# REVISED TAX SHELTER REGULATIONS

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The Internal Revenue Service ("IRS") has issued revised temporary regulations (the "Revised Regulations") that:

(i) require taxpayers to disclose on their tax returns transactions that have characteristics common to tax shelters,

(ii) require promoters to maintain lists of investors, and

(iii) require promoters to register confidential corporate tax shelters.

These regulations, initially promulgated in February 2000 and most recently revised in October 2002, are intended to provide the IRS with better information about tax shelters and other tax-motivated transactions. These regulations are but one of several steps that the government is taking to address the perceived tax shelter problem.

The revisions:

- Expand categories of transactions subject to the disclosure requirements,
- Eliminate the principal exceptions to the disclosure requirements,
- Create a new IRS form for taxpayer disclosure,
- Coordinate listing obligations with disclosure requirements, and
- Broaden the categories of persons required to maintain investor lists.

However, these revisions are generally only effective for transactions occurring after 2002[1] and, thus, in the case of calendar year taxpayers, will begin to apply to returns filed in 2004. In addition, the revisions do not affect the relatively limited sanctions applicable to the disclosure and listing requirements. Congress has been considering legislation with respect to tax shelters, but it is uncertain what legislation, if any, will be enacted. Accordingly, this memorandum does not discuss such legislative proposals in any detail.

## TAX SHELTER DISCLOSURE STATEMENTS

The Revised Regulations require any taxpayer that participates, directly or indirectly, in a "reportable transaction" to attach a completed IRS Form 8886, the "Reportable Transaction Disclosure Statement," to its tax return.[2]

### DEFINITION OF REPORTABLE TRANSACTIONS

A transaction is a reportable transaction if it its described by any one of the following six categories enumerated in the Revised Regulations:

(i) Listed transactions. A transaction is a listed transaction if it is the same or substantially similar[3] to one of the transactions listed in notices, regulations, or other guidance published by the IRS. As of the date of this memorandum, the IRS has listed twenty-one such tax avoidance transactions in public guidance.[4]

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1 See Treas. Reg. §1.6011-4T(h) & Treas. Reg. §301.6112-1T(j). Transactions occurring on or after February 20, 2000 that have been listed as tax avoidance transactions in IRS published guidance are also subject to the Revised Regulations. Transactions entered into before the 2003 effective date will generally be subject to the tax shelter regulations as they existed prior to their most recent modification. For a description of these rules, see our memorandum dated August 2, 2002.

2 Treas. Reg. §1.6011-4T(a). This form is not yet available.

3 The term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. See Treas. Reg. §1.6011-4T(c)(4).

4 See Exhibit A.

(ii) Confidential transactions. The taxpayer has participated in the transaction under conditions of confidentiality with respect to the structure or tax consequences.[5]

(iii) Contractual protection against loss of tax benefits. The taxpayer has obtained or been provided with contractual protection against the possibility that the intended tax benefits of the transaction will not be sustained (including rescission rights, the right to a full or partial refund of fees, fees that are contingent on the realization of tax benefits, insurance protection or a tax indemnity or similar agreement other than a customary indemnity provided by a principal to the transaction that did not participate in the promotion of the transaction to the taxpayer).[6]

(iv) Loss transactions. The taxpayer has participated in a transaction that results in, or is reasonably expected to result in, a loss under Section 165[7] of at least:

- $10 million in any single taxable year or $20 million in any combination of taxable years for corporations;
- $5 million in any single taxable year or $10 million in any combination of taxable years for partnerships or S corporations;
- $2 million in any single taxable year or $4 million in any combination of taxable years for individuals or trusts; or

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5 The analysis to determine whether a transaction is offered under conditions of confidentiality for purposes of disclosure is substantially the same as the analysis for purposes of registration, which is discussed in detail below in "Corporate Tax Shelter Registration." Compare Treas. Reg. § 1.6011-4T(b)(3) with Treas. Reg. § 301.6111-2T(c).

6 A transaction will not be considered to have contractual protection solely because the issuer of a debt instrument agrees to pay additional interest to compensate holders for withholding tax imposed on interest, or because the requirement to pay such additional interest entitles the issuer to redeem the debt instrument.

7 Unless otherwise indicated, all section references are to the sections of the Internal Revenue Code of 1986, as amended (the "Code").

