

Corporate Tax - USA

IRS issues final regulations on material adviser penalties

Contributed by **Caplin & Drysdale, Chartered**

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On July 30 2014 the Internal Revenue Service (IRS) issued final regulations regarding the imposition of penalties under Section 6707 of the Internal Revenue Code against material advisers who fail to file true, complete or timely disclosure returns with respect to reportable or listed transactions. The effective date of the final regulations is July 31 2014.

Material advisers generally include any advisers who make or provide a tax statement with respect to any reportable or listed transaction, and directly or indirectly receive certain threshold levels of gross income in connection with such advice. Reportable transactions include listed transactions, transactions of interest, Section 165 loss transactions, confidential transactions and contractual protection transactions.

The final regulations make several changes to the proposed regulations that were published in 2008.

(1) These include the following:

- The applicable penalty under Section 6707 for a transaction qualifying as both reportable and listed is limited to a single penalty, which is the greater of \$200,000 or 50% of the gross income derived by the material adviser (75% if the failure is intentional).
- In cases where there is a failure to disclose more than one reportable or listed transaction, a separate Section 6707 penalty will be imposed for each transaction.
- For the purposes of computing the penalty in the case of a listed transaction, the gross income derived from the listed transaction includes only fees earned in connection with the listed transaction for which the adviser was a material adviser.

The final regulations also modify the factors considered by the IRS for rescission of a material adviser penalty. The final regulations now allow consideration of facts and circumstances relating to whether a material adviser's failure to timely file Form 8918, Material Adviser Disclosure Statement, was unintentional. However, if an unintentionally delinquent Form 8918 was filed either after the IRS had taken steps to identify the person as a material adviser or after the taxpayer disclosed a reportable transaction on Form 8886, Reportable Transaction Disclosure Statement, such a filing will not weigh in favour of rescission.

Lastly, the final regulations include additional examples to help clarify the application of the material adviser penalties.

Attorneys, accountants, financial and investment consultants and others advising on reportable or listed transactions should remain conscious of the applicable gross income thresholds for each type of transaction, as well as the timing of reporting obligations. The severe penalties and narrow provisions for rescission of such penalties require careful planning and awareness of compliance obligations.

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Endnotes

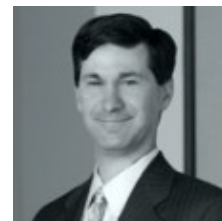
(1) The text of TD 9686 is available at www.federalregister.gov/articles/2014/07/31/2014-17932/material-advisor-penalty-for-failure-to-furnish-information-regarding-reportable-transac

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