DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9853]

RIN 1545–BK62

Reportable Transactions Penalties Under Section 6707A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

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

DATES: *Effective Date:* These regulations are effective on March 26, 2019.

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations, Michael Franklin, (202) 317–6844 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations amending 26 CFR part 301 under section 6707A of the Internal Revenue Code. Section 6707A was added to the Code by section 811(a) of the American Jobs Creation Act of 2004 (Pub. L. 108–357, 118 Stat. 1418) and was amended by section 11(a)(41) of the Tax Technical Corrections Act of 2007 (Pub. L. 110–172, 121 Stat. 2473). Section 6707A imposes a penalty for failure to disclose a reportable transaction. It also imposes a penalty on certain taxpayers for failure to disclose in filings with the Securities and Exchange Commission (SEC) any requirement to pay a penalty under (1) section 6707A with respect to a listed transaction, (2) section 6662A with respect to an undisclosed reportable transaction, or (3) section 6662(h) with respect to an undisclosed reportable transaction. On September 11, 2008, temporary regulations (TD 9425) under section 6707A were published in the **Federal Register** (73 FR 52784). A notice of proposed rulemaking (REG–160868–04) cross-referencing the temporary regulations was published in the **Federal Register** on the same day (73 FR 52805).

Section 6707A was amended in 2010 by section 2041(a) of the Small Business Jobs Act of 2010 (Pub. L. 111–240, 124 Stat. 2504) (the Jobs Act), which changed the amount of the penalty from a stated dollar amount to a percentage of the decrease in tax shown on the return as a result of a reportable transaction and provided maximum and minimum penalty amounts. Before the Jobs Act was enacted, the penalty was $10,000 in the case of a natural person ($50,000 in any other case) and, in the case of a listed transaction, $100,000 in the case of a natural person ($200,000 in any other case). In some cases, this structure resulted in penalties that were potentially disproportionate to the tax benefit derived from the transaction. *See* ''Legislative Recommendations with Legislative Action: Modify Internal Revenue Code Section 6707A to Ameliorate Unconscionable Impact,'' National Taxpayer Advocate 2008 Annual Report to Congress vol. 1, at 419. In response, Congress amended section 6707A(b) through the Jobs Act. *See* Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress (JCS–2–11), March 2011 (explaining the reasons for the change to section 6707A).

The Jobs Act amended section 6707A(b) to make the penalty 75 percent of the decrease in tax shown on the return as a result of a reportable transaction, with a minimum penalty amount of $10,000 ($5,000 in the case of a natural person). The maximum penalty amount is $200,000 ($100,000 in the case of a natural person) for failure to disclose a listed transaction, or $50,000 ($10,000 in the case of a natural person) for failure to disclose any other reportable transaction. The Jobs Act amendment applies to penalties assessed after December 31, 2006. *See* Jobs Act § 2041(b), 124 Stat. at 2560.

On September 7, 2011, final regulations (TD 9550) were published in the **Federal Register** (76 FR 55256) adopting and amending the proposed regulations published on September 11, 2008. The final regulations in TD 9550 did not provide guidance on the amount of the penalty as amended by the Jobs Act beyond reciting the language of section 6707A because the notice of proposed rulemaking on which those final regulations were based predated the Jobs Act.

On August 28, 2015, the Treasury Department and the IRS published in the **Federal Register** (80 FR 52231–01) a notice of proposed rulemaking proposing amendments to regulations under 26 CFR part 301 to provide guidance on the amount of the penalty under section 6707A, as amended by the Jobs Act.

Summary of Comments and Explanation of Revisions

One electronic comment was submitted under the regulation number for the proposed regulations. The comment is available for public inspection at *http://www.regulations.gov* or upon request. The IRS received no requests for a public hearing, and none was held.

