient resident in a low/no-tax jurisdiction
    • Plans that involve a jurisdiction with inadequate or weakly enforced anti-money laundering legislation
    • Plans that are set up to avoid reporting income as required under E.U. transparency rules
    • Plans that circumvent E.U. information exchange requirements for tax rulings
    • Plans that have a direct correlation between the fee charged by the intermediary and the tax savings from the arrangement
    • Plans that result in depreciation deductions to be claimed on the same asset in more than one country
    • Plans that enable the same income to benefit from tax relief in more than one jurisdiction
    • Plans that do not respect E.U. or international transfer pricing guidelines
European Mandatory Disclosures

• Intermediaries subject to disclosure obligation:
  • if they designed, marketed, organized, or managed the transaction while providing tax-related services.
  • Must have a contact with the E.U.:
    • Incorporated in, and/or governed by the laws of, a Member State,
    • Resident, for tax purposes, in a Member State,
    • Registered with a professional association related to legal, taxation, or consultancy services in at least one Member State, or
    • Based in at least one Member State from where the person exercises their profession or provides legal, taxation, or consultancy services.
European Mandatory Disclosures

- Disclosure obligation shifts to taxpayer:
  - the intermediary is not able to disclose the information because of a privilege enjoyed by the taxpayer, such as the attorney-client privilege of confidentiality. In this case, the intermediary has the burden to inform the taxpayer of this shift;
  - the intermediary has no European presence;
  - the plan is designed in-house.
European Mandatory Disclosures

• Timing of Disclosure:

  • If the intermediary must report the plan, the reporting must be made within five days, beginning on the day after the plan becomes available to a taxpayer for implementation or the first step in a series of arrangements has been implemented.

  • If the reporting obligation is shifted to the taxpayer, the disclosure must occur within five days, beginning on the day after the reportable plan, or the first step in a series of arrangements, has been implemented.
European Mandatory Disclosures

- Timing of Disclosure:
  - Use of a standard form throughout the E.U.
  - Information:
    - The identification of intermediaries and taxpayers, which should include the name, country of tax residence, taxpayer identification number, and (where appropriate) persons associated with the intermediary or taxpayer
    - Details of the hallmarks that make the cross-border arrangement reportable
    - A summary of the content of the reportable cross-border arrangement, which should include a reference to the name by which the arrangement is commonly known and a description of the relevant business activities or arrangements, excluding (i) disclosure of a commercial, industrial, or professional secret, or of a commercial process or (ii) disclosure that is contrary to public policy
    - The date of implementation of the arrangement or the date of commencement of the first step in a series of such arrangements
    - The national tax provisions that enable the tax advantage
    - The value of the transaction
    - The other Member States that are affected by the plan
    - The names and identifying information of any person in another Member State that is likely to be affected by the reportable cross-border arrangement or series of such arrangements
European Mandatory Disclosures

• Timing for implementation:
  • Submission to the European Parliament and the European Council;
  • Planned entry into force: January 1, 2019;
  • Information exchanged every 3 months thereafter.
CONCLUSION
Conclusion

- Mandatory disclosure of aggressive tax plans should be anticipated for business transactions conducted within Western economic democracies.

- Governments are viewed as the principal beneficiaries.

- However, disclosure ensures that all plans – proper and abusive – have an equal opportunity of being reviewed.

- Ultimately, disclosure will place obligations on tax authorities to examine issues based on merit rather than relative tax amounts.

- For planners who manage facts to ensure the existence of economic substance, a tax examination based on issues is not a bad occurrence.
Important Notice

This presentation is not intended to be legal advice. Reading these materials does not create an attorney-client relationship. The outcome of each case stands on its own merits.
EUROPEAN COMMISSION PROPOSES NEW ADVISOR DISCLOSURE OBLIGATION FOR AGGRESSIVE TAX PLANNING

In the current context of tax transparency, fair and effective taxation, and global tax good governance, the European Commission (the “Commission”) recently pushed existing disclosure obligations one step further. On June 21, 2017, it published a proposal for a Council Directive (the “Proposal”) amending Directive 2011/16/EU dealing with automatic exchange of information in the field of taxation (the “Directive”).¹ The Proposal requires certain intermediaries, including tax lawyers, to report certain potentially aggressive tax arrangements.

The Proposal comes in the context of B.E.P.S. Action Plan 12 (Disclosure of Aggressive Tax Planning) and the fact that certain financial intermediaries and tax advisors – as revealed again by last year’s Panama Papers scandal – presumably assisted clients in hiding wealth in offshore jurisdictions.

In the press release announcing the proposal, the Commission’s Pierre Moscovici stated:²

We are continuing to ramp up our tax transparency agenda. Today, we are setting our sights on the professionals who promote tax abuse. Tax administrations should have the information they need to thwart aggressive tax planning schemes. Our proposal will provide more certainty for those intermediaries who respect the spirit and the letter of our laws and make life very difficult for those that do not. Our work for fairer taxation throughout Europe continues to advance.

Currently, E.U. Member States are not required to exchange information when they are made aware of tax avoidance or tax evasion plans. The Proposal aims at changing this by scrutinizing intermediaries (such as lawyers, accountants, and bankers) and requiring them to disclose potentially aggressive tax planning arrangements that contain a cross-border element. This disclosure would be done by a timely automatic exchange of information. According to the Commission, only uniform action would provide the appropriate level of disclosure to prevent abusive tax planning involving intermediaries. Consequently, the scope of existing automatic exchange of information between tax authorities must be extended.

At the E.U. level, Ireland, Portugal, and the U.K. already have mandatory disclosure rules in place.

In an attempt to keep compliance costs as low as possible, only the minimum necessary framework for disclosure will be established. The Commission cites the

---

¹ Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.
following examples:

- The rules set out clear reporting responsibilities to avoid double reporting.
- The common rules are limited to addressing potentially aggressive tax planning schemes with a cross-border element within the E.U.
- There will be no publication requirement of the reported tax schemes, only automatic exchange between Member States.
- Penalties for non-compliance will be established under the provisions that implement the Directive into national law and will remain under the sovereign control of Member States.

Member States will retain jurisdiction to decide how to pursue cases of illegitimate arrangements, but the exchange of information will be automatic. The first reports would be due by March 31, 2019.

**POTENTIALLY AGGRESSIVE TAX PLANS**

Since tax planning evolves, the Commission chose not to define what constitutes a potentially aggressive tax arrangement. Instead, it identified certain hallmarks of potentially aggressive tax plans. These hallmarks describe aspects of transactions that present a strong indication of tax avoidance or abuse. If a hallmark exists, the plan must be reported to the tax authorities.

Annex IV lists five types of hallmarks (with the two first only taken into consideration if the plan meets the “main benefit test” discussed below):

- **Generic Hallmarks.** These hallmarks include (i) arrangements entered into to take advantage of confidentiality; (ii) arrangements under which intermediaries are entitled to a fee linked to the tax advantage provided for by the arrangement, or to the absence thereof; and (iii) arrangements that are based on the use of standardized forms that need not be adapted to every single taxpayer.

- **Specific Hallmarks Which May Be Linked to the Main Benefit Test.** These include (i) arrangements triggering the use of losses, (ii) arrangements converting the nature of an income flow from ordinary to another low-taxed category, and (iii) certain circular transactions that result in offsetting certain income flows.

- **Specific Hallmarks Related to Cross-Border Transactions.** These hallmarks include (i) arrangements that entail a deductible payment made to a recipient that will not be taxed on receipt, (ii) depreciation deductions taken in

---

3 Proposed new article 25a of the Directive.
4 New Article 8aaa.4 added to Section II of Chapter II of the Directive.
5 Article 1(b) of the Proposal, as amending Article 3 point 19 of the Directive.
6 Article 1(b) of the Proposal, as amending Article 3 point 20 of the Directive.
7 Annex IV (A) of the Proposal.
8 Annex IV (B) of the Proposal.
more than one jurisdiction on the same asset, (iii) items of income for which
more than one taxpayer can claim double-taxation relief, and (iv) arrange-
ments containing transfers of assets to other jurisdictions that reduce the
amount payable in consideration of the assets.9

- **Specific Hallmarks Concerning Automatic Exchange of Information
  Agreements in the E.U.** This category targets arrangements circumventing
  automatic exchanges of information, resulting in unreported income in the
taxpayer’s country of residence.10

- **Specific Hallmarks Concerning Transfer Pricing.** These include arrange-
  ments that do not conform to the arm’s length principle or the O.E.C.D.’s
  transfer pricing guidelines. They also include arrangements that fall within
  the scope of existing automatic exchange of information provisions concern-
  ing advance cross-border rulings but that are not reported or exchanged.11

The “generic hallmarks” and the “specific hallmarks which may be linked to the main
benefit test” are taken into account only when the main benefit of an arrangement is
to obtain a tax advantage (the “main benefit test”). This occurs:

*** if it can be established that the advantage is the outcome which
one may expect to derive from such an arrangement, or series of
arrangements, including through taking advantage of the specific
way that the arrangement or series of arrangements are structured.

Plans that exemplify the various hallmarks include the following:12

- Plans that involve a cross-border payment to a recipient resident in a no-tax
  jurisdiction
- Plans that involve a jurisdiction with inadequate or weakly enforced anti-mon-
  ey laundering legislation
- Plans that are set up to avoid reporting income as required under E.U. trans-
  parency rules
- Plans that circumvent E.U. information exchange requirements for tax rulings
- Plans that have a direct correlation between the fee charged by the interme-
  diary and the tax savings from the arrangement
- Plans that result in depreciation deductions to be claimed on the same asset
  in more than one country
- Plans that enable the same income to benefit from tax relief in more than one
  jurisdiction
- Plans that do not respect E.U. or international transfer pricing guidelines

---

9 Annex IV (C) of the Proposal.
10 Annex IV (D) of the Proposal.
11 Annex IV (E) of the Proposal.
12 European Commission, “Questions and Answers on New Tax Transparency
INTERMEDIARIES AND DISCLOSURE

Intermediaries are responsible for reporting a potentially aggressive plan, if they designed, marketed, organized, or managed the transaction while providing tax-related services. In addition, in order to be an “intermediary,” an advisor must have a contact with the E.U. This means that the advisor must meet at least one of the following criteria:\(^{13}\)

- Incorporated in, and/or governed by the laws of, a Member State
- Resident, for tax purposes, in a Member State
- Registered with a professional association related to legal, taxation, or consultancy services in at least one Member State
- Based in at least one Member State from where the person exercises their profession or provides legal, taxation, or consultancy services

Intermediaries can be individuals or legal entities, including entities that have no legal personality.

In certain circumstances, the obligation to report is shifted to the taxpayer. This will occur when (i) the intermediary is not able to disclose the information because of a privilege enjoyed by the taxpayer, such as the attorney-client privilege of confidentiality; (ii) the intermediary has no European presence; or (iii) the plan is designed in-house. In any such fact pattern, the disclosure obligation shifts to the taxpayer.\(^{14}\) When this shift occurs due to a privileged situation, the intermediary must inform the taxpayer of this shift in responsibility.\(^{15}\)

TIMING OF DISCLOSURE

In order to effectively deter implementation of aggressive tax plans, the disclosure obligation must be made at an early stage, ideally prior to implementation of a disclosed plan.

The required timing varies depending on who is subject to the disclosure obligation:

- If the intermediary must report the plan, the reporting must be made within five days, beginning on the day after the plan becomes available to a taxpayer for implementation or the first step in a series of arrangements has been implemented.\(^{16}\)

- If the reporting obligation is shifted to the taxpayer, the disclosure must occur within five days, beginning on the day after the reportable plan, or the first step in a series of arrangements, has been implemented.\(^{17}\)

\(^{13}\) Article 1(b) of the Proposal, as amending Article 3 point 21 of the Directive.

\(^{14}\) Proposed new Article 8aaa.2 added to Section II of Chapter II of the Directive.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) Id.

EXCHANGED INFORMATION

The disclosure will be made using the common communication network developed at the E.U. level. To ensure a standardized disclosure obligation throughout the E.U., a standard form would be created.\(^\text{18}\)

The items of information that are expected to be exchanged include the following:\(^\text{19}\)

- The identification of intermediaries and taxpayers, which should include the name, country of tax residence, taxpayer identification number, and (where appropriate) persons associated with the intermediary or taxpayer
- Details of the hallmarks that make the cross-border arrangement reportable
- A summary of the content of the reportable cross-border arrangement, which should include a reference to the name by which the arrangement is commonly known and a description of the relevant business activities or arrangements, excluding (i) disclosure of a commercial, industrial, or professional secret, or of a commercial process or (ii) disclosure that is contrary to public policy
- The date of implementation of the arrangement or the date of commencement of the first step in a series of such arrangements
- The national tax provisions that enable the tax advantage
- The value of the transaction
- The other Member States that are affected by the plan
- The names and identifying information of any person in another Member State that is likely to be affected by the reportable cross-border arrangement or series of such arrangements

CONCLUSION

Sophisticated corporations understand that a business transaction originating in the tax department or at a meeting with outside tax advisors can suffer from the appearance of an absence of economic substance, as the steps are laid out by tax advisors and not business people. The Proposal adopts that approach.

In principle, it is one thing to give tax advice regarding a plan that is taking place for operational reasons and another for a tax advisor to orchestrate the entire transaction. In practice, no one yet knows where the line will be drawn between an aggressive tax plan and an acceptable tax plan where the advice explains two choices for implementation: one that yields higher taxes and one that achieves greater tax savings.


\(^{19}\) Proposed new Article 8aaa.6 added to Section II of Chapter II of the Directive.

Disclaimer: This article has been prepared for informational purposes only and is not intended to constitute advertising or solicitation and should not be relied upon, used, or taken as legal advice. Reading these materials does not create an attorney-client relationship.
Shine a Light and Stop Tax Abuse:
Disclosure Obligations in the U.S. For Taxpayers, Advisors, and Facilitators

by

Stanley C. Ruchelman¹

¹ Mr. Ruchelman is Chair of Ruchelman P.L.L.C., a law firm based in New York City. His practice focuses on tax planning for transnational business operations, with emphasis on intercompany transactions. Mr. Ruchelman has authored numerous monographs on international taxation for a variety of publications and treatises and is a frequent lecturer at conferences sponsored by, *inter alia*, the Practising Law Institute, New York University Tax Institute, the American Bar Association, the International Bar Association, and the International Fiscal Association. He served as Chair of the Committee on U.S. Activities of Foreign Taxpayers and Treaties of the Section on Taxation of the American Bar Association and served on the National Council of the USA Branch of IFA.
# TABLE OF CONTENTS

1. Introduction .......................................................................................................................... 1

2. Reportable Transactions .................................................................................................... 2
   a. Background .................................................................................................................... 2
   b. Reportable Transactions Defined ............................................................................... 2
      i. Listed Transactions .................................................................................................. 2
      ii. Confidential Transactions .................................................................................. 3
      iii. Transactions with Contractual Protection ......................................................... 3
      iv. Substantial Loss Transactions ........................................................................... 3
      v. Transactions Identified as Being of Interest to the I.R.S. .................................... 3
   c. Reporting Obligation of Taxpayer .............................................................................. 4
   d. Retention of Documents ............................................................................................. 4
   e. Taxpayer Penalties ....................................................................................................... 5
   f. Obligations of Material Advisors ............................................................................... 6
      i. Material Advisor Defined ....................................................................................... 6
      ii. Disclosure Obligations of Material Advisors ....................................................... 7
      iii. Record Retention by Material Advisors .............................................................. 7
      iv. Penalties for Noncompliant Material Advisors .................................................. 9
   g. Penalties for Abusive Tax Shelter Promoters ............................................................. 10
   h. Participating Tax-Exempt Entities ............................................................................. 11
      i. Excise Taxes ........................................................................................................... 11
      ii. Disclosure ............................................................................................................... 12

3. Schedule UTP ..................................................................................................................... 12
   a. Background ................................................................................................................ 12
   b. Financial Accounting Conceptual Background ....................................................... 13
      i. SFAS 109 (Accounting for Income Taxes) .......................................................... 13
      ii. FIN 48 (Accounting for Uncertainty in Income Taxes) ...................................... 14
   c. Arthur Young & Co. Case ......................................................................................... 16
d. Announcement 2002-63 ........................................................................................................ 17

e. Textron Case ................................................................................................................... 17

f. Schedule UTP Reporting Uncertain Tax Positions ......................................................... 20

4. Codification of Economic Substance .............................................................................. 23
   a. Background .................................................................................................................... 23
   b. Code §7701(o) .............................................................................................................. 25
   c. Penalty for Transactions Without Economic Substance/Disclosure ......................... 26

5. Conclusion ....................................................................................................................... 26

APPENDICES

Appendix I:
Recognized Abusive and Listed Transactions ................................................................. 27

Appendix II:
Form 8886 (Reportable Transaction Disclosure Statement) .............................................. 34

Appendix III:
Form 8918 (Material Advisor Disclosure Statement) ..................................................... 43

Appendix IV:
Form 8886-T (Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction) ...... 51

Appendix V:
FAS 109 Contingency Reserve Examples ........................................................................ 56

Appendix VI:
FIN 48 Implications – LB&I Field Examiners’ Guide ...................................................... 61

Appendix VII:
Schedule UTP and Instructions .......................................................................................... 69

Appendix VIII:
Form 8275 (Disclosure Statement) .................................................................................. 78
1. **Introduction**

Earlier this year, the European Commission (the “Commission”) published a proposal for a Council Directive (the “Proposal”) amending Directive 2011/16/EU dealing with automatic exchanges of information in the field of taxation (the “Directive”). The Proposal requires certain intermediaries, including tax lawyers, to report certain potentially aggressive tax arrangements. The Proposal reflects B.E.P.S. Action Plan 12 (Disclosure of Aggressive Tax Planning) and the fact that certain financial intermediaries and tax advisors have assisted clients in hiding wealth through abusive schemes that have involved companies based in low tax, offshore jurisdictions that serve as the resting place for transaction proceeds.

Pierre Moscovici, the Commissioner for Economic and Financial Affairs, Taxation, and Customs, was quoted in a press release that stated the following:

> We are continuing to ramp up our tax transparency agenda. Today, we are setting our sights on the professionals who promote tax abuse. Tax administrations should have the information they need to thwart aggressive tax planning schemes. Our proposal will provide more certainty for those intermediaries who respect the spirit and the letter of our laws and make life very difficult for those that do not. Our work for fairer taxation throughout Europe continues to advance.

Currently, E.U. Member States are not required to exchange information when they are made aware of tax avoidance or tax evasion plans. Only three countries impose obligations on tax advisors to alert local tax authorities of abusive plans – Ireland, Portugal, and the U.K. The Proposal aims at changing this by scrutinizing intermediaries, such as lawyers, accountants, and bankers, and requiring them to disclose potentially aggressive tax planning arrangements that contain a cross-border element. Disclosure would be achieved through a timely automatic exchange of information. According to the Commission, only uniform action would provide the appropriate level of disclosure to prevent abusive tax planning involving intermediaries.

The type of disclosure that is being introduced in Europe has been in effect for many years in the U.S. It is found in statutory law and I.R.S. regulations. The disclosure is directed at three separate areas of aggressive or potentially aggressive tax planning:

- **Abusive tax shelters.** Taxpayers, promoters, certain facilitating parties, and material advisors have obligations to disclose participation in abusive tax shelters and those reporting obligations are incentivized through a series of substantial penalties.

- **Tax accrual workpapers.** The analysis of the sufficiency of a corporation’s reserve for taxes performed by a corporation’s independent audit firm can be the subject of an I.R.S. subpoena, and in any event, serves as the basis for the corporation’s disclosure to the I.R.S. of uncertain tax positions.

- **Transactions that fail to meet the economic substance requirements of U.S. tax law.** Relatively harsh penalties can be reduced, but not eliminated, by disclosure on an income tax return.

---

2 Mr. Ruchelman acknowledges the contribution of Sheryl Shah, whose research aided in the preparation of this article.
This paper addresses each of the three areas with the goal of explaining the level of detail that is required in the various disclosures.

2. **Reportable Transactions**
   
   a. **Background**

   At a surface level reading, Code §6011(a)\(^3\) is a relatively innocuous provision of U.S. tax law. It provides as follows:

   
   When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

   From this grant of authority and other specific provisions of U.S. tax law, the I.R.S. fashioned a far-reaching set of regulations that impose information reporting obligations on taxpayers that participate in reportable transactions.\(^4\) It is part of a web designed to catch, impose tax, and penalize those involved in abusive tax shelters if the I.R.S. is not informed of various aspects of the tax shelter transaction. Those caught include the taxpayer, the promoter, the material advisor, and tax-exempt entities that often are accommodation parties for abusive tax shelter transactions.

   Under the regulations, every taxpayer participating in a reportable transaction and who is required to file a tax return must file a disclosure statement in the form prescribed.

   b. **Reportable Transactions Defined**

   Regarding the obligations of the taxpayer entering the transaction, five categories of reportable transactions currently exist and a sixth is covered in proposed regulations that are not yet effective. These are (i) listed transactions, (ii) confidential transactions, (iii) transactions with contractual protection, (iv) substantial loss transactions, and (v) transactions identified as being of interest to the I.R.S. The sixth category covers patented transactions. Under revisions to U.S. patent law, tax planning arrangements are no longer patentable.

   i. **Listed Transactions**

   A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that has been determined to be a tax avoidance transaction by the I.R.S. and has been identified as such by notice, regulation, or other form of published guidance. Appendix I lists 36 transactions that have been identified by the I.R.S.

   The Office of Tax Shelter Analysis is part of the Large Business & International ("L.B.&I.") Division. It collects and analyzes information about abusive tax shelters and transactions, and coordinates L.B.&I.’s tax shelter operation. It has developed a comprehensive strategy to identify and deter the participation in and promotion of abusive tax transactions through audits, summons enforcement,

---

3 All statutory references are to the Internal Revenue Code of 1986 ("Code") as in effect at the time, unless otherwise stated.

4 Treas. Reg. § 1.6011-4.
litigation, and alternative methods. It also publishes taxpayer guidance on abusive transactions and tax shelters. It maintains an abusive tax shelter hotline that people can use to provide information (anonymously, if preferred) about abusive tax shelter transactions.

ii. Confidential Transactions

A confidential transaction is a transaction (i) that is offered to a taxpayer under conditions of confidentiality for the benefit of the advisor and (ii) for which the taxpayer has paid an advisor a fee that is equal to or greater than a specified amount.

Confidentiality will exist if the advisor places a limitation on disclosure by the taxpayer of the tax treatment or tax structure implementing the transaction and the limitation on disclosure protects the confidentiality of the advisor’s tax strategies. A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure, if the advisor confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

The size of the fee that triggers application of the provision depends on the status of the client. If the client is a corporation, the triggering amount is $250,000. For all other clients, the triggering amount is $50,000. Note that if the client is a partnership or trust consisting exclusively of corporations, the triggering amount is $250,000. Fees include consideration in whatever form paid, whether in cash or in kind, for services to (i) analyze the transaction, whether or not related to the tax consequences of the transaction, (ii) implement the transaction, (iii) document the transaction, and (iv) prepare tax returns to the extent return preparation fees are unreasonable in light of the facts and circumstances. The fee need not be paid directly. A referral fee or fee-sharing arrangement is covered.

iii. Transactions with Contractual Protection

A transaction with contractual protection is a transaction for which the taxpayer has the right to a full or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained. The term also includes fees that are contingent on the taxpayer’s realization of tax benefits from the transaction. All the facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation. On the other hand, a transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

iv. Substantial Loss Transactions

Loss transactions are substantial if projected losses exceed a certain threshold. For corporations and partnerships exclusively consisting of corporations, the threshold is $10 million in a single taxable year or $20 million in any combination of years. For all other participants, the threshold is $2 million in a single taxable year or $4 million in any combination of years, or $50,000 in any single taxable year when the loss arises from currency transactions.

v. Transactions Identified as Being of Interest to the I.R.S.

A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the I.R.S. has identified by notice, regulation, or other form of published guidance as a transaction of interest. Typically, the transaction is identified as having the potential for tax avoidance or evasion, but the Office of Tax Shelter Analysis has not developed sufficient information to make a conclusive determination. In other words, a transaction that is of interest to the I.R.S. is
looked at as a precursor to a listed transaction. For that reason, the I.R.S. demands information from participants and material advisors. One recent example involves micro-captive insurance companies. In the identified transaction, a taxpayer attempts to reduce taxable income by using contracts that the parties treat as insurance contracts. The insurance company is related to the taxpayer and is treated as a captive insurance company. The taxpayer is the insured entity under the contract. It claims deductions for premiums paid to obtain insurance coverage. The captive insurance company elects under Code §831(b) to be taxed on investment income only. As a result, up to $1.2 million of premium payments from shareholder/insureds are excluded from income under the purported insurance contracts. The exclusion is increased to $2.2 million for years beginning after 2016, and that increased amount is adjusted annually to reflect inflation. As a result, the exclusion is now capped at $2.25 million. Typical in these arrangements is the continuation of risk insurance with commercial insurance companies at significantly lower premium payments, limited actual risk coverage retained by the captive, and follow-up financing by the captive or the shareholder/insureds or related parties. The I.R.S. believes that the manner in which the contracts are interpreted, administered, and applied are often inconsistent with arm’s length transactions. Consequently, similar, but not identical, transactions involving micro-captives were identified in News Release IR–2016–25 as abusive. However, the I.R.S. has not developed sufficient information to identify which of the arrangements should be identified specifically as tax avoidance transactions. For that reason, these transactions are identified for the time being as of interest to the I.R.S.

c. Reporting Obligation of Taxpayer

A disclosure statement is made by submitting a completed Form 8886 (Reportable Transaction Disclosure Statement). A copy of Form 8866 appears in Appendix II. To be considered complete, the information provided on the form must describe the expected tax treatment and all potential tax benefits expected to result from the transaction, describe any tax result protection, if any, with respect to the transaction, and identify and describe the transaction in sufficient detail for the I.R.S. to be able to understand the tax structure of the reportable transaction and the identity of all parties involved in the transaction. If the form is not completed in accordance with these rules and the instructions to the form, the taxpayer will not be considered to have complied with the reporting obligations for reportable transactions. An incomplete Form 8886 containing a statement that information will be provided upon request is not considered a complete disclosure statement.

The disclosure statement for a reportable transaction must be attached to the taxpayer’s tax return for each taxable year for which a taxpayer participates in a reportable transaction. In addition, a disclosure statement for a reportable transaction must be attached to each amended return that reflects a taxpayer’s participation in a reportable transaction. A copy of the disclosure statement must be sent to Office of Tax Shelter Analysis at the same time that any disclosure statement is first filed by the taxpayer pertaining to a particular reportable transaction. If a reportable transaction results in a loss which is carried back to a prior year, the disclosure statement for the reportable transaction must be attached to the taxpayer’s application for tentative refund or amended tax return for that prior year.

If a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer’s tax return but before the end of the period of limitations for assessment of tax, a disclosure statement must be filed even if the taxpayer did not participate in the transaction in the year the transaction first became a listed transaction or a transaction of interest. The filing is made with the Office of Tax Shelter Analysis.

d. Retention of Documents

A taxpayer must retain a copy of all documents related to a reportable transaction that are material to an understanding of the tax treatment or tax structure of the transaction. The documents must be
retained until the expiration of the statute of limitations applicable to the final taxable year for which disclosure is required. This retention rule is in addition to any document retention requirements under Code §6001, related to general business operations. Documents covered by this retention rule include (i) marketing material related to the transaction, (ii) written analyses used in decision-making related to the transaction, (iii) correspondence and agreements that relate to the transaction that take place between the taxpayer and any advisor, lender, or other party to the reportable transaction, (iv) documents discussing, referring to, or demonstrating the purported tax benefits arising from the reportable transaction, and (v) documents, if any, referring to the business purposes for the reportable transaction.

A taxpayer is not required to retain early drafts of a document if the final document is retained and it contains all information in the earlier drafts that are material to an understanding of the purported tax treatment or tax structure of the transaction.

e. **Taxpayer Penalties**

Failure to properly report participation in a reportable transaction subjects the taxpayer to a penalty of 75% of the decrease in tax resulting from the participation, but not less than $10,000 for entities and $5,000 for individuals. The penalty generally is capped at $50,000 for most forms of reportable transactions ($10,000 for individuals). However, for participation in a listed transaction, the penalty is capped at $200,000 ($100,000 for individuals). More importantly, a penalty that is imposed by the I.R.S. is not subject to judicial review before it is assessed.

If the participant in a reportable transaction is a corporation with publicly-traded shares, penalties imposed for failing to disclose participation in a reportable transaction must be disclosed in reports filed with the S.E.C.

For penalties other than listed transactions, the penalty may be rescinded, provided that rescission would promote compliance and the requirements of effective tax administration. A permanent record must be kept by the I.R.S. of the facts, the reasons for the rescission, and the amount involved. In determining whether rescission would promote compliance, the I.R.S. may take into account the following list of factors that weigh in favor of granting rescission:

- The taxpayer, upon becoming aware that it failed, in whole or in part, to disclose a reportable transaction, filed a complete and proper, albeit untimely, Form 8886, and did so in a timely fashion. If the Form 8886 was not filed initially, the late filing of Form 8886 must be accompanied by an amended tax return on which the reason for filing an amended return is clearly given. The Form 8886 and the amended tax return must be filed prior to the first date of contact by the I.R.S. advising the taxpayer of a proposed tax examination.

- The statement must be sufficient to demonstrate that the late filing was due to an unintentional mistake of fact that existed despite the taxpayer’s reasonable attempts to ascertain the correct facts with respect to the transaction.

- The taxpayer has an established history of properly disclosing other reportable transactions and complying with other tax laws.

---

5 Code §6707A.
• The taxpayer demonstrates that the failure to include any information required to be disclosed arose from events that were beyond the taxpayer’s control.

• The taxpayer cooperates with the I.R.S. by providing timely information with respect to the reportable transaction.

• The assessment of the penalty weighs against equity and good conscience, including the consideration of whether the taxpayer can demonstrate that there was reasonable cause for, and the taxpayer acted in good faith with respect to, the failure to timely file or to include on any return any information required to be disclosed under Code §6011. An important factor in determining reasonable cause and good faith is the extent of the taxpayer’s efforts to ensure that persons who prepared the taxpayer’s return were informed of the taxpayer’s participation in the reportable transactions.

The absence of facts establishing one or more of the above described factors weighs against granting rescission, but the absence of any one particular factor will not necessarily be determinative.

   f. Obligations of Material Advisors

   i. Material Advisor Defined

A person becomes a material advisor in relation to a reportable transaction upon the existence of the following three events:

• The person provides material aid, assistance or advice. These services must relate to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derive gross income in excess of a specified threshold.

• The person directly or indirectly derives gross income in excess of a specified threshold. The threshold is $50,000 of gross income where individuals are beneficiaries of substantially all of the tax benefits. That will occur if at least 70% of the tax benefits inure to individuals, directly or through pass-thru entities such as partnerships, L.L.C.’s, trusts, or S-corporations. In all other instances, the threshold is $250,000. If the transactions are listed transactions or transactions of interest, the foregoing thresholds are reduced to $10,000 and $25,000. In determining whether the threshold is met, all fees for tax strategy, services, advice (whether or not tax advice), or for the implementation of a reportable transaction are taken into account. The fees need not be paid in cash and need not be made directly to the provider of the services as long as an indirect benefit is obtained.

