



MULTISTATE TAX COMMISSION

**Preliminary Report of the Hearing Officer
Regarding Proposed Model Statutes for
Reportable Transactions & Inconsistent Filing Positions
And a Related
Voluntary Compliance Program
November 3, 2005**

I. Introduction

On June 16, 2005, the Multistate Tax Commission (MTC) Executive Committee approved for public hearing an MTC proposed model statute on Reportable Transactions & Inconsistent Filing Positions and a related Voluntary Compliance Program statute. The appointed hearing officer has held the public hearing and received six sets of written comments. This Preliminary Report provides a summary of procedure, an explanation of the proposals' key substantive features, a status report of testimony received and the hearing officer's recommendations for proceeding with the development of this proposal.

II. Summary of Procedure

A. Development of the Proposal

In June of 2003, the MTC full Commission approved its Report entitled *Federalism at Risk*. In that Report, the Commission made several recommendations to "help restore the equity and effectiveness of state income tax systems."¹ One of those recommendations was that the states should "[s]trengthen and expand cooperative administration and enforcement among the states through early review of tax shelters considered questionable by several states..."²

In July of 2004, the MTC State Tax Compliance Initiative Steering Committee proposed to the MTC Executive Committee that an MTC model statute on Reportable Transactions & Inconsistent Filing Positions be developed. This recommendation was

¹ *Federalism at Risk, A Report by the Multistate Tax Commission*; p. 25 (June, 2003)

² *Federalism at Risk, A Report by the Multistate Tax Commission*; p. 26 (June, 2003)

based on an extensive study by the MTC Corporate Income Tax Sheltering Work Group of business income tax sheltering. The work group was comprised of 23 state tax agency representatives representing 13 different states.³ In its report, the Work Group noted:

The marketing and employment of tax sheltering devices and strategies has increased dramatically over the last several years. Many of these devices are of questionable validity. The tax revenues involved are so significant that the Internal Revenue Service has established a list of questionable transactions and has received enforcement tools aimed at the promoters of these devices and strategies. For virtually every state, devices and strategies that impact federal tax collections also have an impact on state collections.⁴

To address this problem, the Work Group recommended:

The states, through a multistate process, could define "multistate listed transactions" that are subject to reporting and disclosure under state law. Transactions could be reportable either to individual states or to a multistate clearinghouse. Reportable "transaction" could include federal listed transactions or transactions or reporting defined by the states, that have a potential for tax avoidance. Reporting could also be required from taxpayers on income reporting characteristics, such as income tax nexus, definition of business and non-business income, and apportionment factors by state. In order to participate in this process, states would need to enact legislation that allows for the designation of listed transactions. To ensure that transactions are reported, states would need to include penalties on promoters or taxpayers for not reporting listed transactions.⁵

And in addition, the Work Group addressed inconsistent filing positions:

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Joe Garrett, *Alabama*
Michael Mason, *Alabama*
Tamara Harris, *Arizona*
Walter Anger, *Arkansas*
Danny Walker, *Arkansas*
Michael Brownell, *California*
Caglar Caglayan, *California*
Ben Miller, *California*
Ben Jablow, *Florida*
Lynn Chenoweth, *Idaho*
Gary Gear, *Idaho*
Dick McFarland, *Idaho*
Ted Spangler, *Idaho*

Jennifer Hays, *Kentucky*
Michael Fatale, *Massachusetts*
Alan LeBovidge, *Massachusetts*
Shona McHugh, *Montana*
Brian Staley, *Montana*
Lennie Collins, *North Carolina*
Mary Loftsgard, *North Dakota*
Janielle Lipscomb, *Oregon*
Eric Smith, *Oregon*
John Mintken, *New Hampshire*
Chuck Redfern, *New Hampshire*

⁴ *Corporate Income Tax Sheltering Work Group Report*; Prepared for the State Tax Compliance Initiative Steering Committee; p. 13 (June 17, 2004).

⁵ *Corporate Income Tax Sheltering Work Group Report*; Prepared for the State Tax Compliance Initiative Steering Committee; p. 22 (June 17, 2004).

State statutes or regulations could contain a requirement that a taxpayer disclose when it files its returns that it has taken an inconsistent position with respect to the treatment of an item on a return filed with another State that has similar laws...

State tax statutes could contain a requirement that corporate taxpayers account for their reporting of income to all States in conjunction with the filing of their tax return. The spreadsheet would allow a state to compare a taxpayer's filing position in their state with the filing position taking in a sister state with comparable laws. It could be shared amongst the states to ensure that taxpayers have correctly disclosed their filing positions. A proposal for a federal requirement for a 51-jurisdiction spreadsheet was made by the Worldwide Unitary Taxation Working Group in 1984...

Without penalties or presumptions as a consequence of a failure to provide required information the requirement is more likely to be ignored. For example, if a state determined that inconsistent filing positions had been taken in filing returns with itself and a sister state it would be able to assert a presumption that the filing position in the other state would be correct in the circumstances where it would result in a greater tax for itself. The ability to assert penalties or apply presumptions would establish consequences to this requirement and would achieve greater compliance with it.⁶

The Work Group also noted the efficacy of an amnesty period associated with new provisions addressing inconsistent filing positions and reportable tax avoidance transactions:

This [Amnesty] strategy provides taxpayers with the opportunity to correct prior inconsistent filing positions whether inadvertent or purposeful. It would need to be coupled with the imposition of penalties for failure to report inconsistent filing positions in order to provide for an incentive for taxpayers to take advantage of amnesty. The current California Voluntary Compliance Initiative (See under IV.R.1) is a successful example of a state income tax amnesty. This initiative provides investors an opportunity to come forward and amend their returns, backing out any tax avoidance transactions to avoid new and enhanced penalties.⁷

In July of 2004, the MTC Executive Committee adopted these recommendations of the MTC State Tax Compliance Initiative Steering Committee and directed that a model Reportable Transaction and Inconsistent Filing Position Statute be developed. A group of knowledgeable state tax agency representatives from states with experience in

⁶ *Corporate Income Tax Sheltering Work Group Report*; Prepared for the State Tax Compliance Initiative Steering Committee; p. 20 (June 17, 2004).