The comment addressed two different issues, the first being the definition of ''decrease in tax'' provided in § 301.6707A–1(d)(1)(i) of the proposed regulations. Section 6707A(b)(1) provides that, subject to certain minimum and maximum amounts, the amount of the penalty under subsection (a) of section 6707A with respect to any reportable transaction shall be 75 percent of the decrease in tax shown on the return as a result of such transaction (or which would have resulted from such transaction if such transaction were respected for federal tax purposes). Section 301.6707A–1(d)(1)(i) of the proposed regulations defines a ''decrease in tax'' generally as the difference between the amount of tax reported on the return as filed and the amount of tax that would be reported on a hypothetical return where the taxpayer did not participate in the reportable transaction. The definition in § 301.6707A–1(d)(1)(i) also encompasses situations where a taxpayer's participation in a reportable transaction creates a liability for a tax that would not exist absent participation in the transaction. For example, a taxpayer engaging in a listed transaction involving a Roth IRA may be subject to an excise tax on excess IRA contributions. If the taxpayer fails to report the excise tax on the taxpayer's excess IRA contributions, this amount of tax would not appear on the return filed by the taxpayer that reflected the taxpayer's participation in the reportable transaction. The excise tax would also not appear on a return filed by the taxpayer if the taxpayer had not engaged in the transaction, because there would be no excess contribution on which the excise tax would be imposed. Therefore, the difference between these two returns would result in no decrease in tax attributable to the abusive Roth IRA transaction. To account for this type of situation, § 301.6707A–1(d)(1)(i)(B) of the proposed regulations includes in the definition of decrease in tax ''any other tax that results from participation in the

reportable transaction but was not reported on the taxpayer's return.'' *Example 1* in § 301.6707A–1(d)(3)(i) illustrates this rule.

The commenter noted that the proposed regulation includes tax that should have been shown on the return, but was not, in the definition of ''decrease in tax'' described in § 301.6707A–1(d)(1)(i)(B) of the proposed regulations. The decrease in tax described in § 301.6707A–1(d)(1)(i)(B) of the proposed regulations will only exist if the taxpayer's reporting position is invalid. If the taxpayer's reporting position were determined to be correct, there would be no additional tax resulting from the participation in the reportable transaction that the taxpayer was required to, but did not, report on the taxpayer's return. The commenter contended that including this unreported tax as part of the decrease in tax used to calculate the penalty conflicts with the common understanding that the section 6707A penalty is intended to apply even if the taxpayer's reporting position is determined to be correct. In this situation, the Service will not be able to impose the penalty without first determining the merits of the reporting position. The commenter expressed concerns about whether Congress intended for the penalty to apply in such circumstances, absent adjudication on the merits of the underlying reporting position. The commenter noted that, in contrast, § 301.6707A–1(d)(1)(i)(A) of the proposed regulations defines ''decrease in tax'' by comparing the amount reported on the taxpayer's return (reflecting participation in the reportable transaction) with the tax liability that would be reported on a hypothetical return that did not reflect participation in the reportable transaction. This portion of the definition is not affected by the assumption that the taxpayer's reporting position is invalid.

The definition of ''decrease in tax'' in § 301.6707A–1(d)(1)(i) of the proposed regulations remains the same in the final regulations. The plain language of section 6707A supports the definition of decrease in tax provided in these final regulations. As noted above, section 6707A(b)(1) provides that the amount of the section 6707A penalty ''shall be 75 percent of the decrease in tax shown on the return as a result of such transaction.'' It is entirely consistent with this statutory language to include, when determining the ''decrease in tax'' upon which the amount of the penalty is calculated, other tax that would result from participation in the reportable transaction and that was not reported on the taxpayer's return. If the taxpayer's participation in the reportable transaction resulted in a decrease in the amount of tax reported on the return, the plain language of section 6707A allows that amount to be taken into account in determining the amount of the section 6707A penalty.

The same commenter also suggested adding an additional factor to the list of factors that the IRS considers when determining whether to rescind a section 6707A penalty in § 301.6707A–1(e)(3) of the final regulations (§ 301.6707A–1(d)(3) in the previous version of these regulations). The commenter suggested adding the filing of a timely amended return that removes the tax benefits claimed with respect to the reportable transaction to that list of factors. The commenter expressed concern that taxpayers might mistakenly believe that they can remedy the failure to disclose the reportable transaction by filing an amended return that does not report the benefits of the transaction and that the filing of such amended return renders moot any obligation to disclose participation in the reportable transaction.

The final regulations do not adopt this suggestion. The section 6707A penalty applies when a taxpayer fails to report participation in a reportable transaction as required under section 6011. The filing of an amended return that does not report the benefits of the reportable transaction does not remedy the failure to which the section 6707A penalty applies, namely the failure to report participation in the reportable transaction. Furthermore, the list of factors in § 301.6707A–1(e)(3) that the IRS considers in deciding whether to rescind a section 6707A penalty is not exclusive. The IRS is not precluded from considering factors other than those listed in the regulation, including the filing of an amended return.

Although no changes were made specifically in response to public comments, some revisions were made to the proposed regulations. Section 301.6707A–1(d)(1)(ii) was revised to clarify how the penalty is calculated in situations where a transaction becomes reportable after the filing of the return or returns reflecting participation in the transaction.

