

107TH CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the Internal Revenue Code of 1986 to provide for adequate disclosure of items attributable to tax shelters, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; AMENDMENT OF 1986 CODE.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Tax Shelter Disclosure Act”.

6 (b) **AMENDMENT OF 1986 CODE.**—Except as other-
7 wise expressly provided, whenever in this Act an amend-
8 ment or repeal is expressed in terms of an amendment
9 to, or repeal of, a section or other provision, the reference

1 shall be considered to be made to a section or other provi-
2 sion of the Internal Revenue Code of 1986.

3 **TITLE I—TREATMENT OF PAR-**
4 **TICIPANTS IN TAX SHELTERS**

5 **SEC. 101. PENALTY FOR UNDERSTATEMENTS ATTRIB-**
6 **UTABLE TO TAX SHELTERS.**

7 (a) PENALTY.—

8 (1) IMPOSITION OF PENALTY.—Section 6662(a)
9 (relating to imposition of penalty) is amended to
10 read as follows:

11 “(a) IMPOSITION OF PENALTY.—

12 “(1) IN GENERAL.—If this section applies to
13 any portion of an underpayment of tax required to
14 be shown on a return, there shall be added to the
15 tax an amount equal to 20 percent of the portion of
16 the underpayment to which this section applies.

17 “(2) APPLICABLE TAX SHELTER UNDERSTATE-
18 MENT.—If a taxpayer has an applicable tax shelter
19 understatement for any taxable year, there shall be
20 added to the tax an amount equal to 40 percent of
21 the amount of the understatement.”

22 (2) APPLICABLE TAX SHELTER UNDERSTATE-
23 MENT.—Section 6662 (relating to imposition of ac-
24 curacy-related penalty) is amended by adding at the
25 end the following new subsection:

1 “(i) APPLICABLE TAX SHELTER UNDERSTATE-
2 MENT.—

3 “(1) APPLICABLE UNDERSTATEMENT DE-
4 FINED.—

5 “(A) IN GENERAL.—The term ‘applicable
6 tax shelter understatement’ means any increase
7 in a taxpayer’s income tax which results from
8 a difference between the taxpayer’s treatment
9 of items attributable to a tax shelter (as shown
10 on the taxpayer’s return of tax) and the proper
11 tax treatment of such items.

12 “(B) LIMITED DOLLAR EXCEPTION.—

13 “(i) IN GENERAL.—An increase in tax
14 with respect to any tax shelter shall not be
15 treated as an applicable tax shelter under-
16 statement under subparagraph (A) if it is
17 less than \$50,000.

18 “(ii) AGGREGATION.—For purposes of
19 clause (i), any applicable tax shelter under-
20 statement of a taxpayer with respect to
21 any tax shelter shall include any applicable
22 tax shelter understatement with respect to
23 such shelter of a related person (within the
24 meaning of section 267 or 707) to the tax-
25 payer.

1 “(C) SPECIAL RULE FOR AMENDED RE-
2 TURNS.—Except as provided in regulations, in
3 no event shall any tax treatment included with
4 an amendment or supplement to a return of tax
5 be taken into account under subparagraph (A)
6 if the amendment or supplement is filed after
7 the earlier of the date the taxpayer is first con-
8 tacted by the Secretary regarding the examina-
9 tion of the return or such other date as is speci-
10 fied by the Secretary.

11 “(2) SPECIAL RULES IN DETERMINING APPLI-
12 CABLE UNDERSTATEMENT.—For purposes of deter-
13 mining whether there is an applicable tax shelter un-
14 derstatement under paragraph (1), the amount of
15 the understatement under paragraph (1) shall be re-
16 duced by that portion of the understatement attrib-
17 utable to any item if—

18 “(A) there was substantial authority for
19 the tax treatment of such item by the taxpayer,

20 “(B) the relevant facts affecting the item’s
21 tax treatment are adequately disclosed in the
22 return or in a statement attached to the return,
23 and

24 “(C) the taxpayer had reasonable belief
25 that the tax treatment of such item by the tax-

1 payer was more likely than not the proper
2 treatment.