• The transaction is entered into by the taxpayer to whom a tax statement was provided. A tax statement is any statement that relates to a tax aspect of a transaction that causes the transaction to be reportable. It may be reportable because the transaction is a confidential transaction, a transaction with contractual protection with regard to fees, or a substantial loss transaction.

__________________________

6 Code §6111.
ii. Disclosure Obligations of Material Advisors

Material advisors to promoters of reportable transactions have an obligation to report the transaction to the I.R.S. Disclosure is made on Form 8918 (Material Advisor Disclosure Statement). A copy of the form appears in Appendix III. To be considered complete, the form must (i) describe the expected tax treatment and all potential tax benefits expected to result from the transaction, (ii) describe any contractual protection with respect to the transaction, and (iii) identify and describe the transaction in sufficient detail for the I.R.S. to understand the tax structure of the reportable transaction and the identity of all other material advisors, if any, with respect to the transaction. An incomplete form containing a statement that information will be provided upon request is not considered a complete disclosure statement. If information is missing from the form, the material advisor will not be considered to have complied with the disclosure requirements of Code §6111.

If more than one material advisor is required to disclose a reportable transaction, a single material advisor may be designated in a written agreement signed by all to disclose the transaction on behalf of the participating material advisors. If a potential material advisor is uncertain whether a transaction must be disclosed, the advisor may fully disclose the transaction on a protective basis. Alternatively, a potential material advisor may request a ruling on the status of a transaction as a reportable transaction.

The material advisor's disclosure statement for a reportable transaction must be filed with the Office of Tax Shelter Analysis by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the reportable transaction. If an amended disclosure is required, it must be filed by the last day of the month that follows the end of the calendar quarter in which circumstances occurred that trigger the need to file an amended disclosure statement.

Once Form 8918 is submitted, the I.R.S. issues a material advisor a reportable transaction number with respect to the disclosed reportable transaction. Receipt of a reportable transaction number does not indicate that the disclosure statement is complete, nor does it indicate that the transaction has been reviewed, examined, or approved by the I.R.S. Material advisors must provide the reportable transaction number on a timely basis to all taxpayers and material advisors for whom the material advisor acts. A timely basis is 60 days from the date of mailing of the reportable transaction number by the I.R.S.

iii. Record Retention by Material Advisors

Material Advisors are required to maintain records identifying each person for whom they acted as a material advisor and that information must be made available to the I.R.S. upon written request. In general, a separate list must be prepared and maintained for each reportable transaction, although one list may be maintained for substantially similar transactions. A material advisor will have 30 calendar days from the date the list maintenance requirement first arises to prepare the list.

Each list must include three components:

- An itemized statement. The statement must contain the following information:
• 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 previously obtained

• The name, address, and tax identification number of each person required to be included on the list

• The date on which each person entered into each reportable transaction, if known by the material advisor

• The amount invested in each reportable transaction by each person on the list, if known by the material advisor

• A summary or schedule of the tax treatment that each person is intended or expected to derive from participation in each reportable transaction

• The name of each other material advisor to the transaction, if known by the material advisor

• A 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.

• Documents. For each reportable transaction, a material advisor must maintain copies of any additional written materials, including tax analyses or opinions, that are material to an understanding of the purported tax treatment or tax structure of the transaction and that have been shown or provided to any person who acquired or may acquire an interest in the transaction, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor. Earlier drafts of a document need not be maintained if the material advisor retains a copy of the final document that contains all the information in the earlier drafts.

Upon request by the I.R.S., each component of the list must be made available in a form that enables the I.R.S. to determine whether the response is complete and in accordance with record maintenance obligations and to do so without undue delay or difficulty. The list must be maintained even if the taxpayer asserts a claim of privilege with regard to the documents or descriptions related to the reportable event.

Each component of the list must be maintained in readily accessible form for seven years following the date on which the material advisor last made a tax statement relating to the transaction, or if earlier, the date the transaction was last entered into by a taxpayer. Where there are several material advisors, one such advisor may be designated by agreement to keep records for all. That designation agreement does not relieve all material advisors from their obligations to maintain the required list in the detail that is required under the regulations.
iv. **Penalties for Noncompliant Material Advisors**

Penalties are imposed on material advisors who fail to report the information required on Form 8918\(^8\) or who fail to maintain the required lists.

If the material advisor fails to timely file a full and complete Form 8918 related to a listed transaction, the penalty is the greater of $200,000 or 50% of the gross income derived by the material advisor. The upper limit of the penalty is increased to 75% of the material advisor’s gross income derived from the listed transaction if the failure is intentional. Failure to timely file a full and complete Form 8918 regarding other reportable transactions may subject a material advisor to a penalty of $50,000.

If the material advisor fails to make available to the I.R.S. information required to be retained under the record maintenance rules for reportable transactions, a penalty of $10,000 per day may be imposed for each day on which the failure continues after the twentieth business day following a request by the I.R.S. The 20-day period for a response begins on the first day following (i) the date of mailing by certified or registered mail, (ii) the date of hand delivery, or (iii) the date a request is left with an individual who is 18 years of age or older at the usual place of business of the material advisor. Upon a showing of good cause, the 20-day period may be extended. Illustrations of good cause provided in regulations suggest that, as a starting point, a material advisor must have in place robust compliance procedures involving record maintenance procedures for reportable transactions, including the appointment of a compliance officer and the training of professional staff.\(^9\)

The penalty will not be imposed if reasonable cause exists for each day on which the material advisor failed to make available the list. Factors establishing reasonable cause include the following facts and circumstances:

- **Good faith.** In principle, various factors may support the existence of a failure notwithstanding efforts at good faith compliance. Items looked at by the I.R.S. include the following:
  - The person’s efforts to determine or assess its status as a material advisor
  - The person’s efforts to determine the information and documentation
  - The person’s efforts to meet his or her obligations to maintain a readily producible list
  - The person’s efforts, upon receiving the list request, to make the list available to the I.R.S. within the 20-day period
  - The person’s efforts to ensure that the list furnished to the I.R.S. is accurate and complete

- **Ordinary business care.** The exercise of ordinary business care may constitute reasonable cause. To illustrate, the material advisor may show that it established and adhered to procedures reasonably designed and implemented to ensure compliance with record maintenance rules. In all instances, a material advisor must show that it took immediate steps upon discovering any systems failure to institute effective corrective measures.

\(^8\) Code §6707.

\(^9\) Treas. Reg. §301.6708-1(c)(4).
• **Supervening events.** A person may establish reasonable cause if the failure to timely furnish the list was due solely to a supervening event beyond the person’s control. Events beyond a person’s control may include (i) fire, flood, storm, or other casualty, (ii) illness, (iii) theft, or (iv) another similarly unexpected event that damages or impairs the person’s relevant business records or system for processing and providing these records, or that affects the person’s ability to maintain the list or make it available to the I.R.S. Reasonable cause may be established only for the period that a person who exercised ordinary business care would need to provide the list from alternative records.

• **Reliance on opinion or advice.** A material advisor may rely on an independent tax professional’s advice to establish reasonable cause. The reliance, however, must be reasonable and in good faith, in light of all the other facts and circumstances. The advice must have been received by the person before the date the list is required to be made available to the I.R.S. Reliance on advice will be considered reasonable only if the independent tax professional reasonably believed that it was more likely than not correct that the material advisor did not have an obligation to maintain records and make them available to the I.R.S. To illustrate, advice that could be reasonably relied upon may conclude that (i) the person is not a material advisor, (ii) the transaction is not a reportable transaction for which a list was required to be maintained as of the date of the advice, (iii) the information and documents to be produced constitute the required list, or (iv) the information or documents withheld by the person are not required to be produced. The advice must also take into account and consider all relevant facts and circumstances, not rely on unreasonable legal or factual assumptions, not rely on or take into account the possibility that a list request may not be made, and not rely on unreasonable representations or statements of the person seeking the advice.

  **g. Penalties for Abusive Tax Shelter Promoters**

The hallmarks of an abusive tax shelter typically involve (i) a disconnect between the actual tax benefit that may reasonably be expected from the underlying transaction and the claims of the promoter or sales personnel, and (ii) the use of a materially inflated valuation in order to maximize tax benefits. U.S. tax law\(^\text{10}\) penalizes promoters and sales personnel with significant penalties that may be assessed without providing access to judicial review in the Tax Court. Review comes at the time collection proceedings are challenged in court with regard to the asserted penalties.

For the penalty to be imposed, there must be an identified bad actor and an identified bad act. The bad actor typically is referred to as the “promoter.” A promoter is a person who (i) organizes or assists in organizing a partnership or other entity or a plan or arrangement or (ii) participates directly or indirectly in the sale of any interest in the entity or plan.

The bad act involves either a bad statement or a bad valuation. A statement is a bad statement if (i) it refers to purported tax benefits that result from holding an interest in the entity or from participating in the plan or arrangement, and (ii) it is made with knowledge or reason to know that the statement is false or fraudulent as to any material matter regarding the purported benefit. The purported benefits may relate to (i) the allowability of any deduction or credit, (ii) the excludability of any income, or (iii) the securing of any other tax benefit. The person may furnish the statement personally or may cause another to furnish the statement.

\(^{10}\) Code §6700.
The valuation is a bad valuation if it contains a gross valuation overstatement as to any material matter. The term "gross valuation overstatement" means any statement as to the value of any property or services when the value exceeds 200% percent of the amount determined to be the correct valuation.

Separate penalty regimes are provided for (i) lower paid bad actors and (ii) those who are involved with fraudulent statements and are highly compensated. For lower paid persons, the penalty is $1,000 for each entity or plan. This penalty is capped at 100% of the gross income derived from that entity or plan. Presumably, that amount is less than $1,000. For highly-compensated bad actors involved with fraudulent statements, the penalty is equal to 50% of the gross income derived from the plan or entity.

h. Participating Tax-Exempt Entities

Because many abusive tax shelters disaggregate taxable income and gain from cash flow, it is not unusual that a tax-disinterested party is a necessary participant in a transaction in order for the tax shelter plan to provide the required benefits to investors. A tax disinterested party is an entity that will not be taxed on gains that have been separated from cash flow. In some instances, the tax disinterested party is a special purpose vehicle that is established by a financial institution. It also can be a tax-exempt entity such as a pension fund or a not-for-profit enterprise that is formed for charitable purposes and has a need for funding.

i. Excise Taxes

An excise tax\textsuperscript{11} is imposed on certain tax-exempt entities that are parties to prohibited tax shelter transactions. These are listed transactions and prohibited reportable transactions. Prohibited reportable transactions are confidential transactions and transactions with contractual protection, discussed above. Tax-exempt entities at risk for the excise tax include (i) entities organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, (ii) labor organizations, (iii) business leagues, (iv) fraternal societies, (v) religious and apostolic organizations, (vi) the states of the U.S. and their political subdivisions, (vii) U.S. possessions, and (viii) pension arrangements of various kinds. For any of these tax-exempt entities to be a party to a listed transaction or a prohibited reportable transaction, it must be found to have facilitated the transaction by reason of its tax-exempt, tax indifferent, or tax-favored status.

The excise tax is computed by applying the highest rate of tax imposed on corporations to the net income of the entity that is derived from its participation, or if greater, applied to 75% of the proceeds received by the entity from its participation. If the tax-exempt entity knowingly participates in a prohibited tax shelter transaction, the tax is equal to all of the net income received by the entity from its participation, or if greater, the tax is equal to 75% of the proceeds received by the entity from its participation.

Entity managers also are subject to an excise tax for knowingly approving participation in a bad transaction. For managers of tax-exempt entities specified above other than a pension arrangement, it is the person who (i) has the authority or responsibility similar to that exercised by an officer, director, or trustee of an organization, and (ii) exercises that authority in favor of participation in the tax shelter. For pension arrangements, the entity manager is the person who approves or otherwise causes the

\textsuperscript{11} Code §4965.
entity to be a party to a prohibited tax shelter transaction. If the pension arrangement is a self-direct plan, the entity manager is the plan participant.

The excise tax is $20,000 for each approval or other act causing participation.

ii. Disclosure

Every tax-exempt entity that participates in a prohibited tax shelter transaction must disclose its participation to the I.R.S. In addition, it must disclose the identity of any other party to the transaction that is known to the entity. The disclosure is made on Form 8886-T (Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction). Disclosure must be made no later than May 15 following the close of the relevant taxable year. A copy of Form 8886-T appears in Appendix IV.

Failure to meet the disclosure obligation can result in the imposition of a penalty on the entity. The penalty is $100 per day during which the failure continues. The maximum penalty is $50,000. If the I.R.S. makes a demand for information and the tax-exempt entity fails to comply, the entity and its manager may be penalized. The penalty is $100 per day and the maximum penalty on the entity and its managers is $10,000 for each disclosure that is not made.

3. Schedule UTP

a. Background

Sophisticated tax planning allows taxpayers to take advantage of existing tax rules. These tax plans typically are well thought-out and properly implemented. Aggressive transactions designed simply to reduce taxes — often referred to as tax shelters, meaning transactions that generate losses with little or no economic substance or business purpose — have been peddled to taxpayers who then attempt to claim benefits on tax returns. These tax plans simply focus on tax-saving opportunities and assume that the losses will not be challenged.

I.R.S. audits are administrative examinations to determine whether a taxpayer has correctly calculated tax liability when preparing a tax return. When the taxpayer is a large multinational, the I.R.S. audit involves a significant investment by the I.R.S. in terms of staffing and resources. The examination portion of the audit may involve the issuance of information document requests and possibly follow-up summonses that are intended to obtain data to test whether the taxpayer’s claimed positions are justified as to intent, business purpose, and economic substance.

U.S.-based multinationals have sophisticated tax lawyers on staff. They also retain sophisticated outside tax advisors. At the close of the year, the books and records of a multinational enterprise are audited by major accounting firms for the purpose of providing certification of the reported results. When the I.R.S. requests information regarding intent and business purpose for a specific transaction, taxpayer objections may be raised asserting that the requested documentation is protected by attorney-client privilege or under the work-product doctrine of privilege. The work-product doctrine states that a party may not discover documents and tangible things prepared in anticipation of litigation or trial by a party or its representative. The work product privilege does not cover material assembled

---

in the ordinary course of business or pursuant to public requirements that are unrelated to litigation or for other non-litigation purposes.\textsuperscript{13}

A flash point for disclosure not covered by the work product doctrine is the tax provision analysis that forms part of the audit workpapers in support of a corporate taxpayer’s published financial statements. When prepared by the audit firm, the tax provision analysis represents an outside professional’s view regarding the expected tax exposure of a corporation in order to arrive at after-tax net profits. The analysis is designed to provide assurance that that the tax provision in the financial statement accurately portrays the financial condition of the company.

\textit{b. Financial Accounting Conceptual Background}

\textit{i. SFAS 109 (Accounting for Income Taxes)}

Financial accounting concepts of income recognition are not identical to U.S. tax accounting concepts. As a result, pre-tax income for financial accounting standards may not look anything like taxable income on a corporate tax return. The differences could result from differences in cost basis resulting from the computation of depreciation under two different sets of rules, or may reflect a mere difference in income or expense recognition rules.

To illustrate, assume an item of depreciable property is sold for a combination of cash and purchase money notes held by the seller calling for payment over time. For financial accounting purposes, all gain is recognized immediately upon the sale. That is the time when income or gain is more likely than not realized. For tax purposes, the recognition of gain may be deferred under rules applicable to an installment sale, where gain is recognized as payments are received. In addition, the amount of the gain may be measured differently. Typically, gain is the difference between sales price and depreciated cost basis. If the depreciation method for book purposes uses a longer useful life than the method for tax purposes, the annual depreciation in the early years of an asset’s useful life will be greater for tax purposes. This effect is reduced in later years. However, in the early years of a holding period, the basis will be lower and the sale will result in greater gain. If a risk exists regarding the likelihood that full payment of the installment notes will be received, the amount of the gain for financial statement purposes may be adjusted for a reserve that takes into account the risk of full and timely payments of the promissory notes issued by the purchaser. No such reserve is generally allowed for tax purposes, which defers the effect of a potential loss until the loss occurs.

These differences in accounting treatment must be taken into consideration when computing the tax expense reported for financial statement purposes. The tax shown on the income tax return for the year will be significantly less than the expense reported on the financial statement because of the installment method of accounting for income tax purposes. In addition, the tax is calculated based on the assumption that the note will be fully paid according to its terms. Only when a default occurs will the financial condition of the purchaser be recognized for tax purposes.

Because the full gain as measured for financial accounting purposes — but not for tax purposes — is recognized at the time of sale, the full amount of tax expense computed must be computed by reference to the statutory rates of tax then in effect. If the installment method of reporting gain is elected for tax purposes, the excess of the book expense over current tax liability is treated as a deferred tax liability; it is incurred at the time of the sale, but deferred until the period in which income is recognized for income tax purposes. The accounting entry for increases in liability accounts is a

credit. Consequently, the deferred tax account is credited for the expected amount of future tax. When tax is due in later years, the deferred tax account is reduced. The accounting entry for reductions in liability accounts is a debit or charge. Finally, if tax depreciation for the period of ownership exceeded financial statement depreciation – and is the reason for the higher cost basis in the property for financial statement purposes – the tax expense for financial statement purposes in those years likely exceeded the actual tax due on the tax return. As a result, a deferred tax asset would have been booked to reflect the excess expense that would be reversed over time. At the sale, the remaining deferred tax assets would be debited or charged.

ii. FIN 48 (Accounting for Uncertainty in Income Taxes)

The foregoing example related to the sale of property is a relatively straightforward fact pattern. The complexity increases when a loss or credit is derived from one transaction but is used immediately to reduce tax otherwise due on income from another transaction. The reduction in tax resulting from the validity of the loss is viewed as a tax position for financial statement purposes. Deciding whether the tax benefit from the loss is recognized and determining how much is recognized are accounting decisions made under the principles of FIN 48.

FIN 48 is an interpretation of SFAS 109 regarding the calculation and disclosure of reserves for uncertain tax positions. The evaluation of a tax position in accordance with FIN 48 is a two-step process. The first step relates to recognition of a benefit arising from a tax position. In this step, the company determines whether it is more likely than not that a tax position will be sustained based on the technical merits of the position upon conclusion of examinations, I.R.S. appeals procedures, and litigation processes. In evaluating whether a tax position has met the more-likely-than-not recognition threshold, the company presumes that the position will be examined by the appropriate taxing authority and that the examiner has full knowledge of all relevant information.

The second step in the evaluation process is measurement. A tax position that meets the more-likely-than-not recognition threshold is measured to determine the amount of benefit to recognize in the financial statements. The tax position is measured as the largest amount of tax benefit that is greater than 50% likely of being realized upon ultimate settlement.

Tax positions that previously failed to meet the more-likely-than-not recognition threshold should be recognized in the first subsequent financial reporting period in which any of the following occurs:

- The threshold is met, for example, by virtue of another taxpayer’s favorable court decision.
- The position is “effectively settled” by virtue of the closing of an examination where the likelihood of the taxing authority reopening the examination of that position is remote.
- The relevant statute of limitations expires.

The disclosure provisions of FIN 48 provide more information about uncertainty in income tax assets and liabilities. Besides requiring a company to accrue interest and penalties where warranted in the financial statements with respect to unrecognized tax benefits, the following disclosures are required:

- A tabular reconciliation of the total amounts of unrecognized tax benefits at the beginning and end of the period, which shall, at a minimum, include the following:
  - The gross amounts of the increases and decreases in unrecognized tax benefits resulting from tax positions taken during a prior period
  - The gross amounts of increases and decreases in unrecognized tax benefits as a result of tax positions taken during the current period
• The amounts of decreases in the unrecognized tax benefits relating to settlements with
taxing authorities

• Reductions to unrecognized tax benefits as a result of a lapse of the applicable statute
of limitations

• The total amount of unrecognized tax benefits that, if recognized, would affect the effective tax
rate

• The total amounts of interest and penalties recognized in the statement of operations and the
total amounts of interest and penalties recognized in the statement of financial position

• For positions for which it is reasonably possible that the total amounts of unrecognized tax
benefits will significantly increase or decrease within 12 months of the reporting date, the
disclosure must include the following:

  o The nature of the uncertainty

  o The nature of the event that could occur in the next 12 months that would cause the
  change

  o An estimate of the range of the reasonably possible change or a statement that an
  estimate of the range cannot be made

• A description of tax years that remain subject to examination by major tax jurisdictions

Only tax positions that meet the more-likely-than-not recognition threshold at the effective date may
be recognized or continue to be recognized upon adoption of FIN 48. The cumulative effect of applying
the provisions of FIN 48 is reported as an adjustment to the opening balance of retained earnings (or
other appropriate components of equity or net assets in the statement of financial position) for the year
of adoption, presented separately.

Recent examples of financial statement disclosures appear in Appendix V.

Under FIN 48, one occasion when the remaining benefits of uncertain tax positions can be fully and
finally recognized on U.S. G.A.A.P. financial statements is when a company determines that “effective
settlement” of the uncertain position has occurred. FIN 48 states as follows:

A company shall evaluate all of the following conditions when determining whether
effective settlement has occurred:

a. The taxing authority has completed its examination procedures including all
appeals and administrative reviews that the taxing authority is required and
expected to perform for the tax position.

b. The company does not intend to appeal or litigate any aspect of the tax position
included in the completed examination.

c. It is remote that the taxing authority would examine or reexamine any aspect of
the tax position. In making this assessment management shall consider the
taxing authority’s policy on reopening closed examinations and the specific
facts and circumstances of the tax position. Management shall presume the
relevant taxing authority has full knowledge of all relevant information in
making the assessment on whether the taxing authority would reopen a previously closed examination.

In the tax years under examination, a tax position does not need to be specifically reviewed or examined by the taxing authority to be considered effectively settled through examination. Effective settlement of a position subject to an examination does not result in effective settlement of similar or identical tax positions in periods that have not been examined.

In general terms, this means that when an I.R.S. examination is closed, there has been effective settlement of all uncertain tax positions for the examined year, whether such uncertainties are known to the I.R.S. and examined or not, so long as the conditions for effective settlement are present.

As an example, assume a taxpayer does not report dividend income on its tax return based on an ambiguous tax law. Furthermore, assume the position meets the requirements of FIN 48, and accordingly, the taxpayer creates a reserve for uncertain tax positions related to this item. The tax year is then audited by the I.R.S., but the I.R.S. does not propose an audit adjustment and closes the case. Assume also that the issue is not likely to meet any of the exceptions to the I.R.S. policy against reopening examinations. At this point in time, the examination is closed and the likelihood is remote that the I.R.S. will reopen an examination of the issue. Consequently, the taxpayer can reverse that contingent tax liability and record the tax benefit on its U.S. G.A.A.P. financial statements because the uncertainty is now effectively removed.

Another occasion when the remaining benefits of uncertain tax positions can be fully and finally recognized on U.S. G.A.A.P. financial statements is when the statute of limitations fully runs for the year and the uncertainty is terminated.

See Appendix VI for the I.R.S. view of FIN 48.

c. Arthur Young & Co. Case

In 1975, the I.R.S. began a routine examination to review Amerada Hess’s corporate income tax liability for the tax years 1972 through 1974. When the audit revealed that the company made questionable payments of $7,830 from a “special disbursement account,” the I.R.S. initiated a criminal investigation of Amerada’s tax returns in addition to the civil examination. In that process, the I.R.S. issued an administrative summons to Arthur Young & Co., pursuant to Code §7602 as in effect prior to the adoption of the Internal Revenue Code of 1986. The summons required Arthur Young to make available to the I.R.S. all its Amerada Hess files, including its tax accrual workpapers. The client instructed Arthur Young not to comply with the summons.

The I.R.S. commenced an action in Federal district court for enforcement of the summons. The district court found that Arthur Young's tax accrual workpapers were relevant to the I.R.S. investigation and refused to recognize an accountant-client privilege that would protect the workpapers.14 The Court of Appeals for the Second Circuit agreed that the tax accrual workpapers were relevant to the I.R.S. investigation, but held that the public interest in promoting full disclosure to public accountants, and in turn ensuring the integrity of the securities markets, required protection for the work that such

independent auditors perform for publicly-owned companies.\textsuperscript{15} The court of appeals fashioned a work-product immunity doctrine for tax accrual workpapers prepared by independent auditors in the course of compliance with Federal securities laws.

Ultimately, the Supreme Court held that the tax accrual workpapers were relevant to the I.R.S. audit and therefore discoverable.\textsuperscript{16} In addition, the Supreme Court found that no accountant-client privilege exists under Federal or state law. Unlike an attorney, whose role is to represent a client in the most favorable light possible, financial statement audit firms have a public responsibility to ensure that a company issuing publicly-traded stock accurately reports its financial accounts to the public. In substance, the Supreme Court acknowledged that financial statement auditors have a responsibility to users of financial statement information. This responsibility can create an adverse relationship between the company and its auditors.

d. Announcement 2002-63

Having won its case against Arthur Young, the I.R.S. understood that total and complete access to tax accrual workpapers would inhibit a full analysis by the outside accountants. Consequently, it scaled back its demands to see accountants’ tax accrual workpapers except in extraordinary circumstances. In Announcement 2002-63, the I.R.S. explained the circumstances in which tax accrual workpapers would be requested during the cause of an I.R.S. examination:

- Workpapers would be requested in the course of the examination of any return filed on or after July 1, 2002 claiming a tax benefit arising out of a listed transaction. If the listed transaction has been disclosed on the taxpayer’s tax return, the review will be limited to those workpapers related to the listed transaction. On the other hand, if the listed transaction has not been disclosed on a tax return, the I.R.S. will request all tax accrual workpapers.
- If the I.R.S. determines that tax benefits have been claimed from multiple investments in listed transactions, the I.R.S., as a discretionary matter, could request all tax accrual workpapers. It would not matter whether the listed transactions were disclosed on a tax return.
- If there are reported financial accounting irregularities requiring a restatement of the earnings of a taxpayer that reported an investment of a listed transaction, the I.R.S. could request all tax accrual workpapers as a discretionary matter.

e. Textron Case

In 2003, the I.R.S. began an audit of Textron’s tax return for 2001 and found that its subsidiary had participated in nine listed transactions that were potential tax shelters. In each of the nine instances, Textron purchased equipment from a foreign utility or transit operator and leased it back to the seller on the same day. The I.R.S. determined that these were sale-in, lease-out (“S.I.L.O.”) transactions.\textsuperscript{17}

\textsuperscript{15} \textit{U.S. v. Arthur Young & Co}, 677 F.2d 211 (2d Cir. 1982).


\textsuperscript{17} For an excellent discussion of a S.I.L.O. transaction, see Wood and Hollingworth, “SILOs and LILOs Demystified,” Tax Notes (October 11, 2010), p.195. The article reports that through March 12, 2004, when U.S. tax law was revised to eliminate the
which are listed as a potential tax shelter subject to abuse by taxpayers. The I.R.S. issued an administrative summons\textsuperscript{18} to obtain the books, papers, records, or any other data that may be relevant to the inquiry.\textsuperscript{19} Since Textron claimed benefits from multiple transactions, the I.R.S. sought all the workpapers for the years in question\textsuperscript{20} from both Textron and its outside auditors, Ernst & Young. Textron refused to hand over its workpapers and intervened in the summons served on Ernst & Young.

The I.R.S. brought an enforcement action in connection with the administrative summons. Textron claimed that the documents listed in the summonses were protected from disclosure under the attorney work-product doctrine. The main issue in the litigation was whether the documents being demanded were prepared routinely or in anticipation of litigation. In the latter case, the documents would be privileged.

The U.S. Federal District Court for the District of Rhode Island, which was the court of original jurisdiction, ruled that the work-product privilege was applicable.\textsuperscript{21} The decision was appealed by the I.R.S. to the First Circuit Court of Appeals.

The work-product doctrine offers protection for documents by or at the direction of an attorney that are prepared in anticipation of litigation or for trial by or for another party or its representative.\textsuperscript{22} A “because of” test is applied to determine whether a document is protected by the attorney work-product doctrine. A document is protected if, in light of the nature of the document and the facts of a particular case, the document can be said to have been prepared because of the prospect of litigation. Conversely, a document is not protected from disclosure if it is prepared in the ordinary course of

\begin{quote}
[A]ll accrual and other financial workpapers or documents created or assembled by the Taxpayer, an accountant for the Taxpayer, or the Taxpayer’s independent auditor relating to any tax reserve for current, deferred, and potential or contingent tax liabilities, however classified or reported on audited financial statements, and to any footnotes disclosing reserves or contingent liabilities on audited financial statements. They include, but are not limited to, any and all analyses, computations, opinions, notes, summaries, discussions, and other documents relating to such reserves and any footnotes.
\end{quote}


\textsuperscript{19} In pertinent part, the subpoena served on Textron demanded the following documents:


\textsuperscript{22} Fed. R. Civ. P. 26(b)(3)(A).
business or it would have been created in essentially similar form in the absence of the litigation. The
work-product doctrine applies in tax summons enforcement proceedings.  

Textron argued that the workpapers were prepared to ensure that a sufficient amount was set aside
in light of disputes that could arise with the I.R.S. The analysis of the tax positions in the return were
conducted by the company's legal counsel. Textron argued that the analysis was prepared to analyze
the risk exposure from potential litigation with the I.R.S. over the very tax shelters that were identified
and Textron's need to set aside reserves in the event the tax benefits were disallowed by the I.R.S.

The I.R.S. argued that the work-product privilege was lost because the workpapers also served
a business/regulatory purpose – the accuracy of the published financial statements. Textron needed to
prepare the same analysis to comply with the transparency rules applicable to capital markets in the
U.S. It also argued that Textron could not have anticipated litigation at the time the accrual workpapers
were prepared, and in any event, no specific litigation was identified by Textron. Finally, the I.R.S.
argued that an adversarial relationship existed between the taxpayer and its independent auditor, so
when the papers were shown to the audit firm, Textron caused the workpapers to lose any privilege
that may have existed.

A three-judge panel of the appeals court initially ruled in favor of Textron regarding
the application of the attorney work-paper doctrine. The initial opinion acknowledged that Textron and the I.R.S. had
a contentious relationship in regard to the examination of the company's tax returns. Evidence
presented to the district court indicated that Textron was audited by the I.R.S. on a continuous basis.
In every three-year audit cycle, hundreds of I.R.S. adjustments were made without challenge. Where
adjustments were disputed, the matter was resolved through a conference with the audit team, by
presentation of arguments to the I.R.S. Office of Appeals, or in litigation. The appeals court held that
while not all aspects of a tax examination are adversarial, the resolution of disputes through
administrative processes, including proceedings before the I.R.S. Appeals Office, is litigation. Consequently, the appeals court initially ruled in favor of Textron.