Section 1.6011–4(a) provides that every taxpayer that has participated in a reportable transaction and who is required to file a tax return must file within the time prescribed in § 1.6011–4(e) a disclosure statement in the form prescribed by § 1.6011–4(d). If a transaction becomes a listed transaction or a transaction of interest after the filing of the return or returns reflecting a taxpayer's participation in such transaction but while the period of limitations on assessment remains open for any year in which the taxpayer participated in the transaction, § 1.6011–4(e)(2)(i) requires the taxpayer to file a single disclosure statement with respect to the taxpayer's participation in the transaction with the Office of Tax Shelter Analysis (OTSA) within 90 calendar days after the date on which the transaction became a listed transaction or a transaction of interest. In order for a disclosure statement to be considered complete, § 1.6011–4(d) requires the disclosure statement to describe the expected tax treatment and all potential tax benefits expected to result from the transaction, describe any tax result protection with respect to the transaction, and identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the transaction and the identity of all parties involved in the transaction.

Section 1.6011–4(e)(2)(i) requires taxpayers to file a single disclosure statement with respect to a subsequently listed transaction or transaction of interest if the period of limitations on assessment remains open with respect to any year in which the taxpayer participated in the reportable transaction. Therefore, a taxpayer that first participated in a listed transaction or transaction of interest during a year for the which the period of limitations on assessment is closed at the time the transaction becomes reportable, but that also participated in the same reportable transaction during a year for which the period of limitations on assessment remains open at the time the transaction becomes reportable, is required to describe participation in that reportable transaction during years for which the period of limitations is closed at the time the transaction becomes reportable.

In the final regulations, § 301.6707A–1(d)(1)(ii) is revised to clarify that, when a taxpayer whose participation in a subsequently identified listed transaction or transaction of interest is reflected on more than one return and when that taxpayer fails to file, as required by § 1.6011–4(a), a complete and proper disclosure statement in the time prescribed under § 1.6011–4(e)(2)(i), the amount of the penalty will be calculated by aggregating the decrease in tax shown on each return for which the period of limitations on assessment remains open at the time the transaction becomes reportable, subject to the statutory minimum and maximum penalty amounts. Decreases in tax shown on returns for years for

which the period of limitations is not open at the time the transaction becomes reportable will not be taken into account in calculating the amount of the penalty. *Example 5* in § 301.6707A–1(d)(3)(v) is revised to more clearly illustrate how the penalty is calculated in situations where a taxpayer fails to disclose participation in a subsequently identified transaction.

Section 6501, which prescribes the period of limitation for assessment of tax, does not preclude the IRS from taking into account decreases in tax shown on returns for which the period of limitations has closed when calculating the amount of the penalty. However, in the interest of providing to taxpayers the repose generally provided for by the expiration of the period of limitations on assessment, these final regulations adopt an approach wherein those amounts are not taken into account in calculating the penalty. When a transaction becomes reportable after the filing of the return or returns reflecting participation in that transaction, the obligation to file a disclosure statement does not arise until the transaction becomes a listed transaction or transaction of interest. When the transaction becomes a listed transaction or transaction of interest, the taxpayer then has 90 calendar days to file a complete and accurate disclosure statement with the OTSA. It is the failure to file this disclosure statement that gives rise to liability for a single section 6707A penalty.

The approach to calculating the penalty adopted in these final regulations is also more administrable. By including in the calculation of the penalty only decreases in tax shown on returns for which the period of limitations on assessment remains open, there is certainty about which returns need to be reviewed and which decreases in tax are taken into account in calculating the amount of the penalty. If decreases in tax reported on returns for tax years for which the period of limitations on assessment is closed were taken into account in calculating the amount of the penalty, an indefinite number of prior year returns would have to be reviewed to determine whether the return reflects participation in the reportable transaction and to correctly calculate the penalty. The approach adopted in these regulations avoids this uncertainty, providing uniformity and repose to both taxpayers and the IRS.

In addition to the changes to § 301.6707A–1(d)(1)(ii), one additional example was added to § 301.6707A–1(d)(3)(vii) of the final regulations. *Example 7* illustrates the application of the penalty in situations where a taxpayer that fails to disclose a subsequently listed transaction files an amended return again reporting the tax benefits associated with that transaction but does not disclose participation in the transaction on the amended return as required by § 1.6011–4. Further, all examples were updated and revised for clarity with non-substantive changes.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because the final regulations would not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. No comments were received on the proposed regulations.

