

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9558]

RIN 1545-BJ21

**Corporate Reorganizations; Allocation of Basis in "All Cash D" Reorganizations****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final and temporary regulations.

**SUMMARY:** This document contains temporary regulations regarding the determination of the basis of stock or securities in a reorganization where no stock or securities of the issuing corporation is issued and distributed in the transaction. These temporary regulations clarify that, in certain reorganizations where no stock or securities of the issuing corporation is issued and distributed in the transaction, the ability to designate the share of stock of the issuing corporation to which the basis, if any, of the stock or securities surrendered will attach applies only to a shareholder that owns actual shares in the issuing corporation. These temporary regulations affect corporations engaging in such transactions and their shareholders. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

**DATES:** *Effective Date:* These regulations are effective on November 21, 2011.*Applicability Date:* For dates of applicability, see § 1.358-2T(d).**FOR FURTHER INFORMATION CONTACT:** Lisa A. Fuller at (202) 622-7550 (not a toll-free number).**SUPPLEMENTARY INFORMATION:****Background**

On December 19, 2006, the IRS and the Treasury Department published a notice of proposed rulemaking (REG-125632-06) in the **Federal Register** (71 FR 75898) that included regulations under section 368 (the Temporary Regulations). These regulations provided guidance regarding whether the distribution requirement under sections 368(a)(1)(D) and 354(b)(1)(B) is satisfied if there is no actual distribution of stock or securities. On December 18, 2009, the IRS and the Treasury Department published final regulations (TD 9475) in the **Federal Register** (71 FR

75879) that, in addition to providing guidance regarding the qualification of certain transactions as reorganizations described in section 368(a)(1)(D), amended the regulations under § 1.358-2(a)(2)(iii) to provide that in the case of a reorganization in which the property received consists solely of non-qualifying property equal to the value of the assets transferred (as well as a nominal share described in the final regulations), the shareholder or security holder may designate the share of stock of the issuing corporation to which the basis, if any, of the stock or securities surrendered will attach. The IRS and the Treasury Department issued these regulations in response to comments that, in a transaction where the consideration received consists solely of cash and a nominal share, the mechanics of preserving basis, if any, in the shares of the stock or securities surrendered in the basis of the stock of the issuing corporation were unclear under current law.

The IRS and the Treasury Department have become aware that some maintain these rules, as written, could be interpreted to allow an inappropriate allocation of basis by persons that do not own actual shares of stock in the issuing corporation. This interpretation would most likely be asserted in the context of a lower-tier reorganization transaction involving corporations in two different ownership chains that have the same ultimate indirect shareholder(s). Specifically, the argument is that the rules could be interpreted to allow persons who do not own actual shares of stock of the issuing corporation to allocate the adjusted basis of the nominal share to an actual share of stock of the issuing corporation directly owned by someone else before the nominal share is deemed to be further transferred through the chains of ownership to reflect the actual ownership of the target and issuing corporations. Under this interpretation of the rules, the actual share to which the basis was allocated could then be sold to recognize a loss, and taxpayers would avoid losing the nominal share's basis, which would otherwise be zero following its deemed transfer through the chains of ownership to the actual shareholder of the issuing corporation.

For example, assume that J owns all the stock of corporations X and Y, and X owns all of the stock of corporation T. X has a \$150 basis in the T stock. The corporations do not join in the filing of a consolidated return. T sells all of its assets to Y for \$100 cash, their fair market value, and liquidates. Pursuant to § 1.368-2(l), Y will be deemed to issue a nominal share of Y stock to T in

addition to the \$100 actually exchanged for the T assets, and T will be deemed to distribute the nominal share of Y stock to X. X will have a basis of \$50 in the nominal share of Y stock under section 358(a). Pursuant to § 1.368-2(l), the nominal share of Y stock is deemed to be further transferred to J in order to reflect the actual ownership of Y. J's basis in the nominal share of Y stock would be zero under section 301(d). However, some argue that the rule, as currently written, could be interpreted as allowing X to allocate the \$50 of basis in the nominal share to an actual share of Y stock owned by J prior to the nominal share of Y stock being deemed to be further distributed to J.

