Notice of Proposed Rulemaking and Notice of Public Hearing

Statutory Mergers and Consolidations

REG–126485–01

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking and Notice of Public Hearing.

SUMMARY: This document contains proposed regulations that define the term statutory merger or consolidation as that term is used in section 368(a)(1)(A). The proposed regulations permit certain transactions involving entities that are disregarded as entities separate from their corporate owners for Federal tax purposes to qualify as a statutory merger or consolidation. These proposed regulations affect corporations engaging in statutory mergers and consolidations, and their shareholders. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments and requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for March 13, 2002, must be received by February 20, 2002.

ADDRESSES: Send submissions to CC:ITA:RU (REG–126485–01), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:ITA:RU (REG–126485–01), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the Tax Regs option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs.reglist.html*.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Reginald Mombrun (202) 622–7750 or Marlene P. Oppenheim (202) 622–7770; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Lanita Van Dyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

A. *Section 368(a) Generally*

The Internal Revenue Code of 1986 (the Code) provides general nonrecognition treatment for reorganizations specifically described in section 368(a). Section 368(a)(1)(A) provides that the term reorganization includes "a statutory merger or consolidation." Section 1.368–2(b)(1) currently provides that a statutory merger or consolidation must be "effected pursuant to the corporation laws of the United States or a State or Territory or the District of Columbia." A transaction will only qualify as a reorganization under section 368(a)(1)(A), however, if it satisfies certain nonstatutory requirements, including the business purpose requirement of §1.368–1(b), the continuity of business enterprise requirement of §1.368–1(d), and the continuity of interest requirement of §1.368–1(e).

B. *Disregarded Entities Generally*

A business entity (as defined in §301.7701–2(a)) that has only one owner may be disregarded as an entity separate from its owner for Federal tax purposes. Examples of disregarded entities include a domestic single member limited liability company that does not elect to be classified as a corporation for Federal tax purposes, a corporation (as defined in §301.7701–2(b)) that is a qualified REIT subsidiary (within the meaning of section 856(i)(2)), and a corporation that is a qualified subchapter S subsidiary (within the meaning of section 1361(b)(3)(B)).

Because qualified REIT subsidiaries and qualified subchapter S subsidiaries are corporations under state law, state merger laws generally permit them to merge with other corporations. In addition, many state merger laws permit a limited liability company to merge with another limited liability company or with a corporation.

C. *Previous Proposal of Regulations*

On May 16, 2000, the IRS and Treasury issued a notice of proposed rulemaking (REG–106186–98, 65 FR 31115) providing guidance under section 368(a)(1)(A), including guidance regarding whether certain mergers involving disregarded entities may qualify as statutory mergers under section 368(a)(1)(A) (hereinafter referred to as the 2000 proposed regulations). The 2000 proposed regulations provided that neither the merger of a disregarded entity into a corporation nor the merger of a target corporation into a disregarded entity was a statutory merger or consolidation qualifying as a reorganization under section 368(a)(1)(A).

A public hearing on the 2000 proposed regulations was held on August 8, 2000. In addition, written comments were received. While commentators generally agreed that the merger of a disregarded entity into a corporation should not qualify as a statutory merger under section 368(a)(1)(A), commentators asserted that the merger of a target corporation into a disregarded entity with a corporate owner should be able to qualify as a statutory merger under section 368(a)(1)(A). Commentators argued that not permitting the merger of a target corporation into a disregarded entity to qualify as a statutory merger under section 368(a)(1)(A) is inconsistent with the general treatment of the disregarded entity as a division of its owner for Federal tax purposes.

Explanation of Provisions

A. *Definitions*

After consideration of the comments received, the IRS and Treasury have decided to withdraw the 2000 proposed regulations and issue new proposed regulations (hereinafter referred to as the 2001 proposed regulations) to provide guidance concerning the definition of the terms

statutory merger and *consolidation* as those terms are used in section 368(a)(1)(A), including as those terms relate to transactions involving disregarded entities.

The 2001 proposed regulations introduce a number of terms that are employed in the definition of statutory merger or consolidation. The term disregarded entity is defined as a business entity (as defined in §301.7701–2(a)) that is disregarded as an entity separate from its owner for Federal tax purposes. The term combining entity is defined as a business entity that is a corporation (as defined in §301.7701–2(b)) that is not a disregarded entity. The term combining unit is defined as a combining entity and all disregarded entities, if any, the assets of which are treated as owned by such combining entity for Federal tax purposes.