Drafting Information

The principal author of these regulations is Michael Franklin of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

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

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

■ **Par. 2.** Section 301.6707A–1 is amended by:

■ 1. Adding paragraph (b)(3).

■ 2. In paragraph (c)(1), removing the language ''(including an amended return or application for tentative refund)'' in the fifth sentence.

■ 3. Redesignating paragraphs (d), (e) and (f) as paragraphs (e), (f), and (g).

■ 4. Adding new paragraph (d).

■ 5. In newly designated paragraph (e), removing ''(d)(3)(i)'' and ''(d)(3)'' wherever they appear and adding ''(e)(3)(i)'' and ''(e)(3)'' in their place, respectively.

■ 6. In newly designated paragraph (e)(3)(i), removing the language ''(including an amended return or application for tentative refund)'' wherever it appears.

■ 7. In newly designated paragraph (f), removing ''(e)(1)'', ''(e)(2)'', ''(e)(3)'', and ''(e)(1)(i) through (e)(1)(iii)'' wherever they appear and adding ''(f)(1)'', ''(f)(2)'', ''(f)(3)'', and ''(f)(1)(i) through (iii)'' in their place, respectively.

■ 8. Revising newly designated paragraph (g).

The additions and revisions read as follows:

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

* * * * *

(b) * * *

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

* * * * *

(d) *Calculation of the penalty*—(1) *Decrease in tax*—(i) *In general.* (A) As used in this section, the phrase *decrease in tax shown on the return as a result of the transaction or the decrease that would have resulted from the transaction if it were respected for Federal tax purposes* means the sum of:

(*1*) The excess of the amount of the tax that would have been shown on the return if the return did not reflect the taxpayer's participation in the reportable transaction over the tax actually reported on the return reflecting participation in the reportable transaction; and

(*2*) Any other tax that results from participation in the reportable transaction but was not reported on the taxpayer's return.

(B) The amount of tax that would have been shown on the return if it did not reflect the taxpayer's participation in the reportable transaction includes adjustments that result mechanically from backing out the reportable transaction, such as tax items affected by an increase in adjusted gross income resulting from not participating in the transaction. The calculation of the penalty is unaffected by whether a taxpayer's tax liability is ultimately settled with the IRS for a different

amount or whether the taxpayer subsequently reports a different amount of tax on an amended return, because these amounts do not enter into the calculation of the decrease in tax shown on the return (or returns) to which the penalty relates.

(ii) *Subsequently identified transactions.* If the taxpayer fails to file, as required by § 1.6011–4(a) of this chapter, a complete and proper disclosure statement disclosing participation in a listed transaction or transaction of interest with respect to more than one return in the time prescribed under § 1.6011–4(e)(2)(i) of this chapter, the amount of the penalty will be computed by aggregating the decrease in tax shown on each return for which the period of limitations on assessment remains open.

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

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

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

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

(i) *Example 1.* Taxpayer X, a natural person, participated in a listed transaction involving a Roth IRA and filed a return reflecting participation in the transaction. X failed to disclose participation in the listed transaction as required by the regulations under section 6011. As a result of the transaction, X was liable under section 4973 for a $10,000 excise tax for excess contributions to X's Roth IRA. On X's return reflecting participation in the listed transaction, X correctly reported $25,000 of income tax, none of which was attributable to the listed transaction, but failed to report the excise tax. If X had not participated in the listed transaction, the excise tax under section 4973 would not have applied and X's income tax would have remained $25,000. There would, therefore, be no difference between the tax on the return as filed and the tax on the return if it did not reflect participation in the transaction. The excise tax, however, is another tax that resulted from participation in the transaction but was not reported on X's return, as described in paragraph (d)(1)(i)(B) of this section. Therefore, under paragraph (d)(1) of this section, the decrease in tax resulting from the listed transaction is $10,000. This amount is determined by adding zero (the excess of the amount of tax that would have been shown on X's return if the return did not reflect X's participation in the transaction over the tax X actually reported on the return reflecting X's participation in the transaction) and $10,000 (the amount of excise tax that resulted from participation in the transaction but was not reported on the return). The amount of the penalty under section 6707A is $7,500, which amount is 75 percent of the $10,000 decrease in tax.