⁷ *Corporate Income Tax Sheltering Work Group Report*; Prepared for the State Tax Compliance Initiative Steering Committee; p. 20 (June 17, 2004).

this area was formed to create an initial draft statute for Uniformity Committee review.⁸ The drafting group determined two statutes should be developed – one to impose disclosure requirements for reportable transactions and state filing positions, and the other to authorize a companion voluntary compliance program. The drafting group submitted a draft voluntary compliance program statute and two alternative draft reportable transaction and state filing positions statutes for Income and Franchise Tax Uniformity Subcommittee review at its March, 2005 meeting in Tampa, Florida. The difference between the two alternative reportable transaction and state filing position statutes was that one would require reporting of inconsistent filing positions, and the other would require reporting of certain state filing positions, regardless of inconsistency, in the manner of a “51 state spreadsheet.”

On June 2, 2005, after review of the proposed statutes at its in-person meetings and via teleconference, the Income & Franchise Tax Uniformity Subcommittee discussed the draft statutes and voted to recommend the reportable transaction and inconsistent filing position statute and the companion voluntary compliance program statute favorably to the Uniformity Committee. On June 14, 2005, the Uniformity Committee considered the recommendation of the Subcommittee and voted to recommend the proposals favorably to the Executive Committee. On June 16, 2005, the Executive Committee approved the proposals for public hearings. Also on June 16, 2005, the Executive Committee considered a proposal from Montana to amend the proposed statute by including a nexus disclosure requirement. The Committee determined it would not amend the proposed statute at that time, but would treat the Montana proposal as an early filed public comment, for consideration at Public Hearing.

B. Public Hearings

After more than 30 days notice, a Public Hearing was held September 27, 2005 in Washington, D.C. Oral public comments were received. In addition, six sets of written comments were received prior to the closure of the public comment period in October, 2005. The written comments are attached as Exhibits:

Exhibit A	Montana Department of Revenue - Proposal for Nexus Disclosure
Exhibit B	McDermott, Will & Emery (MW&E) – Kimberley Reeder and Margaret Wilson
Exhibit C	Southerland, Asbill & Brennan (SAB) – Kendall L. Houghton, Jeffrey A. Friedman and Todd Lard
Exhibit D	Tax Executives Institute – Comments on Draft Model Uniform Statute
Exhibit E	Tax Executives Institute – Comments on Montana Proposal
Exhibit F	Uniformity Committee – Comments on Montana Proposal

⁸ Members of the drafting group included Ben Miller (CA-FTB), Caglar Caglayan (CA-FTB), Debbie Petersen (CA-FTB), Michael Brownell (CA-FTB), Deb Mayer (IL), Paul Caselton (IL), Frank Hales (UT), Lynn Solarsyk (UT) and Leonore Heavey (LA).

An extension of time has been granted for two additional pieces of written testimony, one from COST and one from the American Institute of Certified Public Accountants.

III. Summary of Substantive Provisions

A. Model Reportable Transactions & Inconsistent Filing Position Statute

This model statute has two main purposes. The first is to facilitate state efforts toward corporate income tax compliance, and the second is to do so with as much uniformity as possible. The proposal addresses the first, compliance purpose by requiring taxpayers and material advisors to disclose reportable transactions and requiring taxpayers to disclose inconsistent filing positions. The proposal also imposes penalties for failure to disclose. Seven states⁹ and the federal government¹⁰ have already instituted programs and/or requirements for the disclosure of reportable transactions. A primary goal of this proposal is to piggyback, as closely as possible, on that existing federal legislation, as extensively amended October 22, 2004. The proposal follows the new federal law very closely, largely word for word, but there are some differences. Mainly, these differences occur where necessary to reflect the fact that this is a state tax statute and not a federal tax statute.

1. Definitions – Section I

Section I of the proposal sets out definitions of key terms. One of the most important terms is “reportable transaction.” In essence, a “reportable transaction” is a transaction or arrangement which the director determines has the potential for avoidance or evasion of tax. The definition is a direct copy of the new federal definition, with five exceptions: 1) additional language to include tax issues that only occur at the state level, such as those associated with allocation and apportionment, 2) language changes to indicate that certain determinations will be made by the state revenue director, rather than by the federal treasury secretary, 3) language to narrow the application to only those transactions engaged in by entities that have nexus with the state, 4) the inclusion of “non-economic substance transactions,” and 5) the inclusion of “tax shelters.”

Another important definition is that for “listed transactions.” In essence, a listed transaction is a type of reportable transaction. It is a reportable transaction that has been specifically identified by the director in an informational bulletin as a tax avoidance transaction. It includes transactions that have been identified in federal regulations as federal listed transactions. This definition is from federal law, with the exception that a reference to the state tax director has been substituted for the reference to the federal treasury secretary.

⁹ The states include California, Connecticut, Illinois, Minnesota, New Jersey, New York and South Carolina.

¹⁰ See primarily IRC §§ 6011, 6111, 6112, 6501(c), 6662, 6662A, 6664(d), 6700, 6707, 6707A, 6708 and 7525 as extensively amended by the American Jobs Creation Act of 2004 signed into law as Public Law No: 108-357 on October 22, 2004.

2. Taxpayer Responsibilities to Disclose – Sections II and III

The next two sections, II and III, set out the taxpayer's disclosure responsibilities and taxpayer penalties for failure to disclose. Section II sets out the taxpayer's responsibility to disclose reportable transactions. There are three penalty provisions associated with a failure to disclose a reportable transaction: 1) a flat penalty for each failure to disclose a reportable transaction, 2) a penalty equal to 20% of any tax understatement resulting from one specific type of reportable transaction - a listed transaction, and 3) a penalty equal to 50% or 100% of the interest due on such listed transaction understatement, depending on whether the taxpayer had been contacted by the department or came forward voluntarily. The first two penalties, for failure to disclose and understatement, are from federal law. The third penalty, the interest penalty, is from California law. Under the proposal, the director has authority to waive each of these penalties. The waiver provisions are directly from federal law with the following exceptions. First, waivers are appealable in the federal law, but not in the state version, which follows the California law. Second, for some types of waivers, the federal version states that no penalty may be imposed if there is reasonable cause; but the state version reads that the director may waive if there is reasonable cause. In addition to penalties, if a taxpayer fails to disclose a listed transaction, the statute of limitations for assessment of tax with respect to that listed transaction is extended until one year after the information is received.