The 2001 proposed regulations provide that, for purposes of section 368(a)(1)(A), a statutory merger or consolidation must be effected pursuant to the laws of the United States or a State or the District of Columbia. Pursuant to such laws, the following events must occur simultaneously at the effective time of the transaction: (1) all of the assets (other than those distributed in the transaction) and liabilities (except to the extent satisfied or discharged in the transaction) of each member of one or more combining units (each a transferor unit) become the assets and liabilities of one or more members of one other combining unit (the transferee unit); and (2) the combining entity of each transferor unit ceases its separate legal existence for all purposes.

The IRS and Treasury believe that these definitions of statutory merger and consolidation are consistent with the principles of current law. See *Cortland Specialty Co. v. Commissioner,* 60 F.2d 937 (2d Cir. 1932), cert. denied, 288 U.S. 599 (1933); Rev. Rul. 2000–5 (2000–1 C.B. 436). In particular, the IRS and Treasury do not intend for the requirement that all of the assets of one or more transferor units be transferred in the statutory merger or consolidation to be interpreted in the same manner as the "substantially all" requirement of 368(a)(1)(C), 368(a)(1)(D), 368(a)(2)(D), and 368(a)(2)(E). However, the IRS and Treasury do intend this requirement to ensure that divisive transactions do not qualify as statutory mergers or consolidations under section 368(a)(1)(A). See Rev. Rul. 2000–5.

In addition, the 2001 proposed regulations, like the 2000 proposed regulations, remove the word corporation from the requirement that, in order to qualify as a reorganization under section 368(a)(1)(A), a merger or consolidation must be "effected pursuant to the corporation laws." This change conforms the regulations to the IRS's long-standing position that a transaction may qualify as a reorganization under section 368(a)(1)(A) even if it is undertaken pursuant to laws other than the corporation law of the relevant jurisdiction. See Rev. Rul. 84–104 (1984–2 C.B. 94) (treating a consolidation pursuant to the National Banking Act, 12 U.S.C. 215, as a merger for Federal tax purposes).

Finally, the 2001 proposed regulations remove the word "Territory" from the types of jurisdictions pursuant to the laws of which a transaction that qualifies as a reorganization under section 368(a)(1)(A) may be effected to be consistent with the definition of domestic under section 7701(a)(4), which was amended by section 1906(c) of Tax Reform Act of 1976, Public Law 94–455, 90 Stat. 1525.

In this guidance project, the IRS and Treasury are not addressing the treatment under section 368(a)(1)(A) of transactions that involve one or more foreign corporations. As discussed below, the IRS and Treasury are considering issuing guidance regarding such transactions as part of a separate regulations project.

B. *Mergers Involving Disregarded Entities*

The 2001 proposed regulations' definition of a statutory merger or consolidation, unlike the approach of the 2000 proposed regulations, permits certain statutory mergers and consolidations involving disregarded entities to qualify as statutory mergers and consolidations under section 368(a)(1)(A). However, the 2001 proposed regulations provide that such a transaction in which any of the assets and liabilities of a combining entity of a transferor unit become assets and liabilities of one or more disregarded entities of the transferee unit is not a statutory merger or consolidation within the meaning of section 368(a)(1)(A) unless such combining entity, the combining entity of the transferee unit, such disregarded entities, and each business entity through which the combining entity of the transferee unit holds its interests in such disregarded entities is organized under the laws of the United States or a State or the District of Columbia.

Permitting certain transactions involving disregarded entities that have a single corporate owner to qualify as statutory mergers and consolidations for purposes of section 368(a)(1)(A) is appropriate because it is consistent with the general treatment of a disregarded entity as a division of its owner. Therefore, under the 2001 proposed regulations, the merger of a target corporation into a disregarded entity may qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A). Consistent with the 2000 proposed regulations, however, the 2001 proposed regulations do not permit the merger of a disregarded entity into a member of a transferee unit, where the owner of the disregarded entity does not also merge into a member of the transferee unit, to qualify as a statutory merger or consolidation under section 368(a)(1)(A). In such a transaction, all of the transferor unit's assets may not be transferred to the transferee unit, with the result that the transferor unit's assets may be divided between the transferor unit and the transferee unit. Moreover, the separate legal existence of the combining entity of the transferor unit does not terminate as a matter of law. Although such a transaction cannot qualify as a statutory merger or consolidation under section 368(a)(1)(A), it may qualify for nonrecognition treatment under other provisions of the Code.