(ii) *Example 2.* Taxpayer X participated in a listed transaction that resulted in a $40,000 decrease in the tax shown on the return reflecting participation in the transaction. X failed to disclose its participation in the transaction as required by the regulations under section 6011 and is, therefore, subject to a penalty under section 6707A. After weighing litigating hazards and other costs of litigation, the IRS Office of Appeals agreed to settle X's deficiency for $20,000. For purposes of calculating the amount of the penalty under paragraph (d)(1) of this section, the settlement does not affect the decrease in tax shown on X's return as a result of the listed transaction which remains $40,000. The amount of X's penalty under section 6707A is $30,000, which amount is 75 percent of the $40,000 decrease in tax.

(iii) *Example 3.* For the 2018 tax year, Taxpayer X, a natural person, failed to disclose participation in a reportable transaction that is not a listed transaction and, therefore, is subject to a penalty under section 6707A. After offsetting gross income with the losses generated in the reportable transaction, X's return reported adjusted gross income of $100,000. The return also reported $12,000 of medical expenses, $4,500 of which were deductible after applying the 7.5 percent floor in section 213(a) and (f). If X's return had not reflected participation in the reportable transaction, X's adjusted gross income would have been $140,000 and the deductible medical expenses would be limited to $1,500 ($3,000 less than the deductible amount claimed). Under paragraph (d)(1) of this section, the decrease in tax shown on X's return as a result of X's participation in the reportable transaction takes into account both the tax on the additional $40,000 in adjusted gross income had X not participated in the reportable transaction and the tax on the $3,000 adjustment to X's deductible medical expenses caused by the increase in adjusted gross income.

(iv) *Example 4.* Taxpayer X, a natural person, timely filed X's 2019 return and reported income tax of $40,000. X did not participate in a reportable transaction in 2019. X participated in a listed transaction in 2020, but failed to file a complete and proper disclosure statement with X's 2020 return as required by the regulations under section 6011. As filed, the 2020 return reports that X owes no tax and has a loss of $10,000. If the tax consequences of the listed transaction were not reflected on the 2020 return, the return would show income tax of $15,000 and no loss. X files an amended return for the 2019 tax year on which the only amendment is to carry back the $10,000 loss reported on the 2020 tax return to the 2019 tax year. The loss carryback reduces X's tax liability for 2019 by $3,000 to $37,000. X fails to file a complete and proper disclosure statement with the 2019 amended return as required by the regulations under section 6011. Two penalties under section 6707A apply: one for X's failure to disclose participation in a listed transaction reflected on the 2020 return and another for the failure to disclose participation in the same listed transaction reflected on the 2019 amended return. Under paragraph (d)(1) of this section, the decrease in tax on the 2020 return resulting from the listed transaction is $15,000, which is the excess of the amount of tax that would have been shown on X's 2020 return if that return did not reflect X's participation in the listed transaction over the tax X actually reported on the 2020 return. The amount of the section 6707A penalty with respect to the 2020 return is $11,250, which amount is 75 percent of the decrease in tax. Under paragraph (d)(1) of this section, the decrease in tax on the 2019 amended return that results from the listed transaction is $3,000. This amount is computed by determining the excess of the amount of tax that would have been shown on X's 2019 amended return if that return did not reflect X's participation in the listed transaction over the tax X actually reported on the 2019 amended return reflecting the loss carryback resulting from X's participation in the listed transaction in 2020. *See* paragraph (c) of this section. However, because X is a natural person, and because 75 percent of the $3,000 decrease in tax is less than $5,000, which is the minimum penalty under paragraph (a) of this section and section 6707A(b)(3), the section 6707A penalty with respect to the failure to disclose the listed transaction with respect to the 2019 amended return is $5,000. Accordingly, X is subject to a $11,250 section 6707A penalty for failure to disclose participation in a listed transaction reflected on the 2020 return and a $5,000 section 6707A penalty for failure to disclose participation in a listed transaction reflected on the 2019 amended return.