Section III sets out the taxpayer's responsibility to disclose inconsistent state filing positions. An "inconsistent filing position" essentially means the reporting of information on a return in one state in a manner that is inconsistent with how the same information is reported on a return in another state. Of course, there is no counterpart to this section in federal law. The taxpayer is also required to retain records related to the inconsistency, and to provide those records to the director within 30 days of a request. The section imposes penalties for failure to disclose, provide or retain information regarding an inconsistent filing position. As with reportable transactions, the statute of limitations is extended if there is a failure to disclose. In addition, the taxpayer's burden of proof is increased, to clear and convincing evidence, with respect to any underpayment resulting from an inconsistent filing position.

3. Material Advisor Responsibilities to Disclose – Section IV

A "material advisor" is any person who promotes a reportable transaction and who, by doing so, receives gross income in excess of a threshold amount. Under the proposal, material advisors would be required to disclose their promotion of reportable transactions and to retain an "advisee list." These provisions are entirely from federal law, with the exception of substituting "director" for the federal treasury secretary. Penalties, subject to waiver by the director, would apply for failure to disclose or to retain an advisee list.

4. Tax Shelters – Section V

Under the proposal, any person who organizes a tax shelter and knowingly furnishes a false statement of opinion as to a material tax aspect of the transaction, or who issues a “gross valuation overstatement” is subject to penalties. A “tax shelter” is defined as any entity or plan that has a significant purpose of tax evasion. Penalties resulting from a gross valuation overstatement may be waived by the director if there was a reasonable basis for the valuation and it was made in good faith. These provisions are all from federal law.

5. Other Enforcement Provisions – Section VI.

Section VI provides authority for the director to seek an injunction against any conduct that is subject to penalty under the proposed statute or associated regulations.

B. Model Voluntary Compliance Program

This proposal would establish a model uniform Voluntary Compliance Program which a state could implement as a companion statute to the implementation of the model Reportable Transactions and Inconsistent Filing Positions statute. Under the proposal, a taxpayer who has participated in a “tax avoidance transaction” (which includes but is not limited to a reportable or listed transaction) would be eligible for certain penalty waivers if it files an amended return for each tax year affected by the transaction and makes full payment of the tax due. The amended return must be specific to the tax avoidance transaction and may not include other unrelated adjustments which offset the amount of tax due. Any other adjustments could still be made by separate amended return.

The taxpayer may elect to comply with or without appeal. If the taxpayer elects to comply without appeal, all penalties applicable to the underreporting of tax due to the tax avoidance transaction are waived. If the taxpayer elects to comply with appeal, the penalties specifically imposed on reportable or listed transactions would be waived, but the regular underpayment penalties would still be applicable.

IV. Hearing Officer Recommendations

A. Summary of Preliminary Recommendations

Because there are still written comments outstanding from important constituencies, this Hearing Officer’s Report is preliminary. Nevertheless, there are certain changes that the Hearing Officer will recommend based on the written comments that have been received so far. Exhibit G shows preliminary recommended amendments to the proposed model statutes in light of the testimony received to date. Most of these recommended changes are technical in nature. However, one recommended change would be fairly comprehensive and is in response to extensive public comment expressing concern regarding taxpayer’s requirement to disclose inconsistent filing positions.

Because the change to section III would be comprehensive, the Hearing Officer respectfully suggests that prior to preparation of the final report, the Hearing Officer receive the views of the Uniformity Committee on these and any other proposed changes that result from additional consideration of existing testimony and additional testimony yet to be received.

B. Specific Preliminary Recommendations

1. Definitions - Reportable and Listed Transactions

As noted above, the proposed definition of “reportable transaction” is directly from federal law, with the exception that it incorporates state tax issues as well as federal, and includes two additional types of transactions - “non-economic substance transactions” and “tax shelters.” Commenters have suggested several changes to this definition. The preliminary recommendations would adopt many of these suggestions. The most substantive is the removal of a reference to “tax shelters.” The elimination of “tax shelter” was recommended by several commenters to increase uniformity with the federal law and enhance workability of the proposal. (TEI –RT, p. 7; SAB, p. 9) The Hearing Officer preliminarily agrees with this recommendation. The definition of “tax shelter” involves fraudulent statements and valuations, rather than specific types of transactions. For disclosure purposes, the focus of the requirement should be on the type of transaction required to be disclosed, rather than the truth of statements or valuations associated with the transaction. The separate penalty for participation in a tax shelter would remain in the proposal, parallel to federal law.

Commenters also suggested an amendment to allow the director to specifically list transactions which are not required to be disclosed, as well as to list those that are required to be disclosed. (TEI – RT, p. 8; SAB, p.7) Such an ability could be an important tool for making taxpayer’s disclosure responsibilities as clear as possible. Federal law provides the IRS that authority via regulation, rather than statute. However, statutory authority would be more direct and could help promote uniformity across the States. Therefore, the Hearing Officer preliminarily recommends this provision be added to the definition of “listed transaction.”

2. Penalties

Commenters suggested that prohibiting administrative review of a penalty waiver determination is inappropriate. (TEI- RT, p. 8-9) Federal law prohibits judicial, but not administrative review. The Hearing Officer preliminarily recommends following federal law on this point. There are other, policy issues related to the number and level of penalties. These will be addressed in the final Hearing Officer’s report.

3. Amendments to the Inconsistent Filing Position Requirement

Extensive comments were received regarding the proposal’s requirement for taxpayer disclosure of inconsistent filing positions. (TEI – RT, pp. 10-11; MWE, pp. 1-5;

SAB, pp. 4-6) Commenters characterized this section of the proposal as vague, overbroad and burdensome. One commenter noted that the tax systems in the various states are not uniform to a degree that would support subjecting compliant taxpayers to the administrative burden of reviewing filings to determine inconsistencies, to penalties for failure to identify the inconsistencies, or to an increased burden of proof where there is an inconsistency. (TEI – RT, p. 11) Another commenter described a “terrible administrative burden of identifying, cataloging and disclosing its inconsistent filing positions” that “has the potential to dwarf general state tax filing responsibilities themselves.” (MW&E, p. 2) Several noted that inconsistent positions are often the result of inconsistent state laws. (See e.g. SAB, p. 5) All commenters recommended the removal of the section from the proposed statute.