- $50,000 in any single taxable year for individuals or trusts if the loss arises with respect to foreign currency transactions under Section 988.

(v) Book/tax difference greater than $10 million in any taxable year. The treatment for federal income tax purposes of any item or items from a transaction is expected to differ by more than $10 million from the treatment of the item or items for book purposes in any taxable year[8] (this category is only applicable to reporting companies under the Securities Exchange Act of 1934 and business entities that have at least $100 million in gross assets).

(vi) Transactions involving a brief asset holding period. The taxpayer has participated in a transaction that results in, or is reasonably expected to result in, a tax credit greater than $250,000 if the asset generating the credit is held for less than 45 days.

## EXCEPTIONS TO THE DISCLOSURE REQUIREMENT

Three of the exceptions previously available for purposes of disclosure have been eliminated.[9] The Revised Regulations still provide an exception for transactions the IRS determines are not reportable transactions and, additionally, a new, limited exception for regulated investment companies.[10]

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8 There are several exceptions for items that are not likely give rise to abuse, such as cancellation of indebtedness income, charitable contributions of cash or tangible property, and tax exempt interest, but there are also exceptions for the acceleration of taxable income and deferral of tax losses that may lead to abuse. See Treas. Reg. §1.6011-4T(b)(6)(iii)(A) through (M). Additionally, the Revised Regulations contain special rules that address the treatment of affiliated corporations that file a consolidated return, foreign persons, owners of disregarded entities, partners of partnerships and shareholders of certain foreign corporations. See Treas. Reg. §1.6011-4T(b)(6)(ii)(B) through (F).

9 As discussed in our memorandum dated August 2, 2002, there were four applicable exceptions to the disclosure requirements, including the exception for IRS determinations. The Generally Accepted Understanding Exception and the No Reasonable Basis Exception applied to the disclosure requirements as they currently apply with respect to Confidential Corporate Tax Shelters (see "Corporate Tax Shelter Registration" below). The fourth disclosure exception applied to a taxpayer that participated in a transaction in the ordinary course of its business in a form consistent with commercial practice, and that reasonably determined that it would have participated in the transaction on substantially the same terms irrespective of the expected federal income tax benefits.

10 Regulated investment companies are not subject to the disclosure requirement with respect to transactions with a book/tax difference greater than $10 million or transactions involving a brief asset holding period.

### TIME FOR PROVIDING DISCLOSURE

The required disclosure statement must be attached to the taxpayer's return for each taxable year for which the taxpayer's federal income tax liability is affected by its participation in the transaction. If a reportable transaction results in a loss carryback, the required disclosure statement must be attached to the taxpayer's application for refund or amended federal tax return. If a transaction becomes a reportable transaction on or after the date the taxpayer files its return for the first affected year, the taxpayer must file the disclosure statement as an attachment to its next tax return.[11]

### RULINGS AND PROTECTIVE DISCLOSURES

A taxpayer may submit a request to the IRS for a ruling on whether a particular transaction is subject to the disclosure requirements. Alternatively, a taxpayer who is uncertain about whether a transaction must be disclosed under the Revised Regulations may disclose the transaction, noting on the disclosure statement that the taxpayer is uncertain about the proper treatment and is filing on a protective basis.

### FAILURE TO FILE DISCLOSURE STATEMENT

A taxpayer that is required to file a disclosure statement under the Revised Regulations and fails to do so may be subject to penalties that it otherwise would have avoided. If a taxpayer has an underpayment of tax for a particular year, that underpayment is potentially subject to an accuracy-related penalty of 20% and a fraud penalty of 75%. Normally, those penalties are inapplicable if the taxpayer establishes that there was reasonable cause for its position and that it acted in good faith. However, the preamble to an earlier version of the Revised Regulations indicates that by failing to file a disclosure statement, a taxpayer may be deemed not to have acted in "good faith" with respect to an underpayment, even if its return position has sufficient legal justification to satisfy the "reasonable cause" standard.[12] In such a case, the determination of whether a taxpayer has acted in "good faith" will depend on all of the facts and circumstances, including the reason or reasons for the nondisclosure.

## LISTS OF INVESTORS IN POTENTIALLY ABUSIVE TAX SHELTERS

Each "material advisor" of a "potentially abusive tax shelter" is generally required to maintain a list that identifies participants in the transaction to whom they communicated, in

[11] See Treas. Reg. §1.6011-4T(e).

