

(3) A description of each defense article or defense service that may be involved, including:

- (i) The U.S. Munitions List category and sub-category;
- (ii) Name or military nomenclature of the defense article;
- (iii) Whether the article or service is significant military equipment;
- (iv) Estimated quantity of defense articles;
- (v) Estimated U.S. dollar value of defense articles and defense services;
- (vi) Security classification; and
- (vii) End-user and end-use;

(4) A statement whether the brokering activities are related to a sale through commercial channels or under the U.S. Foreign Military Sales Program or other activity in support of the U.S. Government; and

(5) The type of consideration received or expected to be received, directly or indirectly (consideration includes, for example, any fee, commission, loan, gift, donation, political contribution, or other payment made, or offered or agreed to be made, directly or indirectly, in cash or in kind):

- (i) by the applicant;
- (ii) by other persons who may participate in such brokering activities from or at the direction of the applicant, and the identity of such other persons; and
- (iii) the U.S. dollar value amount and source thereof.

(c) The empowered official signing the request for prior approval shall include a certification that the request is complete and accurate.

(d) If at the time of submission certain information required by paragraph (b) of this section is not yet available, this fact must be stated and explained in the certification required by paragraph (c) of this section. The Directorate of Defense Trade Controls will take any such explanation into account in deciding whether or not to approve the request.

(e) The period of validity for a prior approval may not exceed four years.

27. Section 129.9 is amended by revising the section heading and text, to include new paragraphs (a), (b), and (c), to read as follows:

**§ 129.9 Guidance.**

(a) Any person desiring guidance on whether an activity constitutes a brokering activity within the scope of part 129 of this subchapter may request in writing guidance from the Directorate of Defense Trade Controls. The request for guidance shall identify the applicant and registrant code (if applicable) and describe fully the activities that will be undertaken, including:

(1) The specific activities to be undertaken by the applicant and any other U.S. or foreign person;

(2) The name, nationality, and country where located of all U.S. and foreign persons who may participate in the activities;

(3) A description of the item, including name or military nomenclature, or the service and a complete copy of the data that may be involved in potential transactions;

(4) End-user and end-use;

(5) The type of consideration offered, expected to be made, paid or received, directly or indirectly, to or by the applicant in connection with such activity, and the amount and source thereof (consideration includes, for example, any fee, commission, loan, gift, donation, political contribution, or other payment, in cash or in kind); and

(6) A copy of any agreement or documentation between or among the requester and other persons who will be involved in the activity or related transactions that describes the activity to be taken by such persons.

(b) If at the time of submission certain information is not yet available, this circumstance must be stated and explained. The Directorate of Defense Trade Controls will take the completeness of the information into account in providing guidance on whether or not the activities constitute brokering activities. The guidance will constitute an official determination by the Department of State. The guidance shall not substitute for prior approval when required under § 129.8 of this subchapter.

(c) Persons desiring guidance on other aspects of part 129 may also request guidance from the Directorate of Defense Trade Controls in a similar manner by submitting a description of the relevant facts or copies of relevant documentation.

28. Section 129.10 is amended by revising the section heading and text, to include new paragraphs (a), (b), and (c), to read as follows:

**§ 129.10 Reports.**

(a) Any person required to register under this part (including those registered in accordance with § 129.3(d) of this subchapter) shall provide to the Directorate of Defense Trade Controls on an annual basis a report of its brokering activities in the previous calendar year. Such report shall be submitted along with the registrant's annual renewal submission or, if not renewing, within 30 days after expiration of registration.

(b) The report shall include brokering activities that received or were exempt from prior approval as follows:

(1) The report shall identify the broker's name, address, and registration code and be signed by an empowered official who shall certify that the report is complete and accurate. The report shall describe each of the brokering activities, including the number of the prior approval or the exemption claimed; and

(2) For each of the brokering activities, the report shall identify all persons who participated in the activities, including each person's name, address, nationality, and country where located and role or function; the quantity, description, and U.S. dollar value of the defense articles or defense services; the type and U.S. dollar value of any consideration received or expected to be received, directly or indirectly, by any person who participated in the brokering activities, and the source thereof.

(c) If there were no brokering activities, the report shall certify that there were no such activities.

29. Section 129.11 is added to read as follows:

**§ 129.11 Maintenance of Brokering Records by Registrants.**

A person who is required to register pursuant to this part (including those registered in accordance with § 129.3(d) of this subchapter) must maintain records concerning brokering activities in accordance with § 122.5 of this subchapter.

*Dated:* December 12, 2011.