C. *Request for Comments*

Treasury and the IRS are considering further revisions to the regulations under section 368(a)(1)(A) to address statutory mergers and consolidations that involve one or more foreign corporations, including transactions involving a disregarded entity. Comments are requested regarding the appropriate scope for any such revision. Comments also are specifically requested concerning what related changes would be necessary to the regulations under sections 358 (concerning the determination of stock basis in certain

triangular reorganizations), 367, and 897, as well as other international provisions of the Code. Because a revision of the regulations may include revisions related to transactions under foreign merger or consolidation laws, comments are requested on what changes, if any, may be appropriate to the definition of a statutory merger or consolidation to facilitate the application of the definition in the context of the laws of a foreign jurisdiction. Finally, comments are requested regarding what additional reporting requirements may be appropriate to facilitate administration of the rules regarding statutory mergers or consolidations involving foreign entities.

Effective Date

These regulations are proposed to apply to transactions occurring on or after the date these regulations are published as final regulations in the **Federal Register.**

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do 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), this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight copies) that are submitted timely to the IRS. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the Tax Regs option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs/reglist.html*. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for March 13, 2002, beginning at 10 am in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by February 20, 2002. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for reviewing outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these proposed regulations are Reginald Mombrun and Marlene P. Oppenheim of the office of the Associate Chief Counsel (Corporate), IRS. However, other personnel from the Treasury and the IRS participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1 — INCOME TAXES

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

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

Par. 2. In §1.368–2, paragraph (b)(1) is revised to read as follows:

§1.368–2 Definition of terms.

* * * * *

(b)(1)(i) *Definitions.* For purposes of this paragraph (b)(1), the following terms shall have the following meanings:

(A) *Disregarded entity.* A disregarded entity is a business entity (as defined in §301.7701–2(a) of this chapter) that is disregarded as an entity separate from its owner for Federal tax purposes. Examples of disregarded entities include a domestic single member limited liability company that does not elect to be classified as a corporation for Federal tax purposes, a corporation (as defined in §301.7701–2(b) of this chapter) that is a qualified REIT subsidiary (within the meaning of section 856(i)(2)), and a corporation that is a qualified subchapter S subsidiary (within the meaning of section 1361(b)(3)(B)).

(B) *Combining entity.* A combining entity is a business entity that is a corporation that is not a disregarded entity.

(C) *Combining unit.* A combining unit is comprised solely of a combining entity and all disregarded entities, if any, the assets of which are treated as owned by such combining entity for Federal tax purposes.

(ii) *Statutory merger or consolidation generally.* For purposes of section 368(a)(1)(A), a statutory merger or consolidation is a transaction effected pursuant to the laws of the United States or a State or the District of Columbia, in which, as a result of the operation of such laws, the following events occur simultaneously at the effective time of the transaction —

(A) All of the assets (other than those distributed in the transaction) and liabilities (except to the extent satisfied or discharged in the transaction) of each member of one or more combining units (each a transferor unit) become the assets and liabilities of one or more members of one other combining unit (the transferee unit); and

(B) The combining entity of each transferor unit ceases its separate legal existence for all purposes.

(iii) *Statutory merger or consolidation involving disregarded entities.* A transaction effected pursuant to the laws of the United States or a State or the District of Columbia in which any of the assets and liabilities of a combining entity of a transferor unit become assets and liabilities of one or more disregarded entities of the transferee unit is not a statutory merger or consolidation within the meaning of section 368(a)(1)(A) and paragraph (b)(1)(ii) of this section unless such combining entity, the combining entity of the transferee unit, such disregarded entities, and each business entity through which the combining entity of the transferee unit holds its interests in such disregarded entities is organized under the laws of the United States or a State or the District of Columbia.

(iv) *Examples.* The following examples illustrate the rules of paragraph (b)(1) of this section. In each of the examples, except as otherwise provided, each of V, Y, and Z is a domestic corporation. X is a domestic limited liability company. Except as otherwise provided, X is wholly owned by Y and is disregarded as an entity separate from Y for Federal tax purposes. The examples are as follows:

Example 1. Divisive transaction pursuant to a merger statute. (i) Under State W law, Z transfers some of its assets and liabilities to Y, retains the remainder of its assets and liabilities, and remains in existence following the transaction. The transaction qualifies as a merger under state W corporate law. Prior to the transaction, Y is not treated as owning any assets of an entity that is disregarded as an entity separate from its owner for Federal tax purposes.

(ii) The transaction does not satisfy the requirements of paragraph (b)(1)(ii)(A) of this section because all of the assets and liabilities of Z, the combining entity of the transferor unit, do not become the assets and liabilities of Y, the combining entity and sole member of the transferee unit. In addition, the transaction does not satisfy the requirements of paragraph (b)(1)(ii)(B) of this section because the separate legal existence of Z does not cease. Accordingly, the transaction does not qualify as a statutory merger or consolidation under section 368(a)(1)(A).

