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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-103033-11]

RIN 1545-BK62

Reportable Transactions Penalties under Section 6707A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance regarding the amount of the penalty under section 6707A of the Internal Revenue Code (Code) for failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. The proposed regulations are necessary to clarify the amount of the penalty under section 6707A, as amended by the Small Business Jobs Act of 2010. The proposed regulations would affect any taxpayer who fails to properly disclose participation in a reportable transaction.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-103033-11), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station,

Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-103033-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (indicate IRS and REG-103033-11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Melissa Henkel, (202) 317-6844; concerning submissions of comments or requests for a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 301 under section 6707A of the Internal Revenue Code. Section 6707A was added to the Code by section 811(a) of the American Jobs Creation Act of 2004 (Pub. L. No. 108-357, 118 Stat. 1418) and was amended by section 11(a)(41) of the Tax Technical Corrections Act of 2007 (Pub. L. No. 110-172, 121 Stat. 2473). Section 6707A imposes a penalty on a taxpayer who has a duty to disclose a reportable transaction and fails to do so. It also imposes a requirement that certain taxpayers must disclose in filings with the Securities and Exchange Commission (SEC) any requirement to pay a penalty under (1) section 6707A with respect to a listed transaction, (2) section 6662A with respect to an undisclosed reportable transaction, or (3) section 6662(h) with respect to an undisclosed reportable transaction. Failure to make that required disclosure to

the SEC subjects a taxpayer to another penalty under section 6707A. On September 11, 2008, temporary regulations (TD 9425) relating to the penalty under section 6707A were published in the **Federal Register** (73 FR 52784). A notice of proposed rulemaking (REG-160868-04) cross-referencing the temporary regulations was published in the **Federal Register** on the same day (73 FR 52805). Section 6707A was amended again in 2010 by section 2041(a) of the Small Business Jobs Act of 2010 (Public Law No. 111-240, 124 Stat. 2504) (the Jobs Act), which changed the amount of the penalty from a stated dollar amount to a percentage (with maximum and minimum dollar amounts). Before the Jobs Act was enacted, the penalty was \$10,000 in the case of a natural person (\$50,000 in any other case) and, in the case of a listed transaction, \$100,000 in the case of a natural person (\$200,000 in any other case). In some cases, this structure resulted in penalties that were potentially disproportionate to the tax benefit derived from the transaction. See “Legislative Recommendations with Legislative Action: Modify Internal Revenue Code Section 6707A to Ameliorate Unconscionable Impact,” National Taxpayer Advocate 2008 Annual Report to Congress vol. 1, at 419. In response, Congress amended section 6707A(b) through the Jobs Act. See Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress (JCS-2-11), March 2011 (explaining the reasons for the change to section 6707A). The Jobs Act amended section 6707A(b) to make the penalty 75 percent of the decrease in tax shown on the return as a result of a reportable transaction, with a minimum penalty amount of \$10,000 (\$5,000 in the case of a natural person). The

maximum penalty amount is \$200,000 (\$100,000 in the case of a natural person) for failure to disclose a listed transaction, or \$50,000 (\$10,000 in the case of a natural person) for failure to disclose any other reportable transaction. The 2010 amendment specifying the amount of the penalty applies to penalties assessed after December 31, 2006. See Jobs Act § 2041(b), 124 Stat. at 2560. On September 7, 2011, final regulations (TD 9550) were published in the **Federal Register** (76 FR 55256). The final regulations in TD 9550 did not provide guidance on the amount of the penalty as amended by the Jobs Act beyond reciting the language of section 6707A because the notice of proposed rulemaking on which those final regulations were based predated the Jobs Act. The proposed regulations in this document provide guidance on the amount of the penalty under section 6707A, as amended by the Jobs Act.

Explanation of Provisions

The following is a summary of the proposed changes to the existing regulations relating to the penalties under section 6707A.

1. Definition of Return

Treas. Reg. §1.6011-4 establishes that a taxpayer whose amended return or application for tentative refund reflects participation in a reportable transaction has the same disclosure obligation as a taxpayer whose original return reflects participation in a reportable transaction. Treas. Reg. §301.6707A-1, published on September 11, 2011, clarifies that a taxpayer's failure to disclose participation in a reportable transaction will trigger a penalty under section 6707A regardless of whether the participation is reflected on an original return, an amended return,

or an application for tentative refund. In its current state, the regulation generally refers to original returns, amended returns, and applications for tentative refund in every case where all three terms are relevant. The proposed regulations streamline these references by defining the term “return” to include all three. This change simplifies sentences throughout the regulation without changing their meaning.

