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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-159420-04]

RIN 1545-BE14

Credit for Increasing Research Activities: Intra-Group Gross Receipts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under section 41 of the Internal Revenue Code (Code) relating to the treatment of qualified research expenditures (QREs) and gross receipts resulting from transactions between members of a controlled group of corporations or a group of trades or businesses under common control (intra-group transactions) for purposes of determining the credit under section 41 for increasing research activities (research credit). These proposed regulations will affect controlled groups of corporations or groups of trades or businesses under common control (controlled groups) that are engaged in research activities. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by March 13, 2014. Outlines of topics to be discussed at the public hearing scheduled for April 23, 2014, at 10:00 a.m. must be received by March 13, 2014.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-159420-04), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-159420-04), 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-159420-04). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Concerning these proposed regulations, David Selig, (202) 317-4137; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

These proposed regulations address how the interaction of section 41(f)(1) (relating to the treatment of controlled groups as a single taxpayer) and section 41(c)(7) (relating to the exclusion from gross receipts of amounts received by a foreign corporation that are not effectively connected to a United States trade or business) affects the computation of gross receipts resulting from intra-group transactions between domestic controlled group members (domestic members) and foreign corporate members of the controlled group (foreign corporate members). These proposed regulations apply to an intra-group transaction that is followed by a transaction between a foreign corporate member and a party outside of the controlled group involving the same or a modified version of tangible or intangible property or services that was the subject of the intra-group transaction, and the transaction with the party outside of the controlled group does not give rise to gross receipts that are effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States.

Section 41(f)(1) provides that in determining the amount of the research credit, all members of the same controlled group of corporations and all commonly controlled trades or businesses (whether or not incorporated) shall be treated as a single taxpayer. For this purpose, controlled group is defined by reference to section 1563(a), except that "more than 50 percent" is substituted for "at least 80 percent," and the determination is made without regard to subsections (a)(4) (regarding certain insurance companies) and (e)(3)(C) (regarding stock owned by

an employees' trust). The statute provides no rules, however, regarding how the single taxpayer treatment is to be implemented. Commentators have noted the ambiguity associated with similar provisions of the Code. See, e.g., Prop. Reg. § 1.199-1, 70 FR 67220, 67236 (November 4, 2005) ("the single corporation language in section 199(d)(4)(A) has created confusion among commentators and the proposed regulations clarify the meaning of this language").

The IRS and the Treasury Department believe that the single taxpayer concept should be interpreted consistently with the purpose the statute is intended to advance. The single taxpayer concept as it relates to the computation of the research credit first appeared in 1981 when Congress initially enacted the research credit. As originally enacted, the research credit was determined solely by reference to a taxpayer's QREs. Specifically, to ensure that the research credit was available only for actual increases in research expenditures, former section 44F(f)(1) provided that the QREs of a controlled group of corporations and all commonly controlled trades or businesses (whether or not incorporated) were aggregated and treated as those of a single taxpayer. H. Rept. No. 97-201, 1981-2 CB 364-365 (demonstrating that controlled groups are prevented from increasing research expenditures by shifting these expenditures from an entity that has a high baseline of research expenditures to one that does not).

In 1989, Congress modified the computation of the research credit (now section 41 of the Code) by adding the base amount concept embodied in section 41(a)(1)(B), which included gross receipts in the calculation of the research credit for the first time. See the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101-239, § 7110) (the "1989 Act"). The legislative history of the 1989 Act explains that gross receipts were included in the computation of the research credit to address concerns with the existing rules and incentivize spending on research activities. In particular, Congress wished to modify the pre-existing incremental credit structure in order to maximize the research credit's efficiency by not allowing (to the extent possible) credits for research that would have been undertaken in any event. Congress

believed that businesses often determine their research budgets as a fixed percentage of gross receipts and determined that it was appropriate to compute the research credit, in part, based on the increase in a taxpayer's gross receipts. This approach also had the advantage of effectively indexing the research credit for inflation and preventing taxpayers from being rewarded for increases in research spending that are attributable solely to inflation. See H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 1199-1200 (1989).