The Hearing Officer recommends replacing the requirement to disclose inconsistent filing positions with a requirement for the provision of “51 state spreadsheet.” The requirement for the provision of a “51 state spreadsheet” was an alternative recommendation of the original drafting group, and would meet most, although not all, of the concerns expressed in written testimony. In the alternative, the Hearing Officer would recommend taxpayer’s simply be required to maintain and provide the desired information within 30 days of request.

4. Consideration of a Nexus Disclosure Requirement

The Montana Department of Revenue submitted a comment that the proposed statute be broadened to require disclosure of entities that solicit business in the state but not filing a return. Such entities would be required to report income and receipts attributable to the state, how business is solicited in the state, how services and products are delivered, the existence of any personnel, property or sales in the state and any other information the director may require. The Executive Committee asked that the Uniformity Committee review and comment on this nexus disclosure recommendation. Although the Uniformity Committee found the nexus disclosure proposal to be of interest, it ultimately did not recommend the proposed statute be amended to include it, citing constitutional, procedural and scope issues. These issues were also noted by another Commenter representing taxpayers. (TEI – MP comments). For these reasons, the Hearing Officer does not recommend inclusion of the nexus proposal in this proposed statute.

Respectfully Submitted,

Shirley K. Sicilian
Hearing Officer

Exhibit G

Multistate Tax Commission

Draft Model Uniform Statute on Reportable Transactions and Inconsistent Filing Positions

*Preliminary Recommendations of the Hearing Officer
(Additional Recommendations may be Forthcoming)
November 3, 2005*

I. Definitions.

1. Reportable Transaction. "Reportable transaction" means any transaction or arrangement with respect to which information is required to be included with a state return or statement because, as determined under regulations prescribed pursuant to this act, such transaction or arrangement is of a type which 1) the Director determines as having a potential for avoidance or evasion of the tax imposed by the [State income tax Act], whether through deduction or credit, the excludability or omission of any income, the manipulation of any allocation or apportionment rule, or the securing of any other tax benefit, and 2) is carried out through or invested in by at least one entity that is organized in this State, doing business in this State, deriving income from sources in this State, subject to [State Income Tax Act], or is otherwise subject to the jurisdiction of this State. A reportable transaction includes, but is not limited to, any transaction or arrangement described in U.S. Treasury Regulations Section 1.6011-4(b) , a listed transaction as defined under Section I.2. and a non-economic substance transaction as defined under Section I.4.

2. Listed Transaction. "Listed transaction" means a reportable transaction that is the same as, or substantially similar to, a transaction or arrangement specifically identified by the Director as a tax avoidance transaction through notice, regulation, bulletin or other form of official Department guidance. In addition, the term "listed transaction" includes any reportable transaction that is the same as, or substantially similar to, a transaction or arrangement specifically identified by the U.S. Secretary of Treasury as a tax avoidance transaction for purposes of Internal Revenue Code Section 6011. The Director may; through notice, regulation, bulletin or other form of official Department guidance; specifically identify transactions that are not tax avoidance transactions and are not subject to disclosure under this Act.

3. Inconsistent Filing Position. "Inconsistent filing position" means the reporting or reflecting of information on any return filed for [State] income tax purposes in a manner inconsistent with the manner in which the same or similar information was reported or reflected on any return filed by the same taxpayer, or by a member of a unitary group of which the same taxpayer is a member, in another state with respect to a tax on or measured by net income for the same tax year.

4. Non-Economic Substance Transaction. “Non-economic substance transaction” means any transaction or arrangement that lacks economic substance, as defined by [State or federal] law; including a transaction or arrangement in which an entity is disregarded as lacking a valid nontax [State] business purpose.

5. Tax Shelter. “Tax shelter” means a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of [State] or Federal income tax.

6. Disqualified Opinion. “Disqualified opinion” means an opinion that:

- A.** is based on unreasonable factual or legal assumptions (including assumptions as to future events);
- B.** unreasonably relies on representations, statements, findings, or agreements of the taxpayer or any other person;
- C.** does not identify and consider all relevant facts, or
- D.** fails to meet any other requirement as prescribed by either the U.S. Secretary of the Treasury for purposes of Internal Revenue Code Section 6664(d)(3)(B)(iii) or the Director.

7. Disqualified Tax Advisor. “Disqualified tax advisor” means a tax advisor that meets any of the following conditions:

- A.** is a material advisor and participates in the organization, management, promotion, or sale of the transaction or is related (within the meaning of Internal Revenue Code Sections 267(b) or 707(b)(1)) to any person who so participates;
- B.** is compensated directly or indirectly by a material advisor with respect to the transaction;
- C.** has a fee arrangement with respect to the transaction which is contingent on all or part of the intended tax benefits from the transaction being sustained; or
- D.** as determined under regulations prescribed by either the Secretary of the Treasury for purposes of Internal Revenue Code Section 6664(d)(3)(B)(ii) or the Director, has a disqualifying financial interest with respect to the transaction.

8. Material Advisor. “Material advisor” means any person who:

- A.** provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
- B.** directly or indirectly derives gross income in excess of the threshold amount (or such other amount as may be prescribed by the U.S. Secretary of Treasury for purposes of Internal Revenue Code Section 6111(b)(1)(A) or the Director) for such advice or assistance. For purposes of this section I.10., the threshold amount is
 - i.** \$50,000 in the case of a reportable transaction substantially all of the tax benefits from which are provided to natural persons, and
 - ii.** \$250,000 in any other case.

9. Gross Valuation Overstatement. “Gross Valuation Overstatement” means any statement as to the value of any property or services if:

A. the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

B. the value of such property or services is directly related to the amount of any deduction allowable under [State] or federal income tax, or credit allowable under [State] income tax, to any participant.