The I.R.S. timely petitioned the appeals court asking for review by the entire panel of judges in the
court. The original decision by the appeals court was vacated, additional briefs were submitted, and
amicus curiae briefs were filed by interested parties that might be affected by the ruling of the court.
The full appeals court held that the Textron tax analysis workpapers were independently required by
statutory and audit requirements and that the attorney work-product privilege was not applicable.

The final decision characterized the problem in the following terms:

* * * [H]ow far work product protection extends turns on a balancing of policy concerns
rather than application of abstract logic * * * [in the context of] a document [that] is not
in any way prepared “for” litigation but relates to a subject that might or might not
occasion litigation.

The appeals court looked to Hickman v. Taylor for guidance:

Proper preparation of a client’s case demands that he assemble information, sift what
he considers to be the relevant from the irrelevant facts, prepare his legal theories and

24  553 F.3d 87 (1st Cir. 2009).
25  560 F.3d 513 (1st Cir. 2009).
plan his strategy without undue and needless interference . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . as the "work product of the lawyer."

On this basis, the Supreme Court declared that the interrogatories, which sought witness interviews conducted by opponent’s counsel in preparation for litigation, were protected by a qualified privilege. That privilege is now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure regarding disclosure of material to the opposing side in litigation. The tax accrual workpapers simply did not meet this standard. The immediate motive of Textron in preparing the tax accrual workpapers was to fix the amount of the tax reserve on Textron’s books and to obtain a clean financial opinion from its auditor. Merely because Textron wanted to be adequately reserved in the event of litigation does not mean that the workpapers were prepared for use in possible litigation. The workpapers were prepared to ensure that sufficient reserves were established to cover liabilities that might be determined in litigation.

The appeals court concluded that an experienced litigator would describe the tax accrual workpapers as tax documents and not as case preparation material. The fact that the documents were prepared by lawyers or reflected legal thinking is not sufficient to trigger work product protection, even if the subject matter of a document might conceivably be litigated. Those documents are merely another type of material that is assembled in the ordinary course of business or in compliance with public requirements unrelated to litigation. They do not have immunity from disclosure.

The appeals court decision for the majority ends with the following comments:

Textron apparently thinks it is "unfair" for the government to have access to its spreadsheets, but tax collection is not a game. Underpaying taxes threatens the essential public interest in revenue collection. If a blueprint to Textron’s possible improper deductions can be found in Textron’s files, it is properly available to the government unless privileged. Virtually all discovery against a party aims at securing information that may assist an opponent in uncovering the truth. Unprivileged IRS information is equally subject to discovery. * * *

The practical problems confronting the IRS in discovering under-reporting of corporate taxes, which is likely endemic, are serious. Textron’s return is massive—constituting more than 4,000 pages—and the IRS requested the work papers only after finding a specific type of transaction that had been shown to be abused by taxpayers. It is because the collection of revenues is essential to government that administrative discovery, along with many other comparatively unusual tools, are furnished to the IRS. [Footnote omitted.]

f. Schedule UTP Reporting Uncertain Tax Positions

Having won the right to review tax accrual workpapers, the I.R.S. modified its approach by adopting a plan for transparency of corporate tax returns keyed to the tax return itself. In a speech before the New York State Bar Association Taxation Section Annual Meeting in New York City on January 26, 2010, then Commissioner Doug Schulman announced the introduction of Schedule UTP as a means of coordinating issue identification for tax purposes with the obligations imposed under FIN 48. I.R.S. statistics indicate that up to 25% of its time in large corporate audits is allocated to identifying issues rather than having a straightforward discussion with taxpayers about tax issues. The goal of the I.R.S. is to use the form to reduce the time it takes for I.R.S. examiners to find issues and complete an audit. It does this by assisting the I.R.S. in prioritizing the selection of issues and ensuring that the I.R.S. and taxpayers spend time discussing the law as it applies to the taxpayer’s facts. Below is the plan that was announced by Commissioner Schulman:
Reporting uncertain tax positions would be required at the time a return is filed by certain business taxpayers: those who have both a financial statement prepared under FIN 48 or other similar accounting standards reflecting uncertain tax positions and assets over $10 million. Under the Announcement, these taxpayers would be required to annually disclose uncertain tax positions in the form of a concise description of those positions and the maximum amount of US income tax exposure if the taxpayer’s position is not sustained. By concise, we mean a few sentences that inform us of the nature of the issue, and not pages of factual description or legal analysis.

Let me say a few things about this proposal. We have taken what I believe is a reasonable approach. We could have asked for more…a lot more… but chose not to. We believe we have crafted a proposal that gives us the information we need to do our job without trying to get in the heads of taxpayers as to the strengths or weaknesses of their positions. ***

The proposal does not require the taxpayer to disclose the taxpayer’s risk assessment or tax reserve amounts. We are asking for a list of issues that the taxpayer has already prepared for financial reporting purposes, in order to improve the efficiency and effectiveness of tax examinations. We are also looking for the maximum exposure, so we can allocate our exam resources appropriately. We need to have a sense of materiality and whether we should spend exam resources on an issue. The principal guidance for completing the form comes from the instructions published by the I.R.S.

Schedule UTP and the instructions appear in Appendix VII.

A Schedule UTP is required if each of the following four requirements are met: (i) a corporate tax return is filed, (ii) an asset threshold is met, (iii) audited financial statements are prepared, and (iv) a reserve is reported for a tax position, or a reserve is not recorded because a decision has been reached to litigate the tax position if challenged. Each of these requirements is discussed below.


- **Asset Threshold.** The corporation has assets that equal or exceed $10 million. If the U.S. branch of a foreign corporation has less than $10 million in assets, but the entire corporation meets that threshold, Schedule UTP must be filed.

- **Audited Financial Statements.** The corporation or a related party issued audited financial statements reporting all or a portion of the corporation’s operations for all or a portion of the corporation’s tax year. Audited financial statements mean financial statements on which an independent auditor has expressed an opinion, whether qualified, unqualified, disclaimed, or adverse, under G.A.A.P., I.F.R.S., or another country-specific accounting standard, including a modified version of any of the above. Compilations or reviewed financial statements – which may be prepared in the U.S. without the necessary audit steps to allow the audit firm to issue an opinion – are not are not audited financial statements for purposes of this test. If a corporation reconsiders whether a reserve is required for a tax position and eliminates the reserve in an interim audited financial statement issued before the tax position is taken in a return, the corporation need not report the tax position to which the reserve relates on Schedule UTP.

- **Reserve Recorded/Decision to Litigate.** The corporation has taken one or more tax positions taken on a tax return for the current or prior year and either it or a related party has recorded
A reserve in audited financial statements or a reserve is not recorded because the corporation expects to litigate the position. This is a two-step analysis – first, defining a tax position, and then determining whether a reserve was taken for financial statement purposes.

A tax position taken on a tax return means a tax position that would result in an adjustment to a line item on any schedule or form attached to the tax return if the position is not sustained. A single decision about how to report an item of income, gain, loss, deduction, or credit may affect line items in multiple years’ returns. If so, that decision can result in a tax position taken on each affected year’s return. For example, a decision to amortize an expense rather than currently deduct that expense, or a decision to currently deduct rather than amortize an expense, affects line items on each year’s return in which the tax position is taken during the period of amortization.

A tax position is based on the unit of account used to prepare the audited financial statements in which the reserve is recorded (or in which no reserve was recorded because of an expectation to litigate). A unit of account is the level of detail used in analyzing a tax position. The unit of account used by a G.A.A.P. or modified G.A.A.P. taxpayer for reporting a tax position on Schedule UTP must be the same unit of account used by the taxpayer for G.A.A.P. or modified G.A.A.P.

For a non-accountant, the term “unit of account” is not a clear term. However, an example in the instructions suggests that it means the method adopted by a corporation to report an item for accounting purposes. The example looks at two corporations, each independent of the other. Each conducts an independent research and development project and each intends to claim a credit allowed for the outlays incurred in the activity. Many hurdles must be overcome to benefit from the credit and so the credit is a tax position. One corporation chooses each individual research project as the unit of account for G.A.A.P. financial reporting purposes, since the corporation accumulates information for the tax return at the project level and expects the I.R.S. to address the issues during an examination of each project separately. The other corporation determines that the appropriate unit of account for G.A.A.P. financial reporting purposes is the functional expenditures, based on the amount of its expenditures, the anticipated credits to be claimed, its previous experience, and the advice of its tax advisors. The method chosen by each corporation to accumulate and report information for G.A.A.P. purposes must be used when preparing the Schedule UTP.

A reserve is recorded when an uncertain tax position or a FIN 48 liability is stated anywhere in a corporation’s or related party’s financial statements, including footnotes and any other disclosures, and may be indicated by any of several types of accounting journal entries. Some of the types of entries that, entered alone or in tandem, indicate the recording of a reserve are (i) an increase in a current or non-current liability for income taxes, interest, or penalties payable, or a reduction of a current or non-current receivable for income taxes and/or interest with respect to the tax position, and (ii) a reduction in a deferred tax asset or an increase in a deferred tax liability with respect to the tax position. The initial recording of a reserve will trigger the reporting of a tax position taken on a return. However, subsequent reserve increases or decreases with respect to the tax position will not trigger reporting.

If a corporation is included in multiple audited financial statements, the corporation must report a tax position on Schedule UTP if a reserve for that position was recorded in any of those audited financial statements.

Although the use of a net operating loss (“N.O.L.”) or a credit carryforward is a tax position taken on a tax return, the use of the N.O.L. or credit carryforward in the carryforward year is not reported on Schedule UTP if the corporation previously reported the tax position that created or added to the N.O.L. or credit carryforward on Schedule UTP. Again, an illustration in the instructions explains the steps involved in the context of a tax position that establishes or increases an N.O.L. In the example, a corporation incurs a $50 million expenditure in 2015 and claimed the entire amount as a deduction on its 2015 tax return. The deduction increases the corporation’s N.O.L. carryforward from $100
million to $150 million. The corporation uses the entire N.O.L. carryforward on its 2016 tax return. Claiming the $50 million tax deduction in 2015 is a tax position taken in the 2015 tax year because the position would result in an adjustment to a line item on the 2015 tax return if the position is not sustained. The deduction in 2016 of the N.O.L. carried forward from 2015 is a tax position taken on the 2016 tax return, because the position would result in an adjustment to a line item on the 2016 tax return if the position is not sustained. The corporation recorded a reserve with respect to its 2015 tax position in its 2015 audited financial statements. Because the corporation recorded a reserve with respect to the tax position taken in 2015, it reported the 2015 tax position on the Schedule UTP filed with its 2015 tax return. Because it reported the tax position in its 2015 tax return, the corporation should not report the 2016 tax position on the Schedule UTP filed with its tax return for the 2016 tax year.

Once reportable tax positions are identified, they must be ranked by size and reported in order from greatest to least material. The amounts involved for each tax position need not be reported anywhere on Schedule UTP. The ranking of each tax position is determined on an annual basis and is the amount of U.S. Federal income tax reserve recorded for that position. If a reserve is recorded for multiple tax positions, then a reasonable allocation of that reserve among the tax positions to which it relates must be made in determining the rank of each tax position. If an amount of interest or penalties relating to a tax position is not separately identified in the books and records as associated with that position, the amount of interest and penalties is not included in the size of a tax position used to rank that position or compute whether the position is a major tax position.

Finally, a concise description should be given of the tax position. This entails a very brief description of the relevant facts and information that reasonably can be expected to apprise the I.R.S. of the nature of the issue. The description should not include an assessment of the risks for the corporation or an analysis of legal authorities for or against the tax position in the return.

4. Codification of Economic Substance
   
a. Background

U.S. tax law provides detailed rules specifying the computation of taxable income, including the amount, timing, source, and character of items of income, gain, loss, and deduction. These rules permit both taxpayers and the government to compute taxable income with reasonable accuracy and predictability.

In addition to the statutory provisions, courts have developed several doctrines that can be applied to deny the tax benefits of tax-motivated transactions, notwithstanding that the transaction may satisfy the literal requirements of a specific tax provision. The common-law doctrines are not entirely distinguishable, and their application to a given set of facts is often blurred by the courts and the I.R.S. Although these doctrines serve an important role in the administration of the tax system, they can be seen as at odds with an objective, “rule-based” system of taxation.

A common-law doctrine applied with increasing frequency is the “economic substance” doctrine. In general, this doctrine denies tax benefits arising from transactions that do not result in a meaningful change to the taxpayer’s economic position other than a purported reduction in Federal income tax. Courts generally deny claimed tax benefits if the transaction that gives rise to those benefits lacks economic substance independent of tax considerations – notwithstanding that the purported activity
actually occurs. In cases spanning more than 85 years, courts in the U.S. have expressed the rule in various ways:

- The incidence of taxation depends upon the substance of the transaction and not mere formalism.
- Taxation is not so much concerned with refinements of title as it is with actual command over the property.
- A mere transfer in form, without substance, may be disregarded for tax purposes.
- A given result at the end of a straight path is not made a different result because reached by following a devious path.
- Where a taxpayer has embarked on a series of transactions that are in substance a single, unitary, or indivisible transaction, the courts have disregarded the intermediary steps and have given credence only to the completed transaction.
- The doctrine of economic substance becomes applicable, and a judicial remedy is warranted, where a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings.

While the general rule remained constant, a lack of uniformity developed regarding its application. Some courts applied a conjunctive test requiring a taxpayer to establish the presence of both (i) economic substance, which is an objective standard concluding that the economics of the transaction appear to be real based on listed factors, and (ii) business purpose, which is a subjective standard concluding that the taxpayer's business purpose appears to be genuine even if a loss is encountered. Other courts applied a disjunctive test, under which a transaction is respected if either the transaction has economic substance or the taxpayer has a business purpose.

---

Lack of uniformity existed, as well, in the identification of valid business purposes. Some courts applied the economic substance doctrine to disallow tax benefits for transactions in which a taxpayer is exposed to risk and the transaction has a profit potential, but the court has concluded that the economic risks and profit potential are insignificant when compared to the tax benefits. For example, the business purpose is to invest in treasury bills that could rise or fall slightly in value, but because the entire transaction is funded with debt having prepaid interest that under the law then in effect could be deducted at the time of payment, the value of the interest expense deduction far outweighs the profit potential.\(^{27}\) Other courts applied the economic substance doctrine in a way that requires an objective determination that a reasonable possibility of profit from the transaction exists apart from the tax benefits.

In 2009, Congress codified the economic substance doctrine with the goal of bringing uniformity to the application of the standard and imposing penalties on taxpayers entering transactions that have no economic substance.\(^ {28}\)

\[b. \textit{Code §7701(o)}\]

Code §7701(o), enacted in 2009, clarifies the economic substance doctrine. In general, it adopts the conjunctive approach adopted by several courts that were asked to determine whether a transaction that was carried out met the economic substance standard. Thus, it provides that in the case of any transaction to which the economic substance doctrine is relevant, the transaction will be treated as having economic substance only if (i) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer’s economic position, and (ii) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

The provision does not change the standards in existence prior to enactment of Code §7701(o), which were used by courts in determining when to utilize an economic substance analysis. Thus, if certain tax benefits are clearly consistent with all applicable provisions of the Code and the purposes of those provisions, tax benefits will not be disallowed if the only reason for such disallowance is that the transaction fails the economic substance doctrine as defined in Code §7701(o). For example, if the only reason for entering a transaction is to obtain a credit provided by law for those who enter the transaction, the credit will be allowed.

In addition, the provision does not alter the tax treatment of certain basic business transactions that, under longstanding judicial and administrative practice, are respected merely because the choice between meaningful economic alternatives is largely or entirely based on comparative tax advantages. Among these basic decisions are (i) the choice between capitalizing a business enterprise with debt or equity, (ii) the choice between foreign corporations and domestic corporations, (iii) the treatment of a transaction or series of transactions as a corporate organization or reorganization, and (iv) the ability to respect a transaction between related parties provided that the arm’s length standard of Code §482 is satisfied. Nonetheless, Code §7701(o) does not alter a court’s ability to aggregate, disaggregate, or otherwise recharacterize a transaction when applying the doctrine. Thus, the decisions listed above regarding economic substance continue as valid law.

Because taxpayers typically look to profit potential when arguing the existence of economic substance, the provision adopts a standard by which profit potential is measured. The potential for profit of a transaction is taken into account only if the present value of the reasonably expected pre-tax profit

\(^{27}\) \textit{Goldstein v. Commissioner}, 364 F.2d 734 (2d Cir. 1966).

\(^{28}\) Code §7701(o).
from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected. For the purpose of computing profit potential, fees and other transaction expenses are to be taken into account as expenses in determining pre-tax profit. In addition, the I.R.S. is authorized to adopt regulations under which foreign taxes will be treated as expenses in determining pre-tax profit in appropriate cases. Note that factors other than profit potential may demonstrate that a transaction results in a meaningful change in the taxpayer’s economic position or that the taxpayer has a substantial non-Federal tax purpose for entering into such transaction. The provision does not require or establish a specified minimum return that will satisfy the profit potential test.

Certain benefits that stem from reducing Federal taxable income can no longer be used as a business purpose. Thus, for example, reductions in state or local income taxes – which are typically counted as deductions when computing taxable income for Federal purposes – are treated in the same manner as a reduction in Federal income taxes if the transaction in issue affects the computation of taxable income for Federal tax purposes in addition to state tax purposes. In addition, entering into a transaction to achieve a financial accounting benefit will not be treated as a business purpose for entering into the transaction if the origin of the financial accounting benefit is a reduction of Federal income tax.

c. **Penalty for Transactions Without Economic Substance/Disclosure**

Through the imposition of penalties, taxpayers are incentivized to comply with a mandatory reporting requirement for transactions without substance. When a taxpayer enters into a transaction that does not meet the economic substance standard and the transaction reduces tax, the portion of the taxpayer’s reduction in tax that is attributable to the transaction is subject to a 40% penalty. If the transaction is disclosed in the tax return, the penalty is reduced to 20%. Disclosure is effected on Form 8275 (Disclosure Statement). A copy appears in Appendix VIII.

5. **Conclusion**

Mandatory disclosure of aggressive tax plans should be anticipated for business transactions conducted within Western economic democracies. During the course of a tax examination, too much time and too many resources are allocated to the task of identifying issues. Disclosure ensures that all plans – proper and abusive – have an equal opportunity of being reviewed. Governments are viewed as the principal beneficiaries by taxpayers and their advisors, however, disclosure may also turn out to benefit compliant, non-abusive plans. The U.S. experience at the corporate level has been that outside tax advisors wishing to sell a tax-reduction product now have reduced access to corporate decision-makers.

Ultimately, disclosure will place obligations on tax authorities to examine issues based on merit rather than amounts in issue. It also will remove a *sub rosa* suggestion among aggressive tax examiners that all planning involves cheating. For planners who manage facts to ensure the existence of economic substance, that is not an unwelcome occurrence.

--End--
Recognized Abusive and Listed Transactions

Listed Transactions in Chronological Order

1. Revenue Ruling 90-105 – Certain Accelerated Deductions for Contributions to a Qualified Cash or Deferred Arrangement or Matching Contributions to a Defined Contribution Plan
2. Notice 95-34 - Voluntary Employee Beneficiary Association
3. ASA Investering Partnership v. Commissioner - Transactions similar to that described in the ASA Investering litigation and in ACM Partnership v. Commissioner
4. Treasury Regulation § 1.643(a)-8 – Certain Distributions from Charitable Remainder Trusts
5. Notice 99-59 - Corporate Distributions of Encumbered Property (BOSS)
6. Step-Down Step Down Preferred/Fast Pay Stock §1.7701(1)-3
7. Revenue Ruling 2000-12 – Debt Straddles
8. Notice 2000-44 – Inflated Partnership Basis Transactions (Son of Boss)
12. Notice 2001-17 - §351 Contingent Liability
15. Notice 2002-35 - Notional Principal Contracts
17. Revenue Ruling 2002-69 - Lease In / Lease Out or LILO Transactions
18. Revenue Ruling 2003-6 - Abuses Associated with S Corp ESOPs
22. Notice 2003-55 - Accounting for Lease Strips and Other Stripping Transactions
23. Notice 2003-77 - Improper use of contested liability trusts to attempt to accelerate deductions for contested liabilities under IRC 461(f)
25. Notice 2004-8 - Abusive Roth IRA Transactions
26. Revenue Ruling 2004-4 - S Corporations ESOP
28. Notice 2004-20 - Abusive Foreign Tax Credit Transactions
29. Notice 2004-30 - S Corporation Tax Shelter Involving Shifting Income to Tax Exempt Organization
32. Notice 2007-57 - Loss Importation Transaction
34. Notice 2008-34 - Distressed Asset Trust (DAT) Transaction
35. Notice 2015-73 - Basket Option Contracts
36. Notice 2017-10 - Syndicated Conservation Easement Transactions
The address for the separate OTSA copy of the initial year filing of Form 8886 has changed as follows:

Internal Revenue Service
OTSA Mail Stop 4915
1973 Rulon White Blvd
Ogden, UT 84201

**Revenue Ruling 90-105** – Certain Accelerated Deductions for Contributions to a Qualified Cash or Deferred Arrangement or Matching Contributions to a Defined Contribution Plan

(transactions in which taxpayers claim deductions for contributions to a qualified cash or deferred arrangement or matching contributions to a defined contribution plan where the contributions are attributable to compensation earned by plan participants after the end of the taxable year (identified as “listed transactions” on February 28, 2000)). See also Rev. Rul. 2002-46, 2002-2 C.B. 117 (result is the same, and transactions are substantially similar, even though the contributions are designated as satisfying a liability established before the end of the taxable year), modified by Rev. Rul. 2002-73, 2002-2 C.B. 805

- **Revenue Ruling 2002-46** – §401k Accelerators

**Voluntary Employee Beneficiary Association**

**Notice 95-34** – Certain Trusts Purported to be Multiple Employer Welfare Funds Exempted from the Lists of §§ 419 and 419A (certain trust arrangements purported to qualify as multiple employer welfare benefit funds exempt from the limits of §§ 419 and 419A of the Internal Revenue Code (identified as “listed transactions” on February 28, 2000)). See also § 1.419A(f)(6)-1 of the Income Tax Regulations (10 or more employer plans)).

**ASA Investering Partnership v. Commissioner** - Transactions similar to that described in the ASA Investering litigation and in ACM Partnership v. Commissioner, 157 F.3d 231 (3rd Cir. 1998) (transactions involving contingent installment sales of securities by partnerships in order to accelerate and allocate income to a tax-indifferent partner, such as a tax-exempt entity or foreign person, and to allocate later losses to another partner (identified as “listed transactions” on February 28, 2000)).

**Treasury Regulation § 1.643(a)-8** – Certain Distributions from Charitable Remainder Trusts (transactions involving distributions described in § 1.643(a)-8 from charitable remainder trusts (identified as “listed transactions” on February 28, 2000)).

**Corporate Distributions of Encumbered Property (BOSS)**

**Notice 99-59** – Transactions involving the distributions of encumbered property in which losses claimed for capital outlays have been recovered (aka BOSS transactions) (transactions involving the distribution of encumbered property in which taxpayers claim tax losses for capital outlays that they have in fact recovered (identified as “listed transactions” on February 28, 2000)). See also § 1.301-1(g) of the Income Tax Regulations;

**Step Down Preferred/Fast Pay Stock §1.7701(1)-3**

**Treasury Regulation § 1.7701(1)-3** – Fast Pay or Step-Down Preferred Transactions (transactions involving fast-pay arrangements as defined in § 1.7701(1)-3(b) (identified as “listed transactions” on February 28, 2000))
Revenue Ruling 2000-12 – Debt Straddles (certain transactions involving the acquisition of two debt instruments the values of which are expected to change significantly at about the same time in opposite directions (identified as “listed transactions” on February 28, 2000))

Notice 2000-44 – Inflated Partnership Basis Transactions (Son of Boss) (transactions generating losses resulting from artificially inflating the basis of partnership interests (identified as “listed transactions” on August 11, 2000)). See also § 1.752-6T of the temporary Income Tax Regulations and §§ 1.752-1(a) and 1.752-7 of the proposed Income Tax Regulations;

Son of Boss Settlement Initiative

- IRS Collects $3.2 Billion from Son of Boss
  - Strong response to "Son of Boss" Settlement Initiative -- Over 1,500 taxpayers responded by the June 21 deadline to settle under Announcement 2004-46.
  - IRS News Release Announcing Settlement Initiative
  - IRS Fact Sheet, Son of Boss Settlement Initiative
  - Announcement 2004-46, Son of Boss Settlement Initiative
  - FAQs (updated 5-28-04 with eligibility information)
  - Supplemental FAQs (11-1-04)
  - Form 13582, Notice of Election to Participate in Settlement Initiative
  - Form 13586, Additional Information and Documentation
  - Form 13586-A, Settlement Initiative Declaration
  - Initial RA Letter to Taxpayer
  - Rejection Letter
  - Closing Agreement Letter
  - CCN 2003-20 - Chief Counsel Guidance

Stock Compensation Transactions

Notice 2000-60 – Stock Compensation Transactions (transactions involving the purchase of a parent corporation’s stock by a subsidiary, a subsequent transfer of the purchased parent stock from the subsidiary to the parent’s employees, and the eventual liquidation or sale of the subsidiary (identified as “listed transactions” on November 16, 2000));

Notice 2000-61 – Guam Trust (transactions purporting to apply § 935 to Guamanian trusts (identified as “listed transactions” on November 21, 2000));

Notice 2001-16 – Intermediary Transactions (transactions involving the use of an intermediary to sell the assets of a corporation (identified as “listed transactions” on January 18, 2001));

- Notice 2008-111 - (12/01/2008) – Clarifies Notice 2001-16 (2001-1 C.B. 730) that identified and described the intermediary transaction tax shelter as a listed transaction and supersedes Notice 2008-20 (2008-6 I.R.B. 406). The Notice defines an intermediary transaction in terms of its plan and of more objective components. Also, the Notice specifies when a person is engaged in a transaction as part of a plan and clarifies that a transaction may be an intermediary transaction for one person and not another.
- LB&I Industry Director Guidance - Examination of Multiple Parties in Intermediary Transactions

Notice 2001-17 - §351 Contingent Liability (transactions involving a loss on the sale of stock acquired in a purported § 351 transfer of a high basis asset to a corporation and the corporation’s assumption of a liability that the transferor has not yet taken into account for federal income tax purposes (identified as “listed transactions” on January 18, 2001));
Notice 2001-45 – §302 Basis-Shifting Transactions (certain redemptions of stock in transactions not subject to U.S. tax in which the basis of the redeemed stock is purported to shift to a U.S. taxpayer (identified as “listed transactions” on July 26, 2001));

Notice 2002-21 – Inflated Basis "CARDS" Transactions (transactions involving the use of a loan assumption agreement to inflate basis in assets acquired from another party to claim losses (identified as “listed transactions” on March 18, 2002));

- Appeals Settlement Guidelines (redacted)

Notice 2002-35 – Notional Principal Contracts (transactions involving the use of a notional principal contract to claim current deductions for periodic payments made by a taxpayer while disregarding the accrual of a right to receive offsetting payments in the future (identified as “listed transactions” on May 6, 2002));

- Explanation of Notice 2006-16, Impact on Required Disclosures.

Common Trust Fund Straddles, Pass-Through Entity Straddle, and S Corporation Tax Shelter transaction

Notice 2002-50– Partnership Straddle Tax Shelter (transactions involving the use of a straddle, a tiered partnership structure, a transitory partner, and the absence of a § 754 election to claim a permanent noneconomic loss (identified as “listed transactions” on June 25, 2002)); Notice 2002-65, 2002-2 C.B. 690 (transactions involving the use of a straddle, an S corporation or a partnership, and one or more transitory shareholders or partners to claim a loss while deferring an offsetting gain are substantially similar to transactions described in Notice 2002-50); and Notice 2003-54, 2003-33 I.R.B. 363 (transactions involving the use of economically offsetting positions, one or more tax indifferent parties, and the common trust fund accounting rules of § 584 to allow a taxpayer to claim a noneconomic loss are substantially similar to transactions described in Notice 2002-50 and Notice 2002-65);

- Notice 2003-54 - Common Trust Fund Straddle Tax Shelter
- Notice 2002-65– Passthrough Entity Straddle Tax Shelter

Revenue Ruling 2002-69, Lease In / Lease Out or LILO Transactions (transactions in which a taxpayer purports to lease property and then purports to immediately sublease it back to the lessor (often referred to as lease-in/lease-out; or LILO transactions) (identified as listed transactions on February 28, 2000)

- LILO/SILO SETTLEMENT INITIATIVE - On August 6, 2008, IRS Commissioner Douglas Shulman announced that settlements would be offered to taxpayers who participated in Lease-In/Lease-Out (LILO) and Sale-In/Sale-Out (SILO) transactions. IRS sent out letters giving taxpayers 30 days to make a decision on whether to accept the offer terms.
  - IRS Commissioner's Remarks 08-06-2008
  - LILO/SILO Initiative Frequently Asked Questions

Revenue Ruling 2003-6, Abuses Associated with S Corp ESOPs (certain arrangements involving the transfer of employee stock ownership plans (ESOPs) that hold stock in an S corporation for the purpose of claiming eligibility for the delayed effective date of § 409(p) (identified as “listed transactions” on December 17, 2002));

Notice 2003-22 - Offshore Deferred Compensation Arrangements (certain arrangements involving leasing companies that have been used to avoid or evade federal income and employment taxes (identified as “listed transactions” on April 4, 2003));
**Notice 2003-24** - Certain Trust Arrangements Seeking to Qualify for Exception for Collectively Bargained Welfare Benefit Funds under § 419A(f)(5) (certain arrangements that purportedly qualify as collectively-bargained welfare benefit funds excepted from the account limits of §§ 419 and 419A (identified as “listed transactions” on April 11, 2003));

---

**Transfers of Compensatory Stock Options to Related Persons**

- **Notice 2003-47** - Transfers of Compensatory Stock Options to Related Persons (transactions involving compensatory stock options and related persons to avoid or evade federal income and employment taxes (identified as “listed transactions” on July 1, 2003));
- **Announcement 2005-19** - Stock Option Settlement Initiative
- **Stock Option Settlement Press Release**
- **Stock Option Settlement Fact Sheet**
- **Form 13656** - Settlement Election For Executives and Related Parties
- **Form 13567** - Settlement Election for Corporations

---

**Notice 2003-55** - Accounting for Lease Strips and Other Stripping Transactions (transactions in which one participant claims to realize rental or other income from property or service contracts and another participant claims the deductions related to that income (often referred to as “lease strips”), modifying and superseding Notice 95-53, 1995-2 C.B. 334 (identified as “listed transactions” on February 28, 2000);

- **Notice 95-53** – Lease Strips - Modified and superseded by Notice 2003-55 above

---

**Notice 2003-77** - Improper use of contested liability trusts to attempt to accelerate deductions for contested liabilities under IRC 461(f) (certain transactions that use contested liability trusts improperly to accelerate deductions for contested liabilities under § 461(f) (identified as “listed transactions” on November 19, 2003)). See also § 1.461-2 of the Income Tax Regulations. See Rev. Proc. 2004-31, 2004-22 I.R.B. 986, for procedures which taxpayers must use to change their methods of accounting for deducting under § 461(f) amounts transferred to trusts in transactions described in Notice 2003-77.