The 1989 Act also amended section 41 to provide certain parameters for measuring gross receipts. Specifically, section 41(c)(7) provides that gross receipts are reduced by returns and allowances made during the taxable year. Section 41(c)(7) also provides that in the case of a foreign corporation, only gross receipts effectively connected with the conduct of a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States are taken into account in the computation of the research credit. See section 41(c)(7), as amended. The legislative history of the 1989 Act does not expressly address the purpose of the gross receipts provision relating to foreign corporations. The enactment of the controlled group aggregation rules in section 41(f)(1) (treating all members of a controlled group as a single taxpayer) preceded the enactment of the foreign corporation gross receipts rule in section 41(c)(7). Congress, however, did not make clear how the two provisions should interact and did not provide any additional indication regarding the consequences of being treated as a single taxpayer, including when the deemed single taxpayer is comprised of both domestic and foreign controlled group members.

Current Regulatory Scheme

Section 1.41-3(c) defines gross receipts generally as the total amount, determined under the taxpayer's method of accounting, derived from all its activities and from all sources. Section 1.41-6(i) interprets the single taxpayer concept of section 41(f)(1) to provide that transfers between members of a controlled group of corporations are generally disregarded for purposes of determining the research credit under section 41 for both gross receipts and QREs. The IRS and the Treasury Department believe that, in most cases, the general rule that disregards intra-group transactions for both gross receipts and QREs furthers the statutory purpose of ensuring that the computation of the research credit is

based upon an economic measure of gross receipts relative to QREs and not artificially increased by multiple intra-group transactions.

The IRS and the Treasury Department believe, however, that an interpretation of section 41(f)(1) that completely excludes gross receipts associated with certain transactions is inconsistent with Congressional intent. For example, assume that a domestic corporation incurs research expenditures and sells a product that it produced to a foreign corporate member, and the foreign corporate member then sells the product to a customer in a transaction that does not give rise to gross receipts effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States. If gross receipts from the sales transactions are excluded because the intra-group transaction is disregarded under § 1.41-6 and the foreign corporate member's gross receipts are excluded under section 41(c)(7) for the second transaction, the aggregate amount of gross receipts for purposes of determining the research credit is distorted. The distortion results because the QREs of the domestic member are included, but its gross receipts from the sale to the foreign corporate member are not. Accordingly, the IRS and the Treasury Department propose to revise the regulations to include gross receipts in this situation, including in cases where the property is modified prior to being transferred by the foreign corporate member, the gross receipts are in the form of royalties, interest, or other cash or non-cash remuneration, or the gross receipts relate to services ultimately provided by the foreign corporate member to a third-party customer.

However, the IRS and the Treasury Department believe that multiple inclusions of gross receipts associated with intra-group transactions involving the same or a modified version of tangible or intangible property or services would be inconsistent with Congressional intent. Thus, for example, it would not be appropriate to overstate gross receipts, and thereby reduce the research credit available to a controlled group, by taking into account the transfer of a single piece of property (including a modified form of the same property) more than one time (that is, first as a transfer between controlled group members and then as a transfer with a third party).

Explanation of Provisions

The proposed regulations retain the current rule that generally disregards

transactions among members of a controlled group for purposes of computing the research credit, but provide a narrow exception to this rule. Under the exception, gross receipts (within the meaning of § 1.41-3(c)) from an intra-group transaction are taken into account if (1) a foreign corporate member engages in a transaction with a party outside of the group (external transaction) involving the same or a modified version of tangible or intangible property or a service that was previously the subject of one or more intra-group transactions (an internal transaction); and (2) the external transaction does not give rise to gross receipts that are effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States. The exception harmonizes the application of sections 41(f)(1) and 41(c)(7) and is consistent with the purposes of these provisions as well as the broader statutory changes that made gross receipts a central feature of the research credit computation.

