

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OF INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-10E-2 & 11-10-5

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE \_\_\_\_\_

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

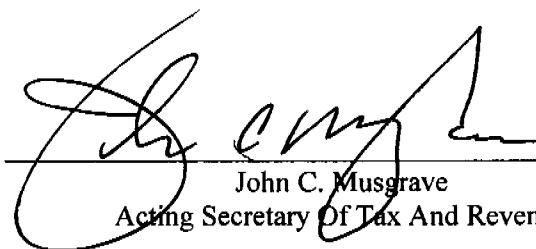
TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 10E

TITLE OF RULE BEING ADOPTED: Tax Shelter Voluntary Compliance Program

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS August 1, 2006

  
\_\_\_\_\_  
John C. Musgrave  
Acting Secretary Of Tax And Revenue

\$6.40

**WEST VIRGINIA INTERPRETIVE RULE  
TITLE 110  
SERIES 10E  
TAX SHELTER VOLUNTARY COMPLIANCE PROGRAM**

No public comments were received during the comment period for this rule.

**WEST VIRGINIA INTERPRETIVE RULE  
TITLE 110  
SERIES 10E  
TAX SHELTER VOLUNTARY COMPLIANCE PROGRAM**

**§110-10E-1. General.**

1.1. **Scope** – This rule provides the guidelines the Tax Commissioner believes to be necessary to implement portions of the West Virginia Tax Shelter Voluntary Compliance Act of 2006, West Virginia Code §11-10E-1 et seq., as enacted by passage of House Bill 4630, in effect July 1, 2006.

1.2. **Authority** – W. Va. Code §11-10E-2(b)

1.3. **Filing Date** –

1.4. **Effective Date** –.

**§110-10E-2. Legislative intent, findings and purpose.**

2.1. **Intent** – It is the intent of the Legislature in enacting the Tax Shelter Voluntary Compliance Act to improve compliance with this State's tax laws and to accelerate and increase collections of certain taxes currently owed to this State.

2.2. **Findings and purpose** – It is the Legislature's finding that the public purpose is served by the waiver of tax penalties, and civil or criminal prosecution, in return for the reporting and payment of previously underreported, unreported, unpaid, or underpaid tax liabilities as a result of participation in a tax avoidance transaction that are due and owing for taxable years beginning before January 1, 2006.

2.2.1. The Tax Commissioner will consider the public purpose of the Tax Shelter Voluntary Compliance Act when interpreting and applying its provisions. There will be no waiver of penalties or civil or criminal prosecution unless and until all requirements of the Voluntary Compliance Act are fulfilled.

**§110-10E-3. Definitions.**

3.1. **General rule.** – Terms used in this rule have the meaning ascribed to them in West Virginia Code §11-10-4, unless the context in which the term is used clearly requires a different meaning, or the term is defined in the following subsection 3.2.

3.2. **Terms defined.** – For purposes of this rule, the term:

3.2.1. **"Abusive tax schemes" or "abusive tax shelters"** means transactions promoted for the promise of tax benefits with no meaningful change in the taxpayer's control over or benefit from the taxpayer's income or assets. These

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transactions typically have no economic purpose other than reducing taxes, or may involve the use of multiple layers of domestic and foreign pass-through entities including: partnerships, S corporations, limited liability companies, and trusts.

3.2.2. "**Commissioner**" or "**Tax Commissioner**" means the West Virginia State Tax Commissioner or his/her delegate.

3.2.3. "**Confidential transactions**" means a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee.

3.2.4. "**Department**" means the West Virginia State Tax Department.

3.2.5. "**Eligible taxpayer**" means an individual, partnership, estate, trust, corporation, limited liability company, joint stock company, or any other company, trustee, receiver, assignee, referee, society, association, business or any other person as described in the tax law of this State, who or which has a tax liability relating to income tax imposed under West Virginia Code §11-21-1 et seq. or West Virginia Code §11-24-1 et seq.

3.2.6. "**Interest**" means interest imposed pursuant to West Virginia Code §§11-10-17 and 11-10-17a.

3.2.7. "**Investor lists**" means any list required to be maintained under I.R.C. § 6112 and Treasury Regulations Section 301.6112-1 with respect to a potentially abusive tax shelter, and to be considered complete shall at a minimum include the following information:

3.2.7.1. The name of each transaction that is a potentially abusive tax shelter and the registration number, if any, obtained under I.R.C. § 6111;

3.2.7.2. The tax identification number, if any, of each transaction;

3.2.7.3. The name, address, and tax identification number of each person required to be on the list;

3.2.7.4. If applicable, the number of units (i.e., percentage of profits, number of shares, etc.) acquired by each person required to be included on the list;

3.2.7.5. The date on which each interest was acquired;

3.2.7.6. The amount invested in each transaction by each person required to be included on the list;

3.2.7.7. A detailed description of each transaction that describes both the structure and its expected tax consequences;

3.2.7.8. A summary or schedule of the tax consequences that each person is intended or expected to derive from participation in each transaction, if known by the material advisor;

3.2.7.9. Copies of any additional written materials, including tax analyses or opinions, relating to each transaction that have been shown or provided to any person who acquired an interest in the transaction, or their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor; and

3.2.7.10. For each person, if the interest in the transaction was not acquired from the material advisor maintaining the list, the name of the person from whom the interest was acquired.