Example 2. Merger of a target corporation into a disregarded entity in exchange for stock of the owner. (i) Under State W law, Z merges into X. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z become the assets and liabilities of X and Z's separate legal existence ceases for all purposes. In the merger, the Z shareholders exchange their stock of Z for stock of Y. Prior to the transaction, Z is not treated as owning any assets of an entity that is disregarded as an entity separate from its owner for Federal tax purposes.

(ii) The transaction meets the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to State W law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z, the combining entity and sole member of the transferor unit, become the assets and liabilities of one or more members of the transferee unit that is comprised of Y, the combining entity of the transferee unit, and X, a disregarded entity the assets of which Y is treated as owning for Federal tax purposes, and Z ceases its separate legal existence for all purposes. Paragraph (b)(1)(iii) does not apply to prevent the transaction from qualifying as a statutory merger or consolidation for purposes of section 368(a)(1)(A) because each of Z, Y, and X is a domestic entity. Accordingly, the transaction qualifies as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 3. Triangular merger of a target corporation into a disregarded entity. (i) The facts are the same as in *Example 2*, except that V owns 100 percent of the outstanding stock of Y and, in the merger of Z into X, the Z shareholders exchange their stock of Z for stock of V. In the transaction, Z transfers substantially all of its properties to X.

(ii) The transaction is not prevented from qualifying as a statutory merger or consolidation under section 368(a)(1)(A), provided the requirements of section 368(a)(2)(D) are satisfied. Because the assets of X are treated for Federal tax purposes as the assets of Y, Y will be treated as acquiring substantially all of the properties of Z in the merger for purposes of determining whether the merger satisfies the requirements of section 368(a)(2)(D). As a result, the Z shareholders that receive stock of V will be treated as receiving stock of a corporation that is in control of Y, the combining entity of the transferee unit that is the acquiring corporation for purposes of section 368(a)(2)(D). Accordingly, the merger will satisfy the requirements of section 368(a)(2)(D) such that the Z shareholders' receipt of stock of V in the merger will not cause the transaction to fail to qualify as a reorganization under section 368(a)(1)(A).

Example 4. Merger of a target corporation into a disregarded entity owned by a partnership. (i) The facts are the same as in *Example 2*, except that Y is organized as a partnership under the laws of State W and is classified as a partnership for Federal tax purposes.

(ii) The transaction does not meet the requirements of paragraph (b)(1)(ii)(A) of this section. All of the assets and liabilities of Z, the combining entity and sole member of the transferor unit, do not become the assets and liabilities of one or more members of a transferee unit because neither X nor Y qualifies as a combining entity. Accordingly, the transaction cannot qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 5. Merger of a disregarded entity into a corporation. (i) Under State W law, X merges into Z. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of X (but not the assets and liabilities of Y other than those of X) become the assets and liabilities of Z and X's separate legal existence ceases for all purposes.

(ii) The transaction does not satisfy the requirements of paragraph (b)(1)(ii)(A) of this section because all of the assets and liabilities of a transferor unit do not become the assets and liabilities of one or more members of the transferee unit. The transaction also does not satisfy the requirements of paragraph (b)(1)(ii)(B) of this section because X does not qualify as a combining entity. Accordingly, the transaction cannot qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 6. Merger of a corporation into a disregarded entity in exchange for interests in the disregarded entity. (i) Under State W law, Z merges into X. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z become the assets and liabilities of X and Z's separate legal existence ceases for all purposes. In the merger of Z into X, the Z shareholders exchange their stock of Z for interests in X so that, immediately after the merger, X is not disregarded as an entity separate from Y for Federal tax purposes. Following the merger, pursuant to §301.7701–2(b)(1)(i) of this chapter, X is classified as a partnership for Federal tax purposes.

(ii) The transaction does not meet the requirements of paragraph (b)(1)(ii)(A) of this section because immediately after the merger X is not disregarded as an entity separate from Y and, consequently, all of the assets and liabilities of Z, the combining entity of the transferor unit, do not become the assets and liabilities of one or more members of a transferee unit. Accordingly, the transaction cannot qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

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(v) *Effective date.* This paragraph (b)(1) applies to transactions occurring on or after the date these regulations are published as final regulations in the **Federal Register**.

Robert E. Wenzel,
Deputy Commissioner of Internal Revenue.

(Filed by the Office of the Federal Register on November 14, 2001, 8:45 a.m., and published in the issue of the Federal Register for November 15, 2001, 66 F.R. 57400)