

Material advisors' disclosure and list maintenance requirements for reportable transactions having a potential for tax avoidance or evasion

Dear Reader:

As you are aware, IRS has been and continues to devote significant resources pursuing those who are involved in abusive tax shelters. In addition, the rules that tax shelter material advisors must follow with respect to their reportable transactions have been significantly altered. As a result, I think it is important for you to understand the material advisor rules.

Under these rules, each "material advisor" must file a return with respect to any "reportable transaction." The return must identify and describe the transaction, describe the expected tax treatment, describe any potential tax benefits expected to result from the transaction, describe any tax result protection with respect to the transaction, identify and describe the transaction in sufficient detail for IRS to understand the tax structure of the transaction and the identity of any material advisor(s) with respect to the transaction, and include any other information that IRS requests. Generally, the return must be filed by the last day of the month following the end of the calendar quarter in which the person became a material advisor with respect to the reportable transaction.

For this purpose, a "material advisor" is any person (a) who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and (b) who (directly or indirectly) derives gross income in excess of certain threshold amounts for that material aid, assistance or advice. A "reportable transaction" is a transaction of a type that, according to IRS, has a potential for tax avoidance or evasion. IRS has identified a long list of transactions that it says have this potential, but has also spelled out rules which take some transactions outside the scope of the reporting rules. IRS added an additional category of reportable transaction, called a "transaction of interest." Failure to file the return for a reportable transaction can result in penalties as high as \$200,000.

Material advisors are also required to maintain a list with respect to a reportable transaction that identifies each person for whom the advisor acted as a material advisor for the transaction, and other information as IRS may require, such as the transaction's tax structure and its tax treatment. Under IRS rules, the list must include an itemized statement, a description of the transaction, and certain documents. There are also rules on the information to be included in the itemized statement. IRS issued Form 13976, "Itemized Statement Component of Advisee List," for material advisors to use in preparing and maintaining the list, but use of that form is optional.

The list must generally be maintained for at least seven years, and must be made available to IRS for inspection on request. A person required to maintain the list who fails to make it available to IRS for inspection within 20 business days after it is requested may be liable for a penalty of \$10,000 per day.

IRS has the right to make both targeted list requests (e.g., a request for a list only for a specific transaction), and general list requests (asking for all the lists the material advisor is required to maintain).

The reporting and list maintenance rules are complicated, and, as pointed out, severe penalties may be imposed for misunderstanding or improperly applying the rules and

failing to properly report a reportable transaction or failing to properly maintain the required list. As a result, I think that it is important that we meet so that you can become familiar with these rules. We can look at how the registration and recordkeeping rules may affect you and see if we can come up with ways to structure your transactions so that they are not subject to these rules.