2. Amount of the Penalty

A. Decrease in tax

Subject to certain minimum and maximum amounts, “the amount of the penalty under subsection (a) with respect to any reportable transaction shall be 75 percent of the decrease in tax shown on the return as a result of such transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes).” Section 6707A(b)(1).

The proposed regulations define this decrease in tax generally as the difference between the amount of tax reported on the return as filed and the amount of tax that would be reported on a hypothetical return where the taxpayer did not participate in the reportable transaction. The amount of tax shown on the hypothetical return will reflect adjustments that result mechanically from backing out the reportable transaction, such as tax items affected by an increase in adjusted gross income resulting from non-participation in the reportable transaction.

In some situations, a taxpayer’s participation in a listed transaction creates a liability for a tax that would not exist absent participation in the transaction. For

example, a taxpayer engaging in a listed abusive Roth IRA transaction may be subject to an excise tax on excess IRA contributions. If the taxpayer fails to report the excise tax on his excess IRA contributions, this amount of tax would not appear on the return filed by the taxpayer that reflected his participation in the reportable transaction. The excise tax would also not appear on a return filed by the taxpayer if he had not engaged in the transaction, because there would be no excess contribution on which excise tax would be imposed. Therefore, the difference between these two returns would result in no decrease in tax attributable to the unreported tax. To capture this tax, the proposed regulations include in the definition of the decrease in tax “any other tax that results from participation in the reportable transaction but was not reported on the taxpayer’s return.” Example 1 in §301.6707A-1(d)(2) illustrates this rule.

B. Subsequently identified transactions

Listed transactions and transactions of interest are identified in published guidance. See §1.6011-4(b)(2), (6). Once a listed transaction or a transaction of interest is identified by published guidance, a taxpayer has a reporting obligation if the taxpayer participated in the transaction prior to the issuance of the guidance and the statute of limitations for the year of the taxpayer’s participation remains open. See §1.6011-4(e)(2). Under §1.6011-4, the taxpayer may use a single disclosure statement to disclose multiple years of participation in a reportable transaction. Because the taxpayer in these cases is permitted to disclose multiple years of participation on a single statement, the taxpayer’s failure to complete and submit the disclosure statement properly will result in no

more than one penalty under section 6707A. The proposed regulations provide, however, that the amount of that penalty will be determined by taking into account the aggregate decrease in tax shown on all of the returns for which disclosure was not provided. Accordingly, under the proposed regulations, the decrease in tax will be determined separately for each year of participation for which only a single disclosure statement was required and the amount of the penalty will be 75 percent of the aggregate decrease in tax in all years for which disclosure was required, subject to the minimum and maximum penalty amount limitations.

C. Penalty under section 6707A(e) for failure to report to the Securities and Exchange Commission

Section 6707A(e) generally requires certain taxpayers who must pay penalties under sections 6707A, 6662A (accuracy-related penalty on understatements with respect to reportable transactions), or 6662(h) (accuracy-related penalty on underpayments attributable to gross valuation misstatements) to disclose their liability for these penalties in filings with the SEC. The flush language of section 6707A(e) provides that “[f]ailure to make a disclosure in accordance with the preceding sentence shall be treated as a failure to which the penalty under subsection (b)(2) applies.” However, as discussed in the Background section of this preamble, subsection (b)(2) was amended in 2010. Prior to enactment of the Jobs Act, section 6707A(b)(2) provided that the amount of the penalty for failure to disclose participation in a listed transaction was \$100,000 for natural persons and \$200,000 in any other case. After the 2010 amendments, section 6707A(b)(2) now provides that “[t]he amount of the penalty

under subsection (a) with respect to any reportable transaction shall not exceed-- (A) in the case of a listed transaction, \$200,000 (\$100,000 in the case of a natural person), or (B) in the case of any other reportable transaction, \$50,000 (\$10,000 in the case of a natural person).”