[12] See T.D. 8877 (2000).

any way, the potential tax consequences of the transaction and to make that list available for inspection upon request by the IRS. The list must include detailed information about the tax shelter and about the investors in the shelter. [13]

### DEFINITION OF POTENTIALLY ABUSIVE TAX SHELTER

The term "potentially abusive tax shelter" means a transaction that (i) is required to be registered under Section 6111, (ii) is listed by the IRS in published guidance as a tax avoidance transaction[14] or (iii) a potential "material advisor" (as defined below) has reason to know falls into one of the other five categories of reportable transactions (as described above in "Tax Shelter Disclosure Statements" – "Definition of Reportable Transactions").

### DEFINITION OF MATERIAL ADVISOR

A person is a material advisor with respect to a potentially abusive tax shelter, and thus responsible for maintaining investor lists, if such person (i) receives, or expects to receive, a minimum fee ($250,000 if all persons who acquire interests in the transaction are corporations and $50,000 for any other qualifying transaction) and (ii) provides any statement, oral or written, to any person as to the potential tax consequences of the transaction.[15]

### PERSONS REQUIRED TO BE INCLUDED ON LISTS

A material advisor must list each known participant, or potential participant, in the transaction to whom the material advisor makes or provides a statement regarding the potential tax consequences of a potentially abusive tax shelter. If a material advisor has reason to know the participant will transfer an interest in the transaction and knows the identity of the subsequent participant, then both the initial participant and the subsequent participant must be listed by the material advisor.

### CLAIMS OF PRIVILEGE

An attorney or federally authorized tax practitioner is not required to disclose any information that he or she believes is protected by the attorney-client privilege (or the confidentiality privilege that relates to federally authorized tax practitioners), but such person is

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13 See Treas. Reg. §301.6112-1T(e).

14 See Exhibit A. Although the Revised Regulations generally only apply to transactions entered into after January 1, 2003, if an interest in a transaction is acquired after February 20, 2000 and the transaction subsequently becomes a listed transaction subject to the disclosure requirements, the investor list rules of the Revised Regulations will apply as well.

15 See Treas. Reg. § 301.6112-1T(c)(2) & (3).

required to maintain the investor list. The attorney or federally authorized tax practitioner must attach a statement to IRS Form 8264 that is signed under penalties of perjury and identifies each document or category of information for which the claim of privilege is made. Furthermore, such person must specifically represent that (a) the information omitted was a confidential practitioner-client communication and that (b) he or she did not disclose the omitted information to any person whose receipt of such information would result in a waiver of the privilege.

Moreover, the preamble to the Revised Regulations specifically indicates that the name of a participant in a potentially abusive tax shelter is not protected by the privilege, and that no such participant should have a reasonable expectation of confidentiality with respect to that person's identity.[16] Inasmuch as the statutory privilege for accountants and other federally authorized tax practitioners is not available with communications involving corporate tax shelters, such persons must additionally represent that the omitted information was not part of tax advice that constituted the promotion of a corporate tax shelter.

### RETENTION AND FURNISHING OF INVESTOR LISTS

Each material advisor must maintain the list of investors in a potentially abusive transaction for ten years following the date on which the material advisor last made a statement regarding the potential consequences of the transaction. The list of a material advisor which is an entity that dissolves or liquidates before the ten year period ends must be maintained and furnished by the person responsible for winding up the affairs of the entity. Each material advisor that receives a written request from the IRS must furnish the list to the IRS within twenty business days of the date of the request.

### DESIGNATION AGREEMENTS

Material advisors for a potentially abusive tax shelter may execute a written agreement that designates a single material advisor to maintain the list. However, such an agreement does not limit the obligation of any material advisor to furnish the list to the IRS. If a material advisor is unable to obtain the investor list from the designated material advisor, such material advisor will not be relieved from the requirements of the Revised Regulations and may be subject to penalties.

### PENALTIES FOR NON-COMPLIANCE

Any person who is responsible for maintaining an investor list and fails to do so is subject to a penalty of $50 for each person with respect to whom there is a failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. However, the

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[16] See T.D. 9018 (2002).

maximum penalty imposed on any given taxpayer for failing to maintain investor lists is $100,000 per calendar year.