II. Taxpayer Responsibility for Disclosure of Reportable Transactions; Penalties; Waiver; Extension of Statute of Limitations.

1. Disclosure of Reportable Transactions Required.

A. Disclosure Required. For each tax year in which a taxpayer, a federal consolidated group of which a taxpayer is a member, or a member of a combined group that has filed a combined return in this State and of which a taxpayer is a member, has participated in a reportable transaction, including a listed transaction, such taxpayer is required to disclose such transaction as provided in Section II.1. B., below. In addition, for each tax year in which a taxpayer, a federal consolidated group of which a taxpayer is a member, or a member of a unitary group of which a taxpayer is a member, is required to make a disclosure statement under Treasury Regulations Section 1.6011-4 with respect to a reportable transaction, including a listed transaction, in which the taxpayer participated; such taxpayer shall file a copy of such disclosure with the Department as provided in Section II.1.B., below.

B. Time and Manner of Disclosure. Reportable transactions, including listed transactions, shall be disclosed in the manner prescribed in Treasury regulations Section 1.6011-4 and Department rules and regulations. With respect to a federal listed transaction entered into after February 28, 2000, but before December 31, [year Act is adopted], disclosure shall be made on or before the due date of, and attached to, the taxpayer’s original and any amended [State] income tax return for tax year [the year of this Act] and to the original and any amended [State] income tax return for any later tax year which reflects a reduction in tax resulting from such listed transaction, including a loss, deduction or credit resulting from a reportable transaction which is being carried forward or back. With respect to a reportable transaction, including a state or federal listed transaction, entered into after December 31, [year Act is adopted], disclosure shall be attached to the taxpayer’s original and any amended [State] income tax return for the tax year during which the transaction was entered into and to the original and any amended [State] income tax return for any later tax year which reflects a reduction in tax resulting from such reportable or listed transaction, including a loss, deduction or credit which is being carried forward or back and which resulted from such transaction. Disclosure of a reportable transaction entered into after February 28, 2000 shall also be attached to any amended [State] income tax return filed after December 31, [year Act is adopted] where such filing reflects a determination by the Internal Revenue Service of the federal tax treatment of a reportable transaction.

C. Effective Date. The provisions of this Section II.1. shall apply to any reportable transaction entered into after February 28, 2000, for any tax year or years for which the transaction remains undisclosed, and for which the statute of limitations on assessment, taking into account the extension provided under Section II.4., has not expired as of 60 days after the effective date of this Act.

2. Penalties Related to Failure to Disclose a Reportable Transaction.

A. Imposition and Amount.

i. Any person who fails to include on any return or statement any information with respect to a reportable transaction which is required under Section II.1. to be included with such return or statement shall pay a penalty, in addition to any other penalty imposed, in the amount determined under Section II.2.A.ii., below.

ii. (a) Except as provided in Section II.2.A.ii.(b), below, the amount of the penalty imposed under Section II.2.A.i., above, shall be [\$X (\$10,000 in IRC)] in the case of a natural person, and [\$X (\$50,000 in IRC)] in any other case.

(b) The amount of penalty under Section II.2.A.i. with respect to a listed transaction shall be [\$X (\$100,000 in IRC)] in the case of a natural person, and [\$X (\$200,000 in IRC)] in any other case.

B. Assessment Date. Penalty imposed under Section II.2.A.i. shall be deemed assessed on the due date of the [State] income tax return upon or attached to which disclosure of the reportable transaction was required pursuant to Section II.1. of this Act and Department rules and regulations.

C. Waiver.

i. The Director may waive or abate all or any portion of any penalty imposed by this Section II.2. with respect to any violation if:

(a) the violation is with respect to a reportable transaction other than a listed transaction, and

(b) rescinding the penalty would promote compliance with the requirements of [State Income Tax Act] and effective tax administration.

ii. Notwithstanding any other law or rule of law, any determination under this Section II.2.C. may not be reviewed in any judicial proceeding.

D. Effective Date. Penalty imposed under this Section II.2. shall apply to any failure to disclose any listed transaction entered into after February 28, 2000, or any other reportable transaction entered into after the effective date of this act, as required by Section II.1., for any tax year or years for which the transaction remains undisclosed, and for which the statute of limitations on assessment, taking into account the extension provided under Section II.4., has not expired as of 60 days after the effective date of this Act.

3. Penalties Related to Understatement of Tax Resulting from a Reportable Transaction.

A. Understatement Penalty.

i. Imposition and Amount.

(a) If a taxpayer has a reportable transaction understatement for any taxable year, there shall be added to the tax an amount equal to 20 percent of the amount of such understatement.

(b) For purposes of this Section II.3.A.,

(1) The term “reportable transaction understatement” means the sum of:

(A) product of:

(i) the highest rate of tax imposed by [Section on state corporate income tax rates]; and

(ii) the amount of the increase (if any) in [State] taxable income which results from a difference between the proper tax treatment of an item to which Section II.1.A. applies and the taxpayer’s treatment of such item as shown on the taxpayer’s return of tax, including an amended return provided such amended return is filed prior to the date the taxpayer is first contacted by the Department regarding the examination of the tax year for which such amended return is filed; The amount of the increase in [State] taxable income for a particular tax year includes the restatement for another tax year to which a loss or deduction is carried forward or carried back that is attributable to the reportable transaction for that year in which the carry forward or carry back of the loss or deduction applies; and

(B) the amount of the decrease (if any) in the aggregate amount of credits which results from a difference between the taxpayers treatment of an item to which this section applies (as shown on the taxpayer’s return of tax) and the proper tax treatment of such item.

For purposes of Section II.3.A.i.(b)(1)(A), any reduction of the excess of deductions allowed for the taxable year over gross income for such year, and any reduction in the amount of capital losses which would be allowed for such year, shall be treated as an increase in taxable income.

(2) This Section II.3.A. shall apply to any item which is attributable to:

(A) any listed transaction, and

(B) any reportable transaction (other than a listed transaction) if a significant purpose of such transaction is the avoidance or evasion of federal or [State] income tax.