**Ellen O. Tauscher,**

*Under Secretary, Arms Control and International Security, Department of State.*

[FR Doc. 2011-32432 Filed 12-16-11; 8:45 am]

**BILLING CODE 4710-25-P**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

[REG-124627-11]

**RIN 1545-BK43**

**Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations concerning the continuity of interest requirement for corporate reorganizations. The guidance is necessary to clarify the manner in which the continuity of interest

requirement is measured in particular circumstances. The proposed regulations affect corporations and their shareholders.

**DATES:** Written or electronic comments and requests for a public hearing must be received by March 19, 2012.

**ADDRESSES:** Send submissions to CC:PA:LPD:PR (REG-124627-11), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-124627-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or electronically, via the Federal e-Rulemaking Portal at <http://www.regulations.gov/> (IRS REG-124627-11).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Richard Starke (202) 622-3497, and concerning submission of comments, Oluwafunmilayo Taylor (202) 622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Background**

This notice of proposed rulemaking accompanies publication of final regulations regarding the continuity of interest requirement (COI) for corporate reorganizations that are published in this issue of the **Federal Register** (the 2011 regulations). In general, the 2011 regulations provide the circumstances under which the consideration to be exchanged for the proprietary interests in the target corporation is valued on the last business day before the first date there is a binding contract (the signing date rule). The preamble explains that the signing date rule is based on the principle that where a binding contract provides for fixed consideration, the target corporation shareholders can generally be viewed as being subject to the economic fortunes of the issuing corporation as of the last business day before the signing date (the Pre-Signing Date). However, if the contract does not provide for fixed consideration, the signing date value of the issuing corporation stock is not relevant for purposes of determining the extent to which a proprietary interest in the target corporation is preserved. For additional background regarding the signing date rule, see the preamble to the 2011 regulations published elsewhere in this issue of the **Federal Register**.

**Explanation of Provisions**

In response to comments, the IRS and the Treasury Department have reconsidered the scope of the signing

date rule, and agree that its underlying principles support additional methods for determining whether COI is satisfied. For example, a contract to effect a potential reorganization may provide that the amount of an item of consideration will vary as the value of issuing corporation stock declines between the stock's Pre-Signing Date value and some lower value provided for in the contract (Floor Price), but will not vary below the Floor Price. If the closing date value is less than the Floor Price in such a case, the target shareholders have been subjected to the economic fortunes of owning the consideration received in the exchange in the same manner as if the contract had fixed the consideration based upon the contract's stated Floor Price. Accordingly, these proposed regulations generally provide that if, pursuant to a binding contract, an item of consideration varies as the value of issuing corporation stock declines between the stock's Pre-Signing Date value and a Floor Price, and the closing date value is less than the Floor Price, COI is determined as if the consideration that would have been delivered at the Floor Price were issued and valued based upon the Floor Price. Applying the same principle, these proposed regulations provide that if, pursuant to a binding contract, an item of consideration varies as the value of issuing corporation stock increases between the stock's signing date value and some higher value provided for in the contract (Ceiling Price), and the closing date value is greater than the Ceiling Price, COI is determined as if the consideration that would have been delivered at the Ceiling Price were issued and valued based upon the Ceiling Price. For purposes of this rule, the Closing Date means the date upon which the exchange of consideration in the potential reorganization occurs.

In response to comments, these proposed regulations also permit, in lieu of the value of issuing corporation stock on the Closing Date, the use of an average value for issuing corporation stock in certain circumstances. The proposed regulations provide that an average value may be used if it is based upon issuing corporation stock values occurring after the signing date and before the Closing Date, and the binding contract utilizes the average price, so computed, in determining the number of shares of each class of stock of the issuing corporation, the amount of money, and the other property to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary

interest in the target corporation. This rule also applies signing date rule principles because the average value fixes the number of shares and amount of other consideration. Accordingly, the target shareholders become subject to the fortunes of the issuer's stock across the range of dates being averaged.

**Request for Comments**

As previously stated, the signing date rule and these proposed regulations are based upon the concept that for purposes of measuring COI, in certain circumstances an item of consideration provided by the issuing corporation can generally be valued on the date that the target shareholders become subject to the economic fortunes of owning the item, assuming the exchange ultimately occurs. Depending upon the contract's terms, this may occur on a date between the signing date and the closing date, and may occur for different items of consideration on different dates. Accordingly, for purposes of COI, it may be appropriate to value an item of consideration on a date between the signing date and the closing date, and to value different items on different dates. For example, future guidance could provide that an item of consideration is valued for COI purposes at the earliest date on which the target shareholders (in the aggregate) become fully subject to the appreciation and depreciation in the value of that item pursuant to a binding contract to effect the potential reorganization, but not later than the date of the reorganization exchange. In determining whether the target shareholders are fully subject to market appreciation and depreciation, certain circumstances, such as the risk of not closing, would be disregarded. The IRS and the Treasury Department request comments on the propriety of such an approach.

