

identical to the requirement of section 403(r)
* * *

On September 17, 2007, FDA published an interim final rule which imposed requirements under section 403(r) of the act. This final rule affirms the September 17, 2007, amendment to the existing food labeling regulations to add isomaltulose to the authorized health claim for noncariogenic carbohydrate sweeteners and dental caries. Although this rule has a preemptive effect in that it precludes States from issuing any health claim labeling requirements for isomaltulose and the nonpromotion of dental caries that are not identical to those required by this final rule, this preemptive effect is consistent with what Congress set forth in section 403A of the act. Section 403A(a)(5) of the act displaces both State legislative requirements and State common law duties. *Riegel v. Medtronic*, 128 S. Ct. 999 (2008).

FDA believes that the preemptive effect of this final rule is consistent with Executive Order 13132. Section 4(e) of the Executive order provides that "when an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings." On August 1, 2007, FDA's Division of Federal and State Relations provided notice via fax and e-mail transmission to State health commissioners, State agriculture commissioners, food program directors, and drug program directors, as well as FDA field personnel, of FDA's intent to amend the health claim regulation authorizing health claims for noncariogenic carbohydrate sweeteners and dental caries (§ 101.80). FDA received no comments from any States in response to this notice.

In addition, the agency sought input from all stakeholders through publication of the interim final rule in the **Federal Register** on September 17, 2007 (72 FR 52783). FDA received no comments from any States on the interim final rule.

In conclusion, the agency believes that it has complied with all of the applicable requirements of Executive Order 13132 and has determined that the preemptive effects of this rule are consistent with the Executive order.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and Recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs, 21 CFR part 101 is amended as follows:

PART 101—FOOD LABELING

■ Accordingly, the interim final rule amending § 101.80 that was published in the **Federal Register** of September 17, 2007 (72 FR 52783), is adopted as a final rule without change.

Dated: May 19, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

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BILLING CODE 4160-01-S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9400]

RIN 1545-BG97

Treatment of Property Used To Acquire Parent Stock in Certain Triangular Reorganizations Involving Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 367(b) of the Internal Revenue Code (Code). The final regulations revise an existing final regulation and add a cross-reference. The temporary regulations implement the rules described in Notice 2006-85 and Notice 2007-48. The regulations affect corporations engaged in certain triangular reorganizations involving one or more foreign corporations. The text of the temporary regulations serves as the text of the proposed regulations (REG-136020-07) set forth in the notice of proposed rulemaking on this subject published in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective May 27, 2008.

Applicability Dates: For dates of applicability, see § 1.367(a)-3T(b)(2)(i)(C) and 1.367(b)-14T(e).

FOR FURTHER INFORMATION CONTACT: Daniel McCall, (202) 622-3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On September 22, 2006, the IRS and Treasury Department issued Notice

2006-85 (2006-41 IRB 677), which announced that regulations would be issued under section 367(b) to address certain triangular reorganizations under section 368(a) involving one or more foreign corporations. On May 31, 2007, the IRS and Treasury Department issued Notice 2007-48 (2007-25 IRB 1428), which amplified Notice 2006-85 and announced that additional regulations would be issued under section 367(b). Each notice describes transactions the IRS and Treasury Department believe raise significant policy concerns.

Notice 2006-85 describes triangular reorganizations in which a subsidiary (S) purchases stock of its parent corporation (P) from P in exchange for property, and then exchanges the P stock for the stock or assets of a target corporation (T), but only if P or S (or both) is foreign. Notice 2006-85 announced that regulations to be issued under section 367(b) would make adjustments that would have the effect of a distribution of property from S to P under section 301 (deemed distribution). Notice 2006-85 further announced that regulations would address similar transactions where S acquires the P stock from a related party that purchased the P stock in a related transaction.

Notice 2007-48 describes transactions in which S purchases all or a portion of the P stock exchanged in the reorganization from a person other than P (such as from public shareholders on the open market). Notice 2007-48 announced that regulations to be issued under section 367(b) would also make adjustments that would have the effect of a distribution of property from S to P (under section 301) followed by a deemed contribution of such property by P to S. Notice 2007-48 further announced that the regulations would take into account the earnings and profits of other corporations, as appropriate, if a principal purpose of creating, organizing, or funding S is to avoid the adjustments to be made by the regulations.