(c) Section II.3.A.i.(a), above, shall be applied by substituting “30 percent” for “20 percent” with respect to the portion of any reportable transaction understatement with respect to which the requirements of section II.1 are not met.

(d) Except as provided in regulations, in no event shall any tax treatment included with an amendment or supplement to a return of tax be taken into account in determining the amount of any reportable transaction understatement if amendment or supplement is filed after the earlier of the date the taxpayer is first contacted by the Director regarding the examination of the return or such other date as is specified by the Director.

ii. Assessment Date. Penalty imposed under this Section II.3.A. shall be deemed assessed on the due date of the [State] income tax return which shows the understatement of tax resulting from a reportable transaction to which such penalty relates.

B. Interest Penalty.

i. 50% Interest Penalty Prior to Contact; Imposition and Amount.

For any amended return filed after [end of voluntary compliance or date of enactment if no voluntary compliance program] and before the taxpayer is contacted by the Internal Revenue Service or the Department regarding a reportable transaction, there shall be added to any reportable transaction understatement, as determined under Section II.3.A.i.(b)(1), a penalty, in addition to any other applicable penalties, equal to 50% of the interest assessed under Section [Interest Section] for the period beginning on the last date prescribed by law for the payment of such tax (determined without regard to extensions) and ending on the date of payment.

ii. 100% Interest Penalty After Contact; Imposition and Amount. If the taxpayer has been contacted by the Internal Revenue Service or the Department regarding a reportable transaction, there shall be added to any reportable transaction understatement, as determined under Section II.3.A.i.(b)(1), a penalty, in addition to any other applicable penalties, equal to 100% of the interest assessed under Section [Interest Section] for the period beginning on the last date prescribed by law for the payment of such tax (determined without regard to extensions) and ending on the date of the notice of proposed assessment is mailed.

iii. Assessment Date. Penalty imposed under this Section II.3.B. shall be deemed assessed upon the assessment of the interest by which such penalty is calculated and shall be collected and paid in the same manner as such interest.

C. Waiver.

i. Except as provided in Section II.3.C.ii. below, the Director may waive or abate all or any portion of any penalty imposed by Section II. 3. with respect to any portion of a reportable transaction understatement if it is shown that the

taxpayer had reasonable cause for such portion and acted in good faith with respect to such portion. Notwithstanding any other law or rule of law, any determination by the Director under this subdivision may not be reviewed in any judicial proceeding.

ii. Section II.3.C.i. shall not apply to any reportable transaction understatement unless:

(a) the relevant facts affecting the tax treatment of the item are adequately disclosed in accordance with all requirements of Section II.1. and Department rules and regulations. A taxpayer failing to fully disclose shall be treated as meeting the requirements of this Section II.3.C.ii.(a) if the penalty for that failure to disclose was waived pursuant to Section II.2.C.;

(b) there is or was substantial authority for such treatment; and

(c) the taxpayer reasonably believed that such treatment was more likely than not the proper treatment. A taxpayer shall be treated as having a reasonable belief with respect to the tax treatment of an item only if such belief:

(1) is based on the facts and law that exist at the time the return which includes such tax treatment is filed, and

(2) relates solely to the taxpayer's chances of success on the merits of such treatment and does not take into account the possibility that a return will not be audited, such treatment will not be raised on audit, or such treatment will be resolved through settlement if it is raised; and

(3) does not rely upon the opinion of a disqualified tax advisor or on a disqualified opinion.

D. Effective Date. Penalty imposed under Section II.3. shall apply to any understatement of tax resulting from a listed transaction entered into after February 28, 2000, or from any other reportable transaction enter into after the effective date of this act, in any tax year or years for which the statute of limitations on assessment, taking into account the extension provided under Section II.4., has not expired as of the effective date of this Act.

4. Extension of Statute of Limitations for Assessments Associated with Non-Disclosure of a Reportable Transaction.

If a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction as required under Section II.1., the time for assessment of any tax imposed by [State Income Tax Act] with respect to such transaction shall not expire before the date which is 1 year after the earlier of (A) the date on which the Director is furnished the information so required, or (B) the date that a material advisor meets the requirements of Section IV.2. with respect to a request by the Director under Section IV.2.B. relating to such transaction with respect to such taxpayer.

III. Taxpayer Responsibility for Disclosure of Filing Positions; Penalties; Waiver; Extension of Statute of Limitations; Presumption and Burden of Proof.

1. Disclosure of Filing Positions in other Income Tax States.

A. Disclosure Required. A taxpayer that conducts business activity in this state and one or more other states or is a member of a combined reporting group that conducts business activity in this state and one or more other states, shall disclose, in the form and manner prescribed by the Director, the filing position taken in all other income tax states with respect to **whether a filing is required**, business income, nonbusiness income, apportionment and combined reporting.

B. Definitions. For purposes of Section III of this Act:

i. "Business activity" means any activity conducted in a state, including sales to customers in that state, that gives rise to gross income or an expense reflected in the taxpayer's federal income tax return or income tax return of any state, or the use (or availability for use) of property in the state.

ii. "State" means a state of the United States, and includes the District of Columbia .

iii. "Income tax state" means any state that imposes a tax on, according to, or measured by income.

iv. "Business income" means the total income (or loss) subject to apportionment.

v. "Nonbusiness income" means income (or loss) subject to allocation to a specific state or states.

vi. "Apportionment percentage" means the percentage formula used to assign a portion of the business income of the taxpayer or the combined reporting group of which the taxpayer is a member to an income tax state.

vii. "Apportionment factor" means any component ratio used in the apportionment percentage used to apportion business income, such as a property factor, payroll factor, or a sales factor.

viii. "Allocation" means assignment of income to one or more income tax states by means other than apportionment.

ix. "Combined reporting" means a method of determining business income and apportionment that takes into account the business income and apportionment factors of more than a single corporation, and for purposes of this section includes a consolidated return.