3.2.8. "**Listed transaction**" means a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

3.2.9. "**Loss transactions**" means any transaction resulting in the taxpayer claiming a loss under I.R.C. § 165 of at least:

3.2.9.1. \$10,000,000 in any single taxable year or \$20,000,000 in any combination of taxable years for corporations;

3.2.9.2. \$10,000,000 in any single taxable year or \$20,000,000 in any combination of taxable years for partnerships that have only corporations as partners (looking through any partners that are themselves partnerships), whether or not any losses flow through to one or more partners; or \$2,000,000 in any single taxable year or \$4,000,000 in any combination of taxable years for all other partnerships, whether or not any losses flow through to one or more partners;

3.2.9.3. \$2,000,000 in any single taxable year or \$4,000,000 in any combination of taxable years for individuals, S corporations, or trusts, whether or not any losses flow through to one or more shareholders or beneficiaries; or

3.2.9.4. \$50,000 in any single taxable year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership, if the loss arises with respect to a section 988 transaction (as defined in I.R.C. §988(c)(1) relating to foreign currency transactions).

3.2.10. "**Material advisor**" means any person who:

3.2.10.1. Must register the transaction as a tax shelter under federal law.

3.2.10.2. Receives, or expects to receive, at least a minimum fee in connection with a transaction that is a potentially abusive tax shelter; and

3.2.10.3. Makes or provides any oral or written statement to any person about the potential tax consequences of that transaction.

3.2.10.4. The minimum fee is \$250,000 if the acquiring entities are corporations, other than S corporations. For all other transactions, the minimum fee is \$50,000. When calculating the minimum fee, each transaction is evaluated separately to determine whether the minimum fee threshold is satisfied.

3.2.11. **“Organizer”** means any person who discovers, creates, investigates, or initiates the tax shelter investment, devises the business or financial plans for the investment or carries out those plans through negotiations or transactions with others. This term also includes any other person who participates in the organization or management of the tax shelter.

3.2.12. **“Penalty”** means any civil money penalties imposed by West Virginia Code §11-10-19 and any other civil money penalty imposed by any article of Chapter 11 of the West Virginia Code administered under West Virginia Code §11-10-1 et seq.

3.2.13. **“Potentially abusive tax shelter”** means any tax shelter required to be registered with the Internal Revenue Service as a potentially abusive tax shelter under I.R.C. §6111, is a transaction that has the potential for tax avoidance or evasion, or is a reportable transaction under present federal law or West Virginia law.

3.2.14. **“Reportable transaction”** means any transaction the Internal Revenue Service or this State determines as having a potential for tax avoidance or evasion, and includes, but is not limited to, the following transactions:

3.2.14.1. Listed transactions;

3.2.14.2. Confidential transactions;

3.2.14.3. Transactions with contractual protection;

3.2.14.4. Loss transactions;

3.2.14.5. Transactions with a significant book-tax difference: Provided, That transactions with a significant book-tax difference entered into on or after January 6, 2006 that do not describe any other reportable transaction in Treasury Regulation Section 1.6011-4, will no longer be classified as reportable transactions:

Provided, however, That the removal of such significant book-tax difference transactions from the categories of reportable transactions does not relieve taxpayers, tax shelter organizers, advisors, or any other person from any disclosure, registration or list maintenance obligations for transactions that should have been disclosed or registered, or for transactions for which lists should have been prepared and maintained, prior to January 6, 2006; and

3.2.14.6. Transactions involving a brief asset holding period.

3.2.15. "**Reportable transaction understatement**" means the product of:

3.2.15.1. The amount of the increase (if any) in taxable income, as determined by reference to the amount of post-apportioned income that results from a difference between the proper tax treatment of an item to which this subsection applies and the taxpayer's treatment of that item as shown on the taxpayer's return, including an amended return filed prior to the date the taxpayer is first contacted by the Tax Commissioner regarding the examination of the return; and

3.2.15.2. The applicable tax rates.

3.2.16. "**Section 165 loss**" means a loss, as defined in I.R.C. §165, sustained during the taxable year, not compensated for by insurance or otherwise, and computed and restricted as defined and provided for in that section.

3.2.17. "**Substantially similar**" means and includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar shall be broadly construed in favor of disclosure.

3.2.18. "**Tax avoidance transaction**" means a plan or arrangement devised for the principal purpose of avoiding federal or state income tax, or both. Tax avoidance transactions include, but are not limited to, "listed transactions" as defined in Treasury Regulations §1.6011-4(b)(2), as well as reportable transactions as defined in this section.

3.2.19. "**Tax shelter**" means a tax avoidance transaction.

3.2.20. "**Tax structure**" means any fact that may be relevant to understanding the purported or claimed West Virginia Personal Income Tax treatment or West Virginia Corporation Net Income Tax treatment of the transaction.

3.2.21. "**Tax treatment**" means the tax treatment of a transaction that is the purported or claimed West Virginia Personal Income Tax treatment or West Virginia Corporation Net Income Tax treatment of the transaction.

3.2.22. **“Transaction”** means and includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as a part of a plan.

