



TaxNewsFlash

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Final regulations: Reportable transactions penalties

The U.S. Treasury Department and IRS released for publication in the Federal Register final regulations (T.D. 9853) as guidance on the amount of the penalty under section 6707A for a failure to include on any return or statement information required to be disclosed under section 6011 with respect to a reportable transaction. Section 6707A also imposes a penalty on certain taxpayers for failure to 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.

The [final regulations](#) [PDF 260 KB] are necessary to clarify the amount of the penalty under section 6707A, as amended by the Small Business Jobs Act of 2010 (“Jobs Act”). Clarification was necessary as the prior final regulations published on September 7, 2011, (T.D. 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.

Among other things, the final regulations revise Reg. section 301.6707A-1(d)(1)(ii) primarily to clarify how the penalty is calculated in situations when a transaction becomes reportable after the filing of the return or returns reflecting participation in the transaction. The new approach to calculating the penalty is more administrable, “providing uniformity and repose to both taxpayers and the IRS.”

One area receiving considerable attention in the final regulations involves situations where taxpayers that first participated in a listed transaction or transaction of interest during a year for which the period of limitations on assessment is closed at the time the transaction becomes reportable, but that also filed returns reflecting the same reportable transaction during a year for which the period of limitations on assessment remains open at the time the transaction becomes reportable. Generally, when a taxpayer whose participation in a subsequently identified listed transaction or transaction of interest is reflected on more than one return and when that taxpayer fails to timely file a complete and proper disclosure statement, the amount of the penalty is calculated by aggregating the decrease in tax shown on each return for which the period of limitations on assessment remains open at the time the transaction becomes reportable, subject to the statutory minimum and maximum penalty amounts. However, the final regulations clarify that the decreases in tax shown on returns for years for which the period of limitations is not open at the time the transaction becomes reportable will not be taken

into account in calculating the amount of the penalty. A new example was added to illustrate this situation.

The final regulations also added a new example to illustrate application of the penalty when a taxpayer that fails to disclose a subsequently listed transaction with respect to its originally filed return files an amended return again reporting the tax benefits associated with that transaction but does not disclose participation in the transaction on the amended return.

According to the preamble, all the other examples were updated and revised with “non-substantive changes.”

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