These temporary regulations set forth the regulations described in Notices 2006-85 and 2007-48. The existing final regulations under § 1.367(b)-13 are revised to conform the definitions of the terms P, S, and T in those regulations to the definitions of such terms in these temporary regulations. The existing final regulations under § 1.367(b)-2 are revised to clarify that the definition of earnings and profits in § 1.367(b)-2(l)(8) applies only for purposes of §§ 1.367(b)-7 and 1.367(b)-9.

Explanation of Provisions

A. Section 367— In General

Section 367(a)(1) provides that if, in connection with any exchange described in section 332, 351, 354, 356, or 361, a United States person transfers property to a foreign corporation, such foreign corporation shall not, for purposes of determining the extent to which gain shall be recognized on such transfer, be considered to be a corporation. However, exceptions are provided under section 367(a)(2) and (3), and the Secretary has broad authority under section 367(a)(6) to provide that section 367(a)(1) will not apply to certain transfers otherwise described therein.

Section 367(b)(1) provides that in the case of any exchange described in section 332, 351, 354, 355, 356, or 361 in connection with which there is no transfer of property described in section 367(a)(1), a foreign corporation shall be considered to be a corporation except to the extent provided in regulations prescribed by the Secretary which are necessary or appropriate to prevent the avoidance of Federal income taxes.

Section 367(b)(2) provides that the regulations prescribed pursuant to section 367(b)(1) shall include (but shall not be limited to) regulations dealing with the sale or exchange of stock or securities in a foreign corporation by a United States person, including regulations providing the circumstances under which gain is recognized, amounts are included in gross income as a dividend, adjustments are made to earnings and profits, or adjustments are made to basis of stock or securities.

B. Policies of Section 367(b)

Section 367(b) was enacted to ensure that international tax considerations are adequately addressed when the nonrecognition provisions of subchapter C of the Code apply to certain exchanges involving foreign corporations. Congress further noted that “it is essential to protect against tax avoidance in transfers to foreign corporations and upon the repatriation of previously untaxed foreign earnings. * * *” H.R. Rep. No. 658, 94th Cong., 1st Sess. 241 (1975). Accordingly, Congress granted the Secretary authority to provide regulations “necessary or appropriate to prevent the avoidance of Federal income taxes” and identified “transfers constituting a repatriation of foreign earnings” as a type of transfer to be covered in regulations to be promulgated by the Secretary. Id. The Secretary has exercised this grant of authority to address a wide range of international policy concerns. For

further discussion, see Notices 2006–85 and 2007–48.

C. Adjustments Made Under Section 367(b)

These temporary regulations apply to triangular reorganizations where P or S (or both) is foreign and, in connection with the reorganization, S acquires, in exchange for property, all or a portion of the P stock that is used to acquire the stock or assets of T. The “in connection with” standard is a broad standard that includes any transaction related to the reorganization even if the transaction is not part of the plan of reorganization. For example, the temporary regulations apply to a triangular reorganization regardless of whether P controls S (within the meaning of section 368(c)) when S acquires the P stock that is used in the reorganization.

In a triangular reorganization subject to the temporary regulations, adjustments shall be made that have the effect of a distribution of property from S to P under section 301. The amount of the deemed distribution shall equal the amount of money plus the fair market value of other property that S used to acquire P stock. For this purpose, the term property has the meaning set forth in section 317(a), but includes any liability assumed by S in exchange for the P stock (notwithstanding the application of section 357(a)) and any S stock used by S to acquire the P stock from a person other than P. Consistent with the rule announced in Notice 2007–48, these temporary regulations provide that to the extent S buys P stock from a person other than P, immediately after taking into account the deemed distribution to P, P is deemed to contribute to S the property deemed distributed to P.

These temporary regulations provide that the deemed distribution shall be treated as a distribution for all purposes of the Code. For example, provisions such as sections 312, 881, 897, 902, 959, 1442, and 1445 apply, as appropriate, to the deemed distribution. Similarly, the deemed contribution of property shall be treated as a contribution of property for all purposes of the Code. For example, appropriate adjustments to P’s basis in the S stock and other affected items shall be made according to applicable Code provisions.

Ordering rules are provided that generally require the deemed distribution and, in cases where S buys P stock from a person other than P, the deemed contribution to be taken into account before the transfers undertaken pursuant to the triangular reorganization. If P does not control S (within the meaning of section 368(c)) at

the time that S purchases the P stock, the deemed distribution and deemed contribution shall be treated as separate transactions occurring immediately after P acquires control of S. Thus, in a transaction where S purchases the P stock from a person other than P, after taking into account the adjustments made under these temporary regulations, S’s purchase and transfer of P stock pursuant to the triangular reorganization are taken into account under generally applicable Code provisions, such as sections 304, 354, 356, 358, and 368.