The IRS and the Treasury Department did not intend for the final regulations to allow such an inappropriate allocation of basis and do not believe the current regulations support such an allocation. Accordingly, the IRS and the Treasury Department are proposing rules in the Proposed Rules section in this issue of the **Federal Register**, to clarify that, in certain reorganizations where no stock or securities of the issuing corporation is issued and distributed in the transaction, the ability to designate the share of stock of the issuing corporation to which the basis, if any, of the stock or securities surrendered will attach applies only to a shareholder that owns actual shares in the issuing corporation.

**Explanation of Provisions**

The preamble to the final regulation noted that the IRS and the Treasury Department believe the ability to designate any remaining basis is consistent with current law regarding basis determination, as a similar result would occur under § 1.358-2 if an amount of issuing corporation stock was actually issued in the transaction (74 FR 67053; 74 FR 67056; TD 9475). To complete the analogy, however, in the case where stock is actually issued in a lower-tier transfer, such stock would then be transferred through chains of ownership, and in the process, if basis in the stock exceeded value, the basis in the shares would be reduced to the fair market value of the shares in the hands of the distributee, under section 301(d). Accordingly, in such a case, basis in excess of the value of the issuing corporation shares would generally be preserved only where the shareholder of the transferor corporation does not further distribute the stock of the issuing corporation in a transaction to which section 301 applies.

Consistent with this view, these temporary regulations clarify and amend the final regulations (TD 9475)

under § 1.358-2(a)(2)(iii) by providing that if an actual shareholder of the issuing corporation is deemed to receive a nominal share of stock of the issuing corporation described in § 1.368-2(l), such shareholder must, after allocating and adjusting the basis of the nominal share in accordance with the rules of this section and § 1.358-1, and after adjusting the basis in the nominal share for any transfers described in § 1.358-1, designate the share of stock of the issuing corporation to which the basis, if any, of the nominal share will attach.

The IRS and the Treasury Department also are clarifying the effective date for a 2009 amendment to the regulations under § 1.358-2(a)(iii).

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act, please refer to the cross-reference notice of proposed rulemaking published elsewhere in this **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### Drafting Information

The principal author of these regulations is Lisa A. Fuller of the Office of the Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 1.358-2 also issued under 26 U.S.C. 358(b)(1).

■ **Par. 2.** Section 1.358-2 is amended by:

■ 1. Revising paragraph (a)(2)(iii).

■ 2. Revising paragraph (d).

The revisions read as follows:

#### § 1.358-2 Allocation of basis among nonrecognition property.

(a) \* \* \*

(2) \* \* \*

(iii) [Reserved]. For further guidance, see § 1.358-2T(a)(2)(iii).

\* \* \* \* \*

(d) *Effective/applicability date.* This section generally applies to exchanges and distributions of stock and securities occurring on or after January 23, 2006. However, paragraph (a)(2)(iii) of this section applies to exchanges and distributions of stock and securities occurring on or after November 21, 2011. See § 1.358-2(a)(2)(iii), as contained in 26 CFR part 1 revised as of April 1, 2010, for exchanges and distributions of stock and securities occurring on or after January 23, 2006, and before November 21, 2011.

■ **Par. 3.** Section 1.358-2T is added to read as follows:

#### § 1.358-2T Allocation of basis among nonrecognition property (temporary).

(a)(1) through (a)(2)(ii) [Reserved]. For further guidance, see § 1.358-2(a)(1) through (a)(2)(ii).

(iii) For purposes of this section, if a shareholder or security holder surrenders a share of stock or a security in a transaction under the terms of section 354 (or so much of section 356 as relates to section 354) in which such shareholder or security holder receives no property or property (including property permitted by section 354 to be received without the recognition of gain or “other property” or money) with a fair market value less than that of the stock or securities surrendered in the transaction, such shareholder or security holder shall be treated as follows.