## CORPORATE TAX SHELTER REGISTRATION

Except for minor conforming changes, there were no modifications to the corporate tax shelter registration requirements in the Revised Regulations. A "confidential corporate tax shelter" must be registered with the IRS no later than the day on which the first offering of interests in the tax shelter occurs.[17] Registration is accomplished by filing IRS Form 8264, "Application for Registration of a Tax Shelter," which requires specific information about the tax shelter.[18] Legislation pending before the U.S. Congress would modify Section 6111 to require registration of transactions that must be disclosed under Section 6011, and the IRS intends to modify the regulations under Section 6111 when such legislation is enacted.[19]

### DEFINITION OF CONFIDENTIAL CORPORATE TAX SHELTER

***Three Requirements***

The Revised Regulations requiring registration define a confidential corporate tax shelter as a transaction that satisfies each of the following three requirements:

(i) Fees in excess of $100,000. The tax shelter promoters may receive fees in excess of $100,000 in the aggregate;[20]

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17 See Treas. Reg. § 301.6111-2T(e)(1).

18 The registration must include information identifying and describing the tax shelter, a description of its intended tax benefits and any written materials that are presented to potential participants in connection with the offering of sales of interests in the tax shelter, including any analyses or opinions relating to its intended tax benefits.

19 See T.D. 9017 (2002).

20 All of the facts and circumstances relating to a transaction are considered in determining the fees that the promoters may receive. For these purposes, all consideration that the 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. All fees from substantially similar transactions are considered part of the same tax shelter and aggregated for purposes of determining whether the $100,000 threshold has been reached. See Treas. Reg. § 301.6111-2T(d).

(ii) Conditions of confidentiality. The transaction is offered to any potential participant under conditions of confidentiality (as discussed below); and

(iii) Tax benefits important. A significant purpose of the structure is the avoidance or evasion of federal income tax for a direct or indirect corporate participant, which is the case if:

(a) the transaction both (x) has been structured to produce federal income tax benefits that constitute "an important part of the intended results" of the transaction and (y) the tax shelter promoter (or other person who would be responsible for registering the tax shelter) reasonably expects the transaction to be presented in substantially similar form to more than one potential participant (the "Tax Benefits Test"), [21] or

(b) the transaction is listed in published guidance by the IRS as a tax avoidance transaction subject to registration. [22]

***Conditions of Confidentiality***

All of the facts and circumstances relating to a transaction are considered in determining whether an offer is made under conditions of confidentiality, including prior conduct of the parties. However, an offer will be considered made under conditions of confidentiality if (i) an offeree's disclosure of the structure or tax aspects of the transaction is limited in any way by an understanding or agreement with or for the benefit of any promoter, whether or not such understanding or agreement is legally binding or (ii) any promoter knows or has reason to know that the transaction is protected from disclosure or use in any other manner (such as where the transaction is claimed to be proprietary or exclusive to the promoter).[23]

An offeree's privilege to maintain the confidentiality of a communication relating to a tax shelter in which the taxpayer might participate or has agreed to participate, including an offeree's confidential communication with the offeree's attorney, is not itself a condition of confidentiality for these purposes. Further, conditions of confidentiality necessary to comply with securities law will not make an offer "confidential" for registration purposes. In other

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21 See Treas. Reg. § 301.6111-2T(b)(3).

22 See Exhibit A.

23 See Treas. Reg. § 301.6111-2T(c).

words, an offer is not considered made under conditions of confidentiality if disclosure of the structure or tax aspects of the transaction is subject to restrictions reasonably necessary to comply with federal or state securities laws and such disclosure is not otherwise limited.

The Revised Regulations provide a safe harbor presumption against confidentiality. To fall within the safe harbor, the parties must comply with its requirements at the outset of discussions regarding a transaction. Unless facts and circumstances clearly indicate otherwise, an offer will not be considered made under conditions of confidentiality if the tax shelter promoter provides express written authorization to each person who participates or discusses participation in the transaction effective at the commencement of discussions permitting such persons to disclose the structure and tax aspects of the transaction with any and all persons, without limitation of any kind on such disclosure.