Treasury and the Service do not believe that Congress intended its reference to subsection (b)(2) to impose the maximum penalty on violations of section 6707A(e). This would be contrary to the purpose of the 2010 amendments to section 6707A, which sought to make the penalty proportionate to the tax benefit derived by the transaction. A reference solely to subsection (b)(2) does not make sense in terms of describing the amount of the penalty, as subsection (b)(2) merely caps the amount of the penalty that can be imposed on a failure to disclose and does not provide a particular amount for the penalty. It seems likely that the intent was to reference the amount of the penalty generally under subsection (b). The proposed regulations clarify this point.

In each case giving rise to an obligation to disclose liability in filings with the SEC, there must be a reportable transaction for the relevant penalty to arise. The amount of the penalty for a violation of section 6707A(e), therefore, will be 75 percent of the decrease in tax, as provided in section 6707A(b). In addition to being consistent with the language of section 6707A(e), the proposed regulations are also consistent with the Congressional intent of the 2010 amendments to section 6707A to render proportionality between the amount of the penalty and the tax benefit derived from the reportable transaction. See JCS-2-11.

D. Minimum and maximum amount of the penalty

Pursuant to section 6707A(b)(2), “[t]he amount of the penalty under subsection (a) with respect to any reportable transaction shall not exceed” certain specified dollar values. Likewise, under section 6707A(b)(3), “[t]he amount of the penalty under subsection (a) with respect to any transaction shall not be less than” certain specified dollar values. Under the proposed regulations, these minimum and maximum limits on the amount of the penalty would be applied separately to each individual penalty under section 6707A(a). The limitations in sections 6707A(b)(2) and (3) apply expressly to “[t]he amount of the penalty under subsection (a).” Because, as provided in §301.6707A-1(c), each separate failure to disclose a reportable transaction gives rise to a new penalty under section 6707A(a), the minimum and maximum limits on the amount of the penalty apply separately to each failure to disclose.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866 of, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the proposed regulations. Because the proposed regulations would not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of

the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available for public inspection and copying at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the Federal Register.

Drafting Information

The principal authors of the proposed regulations are Melissa Henkel of the Office of the Associate Chief Counsel (Procedure and Administration) and Spence Hanemann, formerly of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:
PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.6707A-1 is amended by:

1. Adding paragraph (b)(3).
2. In paragraph (c)(1), removing the language “(including an amended return or application for tentative refund)” in the fifth sentence.
3. Redesignating paragraphs (d), (e) and (f) as paragraphs (e), (f), and (g)..
4. Adding new paragraph (d).
5. In newly designated paragraph (e), removing the language “(d)” wherever it appears and adding “(e)” in its place
6. In newly designated paragraph (e)(3)(i), removing the language “(including an amended return or application for tentative refund)” wherever it appears.
7. In newly designated paragraph (f), removing the language “(e)” wherever it appears and adding “(f)” in its place.
8. Revising newly designated paragraphs (g)(1) and (g)(2).

The revisions and additions read as follows:

§ 301.6707A-1. Failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.--

* * * * *

(b) * * *

(3) Return. For purposes of this section, the term “return” means an original return, amended return, or application for tentative refund, except where otherwise indicated. As used in examples, the term “return” means an original return, except where otherwise indicated.

* * * * *

(d) Calculation of the penalty. (1) Decrease in tax--(i) In general. As used in this section, the phrase “decrease in tax shown on the return as a result of the transaction or the decrease that would have resulted from the transaction if it were respected for Federal tax purposes” means the sum of (A) the excess of the amount of the tax that would be shown on the return if the return did not reflect the taxpayer’s participation in the reportable transaction over the tax actually reported on the return reflecting participation in the reportable transaction and (B) any other tax that results from participation in the reportable transaction but was not reported on the taxpayer’s return. The amount of tax that would be shown on the return if it did not reflect the taxpayer’s participation in the reportable transaction includes adjustments that result mechanically from backing out the reportable transaction, such as tax items affected by an increase in adjusted gross income resulting from not participating in the transaction. Under this rule, it makes no difference whether a taxpayer’s tax liability is ultimately settled with the IRS for a different amount or whether the taxpayer subsequently reports a different amount of tax on an amended return, because these amounts do not enter into the calculation of the decrease in tax shown on the return (or returns) to which the penalty relates.

(ii) Subsequently identified transactions. If the taxpayer fails to file a complete and proper disclosure statement required by §1.6011-4(e)(2)(i) disclosing participation in a listed transaction or transaction of interest with respect to more than one return, the amount of the penalty will be computed by aggregating the decrease in tax shown on each return for which the required disclosure was not provided.