- **Lead Executive Memorandum** -- Advises that settlements will not be offered on these issues
- **Treasury News Release** - Announcing Notice 2003-77
- **TD 9095**
- **Regulation 136890-02**
- **Treasury News Release** - Announcing Revenue Procedure 2004-31

---

**Major/Minor Tax Avoidance Using Offsetting Foreign currency Option Contracts**

**Notice 2003-81** -Offsetting Foreign Currency Option Contracts (certain transactions in which a taxpayer claims a loss upon the assignment of a § 1256 contract to a charity but fails to report the recognition of gain when the taxpayer’s obligation under an offsetting non-section 1256 contract terminates (identified as “listed transactions” on December 4, 2003));

**Notice 2004-8** - Abusive Roth IRA Transactions (certain transactions designed to avoid the limitations on contributions to Roth IRAs described in § 408A (identified as “listed transactions” on December 31, 2003));

- **Treasury Department News Release**

---

**S Corporations ESOP**
Revenue Ruling 2004-04 - Prohibited Allocations of Securities in an S Corporation (transactions that involve segregating the business profits of an ESOP-owned S corporation in a qualified subchapter S subsidiary, so that rank-and-file employees do not benefit from participation in the ESOP (identified as “listed transactions” on January 23, 2004));

- Treasury Department Press Release

Revenue Ruling 2004-20 - Abusive Transactions Involving Insurance Policies in IRC 412(i) Retirement Plans (certain arrangements in which an employer deducts contributions to a qualified pension plan for premiums on life insurance contracts that provide for death benefits in excess of the participant’s death benefit, where under the terms of the plan, the balance of the death benefit proceeds revert to the plan as a return on investment) (identified as “listed transactions” on February 13, 2004)). See also Rev. Rul. 2004-21, 2004-10 I.R.B. 544, §§ 1.79-1(d)(3), 1.83-3(e) and 1.402(a)-1(a)(1) and (2) of the proposed Income Tax Regulations, and Rev. Proc. 2004-16, 2004-10 I.R.B. 559;

- Revenue Ruling 2004-21
- Proposed Regulation 126967-03
- Revenue Procedure 2004-16
- News Release IR-2004-21

Notice 2004-20 - Abusive Foreign Tax Credit Transactions (transactions in which, pursuant to a prearranged plan, a domestic corporation purports to acquire stock in a foreign target corporation and to make an election under § 338 before selling all or substantially all of the target corporation’s assets in a preplanned transaction that generates a taxable gain for foreign tax purposes (but not for U.S. tax purposes) (identified as “listed transactions” on February 17, 2004));

- Treasury Department Press Release
- Notice 2004-19 -- Withdraws
- Notice 98-5 and describes strategy to address abusive FTC transactions

Notice 2004-30 - S Corporation Tax Shelter Involving Shifting Income to Tax Exempt Organization (transactions in which S corporation shareholders attempt to transfer the incidence of taxation on S corporation income by purportedly donating S corporation nonvoting stock to an exempt organization while retaining the economic benefits associated with that stock (identified as “listed transactions” on April 1, 2004));

- Lead Executive Memo regarding settlements (4/6/05)
- IRS Press Release 2004-44

Notice 2004-31 - Intercompany Financing Through Partnerships (transactions in which corporations claim inappropriate deductions for payments made through a partnership (identified as “listed transactions” on April 1, 2004)).

- Treasury Press Release dated 4/1/04

Notice 2005-13, Sale-In Lease-Out transactions

- Treasury Press Release

LIILO/SILO SETTLEMENT INITIATIVE- On August 6, 2008, IRS Commissioner Douglas Shulman announced that settlements would be offered to taxpayers who participated in Lease-In/Lease-Out (LILO) and Sale-In/Sale-Out (SILO) transactions. IRS sent out letters giving taxpayers 30 days to make a decision on whether to accept the offer terms.

- IRS Commissioner's Remarks 08-06-2008
- LILO/SILO Initiative Frequently Asked Questions
Notice 2007-57 - Loss Importation Transaction (IRB 2007-29) (transactions in which a U.S. taxpayer uses offsetting positions with respect to foreign currency or other property for the purpose of importing a loss, but not the corresponding gain, in determining U.S. taxable income (identified as “listed transactions” on July 16, 2007)).

Notice 2007-83 - Abusive Trust Arrangements Utilizing Cash Value Life Insurance Policies Purportedly to Provide Welfare Benefits - 2007-45 I.R.B. 1 (transactions in which certain trust arrangements claiming to be welfare benefit funds and involving cash value life insurance policies that are being promoted to and used by taxpayers to improperly claim federal income and employment tax benefits (identified as “listed transactions” on October 17, 2007)).

Notice 2008-34 - Distressed Asset Trust (DAT) Transaction - 2008-12 I.R.B. 1 (transactions in which a tax indifferent party, directly or indirectly, contributes one or more distressed assets (for example, a creditor’s interests in debt) with a high basis and low fair market value to a trust or series of trusts and sub-trusts, and a U.S. taxpayer acquires an interest in the trust (and/or series of trusts and/or sub-trusts) for the purpose of shifting a built-in loss from the tax indifferent party to the U.S. taxpayer that has not incurred the economic loss (identified as listed transactions on February 27, 2008)).

Notice 2015-73 – Basket Option Contracts - This notice describes certain transactions involving a contract that is denominated as an option referencing a basket of actively traded personal property. The Basket Option Contract attempts to defer income recognition and convert short-term capital gain and ordinary income to long-term capital gain using a contract denominated as an option contract. This notice was published in the Internal Revenue Bulletin on November 16, 2015. This notice was previously listed under Notice 2015-47 which was revoked.

Notice 2017-10 – Syndicated Conservation Easement Transactions - This notice describes certain transactions in which some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested. The promoters identify a pass-through entity that owns real property, or form a pass-through entity to acquire real property. Additional tiers of pass-through entities may be formed. The promoters then syndicate ownership interests in the pass-through entity or tiered entities that owns the real property, suggesting to prospective investors that they may be entitled to a share of a charitable contribution deduction that equals or exceeds two and one-half times the amount of the investor’s investment. The promoters obtain an inflated appraisal of the conservation easement based on unreasonable conclusions about the development potential of the real property. The entity then donates a conservation easement encumbering the property to a tax-exempt entity. Investors then claim a charitable contribution relying upon the pass-through entity’s holding period.

- Notice 2017-29 – Extends the due date for filing some disclosures.

"De-Listed" Transactions

- Notice 2004-65 - De-lists Producer Owned Reinsurance Companies (PORC) as a listed transaction
  - News Release dated 09-24-2004
- Notice 2004-64 Modification of exemption from tax for small property and casualty insurance companies.
Name(s) shown on return (individuals enter last name, first name, middle initial) ▲ ▲

Identifying number ▲ ▲

Number, street, and room or suite no. City or town State ZIP code

A If you are filing more than one Form 8886 with your tax return, sequentially number each Form 8886 and enter the statement number for this Form 8886 of ▲ ▲

Statement number

B Enter the form number of the tax return to which this form is attached or related ▲ ▲

Enter the year of the tax return identified above ▲ ▲

Is this Form 8886 being filed with an amended tax return? ▲ ▲

C Name of reportable transaction ▲ ▲

Identify the type of reportable transaction. Check all boxes that apply (see instructions). ▲ ▲

Initial year participated in transaction Initial year participated in transaction

Reportable transaction or tax shelter registration number (see instructions)

1 a Name of reportable transaction ▲ ▲

b Initial year participated in transaction ▲ ▲

c Reportable transaction or tax shelter registration number (see instructions)

2 Identify the type of reportable transaction. Check all boxes that apply (see instructions). ▲ ▲

a Listed ▲ ▲

b Confidential ▲ ▲

c Contractual protection ▲ ▲

de Transaction of interest ▲ ▲

d Loss ▲ ▲

3 If you checked box 2a or 2e, enter the published guidance number for the listed transaction or transaction of interest ▲ ▲

4 Enter the number of “same as or substantially similar” transactions reported on this form ▲ ▲

5 If you participated in this reportable transaction through a partnership, S corporation, trust, and foreign entity, check the applicable boxes and provide the information below for the entity(s) (see instructions). (Attach additional sheets, if necessary.) ▲ ▲

a Type of entity ▲ ▲

b Name ▲ ▲

c Employer identification number (EIN), if known ▲ ▲

d Date Schedule K-1 received from entity (enter “none” if Schedule K-1 not received) ▲ ▲

6 Enter below the name and address of each individual or entity to whom you paid a fee with regard to the transaction if that individual or entity promoted, solicited, or recommended your participation in the transaction, or provided tax advice related to the transaction. (Attach additional sheets, if necessary.) ▲ ▲

a Name ▲ ▲

b Name ▲ ▲

Identifying number (if known) Fees paid $ ▲ ▲

Number, street, and room or suite no. City or town State ZIP code ▲ ▲

Identifying number (if known) Fees paid $ ▲ ▲

Number, street, and room or suite no. City or town State ZIP code

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 34654G Form 8886 (Rev. 3-2011)
7 Facts
   a Identify the type of tax benefit generated by the transaction. Check all the boxes that apply (see instructions).
   □ Deductions  □ Exclusions from gross income  □ Absence of adjustments to basis  □ Tax Credits
   □ Capital loss  □ Nonrecognition of gain  □ Deferral
   □ Ordinary loss  □ Adjustments to basis  □ Other

   b Further describe the amount and nature of the expected tax treatment and expected tax benefits generated by the transaction for all affected years. Include facts of each step of the transaction that relate to the expected tax benefits including the amount and nature of your investment. Include in your description your participation in the transaction and all related transactions regardless of the year in which they were entered into. Also, include a description of any tax result protection with respect to the transaction.

8 Identify all individuals and entities involved in the transaction that are tax-exempt, foreign, or related. Check the appropriate box(es) (see instructions). Include their name(s), identifying number(s), address(es), and a brief description of their involvement. For each foreign entity, identify its country of incorporation or existence. For each individual or related entity, explain how the individual or entity is related. Attach additional sheets, if necessary.

   a Type of individual or entity:  □ Tax-exempt  □ Foreign  □ Related

   Name
   Address
   Description

   b Type of individual or entity:  □ Tax-exempt  □ Foreign  □ Related

   Name
   Address
   Description
Instructions for Form 8886
(Rev. March 2011)

Reportable Transaction Disclosure Statement

Section references are to the Internal Revenue Code unless otherwise noted.

What’s New
New rules apply to penalties assessed under section 6707A after December 31, 2006. See Penalties on page 4 for details.

General Instructions

Purpose of Form
Use Form 8886 to disclose information for each reportable transaction in which you participated. See Participation in a Reportable Transaction, below, to determine if you participated in a reportable transaction. For more information on the disclosure rules, see Regulations section 1.6011-4.

Generally, you must file a separate Form 8886 for each reportable transaction. However, you may report more than one transaction on one form if the transactions are the same or substantially similar. See the definition of substantially similar below.

The fact that a transaction must be reported on this form does not mean the tax benefits from the transaction will be disallowed.

Prohibited tax shelter transactions. Generally, the term “prohibited tax shelter transaction” means listed transactions, transactions with contractual protection, or confidential transactions. See the definition of these categories below. There may be additional disclosure requirements for tax-exempt entities with respect to these types of transactions. If you are a tax-exempt entity and you are a party to a prohibited tax shelter transaction, you may be required to file Form 8886-T. Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction, in addition to filing Form 8886. For more information, see the instructions for Form 8886-T.

Definitions

Transaction
A transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement and it includes any series of steps carried out as part of a plan.

Substantially Similar
A transaction is substantially similar to another transaction if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure. See Regulations section 1.6011-4(c)(4) for examples.

Tax Benefit
A tax benefit includes deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from federal income taxation, and any other tax consequences that may reduce a taxpayer’s federal tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

Tax Structure
The tax structure of a transaction is any fact that may be relevant to understanding the purported or claimed federal income tax treatment of the transaction.

Who Must File
Any taxpayer, including an individual, trust, estate, partnership, S corporation, or other corporation, that participates in a reportable transaction and is required to file a federal tax return or information return must file Form 8886. However, a regulated investment company (RIC) (as defined in section 851) or an investment vehicle that is at least 95% owned by one or more RICs at all times during the course of a transaction is not required to file Form 8886 for any transaction other than a listed transaction (as defined below) or a transaction of interest (as defined on page 3).

Participation in a Reportable Transaction
A reportable transaction is a transaction described in one or more of the following categories.

Listed Transactions
A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction. These transactions are identified by notice, regulation, or other form of published guidance as a listed transaction. For existing guidance see Notice 2009-59, 2009-31 I.R.B. 170, available at www.irs.gov/pub/irs-irbs/irb09-31.pdf. For updates to this list, go to the IRS web page at www.irs.gov/businesses/corporations and click on Abusive Tax Shelters and Transactions. The listed transactions will also be periodically updated in future issues of the Internal Revenue Bulletin. You can find a notice or ruling in the Internal Revenue Bulletin at www.irs.gov/pub/irs-irbs/irbxx-yy.pdf, where XX is the two-digit year and YY is the two-digit bulletin number. For example, you can find Notice 2009-59, 2009-31 I.R.B. 170, at www.irs.gov/pub/irs-irbs/irb09-31.pdf.

You have participated in a listed transaction if any of the following applies.
• Your tax return reflects tax consequences or a tax strategy described in published guidance that lists the transaction.
• You know or have reason to know that tax benefits reflected on your tax return are derived directly or indirectly from such tax consequences or tax strategy.
• You are in a type or class of individuals or entities that published guidance treats as participants in a listed transaction.

Exception. If you participated in a transaction that is the same as or substantially similar to the transaction described in Notice 2002-35, 2002-21 I.R.B. 992, available at www.irs.gov/pub/irs-irbs/irb02-21.pdf (tax avoidance using notional principal contracts) solely as a result of your direct or indirect interest in a pass-through entity, you are not required to disclose the transaction on Form 8886. For more information, see Notice 2006-16,

Confidential Transactions
A confidential transaction is a transaction that is offered to you or a related party (as described in section 267(b) or 707(b)) under conditions of confidentiality and for which you or a related party paid an advisor a minimum fee (defined below). A transaction is considered to be offered under conditions of confidentiality if the advisor places a limitation on your disclosure of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of the advisor’s tax strategies. The transaction is treated as confidential even if the conditions of confidentiality are not legally binding on you. See Regulations section 1.6011-4(b)(3) for more information.

Minimum fee. For a corporation (excluding S corporations), or a partnership or trust in which all of the owners or beneficiaries are corporations (excluding S corporations), the minimum fee is $250,000. For all others, the minimum fee is $50,000.

The minimum fee includes all fees for a tax strategy, for advice (whether or not tax advice), or for the implementation of a transaction. Fees include payment in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable. You are treated as paying fees to an advisor if you know or should know that the amount you pay will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. Fees do not include amounts paid to a person, including an advisor, in that person’s capacity as a party to the transaction. The IRS will scrutinize all of the facts and circumstances in determining whether consideration received in connection with a confidential transaction constitutes fees. For purposes of determining the minimum fee, related parties (as described in section 267(b) or 707(b)) will be treated as the same individual or entity.

You have participated in a confidential transaction if your tax return reflects a tax benefit from the transaction and your disclosure of the tax treatment or tax structure of the transaction is limited as described above. If disclosure by a pass-through entity (partnership, S corporation, or trust) is limited, but disclosure by the partner, shareholder, or beneficiary is not limited, then the pass-through entity (but not the partner, shareholder, or beneficiary) has participated in the confidential transaction.

Transactions With Contractual Protection
A transaction with contractual protection is a transaction for which you have, or a related party (as described in sections 267(b) or 707(b)) has, the right to a full refund or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained. It also includes a transaction for which fees are contingent on your realization of tax benefits from the transaction. For exceptions and other details, see Regulations section 1.6011-4(b)(4) and Rev. Proc. 2007-20, 2007-7 I.R.B. 517, available at www.irs.gov/pub/irs-irbs/irb07-07.pdf.

You have participated in a transaction with contractual protection if your tax return reflects a tax benefit from the transaction and, as described above, you have the right to a full or partial refund of fees if the fees are contingent. All facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without compensation. If a pass-through entity (partnership, S corporation, or trust) has the right to a full or partial refund of fees or has a contingent fee arrangement, but the partner, shareholder, or beneficiary individually does not, then the pass-through entity (but not the partner, shareholder, or beneficiary) has participated in the transaction with contractual protection.

Loss Transactions
A loss transaction is a transaction that results in your claiming a loss under section 165 (described later) if the amount of the section 165 loss is as follows.

- For individuals, at least $2 million in any single tax year or $4 million in any combination of tax years. (At least $50,000 for a single tax year if the loss arose from a section 988 transaction defined in section 988(c)(1) (relating to foreign currency transactions), whether or not the loss flows through from an S corporation or partnership).
- For corporations (excluding S corporations), at least $10 million in any single tax year or $20 million in any combination of tax years.

- For partnerships with only corporations (excluding S corporations) as partners (looking through any partners that are also partnerships), at least $10 million in any single tax year or $20 million in any combination of tax years, whether or not any losses flow through to one or more partners.
- For all other partnerships and S corporations, at least $2 million in any single tax year or $4 million in any combination of tax years, whether or not any losses flow through to one or more partners or shareholders.
- For trusts, at least $2 million in any single tax year or $4 million in any combination of tax years, whether or not any losses flow through to one or more beneficiaries. (At least $50,000 for a single tax year if the loss arose from a section 988 transaction defined in section 988(c)(1) (relating to foreign currency transactions), whether or not the loss flows through from an S corporation or partnership).

Section 165 loss. For purposes of the above threshold amounts, a section 165 loss is adjusted for any salvage value and for any insurance or other compensation received. However, a section 165 loss does not take into account offsetting gains, other income, or limitations. The full amount of a loss is taken into account in the year it was sustained, regardless of whether all or part of the loss enters into the computation of a net operating loss under section 172 or a net capital loss under section 1212 that is a carryback or carryover to another year. A section 165 loss does not include any portion of a loss attributable to a capital loss carryback or carryover from another year, that is treated as a deemed capital loss under section 1212.

In determining whether a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of tax years as described above, only losses claimed in the tax year that the transaction is entered into and the 5 succeeding tax years are combined.

The types of losses included in this category are section 165 losses, including amounts deductible under a provision that treats a transaction as a sale or other disposition or otherwise results in a deduction under section 165. However, this category does not include losses described in Rev. Proc. 2004-66, 2004-50 I.R.B. 966, available at www.irs.gov/pub/irs-irbs/irb04-50.pdf (or future published guidance).

You have participated in a loss transaction if your tax return reflects a section 165 loss that equals or exceeds the applicable threshold amount. If you are a partner, shareholder, or beneficiary of a pass-through entity
Transactions of Interest

A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest. It is a transaction that the IRS and Treasury Department believe has a potential for tax avoidance or evasion, but for which there is not enough information to determine if the transaction should be identified as a tax avoidance transaction. The requirement to disclose transactions of interest applies to transactions of interest entered into after November 1, 2006. For existing guidance, see Notice 2009-55, 2009-31 I.R.B. 170, available at www.irs.gov/pub/irs-irbs/irb09-31.pdf. The IRS may issue a new, or update the existing, notice, regulation, or other form of guidance that identifies a transaction as a transaction of interest.

You have participated in a transaction of interest if you are one of the types or classes of individuals or entities identified as participants in the transaction in the published guidance describing the transaction of interest.

Eliminated Categories

Transactions With a Significant Book-Tax Difference

The disclosure requirement for this category has been eliminated for transactions entered into on or after August 3, 2007. However, this does not relieve taxpayers of any disclosure obligations for brief asset holding transactions that were entered into before August 3, 2007. The rules for brief asset holding period reportable transactions entered into before August 3, 2007, are contained in Regulations section 1.6011-4 in effect prior to August 3, 2007.

This category includes transactions that result in your claiming a tax credit (including a foreign tax credit) of more than $250,000 if the asset giving rise to the credit was held by you for 45 days or less. For purposes of determining the holding period of the asset, the principles of section 246(c)(3) and (c)(4) apply. Disregard any transactions generating a foreign tax credit for withholding taxes or other taxes imposed on a dividend that are not disallowed under section 901(k) (including transactions eligible for the exception for security dealers under section 901(k)(4)). See Rev. Proc. 2004-68, 2004-50 I.R.B. 969, available at www.irs.gov/pub/irs-irbs/irb04-05.pdf, for a list of exceptions for this category of reportable transaction.

Exceptions to Reportable Transaction Categories, Published Guidance


Shareholders of Foreign Corporations

Special rules apply to determine whether a reporting shareholder of a foreign corporation participated in a reportable transaction. A reporting shareholder means a U.S. shareholder in a controlled foreign corporation, or a 10% shareholder (by vote or value) of a qualified electing fund. For all categories of reportable transactions except transactions of interest, a reporting shareholder participates in a reportable transaction if the foreign corporation would be considered to participate in the transaction if it were a domestic corporation filing a tax return reflecting items from the transaction. A reporting shareholder of a foreign corporation participates in a transaction of interest if the published guidance identifying the transaction includes the reporting shareholder among the types or classes of individuals or entities identified as participants. See Regulations section 1.6011-4(c)(3)(i)(G) for details.

Request for Ruling

You may request a ruling from the IRS to determine whether a transaction must be disclosed. The request for a ruling must be submitted to the IRS by the date Form 8886 would otherwise be required to be filed. See Regulations section 1.6011-4(f). For more information on requesting a ruling, see Rev. Proc. 2011-1, 2011-1 I.R.B. 1, available at www.irs.gov/pub/irs-irbs/irb11-01.pdf, or subsequent IRS guidance. The potential obligation of the taxpayer to disclose the transaction will not be suspended during the period that the ruling request is pending.

Recordkeeping

You must keep a copy of all documents and other records related to a reportable transaction. See Regulations section 1.6011-4(g) for more details.

When and How To File

Attach Form 8886 to your income tax return or information return (including a partnership, S corporation, or trust return), including amended returns, for each tax year in which you participated in a reportable transaction. If a reportable transaction results in a loss or credit carried back to a prior tax year, attach Form 8886 to an application for tentative refund (Form
Also file separately. If this is an initial year filing of Form 8886, send an exact copy of the form to the Office of Tax Shelter Analysis at the following address when you file the form with your tax return:

Internal Revenue Service
OTSA Mail Stop 4915
1973 North Rulon White Blvd.
Ogden, Utah 84404

If you file your income tax return electronically, the copy sent to OTSA must show exactly the same information, word for word, provided with the electronically filed return and it must be provided on the official IRS Form 8886 or an exact copy of the form. If you use a computer-generated or substitute Form 8886, it must be an exact copy of the official IRS form. See the instructions for your income tax return for information on electronic filing and substitute forms.

Special Filing Rules

60-day OTSA Extension
If you are a partner in a partnership, shareholder in an S corporation, or beneficiary of a trust who receives a timely Schedule K-1 less than 10 calendar days before your return due date (including extensions) and, based on receipt of the timely Schedule K-1, you determine that you participated in a reportable transaction, Form 8886 will not be considered late if you file Form 8886 with OTSA within 60 days after the due date of your return including extensions.

Designation as a Listed Transaction and/or Transaction of Interest After Filing Tax Return
If a transaction becomes a listed transaction or a transaction of interest after you file a tax return (including an amended return) reflecting your participation in the listed transaction or transaction of interest and before the running of the period of limitations for assessment of tax for any tax year in which you participated in the listed transaction or transaction of interest, then you must file Form 8886 according to the following rules.

- Listed Transaction entered into after August 2, 2007. If you entered into a transaction after August 2, 2007, that later becomes a listed transaction, then you must file Form 8886 with OTSA within 90 days after the date on which the transaction became a listed transaction.
- Transaction of Interest entered into after November 1, 2006. If you entered into a transaction after November 1, 2006, that later becomes a transaction of interest, then you must file Form 8886 with OTSA within 90 days after the date on which the transaction became a transaction of interest.

However, the published guidance under which the transaction becomes a listed transaction or transaction of interest may also provide the time for filing Form 8886. You must file Form 8886 in the time and in the manner stated above regardless of whether you participated in the transaction in the year in which the transaction became a listed transaction or transaction of interest.

Subsequent Loss Transactions
If a transaction becomes a loss transaction because the losses equal or exceed the threshold amounts described above in Loss Transactions on page 2, Form 8886 must be filed as an attachment to your income tax return or information return for the first tax year in which the threshold amount is reached and to any subsequent income tax return or information return that reflects any amount of section 165 loss from the transaction.

Multiple Disclosures
If you are required to file Form 8886, you must do so regardless of whether you also plan to disclose the transaction under other published guidance, for example, Regulations section 1.6662-3(c)(2).

Penalties
There is a monetary penalty under section 6707A for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. Generally, the penalty for failure to include information with respect to a reportable transaction is 75% of the reduction in the tax reported on the income tax return as a result of participation in the transaction or that would result if the transaction were respected for federal tax purposes, but not less than $5,000 in the case of an individual and $10,000 in any other case. The annual maximum penalty for failure to disclose a reportable transaction, other than a listed transaction, cannot exceed $10,000 in the case of an individual, and $50,000 in any other case. The maximum annual penalty for failure to include information with respect to a listed transaction is $100,000 in the case of an individual and $200,000 in any other case. This penalty is in addition to any other penalty that may be imposed. For information, see section 6707A; Notice 2005-11, 2005-7 I.R.B. 493, available at www.irs.gov/pub/irs-irbs/irb05-07.pdf; and Rev. Proc. 2007-21, 2007-9 I.R.B. 613, available at www.irs.gov/pub/irs-irbs/irb07-09.pdf.

If you have a reportable transaction understatement, an accuracy-related penalty may be imposed under section 6662A. This penalty applies to the amount of the understatement that is attributable to any listed transaction and any reportable transaction (other than a listed transaction) with a significant tax avoidance purpose. The penalty increases for transactions that are not disclosed on Form 8886 in accordance with these instructions. If the transaction is not disclosed and a reportable transaction understatement exists, you may not have a reasonable cause and good faith defense under section 6664(d) with respect to the accuracy-related penalty under section 6662A. For more information, see section 6662A and Notice 2005-12, 2005-7 I.R.B. 494, available at www.irs.gov/pub/irs-irbs/irb05-07.pdf.

A penalty under section 6707A is assessed for each failure by any individual or entity required to file a Form 8886 if the individual or entity (a) fails to attach Form 8886 to the appropriate original, amended return, or application for tentative refund, (b) fails to file the form with OTSA, if required, or (c) files a form that fails to include all the information required (or includes incorrect information). The Form 8886 must be completed in its entirety with all required attachments to be considered complete. Do not enter “Information provided upon request” or “Details available upon request,” or any similar statement in the space provided. Inclusion of any such statements subjects you to penalty under sections 6707A and 6662A.

If you are required to pay a penalty under section 6707A or section 6662A, you may be required to disclose them on reports filed with the Securities and Exchange Commission. If you do not disclose these penalties, you may incur additional penalties under section 6707A(e). For more information, see section 6707A(e) and Rev. Proc. 2005-51, 2005-33 I.R.B. 296, available at www.irs.gov/pub/irs-irbs/irb05-33.pdf, amplified by Rev. Proc. 2007-25;

Instructions for Form 8886 (Rev. 3-2011)
Previously Undisclosed Listed Transactions

If you are required to disclose a listed transaction and fail to do so within the time and manner prescribed under section 6011 and the related regulations, then under section 6501(c)(10) the period to assess any tax with respect to the listed transaction will be extended beyond the normal assessment period until one year after the earlier of either:

• The date you disclose the transaction by filing Form 8886 in the manner prescribed in Rev. Proc. 2005-26, 2005-17 I.R.B. 965, available at www.irs.gov/pub/irs-irbs/irb05-17.pdf (or subsequently published guidance), or

• The date that a material advisor provides the information required under section 6112 in response to a request by the IRS under section 6112.

Section 6501(c)(10) is effective for tax years with respect to which the limitations period on assessment did not expire prior to October 22, 2004. Section 6501(c)(10) does not revive an assessment period that expired prior to October 22, 2004. For more information, see Rev. Proc. 2005-26.

If you are filing Form 8886 to disclose a previously undisclosed listed transaction for purposes of section 6501(c)(10), submit the form and a cover letter to the Internal Revenue Service Center where your original tax return was filed. Write across the top of page 1 of each Form 8886 the following statement: “Section 6501(c)(10) Disclosure” followed by the tax year and tax return to which the disclosure statement applies. For example, if the Form 8886 relates to your Form 1040 for the 2002 tax year, you must include the following statement: “Section 6501(c)(10) Disclosure; 2002 Form 1040.” The cover letter must identify the tax return to which the disclosure statement relates and include the following statement signed under penalties of perjury by the taxpayer and, if applicable, the paid preparer of Form 8886: “Under penalties of perjury, I declare that I have examined this reportable transaction disclosure statement and, to the best of my knowledge and belief, this reportable transaction disclosure statement is true, correct, and complete. Declaration of preparer (other than the taxpayer) is based on all information of which the preparer has any knowledge.” Separate Forms 8886 and separate cover letters must be submitted for each tax year for which you participated in the undisclosed listed transaction. You must also submit a copy of the form and cover letter simultaneously to OTSA at the OTSA address indicated on page 4. See Rev. Proc. 2005-26 for additional guidance.

How To Complete Form 8886

In order to be considered complete, Form 8886 must be completed in its entirety with all required attachments. To be considered complete, the information provided on the form must describe the expected tax treatment and all potential tax benefits expected to result from the transaction, describe any tax result protection with respect to the transaction, and identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction and identify all parties involved in the transaction. A Form 8886 containing a statement that information will be provided upon request is not considered a complete disclosure statement. If Form 8886 is not completed in accordance with these instructions and Regulations section 1.6011-4(f), you will not be considered to have complied with the disclosure requirements. If you receive one or more reportable transaction numbers for a reportable transaction, you must include the reportable transaction numbers on Form 8886.

If the information required exceeds the space provided, complete as much information as possible in the available space and attach the remaining information on additional sheets. The additional sheets must be in the same order as the lines to which they correspond. You must also include your name and identifying number at the top of each additional sheet. Do not write “See Attached” on the form and provide all the information on an attached statement.

Item A

If you file more than one Form 8886 with your return, sequentially number each of these forms and enter the statement number for this Form 8886 (for example, statement number 1 of 3).

Item B

Enter the form number and year of the tax return with which this Form 8886 is filed (for example, Form 1040). If the tax return has a calendar tax year, enter the year shown on the return (for example, 2007). If it is a fiscal year return, enter the date the fiscal year ends using the MM/DD/YYYY format (for example, 06/30/2008).

Item C

Check all the box(es) that apply.

Initial year filer. If this is the first year that you are filing a Form 8886 to disclose this transaction, check this box and file a duplicate copy of the form with OTSA (see When and How To File above).