**THREE EXCEPTIONS TO THE REGISTRATION REQUIREMENT**

Even if a transaction satisfies the three requirements of a confidential corporate tax shelter, it will not satisfy the Tax Benefits Test, and thus will escape registration, if the promoter reasonably determines that any of the following three exceptions are met:

(i) The Generally Accepted Understanding Exception. The taxpayer participated in the transaction in the ordinary course of its business in a form consistent with commercial practice, and the taxpayer reasonably determines that there is a generally accepted understanding that the expected federal income tax benefits are allowable;[24]

(ii) The No Reasonable Basis Exception. The taxpayer reasonably determines that there is no reasonable basis for the denial of any significant portion of the expected federal income tax benefits from the transaction;[25] or

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24 See Treas. Reg. §301.6111-2T(b)(3). The regulation states that "[t]he mere fact that one or more knowledgeable tax practitioners have provided an opinion or advice to the effect that the intended tax treatment of the transaction should or will be sustained, if challenged by the IRS, is not sufficient to satisfy the requirements of [the Generally Accepted Understanding Exception.]"

25 See Treas. Reg. §301.6111-2T(b)(4)(i). This "no reasonable basis" standard would not be satisfied by an IRS position that would be "merely arguable" or would constitute a "merely colorable" claim. Id.

(iii) <u>The IRS Guidance Exception.</u> The IRS has identified the transaction in public guidance as not subject to the registration requirements.[26]

The exceptions are not available for transactions listed in published guidance as tax avoidance transactions by the IRS.

### PERSONS REQUIRED TO REGISTER

The tax shelter promoter is generally the party responsible for registering a tax shelter. Under the Revised Regulations, the category of "promoter" includes any person who participates in the organization, management or sale of a tax shelter (other than (i) a person unrelated to the tax shelter organizer who does not participate in the entrepreneurial risks or benefits of the tax shelter or (ii) a person who performs only ministerial functions such as typing, photocopying or printing) or any related person.[27] Law firms that charge a standard hourly rate for their services will generally not be treated as participating in the entrepreneurial risks or benefits of a transaction, and thus will generally not be responsible for registering corporate tax shelters.[28] There is a procedure by which promoters who are required to register a confidential corporate tax shelter may designate one single person to register the shelter.

### CLAIMS OF PRIVILEGE

If an attorney or federally authorized tax practitioner is required to register the tax shelter, such person is not required to disclose any information which he or she believes is protected by the attorney-client privilege (or the confidentiality privilege that relates to federally authorized tax practitioners). To claim the privilege, the attorney or federally authorized tax practitioner must provide the IRS with a statement signed under penalties of perjury that contains the same information and representations that a tax shelter organizer must provide to omit privileged information from an investor list, as discussed above.

### PENALTIES FOR NON-COMPLIANCE

A person who is required to register a confidential corporate tax shelter and fails to do so in a timely manner will be subject to a penalty in an amount equal to the greater of (i) 50% of the fees paid to all promoters with respect to offerings made prior to the date of late registration, or (ii) $10,000. If the failure to file is intentional, however, the applicable percentage

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[26] See Treas. Reg. §301.6111-2T(b)(4)(ii).

[27] Special rules apply if all promoters of a tax shelter are foreign persons.

[28] See Treas. Reg. §301.6111-1T A-30.

will be 75% instead of 50%. No penalty will be imposed for a failure to register a confidential corporate tax shelter if the failure is due to reasonable cause.

## ACCURACY-RELATED PENALTIES - EFFECT OF TAX SHELTER CLASSIFICATION

As discussed below, the possible imposition of the accuracy-related penalty of 20% depends on a number of factors, including whether any of the transactions are "tax shelters" under the penalty provisions. A tax shelter for purposes of Section 6662 is defined, in part, as any plan or arrangement if a significant purpose of such plan or arrangement is the avoidance or evasion of federal income tax.[29]

Under Section 6662 of the Code, penalties may generally be imposed on a taxpayer if the taxpayer reports an understatement of income tax for any taxable year that exceeds 10% of the tax required to be shown on the return for such taxable year. The penalty is an amount equal to 20% of the portion of the tax underpayment. Under most circumstances, for purposes of this accuracy-related penalty, a taxpayer may reduce the amount of the understatement if (i) there is "substantial authority" for the manner in which the taxpayer reported a tax item, or (ii) the taxpayer discloses the facts affecting the item's tax treatment and there is a "reasonable basis" for the manner in which the taxpayer reported such item.

