

## **Description of Major Changes to the Form 8886 (Rev. December 2007), Reportable Transaction Disclosure Statement**

1. Form 8886 has been ~~completely~~ revised from the prior version (Rev. December 2005). These changes are the result of changes mandated by the adoption of final regulations (see discussion below) as well as changes requested by LMSB and OTSA.
2. A global change was made throughout the form to change the term "person" (which was intended to refer to both natural individuals and entities) to "individuals or entities".
3. A new Line B asking a question relating to the form to which Form 8886 is attached was inserted and old Line B was renamed Line C.
4. On July 31, 2007, IRS promulgated regulations (Treasury Decision 9350) adding a new category of reportable transaction (transactions of interest) and deleting the "brief asset holding period" category of reportable transactions.
5. The addition of the transactions of interest category is effective for transactions of interest entered into on or after November 2, 2006. Regulations section 1.6011-4(h). Accordingly, on line 2, we have added a new box (2f) for transactions of interest.
6. The deletion of the brief asset holding period category of reportable transactions is effective for transactions entered into after August 2, 2007. Regulations section 1.6011-4(h). Because taxpayers must disclose pre-August 3, 2007 transactions, we have retained box 2(e), brief asset holding period.
7. On line 3 we added references to box 2f and transactions of interest to reflect the addition of the transaction of interest category.
8. Line 5 was reformatted and now asks for additional information including a question relating to the date a K-1 was received (where applicable) and expanding the categories of entities to include trusts.
9. Line 6 asks for additional information about the related material advisor including their identifying number and fees paid to such advisor. Also in line 6 previous references to "person" (which were intended to include both natural persons and entities) were changed to "individual or entity".
10. Under Regulations section 1.6011-4(d), to be considered complete, the information on Form 8886 must, among other things, describe the expected tax treatment and all potential tax benefits expected to result from the transaction and any tax result protection with respect to the transaction. To comport with this

regulation, we have inserted the following language after the word tax in the first sentence of line 7b: "treatment and expected tax".

11. To be considered complete, the information provided on Form 8886 must also, among other things, describe any tax result protection with respect to the transaction. Accordingly we have added the following sentence to the end of line 7b: "Also, include a description of any tax results protection with respect to the transaction."
12. Lines 7 through 9 were deleted and new lines 7a, 7b, 8a, and 8b were added.

## **Description of Major Changes for Instructions for 2007 Form 8886, Reportable Transaction Disclosure Statement (Rev. December 2007)**

The issuance of final reportable transaction regulations under section 6011, a major revision of Form 8886, and changes to the structure of the Form 8886 Instructions to make them more consistent with reportable transaction reporting for material advisors (Form 8918, Material Advisor Disclosure Statement and Instructions) resulted in a significant rewrite of Form 8886 Instructions. Accordingly, I have not prepared an Adobe cumulative change document. Significant changes are noted below in the Major Changes discussion. For your information, I have also attached an SGML comparison of the December 2005 instructions with the current version of the instructions.

### 1. Global Change

Throughout the Instructions, references to “person” (which were intended to refer to both natural persons and entities) have been revised to read “individual or entity”.

### 2. General Instructions

- At the suggestion of CC:TEGE, added discussion noting that tax-exempt entities participating in prohibited tax shelter transactions (generally listed transactions, confidential transactions, or transactions with contractual protections) may be required to file Form 8886-T. Also, pursuant to e-mail discussions between CC: PSI and CC: TEGE did not include language about section 6011(g) disclosure by taxable parties.

### 3. Definitions

- Added two new definitions “tax benefit” and “tax structure” to better explain taxpayer disclosure requirements for reportable transactions.

### 4. Who Must File

- On July 31, 2007, IRS promulgated regulations (TD 9350) adding a new category of reportable transaction (transactions of interest) and deleting the “brief asset holding period” category of reportable transactions.
- With the exception of listed transactions and transactions of interest, regulated investment companies (RICs) and investment vehicles which are at least 95% owned by RICs during the course of a transaction are not required to file Form 8886.
- Consistent with the new regulations, added transactions of interest as another type of reportable transaction not subject to the general RIC exception to filing Form 8886.

## 5. Participation in Reportable Transaction

### a. Listed Transactions

- Under listed transactions, added reference to Notice 2007-57 and Notice 2007-83 (which set forth certain types of listed transactions) and Notice 2002-35 (which provides an exception from the general disclosure rule for listed transactions).

### b. Confidential Transactions

- Under confidential transactions, clarified that the related party rules (as defined in section 267(b) and 707(b)) apply to confidential transactions, revised the discussion of what is included in the “Minimum fee” on page 2 to more expressly reflect Regulations section 1.6011-4(b) (3) (iv), clarified that the related party rules apply to the determination of fees, and conformed the definition of participation in this category to the new regulations.