(A) First, the shareholder or security holder shall be treated as receiving the stock, securities, other property, and money actually received by the shareholder or security holder in the transaction and an amount of stock of the issuing corporation (as defined in § 1.368-1(b)) that has a value equal to the excess of the value of the stock or securities the shareholder or security holder surrendered in the transaction over the value of the stock, securities, other property, and money the shareholder or security holder actually received in the transaction. If the shareholder owns only one class of stock of the issuing corporation the receipt of which would be consistent with the economic rights associated with each class of stock of the issuing

corporation, the stock deemed received by the shareholder pursuant to the previous sentence shall be stock of such class. If the shareholder owns multiple classes of stock of the issuing corporation the receipt of which would be consistent with the economic rights associated with each class of stock of the issuing corporation, the stock deemed received by the shareholder shall be stock of each such class owned by the shareholder immediately prior to the transaction, in proportion to the value of the stock of each such class owned by the shareholder immediately prior to the transaction. The basis of each share of stock or security deemed received and actually received shall be determined under the rules of this section.

(B) Second, the shareholder or security holder shall then be treated as surrendering all of its shares of stock and securities in the issuing corporation, including those shares of stock or securities held immediately prior to the transaction, those shares of stock or securities actually received in the transaction, and those shares of stock deemed received pursuant to the previous sentence, in a reorganization under section 368(a)(1)(E) in exchange for the shares of stock and securities of the issuing corporation that the shareholder or security holder actually holds immediately after the transaction. The basis of each share of stock and security deemed received in the reorganization under section 368(a)(1)(E) shall be determined under the rules of this section.

(C) If an actual shareholder of the issuing corporation is deemed to receive a nominal share of stock of the issuing corporation described in § 1.368-2(l), such shareholder must, after allocating and adjusting the basis of the nominal share in accordance with the rules of this section and § 1.358-1, and after adjusting the basis in the nominal share for any transfers described in § 1.368-2(l), designate the share of stock of the issuing corporation to which the basis, if any, of the nominal share will attach.

(a)(2)(iv) through (c), *Example 14* [Reserved]. For further guidance, see § 1.358-2(a)(2)(iv) through (c), *Example 14*.

*Example 15.* (i) *Facts.* Each of Corporation X and Corporation Y has a single class of stock outstanding, all of which is owned by J, an individual. J acquired 100 shares of Corporation X stock on Date 1 for \$1.50 each. On Date 2, Corporation Y acquires the assets of Corporation X for \$100 of cash, their fair market value, in a transaction described in § 1.368-2(l). Pursuant to the terms of the exchange, Corporation X does not receive any Corporation Y stock. Corporation X

distributes the \$100 of cash to J in liquidation. Pursuant to § 1.368-2(l), Corporation Y will be deemed to issue a nominal share of Corporation Y stock to Corporation X in addition to the \$100 of cash actually exchanged for the Corporation X assets, and Corporation X will be deemed to distribute all of the consideration to J. J will have a basis of \$50 in the nominal share of Corporation Y stock under section 358(a).

(ii) *Analysis.* Under paragraph (a)(2)(iii) of this section, J is the actual shareholder of Corporation Y, the issuing corporation, deemed to receive the nominal share of Corporation Y stock described in § 1.368-2(l). Therefore, J must designate any share of Corporation Y stock to which the basis of \$50 in the nominal share of Corporation Y stock will attach.