3.2.23. **“Transactions involving a brief asset holding period”** means any transaction resulting in the taxpayer claiming a tax credit exceeding \$250,000 (including a foreign tax credit) if the underlying asset giving rise to the credit is held by the taxpayer for 45 days or less. For purposes of determining the holding period, the principles of I.R.C. §246(c)(3) and (c)(4) apply. Transactions resulting in a foreign tax credit for withholding taxes or other taxes imposed in respect of a dividend that are not disallowed under I.R.C. §901(k)(4) are excluded from this term.

3.2.24. **“Transaction with a significant book tax difference”** means a transaction where the amount for tax purposes of any item or items of income, gain, expense, or loss from the transaction differs by more than \$10,000,000 on a gross basis from the amount of the item or items for book purposes in any taxable year.

3.2.25. **“Transactions with contractual protection”** means a transaction for which the taxpayer or a related party (as described in I.R.C. §267(b) or I.R.C. §707(b)) has the right to a full or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained. A transaction with contractual protection also is a transaction for which fees are contingent on the taxpayer’s realization of tax benefits from the transaction.

3.2.25.a. **Termination of transaction.** A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

3.2.26. **“Voluntary Compliance Program”** means the tax shelter compliance program authorized by the West Virginia Tax Shelter Voluntary Compliance Act of 2006, as set forth in W. Va. Code §11-10E-1 et seq., and this rule.

#### **§110-10E-4. Participation in a tax avoidance transaction/reportable transaction.**

4.1. A taxpayer is required by West Virginia Code § 11-10E-5 to file each year a disclosure statement with respect to each reportable transaction in which the taxpayer participated.

4.2. The following applies to defining and determining when and whether a taxpayer has participated in a tax avoidance transaction:

4.2.1. **Listed transactions.** A taxpayer has participated in a listed transaction if the taxpayer’s tax return reflects tax consequences or a tax strategy described in the published guidance that lists the transaction under Treasury



Regulations Section 1.6011-4(b)(2) and as described in this rule. A taxpayer also has participated in a listed transaction if the taxpayer knows or has reason to know that the taxpayer's tax benefits are derived directly or indirectly from tax consequences or a tax strategy described in published guidance that lists a transaction described in Treasury Regulations Section 1.6011-4(b)(2) and as described in this rule. Published guidance may identify other types of classes of persons that will be treated as participants in a listed transaction.

**4.2.2. Confidential transactions.** A taxpayer has participated in a confidential transaction if the taxpayer's tax return reflects a tax benefit from the transaction and the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in Treasury Regulations Section 1.6011-4(b)(2) and this rule. If a partnership's, S corporation's or trust's disclosure is limited, and the partner's, shareholders, or beneficiary's disclosure is not limited, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the confidential transaction.

**4.2.2.1. Minimum fee.** For purposes of this subsection, the minimum fee is:

**4.2.2.1.a.** \$250,000 for a transaction if the taxpayer is a corporation.

**4.2.2.1.b.** \$50,000 for all other transactions unless the taxpayer is a partnership or trust, all of the owners or beneficiaries of which are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is \$250,000.

**4.2.2.1.c. Determination of minimum fee.** For purposes of this paragraph, a minimum fee includes all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction. These fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent that the fees exceed the fees customary for return preparation.

**4.2.2.1.d.** For purposes of this paragraph, a taxpayer also is treated as paying fees to an advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property.

**4.2.3. Transactions with contractual protection.** A taxpayer has participated in a transaction with contractual protection if the taxpayer's tax return

reflects a tax benefit from the transaction and, as described in Treasury Regulations Section 1.6011-4(b)(2) and this rule, the taxpayer has the right to the full or partial refund of fees or the fees are contingent. If a partnership, S corporation, or trust has the right to a full or partial refund of fees or has a contingent fee arrangement, and the partner, shareholder, or beneficiary does not individually have the right to the refund of fees or a contingent fee arrangement, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the transaction with contractual protection.

**4.2.4. Loss transactions.** A taxpayer has participated in a loss transaction if the taxpayer's tax return reflects a section 165 loss, as defined in I.R.C. §165 and this rule, and the amount of the section 165 loss equals or exceeds the threshold amount applicable to the taxpayer as described in Treasury Regulations Section 1.6011-4(b)(5)(i). If a taxpayer is a partner in a partnership, shareholder in an S corporation, or beneficiary of a trust and a section 165 loss as described in Treasury Regulations Section 1.6011-4(b)(5) flows through the entity to the taxpayer (disregarding netting at the entity level), the taxpayer has participated in a loss transaction if the taxpayer's tax return reflects a section 165 loss and the amount of the section 165 loss that flows through to the taxpayer equals or exceeds the threshold amounts applicable to the taxpayer as described in Treasury Regulations Section 1.6011-4(b)(5)(i). For this purpose, a tax return is deemed to reflect the full amount of a section 165 loss described in this rule, allocable to the taxpayer under this subsection, regardless of whether all or part of the loss enters into the computation of a net operating loss under I.R.C. § 172 or net capital loss under I.R.C. § 1212 that the taxpayer may carry back or carry over to another year.