(iii) Penalty for failure to report to the SEC. In the case of a penalty imposed under section 6707A(e) for failure to disclose liability for certain penalties in reports to the Securities and Exchange Commission, the amount of the penalty will be determined under section 6707A(b) and this paragraph (d), regardless of whether the penalty that the taxpayer failed to disclose is imposed under section 6707A, 6662A, or 6662(h).

(iv) Minimum and maximum amount of the penalty. The limitations on the minimum and maximum penalty amounts described in paragraph (a) of this section apply separately to each failure to disclose that is subject to a penalty.

(2) No tax required to be shown on return. For returns with respect to which disclosure is required but on which no tax is required to be shown (for example, returns of passthrough entities), the minimum penalty amount will be imposed for failures to disclose.

(3) Examples. The rules in paragraphs (d)(1) and (2) of this section are illustrated by the following examples:

Example 1. Taxpayer X, a natural person, filed a return reflecting participation in an abusive Roth IRA transaction listed in Notice 2004-8, 2004-1 I.R.B. 333 (Jan. 26, 2004). As described in the notice, X's Roth IRA acquired shares of a wholly owned corporation and then X sold assets to the corporation

at less than fair market value, effectively transferring value to the corporation comparable to a contribution to the Roth IRA. X failed to disclose his participation in the listed transaction as required by the regulations under section 6011. As a result of the transaction, X was liable under section 4973 for a \$10,000 excise tax for excess contributions to his Roth IRA. On his return, X correctly reported \$25,000 of income tax, none of which was attributable to the listed transaction, but failed to report the excise tax. If X had not participated in the listed transaction, the excise tax under section 4973 would not have applied and his income tax would have remained \$25,000. There would, therefore, be no difference between the tax on his return as filed and the tax on his return if it did not reflect participation in the transaction. The excise tax, however, is another tax that resulted from participation in the transaction but was not reported on X's return, as described in paragraph (d)(1)(i)(B) of this section. Therefore, the decrease in tax resulting from the listed transaction is \$10,000, which amount is the sum of zero (the excess of the amount of tax that would be shown on X's return if the return did not reflect X's participation in the transaction over the tax X actually reported on the return reflecting X's participation in the transaction) and \$10,000 (the amount of excise tax that resulted from participation in the transaction but was not reported on the return). The amount of the penalty will be \$7,500, which amount is 75 percent of the \$10,000 decrease in tax.

Example 2. Taxpayer X participated in a listed transaction that resulted in a \$40,000 decrease in the tax shown on its return. X failed to disclose its participation and is, therefore, subject to a penalty under section 6707A. After weighing litigating hazards and other costs of litigation, the IRS Office of Appeals agreed to settle X's deficiency for \$20,000. For purposes of calculating the amount of the penalty, the settlement does not affect the decrease in tax shown on X's return as a result of the listed transaction, which remains \$40,000. The amount of X's penalty will be \$30,000, which amount is 75 percent of the \$40,000 decrease in tax.

Example 3. Taxpayer X, a natural person, participated in a nonlisted reportable transaction and, because he failed to disclose his participation, is subject to a penalty under section 6707A. After offsetting gross income with the losses generated in the reportable transaction, X's return reported adjusted gross income of \$100,000. The return also reported \$12,000 of medical expenses, \$2,000 of which were deductible after applying the 10 percent floor in section 213(a). If X's return had not reflected participation in the reportable transaction, his adjusted gross income would have been \$140,000. The decrease in tax shown on X's return as a result of the transaction would take into account both the tax on the \$40,000 difference in adjusted gross income and the tax on the \$2,000 adjustment to X's deductible medical expenses under section 213(a) caused by the increase in adjusted gross income.