**Effective Date**

These regulations are proposed to apply to transactions occurring on or after the date the regulations are published as final regulations in the **Federal Register**, unless completed pursuant to a binding agreement that was in effect immediately before the date such final regulations are published and all times afterwards.

**Special Analysis**

It has been determined that this notice of proposed rulemaking 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 has also been determined that 5 U.S.C. 553(b)

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. 601 *et seq.*) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities.

### Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and the 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 will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

### Drafting Information

The principal author of these regulations is Richard Starke of the Office of Associate Chief Counsel (Corporate), IRS. 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.

### 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.** Section 1.368-1 is amended by adding new paragraphs (e)(2)(vi), (e)(2)(vii), and revising (e)(9) to read as follows:

#### § 1.368-1 Purpose and scope of exception of reorganization exchanges.

\* \* \* \* \*

(e) \* \* \*  
(2) \* \* \*

(vi) *Special Rules*—(A) *Floors*. This paragraph (e)(2)(vi)(A) applies if,

pursuant to a binding contract, the amount of an item of consideration to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation, changes as the value of a share of the issuing corporation varies above a specified price (Floor Price), but does not vary below the Floor Price. If the value of the share is greater than or equal to the Floor Price on the Pre-Signing Date (as defined in paragraph (e)(2)(i) of this section) but below the Floor Price on the Closing Date (as defined in paragraph (e)(2)(vi)(D) of this section), whether a proprietary interest is preserved is determined as if the consideration was issued and valued based upon the Floor Price.

(B) *Ceilings*. This paragraph (e)(2)(vi)(B) applies if, pursuant to a binding contract, the amount of an item of consideration to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation, changes as the value of a share of the issuing corporation varies below a specified price (Ceiling Price), but does not vary above the Ceiling Price. If the value of the share is less than or equal to the Ceiling Price on the Pre-Signing Date (as defined in paragraph (e)(2)(i) of this section) but above the Ceiling Price on the Closing Date (as defined in paragraph (e)(2)(vi)(D) of this section), whether a proprietary interest is preserved is determined as if the consideration was issued and valued based upon the Ceiling Price.

(C) *Closing Date value—average values between signing date and Closing Date*. In determining the Closing Date value of issuing corporation stock for purposes of determining whether a proprietary interest in the target corporation is preserved, an average of prices may be used in lieu of the Closing Date price if—

(1) The average price is based upon prices of issuing corporation stock occurring after the signing date and before the Closing Date, and

(2) The binding contract utilizes the average price, so computed, in determining the number of shares of each class of stock of the issuing corporation, the amount of money, and the other property to be exchanged for all the proprietary interests in the target corporation, or to be exchanged for each proprietary interest in the target corporation.

(D) *Closing Date*. For purposes of paragraphs (e)(2)(vi) and (e)(2)(vii) of this section, the *Closing Date* means the date upon which the exchange of

consideration in the potential reorganization occurs.

(vii) *Examples*. For purposes of the examples in this paragraph (e)(2)(vii), P is the issuing corporation, T is the target corporation, each corporation has only one class of stock outstanding, no transactions other than those described occur, and the transactions are not otherwise subject to recharacterization. The following examples illustrate the application of paragraph (e)(2)(vi) of this section:

*Example 1. Price adjustment to provide more or less cash.* (i) *Facts*. On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged into P. Pursuant to the contract, the T shareholders will receive 50 shares of P stock and \$50 cash in exchange for all of the outstanding shares of T stock, subject to the following price adjustment:

(A) If the average price of P stock over the five-day period prior to the Closing Date exceeds \$1, the amount of cash will be reduced by 50 times the excess of that price over \$1, and

(B) If the average price of P stock during the specified period is less than \$1, the amount of cash will be increased by 50 times the excess of \$1 over that price, provided that in no event will P deliver cash of less than \$40 or more than \$60 to the T shareholders. This adjustment ensures that the T shareholders will be entitled to receive aggregate consideration with a value of \$100 on the closing date if the average price of P stock during the specified period is between \$.80, at which point the T shareholders would receive \$60 of cash ( $\$50 + ((\$1 - \$.80) \times 50)$ ), and \$1.20, at which point the T shareholders would receive \$40 of cash ( $\$50 - ((\$1.20 - \$1) \times 50)$ ).

(C) On January 2 of year 1, the value of the P stock is \$1 per share. On June 1 of year 1, T merges into P, when the value of P stock is \$.25 per share. The average price of P stock during the specified period is also \$.25 per share. In the merger, the T shareholders receive \$60 cash and 50 shares of P stock with a value (determined as of the Closing Date) of \$12.50.