3 “(3) RULES RELATING TO REASONABLE BE-
4 LIEF.—For purposes of paragraph (2)(C)—

5 “(A) IN GENERAL.—A taxpayer shall be
6 treated as having a reasonable belief with re-
7 spect to the tax treatment of an item only if
8 such belief—

9 “(i) is based on the facts and law that
10 exist at the time the return of tax which
11 includes such tax treatment is filed, and

12 “(ii) relates solely to the taxpayer’s
13 chances of success on the merits of such
14 treatment and does not take into account
15 the possibility that a return will not be au-
16 dited, such treatment will not be raised on
17 audit, or such treatment will be resolved
18 through settlement if it is raised.

19 “(B) CERTAIN OPINIONS MAY NOT BE RE-
20 LIED UPON.—

21 “(i) IN GENERAL.—An opinion of a
22 tax advisor may not be relied upon to es-
23 tablish the reasonable belief of a taxpayer
24 if—

1 “(I) the tax advisor is described
2 in clause (ii), or

3 “(II) the opinion is described in
4 clause (iii).

5 “(ii) DISQUALIFIED TAX ADVISORS.—
6 A tax advisor is described in this clause if
7 the tax advisor—

8 “(I) is an organizer or promoter
9 of the tax shelter,

10 “(II) is compensated directly or
11 indirectly by such organizer or pro-
12 moter with respect to the tax shelter,

13 “(III) has a contingent fee ar-
14 rangement with respect to such tax
15 shelter,

16 “(IV) has any type of referral
17 agreement or other similar agreement
18 or understanding with such organizer
19 or promoter which relates to the tax
20 shelter, or

21 “(V) has any other similar char-
22 acteristic which, as determined under
23 regulations prescribed by the Sec-
24 retary, is indicative of a potential con-

1 flict of interest or compromise of inde-
2 pendence.

3 “(iii) DISQUALIFIED OPINIONS.—An
4 opinion is described in this clause if the
5 opinion—

6 “(I) is based on unreasonable
7 factual or legal assumptions (includ-
8 ing assumptions as to future events),

9 “(II) unreasonably relies on rep-
10 resentations, statements, findings, or
11 agreements of the taxpayer or any
12 other person,

13 “(III) does not identify and con-
14 sider all relevant facts, or

15 “(IV) fails to meet any other re-
16 quirement as the Secretary may pre-
17 scribe.

18 “(iv) DEFINITIONS.—For purposes of
19 this subparagraph, the terms ‘organizer’
20 and ‘promoter’ have the meanings given
21 such terms by section 6111.

22 “(4) TAX SHELTER.—For purposes of this sub-
23 section, the term ‘tax shelter’ includes any entity,
24 plan, arrangement, or transaction if a significant
25 purpose of such entity, plan, arrangement, or trans-

1 action is the avoidance or evasion of Federal income
2 tax.”

3 (b) COORDINATION WITH OTHER TAX SHELTER
4 PROVISIONS.—

5 (1) SUBSTANTIAL UNDERSTATEMENT PEN-
6 ALTY.—Section 6662(d)(2)(C) is amended to read as
7 follows:

8 “(C) COORDINATION WITH APPLICABLE
9 TAX SHELTER UNDERSTATEMENTS.—

10 “(i) IN GENERAL.—This subsection
11 shall not apply to any applicable tax shel-
12 ter understatement to which subsection (i)
13 applies.

14 “(ii) EXCEPTION.—Any understate-
15 ment described in clause (i) shall be taken
16 into account in determining whether para-
17 graph (1) applies to other understatements
18 not so described.”

