

whether an offer is made under conditions of confidentiality as described in section 6111(d)(2), including prior conduct of the parties. Pursuant to section 6111(d)(2)(A), if an offeree's disclosure of the tax treatment or tax structure of the transaction is limited in any manner by an express or implied understanding or agreement with or for the benefit of any tax shelter promoter, an offer is considered made under conditions of confidentiality, whether or not such understanding or agreement is legally binding. The tax treatment of a transaction is the purported or claimed Federal income tax treatment of the transaction. 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. Pursuant to section 6111(d)(2)(B), an offer will also be considered made under conditions of confidentiality in the absence of any such understanding or agreement if any tax shelter promoter knows or has reason to know that the offeree's use or disclosure of information relating to the tax treatment or tax structure of the transaction is limited for the benefit of any person other than the offeree in any other manner, such as where the transaction is claimed to be proprietary or exclusive to the tax shelter promoter or any party other than the offeree.

(2) *Exceptions*—(i) *Securities law*. An offer is not considered made under conditions of confidentiality if disclosure of the tax treatment or tax structure of the transaction is subject to restrictions reasonably necessary to comply with securities laws and such disclosure is not otherwise limited.

(ii) *Mergers and acquisitions*. In the case of a proposed taxable or tax-free acquisition of historic assets of a corporation (other than an investment company, as defined in section 351(e), that is not publicly traded) that constitute an active trade or business the acquirer intends to continue, or a proposed taxable or tax-free acquisition of more than 50 percent of the stock of a corporation (other than an investment company, as defined in section 351(e), that is not publicly traded) that owns historic assets used in an active trade or business the acquirer intends to continue, the transaction is not considered offered under conditions of confidentiality under paragraph (c)(1) of this section if the offeree is permitted to disclose the tax treatment and tax structure of the transaction no later than the earlier of the date of the public announcement of discussions relating to the transaction, the date of the public announcement of the transaction, or the

date of the execution of an agreement (with or without conditions) to enter into the transaction. However, this exception is not available where the offeree's ability to consult any tax advisor (including a tax advisor independent from all other entities involved in the transaction) regarding the tax treatment or tax structure of the transaction is limited in any way.

(3) *Presumption*. Unless facts and circumstances indicate otherwise, an offer is not considered made under conditions of confidentiality if the tax shelter promoter provides express written authorization to each offeree permitting the offeree (and each employee, representative, or other agent of such offeree) to disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transaction, and all materials of any kind (including opinions or other tax analyses) that are provided to the offeree related to such tax treatment and tax structure. Except as provided in paragraph (c)(2) of this section, this presumption is available only in cases in which each written authorization permits the offeree to disclose the tax treatment and tax structure of the transaction immediately upon commencement of discussions with the tax shelter promoter providing the authorization and each written authorization is given no later than 30 days from the day the tax shelter promoter commenced discussions with the offeree. A transaction that is exclusive or proprietary to any party other than the offeree will not be considered offered under conditions of confidentiality if written authorization to disclose is provided to the offeree in accordance with this paragraph (c)(3) and the transaction is not otherwise confidential.

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

facts and circumstances indicate that the fee paid for the other transaction is in consideration for the confidential corporate tax shelter. For purposes of determining whether the tax shelter promoters may receive fees in excess of \$100,000, the fees from all substantially similar transactions are considered part of the same tax shelter and must be aggregated.

(e) *Registration*—(1) *Time for registering*—(i) *In general*. A tax shelter must be registered not later than the day on which the first offering for sale of interests in the shelter occurs. An offer to participate in a confidential corporate tax shelter shall be treated as an offer for sale. If interests in a confidential corporate tax shelter were first offered for sale on or before February 28, 2000, the first offer for sale of interests in the shelter that occurs after February 28, 2000 shall be considered the first offer for sale under this section.

(ii) *Special rule*. If a transaction becomes a confidential corporate tax shelter (e.g., because of a change in the law or factual circumstances, or because the transaction becomes a listed transaction) subsequent to the first offering for sale after February 28, 2000, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section if interests are offered for sale after the transaction becomes a confidential corporate tax shelter. The transaction must be registered by the next offering for sale of interests in the shelter. If, subsequent to the first offering for sale, a transaction becomes a confidential corporate tax shelter because the transaction becomes a listed transaction on or after February 28, 2003, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section within 60 days after the transaction becomes a listed transaction/confidential corporate tax shelter if any interests were offered for sale within the previous six years.

(2) *Procedures for registering*. To register a confidential corporate tax shelter, the person responsible for registering the tax shelter must file Form 8264, "Application for Registration of a Tax Shelter". (Form 8264 is also used to register tax shelters defined in section 6111(c).) Similar to the treatment provided under Q&A-22 and Q&A-48 of § 301.6111-1T, transactions involving similar business assets and similar plans or arrangements that are offered to corporate taxpayers by the same person or related persons are aggregated and considered part of a single tax shelter.