(v) *Example 5.* Taxpayer X, a corporation, timely files its 2019, 2020, and 2021 returns, each of which reflects participation in the same transaction. In 2023, the transaction becomes a listed transaction. When the transaction at issue became listed, the periods of limitations on assessment on X's 2020 and 2021 tax year were open, but the period of limitations on assessment on X's 2019 tax year was closed. Pursuant to § 1.6011–4(a) and (e)(2)(i) of this chapter, X is required to file a single disclosure statement reflecting its participation in the listed transaction 90 calendar days after the date on which the transaction becomes a listed transaction. X failed to file a disclosure

statement as required. Pursuant to paragraph (d)(1)(ii) of this section, the section 6707A penalty is computed by aggregating the decrease in tax shown on the 2020 return and the decrease in tax shown on the 2021 return. Because the period of limitations on assessment for X's 2019 tax year was closed at the time the transaction became listed, the decrease in tax shown on the 2019 return as a result of X's participation in the listed transaction is not taken into account in computing the amount of the penalty. The decreases in tax shown on the returns as a result of X's participation in the transaction are $265,000 in tax year 2020 and $7,000 in tax year 2021. Under paragraph (d)(1) of this section, the total decrease in tax shown is computed by adding the decrease in tax for 2020 and the decrease in tax for 2021, which is $272,000. Seventy-five percent of that amount is $204,000. Because X is a corporation, the maximum penalty amount is $200,000 under paragraph (a) of this section and section 6707A(b)(2)(A). Accordingly, X is subject to a section 6707A penalty of $200,000, rather than $204,000.

(vi) *Example 6.* Taxpayer X, a natural person, files X's 2019 return reflecting participation in a reportable transaction that is not a listed transaction, but fails to disclose the transaction as required by the regulations under section 6011. The decrease in tax with respect to X's 2019 return as a result of participation in the reportable transaction is $20,000. X files an amended 2019 return to include a net operating loss carried forward from a prior year, which X inadvertently failed to include when filing the original 2019 return. The amended return reflects participation in the same reportable transaction, but X again fails to disclose the transaction as required by the regulations under section 6011. The decrease in tax with respect to the amended 2019 return as a result of participation in the transaction is also $20,000. X is subject to two separate 6707A penalties: one for the failure to disclose the reportable transaction with respect to the tax benefits from the reportable transaction reflected on the original 2019 return and one for the failure to disclose the reportable transaction with respect to the tax benefits from the reportable transaction reflected on the amended 2019 return. Seventy-five percent of the $20,000 decrease in tax shown on the original 2019 return is $15,000 and on the amended 2019 return is another $15,000. However, because X is a natural person, the amount of the penalty for failure to disclose is limited to the maximum amount of $10,000 under § 301.6707A–1(a) and section 6707A(b)(2)(B). Accordingly, the amount of the section 6707A penalty for the 2019 original return is $10,000 and the amount of the section 6707A penalty for the 2019 amended return is also $10,000, for a total penalty of $20,000.

(vii) *Example 7.* Taxpayer X, a natural person, timely files X's 2019 return on April 15, 2020, reflecting participation in a transaction that was not identified as a reportable transaction when X filed the return, the only year X participated in the transaction. In early 2021, the IRS identifies the transaction as a listed transaction. X fails to disclose the listed transaction as required by the regulations under section 6011. In late 2021, X files an amended 2019 income tax return to claim deductions that had been omitted from the originally filed 2019 return. The amended 2019 return reflects X's participation in the listed transaction. X does not disclose the listed transaction when filing the amended 2019 return. The decrease in tax resulting from X's participation in the transaction is $100,000 with respect to the original 2019 return and $80,000 with respect to the 2019 amended return. Pursuant to § 1.6011–4(e)(2)(i) of this chapter, X was required to file a disclosure statement reflecting X's participation in the listed transaction if the period of limitations on assessment of tax remained open for any taxable year in which the taxpayer participated in the listed transaction. When the transaction at issue became listed, the period of limitations on assessment on X's 2019 tax year was open. Pursuant to § 1.6011–4(e)(1) of this chapter, X was also required to disclose participation in the transaction when the 2019 amended return was filed because the transaction was a listed transaction at that time. X is subject to two penalties under section 6707A: one for the failure to disclose participation in a listed transaction reflected on X's original 2019 return within 90 calendar days of the date the transaction became a listed transaction as required by § 1.6011–4(e)(2)(i) of this chapter and another for the failure to disclose participation in the same listed transaction reflected on the 2019 amended return. Seventy-five percent of this decrease in tax with respect to the original 2019 return is $75,000 (75 percent of $100,000) and with respect to the 2019 amended return is $60,000 (75 percent of $80,000). Pursuant to paragraph (d)(1)(iv) of this section, because X is subject to two separate penalties, the maximum penalty amount of $100,000 under § 301.6707A–1(a) and section 6707A(b)(2)(A) applies separately to each penalty and does not operate to reduce the amount of the X's 6707A penalties.