These temporary regulations also provide that appropriate adjustments will be made if in connection with a triangular reorganization described in the regulations, a transaction is engaged in with a view to avoid the purpose of the regulations. For example, if S is a newly formed corporation and, in connection with the reorganization, P contributes to S another corporation with positive earnings and profits (S2) to facilitate S’s purchase of the P stock or to facilitate the repayment of an obligation incurred by S to purchase the P stock, then, under the temporary regulations, the earnings and profits of S may be deemed to include the earnings and profits of S2.

Finally, these temporary regulations contain a coordination rule that applies to transactions described in section 367(a) and § 1.367(b)–14T. The IRS and Treasury Department continue to study transactions that implicate the policies of section 367(a) and (b), but that are not subject to both provisions as a result of the application of the coordination rule. Comments are requested on such transactions.

Availability of IRS Documents

IRS notices cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Effective/Applicability Dates

With respect to those rules addressing transactions described in Notice 2006–85, these temporary regulations are generally applicable to transactions occurring on or after September 22, 2006, with limited transition relief. With respect to those rules addressing transactions described in Notice 2007–48, these temporary regulations are generally applicable to transactions occurring on or after May 31, 2007, with limited transition relief. Other rules included in these temporary regulations are generally applicable to transactions occurring on or after May 23, 2008, with limited transition relief. See § 1.367(b)–14T(e).

No inference is intended as to the potential applicability of other Code or regulatory provisions or judicial doctrines (including substance over form) to transactions described in these temporary regulations.

Effect on Other Documents

The following publications are obsolete as of May 27, 2008:

Notice 2006–85 (2006–41 IRB 677).

Notice 2007–48 (2007–25 IRB 1428).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. A delayed effective date would be inappropriate because the purpose of this regulation is to address transactions that the IRS and Treasury Department believe raise serious policy concerns. Accordingly, good cause is found for dispensing with notice and public comment pursuant to 5 U.S.C. 553(b) and (c) and with a delayed effective date pursuant to 5 U.S.C. 553(d). Furthermore, under section 7805(b)(1)(C) of the Code, an effective date earlier than the date this regulation is filed with the **Federal Register** is appropriate because prior notices substantially described the rules contained in this regulation. For applicability of the Regulatory Flexibility Act, see the cross-referenced notice of proposed rulemaking published elsewhere in this **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Request for Comments

For information on how to submit comments or request a public hearing, see the section “Comments and Requests for a Public Hearing,” set forth in the notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

Drafting Information

The principal author of these regulations is Daniel McCall of the Office of Associate Chief Counsel (International). 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 new entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.367(a)–3T(b)(2)(i)(C) also issued under 26 U.S.C. 367(a) and (b). * * *
Section 1.367(b)–14T also issued under 26 U.S.C. 367(b). * * *

■ **Par. 2.** Section 1.367(a)–3 is amended by revising the first sentence in paragraph (b)(2)(i) and adding new paragraph (b)(2)(i)(C) to read as follows:

§ 1.367(a)–3 Treatment of transfers of stock or securities to foreign corporations.

* * * * *

(b) * * *
(2) * * *
(i) * * * A transfer of stock or securities described in section 367(a) or the regulations thereunder as well as in section 367(b) or the regulations thereunder shall be subject concurrently to sections 367(a) and (b) and the respective regulations thereunder, except as provided in paragraph (b)(2)(i)(A) through (C) of this section.

(C) [Reserved]. For further guidance, see § 1.367(a)–3T(b)(2)(i)(C).

* * * * *

■ **Par. 3.** Section 1.367(a)–3T is amended by revising paragraphs (a) through (d) and (f)(3), to read as follows:

§ 1.367(a)–3T Treatment of transfers of stock or securities to foreign corporations (temporary).

(a) through (b)(2)(i)(B) [Reserved]. For further guidance, see § 1.367(a)–3(a) through (b)(2)(i)(B).

(C) If in connection with a transaction described in § 1.367(b)–14T, one or more U.S. persons transfer stock of T, as defined in § 1.358–6(b)(1)(iii), to a corporation in a transfer described in section 367(a), and the amount of gain in the T stock that would otherwise be recognized under section 367(a) is less than the deemed distribution that would result from the adjustments made under § 1.367(b)–14T and that would be treated as a dividend under section 301(c)(1), then section 367(b), and not section 367(a), shall apply to such transaction. This paragraph (b)(2)(i)(C) applies to transfers occurring on or after May 23, 2008.