19 (2) REASONABLE CAUSE EXCEPTION NOT TO
20 APPLY.—Section 6664(c)(1) (relating to reasonable
21 cause exception) is amended by adding at the end
22 the following: “This subsection shall not apply to a
23 penalty imposed under section 6662(a) which is at-
24 tributable to any applicable tax shelter understate-
25 ment described in section 6662(i).”

1 (3) TAX SHELTER DEFINITIONS.—

2 (A) Section 461(i)(3)(C) (defining tax
3 shelter) is amended by striking “section
4 6662(d)(2)(C)(iii)” and inserting “section
5 6662(i)(4)”.

6 (B) Section 1274(b)(3)(B)(i) (defining po-
7 tentially abusive situation) is amended by strik-
8 ing “section 6662(d)(2)(C)(iii)” and inserting
9 “section 6662(i)(4)”.

10 (4) SUBSTANTIAL AUTHORITY.—

11 (A) Section 6662, as amended by sub-
12 section (a)(2), is amended by adding at the end
13 the following new subsection:

14 “(j) SUBSTANTIAL AUTHORITY.—For purposes of
15 subsections (d)(2) and (i), the Secretary shall prescribe
16 a list of positions for which the Secretary believes there
17 is, or there is not, substantial authority. Such list (and
18 any revision) shall be published in the Federal Register.”

19 (B) Section 6662(d)(2) (relating to under-
20 statement) is amended by striking subpara-
21 graph (D).

22 (c) EFFECTIVE DATE.—The amendments made by
23 this section shall apply to any tax shelter entered into
24 after the date of the enactment of this Act.

1 **SEC. 102. PENALTY FOR FAILING TO DISCLOSE REPORT-**
2 **ABLE TRANSACTION.**

3 (a) IN GENERAL.—Part I of subchapter B of chapter
4 68 (relating to assessable penalties) is amended by insert-
5 ing after section 6707 the following new section:

6 **“SEC. 6707A. PENALTY FOR FAILURE TO INCLUDE TAX**
7 **SHELTER INFORMATION WITH RETURN.**

8 “(a) IMPOSITION OF PENALTY.—Any person who
9 fails to include with its return of Federal income tax any
10 information required to be included under section 6011
11 with respect to a reportable transaction shall pay a penalty
12 in the amount determined under subsection (b). No pen-
13 alty shall be imposed on any such failure if it is shown
14 that such failure is due to reasonable cause.

15 “(b) AMOUNT OF PENALTY.—

16 “(1) IN GENERAL.—The amount of the penalty
17 under subsection (a) shall be equal to the greater
18 of—

19 “(A) 5 percent of any increase in Federal
20 tax which results from a difference between the
21 taxpayer’s treatment (as shown on its return)
22 of items attributable to the reportable trans-
23 action to which the failure relates and the prop-
24 er tax treatment of such items, or

25 “(B) \$100,000.

1 For purposes of subparagraph (A), the rule of sec-
2 tion 6662(i)(1)(C) shall apply.

3 “(2) LISTED TRANSACTION.—If the failure
4 under subsection (a) relates to a reportable trans-
5 action which is the same as, or substantially similar
6 to, a transaction specifically identified by the Sec-
7 retary as a tax avoidance transaction for purposes of
8 section 6011, paragraph (1) shall be applied by sub-
9 stituting ‘10 percent’ for ‘5 percent’ and ‘\$200,000’
10 for ‘\$100,000’.

11 “(c) REPORTABLE TRANSACTIONS.—For purposes of
12 this section, the term ‘reportable transaction’ means any
13 transaction with respect to which information is required
14 under section 6011 to be included with a taxpayer’s return
15 of tax because, as determined under regulations prescribed
16 under section 6011, such transaction has characteristics
17 which may be indicative of a tax shelter (as defined in
18 section 6662(i)(4)).

19 “(d) COORDINATION WITH OTHER PENALTIES.—
20 The penalty imposed by this section is in addition to any
21 penalty imposed under section 6662.”