(viii) *Example 8.* Under § 1.6011–4 of this chapter, Partnership M is required to attach a disclosure statement to its Form 1065, U.S. Return of Partnership Income, for the 2020 taxable year. M fails to do so and is, therefore, subject to a penalty under section 6707A. No tax is required to be shown on M's Form 1065. Pursuant to § 301.6707A–1(d)(2), M is subject to the minimum section 6707A penalty of $10,000. The partners of Partnership M may have separate disclosure obligations as required by the regulations under section 6011 and would be subject to separate section 6707A penalties if they fail to comply with the disclosure requirements.

(ix) *Example 9.* In tax year 2019, Taxpayer X participated in a listed transaction that resulted in a $150,000 deduction. X's gross income for 2019 before the listed transaction deduction is $100,000. X uses $100,000 of the deduction resulting in zero tax liability for 2019. X carried over to tax year 2020 the remaining $50,000 net operating loss that was not used in 2019. X's gross income for tax year 2020 is $200,000 but as a result of the $50,000 net operating loss carryover, X reports $150,000 adjusted gross income. Pursuant to § 1.6011–4 of this chapter, X is required to disclose participation in the listed transaction for both 2019 and 2020, but X fails to make the required disclosures and is therefore subject to the section 6707A penalty for each failure. The decrease in tax on the 2019 return is the amount of tax on $100,000 because that is the difference between the amount of tax that would have been shown on the return if it did not reflect participation in the listed transaction and the tax actually reported. No other tax resulted from X's participation in the listed transaction. The amount of the penalty with respect to X's failure to disclose with respect to 2019 will be 75 percent of the decrease in tax. The decrease in tax on the 2020 return is the difference between the tax shown on the return as filed and the tax that would be shown if the $50,000 net operating loss was not used, including any changes to the amount of tax that are only indirectly connected with the listed transaction. The amount of the penalty with respect to X's failure to disclose with respect to 2020 will be 75 percent of the decrease in tax, subject to the minimum and maximum penalty amount limitations.

(x) *Example 10.* In tax year 2020, Taxpayer X, a natural person, participated in a listed transaction that resulted in a $50,000 deduction. X also has a net operating loss carryover of $150,000 from 2019. X uses the deduction of $50,000 and a portion of the net operating loss carryover resulting in zero tax liability for 2020. X carries over the remaining net operating loss to tax year 2021. X's gross income for 2021 is $250,000, but as a result of the net operating loss carryover, X reports reduced adjusted gross income of $150,000. Pursuant to § 1.6011–4 of this chapter, X is required to disclose participation in the listed transaction for both 2020 and 2021, but X fails to make the required disclosures and is subject to the section 6707A penalty for each failure. The decrease in tax on the 2020 return that results from the reportable transaction is zero. Because X has $150,000 of a net operating loss carryover not attributable to the reportable transaction, X's tax without the benefits of the reportable transaction is the same as the tax shown on the 2020 return as filed. Because X is a natural person, the minimum penalty of $5,000 under § 301.6707A–1(a) and section 6707A(b)(3) will apply for the failure to disclose the listed transaction with the 2020 return. The decrease in tax on the 2021 return is the difference between the tax shown on the return as filed and the tax that would be shown if X had only $50,000 of net operating loss to carry over to 2021 (*i.e.,* if X had not offset $50,000 of its 2020 gross income with the deduction resulting from the reportable transaction and thus had used $100,000 of its net operating loss carryover in 2020), including any changes to the amount of tax that are only indirectly connected with the listed transaction. The amount of the penalty with respect to the disclosure relating to 2021 will be 75 percent of this decrease in tax, subject to the minimum and maximum penalty amount limitations.

(xi) *Example 11.* Taxpayer X, a public corporation required to file periodic reports under section 13 or 15(d) of the Securities

Exchange Act of 1934, timely filed its 2019 return reflecting tax benefits from a reportable transaction that is not a listed transaction and properly disclosed the transaction in accordance with the regulations under section 6011. In 2023, as a result of an examination of X's 2019 return, the IRS imposes a penalty under section 6662A with respect to the reportable transaction. The decrease in tax for purposes of paragraph (d)(1) of this section is $190,000. As a person who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934, X is required, pursuant to section 6707A(e), to disclose the penalty imposed under section 6662A to the Securities and Exchange Commission in 2023, which X failed to do. X's failure to disclose the section 6662A penalty is treated as a failure to disclose to which section 6707A(b) applies. Thus, X is subject to a penalty under section 6707A(e), which equals 75 percent of the decrease in tax resulting from the transaction. The decrease in tax resulting from the reportable transaction was $190,000, 75 percent of which is $142,500. Because X is a corporation and the transaction is not a listed transaction, the amount of the penalty is limited to $50,000 under paragraph (a) of this section and section 6707A(b)(2)(B). Therefore, rather than $142,500, X is subject to a $50,000 section 6707A penalty for failure to disclose the section 6662A penalty to the SEC.