(b)(2)(ii) through (d) [Reserved]. For further guidance, see § 1.367(a)–3(b)(2)(ii) through (d).

* * * * *

(f) * * *

(3) *Expiration date.* The applicability of § 1.367(a)–3T(b)(2)(i)(C) expires on May 23, 2011. The applicability of § 1.367(a)–3T(e) and (f)(1) and (f)(2) expires on February 1, 2010.

■ **Par. 4.** Section 1.367(b)–2 is amended by revising paragraph (l)(8) to read as follows:

§ 1.367(b)–2 Definitions and special rules.

* * * * *

(l) * * *
(8) *Earnings and profits.* For purposes of §§ 1.367(b)–7 and 1.367(b)–9, the term *earnings and profits* means post-1986 undistributed earnings, pre-1987 accumulated profits, and pre-1987 section 960 earnings and profits.

* * * * *

■ **Par. 5.** Section 1.367(b)–13 is amended by redesignating paragraph (a)(2)(ii) as paragraph (a)(2)(iii), revising newly designated paragraph (a)(2)(iii), and adding a new paragraph (a)(2)(ii) to read as follows:

§ 1.367(b)–13 Special rules for determining basis and holding period.

(a) * * *
(2) * * *
(ii) The terms *P*, *S*, and *T* have the meanings set forth in § 1.358–6(b)(1)(i), (ii), and (iii), respectively.

(iii) A triangular reorganization is a reorganization described in § 1.358–6(b)(2)(i), (ii), or (iii) or in sections 368(a)(1)(G) and (a)(2)(D) (a forward triangular merger, triangular C reorganization, reverse triangular merger, or triangular G reorganization, respectively).

* * * * *

■ **Par. 6.** Section 1.367(b)–14T is added to read as follows:

§ 1.367(b)–14T Acquisition of parent stock for property in triangular reorganizations (temporary).

(a) *In general*—(1) *Scope and purpose.* This section applies to triangular reorganizations where P or S (or both) is foreign and, in connection with the reorganization, S acquires, in exchange for property (as defined in this section), all or a portion of the P stock that is used to acquire the stock or assets of T. This section may apply to a reorganization regardless of whether P controls S (within the meaning of section 368(c)) at the time S acquires the P stock that is used to acquire the stock or assets of T. The purpose of this section is to prevent what is in effect a distribution of property to P without the application of provisions otherwise applicable to property distributions, when in connection with a triangular

reorganization S acquires, in exchange for property, all or a portion of the P stock used in the reorganization.

(2) *Definitions.* For purposes of this section, the following definitions apply:

(i) The terms *P*, *S*, and *T* have the meanings set forth in § 1.358-6(b)(1)(i), (ii), and (iii), respectively.

(ii) In general, the term *property* has the meaning set forth in section 317(a). Notwithstanding section 357(a), such term includes any liability assumed by S in exchange for the P stock used to acquire the stock or assets of T. Such term also includes any S stock used by S to acquire P stock from a person other than P.

(iii) The term *triangular reorganization* means a reorganization described in § 1.358-6(b)(2) or in section 368(a)(1)(G) and (a)(2)(D).

(b) *General rules—(1) Deemed distribution.* If this section applies, adjustments shall be made that have the effect of a distribution of property from S to P under section 301 (deemed distribution). The amount of the deemed distribution shall equal the amount of money plus the fair market value of other property transferred, in connection with the reorganization, by S in exchange for the P stock used to acquire the stock or assets of T in the triangular reorganization. Additional adjustments shall be made under paragraph (b)(3) of this section to the extent S acquires, in exchange for property, P stock from a person other than P.

(2) *Timing in the case of acquisitions from P.* To the extent S acquires P stock from P in exchange for property, the deemed distribution described in paragraph (b)(1) of this section shall be treated as a transaction separate from, and occurring immediately before, the triangular reorganization. Therefore, P shall not be treated as receiving the property from S in exchange for P stock. The transfers of P stock in the triangular reorganization shall be subject to generally applicable provisions. See, for example, § 1.1032-2.

(3) *Timing and deemed contribution in the case of acquisitions from persons other than P.* To the extent S acquires P stock from a person other than P in exchange for property (the purchase), then immediately following the deemed distribution described in paragraph (b)(1) of this section, adjustments shall be made that have the effect of a contribution by P to S (deemed contribution) of the property deemed distributed by S to P under paragraph (b)(1) of this section. If P controls S (within the meaning of section 368(c)) at the time of the purchase, the deemed distribution and deemed contribution

shall be treated as separate transactions occurring immediately before the purchase. If P does not control S (within the meaning of section 368(c)) at the time of the purchase, the deemed distribution and deemed contribution shall be treated as separate transactions occurring immediately after P acquires control of S. Other provisions, such as sections 304, 354, 358 and 368, shall apply after the adjustments made pursuant to paragraph (b)(1) of this section and this paragraph.