**4.2.5. Transactions with a significant book-tax difference.** A taxpayer has participated in a transaction with a significant book-tax difference if the taxpayer's tax treatment of an item from the transaction differs from the book treatment of that item as described in Treasury Regulations Section 1.6011-4(b)(6) and this rule. In determining whether a transaction results in a significant book-tax difference for a taxpayer, differences that arise solely because a subsidiary of the taxpayer is consolidated with the taxpayer, in whole or in part, for book purposes, but not for tax purposes, are not taken into account: Provided, That transactions with a significant book-tax difference entered into or on January 6, 2006 that do not describe any other reportable transaction in Treasury Regulation Section 1.6011-4, will no longer be classified as reportable transactions: Provided, however, That the removal of such significant book-tax difference transactions from the categories of reportable transactions does not relieve taxpayers, tax shelter organizers, advisors, or any other person from any disclosure, registration or list maintenance obligations for transactions that should have been disclosed or registered, or for transactions for which lists should have been prepared and maintained, prior to January 6, 2006.

For purposes of this subsection, the amount of an item for book purposes is determined by applying U.S. generally accepted accounting principles (U.S. GAAP) for worldwide income. However, if a taxpayer, in the ordinary course of its business,

keeps books for reporting financial results to shareholders, creditors, or regulators on a basis other than U.S. GAAP, and does not maintain U.S. GAAP books for any purpose, then the taxpayer may determine the amount of a book item for purposes of this subsection by using the books maintained by the taxpayer, provided the books are kept on the same basis consistently from year to year. Adjustments to any reserve for taxes are disregarded for purposes of determining the book-tax difference.

4.2.5.1. In general, this category of reportable transactions applies only to:

4.2.5.1.a. Taxpayers that are reporting companies under the Security Exchange Act of 1934 and are related businesses; or

4.2.5.1.b. Business entities that have \$250,000,000 or more in gross assets for book purposes at the end of any financial accounting period that ends with or within the entity's taxable year in which the transaction occurs (for purposes of this determination, the assets of all related business entities) must be aggregated.

**4.2.6. Transactions involving a brief asset holding period.** A taxpayer has participated in a transaction involving a brief asset holding period if the taxpayer's tax return reflects items giving rise to a tax credit described in Treasury Regulations Section 1.6011-4(b)(7) and section 3 of this rule. If a taxpayer is a partner in a partnership, shareholder in an S corporation, or beneficiary of a trust and the items giving rise to a tax credit described in Treasury Regulations Section 1.6011-4(b)(7) flow through the entity to the taxpayer (disregarding netting at the entity level), the taxpayer has participated in a transaction involving a brief asset holding period if the taxpayer's tax return reflects the tax credit and the amount of the tax credit claimed by the taxpayer exceeds \$250,000.

**4.2.7. Shareholders of foreign corporations.** A reporting shareholder of a foreign corporation participates in a transaction described in Treasury Regulations Section 1.6011-4(b)(2) through (5) and (b)(7) and section 4 of this rule if the foreign corporation would be considered to participate in the transaction under the rules of Treasury Regulations Section 1.6011-4(c)(3) if it were a domestic corporation filing a tax return that reflects the items from the transaction. A reporting shareholder participates in a transaction described in Treasury Regulations Section 1.6011-4(b)(6) only if the foreign corporation would be considered to participate in the transaction under the rules of Treasury Regulations Section 1.6011-4(c)(3) if it were a domestic corporation and the transaction reduces or eliminates an income inclusion that otherwise would be required under I.R.C. § 551, 951, or 1293. A reporting shareholder (and any successor in interest) is considered to participate in a transaction under Treasury Regulations Section 1.6011-4(c)(3)(i)(G) only for its first taxable year with or within which ends the first taxable year of the foreign corporation in which the foreign corporation participates in the transaction, and for the reporting shareholder's five succeeding taxable years.

**4.2.8. Reporting shareholder.** The term reporting shareholder means a United States shareholder (as defined in I.R.C. §551(a)) in a foreign personal holding company (as defined in I.R.C. § 552), a United States shareholder (as defined in I.R.C. § 951(b)) in a controlled foreign corporation (as defined in I.R.C. § 957) or a 10 percent shareholder (by vote or value) of a qualified electing fund (as defined in I.R.C. § 1295).

**4.2.9. Exceptions --** A transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction if the Commissioner of Internal Revenue makes a determination by published guidance that the transaction is not subject to the reporting requirements of this section. The Commissioner may make a determination by individual letter ruling that an individual letter ruling request on a specific transaction or type of transaction satisfies the reporting requirements of this section with regard to that transaction or type of transaction for the taxpayer who requests the individual letter ruling.

**4.2.9.1. Special rule for regulated investment companies.** For purposes of this subsection, a regulated investment company (RIC) as defined in I.R.C. § 851 or an investment vehicle that is owned 95 percent or more by one or more RICs at all times during the course of the transaction are not required to disclose a tax avoidance transaction unless the transaction is also a listed transaction.

**4.2.9.2. Special rule for lease transactions.** For purposes of this subdivision, leasing transactions of the type excepted from the registration requirements under I.R.C. § 6111(d) and the list maintenance requirements under I.R.C. § 6112 as described in Notice 2001-18 (2001-1 C.B. 731) are not classified as tax avoidance transactions.

**§110-10E-5. Disclosure requirement of reportable transactions and listed transactions; time period.**

5.1. For each taxable year in which a taxpayer is required to make a disclosure statement under Treasury Regulations Section 1.6011-4 with respect to any reportable transaction in which the taxpayer participated in a taxable year for which a return is required, such taxpayer shall file a copy of such disclosure with the Tax Commissioner: Provided, That this disclosure requirement also applies to any taxpayer that is a member of a consolidated group that is required to make such a disclosure.