### c. Loss Transactions

- Modified first paragraph to conform to the language of Regulations 1.6011-4(b) (5) by deleting the word “gross” and the parenthetical referring to netting.
- Under “Section 165 loss” in the first paragraph, the first sentence is added to clarify that a section 165 loss is adjusted for any salvage value and any other insurance or compensation received.
- Consistent with the Regulations section 1.6011-4(b) (5), we added the following sentence as the last sentence of the Section 165 loss discussion: “For this purpose, a tax return is deemed to reflect the full amount of the section 165 loss allocable to the taxpayer, regardless of whether all or part of the loss enters in the computation of a net operating loss under section 172 or net capital loss under section 1212 that the taxpayer may carry back or carry over to another year.”

### d. Transactions of Interest

- The new regulations relating to transactions of interest are effective for transactions of interest entered into after November 2, 2006. The deletion of the brief asset holding period category of reportable transactions is effective for transactions entered into for transactions entered into after August 2, 2007. Accordingly, we have added an explanation of transaction of interest and what constitutes participation in a transaction of interest. We also retained a discussion of the brief asset holding period category because of pre-August 3, 2007, brief asset holding period transactions that may have to be reported after August 2, 2007.

### e. Transactions with a Significant Book Tax Difference

- Added clarifying reference to pre-August 3, 2007 Regulations and provided information on how to file with respect to pre- January 6, 2006 transactions pursuant to Notice 2006-6.
  - Per CC: PA deleted reference to amended return.
- f. Transactions with a Brief Asset Holding Period
- Added discussion of repeal of this category post August 2, 2007.
- g. Exceptions
- Deleted reference to exception for “Certain Leasing Transactions” which is apparently no longer applicable. See Regulations section 1.6011-4(b) (8).
- h. Shareholders of Foreign Corporations
- Modified to include a definition of “participation” by shareholders of foreign corporations.
6. Request for Ruling
- Added citation to Regulations Section 1.6011-4(f).
7. When and How to File.
- Under the new regulations, if a transaction becomes a listed transaction or transaction of interest after the filing of a taxpayer’s return reflecting the taxpayer’s participation in the transaction (including an amended return) the taxpayer must file Form 8886 with the Office of Tax Shelter Analysis (OTSA) within 90 days of the transaction becoming a listed transaction or transaction of interest. This is a change from prior law which required subsequently identified listed transactions to be disclosed on the taxpayer’s next filed return. Thus, prior law language (last sentence of this section) was deleted.
  - Added new subsection “Special Filing Rules” to comport with new regulations dealing with 60-day OTSA filing extension, designation of a transaction as a listed transaction or transaction of interest after a tax return is filed (90 day rule discussed in prior bullet), subsequent loss transaction, and multiple disclosures.
8. Penalties
- Added references to Rev. Proc. 2007-21 and Rev. Proc. 2007-25.
  - In the second paragraph, in the fourth sentence, per CC:PA, changed the word “will” to “may” thus providing that if the taxpayer has a reportable transaction understatement and the transaction is not disclosed, the taxpayer may not (rather than will not) have reasonable cause defense to the imposition of penalties under section 6664(d).

- In the third paragraph revised the first sentence to read as follows: A penalty under section 6707A is assessed for each failure by any individual or entity required to file a Form 8886, if the individual or entity (a) fails to attach Form 8886 to the appropriate original or amended return, (b) fails to file the form with OTSA if required, or (c) files a form that fails to include all the information required (or includes incorrect information). Under the prior version this section read: A penalty is assessed for each failure by any person required to file a Form 8886, if the person (a) fails to file the form by the due date including extensions, or (b) files a form that fails to include all the information required (or includes incorrect information).
- Also in the third paragraph added the reference to tentative application for refund in the first sentence per CC: PA.

## 9. Specific Instructions.

### a. How to Complete

- Added language detailing information that must be included on Form 8886 for it to be considered complete as required by updated Regulations section 1.6011-4(d).

### b. Item A

- Added instructions for this addition to the Form.

### c. Item C

- Added additional information about protective disclosures.

### d. Line 1a

- Added second paragraph to provide instruction for book-tax difference filings (relating to pre-January 6, 2006).

### e. Line 1c

- Deleted discussion of tax shelter registration numbers.

### f. Line 2

- Added note regarding the elimination of the brief-asset holding period category.
- Added reference to transaction of interest in the caution note.

### g. Line 3

- Deleted reference to Notice 2002-70 and added references to Notice 2003-81 and Notice 2007-7.
  - Moved example to the end of the first sentence per CC: PA.
- h. Lines 7a, 7b, and 8
- Added instructions for lines 7a, 7b, and 8. Consistent with Regulations section 1.6011-4(d), there are no references to “if known” where such references relate to the identity of parties involved in the transaction. Thus taxpayers are instructed to identify all parties to the transaction.
  - In the penultimate sentence of the instructions for line 7a, added the parenthetical to the following sentence per CC: PA request. “Check the “Other” box for tax benefits not specifically identified by a box (e.g., status as an entity exempt from federal income taxation), and identify the tax benefits in the space provided.
10. Preparing, copying, assembling and sending the form to the IRS
- Changed room reference from 6422 to 6526
11. Form 8271, Investor Reporting of a Tax Shelter Registration Number
- Added What’s New item noting that Form 8271 has been eliminated for filings otherwise required after August 2, 2007 and those taxpayers required to file both Form 8886 and 8271 need only report the registration number on Form 8886.