22 (b) CONFORMING AMENDMENT.—The table of sec-
23 tions for part I of subchapter B of chapter 68 is amended
24 by inserting after the item relating to section 6707 the
25 following:

“Sec. 6707A. Penalty for failure to include tax shelter information on return.”

1 (c) EFFECTIVE DATE.—The amendments made by
2 this section shall apply to transactions entered into after
3 the date of the enactment of this Act.

4 **TITLE II—TREATMENT OF**
5 **OTHER PARTIES TO TAX**
6 **SHELTERS**

7 **SEC. 201. MODIFICATIONS OF PENALTIES FOR AIDING AND**
8 **ABETTING UNDERSTATEMENT OF TAX LI-**
9 **ABILITY INVOLVING TAX SHELTERS.**

10 (a) IMPOSITION OF PENALTY.—Section 6701(a) (re-
11 lating to imposition of penalty) is amended to read as fol-
12 lows:

13 “(a) IMPOSITION OF PENALTIES.—

14 “(1) IN GENERAL.—Any person—

15 “(A) who aids or assists in, procures, or
16 advises with respect to, the preparation or pres-
17 entation of any portion of a return, affidavit,
18 claim, or other document,

19 “(B) who knows (or has reason to believe)
20 that such portion will be used in connection
21 with any material matter arising under the in-
22 ternal revenue laws, and

23 “(C) who knows that such portion (if so
24 used) would result in an understatement of the
25 liability for tax of another person,

1 shall pay a penalty with respect to each such docu-
2 ment in the amount determined under subsection
3 (b).

4 “(2) CERTAIN TAX SHELTERS.—If—

5 “(A) any person—

6 “(i) aids or assists in, procures, or ad-
7 vises with respect to the creation, organiza-
8 tion, sale, implementation, management, or
9 reporting of a tax shelter (as defined in
10 section 6662(i)(4)), and

11 “(ii) opines, advises, represents, or
12 otherwise indicates (directly or indirectly)
13 that another person’s tax treatment of
14 items attributable to such tax shelter and
15 giving rise to an understatement of tax li-
16 ability would more likely than not prevail
17 or not give rise to a penalty, and

18 “(B) such opinion, advice, representation,
19 or indication is unreasonable,

20 then such person shall pay a penalty in the amount
21 determined under subsection (b). If a standard high-
22 er than the more likely than not standard was used
23 in any such opinion, advice, representation, or indi-
24 cation, then subparagraph (A)(ii) shall be applied as

1 if such standard were substituted for the more likely
2 than not standard.”

3 (b) AMOUNT OF PENALTY.—Section 6701(b) (relat-
4 ing to amount of penalty) is amended—

5 (1) by inserting “or (3)” after “paragraph (2)”
6 in paragraph (1),

7 (2) by striking “subsection (a)” each place it
8 appears and inserting “subsection (a)(1)”, and

9 (3) by redesignating paragraph (3) as para-
10 graph (4) and by adding after paragraph (2) the fol-
11 lowing:

12 “(3) TAX SHELTERS.—In the case of—

13 “(A) a penalty imposed by subsection
14 (a)(1) which involves a return, affidavit, claim,
15 or other document relating to a tax shelter (as
16 defined in subsection (a)(2)), and

17 “(B) any penalty imposed by subsection
18 (a)(2) with respect to a tax shelter,

19 the amount of the penalty shall be equal to 50 per-
20 cent of the gross income derived (or to be derived)
21 by the person in connection with the tax shelter.”

22 (c) REFERRAL AND PUBLICATION.—If a penalty is
23 imposed under section 6701(a)(2) of the Internal Revenue
24 Code of 1986 (as added by subsection (a)) on any person,
25 the Secretary of the Treasury shall—

1 (1) notify the Director of Practice of the Inter-
2 nal Revenue Service and any appropriate State li-
3 censing authority of the penalty and the cir-
4 cumstances under which it was imposed, and

5 (2) publish the identity of the person and the
6 fact the penalty was imposed on the person.