* * * * *

(g) *Applicability date.* (1) This section applies to penalties assessed after *March 26, 2019.*

(2) For penalties assessed before *March 26, 2019,* § 301.6707A–1 (as contained in 26 CFR part 1, revised April 2018) shall apply.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

Approved: November 16, 2018.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

Editorial note: This document was received for publication by the Office of the Federal Register on March 19, 2019.

[FR Doc. 2019–05546 Filed 3–25–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Parts 550 and 553

[Docket ID: BOEM–2019–0079; MMAA104000]

RIN 1010–AE03

Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Civil Penalties Inflation Adjustments

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Final rule.

SUMMARY: This final rule implements the 2019 adjustment of the level of the maximum daily civil monetary penalties contained in the Bureau of Ocean Energy Management (BOEM) regulations for violations of the Outer Continental Shelf Lands Act (OCSLA) and the Oil Pollution Act of 1990 (OPA), in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and relevant Office of Management and Budget (OMB) guidance. The 2019 adjustment multiplier of 1.02522 accounts for one year of inflation spanning the period from October 2017 through October 2018.

DATES: This rule is effective on March 26, 2019.

FOR FURTHER INFORMATION CONTACT: Deanna Meyer-Pietruszka, Chief, Office of Policy, Regulation and Analysis, Bureau of Ocean Energy Management, at (202) 208–6352 or by email at *deanna.meyer-pietruszka@boem.gov*.

SUPPLEMENTARY INFORMATION:

I. Background and Legal Authority
II. Calculation of 2019 Adjustments
III. Procedural Requirements
A. Regulatory Planning and Review (E.O. 12866, 13563, and 13771)
B. Regulatory Flexibility Act
C. Small Business Regulatory Enforcement Fairness Act
D. Unfunded Mandates Reform Act
E. Takings (E.O. 12630)
F. Federalism (E.O. 13132)
G. Civil Justice Reform (E.O. 12988)
H. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)
I. Paperwork Reduction Act
J. National Environmental Policy Act
K. Effects on the Energy Supply (E.O. 13211)

I. Background and Legal Authority

The OCSLA directs the Secretary of the Interior to adjust the OCSLA maximum daily civil penalty amount at least once every three years to reflect any increase in the Consumer Price Index to account for inflation (43 U.S.C. 1350(b)(1)).

The OPA does not include a maximum daily civil penalty inflation adjustment provision.

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114–74) (FCPIAA of 2015) requires Federal agencies to promulgate annual inflation adjustments for civil monetary penalties. Specifically, the FCPIAA of 2015 required agencies to adjust the level of civil monetary penalties with an initial ''catch-up'' adjustment through an interim final rulemaking (IFR) in 2016, and required agencies to make subsequent annual adjustments for inflation, beginning in 2017. Agencies were required to publish the first annual inflation adjustments in the **Federal Register** by no later than January 15, 2017, and must publish recurring annual inflation adjustments by no later than January 15 of each subsequent year. The purpose of these adjustments is to maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. For this year's annual inflation adjustment, BOEM is publishing this rule after the statutory January 15 deadline because of a lapse in government funding that began on December 22, 2018, and ended on January 25, 2019.

BOEM last adjusted the levels of civil monetary penalties in BOEM regulations through a final rule, RIN 1010–AD99 [83 FR 8930], which was published on March 2, 2018.

The OMB Memorandum M–19–04 (Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015; *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf*), issued December 14, 2018, explains agency statutory responsibilities for: Identifying applicable penalties and performing the annual adjustment; publishing revisions to regulations to implement the adjustment in the **Federal Register**; applying adjusted penalty levels; and performing agency oversight of inflation adjustments.

BOEM is promulgating this 2019 inflation adjustment for the OCSLA and OPA maximum daily civil penalties as a final rule pursuant to the provisions of the FCPIAA of 2015 and OMB guidance. A proposed rule is not required because the FCPIAA of 2015 expressly exempted the annual inflation adjustments implemented pursuant to the FCPIAA of 2015 from the pre-promulgation notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* (the APA), allowing those adjustments to be published directly as final rules.