*Example 16.* (i) *Facts.* Each of Corporation X and Corporation Y has a single class of stock outstanding, all of which is owned by Corporation P. Corporation T has a single class of stock outstanding, all of which is owned by Corporation X. The corporations do not join in the filing of a consolidated return. Corporation X acquired 100 shares of Corporation T stock on Date 1 for \$1.50 each. On Date 2, Corporation Y acquires the assets of Corporation T for \$100 of cash, their fair market value, in a transaction described in § 1.368-2(l). Pursuant to the terms of the exchange, Corporation T does not receive any Corporation Y stock. Corporation T distributes the \$100 of cash to Corporation X in liquidation. Pursuant to § 1.368-2(l), Corporation Y will be deemed to issue a nominal share of Corporation Y stock to Corporation T in addition to the \$100 of cash actually exchanged for the Corporation T assets, and Corporation T will be deemed to distribute all of the consideration to Corporation X. Corporation X will have a basis of \$50 in the nominal share of Corporation Y stock under section 358(a). Corporation X will be deemed to distribute the nominal share of Corporation Y stock to Corporation P. Corporation X does not recognize the loss on the deemed distribution of the nominal share to Corporation P under section 311(a). Corporation P's basis in the nominal share is zero, its fair market value, under section 301(d).

(ii) *Analysis.* Corporation X is deemed to receive the nominal share of Corporation Y stock described in § 1.368-2(l). However, under paragraph (a)(2)(iii) of this section, Corporation X is not an actual shareholder of Corporation Y, the issuing corporation. Therefore, Corporation X cannot designate any share of Corporation Y stock to which the basis, if any, of the nominal share of Corporation Y stock will attach. Furthermore, Corporation P cannot designate a share of Corporation Y stock to which basis will attach because Corporation P receives the nominal share with a basis of zero.

(d) *Effective/applicability date.* This section applies to exchanges and distributions of stock and securities occurring on or after November 21, 2011.

(e) *Expiration date.* This section expires on or before November 18, 2014.

Approved: November 1, 2011.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

**Emily S. McMahon,**

*Acting Assistant Secretary of the Treasury (Tax Policy).*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 26

[EPA-HQ-OPP-2010-0785; FRL-9325-5]

RIN 2070-AJ76

### Protections for Subjects in Human Research Involving Pesticides; Notification of Submission to the Secretary of Agriculture

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notification of submission to the Secretary of Agriculture.

**SUMMARY:** This document notifies the public that the Administrator of EPA has forwarded to the Secretary of the United States Department of Agriculture (USDA) a draft final rule as required by section 25(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2010-0785. All documents in the docket are listed in the docket index available in <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

**FOR FURTHER INFORMATION CONTACT:** Kelly Sherman, Immediate Office of the Director (7501P), Office of Pesticide Programs, Environmental Protection

Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-8401; email address: [sherman.kelly@epa.gov](mailto:sherman.kelly@epa.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Does this action apply to me?

This action is directed to the public in general. It simply announces the submission of a draft final rule to the Secretary of USDA and does not otherwise affect any specific entities. This action may, however, be of particular interest to pesticide registrants (NAICS code 325320) who sponsor or conduct human research for pesticides, and to other entities that sponsor or conduct human research for pesticides (NAICS code 541710). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding this action, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### II. What action is EPA taking?

As described in the Agency's semi-annual Regulatory Agenda, the draft final rule would take final action with regard to the proposed rule issued on February 2, 2011 (76 FR 5735). The amendments would make no changes to the Common Rule or EPA's codification of the Common Rule. EPA proposed these amendments as a result of a settlement agreement.

Section 25(a)(2)(B) of FIFRA requires the EPA Administrator to provide the Secretary of USDA with a copy of any draft final rule at least 30 days before signing it in final form for publication in the **Federal Register**. The draft final rule is not available to the public until after it has been signed by EPA. If the Secretary of USDA comments in writing regarding the draft final rule within 15 days after receiving it, the EPA Administrator shall include in the final rule, when published in the **Federal Register**, the comments of the Secretary of USDA, if requested by the Secretary of USDA, and the EPA Administrator's response to those comments. If the Secretary of USDA does not comment in writing within 15 days after receiving the draft final rule, the EPA Administrator may sign the final rule for publication in the **Federal Register** any time after the 15-day period.

#### III. Do any statutory and Executive Order reviews apply to this notification?

No. This document is not a rule. It is merely a notification of submission to the Secretary of USDA. As such, none