However, if an item is determined to be attributable to a tax shelter for purposes of Section 6662 as described above, a taxpayer may not reduce the amount of the understatement by disclosing the facts affecting the item's tax treatment. Moreover, a taxpayer will not be able to reduce the amount of the understatement by establishing "substantial authority" unless the taxpayer also reasonably believed that the tax treatment of such item was "more likely than not" the proper treatment.[30] The regulations provide that a taxpayer reasonably believes the tax treatment of such item is more likely than not the proper treatment if (i) the taxpayer analyzes the pertinent facts and authorities, and in reliance upon that analysis, reasonably concludes in good faith that there is a greater than 50% likelihood that the tax treatment of the item will be upheld if challenged by the IRS or (ii) the taxpayer reasonably relies in good faith on the opinion of a professional tax advisor, and the opinion analyzes the pertinent facts and authorities and unambiguously states that the tax advisor concludes there is a greater than 50% likelihood that the tax treatment of the item will be upheld if challenged by the IRS.[31]

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29 See Section 6662(d)(2)(C)(iii).

30 See Treas. Regs. § 1.6662-4(g)(4)(i), 1.6664-4(e)(2)(i)(B).

31 Id.

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The foregoing is intended only as a general summary, and the Revised Regulations are more complex in their entirety. If you have any questions about the Revised Regulations or would like more information regarding specific provisions, please do not hesitate to call Dickson G. Brown (dbrown@stblawcom, (212) 455-2850); John J. Creed (jcreed@stblaw.com, (212) 455-3485), Jonathan E. Cantor (jcantor@stblaw.com, (212) 455-2237), Joshua R. Isenberg (jisenberg@stblaw.com, (212) 455-3512), or any other member of our tax department.

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## EXHIBIT A – TAX AVOIDANCE TRANSACTIONS IDENTIFIED BY THE IRS

The following are tax avoidance transactions listed by IRS in published guidance:

(1) 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;[32]

(2) certain trust arrangements purported to qualify as multiple employer welfare benefit funds exempt from the limits of sections 419 and 419A of the Code;

(3) certain multiple-party transactions intended to allow one party to realize rental or other income from property or service contracts and to allow another party to report deductions related to that income (often referred to as "lease strips");

(4) transactions in which the reasonably expected economic profit is insubstantial in comparison to the value of the expected foreign tax credits;

(5) 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 losses to another partner;

(6) transactions involving distributions described in Treas. Reg. § 1.643(a)-8 from charitable remainder trusts;

(7) 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);

(8) transactions involving the distribution of encumbered property in which taxpayers claim tax losses for capital outlays that they have in fact recovered;

(9) transactions involving fast-pay arrangements as defined in Treas. Reg. § 1.7701(1)-3(b);

(10) 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;

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[32] See Notice 2002-51, 2001-34 IRB 190 (listing transactions 1-16 below).

(11) transactions generating losses resulting from artificially inflating the basis of partnership interests;

(12) 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;

(13) transactions purporting to apply Section 935 of the Code to Guamanian trusts;

(14) transactions involving the use of an intermediary to sell the assets of a corporation;

(15) transactions involving a loss on the sale of stock acquired in a purported Section 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;

(16) 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;

(17) certain transactions involving the use of a loan assumption agreement to claim an inflated basis in assets acquired from another taxpayer;[33]

(18) certain transactions involving the use of a notional principal contract to claim current deductions for periodic payments made by a taxpayer while disregarding the accrual right to receive offsetting payments in the future;[34]

(19) transactions involving the creation of a tiered partnership that does not make a Section 754 election used to duplicate straddle losses;[35]

(20) transactions involving the use of an S corporation (or partnership) that enters into foreign currency straddle transactions and recognizes the loss leg of the straddles after the other shareholders (or partners) are redeemed and an election to treat the S corporation's (or partnership's) tax year as consisting of two separate years is made in order to allocate the loss to the remaining shareholder;[36] and

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[33] See Notice 2002-21, 2002-14 IRB 730.

[34] See Notice 2002-35, 2002-21 IRB 992.

[35] See Notice 2002-50, 2002-28 IRB 98 (also discussing substantially similar transactions).

[36] See Notice 2002-65, 2002-41 IRB 690.

(21) transactions involving the use of a reinsurance arrangement to improperly divert income from a U.S. taxpayer to the taxpayer's reinsurance subsidiary that is subject to little or no federal income tax.[37]

[37] See Notice 2002-70 (October 15, 2002).