Example 4. Taxpayer X, a natural person, timely filed his 2014 return and reported income tax of \$40,000. X did not participate in a reportable transaction in 2014. X participated in a listed transaction in 2015, but failed to file a complete

and proper disclosure statement with his 2015 return as required by the regulations under section 6011. As filed, the 2015 return reports that X owes no tax and has a loss of \$10,000. If the tax consequences of the listed transaction were not reflected on the 2015 return, the return would show income tax of \$15,000 and no loss. X files an amended return for his 2014 tax year on which its only amendment is to carry back the \$10,000 loss reported on its 2015 tax return to the 2014 tax year, which decreases X's tax liability for 2014 by \$3,000. X fails to file a complete and proper disclosure statement with the 2014 amended return as required by the regulations under section 6011. X will be assessed two penalties under section 6707A: one for his failure to disclose participation in a listed transaction reflected on his 2015 tax return and another for his failure to disclose participation in the same listed transaction reflected on his 2014 amended return. The decrease in tax on the 2015 tax return resulting from the listed transaction is \$15,000, which amount is the excess of the amount of tax that would be shown on X's return if the return did not reflect X's participation in the transaction over the tax X actually reported on the return reflecting X's participation in the transaction. The amount of the penalty with respect to the 2015 tax return is \$11,250, which amount is 75 percent of the decrease in tax. The decrease in tax on the 2014 amended return that results from the listed transaction is \$3,000, which is the excess of the amount of tax that would be shown on X's return if the return did not reflect X's participation in the transaction over the tax X actually reported on the return reflecting X's participation in the transaction. See §301.6707A-1(c). Because X is a natural person, the amount of the penalty with respect to the 2014 amended return is \$5,000, which is the minimum penalty under §301.6707A-1(a) and section 6707A(b)(3).

Example 5. Taxpayer X, a corporation, timely files its 2012 and 2013 tax returns, each of which reflects participation in the same transaction. In 2015, the transaction becomes a listed transaction and X fails to file a complete and proper disclosure statement as required by the regulations under section 6011. X was required to file a single disclosure statement reflecting its participation in the listed transaction for all years which had open periods of limitation on assessment at the time the transaction became listed. When the transaction at issue became listed, the periods of assessment on X's 2012 and 2013 tax years were open. Pursuant to paragraph (d)(1)(ii) of this section, the amount of the penalty for X's single failure to disclose its participation in the transaction in 2012 and 2013 is computed by aggregating the decrease in tax shown on the 2012 return and the decrease in tax shown on the 2013 return. The decreases in tax shown on the returns as a result of X's participation in the transaction are \$265,000 in tax year 2012 and \$7,000 in tax year 2013. The total decrease in tax shown on both returns is \$272,000, and 75 percent of that amount is \$204,000. Because X is a corporation, the amount of the penalty will be limited to the maximum amount of \$200,000 under §301.6707A-1(a) and section 6707A(b)(2)(A).

Example 6. The 2014 return of Taxpayer X, a natural person, reflects participation in a nonlisted reportable transaction, but X fails to file a complete

and proper disclosure statement as required by the regulations under section 6011. The decrease in tax shown on X's 2014 return as a result of participation in the reportable transaction is \$20,000. X subsequently files an amended 2014 return to include a net operating loss carried forward from a prior year, which X inadvertently failed to include when he filed his original return. The amended return reflects participation in the same reportable transaction, but X again fails to file a complete and proper disclosure statement. The decrease in tax shown on the amended 2014 return as a result of participation in the transaction is also \$20,000. X is subject to two separate penalties: one for each failure to disclose. Seventy-five percent of the \$20,000 decrease in tax shown on each of the original 2014 return and the amended 2014 return is \$15,000 for each return. Because X is a natural person, the amount of the penalty for failure to disclose with respect to the original return will be limited to the maximum amount of \$10,000 under §301.6707A-1(a) and section 6707A(b)(2)(B). The amount of the penalty for failure to disclose with respect to the amended return will also be limited to the maximum amount of \$10,000.

Example 7. Partnership M is required to attach Form 8886, Reportable Transaction Disclosure Statement, to its Form 1065, U.S. Return of Partnership Income, for the 2014 taxable year. It fails to do so and is, therefore, subject to a penalty under section 6707A. The amount of the penalty will be the minimum penalty of \$10,000 under §301.6707A-1(a) and section 6707A(b)(3) because Form 1065 is a return that does not show an amount of tax that would be decreased as a result of participation in the reportable transaction. The partners of Partnership M may have separate disclosure obligations as required by the regulations under section 6011 and would be subject to separate section 6707A penalties if they fail to comply with the disclosure requirements.