(4) *Example.* The rules of this paragraph (b) are illustrated by the following example:

(i) *Facts.* P, a publicly traded domestic corporation, owns all of the outstanding stock of FS, a foreign corporation, and all of the outstanding stock of US1, a domestic corporation that is a member of the P consolidated group. US1 owns all of the outstanding stock of FT, a foreign corporation, the fair market value of which is \$100x. FS purchases \$100x of P stock on the open market for cash. Pursuant to foreign law, FT merges with and into FS in a triangular reorganization described in section 368(a)(1)(A) by reason of section 368(a)(2)(D). US1 exchanges all the outstanding stock of FT for the stock of P purchased by FS on the open market for \$100x cash.

(ii) *Analysis.* The triangular reorganization is described in paragraph (a)(1) of this section. Therefore, pursuant to paragraphs (b)(1) and (b)(3) of this section, FS is treated as distributing \$100x to P under section 301. Immediately after such deemed distribution, P is deemed to contribute to FS the \$100x that was deemed distributed to P. The deemed distribution and deemed contribution are treated as separate transactions occurring immediately before FS's purchase of the P stock used in the triangular reorganization.

(c) *Collateral adjustments.* This paragraph (c) provides rules for the treatment of a deemed distribution or deemed contribution resulting under paragraph (b)(1) or (b)(3) of this section.

(1) *Deemed distribution.* A deemed distribution of property described in paragraph (b)(1) of this section shall be treated as a distribution of property for all purposes of the Internal Revenue Code. For example, under section 301(c) the distribution may constitute a dividend to the extent of the earnings and profits of S, a return of basis, or gain from the sale or exchange of property, as appropriate. In addition, sections 902 and 959 may apply when S is foreign, and sections 897, 1442, and 1445 may apply when S is domestic.

(2) *Deemed contribution.* A deemed contribution of property described in paragraph (b)(3) of this section shall be treated as a contribution of property for all purposes of the Internal Revenue Code. For example, appropriate adjustments to P's basis in the S stock

and other affected items shall be made according to applicable provisions.

(d) *Special rule.* Appropriate adjustments shall be made pursuant to this section if, in connection with a triangular reorganization, a transaction is engaged in with a view to avoid the purpose of this section as described in paragraph (a)(1) of this section. For example, if S is formed or availed of with a view to avoid the purpose of this section, the earnings and profits of S may be deemed to include the earnings and profits of a corporation related to S (within the meaning of section 267(b)).

(e) *Effective/applicability date—(1) Acquisitions of P stock from P or related persons.* Except as otherwise provided in this paragraph (e), this section applies to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from P or from a person related to P or S within the meaning of section 267(b) or 707(b), occurring on or after September 22, 2006. This section, however, shall not apply to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from P or from a person related to P or S within the meaning of section 267(b) or 707(b), completed on or after September 22, 2006, pursuant to a written agreement that was (subject to customary conditions) binding before September 22, 2006, and all times afterward.

(2) *Acquisitions of P stock from persons other than P—(i) General rule.* Except as otherwise provided in this paragraph (e), this section applies to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from a person other than P that is not related to P or S within the meaning of section 267(b) or 707(b) (unrelated person), occurring on or after May 31, 2007.

(ii) *Binding commitment exception.* This section shall not apply to triangular reorganizations described in paragraph (a)(1) of this section, to the extent S acquires the P stock from an unrelated person, pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, but only to the extent that—

(A) S acquired the P stock from an unrelated person before May 31, 2007; or

(B) S had a commitment to acquire the P stock from an unrelated person pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, or pursuant to a tender offer announced before May 31, 2007, that is subject to section 14(d) of the

Securities and Exchange Act of 1934 (15 U.S.C. 78n(d)(1)) and Regulation 14(D) (17 CFR 240.14d-1 through 240.14d-101) or that is subject to comparable foreign laws.

(3) *Application of special rule*—(i) *General rule.* Except as provided in paragraph (e)(3)(ii) of this section, paragraph (d) of this section applies to triangular reorganizations described in paragraph (a)(1) of this section occurring on or after May 31, 2007.

