



## Final Treasury Regulations Explain Listed Transaction Disclosures to Close Assessment Period

The U.S. Department of the Treasury and the Internal Revenue Service issued final regulations effective March 31, 2015 that clarify what steps must be taken to ensure that a taxpayer's assessment period closes for tax years in which a listed transaction occurred.

### Reportable Transaction Regime

Concerned by a wave of tax shelter activity, Congress enacted a series of disclosure and penalty statutes requiring taxpayers and certain professional advisers to inform the Internal Revenue Service (IRS) of involvement in transactions deemed to carry a high risk of tax avoidance.<sup>1</sup> Included in the covered list of transactions that must be reported to the IRS are "listed transactions," which are defined as those that are the "same or substantially similar to" transactions the IRS has identified in public guidance as displaying characteristics of illegitimate tax avoidance.<sup>2</sup>

### Statute of Limitation Issues

The general statutory period under Internal Revenue Code (IRC) section 6501(a) for making an assessment of tax is three years from the date a tax return is due (or from when a return was filed, if later). The expiration of the statute of limitations will foreclose the IRS from making changes to a taxpayer's reported liability for any tax period. However, in 2004, Congress created an exception to the general rule in IRC section 6501(c)(10)<sup>3</sup> that keeps the limitations period open indefinitely for any tax year in which the taxpayer entered into a listed transaction, unless specific actions are taken to inform

<sup>1</sup> See IRC sections 6011, 6111 and 6112; Treas. Reg. Section 1.6011-4.

<sup>2</sup> IRC Section 6707A(c)(2); Treas. Reg. Section 1.6011-4(b)(2). The most recent list of listed transactions is provided in Notice 2009-59.

<sup>3</sup> See Sec. 814 of the American Jobs Creation Act of 2004, P.L. 108-357.

the IRS of such activity. Once the IRS receives the required information, the agency has one additional year in which to make an assessment before the period closes (if the general three-year period has already lapsed).

Specifically, the limitations period remains open until either a taxpayer discloses a listed transaction to the IRS as required under IRC section 6011, or else a material adviser<sup>4</sup> provides the IRS with certain information under IRC section 6112. A taxpayer's disclosure under IRC section 6011 is generally made by filing a Form 8886, "Reportable Transaction Disclosure Statement," with the required information and attaching it to the tax return for each taxable year in which a listed transaction occurred. A copy of the Form 8886 is also required to be filed with the IRS Office of Tax Shelter Analysis (OTSA). IRC section 6112 requires material advisers to maintain lists of advisees and other information related to reportable transactions and to provide it to the IRS upon a written request.

Following the statutory change, the IRS issued Revenue Procedure 2005-26 to provide interim guidance on IRC section 6501(c)(10), by describing procedures for taxpayers to follow in making the proper disclosures in order to start the one-year period. Proposed regulations were issued in October 2009 that further instructed taxpayers on the applicable disclosure procedures.

### The Final Regulations

The final regulations, encapsulated in Treas. Reg. Section 301.6501(c)-1(g), largely adopt the proposed regulations with four substantive clarifications. As a preliminary matter, the final regulations confirm that a taxpayer's requirement to disclose a listed transaction will keep the IRC section 6501(c)(10) limitations period exception open indefinitely until a proper disclosure is made in conformance with the regulation.<sup>5</sup> A clarification was added to emphasize that the assessment period with regard to taxable years involving listed transactions will not expire any earlier than would apply under the general three-year rule. Thus, a timely filed disclosure under IRC section 6011 does not shorten the assessment period under IRC section 6501(a). Once a listed transaction disclosure is made by either a taxpayer or material adviser if the three-year period has closed prior to the disclosure, the IRS is only given one year in which to assess additional tax.<sup>6</sup>

In order to trigger the one-year assessment period, a taxpayer must make a disclosure for each taxable year that the taxpayer participated in a listed transaction. If the listed transaction was undertaken by a pass-through entity (e.g., a partnership, S corporation or trust), any partner, shareholder or beneficiary of such entity has the responsibility to make a proper disclosure in order to allow the limitations period to expire.<sup>7</sup> This taxpayer-by-taxpayer requirement removes the possibility of closing the period by piggybacking off of another taxpayer's compliance.

If a taxpayer did not originally timely disclose participation in a listed transaction, and later tries to comply with IRC section 6011, the taxpayer must notate on Form 8886 the applicable taxable years and tax returns, and state the purpose of falling within IRC section 6501(c)(10). A late Form 8886 must include a cover letter that contains a signed statement under penalty of perjury by the taxpayer (and return

<sup>4</sup> "Material adviser" is defined in Treas. Reg. Section 301.6111-3(b) as a person who provides "material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction" when the fees obtained are above an established threshold.

<sup>5</sup> Treas. Reg. Section 301.6501(c)-1(g)(1).

<sup>6</sup> Treas. Reg. Section 301.6501(c)-1(g)(2).

<sup>7</sup> Treas. Reg. Section 301.6501(c)-1(g)(4).

preparer, if applicable).<sup>8</sup> If the disclosure is made while the taxpayer is under audit or in Appeals, copies of the disclosure must be provided to the respective IRS personnel. Incomplete disclosures will not start the one-year assessment period until all required information is provided to the IRS. The one-year period begins on the date that the IRS receives the information.

Alternatively, disclosure of a taxpayer's participation in a listed transaction by a material adviser can start the one-year assessment period if the adviser is responding to a written request from the IRS under IRC section 6112. To be effective, the disclosure must be made by a material adviser, person making the disclosure on behalf of a dissolved or liquidated material adviser, or under a designation agreement. In addition, this disclosure will only satisfy the regulations if it is made in response to a written request by the IRS, and it must actually identify the taxpayer who entered into the listed transaction. The IRS's receipt of a taxpayer's listed transaction information other than from a material adviser pursuant to a written IRC section 6112 request, such as during a promoter investigation or from a summons, will not satisfy the regulation's disclosure requirements.

### Practical Problems

As noted in the regulations, material advisers who promoted or assisted in a listed transaction may no longer be operating entities to make a disclosure under IRC section 6112. Thus, IRS investigations into tax promoters may not lead to a compliant disclosure that will trigger the one-year assessment period for a particular taxpayer. And for taxpayers with interests in pass-through entities that engaged in listed transactions, reporting by other partners or the pass-through entity itself will not operate to start the one-year period for the non-compliant taxpayer.

Identification of a listed transaction after a taxpayer has already filed a tax return may still lead to a disclosure requirement if the general three-year limitations period was open at the time of listing. Conversely, although the IRS may have removed a transaction from the listed transaction publications, that removal does not excuse a taxpayer from making a disclosure if they have not already done so for the tax years involved. And closure of the IRC section 6501(c)(10) assessment period exception only happens for tax years specifically identified in a proper disclosure. Thus, there is a heavy burden on the taxpayer to make a satisfactory disclosure under the regulations in order to close the statute of limitations for assessment. An assessment under an open period can include any amount of tax, penalty or interest from a tax item related to or affected by a listed transaction.

### Take Aways

Treasury and the IRS have issued strict guidelines under which taxpayers can ensure that they will not have an open-ended assessment period if they engaged in a listed transaction for any taxable year. Although the final regulations provide clear guidance on the applicable disclosure procedures, taxpayers may still have difficulty in achieving full compliance on their own. A professional tax adviser can assist taxpayers in making sure all necessary steps are followed. Otherwise, the threat of an indefinite assessment period can cause great uncertainty for taxpayers.

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<sup>8</sup> Treas. Reg. Section 301.6501(c)-1(g)(5)(B).

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