Protective disclosure. You may indicate that you are filing on a protective basis by checking this box (under the option provided in Regulations section 1.6011-4(f)). Generally, the IRS will not treat a Form 8886 filed on a protective basis any differently than other Forms 8886. An incomplete form containing a statement that information will be provided on request is not a complete disclosure statement. For a protective disclosure to be effective, you must properly complete and file Form 8886 and provide all required information. See How To Complete Form 8886 above.

Line 1a

Enter the name, if any, by which the transaction is known or commonly referred to. If no name exists, provide a short identifying description of this transaction that distinguishes it from other reportable transactions in which you have participated (or may participate in the future). If you are reporting more than one transaction and the transactions have different names, enter all names in the space provided. If additional space is needed, write “See Additional List” and attach a list.

If you are filing Form 8886 to disclose a transaction with a significant book-tax difference that was due prior to January 6, 2006, write “book-tax difference” in parentheses after the name of the transaction on line 1a. If any other disclosure category also applies, check the appropriate box(es) on line 2.

Line 1b

Enter the first year that you participated in the transaction in year format (YYYY). If you are reporting for more than one transaction, enter all initial years in the space provided. If additional space is needed, write “See Additional List” and attach a list.

Note. This may not be the same as the year for which you are disclosing a reportable transaction.

Line 1c

Enter the 9 digit and/or 11 digit number provided to you. This number may be
referred to as a registration number or reportable transaction number and may begin with the letters “MA.” Reportable transactions can have more than one number. If you have more than one number for this transaction, include all numbers in the space provided. If additional space is needed, write “See Additional List” and attach a list.

Reportable transaction numbers (formerly known as tax shelter registration numbers or registration numbers) are issued to material advisors who file a statement disclosing a reportable transaction under section 6111. Material advisors are required to provide this number to investors/advisees.

Line 2
Check the box(es) for all categories that apply to the transaction being reported. The reportable transaction categories are described under Participation in a Reportable Transaction on page 1.

Note. The category for significant book-tax difference transactions has been eliminated by Notice 2006-6. Transactions with a significant book-tax difference that would have been required to be disclosed after January 5, 2006, are no longer reportable transactions.

However, if the transaction is also a transaction described in any of the remaining reportable transaction categories, it must still be disclosed and the box for all appropriate categories (that is, a, b, c, d, or e) must be checked.

For more details, see Transactions With a Significant Book-Tax Difference on page 3 and Notice 2006-6.

Note. The category for brief-asset holding period has been eliminated for transactions entered into on or after August 3, 2007. However, this does not relieve taxpayers of any disclosure obligations for brief asset holding transactions that were entered into before August 3, 2007. The rules for brief asset holding period reportable transactions entered into before August 3, 2007, are contained in Regulations section 1.6011-4 in effect prior to August 3, 2007. For more details, see Transactions With a Brief Asset Holding Period on page 3.

If the transaction is a listed transaction or transaction of interest, you must check the listed transaction box or transaction of interest box in addition to any others that may apply.

Line 3
Identify the notice, revenue ruling, regulation, announcement, or other published guidance that identified the transaction as a listed transaction or a transaction of interest. For listed transactions, identify the guidance as shown in Notice 2009-59, or later IRS guidance.

Line 4
Do not report more than one transaction on this form unless the transactions are the same or substantially similar. See Substantially Similar on page 1.

Line 5
If you participated in the transaction through other entities, indicate whether each entity is a partnership, S corporation, or trust. In addition, if the entity is foreign, check the box for “Foreign.” On line 5b, provide the full name of the entity. On line 5c, enter the entity’s EIN (if known). Use hyphens when entering the EIN. On line 5d, enter the date you received the Schedule K-1 from the entity. Enter “none” if Schedule K-1 was not received. If you are reporting more than one entity, use a separate column for each entity. Attach additional sheets for more than two entities.

Line 6
Enter the name, address, and social security number (SSN) or EIN (if known) for each individual or entity to whom you paid a fee with regard to the transaction if that individual or entity promoted, solicited, or recommended your participation in the transaction, or provided tax advice related to the transaction. Also, enter the approximate fees paid to each of the individuals or entities. These fees include payment in whatever form, whether in cash or in kind, for a tax strategy or for advice (whether or not tax advice). Fees also include consideration for services to:
1. Analyze the transaction (whether or not related to the tax consequences of the transaction),
2. Implement the transaction,
3. Document the transaction, or
4. Prepare tax returns to the extent the return preparation fees are unreasonable.

You are also treated as paying fees to an advisor if you know or should know that an amount you paid will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including an advisor, in that person’s capacity as a party to the transaction.

Line 7a
Please check the box representing the type of tax benefit the transaction will reflect on your tax return. There may be more than one tax benefit to your transaction. A tax benefit includes but is not limited to the following: deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or absence of adjustments) to the basis of property, status as an entity exempt from federal income taxation, and any other tax consequences that may reduce a taxpayer’s federal income tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit. Check the “Other” box for tax benefits not specifically identified by a box and identify the tax benefits in the space provided (for example, status as an entity exempt from federal income taxation). If you need more space, follow the instructions under How To Complete Form 8886 on page 5.

Line 7b
Describe the reportable transaction you entered into and the relevant facts and tax benefits for all affected years that caused the transaction to be reportable. Describe each step of the transaction, including all information known to you. Include in your description other parties to the transaction and, if known, assumptions of liabilities or other obligations, satisfaction of liabilities or obligations, sales of property or interests in property, the formation and dissolution of entities, and any agreements between or among parties to the transaction. Also describe any tax result protection with respect to the transaction. The term “tax result protection” includes insurance company and other third party products commonly described as tax result insurance. Include, if known, the relevant dates and the amounts involved in the steps described. Amounts involved include cash, fair market value of property or services transferred or acquired, adjustments to basis, valuation of notes, obligations, shares, or other securities. Describe, if known, the relationship between the steps of the transaction and how each step relates to why the transaction is reportable. Your description should include the relevance, if known, of any party (including but not limited to participants in the transaction) listed in line 8.

Describe the economic and business reasons for the transaction and its structure. Describe market or business conditions creating the tax benefit(s) or consequence(s) and the transaction’s financial reporting if known.

If you checked box 2b, explain how your disclosure of information concerning the transaction was limited...
The type and rule above prints on all proofs including departmental reproduction proofs. MUST be removed before printing.

(for example, by contract or verbal agreement) and the nature and extent of the disclosure limitations. See Regulations section 1.6011-4(b)(3) for more details.

If you checked box 2c, describe the terms of the contractual protection. See Regulations section 1.6011-4(b)(4) for more details.

If you checked box 2d, explain how you calculated the basis of the asset for which there was a loss.

If you need more space, follow the instructions under How To Complete Form 8886 on page 5.

Line 8
List all individuals involved in the transaction. List all tax-exempt, foreign, or related entities involved in the transaction. Check the applicable box(es) for the type of entity. Attach additional sheets where appropriate. Provide all information, including the name, EIN or SSN (include hyphens), and address, if known.

Include a brief description of each listed individual’s and each entity’s involvement in the transaction (purchaser, lender, seller, broker, etc.). Provide the country of incorporation or existence for each foreign entity, if known. Describe the relationship between you and any related entity and between or among any related entities (as described in section 267(b) or 707(b)).

Paperwork Reduction Act Notice.
You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545-0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for all other taxpayers who file this form is shown below.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Time Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recordkeeping</td>
<td>10 hr., 16 min.</td>
</tr>
<tr>
<td>Learning about the law or the form</td>
<td>4 hr., 50 min.</td>
</tr>
<tr>
<td>Preparing, copying, assembling, and sending</td>
<td>6 hr., 25 min.</td>
</tr>
<tr>
<td>the form to the IRS</td>
<td></td>
</tr>
</tbody>
</table>

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see When and How To File on page 3.
# APPENDIX III

## Material Advisor Disclosure Statement

*See separate instructions.*

### Note
The reportable transaction number will be sent to the material advisor's address below.

<table>
<thead>
<tr>
<th>Material Advisor’s Name (see instructions)</th>
<th>Identifying number</th>
<th>Telephone number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number, street, and room or suite no.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### A
Contact person name (last name, first name, middle initial) | Title | Telephone number

### B
Is this a protective disclosure? (see instructions)  
- [ ] Yes  
- [ ] No  
If "Yes," see line 6a instructions.

### C
Is this the original Form 8918 for this reportable transaction?  
- [ ] Yes  
- [ ] No  
If "Yes," go to line 1. If "No," enter the reportable transaction number previously issued for this reportable transaction or tax shelter.

#### Reportable Transaction Number

1. **Name of reportable transaction (see instructions)**

2. Identify the type of reportable transaction. Check all the box(es) that apply (see instructions).
   - [ ] Listed  
   - [ ] Confidential  
   - [ ] Contractual protection  
   - [ ] Transaction of interest
   - [ ] Loss

3. If you checked box 2a or 2e, enter the published guidance number for the listed transaction or transaction of interest ►

4. Enter the date the Material Advisor became a material advisor with respect to the reportable transaction (see instructions) ►

5. If you are a party to a designation agreement, identify the other parties (see instructions).

### Name

| Identifying number (if known) |

| Address (Number, street, and room or suite no.) |

### City or town, state, and ZIP code

| Contact name | Telephone number |

6a Provide a brief description of the type of material aid, assistance, or advice you provided (see instructions).

b Describe the role of any other entity(ies) or individual(s) who you know or have reason to know provided material aid, assistance, or advice to this transaction and include each entity’s and individual’s complete name, identifying number (if known), and address.

7a To obtain the intended tax benefits generated by the transaction:
   - Is a related entity(ies) or individual(s) needed?  
     - [ ] Yes  
     - [ ] No
   - Is a foreign entity(ies) or individual(s) needed?  
     - [ ] Yes  
     - [ ] No
   - Is a tax-exempt entity(ies) needed?  
     - [ ] Yes  
     - [ ] No

b If you answered ‘Yes’ to any of the above questions, describe the role of each individual or entity. Also identify the individual’s or entity’s country of existence if a particular country is required to obtain the intended tax benefits.

8a To obtain the intended tax benefits generated by the transaction, is income or gain from the transaction allocated directly or indirectly to an individual(s) or entity(ies) that has a net operating loss and/or unused loss or credits?  
- [ ] Yes  
- [ ] No

b If “Yes,” describe the role of each individual or entity in the transaction.
9 Identify the types of financial instruments used in this transaction (see instructions).

10 Estimated Tax Benefits—Identify the type of tax benefit generated by the transaction that you expect the taxpayer to claim in each year. Check all boxes that apply (see instructions).

☐ Deductions ☐ Exclusions from gross income ☐ Tax credits ☐ Other __________________________
☐ Capital loss ☐ Nonrecognition of gain ☐ Deferral
☐ Ordinary loss ☐ Adjustments to basis ☐ Absence of adjustments to basis

11 Timing of Tax Benefits—If you checked one or more boxes on line 10, check the applicable box(es) below to identify the period in which such tax benefits are claimed. Check each box that applies.

☐ Tax benefits generated by the transaction are required to be claimed in the first year of participation by the taxpayer.
☐ Tax benefits may be claimed in another year by the taxpayer.

12 Enter the Internal Revenue Code section(s) used to claim tax benefit(s) generated by the transaction. (Attach additional sheets if necessary.)

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

13 Describe the reportable transaction for which you provided material aid, assistance or advice, including but not limited to the following: the nature of the expected tax treatment and expected tax benefits generated by the transaction for all affected years, the years the tax benefits are expected to be claimed, the role of the entities or individuals mentioned in lines 7a or 8a (if any) and the role of the financial instruments mentioned in line 9 (if any). Explain how the Internal Revenue Code sections listed in line 12 are applied and how they allow the taxpayer to obtain the desired tax treatment. Also, include a description of any tax result protection with respect to the transaction.

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature of Material Advisor __________________________ Date __________________________ Title __________________________

Print name __________________________
Instructions for Form 8918
(Rev. June 2017)

Material Advisor Disclosure Statement
(For use with Form 8918 (Rev. December 2011) or later revision)

Section references are to the Internal Revenue Code unless otherwise noted.

What's New
The IRS has created a page on IRS.gov for information about Form 8918 and its instructions, at IRS.gov/Form8918. Information about any future developments affecting Form 8918 (such as legislation enacted after we release it) will be posted on that page.

Form 8918. Use the latest revision of Form 8918 available on IRS.gov.

General Instructions
Purpose of Form
Material advisors to any reportable transaction must disclose certain information about the reportable transaction by filing a Form 8918 with the IRS.

Note. Form 8918 replaces Form 8264, Application for Registration of a Tax Shelter.

Material advisors who file a Form 8918 will receive a reportable transaction number from the IRS. Material advisors must provide the reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor. See Who Is a Material Advisor below. Every taxpayer who has participated in a reportable transaction (see What is a Reportable Transaction, later) must also disclose the transaction on Form 8886, Reportable Transaction Disclosure Statement. For more information, see Form 8886 and the Instructions for Form 8886.

Who Must File?
Generally, every material advisor to a reportable transaction is required to file Form 8918. A material advisor can be an individual, trust, estate, partnership, or corporation. You are not required to file Form 8918 unless a taxpayer to whom or for whose benefit you provided the tax statement (defined below) entered into the reportable transaction. If you provide a tax statement to another material advisor, you are not required to file Form 8918 unless the reportable transaction is entered into by a taxpayer to whom or for whose benefit that material advisor provided the tax statement.

Who Is a Material Advisor?
You are a material advisor to a transaction if you:
- Provide any material aid, assistance, or advice with respect to the organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
- You directly or indirectly receive or expect to receive gross income in excess of the threshold amount (defined below) for the material aid, assistance, or advice.

You provide material aid, assistance, or advice with respect to the organizing, managing, promoting, selling, implementing, insuring, or carrying out any transaction if you make or provide a tax statement to or for the benefit of:
- A taxpayer who either is required to disclose the transaction under section 6011 because the transaction is a listed transaction or a transaction of interest, or would have been required to disclose the transaction under section 6011 if the transaction had become a listed transaction or a transaction of interest within the period of limitations;
- A taxpayer who you know or reasonably expect to be required to disclose the transaction under Regulations section 1.6011-4 because the transaction is or is reasonably expected to become a reportable transaction other than a listed transaction or transaction of interest;
- A material advisor who is required to disclose the transaction under section 6111 because the transaction is a listed transaction or a transaction of interest; or
- A material advisor who you know or reasonably expect to be required to disclose the transaction under section 6111 because the transaction is or is reasonably expected to become a reportable transaction other than a listed transaction or transaction of interest.

Threshold amount. The threshold amount of gross income is $50,000 for a reportable transaction that provides substantially all of the tax benefits to individuals (looking through any partnerships, S corporations, or trusts). The determination of whether substantially all of the tax benefits from a reportable transaction are provided to individuals is based on all the facts and circumstances. Generally, if 70% or more of the tax benefits (defined later) from a reportable transaction are provided to individuals (looking through any partnerships, S corporations, or trusts) then substantially all of the tax benefits will be considered to be provided to individuals.

For all other transactions, the threshold amount is $250,000. For listed transactions, the threshold amounts are reduced from $50,000 to $10,000 and from $250,000 to $25,000. For transactions of interest, the threshold amounts may be reduced as identified in the published guidance describing the transaction. Determine the threshold amount separately for each reportable transaction. The threshold amount must be met independently for each transaction that is a reportable transaction and aggregation of fees among reportable transactions is not required.

In figuring the amount of gross income you receive directly, or indirectly, for material aid, assistance, or advice, include all the following:
- Fees for a tax strategy.
- Fees for advice (whether or not tax advice).
- Fees for implementing the reportable transaction.

Fees. Fees include consideration in whatever form paid, whether in cash or in kind, for:
- Services to analyze the transaction (whether or not related to the tax consequences of the transaction),
- Services to implement the transaction,
- Services to document the transaction, and
- Services to prepare tax returns to the extent return preparation fees are unreasonable.

A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the
transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property.

The IRS will scrutinize carefully all of the facts and circumstances to determine if consideration received or expected to be received in connection with a reportable transaction is gross income received directly, or indirectly, for aid, assistance, or advice.

**Employee exception.** Generally, you are not considered to be a material advisor if you make a tax statement solely in your capacity as an employee, shareholder, partner, or agent of another person. In this case, any tax statement you make will be considered to be made by your employer, corporation, partnership, or principal.

However, you will be treated as a material advisor if you form or use an entity to avoid the rules of section 6111 or 6112 or the penalties under section 6707 or 6708.

**Date you became a material advisor.** You are a material advisor when all of the following have occurred (in no particular order).

- You make a tax statement,
- You receive (or expect to receive) gross income in excess of the threshold amount, and
- The transaction is entered into by the taxpayer to whom or for whose benefit you provided the tax statement, or in the case of a tax statement provided to another material advisor, when the transaction is entered into by a taxpayer to whom or for whose benefit material advisor provided a tax statement.

If a transaction that was not a reportable transaction is identified as a listed transaction or a transaction of interest in published guidance after the occurrence of the 3 events described above, you will be treated as becoming a material advisor on the date the transaction is identified as a listed transaction or a transaction of interest.

You must make reasonable and good faith efforts to determine when the taxpayer entered into the transaction, even if you stop providing services before the taxpayer enters into the transaction.

**Post-filing advice.** You are not considered to be a material advisor concerning a transaction if you do not make or provide a tax statement about the transaction until after the first tax return reflecting tax benefit(s) of the transaction is filed with the IRS. This exception does not apply to you if it is expected the taxpayer will file a supplemental or amended return reflecting additional tax benefits from the transaction.

**Definitions**

**Transaction**

A transaction includes all factual elements relevant to the expected tax treatment of an investment, entity, plan, or arrangement and it includes any series of steps carried out as part of a plan.

**Substantially Similar**

A transaction is substantially similar to another transaction if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy.

Receipt of an opinion regarding the tax consequences of the transaction is not relevant to determine if the transaction is the same as or substantially similar to another transaction. The term substantially similar must be broadly construed in favor of disclosure. See Regulations section 1.6011-4(c)(4) for examples.

**Tax Benefit**

A tax benefit includes deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from federal income taxation, and any other tax consequences that may reduce a taxpayer’s federal tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

**What Is a Reportable Transaction?**

A reportable transaction is a transaction described in one or more of the following categories. See Regulations section 1.6011-4(b) for more information.

**Listed Transactions**

A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction.

These transactions are identified by notice, regulation, or other form of published guidance as a listed transaction. See Notice 2009-59 for guidance.

Go to IRS.gov/Businesses/Corporations/Abusive-Tax-Shelters-And-Transactions for the latest information and guidance.

**Confidential Transactions**

A confidential transaction is a transaction that is offered to a taxpayer or related party (as described in section 267(b) or 707(b)) under conditions of confidentiality and for which the taxpayer (or related party) paid an advisor a minimum fee (defined below).

A transaction is considered to be offered under conditions of confidentiality if the advisor who is paid a minimum fee places a limitation on the disclosure of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of the advisor’s tax strategies. The transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. See Regulations section 1.6011-4(b)(3) for more information.

**Minimum fee.** For a corporation (excluding S corporations), or a partnership or trust in which all of the owners or beneficiaries are corporations (excluding S corporations), the minimum fee is $250,000. For all others, the minimum fee is $50,000.

The minimum fee includes all fees for a tax strategy, for advice (whether or not tax advice), or for the implementation of a transaction. Fees include payment in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable. A taxpayer is treated as paying fees to an advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. Fees do not include amounts paid to a person, including an advisor, in that person’s capacity as a party to the transaction. The IRS will scrutinize all of the facts and circumstances in determining whether consideration received in connection with a confidential transaction constitutes fees. For purposes of determining the minimum fee, related parties (as described in section 267(b) or 707(b)) will be treated as the same individual or entity.

**Transactions With Contractual Protection**

A transaction with contractual protection is a transaction for which the taxpayer, or a related party (as described in sections 267(b) or 707(b)), has the right to a full refund or partial refund of fees if all or part of the intended tax consequences from
the transaction are not sustained. It also includes a transaction for which fees are contingent on the taxpayer’s realization of tax benefits from the transaction. See Regulations section 1.6011-4(b)(4) and Rev. Proc. 2007-20 for the latest information and guidance.

Loss Transactions

A loss transaction is a transaction that results in the taxpayer claiming a loss under section 165 (described later) if the amount of the section 165 loss is as follows.

- For individuals, at least $2 million in any single tax year or $4 million in any combination of tax years. At least $50,000 for a single tax year if the loss arose from a section 988 transaction defined in section 988(c)(1) (relating to foreign currency transactions), whether or not the loss flows through from an S corporation or partnership.
- For corporations (excluding S corporations), at least $10 million in any single tax year or $20 million in any combination of tax years.
- For partnerships with only corporations (excluding S corporations) as partners (looking through any partners that are also partnerships), at least $10 million in any single tax year or $20 million in any combination of tax years, whether or not any losses flow through to one or more partners.
- For all other partnerships and S corporations, at least $2 million in any single tax year or $4 million in any combination of tax years, whether or not any losses flow through to one or more partners or shareholders.
- For trusts, at least $2 million in any single tax year or $4 million in any combination of tax years, whether or not any losses flow through to one or more beneficiaries. At least $50,000 for a single tax year if the loss arose from a section 988 transaction defined in section 988(c)(1) (relating to foreign currency transactions), whether or not the loss flows through from an S corporation or partnership.

Section 165 loss. For this purpose, a section 165 loss is adjusted for any salvage value and for any other insurance compensation received. However, a section 165 loss does not include offsetting gains, other income or limitations. The full amount of a section 165 loss is included in the year it occurred, regardless of whether all or part of it is included in computing a net operating loss (under section 172) or a net capital loss (under section 1212) that is a carryback or carryover to another year. A section 165 loss does not include any portion of a loss attributable to a capital loss carryback or carryover from another year that is treated as a deemed capital loss under section 1212.

To determine if a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of tax years, only losses claimed in the tax year the transaction is entered into and the 5 succeeding tax years are combined.

The types of losses included in this category are section 165 losses (including amounts deductible under a provision that treats a transaction as a sale or other disposition or otherwise results in a deduction under section 165). However, this category does not include losses described in Rev. Proc. 2013-11 (or future published guidance).

Transactions of Interest

A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest. It is a transaction that the IRS and Treasury Department believe has a potential for tax avoidance or evasion, but for which there is not enough information to determine if the transaction should be identified as a tax avoidance transaction. The requirement to disclose transactions of interest applies to transactions of interest entered into after November 1, 2006. See Notice 2009-55, Notice 2016-66, and Notice 2017-08 for the latest information and guidance. The IRS may issue a new or update an existing notice, regulation, or other form of guidance that identifies a transaction as a transaction of interest.

Eliminated Categories

Transactions with a brief asset holding period. The disclosure requirement for this category has been eliminated for transactions entered into after August 2, 2007. However, this does not relieve taxpayers of any disclosure obligations for brief asset holding transactions that were entered into before August 3, 2007. The rules for brief asset holding period reportable transactions entered into before August 3, 2007, are contained in Regulations section 1.6011-4 in effect prior to August 3, 2007.

Transactions with a significant book-tax difference. The disclosure requirement for this category has been eliminated. Transactions with a significant book-tax difference that would have been required to be disclosed with returns due on dates (including extensions) after January 5, 2006, are no longer reportable transactions.

However, this does not relieve taxpayers of any disclosure obligations for significant book-tax difference transactions that should have been disclosed on a return with a due date prior to January 6, 2006. See Notice 2006-06.

Exceptions to Reportable Transaction Categories, Published Guidance

A transaction is not considered a reportable transaction if the IRS makes a determination in published guidance that it is not subject to the reporting requirements. For more information, see the following:

- Rev. Proc. 2004-68;
- Rev. Proc. 2007-20; and

The IRS may also determine by individual letter ruling that an individual letter ruling request satisfies the reporting requirements. See Request for Ruling below for more details on submitting a letter ruling request.

Request for Ruling

You may request a ruling from the IRS to determine whether a specific transaction is a reportable transaction. The potential obligation of a material advisor and the taxpayer to disclose the transaction will not be suspended during the period that the ruling request is pending. Therefore, even if you have a ruling request with the IRS, you must still complete and file this form in order to avoid potential penalties. See Rev. Proc. 2017-1 for information on ruling requests.

When To File

The material advisor’s disclosure statement must be filed with the Office of Tax Shelter Analysis (OTSA) by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the reportable transaction or in which circumstances occur to require an amended disclosure statement. See Date you became a material advisor, earlier.

Where To File

In order to file, mail your completed Form 8918 to:

Internal Revenue Service
OTSA Mail Stop 4915
1973 Rulon White Blvd.
Ogden, Utah 84201

Furnishing a Reportable Transaction Number

Receipt of a reportable transaction number does not indicate that the IRS has reviewed, examined, or approved the transaction.
Material advisors must provide the reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor. The reportable transaction number must be provided when the transaction is entered into, or, if the transaction is entered into before the material advisor received the reportable transaction number, within 60 calendar days from the date the reportable transaction number is mailed to the material advisor.

Requirement to Keep Lists
Generally, a material advisor must maintain a list identifying each entity or individual to whom the advisor was a material advisor to a reportable transaction. A material advisor is not required to identify an entity or individual on the list if the entity or individual entered into a listed transaction or a transaction of interest more than 6 years before the transaction was identified in publicly available guidance as a listed transaction or a transaction of interest. A separate list must be prepared and maintained for each transaction or group of substantially similar transactions.

The list must be maintained for 7 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. Upon IRS’s written request, each material advisor who is responsible for maintaining a list must furnish the list to the IRS. The list must be maintained in a form that enables the IRS to determine without undue delay or difficulty the information required to be maintained for each list. See Regulations section 301.6112-1 for more information.

Note. Go to IRS.gov/Businesses/Corporations/Abusive-Tax-Shelters-And-Transactions for the latest information and guidance.

Contents of the list. Each list must contain the following.

1. An itemized statement containing:
   a. The name of each reportable transaction, the citation to the notice number or published guidance number identifying the transaction if the transaction is a listed transaction or transaction of interest, and the reportable transaction number obtained under section 6111;
   b. The name, address, and identifying number of each individual or entity required to be included on the list;
   c. The date on which each individual or entity entered into the reportable transaction, if known;
   d. The amount invested in the reportable transaction by each individual or entity, if known;
   e. A summary or schedule of the tax treatment that each individual or entity is intended or expected to derive from participation in the reportable transaction; and
   f. The name of each other material advisor to the transaction, if known.
   2. A detailed description of the reportable transaction that describes both the tax structure and the purported tax treatment.
   3. A copy of any designation agreement to which the material advisor is a party. See Line 5 for more information.
   4. Copies of any additional written materials, including tax analyses or opinions, relating to each reportable transaction that are material to an understanding of the intended tax treatment or tax structure of that transaction that the material advisor or any related party or agent of the material advisor has shown or provided to any individual or entity (or to their representatives, tax advisors, or agents) who acquired or may acquire an interest in the transaction. However, you are not required to retain earlier drafts of a document if you retain 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.

Dissolution or liquidation of material advisor. Generally, if a material advisor dissolves or liquidates before completion of the 7-year list maintenance period, the person responsible under state law for winding up the entity’s affairs must prepare, maintain, and furnish each component of the list on behalf of the entity, unless the entity submits the list to OTSA within 60 days after the dissolution or liquidation. See Regulations section 301.6112-1(d) for more information.

Penalties

Penalty for Failure To Furnish Information Regarding Reportable Transactions
A penalty may be imposed if you are required to file Form 8918 and you fail to file the return on or before the due date, or file false or incomplete information about a reportable transaction.

The penalty is $50,000 for reportable transactions other than listed transactions. The penalty imposed for listed transactions is the greater of:
• $20,000, or
• 50 percent of the gross income from providing aid, assistance, or advice about the listed transaction before the date the return is filed. If the failure is intentional, the percentage is 75%.

For more information, see section 6707. Form 8918 must be completed in its entirety with all required attachments to be considered complete. Stating that “Information will be provided upon request” or that “Details are available upon request,” or any similar statement in the space provided, is not considered a description and may cause your disclosure statement to be treated as incomplete.


Penalty for Failure To Maintain Required Lists
Any person who is required to maintain a list and fails to make the list available within 20 business days of an IRS written request must pay a penalty of $10,000 for each day of the failure after the 20th business day. The penalty may be assessed for failure to maintain the list in a form that enables the IRS to determine without undue delay or difficulty the information required.

Other Penalties
Section 6700 imposes penalties for promoting abusive tax shelters and related activities.

Section 6701 imposes penalties for aiding and abetting an understatement of tax liability.

Section 7203 imposes penalties for the willful failure to file a return, supply information, or pay tax.

Section 7206 imposes penalties for tax-related fraud and false statements.

Section 7207 imposes penalties for submitting fraudulent returns, statements, or other documents.

Specific Instructions

How To Complete Form 8918
In order to be considered complete, Form 8918 must be completed in its entirety with all required attachments. To be considered complete, the information provided on the form must describe the expected tax treatment and all potential

Instructions for Form 8918 Rev. 06-2017
tax benefits expected to result from the transaction, describe any tax result protection with respect to the transaction, and identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction. A Form 8918 containing a statement that information will be provided upon request is not considered a complete disclosure statement.

If the information required exceeds the space provided, complete as much information as possible in the available space and attach the remaining information on additional sheets. The additional sheets must be in the same order as the lines to which they correspond. You must also include your name and identifying number at the top of each additional sheet. Do not write “See Attached” on the form and provide all the information on an attached statement.

**Material Advisor Identifying Information**

**Individuals.** If the material advisor is an individual, enter the first name, middle initial (if any), and last name; the social security number; the phone number; and the complete address.

**Entities.** If the material advisor is an entity, enter the full name of the entity as shown on its income tax return, the employer identification number, and the complete address. See **Item A** for contact information.

**Item A**

**Contact information.** If the material advisor is an entity, list the name of a contact person along with a contact telephone number. If the material advisor is an individual, you may disregard this line.

**Item B**

**Protective disclosure.** Indicate if you are filing on a protective basis by checking the appropriate box. If you are uncertain if a transaction must be disclosed, check the “Yes” box and disclose the transaction in accordance with these instructions.

On line 6a, you must explain why you are filing the disclosure on a protective basis. Generally, the IRS will not treat disclosure statements filed on a protective basis any differently than other disclosure statements filed on Form 8918. An incomplete form containing a statement that information will be provided on request is not a complete disclosure statement. For a protective disclosure to be effective, you must properly complete Form 8918 and provide all required information. See **How To Complete Form 8918**, earlier, for more information.

**Item C**

Answer “Yes” if this is the original Form 8918 for this reportable transaction. If this is an amendment to a previously filed Form 8918 for the reportable transaction, answer “No” and enter the reportable transaction number previously provided for the reportable transaction by the IRS.

**Amended statement.** An amended statement must be filed if information previously provided is no longer accurate, if additional information that was not disclosed becomes available, or if there are material changes to the transaction.

**Line 1**

Enter the name, if any, by which the transaction is known or commonly referred to by either yourself or published guidance. If no name exists, provide a short identifying description of this transaction that distinguishes it from other reportable transactions in which you have participated (or may participate in the future). Do not report more than one transaction on this form unless the transactions are the same or substantially similar. See **Substantially Similar**, earlier.

