

proposed regulations modifying the rules under sections 6011 and 6111 (TD 9000, REG-103735-00, REG-110311-98) (the June 2002 regulations). The June 2002 regulations were published in the **Federal Register** (67 FR 41324, 67 FR 41362) on June 18, 2002. On October 17, 2002, the IRS issued temporary and proposed regulations modifying the rules under sections 6011, 6111, and 6112 (TD 9017, REG-103735-00, REG-154117-02, REG-154116-02, REG-154115-02, REG-154429-02, REG-154423-02, REG-154426-02, REG-110311-98; TD 9018, REG-103736-00) (the October 2002 regulations). The October 2002 regulations were published in the **Federal Register** (67 FR 64799, 67 FR 64840; 67 FR 64807, 67 FR 64842) on October 22, 2002. On December 11, 2002, and on January 7, 2003, the IRS and Treasury Department held a public hearing on these regulations. Written and electronic comments responding to the temporary regulations and the notices of proposed rulemaking were received. After consideration of all the statements and comments, the proposed regulations are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed. The revisions are discussed below.

Explanation and Summary of Comments

1. In General

These regulations finalize the rules for disclosure of reportable transactions, registration of confidential corporate tax shelters, and list maintenance of potentially abusive tax shelters. Sections 20.6011-4, 25.6011-4, 31.6011-4, 53.6011-4, 54.6011-4, 56.6011-4, and 301.6111-2 finalize each corresponding proposed regulation with few, if any, changes. Sections 1.6011-4 and 301.6112-1 modify and finalize each corresponding proposed regulation.

The IRS and Treasury Department received numerous comments relating to the October 2002 temporary regulations regarding disclosure under § 1.6011-4T and list maintenance under § 301.6112-1T. All comments were reviewed thoroughly. In particular, the IRS and Treasury Department reviewed the commentators' suggested clarifications to the rules pertaining to loss transactions and transactions with a significant book-tax difference, and to the rules pertaining to who must disclose transactions under section 6011. The IRS and Treasury Department also focused specifically on the comments relating to the rules pertaining to material advisors and the

rules pertaining to the persons who must be included on lists under section 6112. In response to the commentators' suggested clarifications, the final regulations have been revised to tailor more narrowly the scope of the transactions for which disclosure and maintenance of information under sections 6011 and 6112 is required. The major changes to the regulations are described below.

2. Section 6011—Participants

The definition of participation has been clarified in the final regulations. Reporting of transactions by RICs and reporting of certain leasing transactions have been excluded from the requirements under § 1.6011-4, provided that the transactions are not listed transactions.

3. Section 6011—Confidential Transactions

A confidential transaction is a transaction that is offered under conditions of confidentiality. The regulations generally provide a presumption of non-confidentiality if the taxpayer receives written authorization to disclose the tax treatment and tax structure of the transaction. Some commentators suggested the following changes to the regulations: (1) clarification regarding when the written authorization to disclose has to be effective, (2) clarification regarding whether proprietary transactions are confidential if there is a written authorization to disclose, and (3) an exception for certain merger and acquisition transactions. In response to those comments, the IRS and Treasury Department have made modifications to the factors for a confidential transaction in the final regulation.

The final regulations delete the clarification, under the definition of a confidential transaction for purposes of both section 6011 and section 6111, that a privilege held by the taxpayer does not cause a transaction to be confidential. The IRS and Treasury Department believe that this clarification is not necessary because the attorney-client privilege (or the confidentiality privilege of section 7525(a)) does not affect whether a transaction is confidential. A claim of privilege does not restrict the taxpayer's ability to disclose the tax treatment or tax structure of a transaction.

4. Section 6011—Transactions with Contractual Protection

Commentators indicated that it is inappropriate to require the reporting of a transaction for which the taxpayer

obtains tax insurance. Other commentators suggested that the contractual protection factor would require the reporting of numerous non-abusive types of transactions, such as legitimate business transactions with tax indemnities or rights to terminate the transaction in the event of a change in tax law. In response to these comments, the IRS and Treasury Department changed the focus of the contractual protection factor to whether fees are refundable or contingent. However, if it comes to the attention of the IRS and Treasury Department that other types of contractual protection, including tax insurance or tax indemnities, are being used to facilitate abusive transactions, changes to the regulations will be considered.

5. Section 6011—Loss Transactions

Many commentators suggested that the loss transaction factor was over broad and would require disclosure of a significant number of transactions occurring in the ordinary course of business. In response to these comments, exceptions to the loss transaction factor will be issued in separate published guidance.

6. Section 6011—Transactions with a Significant Book-Tax Difference

The IRS and Treasury Department received many comments on the use of U.S. GAAP, the manner in which gross assets are to be calculated, and the potential exclusion of items for purposes of the book-tax difference factor. In response, the final regulations revise the book-tax difference factor to provide that if a taxpayer in the ordinary course of its business keeps books on a basis other than U.S. GAAP and does not use U.S. GAAP for any purpose, then the taxpayer may determine the treatment of a book item by using the books maintained by the taxpayer, provided the books are kept on the same basis consistently from year to year. In addition, the final regulations increase the requisite gross asset amount to \$250 million or more and specify that the amount of gross assets is determined by ascertaining whether the gross assets equaled or exceeded \$250 million for book purposes at the end of any financial accounting period that ends with or within the entity's taxable year in which the transaction occurs.

In response to comments that the scope of the book-tax difference factor was over broad, the IRS and Treasury Department have revised the exceptions to this factor. The exceptions to the book-tax difference factor have been removed from the regulations and will