5.1.1. Disclosure under this subsection is required to be made by any taxpayer that is a member of a unitary business group that includes any person required to make a disclosure statement under Treasury Regulations Section 1.6011-4.

5.1.2. Disclosure under this subsection is required with respect to any reportable transaction entered into after February 28, 2000, that becomes a listed transaction at any time.

5.1.2.1. If a taxpayer fails to disclose a listed transaction on either the taxpayer's state or federal income tax return, an assessment may be made at any time not later than six years after the due date of the return required under West Virginia Code § 11-21-1 et seq., or West Virginia Code § 11-24-1 et seq., for the same taxable year or after such return was filed, or not later than three years after an amended return is filed, whichever is later.

5.1.3. With respect to reportable transactions in which the taxpayer participated for taxable years ending before December 31, 2004, disclosure shall be made by the due date of the first annual return due after June 8, 2006: Provided, That if the taxpayer has applied for and been granted an extension of time for filing the first annual return that is due after June 8, 2006, the extension of time shall apply in like manner to the disclosure statement required to be filed with the return.

5.1.4. With respect to reportable transactions in which the taxpayer participated for taxable years ending on and after December 31, 2004, disclosure shall be made in the time and manner prescribed in Treasury Regulations Section 1.6011-4(e).

5.1.4.1. The disclosure statement for a reportable transaction must be attached to the taxpayer's tax return for each taxable year for which a taxpayer participates in a reportable transaction. In addition, the disclosure statement for a reportable transaction must be attached to each amended return that reflects a taxpayer's participation in a reportable transaction. If a reportable transaction results in a loss which is carried back to a prior year, the disclosure statement for the reportable transaction must be attached to the taxpayer's application for tentative refund or amended tax return for that prior year. In the case of a taxpayer that is a partnership or S corporation, the disclosure statement for a reportable transaction must be attached to the partnership's or S corporation's tax return for each taxable year in which the partnership or S corporation participates in the transaction under the rules of section 5 of this rule.

5.1.4.2. If a transaction becomes a listed transaction after the filing of a taxpayer's tax return (including an amended return) reflecting either tax consequences or a tax strategy described in guidance published by the Internal Revenue Service listing the transaction (or a tax benefit derived from tax consequences or a tax strategy described in the publication) and before the end of the period of limitations for the final return (whether or not already filed) reflecting the tax consequences, tax strategy, or tax benefit, then a disclosure statement must be filed as an attachment to the taxpayer's tax return next filed after the date the transaction is listed regardless of whether the taxpayer participated in the transaction in that year.

5.1.5. Notwithstanding the above, no disclosure is required for transactions entered into after February 28, 2000 and before January 1, 2004:

5.1.5.1. If the taxpayer has filed an amended West Virginia income tax return which reverses the tax benefits of the potential tax avoidance transaction; or

5.1.5.2. As a result of a federal audit the Internal Revenue Service has determined the tax treatment of the transaction and a West Virginia amended return has been filed to reflect the federal treatment.

5.1.6. If as a result of filing a disclosure required by West Virginia Code §11-10E-5 and this rule a taxpayer's tax liability for any taxable year for tax imposed by West Virginia Code §11-21-1 et seq., or West Virginia Code §11-24-1 et seq., the appropriate amended tax return or returns for the affected tax year or years are required to be filed.

5.1.7. Any action by the Internal Revenue Service resulting in a reportable transaction being added to, modified or removed from the categories of reportable transactions identified and described in Treasury Regulations Section 1.6011-4 will be treated in like manner by the Tax Department and deemed to be incorporated herein.

**5.2. Reportable transaction understatement penalty.** -- If a taxpayer has a reportable transaction understatement for any taxable year, there shall be added to the tax an amount equal to 20% of the amount of that understatement. This penalty shall be deemed assessed upon the assessment of the tax to which such penalty relates and shall be collected and paid on notice and demand in the same manner as the tax.

5.2.1. This subsection 5.2 applies to any item which is attributable to either of the following:

5.2.1.1. Any listed transaction as defined in Treasury Regulations Section 1.6011-4 and section 3 of this rule; and

5.2.1.2. Any other reportable transaction as defined in Treasury Regulations Section 1.6011-4 and section 3 of this rule (other than a listed transaction) if a significant purpose of the transaction is the avoidance or evasion of federal income tax. The following additional information is provided relative to reportable transactions other than listed transactions so as to assist in determining whether certain transactions are deemed to be reportable transactions other than listed transactions.

5.2.1.2.a. **Confidential transactions.** - For confidential transactions, a transaction is considered to be offered to a taxpayer under conditions of confidentiality if the material advisor who is paid the minimum fee places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that material advisor's tax strategies. A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure if the material advisor

confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

5.2.1.2.a.1. The minimum fee is:

5.2.1.2.a.1.A. \$250,000 for a transaction if the taxpayer is a corporation; or,

5.2.1.2.a.1.B. \$50,000 for all other transactions unless the taxpayer is a partnership or trust, all of the owners or beneficiaries of which are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is \$ 250,000.