C. Information Required to Be Disclosed. For each income tax state in which a taxpayer or a member of a combined reporting group of which a taxpayer is a member has business activity, the following information shall be disclosed:

i. **Whether the taxpayer filed in that state.**

ii. The business income of the taxpayer, or of the taxpayer's combined reporting group, reported to that state.

iii. The total nonbusiness income of the taxpayer, or the total nonbusiness income of each member of the taxpayer's combined reporting group.

iv. The total nonbusiness income of the taxpayer, or the total nonbusiness income of each member of the taxpayer's combined reporting group, allocable to that state.

v. For each of the apportionment factors used to determine the apportionment percentage, the dollar amount of the numerator and the denominator of the ratio used in that factor.

vi. The apportionment percentage used to apportion income subject to taxation in that state.

vii. The dollar amount of business income apportioned to that state.

viii. For those states that use combined reporting to apportion income, for each combined reporting group of which the taxpayer is a member, a list of all corporations whose business income was included in business income of the combined reporting group.

ix. Such other information relating to the determination of business income, nonbusiness income, or the apportionment or allocation of that income as the Director, by regulation, shall require.

D. Time and Manner of Disclosure. Disclosures required by Section III.1. shall be filed with, and attached to, the original and any amended [State] income tax returns for any tax year to which the requirements apply, in the form and manner required by the Director.

E. Effective Date. The provisions of this Section III.1. are effective for tax years ending on or after the effective date of this Act.

2. Retention and Provision of Records.

A. Retention and Provision of Records Required. A taxpayer shall retain a copy of its filings of [State] schedule [apportionment schedule identifier] and of the equivalent schedule filed by the taxpayer [or a member of the taxpayer's combined reporting group] in such other state or states in which the taxpayer [or the taxpayer's combined reporting group] conducted business activity; and shall, within 20 days of written request, provide a copy of such schedules to the Director. Information required to be retained under this Section III.2. shall be retained for that period of time during which the taxpayers' income tax liability to this state for that tax year may be subject to adjustment, including all periods in which additional income taxes or penalties may be assessed, or during which a protest, appeal or lawsuit is pending with respect to [State] income tax, but not less than ten years from the due date or extended due date of the return.

B. Effective Date. The provisions of this Section III.2. shall apply to information associated with any return due on or after the date two years before the enactment of this Act. Provided however, during the course of an audit investigation, the Director may, following the effective date of this Act, require

provision of such information as may be in possession of the taxpayer [or a member of the taxpayer's combined reporting group]for any tax year for which the statute of limitations on assessment has not expired.

3. Penalties Related to Failure to Disclose, Retain or Provide Information Regarding Filing Positions.

A. Imposition and Amount.

i. A taxpayer that fails to fully disclose, retain or provide any information with respect to filing positions as required by Section III.1 and 2. of this Act and Department rules and regulation, shall be subject to penalty in an amount determined under Section III.3.A.ii., in addition to any other applicable penalties.

ii. (a) For failure to file a disclosure of filing positions required pursuant to Section III.1., the amount of the penalty shall be the greater of \$10,000 or 0.25 percent of the amount of net income properly apportioned and allocated to this State,.

(b) For failure to provide information required to be retained under Section III.1. C. within 30 days of a request by the Director, there shall be assessed a penalty in the amount of \$[X]. An additional penalty in the amount of \$[Y] shall be assessed with respect to each additional 30 days thereafter during which the information is not provided. A taxpayer that has not retained the information required under Section III. 1. C., shall, after submitting an affidavit that such information does not exist, be subject to a penalty in the amount of \$[Z] in lieu of additional 30 day penalties.

B. Assessment Date. Penalty imposed under Section III.3.A.ii.(a) shall be deemed assessed on the due date of the [State] income tax return upon or attached to which disclosure of filing positions was required pursuant to Section III.1 and Department rules and regulations. The penalty imposed under Section III.3.A.ii.(b) shall be deemed assessed on the 30th day following a request by the director, and , if applicable, every 30 days thereafter for which taxpayer fails to provide the information required to be retained pursuant to Section III.2 .

C. Waiver.

i. The Director, in his or her sole discretion, may waive or abate all or any portion of any penalty imposed by this Section III.3. with respect to any violation if rescinding the penalty would promote compliance with the requirements of this Act and effective tax administration.

ii. Notwithstanding any other law or rule of law, any determination by the Director under this subdivision may not be reviewed in any administrative or judicial proceeding.

D. Effective Date. Penalty imposed under this Section III.3. shall apply to any failure to disclose, retain or provide any information regarding a filing position, as

required pursuant to Section III.1. or 2., with respect to any tax year ending on or after the effective date of this Act.

4. Extension of Statute of Limitations for Assessments Associated with Non-Disclosure.

If a taxpayer fails to fully disclose all information required under Section III.1 of this Act and Department rules and regulations with respect to filing positions, an assessment and notice of deficiency may be issued not later than [twice the standard SOL] after the return or statement was due or filed, whichever is later, upon or attached to which such disclosure was required. Extension of the statute of limitations under this Section III.2. is limited to extension for purpose of assessment of a tax deficiency, penalty and interest resulting from an application of the proper tax treatment with respect to a filing position that was not disclosed and that is an inconsistent filing position as defined in Section I.3.

5. Presumption and Burden of Proof.

A taxpayer shall be presumed to be liable for any underpayment of tax properly assessed by the Director, where such underpayment resulted from a filing position, which is an inconsistent filing position, as defined in Section I.3., with respect to a position taken in another state with substantially similar law. The taxpayer may overcome such presumption by submission of clear and convincing evidence to the contrary.

IV. Material Advisor Responsibility for Disclosure of Reportable Transactions and Maintenance of Advisee Lists; Penalties; Waiver.

1. Material Advisor Responsibility for Disclosure of Reportable Transactions.

A. Each material advisor with respect to any reportable transaction shall make a return in such form as the Director may prescribe setting forth -

- i. information identifying and describing the transaction,
- ii. information describing any potential tax benefits expected to result from the transaction, and
- iii. such other information as the Director may prescribe.

In addition, each material advisor who is required to disclose a reportable transaction pursuant to Internal Revenue Code Section 6111 shall file a copy of such disclosure with the Department. Such return and disclosure shall be filed not later than the date specified by the Director.

B. The Director may prescribe regulations which provide -

- i. that only 1 person shall be required to meet the requirements of Section IV.1.A. in cases in which 2 or more persons would otherwise be required to meet such requirements, and.
- ii. exemptions from the requirements of this section.

