

September 13, 2011

IRS Issues Final Regulations on Penalties for Reportable Transactions

The Internal Revenue Service (IRS) issued [final regulations](#) under Code § 6707A regarding the penalty for the failure to report on [Form 8886](#) “reportable transactions” and “listed transactions,” including listed transactions involving employee benefit arrangements. “Reportable transactions” are transactions the IRS determines as having a potential for tax avoidance or evasion pursuant to regulations under Code § 6011. “Listed transactions,” a subset of reportable transactions, are “the same or substantially similar” to transactions that the IRS has determined to be tax avoidance transactions and have been identified in published guidance.

The final regulations reflect the changes made to the penalty calculation under Code § 6707A by the Small Business Jobs Act of 2010 (the “Jobs Act”). Under the Jobs Act, the amount of the Code § 6707A penalty was revised generally to make the penalty proportionate to the decrease in tax shown on the return as a result of a reportable transaction (i.e., 75% of the incremental decrease). Prior to the Jobs Act, the penalty was a specific fixed-dollar amount without reference to the amount of tax benefit, so the penalty could exceed the tax benefit of the transaction.

The maximum penalties under Code § 6707A are:

- \$200,000 for a listed transaction (\$100,000 in the case of a natural person); and
- \$50,000 for any other reportable transaction (\$10,000 for a natural person).

The minimum penalty for any reportable or listed transaction is \$10,000 (\$5,000 for a natural person).

The final regulations, effective September 7, 2011, conform to the statutory language of Code § 6707A but do not give further guidance on how the penalty is calculated.

Listed transactions involving employee benefit arrangements include:

- [Revenue Ruling 90-105](#) – **Certain Accelerated Deductions for Contributions to a Qualified Cash or Deferred Arrangement or Matching Contributions to a Defined Contribution Plan** (identified as “listed transactions” on February 28, 2000). See also Rev. Rul. 2002-46, 2002-2 C.B. 117, modified by Rev. Rul. 2002-73, 2002-2 C.B. 805;
- [Revenue Ruling 2003-6](#) – **Abuses Associated with S Corp ESOPs** for the purpose of claiming eligibility for the delayed effective date of Code § 409(p) (identified as “listed transactions” on December 17, 2002);
- [Notice 2003-24](#) – **Certain Trust Arrangements Seeking to Qualify for Exception for Collectively Bargained Welfare Benefit Funds under Code § 419A(f)(5)** (identified as “listed transactions” on April 11, 2003);
- [Notice 95-34](#) – **Certain Trusts Purported to be Multiple Employer Welfare Funds Exempted from the Lists of Code §§ 419 and 419A** (identified as “listed transactions” on February 28, 2000). See also § 1.419A(f)(6)-1 of the Income Tax Regulations (10 or more employer plans);

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- [Notice 2003-22](#) – **Offshore Deferred Compensation Arrangements** involving leasing companies (identified as “listed transactions” on April 4, 2003);
- [Notice 2004-8](#) – **Abusive Roth IRA Transactions** designed to avoid the limitations on contributions to Roth IRAs described in Code § 408A (identified as “listed transactions” on December 31, 2003);
- [Revenue Ruling 2004-04](#) – **Prohibited Allocations of Securities in an S Corporation** (identified as “listed transactions” on January 23, 2004);
- [Revenue Ruling 2004-20](#) – **Abusive Transactions Involving Insurance Policies in Code §412(i) Retirement Plans** (identified as “listed transactions” on February 13, 2004). See also Rev. Rul. 2004-21, 2004-10 I.R.B. 544, §§ 1.79-1(d)(3), 1.83-3(e) and 1.402(a)-1(a)(1) and (2) of the proposed Income Tax Regulations, and Rev. Proc. 2004-16, 2004-10 I.R.B. 559; and
- [Notice 2007-83](#) – **Abusive Trust Arrangements Utilizing Cash Value Life Insurance Policies Purportedly to Provide Welfare Benefits** (identified as “listed transactions” on October 17, 2007).



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