5.2.1.2.a.2. A minimum fee includes all fees for a tax strategy, for services for advice (whether or not tax advice), or for the implementation of a transaction. These fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent that the fees exceed the fees customary for return preparation. A taxpayer is treated as paying fees to a material advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the material advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including a material advisor, in that person's capacity as a party to the transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property.

**5.2.1.2.b. Transactions with contractual protections. –** When determining whether the transaction has contractual protections, all the facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation.

5.2.1.2.b.1. Fees are required to have been paid by or on behalf of the taxpayer or a related party to any person who makes or provides a statement, oral or written, to the taxpayer or related party (or for whose benefit a statement is made or provided to the taxpayer or related party) as to the potential tax consequences that may result from the transaction.

5.2.1.2.b.2. Exceptions

5.2.1.2.b.2.A. Termination of transaction. A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

5.2.1.2.b.2.B. Previously reported transaction.

If a person makes or provides a statement to a taxpayer as to the potential tax consequences that may result from a transaction only after the taxpayer has entered into the transaction and reported the consequences of the transaction on a filed tax return, and the person has not previously received fees from the taxpayer relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection.

5.2.1.2.c. **Loss transactions.** - In determining whether a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of taxable years, only losses claimed in the taxable year that the transaction is entered into and the five succeeding taxable years are combined.

5.2.1.2.c.1. Because a loss transaction is a transaction resulting in a loss being claimed under I.R.C. §165, for purposes of loss transactions, an I.R.C. §165 loss includes the following:

5.2.1.2.c.1.A. When determining the thresholds as stated in the definition of "loss transaction" in section 3 of this rule, the amount of an I.R.C. §165 loss is adjusted for any salvage value and for any insurance or other compensation received. However, an I.R.C. §165 loss does not take into account offsetting gains, or other income or limitations. The full amount of an I.R.C. §165 loss is taken into account for the year in which the loss is sustained, regardless of whether all or part of the loss enters into the computation of a net operating loss under I.R.C. §172 or a net capital loss under I.R.C. §1212 that is a carryback or carryover to another year. An I.R.C. §165 loss does not include any portion of a loss, attributable to a capital loss carryback or carryover from another year, that is treated as a deemed capital loss under I.R.C. §1212.

5.2.1.2.c.1.B. An I.R.C. §165 loss includes an amount deductible pursuant to a provision that treats a transaction as a sale or other disposition, or otherwise results in a deduction under I.R.C. §165. An I.R.C. §165 loss includes, for example, a loss resulting from a sale or exchange of a partnership interest under I.R.C. §741 and a loss resulting from an I.R.C. §988 transaction.

5.2.1.2.d. **Transactions with a significant book-tax difference.** - For purposes of determining whether the transaction is a transactions with a significant book-tax difference, offsetting items may not be netted for either tax or book purposes. The amount of an item for book purposes is determined by applying United States generally accepted accounting principles (U.S. GAAP) for worldwide income. However, if a taxpayer, in the ordinary course of its business, keeps books for reporting financial results to shareholders, creditors, or regulators on a basis other than U.S. GAAP, and does not maintain U.S. GAAP books for any purpose, then the taxpayer may determine the amount of a book item by using the books maintained by the taxpayer, provided the books are kept on the same basis consistently from year to



year. Adjustments to any reserve for taxes are disregarded for purposes of determining the book-tax difference.

5.2.1.2.d.1. In general, this category of reportable transactions applies only to:

5.2.1.2.d.1.A. Taxpayers that are reporting companies under the Securities Exchange Act of 1934 and are related business; or

5.2.1.2.d.1.B. Business entities that have \$250,000,000 or more in gross assets for book purposes at the end of any financial accounting period that ends with or within the entity's taxable year in which the transaction occurs (for purposes of this determination, the assets of all related business entities) must be aggregated.

5.2.1.2.d.2. **Consolidated returns.** For purposes of this category of reportable transactions, in the case of taxpayers that are members of a group of affiliated corporations filing a consolidated return, transactions solely between or among members of the group will not be disregarded. Moreover, where two or more members of the group participate in a transaction that is not solely between or among members of the group, items shall be aggregated (as if such members were a single taxpayer), but any offsetting items shall not be netted.

5.2.1.2.d.3. **Foreign persons.** In the case of a taxpayer that is a foreign person (other than a foreign corporation that is treated as a domestic corporation for Federal tax purposes under I.R.C. §§269B, 953(d), 1504(d) or any other provision of the Internal Revenue Code), only assets that are U.S. assets under Treasury Regulation §1.884-1(d) shall be taken into account for purposes of part 5.2.1.2.d.2 of this rule, and only transactions that give rise to income that is effectively connected with the conduct of a trade or business within the United States (or to losses, expenses, or deductions allocated or apportioned to such income) shall be taken into account for purposes of this reportable transaction.

5.2.1.2.d.4. **Owners of disregarded entities.** In the case of an eligible entity that is disregarded as an entity separate from its owner for Federal tax purposes, items of income, gain, loss, or expense that otherwise are considered items of the entity for book purposes shall be treated as items of its owner, and items arising from transactions between the entity and its owner shall be disregarded, for purposes of this reportable transaction.