**Line 2**

Check the box(es) for all categories that apply to the transaction being reported. The reportable transaction categories are described under **What Is a Reportable Transaction**, earlier.

If the transaction is a listed transaction, you must check the listed transaction box in addition to any others that apply.

**Line 3**

Identify the notice, revenue ruling, regulation (for example, Notice 2003-81, modified and supplemented by Notice 2007-71), announcement, or other published guidance that identified the transaction as a listed transaction or transaction of interest. For listed transactions, identify the guidance as shown in Notice 2009-59 or later IRS guidance.

**Line 4**

Enter the latest of the following dates.
- The date you made a tax statement with regard to the transaction.
- The date you received or had an expectation that you would receive gross income in excess of the threshold amount (defined earlier).
- The date the transaction was entered into by the taxpayer.
- The date the transaction became a listed transaction or transaction of interest. The latest of these dates is the date you became a material advisor. See **Date you became a material advisor**, earlier.

**Line 5**

If more than one material advisor is required to disclose a reportable transaction under this section, the material advisors may designate by written agreement a single material advisor to disclose the transaction. The transaction must be disclosed by the last day of the month following the end of the calendar quarter that includes the earliest date on which a material advisor who is a party to the agreement became a material advisor to the transaction.

The designation of one material advisor to disclose the transaction does not relieve the other material advisors of the obligation to disclose the transaction to the IRS in accordance with these instructions, if the designated material advisor fails to disclose the transaction to the IRS in a timely manner.

**Line 6a**

Provide a concise statement indicating your role as a material advisor to this transaction. See **Who Is a Material Advisor**, earlier. If you are filing a protective disclosure, you must explain why you believe you are not a material advisor. If you need more space, follow the instructions under **How To Complete Form 8918**, earlier.

**Lines 7a and 7b**

Check the box(es) for all categories that apply to the transaction being reported. Indicate the related parties that are needed and how they are related. Indicate the role of tax-exempt entities if they are required for the transaction. In addition, if a foreign entity is required, indicate how and why the foreign entity is used, along with which country is used if a particular country is required for the transaction. If you need more space, follow the instructions under **How To Complete Form 8918**, earlier.

**Line 9**

Identify the types of financial instruments required by the transaction (loan, stocks, bonds, notes, original issue discounts, domestic and foreign currency agreements, swaps, futures, notional principal contracts, options, input or risk hedges, etc.). If you need more space, follow the instructions under **How To Complete Form 8918**, earlier.

**Line 10**

Check all the boxes that apply for the tax benefits expected from the transaction. A tax benefit includes deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from federal income taxation, and any other tax

Instructions for Form 8918 Rev. 06-2017
consequences that may reduce a taxpayer's federal tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit. Check the "Other" box for tax benefits not specifically described by a box and identify the tax benefit(s) in the space provided. If you need more space, follow the instructions under How To Complete Form 8918, earlier.

Line 13
Describe all of the relevant facts about the reportable transaction including the following.
1. Tax benefits causing the transaction to be reportable.
2. Years affected by the transaction.
3. Steps of the transaction including:

a. Agreements.
b. Property transfers and acquisitions.
c. Liability assumptions.
d. Obligation fulfillment.
e. Sales.
f. Entity formation or dissolution.
g. Other relevant events. Other relevant events may include but are not limited to tax result protection. Tax result protection includes insurance company and other third party products commonly described as tax result insurance.
4. Nature of the transaction (cash, loan, service, other).
5. Purpose of each step in accomplishing the tax benefits and consequences.
6. Where and how each party to the transaction (entered on lines 7a, 7b, and 8a and 8b) is used, including their roles.
7. The economic and business reasons for the transaction and its structure (describe market or business conditions creating the tax benefit or consequence and its financial reporting, if known).
8. How the financial instruments (entered on line 9) are used in the transaction.
9. How the Internal Revenue Code sections (entered on line 12) enable you to obtain the tax treatment.

If you need more space, follow the instructions under How To Complete Form 8918, earlier.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws. We may give the information to the Department of Justice and to other federal agencies, as provided by law. We may give it to cities, states, the District of Columbia, and U.S. commonwealths or possessions to carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. A penalty may be imposed if you are required to file this return and fail to file by the due date or provide incomplete or false information.

Our authority to ask for information is section 6111 and its regulations, which require you to file a return or statement with us with respect to any reportable transaction for which you are a material advisor. Your response is mandatory under these sections. Section 6109 requires that you provide your identifying number on what you file. This is so we know who you are, and can process your return and other papers. You must fill in all parts of the tax form that apply to you.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

<table>
<thead>
<tr>
<th>Activity</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recordkeeping</td>
<td>8 hr., 7 min.</td>
</tr>
<tr>
<td>Learning about the law or the form</td>
<td>3 hr., 4 min.</td>
</tr>
<tr>
<td>Preparing, copying, assembling, and sending the form to the IRS</td>
<td>3 hr., 20 min.</td>
</tr>
</tbody>
</table>

Comments. Go to IRS.gov/UAC/Comment-On-Tax-Forms-And-Publications to provide any comments. You can also send your comments to the Internal Revenue Service, Tax Forms and Publications Division, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. DO NOT SEND THE FORM TO THIS ADDRESS. Instead, see Where To File, earlier.
# Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction

As required by section 6033(a)(2) of the Internal Revenue Code

<table>
<thead>
<tr>
<th>For calendar year 20</th>
<th>, or tax year beginning</th>
<th>20 and ending</th>
<th>Employer identification number</th>
</tr>
</thead>
</table>

**Name of tax-exempt entity**

**In care of (if applicable)**

**Number, street, and room or suite no. (or P.O. box number if mail is not delivered to street address)**

**City or town, state, and ZIP code**

---

1. **Check the applicable box that describes the tax-exempt entity.**
   - [ ] An organization described in section 501(c) or 501(d)
   - [ ] A State, a possession of the United States, or the District of Columbia, a political subdivision of a State or possession of the United States
   - [ ] An Indian tribal government
   - [ ] A plan described in section 401(a) which includes a trust exempt from tax under section 501(a)
   - [ ] An annuity plan described in section 403(a) or annuity contract described in section 403(b)
   - [ ] A qualified tuition program described in section 529
   - [ ] An eligible deferred compensation plan described in section 457(b) which is maintained by an employer described in section 457(e)(1)(A)
   - [ ] An individual retirement account
   - [ ] An individual retirement annuity
   - [ ] An Archer MSA
   - [ ] A custodial account treated as an annuity contract under section 403(b)(7)(A)
   - [ ] A Coverdell education savings account
   - [ ] A health savings account

2. **Identify the type of prohibited tax shelter transaction. Check all the box(es) that apply (see instructions).**
   - [ ] Listed transaction
   - [ ] Confidential
   - [ ] Contractual protection

3. **If the transaction is a listed transaction or substantially similar to a listed transaction, identify the listed transactions (see instructions).**

4. **Identity of other parties (whether taxable or tax-exempt) to the transaction, if known (attach additional sheets, if necessary):**

   **Name of party**

   **Number, street, and room or suite no.**

   **City or town, state, and ZIP code**

   **Name of party**

   **Number, street, and room or suite no.**

   **City or town, state, and ZIP code**

5. **I declare under penalty of perjury that I am authorized to sign this disclosure, that I have examined this disclosure, including any accompanying attachments, and to the best of my knowledge and belief, it is true, correct, and complete.**

   **Signature of director, trustee, officer, or other authorized official**

   **Date**

   **Type or print name of signer**

   **Type or print title or authority of signer**

---

For Paperwork Reduction Act Notice, see the separate instructions.
Instructions for Form 8886-T
(September 2007)

Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

Purpose of Form
Certain tax-exempt entities (defined below) are required to file Form 8886-T to disclose information with respect to each prohibited tax shelter transaction to which the entity is a party. See Prohibited tax shelter transaction below. See Party to a prohibited tax shelter transaction below to determine if the tax-exempt entity is a party to a prohibited tax shelter transaction. See Temporary Regulations section 1.6033-5T for more information. Form 8886-T is available for public inspection.

A separate Form 8886-T must be filed for each prohibited tax shelter transaction.

In addition to filing Form 8886-T, a tax-exempt entity and/or entity manager(s) may be liable for excise taxes in connection with the prohibited tax shelter transaction. For more information, see the instructions for Form 4720, Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code, and the Instructions for Form 5330, Return of Excise Taxes Related to Employee Benefit Plans.

A taxable party to a prohibited tax shelter transaction must provide a statement to any tax-exempt entity that is party to the transaction that the transaction is a prohibited tax shelter transaction. See Tax-exempt entity below.

If a tax-exempt entity participates in any reportable transaction (defined in Regulations section 1.6011-4), the tax-exempt entity also may be required to file Form 8886, Reportable Transaction Disclosure Statement. For more information, see the Instructions for Form 8886.

Frequency of disclosure. A single disclosure is required for each prohibited tax shelter transaction.

Who Must File
If the tax-exempt entity is a non-plan entity (defined below), Form 8886-T must be filed by the entity. If the tax-exempt entity is a plan entity (defined below), Form 8886-T must be filed by the entity manager (defined on page 2).

Note. If the entity is a fully self-directed qualified plan, IRA, or other savings arrangement, the entity manager is the plan participant, beneficiary, or owner who approved or caused the entity to be a party to the prohibited tax shelter transaction.

Definitions

Tax-exempt entity. A tax-exempt entity is an entity which is either a plan entity (defined below) or a non-plan entity (defined below).

Non-plan entity. Non-plan entities are tax-exempt entities described in section 4965(c)(1), (c)(2), or (c)(3). The following tax-exempt entities are non-plan entities:

• An organization described in section 501(c) or 501(d).
• Entities described in section 170(c) including a state, a possession of the United States, the District of Columbia, or a political subdivision of a state or possession of the United States (but not including the United States).
• An Indian tribal government.

See Temporary Regulations section 1.6033-5T for more information.

Plan entity. Plan entities are tax-exempt entities described in section 4965(c)(4), (c)(5), (c)(6), or (c)(7). The following tax-exempt entities are plan entities:

• A plan described in section 401(a) which includes a trust exempt from tax under section 501(a).
• An annuity plan described in section 403(a) or annuity contract described in section 403(b).
• A qualified tuition program described in section 529.
• An eligible deferred compensation plan described in section 457(b) that is maintained by a governmental employer described in section 457(e)(1)(A).
• An individual retirement account.
• An individual retirement annuity.

• An Archer medical savings account.
• A custodial account treated as an annuity contract under section 403(b)(7)(A).
• A Coverdell education savings account.
• A health savings account.

See Temporary Regulations section 1.6033-5T for more information.

Party to a prohibited tax shelter transaction. A tax-exempt entity is a party to a prohibited tax shelter transaction if it:

• Facilitates the transaction by reason of its tax-exempt, tax indifferent or tax-favored status;
• Enters into a listed transaction and the tax-exempt entity’s return (original or amended) reflects a reduction or elimination of liability for applicable federal employment, excise, or unrelated business income taxes that is derived directly or indirectly from tax consequences or tax strategy described in the published guidance that lists the transaction; or
• Is identified in published guidance, by type, class or role, as a party to a prohibited tax shelter transaction.

Prohibited tax shelter transaction. Generally, a prohibited tax shelter transaction is a transaction that is a listed transaction (including subsequently listed transaction), a confidential transaction, or a transaction with contractual protection. See definitions of these terms on pages 1 and 2.

Note. In general, if the IRS determines by published guidance that a transaction will be excluded from the definition of listed transaction, confidential transaction, or transaction with contractual protection, the transaction will not be considered a prohibited tax shelter transaction.

Listed transaction. A listed transaction is a transaction that is the same as or substantially similar to any of the types of transactions that the IRS has determined to be a tax avoidance transaction and are identified by notice, regulation, or other form of published guidance as a listed transaction. For existing guidance see:
Subsequently listed transaction. A subsequently listed transaction is a transaction that is identified in published guidance as a listed transaction after the tax-exempt entity has entered into the transaction and that was not a confidential transaction or transaction with contractual protection at the time the entity entered into the transaction. See section 4965(e)(2) for more information.

Substantially similar. A transaction is substantially similar to another transaction if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure. See Regulations section 1.6011-4(c)(4) for examples.

Confidential transaction. A confidential transaction is a transaction that is offered under conditions of confidentiality and for which a minimum fee (defined below) was paid. A transaction is considered to be offered under conditions of confidentiality if the advisor places a limitation on disclosure of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of the advisor’s tax strategies. The transaction is treated as confidential even if the conditions of confidentiality are not legally binding. See Regulations section 1.6011-4(b)(3) for more information.

Minimum fee. For a corporation, or a partnership or trust in which all of the owners or beneficiaries are corporations (looking through any partners or beneficiaries that are themselves partners or trusts), the minimum fee is $250,000. For all others, the minimum fee is $50,000. The minimum fee includes all fees paid directly or indirectly for the tax strategy, advice or analysis of the transaction (whether or not related to the tax consequences of the transaction), implementation and documentation of the transaction, and preparation fees to the extent they exceed customary return preparation fees. Fees do not include amounts paid to a person, including an advisor, in that person’s capacity as a party to the transaction.

Transaction with contractual protection. A transaction with contractual protection is a transaction for which a participant (or related party as defined under section 267(b) or 707(b)) has the right to a full refund or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained. It also includes a transaction for which fees are contingent on the realization of tax benefits from the transaction. For exceptions and other details, see Regulations section 1.6011-4(b)(4) and Rev. Proc. 2007-20, 2007-7 I.R.B. 517.

Entity manager. In the case of a plan entity, entity manager means the person who approves or otherwise causes the tax-exempt entity to be a party to the prohibited tax shelter transaction. See section 4965(d)(2).

Recordkeeping. The entity or entity manager must keep a copy of all documents and other records related to a prohibited tax shelter transaction. See Regulations section 1.6001-1(c) and 53.6001-1 for more details.

When To File

General rules. Generally, the due date for filing Form 8886-T depends on whether the tax-exempt entity is a party to a prohibited tax shelter transaction to reduce its own federal tax liability or, alternatively, whether it is a party to such a transaction to facilitate the transaction by reason of its tax-exempt, tax indifferent, or tax-favored status.

In the case of a tax-exempt entity that is a party to a prohibited tax shelter transaction because it facilitates the transaction by reason of its tax-exempt, tax indifferent, or tax-favored status, Form 8886-T must be filed on or before May 15 of the year following the close of the calendar year during which the tax-exempt entity entered into the prohibited tax shelter transaction. See Temporary Regulations section 1.6033-5T(e) for more details.

In the case of a tax-exempt entity that became a party to a prohibited tax shelter transaction that is a listed transaction to reduce or eliminate an own tax liability, Form 8886-T must be filed on or before the date the first tax return (whether an original or an amended return) is filed on which the tax-exempt entity reflects a reduction or elimination of its liability for applicable federal employment, excise, or unrelated business income taxes that is derived directly or indirectly from tax consequences or tax strategy described in published guidance that lists the transaction. See Temporary Regulations section 1.6033-5T(e) for more details.

Entities identified as a party to a prohibited tax shelter transaction by published guidance. In the case of a tax-exempt entity that becomes a party to a prohibited tax shelter transaction because it is identified in published guidance by type, class, or roles as a party to a prohibited tax shelter transaction, the published guidance will specify the due date of Form 8886-T.

Subsequently listed transaction. In the case of a tax-exempt entity that is a party to a prohibited tax shelter transaction because the transaction was subsequently listed, Form 8886-T must be filed by May 15 of the year following the close of the calendar year during which the transaction was identified as a listed transaction. See Temporary Regulations section 1.6033-5T(e) for more details.

Special transition rules. In the case of a tax-exempt entity that entered into a prohibited tax shelter transaction after May 17, 2006, but before January 1, 2007, and that is a party to the transaction by reason of its tax-exempt, tax indifferent, or tax-favored status, Form 8886-T is due on or before November 5, 2007.

In the case of a tax-exempt entity that entered into a listed transaction
after May 17, 2006, but before January 1, 2007, to reduce its own federal tax liability, Form 8886-T is due on or before the later of November 5, 2007, or the date the first tax return (whether an original or an amended return) is filed reflecting a reduction or elimination of the tax-exempt entity’s liability for applicable federal employment, excuse, or unrelated business income taxes derived directly or indirectly from tax consequences or tax strategy described in published guidance that lists the transaction.

No disclosure is required for any prohibited tax shelter transaction entered into by a tax-exempt entity on or before May 17, 2006. Although there is no disclosure requirement for transactions entered into before May 18, 2006, certain tax-exempt entities may be liable for an excise tax. See Form 4720, Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code and accompanying instructions.

**Where To File**

Send the return to the:

Department of the Treasury Internal Revenue Service Center Ogden, UT 84201-0027

**Penalties**

There is a monetary penalty under section 6652(c) for the failure to disclose information required under section 6033(a)(2) with respect to a prohibited tax shelter transaction. The penalty for failure to include information with respect to a prohibited tax shelter transaction is $100 for each day during which such failure continues, not to exceed $50,000 for each required disclosure. In addition, the IRS is authorized to make a written demand on the entity or entity manager specifying a future date by which the required disclosure must be filed. If there is a failure to comply with this demand, there is an additional penalty in the amount of $100 per day after the expiration of the time specified in the demand, not to exceed $10,000 for each required disclosure. In the case of a non-plan entity (defined on page 1), the penalty is imposed on the tax-exempt entity. In the case of a plan entity (defined on page 1), the penalty is imposed on the entity manager. See section 6652(c) for more information.

A penalty is assessed to the tax-exempt entity (for a non-plan entity) or to the entity manager (for a plan entity) for each failure to timely file Form 8886-T in accordance with its instructions and Temporary Regulations section 1.6033-5T. Form 8886-T must be completed in its entirety with all required attachments to be considered complete. Do not enter “Information provided upon request” or “Details available upon request,” or any similar statement in the space provided. Inclusion of any such statements subjects the tax-exempt entity (for a non-plan entity) or the entity manager (for a plan entity) to penalty. See section 6652(c) for more information.

**Public Inspection**

A completed Form 8886-T is available for public inspection as required under section 6104(b).

**Specific Instructions**

**Name and Address**

Enter the name and address of the tax-exempt entity. Include the suite, room, or other unit number after the street address. If the Post Office does not deliver mail to the street address, show the P.O. box number instead of the street address. The name and address should be the same as shown on other forms filed with the IRS.

**Employer Identification Number (EIN)**

Enter the employer identification number of the tax-exempt entity. In the case of a fully self-directed qualified plan, or an IRA (or other savings arrangement) that does not have and is not required to obtain an EIN, leave the EIN box blank. Do not enter a social security number.

**Who Must Sign**

**Non-plan entity.** The director, trustee, officer, or other official authorized to sign for the non-plan entity (defined on page 1) must sign Form 8886-T.

**Plan entity.** For plan entities (defined on page 1), the entity manager (defined on page 2) must sign Form 8886-T.

**How To Complete Form 8886-T**

In order to be considered complete, Form 8886-T must be completed in its entirety with all required attachments. Do not simply write “See Attached.” If the information required exceeds the space provided, complete as much information as possible in the available space and attach the remaining information on additional sheets. The additional sheets must be in the same order as the lines to which they correspond. You must also include the entity name and identifying number at the top of each additional sheet.

**Line 1**

Check the box which indicates the type of tax-exempt entity that is a party to a prohibited tax shelter transaction.

**Line 2**

Check the box for all categories that apply to the transaction being reported. The categories of prohibited tax shelter transactions (listed, confidential, and transaction with contractual protection) are described on pages 1 and 2. Do not report more than one transaction on this form. If the transaction is substantially similar to a listed transaction, check the box next to “listed transaction.” See **Substantially similar** on page 2. If you checked the listed transaction box, you must also identify the transaction on line 3.

**CAUTION**

If the transaction is a listed transaction or substantially similar to a listed transaction, you must check the listed transaction box in addition to any others that may apply.

**Line 3**

If you selected “listed transaction” on line 2, provide a brief identifying description of the listed transaction and identify the notice, revenue ruling, regulation (for example, Regulations section 1.643(a)-8 or Notice 2003-81 modified and supplemented by Notice 2007-71, 2007-35 I.R.B. 472), announcement, or other published guidance that identified the listed transaction. See the notices below or later IRS guidance identifying listed transactions.

- Notice 2005-13, 2005-9 I.R.B. 630; and

**Line 4**

Provide the complete names and addresses of all other parties.
(whether taxable or tax-exempt) to the transaction, if known. If you need additional space, attach separate sheets. At the top of each additional sheet, write “Line 4” and enter the tax-exempt entity’s name and identifying number.

**Paperwork Reduction Act Notice.** You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545-0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for all other taxpayers who file this form is shown below.

- **Recordkeeping** ........................................4 hr., 4 min.
- **Learning about the law or the form** .........................3 hr., 16 min.
- **Preparing, copying, assembling, and sending the form to the IRS** ........3 hr., 28 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see **Where To File**, on page 3.
FAS 109 contingency reserve examples

AMAZON 2016 FORM 10-K
https://www.sec.gov/Archives/edgar/data/1018724/000101872417000011/amzn-20161231x10k.htm

p.56: Tax Contingencies

We have recorded reserves for tax contingencies, inclusive of accrued interest and penalties, for U.S. and foreign income taxes. These reserves primarily relate to transfer pricing, research and development credits, and state income taxes, and are presented net of offsetting deferred tax assets related to net operating losses and tax credits. See “Note 10—Income Taxes” for discussion of tax contingencies.

p. 65: Tax Contingencies

We are subject to income taxes in the U.S. (federal and state) and numerous foreign jurisdictions. Significant judgment is required in evaluating our tax positions and determining our provision for income taxes. During the ordinary course of business, there are many transactions and calculations for which the ultimate tax determination is uncertain. We establish reserves for tax-related uncertainties based on estimates of whether, and the extent to which, additional taxes will be due. These reserves are established when we believe that certain positions might be challenged despite our belief that our tax return positions are fully supportable. We adjust these reserves in light of changing facts and circumstances, such as the outcome of tax audits. The provision for income taxes includes the impact of reserve provisions and changes to reserves that are considered appropriate.

The reconciliation of our tax contingencies is as follows (in millions):

<TABLE>

As of December 31, 2016, we had $1.7 billion of accrued tax contingencies, of which $1.1 billion, if fully recognized, would decrease our effective tax rate.

As of December 31, 2015 and 2016, we had accrued interest and penalties, net of federal income tax benefit, related to tax contingencies of $59 million and $67 million. Interest and penalties, net of federal income tax benefit, recognized for the years ended December 31, 2014, 2015, and 2016 was $8 million, $18 million, and $9 million.

We are under examination, or may be subject to examination, by the Internal Revenue Service (“IRS”) for the calendar year 2005 and thereafter. These examinations may lead to ordinary course adjustments or proposed adjustments to our taxes or our net operating losses with respect to years under examination as well as subsequent periods. As previously disclosed, we have received Notices of Proposed Adjustment from the IRS for transactions undertaken in the 2005 and 2006 calendar years relating to transfer pricing with our foreign subsidiaries. The IRS is seeking to increase our U.S. taxable income by an amount that would result in additional federal tax of approximately $1.5 billion, subject to interest. To date, we have not resolved this matter administratively and are currently contesting it in U.S. Tax Court. We continue to disagree with these IRS positions and intend to defend ourselves vigorously in this matter. In addition to the risk of additional tax for 2005 and 2006 transactions, if this
litigation is adversely determined or if the IRS were to seek transfer pricing adjustments of a similar nature for transactions in subsequent years, we could be subject to significant additional tax liabilities.

Certain of our subsidiaries are under examination or investigation or may be subject to examination or investigation by the French Tax Administration ("FTA") for calendar year 2006 and thereafter. These examinations may lead to ordinary course adjustments or proposed adjustments to our taxes. In September 2012, we received proposed tax assessment notices for calendar years 2006 through 2010 relating to the allocation of income between foreign jurisdictions. In June 2015, we received final tax collection notices for these years assessing additional French tax of €196 million, including interest and penalties through September 2012. We disagree with the assessment and intend to contest it vigorously. We plan to pursue all available administrative remedies, and if we are not able to resolve this matter, we plan to pursue judicial remedies. In addition to the risk of additional tax for years 2006 through 2010, if this litigation is adversely determined or if the FTA were to seek adjustments of a similar nature for subsequent years, we could be subject to significant additional tax liabilities. In addition, in October 2014, the European Commission opened a formal investigation to examine whether decisions by the tax authorities in Luxembourg with regard to the corporate income tax paid by certain of our subsidiaries comply with European Union rules on state aid. If this matter is adversely resolved, Luxembourg may be required to assess, and we may be required to pay, additional amounts with respect to current and prior periods from 2003 onwards and our taxes in the future could increase. We are also subject to taxation in various states and other foreign jurisdictions including Canada, China, Germany, India, Italy, Japan, Luxembourg, and the United Kingdom. We are under, or may be subject to, audit or examination and additional assessments by the relevant authorities in respect of these particular jurisdictions primarily for 2008 and thereafter.

We expect the total amount of tax contingencies will grow in 2017. In addition, changes in state, federal, and foreign tax laws may increase our tax contingencies. The timing of the resolution of income tax examinations is highly uncertain, and the amounts ultimately paid, if any, upon resolution of the issues raised by the taxing authorities may differ from the amounts accrued. It is reasonably possible that within the next 12 months we will receive additional assessments by various tax authorities or possibly reach resolution of income tax examinations in one or more jurisdictions. These assessments or settlements may or may not result in changes to our contingencies related to positions on tax filings in years through 2016. The actual amount of any change could vary significantly depending on the ultimate timing and nature of any settlements. We cannot currently provide an estimate of the range of possible outcomes.

**ALPHABET, INC. 2016 FORM 10-K**

p.79: Uncertain Tax Positions

The following table summarizes the activity related to our gross unrecognized tax benefits from January 1, 2014 to December 31, 2016 (in millions):

<TABLE>

The total amount of gross unrecognized tax benefits was $3,294 million, $4,167 million, and $5,393 million as of December 31, 2014, 2015, and 2016, respectively, of which, $2,909 million, $3,614 million, and $4,258 million if recognized, would affect our effective tax rate.
As of December 31, 2015 and 2016, we had accrued $348 million and $493 million in interest and penalties in provision for income taxes.

We file income tax returns in the U.S. federal jurisdiction and in many state and foreign jurisdictions, our two major tax jurisdictions are the U.S. federal and Ireland. We are subject to the continuous examination of our income tax returns by the IRS and other tax authorities. The IRS completed its examination through our 2006 tax years; all issues have been concluded except for one which is currently under review in Tax Court. The IRS is currently examining our 2007 through 2012 tax returns. We have also received tax assessments in multiple foreign jurisdictions asserting transfer pricing adjustments or permanent establishment. We continue to defend any and all such claims as presented.

Our 2013, 2014, 2015, and 2016 tax years remain subject to examination by the IRS for U.S. federal tax purposes, and our 2011 through 2015 tax years remain subject to examination by the appropriate governmental agencies for Irish tax purposes. There are other ongoing audits in various other jurisdictions that are not material to our financial statements.

We regularly assess the likelihood of adverse outcomes resulting from these examinations to determine the adequacy of our provision for income taxes. We continue to monitor the progress of ongoing discussions with tax authorities and the impact, if any, of the expected expiration of the statute of limitations in various taxing jurisdictions.

We believe that an adequate provision has been made for any adjustments that may result from tax examinations. However, the outcome of tax audits cannot be predicted with certainty. If any issues addressed in our tax audits are resolved in a manner not consistent with management’s expectations, we could be required to adjust our provision for income taxes in the period such resolution occurs. Although the timing of resolution, settlement, closure of audits is not certain, it is reasonably possible that certain U.S. federal and non-U.S. tax audits may be concluded within the next 12 months, which could significantly increase or decrease the balance of our gross unrecognized tax benefits.

We estimate that our unrecognized tax benefits as of December 31, 2016 could possibly decrease by approximately $200 million to $700 million in the next 12 months. Positions that may be resolved include various U.S. and non-U.S. matters.

**Altera decision (pp. 77 and 78)**

On July 27, 2015, the United States Tax Court, in an opinion in Altera Corp. v. Commissioner, invalidated the portion of the Treasury regulations issued under IRC Section 482 requiring related-party participants in a cost sharing arrangement to share stock-based compensation costs. The U.S. Tax Court issued the final decision on December 28, 2015. The IRS served a Notice of Appeal on February 22, 2016. At this time, the U.S. Treasury has not withdrawn the requirement to include stock-based compensation from its regulations. We have evaluated the opinion and continue to record a tax benefit in 2016 related to reimbursement of cost share payments for the previously shared stock-based compensation costs. In addition, we continue to record a tax liability for the U.S. tax cost of potential repatriation of the associated contingent foreign earnings because at this time we cannot reasonably conclude that the Company has the ability and the intent to indefinitely reinvest these contingent earnings. The net impact to our consolidated financial statements is not material. We will continue to monitor developments related to the case and the potential impact on our consolidated financial statements.
As a result of the Altera opinion, we have recognized a deferred tax asset of $4.4 billion and a deferred tax liability of $4.4 billion.

**MICROSOFT 2017 FORM 10-K**

pp.39 and 81:

Tax contingencies and other income tax liabilities were $13.5 billion and $11.8 billion as of June 30, 2017 and 2016, respectively, and are included in other long-term liabilities. This increase relates primarily to current period intercompany transfer pricing and tax credits.

While we settled a portion of the Internal Revenue Service ("IRS") audit for tax years 2004 to 2006 during the third quarter of fiscal year 2011, and settled a portion of the IRS audit for tax years 2007 to 2009 during the first quarter of fiscal year 2016, we remain under audit for those years. We also continue to be subject to examination by the IRS for tax years 2010 to 2016. In February 2012, the IRS withdrew its 2011 Revenue Agents Report for tax years 2004 to 2006 and reopened the audit phase of the examination. As of June 30, 2017, the primary unresolved issue relates to transfer pricing, which could have a significant impact on our consolidated financial statements if not resolved favorably. We believe our allowances for income tax contingencies are adequate. We have not received a proposed assessment for the unresolved issues and do not expect a final resolution of these issues in the next 12 months. Based on the information currently available, we do not anticipate a significant increase or decrease to our tax contingencies for these issues within the next 12 months.

We are subject to income tax in many jurisdictions outside the U.S. Our operations in certain jurisdictions remain subject to examination for tax years 1996 to 2017, some of which are currently under audit by local tax authorities. The resolutions of these audits are not expected to be material to our consolidated financial statements.

**COCA COLA CO 2016 FORM 10-K**

https://www.sec.gov/Archives/edgar/data/21344/000002134417000009/a2016123110-k.htm

p. 108:

Tax Audits

The Company is involved in various tax matters, with respect to some of which the outcome is uncertain. These audits may result in the assessment of additional taxes that are subsequently resolved with authorities or potentially through the courts. Refer to Note 14.