Example 8. In tax year 2014, Taxpayer X participated in a listed transaction that resulted in a \$150,000 deduction. X's gross income for 2014 before the listed transaction deduction is \$100,000. X uses \$100,000 of the deduction to offset \$100,000 of gross income and reports tax of zero for 2014. X also has a \$50,000 net operating loss for 2014. X timely elects to waive the carryback period and carry over the 2014 net operating loss to tax year 2015. X's gross income for tax year 2015 is \$200,000 but as a result of the \$50,000 net operating loss carryover, X reports \$150,000 adjusted gross income. Pursuant to §1.6011-4, X is required to disclose participation in the listed transaction for both 2014 and 2015, but X fails to make the required disclosures and is therefore subject to the section 6707A penalty for each failure. The decrease in tax on the 2014 return is the amount of tax on \$100,000 because that is the difference between the amount of tax that would have been shown on the return if it did not reflect participation in the reportable transaction and the tax actually reported. No other tax resulted from X's participation in the listed transaction. The amount of the penalty with respect to X's failure to disclose with respect to 2014 will be 75 percent of the decrease in tax. The decrease in tax on the 2015 return is the difference between the tax shown on the return as filed and the tax that would be shown if the \$50,000 net operating loss was not used, including any changes to

the amount of tax that are only indirectly connected with the listed transaction. The amount of the penalty with respect to X's failure to disclose with respect to 2015 will be 75 percent of the decrease in tax.

Example 9. In tax year 2014, Taxpayer X, a natural person, participated in a listed transaction that resulted in a \$50,000 deduction. X's gross income for 2014 before the listed transaction deduction is \$100,000. X also has a net operating loss carryover of \$150,000 from 2013. X uses the deduction of \$50,000 and a portion of the net operating loss carryover to offset \$100,000 of gross income and reports adjusted gross income of zero for 2014. X carries over the remaining net operating loss to tax year 2015. X's gross income for 2015 is \$250,000, but as a result of the net operating loss carryover, X reports reduced adjusted gross income of \$150,000. Pursuant to §1.6011-4, X is required to disclose participation in the listed transaction for both 2014 and 2015, but X fails to make the required disclosures and is subject to the section 6707A penalty for each failure. The decrease in tax on the 2014 return that results from the reportable transaction is zero. Because X has \$150,000 of a net operating loss carryover not attributable to the reportable transaction, X's tax without the benefits of the reportable transaction is the same as the tax shown on the 2014 return as filed. Because X is a natural person, the minimum penalty of \$5,000 under §301.6707A-1(a) and section 6707A(b)(3) will apply for the failure to disclose the listed transaction with the 2014 return. The decrease in tax on the 2015 return is the difference between the tax shown on the return as filed and the tax that would be shown if X had only \$50,000 of net operating loss to carry over to 2015 (i.e., if X had not offset \$50,000 of its 2014 gross income with the deduction resulting from the reportable transaction and thus had used \$100,000 of its net operating loss carryover in 2014), including any changes to the amount of tax that are only indirectly connected with the listed transaction. The amount of the penalty with respect to the disclosure relating to 2015 will be 75 percent of this decrease in tax.

Example 10. In tax year 2014, Taxpayer X, a corporation, engaged in a nonlisted reportable transaction and is subject to a penalty under section 6662A because its 2014 return resulted in a reportable transaction understatement. As a result of X's involvement in the transaction, it reported tax of \$10,000 for 2014; if X had not engaged in the transaction, it would have reported tax of \$200,000. X disclosed its involvement in the transaction as required by the regulations under section 6011, and thus was not subject to a penalty under section 6707A(a). As a person who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934, however, X was also required, pursuant to section 6707A(e), to disclose the penalty imposed under section 6662A to the Securities and Exchange Commission, which X failed to do. X's failure to disclose the section 6662A penalty is treated as a failure to disclose to which section 6707A(b) applies. Thus, X will be subject to a penalty under section 6707A(e), which will equal 75 percent of the decrease in tax resulting from the transaction. The decrease in tax resulting from the nonlisted reportable transaction was \$190,000, 75 percent of which is \$142,500. Because X is a

corporation, the amount of the penalty will be limited to \$50,000 under §301.6707A-1(a) and section 6707A(b)(2)(B).

* * * * *

(g) * * *

(1) This section applies to penalties assessed after the date that these regulations are published as final regulations in the **Federal Register**.

(2) For penalties assessed before the date that these regulations are published as final regulations in the **Federal Register**, §301.6707A-1 (as contained in 26 CFR part 1, revised April 2013) shall apply.

John M. Dalrymple

Deputy Commissioner for Services and Enforcement.

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