2. Material Advisor Responsibility for Maintenance of Reportable Transaction Advisee List.

A. Each material advisor with respect to any reportable transaction shall, whether or not required to file a return under Section IV.1., maintain a list identifying each [State] taxpayer, member of a unitary business group of a [State] taxpayer or member of a consolidated return of a [State] taxpayer with respect to whom such advisor acted as a material advisor with respect to such transaction. The list required under this Section IV.2.A. shall include the same information, and shall be maintained in the same form and manner, as required under Internal Revenue Code Section 6112, Treasury Regulations Section 301.6112-1, and any additional information or maintenance requirements as the Director may by regulation require.

B. Any person required to maintain a list under Section IV.2.A. -

i. shall make such list available to the Director upon written request by the Director, and

ii. except as otherwise provided by the Director by regulation, shall retain any information which is required to be included on such list for 7 years.

C. The Director may, by regulation, provide that in cases in which 2 or more persons are required under Section IV.2.A. to maintain the same list (or portion thereof), only 1 person shall be required to maintain such list (or portion).

3. Penalty for Failure to Disclose a Reportable Transaction or to Maintain Advisee List.

A. Imposition and Amount.

i. Penalty for Failure to Disclose a Reportable Transaction.

(a) If a person who is required to file a return or disclosure under Section IV.1 with respect to any reportable transaction (1) fails to file such return or disclosure on or before the date prescribed therefore, or (2) files false or incomplete information with the Director with respect to such transaction, such person shall pay a penalty with respect to such return or disclosure in the amount determined under Section IV.3.A.(b) and (c).

(b) Except as provided in Section IV.3.A.i.(c), below, the penalty imposed under Section IV.3.A.i.(a) with respect to any failure shall be [\$X (\$50,000 under IRC)].

(c) The penalty imposed under Section IV.3.A.i. with respect to any listed transaction shall be an amount equal to the greater of (1) [\$X (\$200,000 under IRC)], or (2) 50% of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return and, if applicable, disclosure is filed under Section IV.1. Section IV.3.A.i.(c)(2) shall be applied by substituting “75 percent” for “50 percent” in the case of an intentional failure or act described in Section IV.3.A.i.(a).

ii. Penalty for Failure to Maintain Advisee Lists. If any person who is required to maintain a list under Section IV.2. fails to make such list available

upon written request to the Director in accordance with Section IV.2.B. within 20 business days after the date of such request, such person shall pay a penalty of [\$X (\$10,000 under IRC)] for each day of such failure after such 20th day.

iii. Each of the penalties imposed by Section IV.3.A. is in addition to any other applicable penalties.

B. Waiver.

i. The Director may waive all or any portion of penalty imposed under this Section IV.3.

(a) with respect to any violation of Section IV.1. if:

(1) the violation is with respect to a reportable transaction other than a listed transaction, and

(2) waiver of the penalty would promote compliance with the requirements of [State Income Tax Act] and effective tax administration.

(b) with respect to any violation of Section IV.2 if on any day such violation is due to reasonable cause

ii. Notwithstanding any other law or rule of law, any determination by the Director under this subdivision may not be reviewed in any judicial proceeding.

4. Effective Date. The provisions of this Section IV. shall apply to transactions with respect to which material aid, assistance, or advice referred to in section I.10. is provided after the date of the enactment of this Act.

V. Tax Shelters

1. Penalty for Promotion of Tax Shelters.

A. Imposition and Amount. Any person who

i.

(a) organizes or assists in the organization of

(1) a partnership or other entity,

(2) any investment plan or arrangement, or

(3) any other plan or arrangement, or

(b) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in Section V.1.A.i.(a) and

ii. makes or furnishes or causes another person to make or furnish in connection with such organization or sale -

(a) a statement with respect to the allowability of any deduction or credit, the excludability of any income, the manipulation of any allocation or apportionment rule, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to known is false or fraudulent as to any material matter, or

(b) a gross valuation overstatement as to any material matter,

shall pay, with respect to each activity described in Section V.1.A.i.(a) and in addition to any other penalty provided by law, a penalty equal to the [X (\$1,000 under IRC)] or, if the person establishes that it is lesser, 100 percent of the gross income derived or to be derived by such person from such activity. For purposes of the preceding sentence, activities described in Section V.1.A.i.(a) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in Section V.1.A.i.(b) shall be so treated.

Notwithstanding the first sentence, if an activity with respect to which a penalty imposed under this subsection involves a statement described in Section V.1.A.ii.(a), the amount of the penalty shall be equal to 50 percent of the gross income derived or to be derived from such activity by the person on which the penalty is imposed.

B. Waiver. The Director, in his or her sole discretion, may waive all or any part of the penalty provided by Section V.A. with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

2. **Tax Shelter Exception to Confidentiality Privileges Relating to Taxpayer Communications.** No privilege of confidentiality shall apply to any written communication which is:
 - A. between a tax practitioner and
 - i. any person,
 - ii. any director, officer, employee, agent, or representative of the person,or
 - iii. any other person holding a capital or profits interest in the person; and
 - B. in connection with the promotion of the direct or indirect participation of the person in any tax shelter.
3. **Effective Date.** The provisions of this Section V. shall apply to activities after the date of the enactment of this Act.

VI. Injunction of Certain Conduct Related to Reportable Transactions and Tax Shelters .

1. **Authority to Seek Injunction.** A civil action in the name of the State to enjoin any person from further engaging in specified conduct may be commenced at the request of the Director. Any action under this Section VI. shall be brought in State District Court [county of DOR] The court may exercise its jurisdiction over such action separate and apart from any other action brought by the State against such person.
2. **Adjudication and Decree.** In any action under Section VI. , if the court finds
 - A. that the person has engaged in any specified conduct, and
 - B. that injunctive relief is appropriate to prevent recurrence of such conduct;

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this Act.

- 3. Specified Conduct.** For purposes of this Section VI., the term “specified conduct” means any action, or failure to take action, which is
 - A.** subject to penalty under this Act, or
 - B.** in violation of any requirement under regulations issued pursuant to this Act.