On September 17, 2015, the Company received a Statutory Notice of Deficiency ("Notice") from the Internal Revenue Service ("IRS") for the tax years 2007 through 2009, after a five-year audit. In the Notice, the IRS claims that the Company's United States taxable income should be increased by an amount that creates a potential additional federal income tax liability of approximately $3.3 billion for the period, plus interest. No penalties were asserted in the Notice. The disputed amounts largely relate to a transfer pricing matter involving the appropriate amount of taxable income the Company should report in the United States in connection with its licensing of intangible property to certain related foreign licensees regarding the manufacturing, distribution, sale, marketing and promotion of products in overseas markets.
The Company has followed the same transfer pricing methodology for these licenses since the methodology was agreed with the IRS in a 1996 closing agreement that applied back to 1987. The closing agreement provides prospective penalty protection as long as the Company follows the prescribed methodology and material facts and circumstances and relevant Federal tax law have not changed. On February 11, 2016, the IRS notified the Company, without further explanation, that the IRS has determined that material facts and circumstances and relevant Federal tax law have changed and that it may assert penalties. The Company does not agree with this determination. The Company’s compliance with the closing agreement was audited and confirmed by the IRS in five successive audit cycles covering the subsequent 11 years through 2006, with the last audit concluding as recently as 2009.

The Notice represents a repudiation of the methodology previously adopted in the 1996 closing agreement. The IRS designated the matter for litigation on October 15, 2015. Therefore, the Company will be prevented from pursuing any administrative settlement at IRS Appeals or under the IRS Advance Pricing and Mutual Agreement Program.

The Company firmly believes that the IRS' claims are without merit and plans to pursue all available administrative and judicial remedies necessary to resolve this matter. To that end, the Company filed a petition in the U.S. Tax Court on December 14, 2015, and the IRS filed its answer on February 12, 2016. A trial date has been set for March 5, 2018. The Company intends to vigorously defend its position and is confident in its ability to prevail on the merits. The Company regularly assesses the likelihood of adverse outcomes resulting from examinations such as this to determine the adequacy of its tax reserves. The Company believes that the final adjudication of this matter will not have a material impact on its consolidated financial position, results of operations or cash flows. However, the ultimate outcome of disputes of this nature is uncertain, and if the IRS were to prevail on its assertions, the additional tax, interest and any potential penalties could have a material adverse impact on the Company's financial position, results of operations and cash flows.

The Company recognizes accrued interest and penalties related to unrecognized tax benefits in income tax expense. The Company had $142 million, $111 million and $113 million in interest and penalties related to unrecognized tax benefits accrued as of December 31, 2016, 2015 and 2014, respectively. Of these amounts, $31 million and $8 million of expense were recognized through income tax expense in 2016 and 2014, respectively. An insignificant amount of interest and penalties were recognized through income tax expense for the year ended December 31, 2015. If the Company were to prevail on all uncertain tax positions, the reversal of this accrual would also be a benefit to the Company's effective tax rate.

It is expected that the amount of unrecognized tax benefits will change in the next 12 months; however, we do not expect the change to have a significant impact on our consolidated statements of income or consolidated balance sheets. These changes may be the result of settlements of ongoing audits, statute of limitations expiring or final settlements in transfer pricing matters that are the subject of litigation. At this time, an estimate of the range of the reasonably possible outcomes cannot be made.
On July 13, 2006, the Financial Accounting Standards Board ("FASB") issued FASB Interpretation No. 48 ("FIN 48"), Accounting for Uncertainty in Income Taxes. FIN 48 is an interpretation of FASB Statement No. 109 regarding the calculation and disclosure of reserves for uncertain tax positions.

The implementation of FIN 48 is causing significant activity in the taxpayer community regarding the handling of uncertain tax positions. In other words, it is possible that taxpayers may use new approaches in managing their examinations. For example, taxpayers and their representatives may want to more tightly control the statute of limitations, especially if there is a motivation to release the contingent tax liabilities into earnings. As another example, taxpayers may request additional closing agreements on specific subject matters on a more regular and expedited basis.

Given the significant activity regarding the implementation of FIN 48, this field guide has been created to provide an awareness and examples of expected taxpayer behavior and the considerations in responding in light of existing tax law, process and procedure.

**FIN 48 – Summary of Requirements**

As stated earlier, FIN 48 clarifies the accounting for uncertainty in income taxes recognized in an enterprise’s financial statements. FIN 48 is effective for fiscal years beginning after December 15, 2006, is applicable to all enterprises subject to US GAAP (including non-profit enterprises), and applies to all income tax positions accounted for in accordance with FASB Statement No. 109.

**Evaluation of Reserve for Uncertain Tax Positions:**

The evaluation of a tax position in accordance with FIN 48 is a two-step process. The first step in the evaluation process is recognition. The enterprise determines whether it is more likely than not that a tax position will be sustained upon examination, including resolution of any related appeals or litigation processes, based on the technical merits of the position. In evaluating whether a tax position has met the more-likely-than-not recognition threshold, the enterprise should presume that the position will be examined by the appropriate taxing authority that has full knowledge of all relevant information.

The second step in the evaluation process is measurement. A tax position that meets the more-likely-than-not recognition threshold is measured to determine the amount of benefit to recognize in the financial statements. The tax position is measured as the largest amount of tax benefit that is greater than 50 percent likely of being realized upon ultimate settlement. Tax positions that previously failed to meet the more-likely-than-not recognition threshold should be recognized in the first subsequent financial reporting period in which:

(a) the threshold is met (for example, by virtue of another taxpayer’s favorable court decision);

(b) the position is “effectively settled” by virtue of the closing of an examination where the likelihood of the taxing authority reopening the examination of that position is remote; or

(c) the relevant statute of limitations expires.
Previously recognized tax positions that no longer meet the more-likely-than-not recognition threshold should be derecognized in the first subsequent financial reporting period in which that threshold is no longer met.

**Disclosure of Reserve for Uncertain Tax Positions:**

The disclosure provisions of FIN 48 provide more information about the uncertainty in income tax assets and liabilities. Besides requiring an enterprise to accrue interest and penalties (where warranted) in the financial statements with respect to unrecognized tax benefits the following disclosures are required:

(a) A tabular reconciliation of the total amounts of unrecognized tax benefits at the beginning and end of the period, which shall include at a minimum:

1. The gross amounts of the increases and decreases in unrecognized tax benefits as a result of tax positions taken during a prior period.
2. The gross amounts of increases and decreases in unrecognized tax benefits as a result of tax positions taken during the current period.
3. The amounts of decreases in the unrecognized tax benefits relating to settlements with taxing authorities.
4. Reductions to unrecognized tax benefits as a result of a lapse of the applicable statute of limitations.

(b) The total amount of unrecognized tax benefits that, if recognized, would affect the effective tax rate.

(c) The total amounts of interest and penalties recognized in the statement of operations and the total amounts of interest and penalties recognized in the statement of financial position.

(d) For positions for which it is reasonably possible that the total amounts of unrecognized tax benefits will significantly increase or decrease within 12 months of the reporting date:

1. The nature of the uncertainty;
2. The nature of the event that could occur in the next 12 months that would cause the change;
3. An estimate of the range of the reasonably possible change or a statement that an estimate of the range cannot be made;

and

(e) A description of tax years that remain subject to examination by major tax jurisdictions.

The provisions of FIN 48 shall be applied to all tax positions upon its initial adoption. Only tax positions that meet the more-likely-than-not recognition threshold at the effective date may be recognized or continue to be recognized upon adoption of FIN 48. The cumulative effect of applying the provisions of FIN 48 shall be reported as an adjustment to the opening balance of retained earnings (or other appropriate components of equity or net assets in the statement of financial position) for the year of adoption, presented separately.

**Potential Taxpayer Concerns and Questions – Implications of FIN 48 on IRS Examinations**

Under FIN 48, one occasion when the remaining benefits of uncertain tax positions can be fully and finally recognized in US GAAP financial statements is when an enterprise determines that "effective settlement" of the uncertain position occurs. FIN 48 states:

An enterprise shall evaluate all of the following conditions when determining whether effective settlement has occurred:
a. The taxing authority has completed its examination procedures including all appeals and administrative reviews that the taxing authority is required and expected to perform for the tax position.

b. The enterprise does not intend to appeal or litigate any aspect of the tax position included in the completed examination.

c. It is remote that the taxing authority would examine or reexamine any aspect of the tax position. In making this assessment management shall consider the taxing authority’s policy on reopening closed examinations and the specific facts and circumstances of the tax position. Management shall presume the relevant taxing authority has full knowledge of all relevant information in making the assessment on whether the taxing authority would reopen a previously closed examination.

In the tax years under examination, a tax position does not need to be specifically reviewed or examined by the taxing authority to be considered effectively settled through examination. Effective settlement of a position subject to an examination does not result in effective settlement of similar or identical tax positions in periods that have not been examined.

In general terms, this means that when an IRS examination is closed there has been effective settlement of all uncertain tax positions for the examined year, whether such uncertainties are known to the IRS and examined or not, so long as the conditions in the immediately preceding quote are present.

As an example, assume a taxpayer did not report dividend income on its tax return based on an ambiguous tax law. Furthermore, assume the position meets the requirements of FIN 48 and accordingly, the taxpayer creates a reserve for uncertain tax positions related to this item. The tax year is audited by the Service, but the Service does not propose an audit adjustment and closes the case. Assume also that the issue is not likely to meet any of the exceptions to the Service’s policy against reopening examinations. Since the examination is closed and it is remote that the Service would reopen an examination of the issue, the taxpayer can reverse that contingent tax liability and record the tax benefit at this point in time on the US GAAP financial statements because the uncertainty is now effectively removed.

Another occasion when the remaining benefits of uncertain tax positions can be fully and finally recognized in US GAAP financial statements is when the statute of limitations terminates on those positions.

Therefore, it should be anticipated that taxpayers and their representatives will use various approaches to reach and document effective settlement of specific issues and entire examinations as early as possible, and that they may be less willing than previously to extend the statute of limitations to points beyond an expected examination closing date.

Listed below are some common questions and answers related to the requirements of FIN 48. Many of the questions and answers relate to approaches taxpayers may use to quickly gain certainty about the final outcome of uncertain tax positions in light of the requirements of FIN 48. Note that each approach should be handled in a manner appropriate to the taxpayer based on the facts and circumstances of the case, considering the Service’s need to fully examine and properly resolve tax issues, as well as taxpayer burden. In addition, the Service’s response to these possible approaches should coincide with current initiatives set out by LB&I.

**Question #1:**

Are FIN 48 Disclosures a Roadmap for the IRS?

**Answer #1:**

The disclosures required under FIN 48 should give the Service a somewhat better view of a taxpayer’s uncertain tax positions; however, the disclosures still do not have the specificity that would allow a perfect view of the issues and amounts at risk. For example, there may be a contingent tax liability listed in the tax footnotes of a large multi-national taxpayer with a description called “tax credits”; however, tax credits could be US, foreign, or state tax credits. So the “tax credits” in this example may or may not in this case have a US tax impact.
Even with the lack of specificity, tax footnotes included in financial statements, including FIN 48 disclosures, should be carefully reviewed and analyzed as part of the audit planning process. For example, if a taxpayer reflecting a contingent tax liability in the year under audit for Subpart F income does not reflect Subpart F in the tax return, questions could develop about why Subpart F income does not appear in the tax return, but is mentioned in the tax footnotes as creating a contingent tax liability.

Revenue Agents should not be reluctant to pursue matters mentioned in FIN 48 disclosures, but should be mindful of our policy of restraint on Tax Accrual Workpapers (TAW) and not cross over the boundaries contained there. If for example, there is discussion in the tax footnotes about a contingent tax liability being reversed because the statute of limitations related to the transfer of an intangible asset has expired, even though the statute may have run on that particular issue, this provides insight into how the taxpayer may be treating other intangible assets in other years where the statute of limitations is still open. In this example, this is public information that can be used without violating the TAW’s policy.

Question #2:

What is the impact of FIN 48 on the Service’s tax accrual workpaper ("TAW") policy?

Answer #2:

The Service’s TAW policy may be found at IRM 4.10.20. Since FIN 48 is new, we will have to experience and study FIN 48 disclosures as they are published. However, FIN 48 workpapers are tax accrual workpapers, and they are subject to the policy of restraint covering TAW.

On the other hand, FIN 48 Disclosures reported in quarterly and/or annual financial statements, and any other public documents, are not subject to the policy of restraint, and should be considered by examiners and others when conducting risk assessments. These FIN 48 disclosures might lead into discussions with appropriate taxpayer personnel during an examination, a CAP engagement, a PFA process or other taxpayer interaction.

Question #3:

Is it permissible to sign restricted consents to extend the statute of limitations?

Answer #3:

The Service has a policy regarding restricted consents:
IRM 25.6.22.8.3 – Situations when the Service may Request Restricted Consents:

1. Generally, the Service will not solicit restricted consents.

2. The Service may request a restricted consent to one or more issues where, in light of reasonable tax administration, resolution of such issue or issues requires establishment of a Service position through court decision, regulation, ruling or other Headquarters action, or where other equally meritorious circumstances exist. See Rev. Proc. 68-31 (modified by Rev. Proc. 77-6 for other matters).

IRM 8.9.1.2.3 – Period of Limitation on Joint Committee (JC) Cases (10-22-2001)

Do not use restricted consents in Joint Committee cases.

Restricted Consents – If an issue has been identified by the agent and the assessment period is about to expire, the taxpayer has the right to request a consent to extend the assessment period restricted to specific issue(s) only, while the statute of limitation is allowed to expire on all other issues. Although the taxpayer has the right to request a restricted waiver, and indeed the Service must notify the taxpayer of the opportunity, the Service has the right to limit the circumstances in which it will agree to enter into a restricted consent. Restricted waivers will only be entered under certain conditions, which are as follows: (1) the number of unresolved issues must not make it impractical for the Service to enter into a restricted waiver; (2) the specific unresolved issues covered in the restricted consent must be clearly described so that there will be no later dispute about what issues are covered in the restricted consent; (3) the issues on which the statute of limitations will be allowed to expire must be agreed, and the assessment of any deficiency or, under certain circumstances, the scheduling of refund or credit of the amount of an overassessment provided for; (4) the agent’s use of a restricted consent is approved by the agent’s group manager; and (5) the language of the restricted consent must be approved by Area Counsel.

Whether it is acceptable in a particular case depends on all the facts and circumstances involved. Determining factors include but are not limited to:

(a) what our working relationship has been like;

(b) the nature of the issues involved;

(c) whether the taxpayer has been forthcoming in identifying its uncertain tax positions;

(d) where we are in the audit plan timeline;

(e) how many issues are left to examine; whether Notices of Proposed Adjustments are signed when they are agreed to or left to linger until the end of the exam.

While we understand that unrecognized tax benefits present contingent liabilities on balance sheets for which interest must be regularly accrued, and perhaps penalties, and while that may have an impact on loan covenants and net worth, we have to protect the government’s right to having the time necessary to adequately examine returns for compliance.

We have processes in place to speed up examination and resolution of issues, both on a pre-filing and post-filing basis, and taxpayers who use those processes will undoubtedly conclude their examinations more quickly, allowing for speedier cleanup of contingent tax liabilities. Taxpayers should be encouraged to use our programs and processes to gain speed in resolving tax issues. See question #7 below.

Counsel should be consulted if a taxpayer insists on the use of a restricted consent.

Question #4:

What is the Service’s policy regarding the use of Closing Agreement(s)?

Answer #4:
The Service has the discretion to decide whether to sign a closing agreement. The Service is generally reluctant to enter into closing agreements. As a matter of policy, the Service will enter into a closing agreement only if there appears to be an advantage in having the case “permanently and conclusively” closed, or “good and sufficient reasons” are shown by the taxpayer for entering into a closing agreement and it is determined that the U.S. Government will suffer no disadvantage by entering into the agreement.

IRC Section 7121 is not a mandate by Congress, but is rather an authorization to enter into closing agreements. Although Congress authorized the Service to enter into these agreements, it allowed the Service the discretion to reject a taxpayer’s request for an agreement or to impose conditions on a taxpayer before executing the agreement. Similarly, it is left to the Service to determine whether the U.S. Government will sustain a disadvantage as a result of a closing agreement.

**Question #5:**

Can a closing agreement contain a stipulation by the IRS that, although the statute of limitations has not legally expired, it is deemed to be expired and further examinations of the subject year(s) is consequently barred?

**Answer #5:**

No. Counsel has stated that we have no authority to make such agreements.

**Question #6:**

Is it permitted to close a case by executing a Form 866, Agreement as to Final Determination of Tax Liability, if the taxpayer requests that be done?

**Answer #6:**

This action would completely bar the Service and the taxpayer from later changing the tax liability for that tax year for any reason.

This Form has rarely been used by the field and the field avoids the issuance of qualified liability determinations in a Form 866.

Counsel should be consulted if a taxpayer insists on the use of this Form.

**Question #7:**

How can we help taxpayers gain certainty more quickly in regard to their FIN 48 unrecognized tax benefits?

**Answer #7:**

We have witnessed through our FIN 48 initiative that some taxpayers do want certainty sooner because of FIN 48. We have also proven through our FIN 48 initiative that we can examine and resolve issues very speedily when taxpayers are transparent about the details of the issues that matter greatly to them. Accordingly, we anticipate that taxpayers will desire to have certainty regarding otherwise uncertain tax positions much sooner on average than in the past since the financial statements can be negatively affected much more than was the case in the past by continuing uncertainty.

We can remind taxpayers that candor, transparency and the right motivations, coupled with programs and processes we have in place today can quickly generate certainty on tax issues. Those programs and processes include:
Question #8:

There is an interesting thing about FIN 48 and undisclosed Listed Transactions. Under the Jobs Creation Act, the statute of limitations is extended until one calendar year after the IRS receives proper disclosure of Listed Transactions. So if a closed transaction should become a Listed Transaction, until one year after proper disclosure to the IRS, interest must be accrued in the P&L on the unrecognized tax benefit (perhaps all of the benefit because the "more likely than not" threshold may not have been met) under the rules of FIN 48, and the tax benefit taken on the return will never be recognizable in the financial statements. So, in that circumstance, each year the accrued interest gets larger and the P&L is negatively impacted.

Has the Service considered this issue?

Answer #8:

LB&I has consulted with FASB on this point and they agree that that is the result. As good taxpayer service, and in order to ensure that we obtain disclosure about Listed Transactions, it may be a good practice to remind taxpayers about this provision affecting Listed Transactions and the way they impact on the application of FIN 48 in their financial statements.

Question #9:

Will the IRS reopen an examination cycle that has been closed because of disclosures that are made in financial statements in accordance with FIN 48?

Answer #9:

Our longstanding policy is that we do not reopen tax years that have been examined and closed. IRM 1.2.1.4.1, P-4-3 (12-21-1984). However, there are exceptional circumstances stated in this policy, the existence of which would allow us to reopen an examination for a tax year that was previously examined and closed. The Service has no plans to modify its policy against reopening examinations.

However, since FIN 48 does require more information to be disclosed about uncertain tax positions than was the case before FIN 48 was issued, it is possible that reopenings will occur more frequently because of the potentially increased availability of information warranting reopening.

Question #10:

Where can one learn more about FIN 48?

Answer #10:

In general – Further information is available on the websites of the FASB, the AICPA and numerous research services.

IRS FIN 48 Internet Site
## Part I Uncertain Tax Positions for the Current Tax Year

Enter, in Part III, a description for each uncertain tax position (UTP). Check this box if the corporation was unable to obtain information from related parties sufficient to determine whether a tax position is a UTP. See instructions. □

### (a) UTP No.

<table>
<thead>
<tr>
<th></th>
<th>(b) Primary IRC Sections (for example, &quot;61&quot;, &quot;108&quot;, &quot;263A&quot;)</th>
<th>(c) Timing Codes (check if Permanent, Temporary, or both)</th>
<th>(d) Pass-Through Entity EIN</th>
<th>(e) Major Tax Position</th>
<th>(f) Ranking of Tax Position</th>
<th>(g) Reserved for Future Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

For Paperwork Reduction Act Notice, see the Instructions for Form 1120.
### Part II Uncertain Tax Positions for Prior Tax Years.

See instructions for how to complete columns (a) through (h). Enter, in Part III, a description for each uncertain tax position (UTP).

Check this box if the corporation was unable to obtain information from related parties sufficient to determine whether a tax position is a UTP. See instructions. □

<table>
<thead>
<tr>
<th>UTP No.</th>
<th>(b) Primary IRC Sections (for example, &quot;61&quot;, &quot;108&quot;, &quot;263A&quot;)</th>
<th>(c) Timing Codes (check if Permanent, Temporary, or both)</th>
<th>(d) Pass-Through Entity EIN</th>
<th>(e) Major Tax Position</th>
<th>(f) Ranking of Tax Position</th>
<th>(g) Reserved for Future Use</th>
<th>(h) Year of Tax Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P</td>
<td></td>
<td>P</td>
<td>T</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
This Part III, Schedule UTP (Form 1120) is page _______ of _______ Part III pages.

<table>
<thead>
<tr>
<th>UTP No.</th>
<th>Concise Description of Uncertain Tax Position</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Schedule UTP (Form 1120) 2016
Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments
For the latest information about developments related to Schedule UTP (Form 1120) and its instructions, such as legislation enacted after they were published, go to www.irs.gov/scheduleutp.

General Instructions

Purpose of Schedule
Schedule UTP asks for information about tax positions that affect the U.S. federal income tax liabilities of certain corporations that issue or are included in audited financial statements and have assets that equal or exceed $10 million.

Reporting Uncertain Tax Positions on Schedule UTP

Tax positions to be reported.
Schedule UTP requires the reporting of each U.S. federal income tax position taken by an applicable corporation on its U.S. federal income tax return for which two conditions are satisfied.

1. The corporation has taken a tax position on its U.S. federal income tax return for the current tax year or for a prior tax year.

2. Either the corporation or a related party has recorded a reserve with respect to that tax position for U.S. federal income tax in audited financial statements, or the corporation or related party did not record a reserve for that tax position because the corporation expects to litigate the position.

A tax position for which a reserve was recorded (or for which no reserve was recorded because of an expectation to litigate) must be reported regardless of whether the audited financial statements are prepared based on U.S. generally accepted accounting principles (GAAP), International Financial Reporting Standards (IFRS), or other country-specific accounting standards, including a modified version of any of the above (for example, modified GAAP).

If the corporation reconsiders whether a reserve is required for a tax position and eliminates the reserve in an interim audited financial statement issued before the tax position is taken in a return, the corporation need not report the tax position to which the reserve relates on Schedule UTP.

A tax position is based on the unit of account used to prepare the audited financial statements in which the reserve is recorded (or in which no reserve was recorded because of an expectation to litigate). A tax position taken on a tax return is a tax position that would result in an adjustment to a line item on that tax return if the position is not sustained. If multiple tax positions affect a single line item on a tax return, report each tax position separately on Schedule UTP. See Tax position taken on a tax return, later.

Reporting current year and prior year tax positions.
Tax positions taken by the corporation on the current year's tax return are reported in Part I. Tax positions taken by the corporation on a prior year's tax return are reported on Part II. A corporation is not required to report a tax position it has taken in a prior tax year if the corporation reported that tax position on a Schedule UTP filed with a prior year tax return. If a transaction results in tax positions taken on more than one tax return, the tax positions must be reported in Part I of the Schedule UTP attached to each tax return in which a tax position is taken regardless of whether the transaction or a tax position resulting from the transaction was disclosed in a Schedule UTP filed with a prior year's tax return. See Example 7 and Example 8. Do not report a tax position on Schedule UTP before the tax year in which the tax position is taken on a tax return by the corporation.

If, after a subsidiary member leaves a consolidated group, the subsidiary, or a related party of the subsidiary, records a reserve in an audited financial statement with respect to one of the subsidiary's tax positions in its former group's prior return, the subsidiary should report the tax position on Part II of the Schedule UTP filed with its current tax return, if it files a separate return. If the subsidiary is included in the return of another consolidated group that is required to file Schedule UTP, the common parent of that consolidated group should report the tax position on Part II of the Schedule UTP filed with its current tax return.

Concise description of tax position.
A corporation that reports a tax position in either Part I or Part II is required to provide a concise description of each tax position in Part III. See Examples 12 and 13.

Consistency with financial statement reporting.
The analysis of whether a reserve has been recorded for the purpose of completing Schedule UTP is determined by reference to those reserve decisions made by the corporation or a related party for audited financial statement purposes. If the corporation or a related party determined that, under applicable accounting standards, either no reserve was required for a tax position taken on a tax return because the amount was immaterial for audited financial statement purposes, or that a tax position was sufficiently certain so that no reserve was required, then the corporation need not report the tax position on Schedule UTP. For a corporation subject to FASB Interpretation No. (FIN) 48, a tax position is considered “sufficiently certain so that no reserve was required,” and therefore need not be reported on Schedule UTP, if the position is “highly certain” within the meaning of FIN 48.

Transition rule.
A corporation is not required to report on Schedule UTP a tax position taken in a tax year beginning before January 1, 2010, even if a reserve is recorded with respect to that tax position in audited financial statements issued in 2010 or later. See Example 9. In addition, a corporation is not required to report accruals of interest on a tax reserve recorded with respect to a tax position taken on a pre-2010 tax return.
Periods covered. File a 2016 Schedule UTP with the 2016 income tax return for the calendar year 2016 and for a fiscal year that begins in 2016.

Who Must File
A corporation must file Schedule UTP for 2016 if:

2. The corporation has assets that equal or exceed $10 million;
3. The corporation or a related party issued audited financial statements reporting all or a portion of the corporation’s operations for all or a portion of the corporation’s tax year; and
4. The corporation has one or more tax positions that must be reported on Schedule UTP.

Do not file a blank Schedule UTP if there are no tax positions to be reported.

Attach Schedule UTP to the corporation’s income tax return. Do not file it separately. A taxpayer that files a protective Form 1120, 1120-F, 1120-L, or 1120-PC must also file Schedule UTP if it satisfies the four requirements set forth above.

A corporation required to file Schedule UTP also must check “Yes” to Form 1120, Schedule K, Question 14; Form 1120-F, Additional Information, Question AA; Form 1120-L, Schedule M, Question 15; or Form 1120-PC, Schedule I, Question 13.

Computation of assets that equal or exceed $10 million. For the following corporate income tax returns:

Forms 1120, 1120-L, and 1120-PC. A corporation’s assets equal or exceed $10 million if the amount reported on page 1, item D of Form 1120, or the higher of the beginning or end of year total assets reported on Schedule L of Form 1120-L or Form 1120-PC, is at least $10 million.

Form 1120-F. The assets of a corporation filing a Form 1120-F equal or exceed $10 million if the higher of the beginning or end of year total worldwide assets of the corporation reported on Form 1120-F, Schedule L, Line 17, would be at least $10 million if the corporation were to prepare a Schedule L on a worldwide basis.

Affiliated groups. An affiliated group of corporations filing a consolidated return will file one Schedule UTP for the affiliated group. The affiliated group need not identify the member of the group to which the tax position relates or which member recorded the reserve for the tax position. Any affiliate that files its U.S. federal income tax return separately and satisfies the requirements set forth above must file a Schedule UTP with its return setting forth its own tax positions.

Definitions and Special Rules
Note. All examples in these instructions assume the calendar year is the reporting year both for U.S. federal income tax and financial statement purposes and the independent auditor’s opinion on the audited financial statements is issued before the filing of the tax return.

Audited financial statements. Audited financial statements mean financial statements on which an independent auditor has expressed an opinion, whether qualified, unqualified, disclaimed, or adverse, under GAAP, IFRS, or another country-specific accounting standard, including a modified version of any of the above (for example, modified GAAP). Compiled or reviewed financial statements are not audited financial statements.

Record a reserve. A corporation or a related party records a reserve for a U.S. federal income tax position when a reserve for U.S. federal income tax, interest, or penalties with respect to that position is recorded in audited financial statements of the corporation or a related party. A reserve is recorded when an uncertain tax position or a FIN 48 liability is stated anywhere in a corporation’s or related party’s financial statements, including footnotes and any other disclosures, and may be indicated by any of several types of accounting journal entries. Some of the types of entries that, entered alone or in tandem, indicate the recording of a reserve are:

1. An increase in a current or non-current liability for income taxes, interest or penalties payable, or a reduction of a current or non-current receivable for income taxes and/or interest with respect to the tax position; or
2. A reduction in a deferred tax asset or an increase in a deferred tax liability with respect to the tax position.

The initial recording of a reserve will trigger reporting of a tax position taken on a return. However, subsequent reserve increases or decreases with respect to the tax position will not.

If a corporation is included in multiple audited financial statements, the corporation must report a tax position on Schedule UTP if a reserve for that position was recorded in any of those audited financial statements.

Example 1. General rule regarding recording a reserve. A corporation recorded a reserve in its 2014 audited financial statements relating to a tax position taken on its tax return for the 2014 tax year. The corporation filed its 2014 tax return on September 15, 2015. The corporation reported the 2014 tax position on Part I of Schedule UTP and filed Schedule UTP with its 2014 tax return. If the corporation increases its reserve with respect to the tax position taken on its 2014 tax return in its 2016 audited financial statements, the corporation is not required to report the 2014 tax position again on its 2016 tax return as a result of the reserve increase in 2016.

Example 2. Reporting reserves in subsequent years. A corporation claimed a deduction in 2014 and determined under applicable accounting standards that it could recognize the full benefit of the position. In 2016 the IRS began an examination of the 2014 tax return and decided to examine whether the deduction was proper. The corporation subsequently reevaluated the tax position and recorded a reserve for that position in 2016. The corporation has taken a tax position in its 2014 tax return and recorded a reserve with respect to that tax position. The corporation must report the tax position on Schedule UTP filed with its 2016 tax return even if the IRS identifies the tax position for examination prior to the recording of the reserve.

Related party. A related party is any entity that has a relationship to the corporation that is described in sections 267(b), 318(a), or 707(b), or any entity that is included in consolidated audited financial statements in which the corporation is also included.

Example 3. Related party general rule. Corporation A is a corporation filing Form 1120 that has $160 million of assets. Corporation B is a foreign corporation not doing business in the United States and is a related party to Corporation A. Corporations A and B issue their own audited financial statements. Corporation A takes a tax position on its tax return. If Corporation
B records a reserve with respect to that tax position in its own audited financial statements, even though Corporation A does not, then that tax position must be reported by Corporation A on its Schedule UTP.

**Example 4. Reserve recorded in consolidated financial statements.** Corporation C files a tax return and has assets of $160 million. Corporations C and D issue consolidated audited financial statements, but they do not file a consolidated tax return. Corporation C takes a tax position for which a reserve was recorded in the consolidated financial statements of Corporations C and D. The tax position taken by Corporation C on its tax return must be reported on its Schedule UTP because a reserve was recorded for its tax position in consolidated financial statements in which Corporation C was included.

**Reserve not recorded based on expectation to litigate.** A corporation must report on Schedule UTP a tax position taken on its return for which no reserve for income tax was recorded if the tax position is one which the corporation or a related party determines the probability of settling with the IRS to be less than 50% and, under applicable accounting standards, no reserve was recorded in the audited financial statements because the corporation intends to litigate the tax position and has determined that it is more likely than not to prevail on the merits in the litigation.