(ii) *COI determined at the Floor Price*. For purposes of determining whether a proprietary interest in the target corporation is preserved, the rules of paragraph (e)(2)(vi)(A) of this section apply because, pursuant to a binding contract, the amount of cash to be exchanged for all the proprietary interests in the target corporation varies above a Floor Price of \$.80 but does not vary below the Floor Price, the Pre-Signing Date value exceeds the Floor Price, and the value on the Closing Date is less than the Floor Price. Accordingly, whether a proprietary interest is preserved is determined as if the consideration that would have been delivered at the Floor Price was issued and valued based upon the Floor Price value. At the Floor Price, the T shareholders would have received, in the aggregate, \$60 of cash and \$40 of P stock. Therefore, the transaction satisfies the continuity of interest requirement.

*Example 2. No Floor Price.* The facts are the same as in *Example 1*, except that the Pre-Signing Date value is \$.50, the Closing Date value is \$1.50, and there is no limitation on the amount of additional cash that the T shareholders may receive (that is, there is no Floor Price). For purposes of determining whether a proprietary interest in the target corporation is preserved, the rules of paragraph (e)(2)(vi)(B) of this section apply because, pursuant to a binding contract, the amount of cash to be exchanged for all the proprietary interests in the target corporation varies below a Ceiling Price of \$1.20 but does not vary above the Ceiling Price, the Pre-Signing Date value is less than the Ceiling Price, and the value on the Closing Date exceeds the Ceiling Price. Accordingly, whether a proprietary interest is preserved is determined as if the consideration that would have been delivered at the Ceiling Price was issued and valued based upon the Ceiling Price. At the Ceiling Price, the T shareholders would have received, in the aggregate, \$40 of cash and \$60 of P stock. Therefore, the transaction satisfies the continuity of interest requirement.

*Example 3. No Floor or Ceiling Price.* (i) *Facts.* On January 3 of year 1, P and T sign a binding contract pursuant to which T will be merged into P. Pursuant to the contract, the T shareholders will receive \$50 cash and \$50 of P stock based upon the P stock value on the Closing Date. On January 2 of year 1, the Pre-Signing Date, the value of the P stock is \$1 per share. On June 1 of year 1, when the value of P stock is \$5 per share, T merges into P.

(ii) *COI determined on the Closing Date.* For purposes of determining whether a proprietary interest in the target corporation is preserved, the rules of paragraph (e)(2)(vi) of this section do not apply because the contract does not provide for either a Floor Price or a Ceiling Price. There is no Floor Price because there is not a value below which the amount of P stock will not vary. There is no Ceiling Price because there is not a value above which the amount of P stock will not vary. Because the transaction does not satisfy the requirements of paragraph (e)(2)(vi) of this section and does not satisfy the definition of fixed consideration, the consideration will be valued on the Closing Date. The transaction satisfies the continuity of interest requirement because the T shareholders receive, in the aggregate, \$50 cash and \$50 of P stock.

\* \* \* \* \*

(9) *Effective/Applicability date.* Paragraphs (e)(2)(vi) and (e)(2)(vii) are proposed to apply to transactions occurring on or after the date the regulations are published as final regulations in the **Federal Register**, unless completed pursuant to a binding agreement that was in effect immediately before the date such final

regulations are published and at all times afterwards.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2011-32079 Filed 12-16-11; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-130302-10]

RIN 1545-BJ69

#### Reporting of Specified Foreign Financial Assets

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the Rules and Regulations section of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding foreign financial assets in which they have an interest. The text of the temporary regulations also serves as the text of these proposed regulations. This notice of proposed rulemaking also includes a proposed regulation setting forth requirements for certain domestic entities to report foreign financial assets in the same manner as an individual.

**DATES:** Written or electronic comments and requests for a public hearing must be received by March 19, 2012. Comments on the collection of information should be received by February 17, 2012.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-130302-10), Room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-130302-10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC., or sent electronically, via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-130302-10).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Joseph S. Henderson, (202) 622-3880; concerning submission of comments and/or requests for a hearing, *Richard.A.*

*Hurst@irs.counsel.treas.gov*, (202) 622-7180 (not a toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

#### Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 17, 2012. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance and purchase of service to provide information.

The collection of information in these proposed regulations is in §§ 1.6038D-2 and 1.6038D-4. The collection of information is mandatory with respect to a specified person that has an interest in specified foreign financial assets and the value of those assets is more than the applicable reporting threshold. The respondents are U.S. citizens, U.S. residents, certain nonresidents and, to the extent provided in future regulations, certain domestic entities. The collection of information is satisfied by filing Form 8938, "Statement of Specified Foreign Financial Assets," OMB No. 1545-2195, with the respondent's income tax return.

*Estimated total annual reporting burden:* 378,000 hours.

*Estimated annual burden per respondent:* 1 hour and 5 minutes.