5.2.1.2.d.5. **Partners of partnerships.** In the case of a taxpayer that is a member or a partner of an entity that is treated as a partnership for Federal tax purposes, items of income, gain, loss, or expense that are allocable to the taxpayer for Federal tax purposes, but otherwise are considered items of the entity for book purposes, shall be treated as items of the taxpayer for purposes of this reportable transaction.

5.2.1.2.e. **Transactions involving a brief asset holding period.** A transaction involving a brief asset holding period is any transaction resulting in the taxpayer claiming a tax credit exceeding \$250,000 (including a foreign tax credit)

if the underlying asset giving rise to the credit is held by the taxpayer for 45 days or less. For purposes of determining the holding period, the principles of I.R.C. §§246(c)(3) and (c)(4) apply. Transactions resulting in a foreign tax credit for withholding taxes or other taxes imposed in respect of a dividend that are not disallowed under I.R.C. §901(k) (including transactions eligible for the exception for securities dealers under I.R.C. §901(k)(4)) are excluded.

#### **§110-10E-6. Investor list requirements.**

6.1. Following are the requirements for the providing of investor lists to the Tax Commissioner for any investor list required to be maintained under I.R.C. §6112 and Treasury Regulations Section 301.6112-1 with respect to a potentially abusive tax shelter.

6.1.1. **Federal potentially abusive tax shelter.** -- Each person required to maintain an investor list is required to furnish the investor list to the Tax Commissioner not later than the time the investor list is required to be furnished to the Internal Revenue Service under federal income tax law. The list required under this subdivision shall include the same information required with respect to a potentially abusive tax shelter under Treasury Regulations Section 301.6112-1 and any other information that the Tax Commissioner may require.

6.1.2. **Additional requirements for listed transactions.** -- For transactions entered into on or after February 28, 2000 and that become listed transactions (as defined under Treasury Regulations Section 1.6011-4 and section 3 of this rule) at any time thereafter, the investor list shall be furnished to the Tax Commissioner by the later of 60 days after entering into the transaction or 60 days after the transaction becomes a listed transaction.

6.1.3. **Tax shelters subject to this section.** -- The provisions of this section apply to any tax shelter herein described in which a person:

6.1.3.1. Organizes or participates in the sale of an interest in a partnership, entity or other plan or arrangement; and

6.1.3.2. Makes or causes another person to make a false or fraudulent statement with respect to securing a tax benefit or a gross valuation as to any material matter; and which is or was one or more of the following:

6.1.3.2.a. Organized in this state;

6.1.3.2.b. Doing business in this state; or

6.1.3.2.c. Deriving income from sources in this state.

#### **§110-10E-7. Duration and Application of the Voluntary Compliance Program**

7.1. The Voluntary Compliance Program implemented herein is available for eligible taxpayers who are subject to tax imposed under West Virginia Code §11-21-1 et seq., or §11-24-1 et seq., and who have previously underreported, unreported, unpaid, underpaid or have otherwise not acknowledged tax liabilities resulting from their participation in a tax avoidance transaction, including but not limited to, the reportable transactions listed and defined in subsections 3 of this rule, that are due and owing for taxable years beginning before January 1, 2006.

7.1.1. An otherwise eligible taxpayer is prohibited from participating in the Voluntary Compliance Program if:

7.1.1.1. The taxpayer is a party to any federal or state criminal investigation for underreporting or underpayment of tax;

7.1.1.2. As of the taxpayer's application date under the Voluntary Compliance Program, the taxpayer is a party to any pending administrative proceeding or civil or criminal litigation relating to the designated taxes under the Voluntary Compliance Program. An administrative proceeding or civil litigation shall be deemed not pending on the application date if the taxpayer withdraws from that proceeding or litigation before the Tax Commissioner's penalty waiver under the Voluntary Compliance Program;

7.1.1.3. The taxpayer has a criminal conviction concerning the tax on which penalty relief is sought;

7.1.1.4. The taxpayer was eligible to participate in the amnesty program under West Virginia Code §11-10D-1 et seq., but did not do so, and the taxpayer participated in the voluntary compliance programs of any other state.

7.1.2. The Voluntary Compliance Program shall be conducted from August 1, 2006 through November 1, 2006.

7.1.3. The Voluntary Compliance Program applies to Personal Income Tax and Corporation Net Income Tax liabilities attributable to the use of tax avoidance transactions, including but not limited to, the reportable transactions listed and defined in section 3 of this rule, but only for such reportable transactions entered into prior to January 1, 2006.

7.1.4. Obligations for payments and returns of taxes not imposed under West Virginia Code §11-21-1 et seq. or West Virginia Code §11-24-1 et seq., are not eligible for the Voluntary Compliance Program.

**§110-10E-8 Election, voluntary compliance with and without appeal, eligible taxpayer status, time periods**

**8.1. Election** – An eligible taxpayer that meets the requirements of West Virginia Code §11-10E-2(d) with respect to any taxable year to which West Virginia Code §11-10E-1 et seq. applies may elect to participate in the Voluntary Compliance Program under one of two procedures described below, for any particular tax avoidance transaction period. Such election shall be made separately for each taxable year. Such election, once made, is irrevocable.