**Example 5. Reserve not recorded after a change in circumstances based on expectation to litigate.** A corporation takes a tax position on its 2014 tax return for which no reserve is recorded because the corporation determines the tax position is correct. Circumstances change, and in 2016 the corporation determines that the tax position is uncertain, but does not record a reserve because of its expectation to litigate the position. That is, the corporation or a related party determines the probability of settling with the IRS to be less than 50% and, under applicable accounting standards, no reserve was recorded because the corporation intends to litigate the tax position and has determined that it is more likely than not to prevail on the merits in the litigation. The corporation must report that position on Part II of the Schedule UTP filed with the 2016 tax return either if it records a reserve or if it does not record a reserve because it expects to litigate, even if that decision to record or not record occurs because of a change in circumstances in a later year.

**Tax position taken on a tax return.** A tax position taken on a tax return means a tax position that would result in an adjustment to a line item on any schedule or form attached to the tax return (or would be included in a section 481(a) adjustment) if the position is not sustained. If multiple tax positions affect a single line item on a tax return, each tax position is a separate tax position taken on a tax return. For example, a tax position that is reported on a line item on Form 5471 is a tax position taken on a return, even though an adjustment to that line item might not result in the payment of any additional tax.

A single decision about how to report an item of income, gain, loss, deduction, or credit may affect line items in multiple years’ returns. If so, that decision can result in a tax position taken on each affected year’s return. For example, a decision to amortize an expense rather than currently deduct that expense, or a decision to currently deduct rather than amortize an expense, affects line items on each year’s return in which the tax position is taken during the period of amortization. Whether these tax positions taken on a return are reported on Schedule UTP for a particular tax year, and when they are reported, depends on whether and when a reserve is recorded. See Example 7 and Example 8.

**Example 6. Unit of account.** Corporation A and Corporation B each have two individual research projects and each anticipates claiming a research and development credit arising out of their projects. Corporation A chooses each individual research project as the unit of account for GAAP financial reporting purposes, since the corporation accumulates information for the tax return about the projects at the project level and expects the IRS to address the issues during an examination of each project separately. Corporation B determines that the appropriate unit of account for GAAP financial reporting purposes is the functional unit, based on the amount of its expenditures, the anticipated credits to be claimed, its previous experience, and the advice of its tax advisors. Based on the unit of account used for financial reporting purposes, Corporation A must use each project as its unit of account for Schedule UTP reporting, and Corporation B must use functional expenditures as its unit of account for Schedule UTP reporting, regarding the research and development credit.

**Ranking Tax Positions by Size**

The corporation must rank by size each tax position listed in Part I. The size of a tax position, however, need not be reported anywhere on Schedule UTP. See the instructions for Part I, column (f), regarding coding to be used to rank the corporation’s tax positions.

**Size.** The size of each tax position is determined on an annual basis and is the amount of U.S. federal income tax reserve recorded for that position. If a reserve is recorded for multiple tax positions, then a reasonable allocation of that reserve among the tax positions to which it relates must be made in determining the size of each tax position.

If an amount of interest or penalties relating to a tax position is not separately identified in the books and records as associated with that position,
then that amount of interest and penalties is not included in the size of a tax position used to rank that position or compute whether the position is a major tax position.

**Expectation to litigate.** Do not determine a size for positions listed because of an expectation to litigate. See the instructions for Parts I and II, column (f), regarding ranking of these positions.

**Affiliated groups.** The determination of the size of a tax position taken in a tax return by an affiliated group filing a consolidated return is to be determined at the affiliated group level for all members of the affiliated group.

**Coordination with Other Reporting Requirements**

A complete and accurate disclosure of a tax position on the appropriate year’s Schedule UTP will be treated as if the corporation filed a Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement, regarding the tax position. A separate Form 8275 or Form 8275-R need not be filed to avoid certain accuracy-related penalties with respect to that tax position.

**Comprehensive Examples**

**Example 8. Multiple year positions.** A corporation incurred an expenditure in 2012 and takes the position that the expenditure may be amortized over 15 years beginning on its 2012 tax return. During the course of reviewing its tax positions for purposes of establishing reserves for U.S. federal income taxes for its 2012 audited financial statements, the corporation determines it is uncertain whether any deduction or amortization of this expenditure is allowable. In the 2012 audited financial statements, the corporation recorded a reserve with respect to the amortization deduction to be claimed in each tax year. The corporation has taken a tax position in each of the 15 tax years because on each year’s tax return there would be an adjustment to a line item on that return if the position taken in that year is not sustained. The corporation must report the 2012 tax position on Part I of Schedule UTP for the 2012 tax year. In addition, the tax position to be taken in each of the 2013 to 2026 tax years must be reported on Part I of the Schedule UTP filed with the tax return for the respective tax year in which the tax position was taken. The result would be the same if, instead of recording the reserve in 2012 for all of the tax positions taken in each of the 15 years, the corporation records a reserve in each year that specifically relates to the tax position taken on the return for that year.

**Example 9. Transition rule.** The facts are the same as in Example 8, except that the corporation incurred the expenditure and recorded the reserve in 2009. The corporation has taken a tax position in each of the 15 tax years (2009 through 2023) because on each year’s tax return there would be an adjustment to a line item on that return if the position taken in that year is not sustained. However, the corporation was not required to report the tax position taken in the 2009 tax year because it was taken in a tax year beginning before January 1, 2010. The corporation reports the tax position taken in each of the 2010 to 2023 tax years on Part I of the Schedule UTP filed with its tax return for the respective tax year in which the position was taken.

**Example 10. Creation and use of net operating loss (NOL).** A corporation incurred a $50 expenditure in 2015 and claimed the entire amount as a deduction on its 2015 tax return. The deduction increases the corporation’s NOL carryforward from $100 to $150. The corporation uses the entire $150 NOL carryforward on its 2016 tax return. Claiming the $50 deduction in 2015 is a tax position taken in the 2015 tax year because the position would result in an adjustment to a line item on the 2015 tax return if the position is not sustained. The deduction in 2016 of the NOL carried forward from 2015 is a tax position taken on the 2016 tax return, because the position would result in an adjustment to a line item on the 2016 tax return if the position is not sustained. The corporation recorded a reserve with respect to its 2015 tax position in its 2015 audited financial statements. Because the corporation recorded a reserve with respect to the tax position taken in 2015, it reported the 2015 tax position on the Schedule UTP filed with its 2015 tax return. Because it reported the tax position in its 2015 tax return, the corporation should not report the 2016 tax position on the Schedule UTP filed with its 2016 tax return. Because MergerCo’s final return is a prior year tax return on which the tax position was reported.

**Specific Instructions**

**Part I. Uncertain Tax Positions For the Current Tax Year**

**When to Complete Part I**

Complete Part I to report tax positions taken by the corporation on its 2016 tax return.

**Information From Related Parties**

Check the box at the top of Part I if the corporation was unable to obtain sufficient information from one or more related parties and was therefore unable to determine whether a tax position taken on its current year’s tax return is
required to be reported in Part I of this schedule.

**Column (a). UTP No.**
Enter a number in column (a) for each tax position reported. The UTP numbers on Part I, column (a), include a preprinted “C” prefix to indicate that they are positions for the current tax year. A corresponding UTP number with the letter “C” prefix will be used on Part III for reporting the concise description of the tax position. Begin with the number 1, do not skip any whole numbers, do not enter extraneous characters, and do not duplicate any numbers (for example, C1, C2, C3, where the letters “C” are preprinted on the schedule and the numbers are entered).

**Column (b). Primary IRC Sections**
Provide the primary IRC sections (up to three) relating to the tax position. Enter one primary IRC section in each box (for example, “61,” “108,” “263A,” etc.). Do not include descriptive references or any other text such as “IRC,” “Section,” or “IRC Sec.” Beneath each primary IRC section, you may enter the applicable IRC subsections (for example, (f)(2)(A)(ii)), using the preprinted parentheses. If there are more than four subsection components, list only the first four.

**Column (c). Timing Codes**
Check “T” for temporary differences, “P” for permanent differences, or check both “T” and “P” for a tax position that creates both a temporary and permanent difference. Categorization as a temporary difference, permanent difference, or both must be consistent with the accounting standards used to prepare the audited financial statements.

**Column (d). Pass-Through Entity EIN**
If the tax position taken by the corporation relates to a tax position of a pass-through entity, enter the EIN of the pass-through entity to which the tax position relates. For example, if the corporation is a partner in a partnership and the tax position involves the partner’s distributive share of an item of income, gain, loss, deduction, or credit of the partnership, enter the EIN of the partnership. A pass-through entity is any entity listed in section 1(h)(10). If the tax position is not related to a tax position of a pass-through entity, leave this blank.

Enter “F” if the pass-through entity is a foreign entity that does not have an EIN.

**Column (e). Major Tax Position**
Check this box if the relative size of the tax position is greater than or equal to 0.10 (10%). The relative size of a tax position is the amount computed by dividing the size of that position by the sum of all of the sizes for all of the tax positions listed on Parts I and II. Disregard expectation to litigate positions for column (e) purposes. Round amounts using rules similar to the rules in the Instructions for Form 1120 for rounding dollar amounts.

**Column (f). Ranking of Tax Positions**
Enter a letter and a ranking number for each tax position. Use the letter T for transfer pricing positions and the letter G for all other tax positions.

Rank all tax positions in Parts I and II together, regardless of type. Starting with the largest size, assign the number 1 to the largest, the number 2 to the next largest, and so on, in order. This number is the ranking number for the tax position. Expectation to litigate positions may be assigned any ranking number.

For example, the corporation has 1 transfer pricing tax position and 2 other tax positions. The transfer pricing position is the largest and one of the other tax positions is the expectation to litigate position. The expectation to litigate position is assigned a rank of 2. Enter T1 for the transfer pricing position, G2 for the expectation to litigate position, and G3 for the second other tax position.

**Part II. Uncertain Tax Positions For Prior Tax Years**

*When to Complete Part II*
Complete Part II to report tax positions taken by the corporation in a prior tax year that have not been reported on a Schedule UTP filed with a prior year’s tax return. Do not report a tax position taken in a tax year beginning before January 1, 2010. See *Transition rule under Reporting Uncertain Tax Positions on Schedule UTP*, earlier.

*Information From Related Parties*
Check the box at the top of Part II if the corporation was unable to obtain sufficient information from one or more related parties and was therefore unable to determine whether a tax position taken on its prior year’s tax return is required to be reported in Part II of this schedule.

**Column (a). UTP No.**
Continue the numeric sequence based on the last UTP number entered on Part I. For example, if the last UTP listed on Part I is 3, enter 4 for the first UTP listed on Part II. The UTP numbers on Part II, column (a), include a preprinted “P” prefix to indicate that they are positions for prior tax years. A corresponding UTP number with a letter “P” prefix will be used on Part III for reporting the concise description of the tax position. Do not skip any whole numbers, do not enter extraneous characters, and do not duplicate any numbers (for example, P4, P5, P6, where the letters “P” are preprinted on the schedule and the numbers are entered).

**Column (b). Primary IRC Sections**
See the instructions for Part I, column (b).

**Column (c). Timing Codes**
See the instructions for Part I, column (c).

**Column (d). Pass-Through Entity EIN**
See the instructions for Part I, column (d).

**Column (e). Major Tax Position**
See the instructions for Part I, column (e).

**Column (f). Ranking of Tax Position**
See the instructions for Part I, column (f).

**Column (h). Year of Tax Position**
List the prior tax year in which the tax position was taken and the last month of that tax year, using a six-digit number. For example, enter 201312 for tax years ending December 31, 2013, and 201408 for tax years ending August 2014.

**Part III. Concise Description of UTPs**
When to Complete Part III

Part III must be completed for every tax position listed in Part I or Part II. Enter the corresponding UTP number from Part I, column (a) (for example, C1, C2, C3) or Part II, column (a) (for example, P4, P5, P6), related to the description.

Concise description. Provide a concise description of the tax position, including a description of the relevant facts affecting the tax treatment of the position and information that reasonably can be expected to apprise the IRS of the identity of the tax position and the nature of the issue. In most cases, the description should not exceed a few sentences. Stating that a concise description is "Available upon request" is not an adequate description.

A concise description should not include an assessment of the hazards of a tax position or an analysis of the support for or against the tax position.

Examples of Concise Descriptions for Hypothetical Fact Patterns

The following examples set out a description of hypothetical facts and the uncertainties about a tax position that would be reportable on Schedule UTP. Following each set of hypothetical facts, which would not be disclosed on the schedule, is an example of a sufficient concise description that would be reported in Part III to disclose that hypothetical case.

Example 12. Allocation of costs between uncompleted and completed acquisitions.

Facts. The corporation investigated and negotiated several potential business acquisitions during the tax year. One of the transactions was completed during the tax year, but all other negotiations failed and the other potential transactions were abandoned during the tax year. The corporation deducted costs of investigating and partially negotiating potential business acquisitions that were not completed and capitalized costs allocable to one business acquisition that was completed. The corporation established a reserve for financial accounting purposes in recognition of the possibility that the amount of costs allocated to the uncompleted acquisition attempts was excessive.

Sample concise description. The corporation incurred costs of completing one business acquisition and also incurred costs investigating and partially negotiating potential business acquisitions that were not completed. The costs were allocated between the completed and uncompleted acquisitions. The issue is whether the allocation of costs between uncompleted acquisitions and the completed acquisition is appropriate.

Example 13. Recharacterization of distribution as a sale.

Facts. The corporation is a member of Venture LLC, which is treated as a U.S. partnership for tax purposes. During the tax year, Venture LLC raised funds through (i) admitting a new member for a cash contribution and (ii) borrowing funds from a financial institution, using a loan partially guaranteed by the corporation. Also during the tax year, Venture LLC made a cash distribution to the corporation that caused its membership interest in Venture LLC to be reduced from 25% to 2%. The corporation has taken the position that the cash distribution is properly characterized as a nontaxable distribution that does not exceed its basis in its Venture LLC interest, but has established a reserve for financial accounting purposes, recognizing that the transaction might be recharacterized as a taxable sale of a portion of its Venture LLC interest under section 707(a)(2).

Sample concise description. The corporation is a member of Venture LLC, which is treated as a U.S. partnership for tax purposes. The corporation received a cash distribution during the year from Venture LLC. The issue is the potential application of section 707(a)(2) to recharacterize the distribution as a sale of a portion of the corporation’s Venture LLC interest.
Disclosure Statement

Do not use this form to disclose items or positions that are contrary to Treasury regulations. Instead, use Form 8275-R, Regulation Disclosure Statement.

Information about Form 8275 and its separate instructions is at www.irs.gov/form8275.

Attach to your tax return.

<table>
<thead>
<tr>
<th>Name(s) shown on return</th>
<th>Identifying number shown on return</th>
</tr>
</thead>
</table>

If Form 8275 relates to an information return for a foreign entity (for example, Form 5471), enter:

Name of foreign entity

Employer identification number, if any

Reference ID number (see instructions)

### Part I  General Information (see instructions)

<table>
<thead>
<tr>
<th>(a) Rev. Rul., Rev. Proc., etc.</th>
<th>(b) Item or Group of Items</th>
<th>(c) Detailed Description of Items</th>
<th>(d) Form or Schedule</th>
<th>(e) Line No.</th>
<th>(f) Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Part II  Detailed Explanation (see instructions)

1

2

3

4

5

6

### Part III  Information About Pass-Through Entity. To be completed by partners, shareholders, beneficiaries, or residual interest holders.

Complete this part only if you are making adequate disclosure for a pass-through item.

**Note:** A pass-through entity is a partnership, S corporation, estate, trust, regulated investment company (RIC), real estate investment trust (REIT), or real estate mortgage investment conduit (REMIC).

<table>
<thead>
<tr>
<th>1 Name, address, and ZIP code of pass-through entity</th>
<th>2 Identifying number of pass-through entity</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Tax year of pass-through entity</td>
<td>4 Internal Revenue Service Center where the pass-through entity filed its return</td>
</tr>
</tbody>
</table>

For Paperwork Reduction Act Notice, see separate instructions.
Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments
For the latest information about developments related to Form 8275 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8275.

What's New
In the filer identification section, additional lines have been added to request the name, employer identification number (if any), and reference ID number of any foreign entity for which the taxpayer is making a disclosure on Form 8275.

General Instructions
Purpose of Form
Form 8275 is used by taxpayers and tax return preparers to disclose items or positions, except those taken contrary to a regulation, that are not otherwise adequately disclosed on a tax return to avoid certain penalties. The form is filed to avoid the portions of the accuracy-related penalty due to disregard of rules or to a substantial understatement of income tax for non-tax shelter items if the return position has a reasonable basis. It can also be used for disclosures relating to the economic substance penalty and the preparer penalties for tax understatements due to unreasonable positions or disregard of rules.

The portion of the accuracy-related penalty attributable to the following types of misconduct cannot be avoided by disclosure on Form 8275:

- Negligence.
- Disregard of regulations.
- Any substantial understatement of income tax on a tax shelter item.
- Any substantial valuation misstatement under chapter 1.
- Any substantial overstatement of pension liabilities.
- Any substantial estate or gift tax valuation understatements.

- Any claim of tax benefits from a transaction lacking economic substance (within the meaning of section 7701(o)) or failing to meet the requirements of any similar rule of law.
- Any otherwise undisclosed foreign financial asset understatement.

Who Should File
Form 8275 is filed by individuals, corporations, pass-through entities, and tax return preparers. If you are disclosing a position taken contrary to a regulation, use Form 8275-R, Regulation Disclosure Statement, instead of Form 8275.

For items attributable to a pass-through entity, disclosure should be made on the tax return of the entity. If the entity does not make the disclosure, the partner (or shareholder, etc.) can make adequate disclosure of these items.

Exception to filing Form 8275.
Guidance is published annually in a revenue procedure in the Internal Revenue Bulletin. This can be found on the Internet at IRS.gov. The revenue procedure identifies circumstances when an item reported on a return is considered adequate disclosure for purposes of the substantial understatement aspect of the accuracy-related penalty and for avoiding the preparer’s penalty relating to understatements due to unreasonable positions. See the Example below. You do not have to file Form 8275 for items that meet the requirements listed in this revenue procedure.

Example. Generally, you will have met the requirements for adequate disclosure of a charitable contribution deduction if you complete the contributions section of Schedule A (Form 1040) and supply all the required information. If you make a contribution of property other than cash that is over $500, the form required by the Schedule A instructions must be attached to your return.

How To File
File Form 8275 with your original tax return. Keep a copy for your records. You may be able to file Form 8275 with an amended return. See Regulations sections 1.6662-4(f)(1) and 1.6664-2(c)(3) for more information.

To make adequate disclosure for items reported by a pass-through entity, you must complete and file a separate Form 8275 for items reported by each entity.

To make adequate disclosure for a position or positions related to more than one foreign entity, you must complete and file a separate Form 8275 for each foreign entity.

Carryovers, carrybacks, and recurring items. Carryover items must be disclosed for the tax year in which they originated. You do not have to file another Form 8275 for those items for the tax years in which the carryover is taken into account.

Carryback items must be disclosed for the tax year in which they originated. You do not have to file another Form 8275 for those items for the tax years in which the carryback is taken into account.

However, if you disclose items of a recurring nature (such as depreciation expense), you must file Form 8275 for each tax year in which the item occurs.

Accuracy-Related Penalty

Generally, the accuracy-related penalty is 20% of any portion of a tax underpayment attributable to:

1. Negligence or disregard of rules or regulations,
2. Any substantial understatement of income tax,
3. Any substantial valuation misstatement under chapter 1 of the Internal Revenue Code,
4. Any substantial overstatement of pension liabilities,
5. Any substantial estate or gift tax valuation understatement, or
6. Any claim of tax benefits from a transaction lacking economic substance, as defined by section 7701(o), or failing to meet the requirements of any similar rule of law.

The penalty is 40% of any portion of a tax underpayment attributable to one or more gross valuation misstatements in (3), (4), or (5) above if the applicable dollar limitation under section 6662(h)(2) is met. The penalty also increases to 40% for failing to adequately disclose a transaction that lacks economic substance in (6) above. See Economic substance, below. The penalty is 40% of any portion of an underpayment that is attributable to any undisclosed foreign financial asset understatement.

Economic substance. To satisfy the disclosure requirements under section 6662(i), you may adequately disclose with a timely filed original return (determined with regard to extensions) or a qualified amended return (as defined under Regulations section 1.6664-2(c)(3)) the relevant facts affecting the tax treatment of the transaction.

Note. If you filed a Schedule UTP, you may not need to file Form 8275 to satisfy the disclosure requirements of section 6662(i). See the Instructions for Schedule UTP.

Reasonable cause exception. Generally, no accuracy-related penalty will be imposed on any portion of an underpayment if you show that there was reasonable cause for that portion and that you acted in good faith with respect to that portion.

Reasonable cause and good faith exception does not apply to any portion of an underpayment attributable to a transaction that lacks economic substance under section 7701(o).

Adequate disclosure. Generally, you can avoid the disregard of rules and substantial understatement portions of the accuracy-related penalty if the position is adequately disclosed and the position has at least a reasonable basis.

Reasonable basis. Reasonable basis is a relatively high standard of tax reporting that is significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable.

If the return position is reasonably based on one of the authorities set forth in Regulations section 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in Regulations section 1.6662-4(d)(2). For details, see Regulations section 1.6662–4(d).

If you failed to keep proper books and records or failed to substantiate items properly, you cannot avoid the penalty by disclosure.

Substantial Understatement

An understatement is the excess of:

1. The amount of tax required to be shown on the return for the tax year, over
2. The amount of tax shown on the return for the tax year, reduced by any rebates.

There is a substantial understatement of income tax if the amount of the understatement for any tax year exceeds the greater of:

1. 10% of the tax required to be shown on the return for the tax year, or
2. $5,000.

An understatement of a corporation (other than an S corporation or a personal holding company, as defined in section 542) is substantial if it exceeds in any year the lesser of:

1. 10% of the tax required to be shown on the return for the tax year (or, if greater, $10,000), or
2. $10,000,000.

Reduction of understatement. The amount of the understatement will be reduced by the part that is attributable to the following items.

- An item (other than a tax shelter item) for which there was substantial authority for the treatment claimed at the time the return was filed or on the last day of the tax year to which the return relates.
- An item (other than a tax shelter item) that is adequately disclosed on this form if there is a reasonable basis for the tax treatment of the item. (In no event will a corporation be treated as having a reasonable basis for its tax treatment of an item attributable to a multi-party financing transaction entered into after August 5, 1997, if the treatment does not clearly reflect the income of the corporation.)

For corporate tax shelter transactions (and for tax shelter items of other taxpayers for tax years ending after October 22, 2004), the only exception to the substantial understatement portion of the accuracy-related penalty is the reasonable cause exception. For more details, see Reasonable cause exception (earlier), section 6662(d) and Regulations section 1.6664-4.

Tax shelter items. A tax shelter, for purposes of the substantial understatement portion of the accuracy-related penalty, is a partnership or other entity, plan, or arrangement, with a significant purpose to avoid or evade federal income tax. For transactions on or before August 5, 1997, a tax shelter is a partnership or other entity, plan, or arrangement, whose principal purpose is to avoid or evade federal income tax.

A tax shelter item is any item of income, gain, loss, deduction, or credit that is directly or indirectly attributable to the principal or significant purpose of the tax shelter to avoid or evade federal income tax.

Tax Return Preparer Penalties

A preparer who files a return or claim for refund is subject to a penalty in an amount equal to the greater of $1,000 or 50 percent of the income derived
(or to be derived) by the tax return preparer, with respect to the return or claim, for taking a position which the preparer knew or reasonably should have known would understated any part of the liability if:
- There is or was no substantial authority for the position.
- The position is a tax shelter (as defined in section 6662(d)(2)(C)(i) or a reportable transaction to which section 6662A applies and it was not reasonable to believe that the position would more likely than not be sustained on its merits.
- The position disclosed as provided in section 6662(d)(2)(B)(ii), is not a tax shelter or a reportable transaction to which section 6662A applies, and there was no reasonable basis for the position.

The penalty will not apply if it can be shown that there was reasonable cause for the understatement and that the preparer acted in good faith.

In cases where any part of the understatement of the liability is due to a willful attempt by the return preparer to understate the liability, or if the understatement is due to reckless or intentional disregard of rules or regulations by the preparer, the preparer is subject to a penalty equal to the greater of $5,000 or 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim. This penalty shall be reduced by the amount of the penalty paid by such person for taking an unreasonable position, or a position with no reasonable basis, as described immediately above.

A preparer is not considered to have recklessly or intentionally disregarded a rule if a position is adequately disclosed and has a reasonable basis.

Note. For more information about the accuracy-related penalty and preparer penalties, and the means of avoiding these penalties, see the regulations under sections 6662, 6664, and 6694.

Specific Instructions
Be sure to supply all the information for Parts I, II, and, if applicable, Part III. Your disclosure will be considered adequate if you file Form 8275 and supply the information requested in detail.

Use Part IV on page 2 if you need more space for Part I or II. Indicate the corresponding part and line number from page 1. You can use a continuation sheet(s) if you need additional space. Be sure to put your name and identifying number on each sheet.

Reference ID number. If you are filing Form 8275 to disclose a position related to a foreign entity for which an information return (such as Form 5471) is filed, enter on Form 8275 the same reference ID number for the foreign entity that is entered on the information return.

If you are filing Form 8275 to report a position or positions related to multiple foreign entities, file a separate Form 8275 for each foreign entity.

Part I
Column (a). If you are disclosing a position contrary to a rule (such as a statutory provision or IRS revenue ruling), you must identify the rule in column (a).
Column (b). Identify the item by name.

If any item you disclose is from a pass-through entity, you must identify the item as such. If you disclose items from more than one pass-through entity, you must complete a separate Form 8275 for each entity. Also, see How To File on page 1.

Column (c). Enter a complete description of the item(s) you are disclosing.

Example. If entertainment expenses were reported in column (b), then list in column (c) “theater tickets, catering expenses, and banquet hall rentals.”

If you claim the same tax treatment for a group of similar items in the same tax year, enter a description identifying the group of items you are disclosing rather than a separate description of each item within the group.

Columns (d) through (f). Enter the location of the item(s) by identifying the form number or schedule and the line number in columns (d) and (e) and the amount of the item(s) in column (f).

Part II
Your disclosure statement must include a description of the relevant facts affecting the tax treatment of the item. To satisfy this requirement, you must include information that reasonably can be expected to apprise the IRS of the identity of the item, its amount, and the nature of the controversy or potential controversy. Information concerning the nature of the controversy can include a description of the legal issues presented by the facts.

 Unless provided otherwise in the General Instructions above, your disclosure will not be considered accurate unless the information described above is provided using Form 8275. For example, your disclosure will not be considered adequate if you attach a copy of an acquisition agreement to your tax return to disclose the issues involved in determining the basis of certain acquired assets. If Form 8275 is not completed and attached to the return, the disclosure will not be considered valid even if the information described above is provided using another method, such as a different form or an attached letter.

Part III
Line 4. Contact your pass-through entity if you do not know where its return was filed. However, for partners and S corporation shareholders, information for line 4 can be found on the Schedule K-1 that you received from the partnership or S corporation.

If the pass-through entity filed its return electronically using e-file, enter “e-file” on line 4.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information if you wish to use this form to make adequate disclosure to avoid the portion of the accuracy-related penalty due to a substantial understatement of income tax or disregard of rules, or to avoid certain preparer penalties. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.
You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545-0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for all other taxpayers who file this form is shown below.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Burden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recordkeeping</td>
<td>3 hr., 35 min.</td>
</tr>
<tr>
<td>Learning about the law or the form</td>
<td>1 hr.</td>
</tr>
<tr>
<td>Preparing and sending the form to the IRS</td>
<td>1 hr., 6 min.</td>
</tr>
</tbody>
</table>

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.
Alev Fanny Karaman

karaman@ruchelaw.com
212.755.3333 x127

ALEV FANNY KARAMAN is a French avocat à la cour and U.S. tax lawyer concentrating her practice in the areas of U.S. and international taxation with a focus on cross-border issues in France and the U.S. Ms. Karaman regularly advises entities and individuals on taxation of U.S. and European investments, estate and gift tax exposures, and corporate structuring with an emphasis on the treatment of French holdings under U.S. tax law.

Language proficiency in French and German facilitates the major aspects of her practice. Ms. Karaman practiced in Paris with small and mid-size international law firms advising on French-U.S. tax issues and with a boutique New York firm focusing on U.S.-German tax issues.

Ms. Karaman received her LL.M. in Taxation from New York Law School. She also holds a Licence en Droit and Master II en Droit Fiscal des Affaires (the French equivalents of the J.D. and LL.M. in Taxation) from Université de Rennes 1 Law School. She is active in the French-American Bar Association.

Education
Université de Rennes 1 Law School – LL.M. in Taxation (2010)

Bar Admissions
New York Bar – 2013
Avocat à la Cour, France – 2016

Languages
English
French
German
Turkish
Spanish

http://www.ruchelaw.com/print-alev-fanny-karaman
Stanley C. Ruchelman

ruchelman@ruchelaw.com
212.755.3333 x 111

STANLEY C. RUCHELMAN concentrates his practice in the area of tax planning for transnational business operations, with emphasis on intercompany transactions. Mr. Ruchelman represents companies in matters involving the I.R.S. and counsels corporate clients on transfer pricing issues and worldwide reorganizations. He advises foreign private clients on structuring investments in the United States. Mr. Ruchelman has authored numerous monographs on international taxation for a variety of publications and treatises. In addition, Mr. Ruchelman is a frequent lecturer on that subject, having spoken at conferences sponsored by, inter alia, the Practicing Law Institute, New York University Tax Institute, the American Bar Association, the International Bar Association, and the International Fiscal Association.

Mr. Ruchelman was an international tax partner at one of the major international accounting firms, where he practiced for eight years representing clients involved in cross-border trade and investment. Mr. Ruchelman was a Senior Attorney in the Legislation & Regulations Division of the Office of Chief Counsel, Internal Revenue Service, where he participated in the negotiation of income tax treaties and the development of legislative and regulatory policy affecting international business. Prior to that, Mr. Ruchelman was an Attorney Adviser to the Honorable Charles R. Simpson, Judge of the U.S. Tax Court.

Mr. Ruchelman is a fellow of the American Bar Foundation and of the American College of Tax Counsel. He is a former Chair of the Committee on U.S. Activities of Foreigners and Tax Treaties, Section of Taxation, American Bar Association and the International Tax Committee, Section of International Law and Practice, American Bar Association. Mr. Ruchelman served on the National Council of the International Fiscal Association - U.S.A. Branch. He was an adjunct professor in the Tax LL.M. program at New York Law School.

Education
George Washington University – J.D., with honors (1972)
Brooklyn College of the City University of New York – B.A. (1968)

Bar Admissions
New York Bar – 1986
District of Columbia Bar – 1973
Languages

English
Sheryl Shah

shah@ruchelaw.com
212.755.3333 x 112


Education
Pace University, School of Law - J.D. with a Certificate in International Law (2011)
University College of London - B.S. with honors (2008)

Bar Admissions
New York Bar - 2011

Languages
English
French