7 (d) CONFORMING AMENDMENTS.—

8 (1) Section 6701(e) is amended by striking
9 “subsection (a)(1)” and inserting “subsection (a)”.

10 (2) Section 6701(f) is amended by inserting “or
11 tax shelter” after “document” each place it appears.

12 (e) EFFECTIVE DATE.—The amendments made by
13 this section shall apply to activities after the date of the
14 enactment of this Act.

15 **SEC. 202. PENALTY ON PROMOTERS OF TAX SHELTERS.**

16 (a) PENALTY ON PROMOTING ABUSIVE TAX SHEL-
17 TERS.—Section 6700(a) is amended by adding at the end
18 the following new sentence: “Notwithstanding the first
19 sentence, if an activity with respect to which a penalty
20 imposed under this subsection involves a statement de-
21 scribed in paragraph (2)(A), the amount of the penalty
22 shall be equal to 50 percent of the gross income derived
23 (or to be derived) from such activity by the person on
24 which the penalty is imposed.”

1 (b) EFFECTIVE DATE.—The amendment made by
2 this section shall apply to activities after the date of the
3 enactment of this Act.

4 **SEC. 203. REGISTRATION OF CERTAIN TAX SHELTERS**
5 **WITHOUT CORPORATE PARTICIPANTS.**

6 (a) IN GENERAL.—Section 6111(d)(1)(A) (relating
7 to certain confidential arrangements treated as tax shel-
8 ters) is amended by striking “for a direct or indirect par-
9 ticipant which is a corporation”.

10 (b) EFFECTIVE DATE.—The amendment made by
11 this section shall apply to any tax shelter interest which
12 is offered to potential participants after the date of the
13 enactment of this Act.

14 **SEC. 204. FAILURE TO MAINTAIN LISTS.**

15 (a) FAILURE TO MAINTAIN LISTS.—Section 6708(a)
16 (relating to failure to maintain lists of investors in poten-
17 tially abusive tax shelters) is amended—

18 (1) by striking “and not due to willful neglect”
19 in the first sentence, and

20 (2) by adding at the end the following: “In the
21 case of a tax shelter (as defined in section
22 6662(i)(4))—

23 “(1) the penalty shall be equal to 50 percent of
24 the gross income derived (or to be derived) from
25 each person with respect to which there was a fail-

1 ure, reduced by the amount of any penalty imposed
2 with respect to such gross income under section
3 6707(a)(3), and

4 “(2) the limitation of the preceding sentence
5 shall not apply.”

6 (b) EFFECTIVE DATE.—The amendments made by
7 this section shall apply to any tax shelter interest which
8 is offered to potential participants after the date of the
9 enactment of this Act.

10 **SEC. 205. REGULATION OF INDIVIDUALS PRACTICING BE-**
11 **FORE THE DEPARTMENT OF TREASURY.**

12 (a) IN GENERAL.—Section 330(b) of title 31, United
13 States Code, is amended—

14 (1) by inserting “, or censure,” after “Depart-
15 ment”, and

16 (2) by adding at the end the following new
17 flush sentence:

18 “The Secretary may impose a monetary penalty on any
19 representative described in the preceding sentence. If the
20 representative was acting on behalf of an employer or any
21 firm or other entity in connection with the conduct giving
22 rise to such penalty, the Secretary may impose a monetary
23 penalty on such employer, firm, or entity if it knew, or
24 reasonably should have known, of such conduct. Such pen-
25 alty shall not exceed the representative’s (employer’s,

1 firm's, or entity's) gross income derived (or to be derived)
2 from the conduct giving rise to the penalty and may be
3 in addition to, or in lieu of, any suspension, disbarment,
4 or censure.”

5 (b) **EFFECTIVE DATE.**—The amendments made by
6 this section shall apply to actions taken after the date of
7 the enactment of this Act.