**8.1.1. Voluntary compliance without appeal** – Once the eligible taxpayer elects to participate in the Voluntary Compliance Program under this procedure, the Tax Commissioner:

8.1.1.1. Shall abate and not seek to collect any penalty that may be applicable to the underreporting or underpayment of West Virginia tax attributable to the use of tax avoidance transactions for such taxable year;

8.1.1.2. Except as otherwise provided in West Virginia Code §11-10E-1 et seq., shall not seek civil or criminal prosecution against the taxpayer for such taxable year with respect to tax avoidance transactions; and

8.1.1.3. The taxpayer may not file a claim for credit or refund with respect to the tax avoidance transaction for the taxable year. Nothing in this subdivision may preclude a taxpayer from filing a claim for credit or refund for the same taxable year in which a tax avoidance transaction was reported if such credit or refund is not attributable to the tax avoidance transaction.

8.1.1.4. No penalty may be waived or abated under West Virginia Code §11-10E-1 et seq., or this subdivision if the penalty imposed relates to West Virginia income tax assessed prior to the August 1, 2006.

**8.1.2. Voluntary compliance with appeal** – Once an eligible taxpayer elects to participate in the Voluntary Compliance Program under this procedure, the Tax Commissioner:

8.1.2.1. Shall abate and not seek to collect any penalty that may be applicable for the failure to report listed transactions, with respect to such taxable year;

8.1.2.2. Except as otherwise provided in West Virginia Code §11-10E-1 et seq., shall not seek civil or criminal prosecution against the taxpayer for such taxable year with respect to tax avoidance transactions; and

8.1.2.3. The taxpayer may file a claim for credit or refund as provided in West Virginia Code §11-10-1 et seq., with respect to such taxable year.

8.1.2.4. Notwithstanding any other provision of the West Virginia Code to the contrary, the taxpayer electing to participate in the Voluntary Compliance Program with appeal may not file such appeal until after either of the following:

8.1.2.4.a. The Tax Commissioner issues a notice of denial;

or

8.1.2.4.b. The earlier of:

8.1.2.4.b.1. The date which is 180 days after the date of a final determination by the Internal Revenue Service with respect to the transactions at issue;

8.1.2.4.b.2. The date that is three years after the date the claim for refund or credit was filed; or

8.1.2.4.b.3. One year after full payment of all tax, including penalty and interest.

8.2. No penalty may be waived or abated under West Virginia Code §11-10E-1 et seq., or this subsection if the penalty imposed relates to an amount of West Virginia income tax assessed prior to August 1, 2006..

8.3. **Time period** – The eligible taxpayer must elect the voluntary compliance procedure to be used and complete all other acts prescribed the Tax Commissioner during the period August 1, 2006 to November 1, 2006.

8.3.1. The eligible taxpayer, during the time period stated above, is required to complete the following:

8.3.1.1. File an amended return for each taxable year for which the taxpayer used a tax avoidance transaction to underreport the taxpayer's West Virginia income tax liability, reporting the total West Virginia taxable income and income tax for the taxable year computed without regard to any tax avoidance transactions; and

8.3.1.2. Make a full payment of the additional income tax and interest due for such taxable year that is attributable to the use of the tax avoidance transaction.

**§110-10E-9. Use of evidence of participation in the Voluntary Compliance Program.**

9.1. The fact of a taxpayer's participation in the Voluntary Compliance Program shall not be considered evidence that the taxpayer in fact engaged in a tax avoidance transaction.

**§110-10E-10. One hundred percent interest penalty for failure to participate.**

10.1. If an eligible taxpayer who fails to participate in the Voluntary Compliance Program is contacted by the Internal Revenue Service or the Tax Commissioner regarding the potential use of a tax avoidance transaction with respect to a taxable year or years and has a deficiency with respect to such taxable year or years, there shall be added to the tax attributable to the potential tax avoidance transaction an amount equal to 100% of the interest due under West Virginia Code §11-10-1 et seq., for the period beginning with the statutory due date of the return (determined without regard to extensions) on which the income should have been reported to the date of the notice of assessment. The penalty shall be deemed assessed upon the assessment of the interest to which the penalty relates and shall be collected and paid in the same manner as the interest. The penalty imposed in this subsection is in addition to any other penalty imposed by West Virginia Code §11-10E-1 et seq., or West Virginia Code §11-10-1 et seq. This subsection shall apply to taxable years ending on and after December 31, 2005.

10.2. The penalty imposed by West Virginia Code §11-10E-5 is in addition to any other penalty imposed by West Virginia Code §§11-10-1 et seq., or 11-10E-1 et seq.

**§110-10E-11. Program encompasses investor list requirement**

11.1. The Voluntary Compliance Program provides amnesty to persons that previously failed to provide investor lists to the Tax Commissioner if those investor lists are provided to the Tax Commissioner prior to the completion of the Voluntary Compliance Program on November 1, 2006.

11.2. The Voluntary Compliance Program provides amnesty to tax shelter organizers required to register tax shelters under I.R.C. § 6111 prior to its amendment on October 22, 2004, and to material advisors required under I.R.C. § 6111 after its amendment on October 22, 2004 to register reportable transactions, including listed transactions, but that did not register tax shelters or reportable transactions, including listed transaction, with the Tax Commissioner, if the information relevant to those shelters and transactions that was provided to the Internal Revenue Service is provided to the Tax Commissioner prior to completion of the Voluntary Compliance Program on November 1, 2006.