(ii) *Binding commitment exception.* Paragraph (d) of this section shall not apply to triangular reorganizations described in paragraph (a)(1) of this section entered into pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, but only to the extent that—

(A) S acquired the P stock before May 31, 2007; or

(B) S had a commitment to acquire the P stock from an unrelated person pursuant to a written agreement that was (subject to customary conditions) binding before May 31, 2007, and all times afterward, or pursuant to a tender offer announced before May 31, 2007, that is subject to section 14(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78n(d)(1)) and Regulation 14(D) (17 CFR 240.14d-1 through 240.14d-101) or that is subject to comparable foreign laws.

(4) *Treatment of S stock as property*—(i) *General rule.* Except as provided in paragraph (e)(4)(ii) of this section, the treatment of S stock as property under paragraph (a)(2)(ii) of this section applies to triangular reorganizations described in paragraph (a)(1) of this section occurring on or after May 23, 2008.

(ii) *Binding commitment exception.* The treatment of S stock as property under paragraph (a)(2)(ii) of this section shall not apply to triangular reorganizations described in paragraph (a)(1) of this section occurring on or after May 23, 2008 entered into pursuant to a written agreement that was (subject to customary conditions) binding before May 23, 2008 and all times afterward, but only to the extent that—

(A) S acquired the P stock before May 23, 2008; or

(B) S had a commitment to acquire the P stock from an unrelated person pursuant to a written agreement that was (subject to customary conditions) binding before May 23, 2008 and all times afterward, or pursuant to a tender offer announced before May 23, 2008, that is subject to section 14(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78n(d)(1)) and Regulation 14(D)

(17 CFR 240.14d-1 through 240.14d-101) or that is subject to comparable foreign laws.

(5) *Expiration.* The applicability of this section expires May 23, 2011.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: May 16, 2008.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

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BILLING CODE 4830-01-P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 261

RIN 0596-AC30

Clarifying Prohibitions for Failure To Maintain Control of Fires That Damage National Forest System Lands

AGENCY: Forest Service, USDA.

ACTION: Notice of final rule.

SUMMARY: This final rule revises regulations to establish a new prohibition for starting and negligently failing to maintain control of a prescribed fire. Proof of criminal negligence is required for this offense. The rule also clarifies that the prohibition for causing and failing to maintain control of all other fires is a strict liability offense, not requiring proof of criminal intent. In implementing the National Fire Plan, the Forest Service has encouraged adjacent landowners to develop integrated fire management plans for the use of prescribed fire for the restoration and protection of private lands adjacent to National Forest System lands. Without these changes, adjacent landowners might be discouraged from using prescribed fire.

DATES: This rule is effective June 26, 2008.

ADDRESSES: The public may inspect comments received at USDA Forest Service, State and Private Forestry, 1400 Independence Avenue, SW., Washington, DC. Visitors are encouraged to call ahead to 202-205-1331 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Denny Truesdale, State and Private Forestry, 202-205-1588. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8

p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The following outline contains the contents of the **SUPPLEMENTARY INFORMATION** section of this final rule:

Background
Regulatory Certifications
Regulatory Impact
Environmental Impact
Federalism
Consultation With Tribal Governments
No takings Implications
Controlling Paperwork Burdens on the Public
Energy Effects
Civil Justice Reform
Unfunded Mandates

List of Subjects in Part 261

Background

A new paragraph (c) is added to section 261.1, Scope, to clarify that unless criminal intent (“*mens rea*”) is expressly required in the provision setting forth the offense, strict liability would apply. Whether criminal intent is a required element of an offense is a question of statutory construction. Where a statute or regulation does not expressly require criminal intent, “silence on this point by itself does not necessarily suggest that Congress intended to dispense with the conventional *mens rea* element * * *” *Staples v. United States*, 511 U.S. 600, 605 (1994). As a general rule, absent a clear indication of legislative intent, courts require proof of intent for criminal offenses. See *Id.* at 605, for a discussion of cases that support this well-established principle.

However, the general presumption that some guilty intent or purpose is required does not apply to “public welfare offenses.” These are offenses that typically impose penalties to serve as an effective means of regulation. *Id.* At 606 (“[i]n construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense”). Public welfare offenses are those that “are not of the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes duty.” *Morissette v. United States*, 342 U.S. 246, 255 (1952). Public welfare offenses “render[s] criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health and safety.” *Liparota v. United States*, 471 U.S. 419, 426 (1985). A person should know that the use of Federal lands is subject to stringent regulation, and that