For example, if a domestic member transfers property to a foreign corporate member, and the foreign corporate member then transfers the property outside of the controlled group in a transaction that does not give rise to gross receipts that are effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States, the proposed regulations provide that the domestic member includes in its gross receipts amounts received from the foreign corporate member for that transaction. The amounts are taken into account in computing gross receipts in the taxable year in which the foreign corporate member engages in the external transaction. The fact that the foreign corporate member that ultimately engages in a transaction involving the property outside of the controlled group is not the same foreign corporate member to which the domestic member directly transferred the property (for example, one foreign corporate member re-transfers the property to another foreign corporate member) is not material to the determination of the domestic member's gross receipts.

To prevent multiple inclusions of gross receipts in cases in which transactions involving the same or a modified version of tangible or intangible property or services occur successively between domestic and foreign corporate members, the proposed regulations provide that only

the last internal transaction giving rise to gross receipts (within the meaning of section 1.41–3(c)) is taken into account in the research credit computation.

These proposed regulations embody the statutory requirement of consistency in determining a taxpayer's base amount (generally, the product of the fixed-base percentage and 4-year average annual gross receipts preceding the credit year). See section 41(c)(6). Accordingly, in computing the research credit for taxable years beginning on or after the date of publication of these proposed regulations as final regulations, QREs and gross receipts taken into account in computing a taxpayer's fixed-base percentage and a taxpayer's base amount must be determined on a basis consistent with the definition of QREs and gross receipts for the credit year, without regard to the law in effect for the earlier taxable years that are taken into account in computing the fixed-base percentage or the base amount. However, the proposed regulations do not specify the manner in which a taxpayer must make the base amount adjustments. The IRS and the Treasury Department recognize that accounting for intra-group transactions in prior years presents a unique burden because taxpayers may not have records for the base years with sufficient information to satisfy the proposed regulations' requirement of consistency. These proposed regulations are intended to capture some measure of intra-group gross receipts for purposes of satisfying the requirement of consistency, but are not intended to preclude research credit claims for taxpayers that do not have adequate information in their books and records for the base years. Accordingly, the IRS and Treasury Department request comments regarding the need for a rule or safe harbor in applying the consistency rule for purposes of determining the base amount in accordance with these proposed regulations.

QREs

These proposed regulations remove the rules in § 1.41–6(i)(4) (relating to the treatment of lease payments as QREs) to reflect changes to section 41 by the Tax Reform Act of 1986, Public Law 99–514.

These proposed regulations generally would not change the rules concerning whether payments between members of a controlled group constitute QREs. The IRS and the Treasury Department request comments concerning whether any revisions are necessary.

Proposed Effective Date

The amendments to § 1.41–6(i) are proposed to apply to taxable years

beginning on or after the date that these regulations are published as final regulations in the **Federal Register**.

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. It also has been determined that section 553(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the 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 business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and the Treasury Department request comments on all aspects of the proposed rules.

All comments will be available for public inspection and copying.

A public hearing has been scheduled for April 23, 2014, beginning at 10:00 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. 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 30 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** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by March 13, 2014, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by March 13, 2014. 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 receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries). 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.** In § 1.41–0, the table of contents is amended by:

- 1. Revising the section heading for § 1.41–6 and the entries for § 1.41–6(i), (i)(1), (i)(2), (i)(3), (i)(4), and (i)(5).
- 2. Adding a new entry for § 1.41–6(i)(6).
- 3. Adding a new entry for § 1.41–6(j)(4).

The addition reads as follows:

§ 1.41–0 Table of contents.

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§ 1.41–6 Controlled groups.

* * * * *

(i) Transactions between controlled group members.

(1) In general.

(2) Exception for certain amounts received from foreign corporate controlled group members.

(3) In-house research expenses.

(4) Contract research expenses.

(5) Payment for supplies.

(6) Consistency requirement.

(j) * * *

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(4) Intra-group transactions.

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■ **Par. 3.** Section 1.41–6 is amended by:

- 1. Revising the section heading.
- 2. Revising paragraph (i)(1).
- 3. Removing paragraph (i)(4).
- 4. Redesignating paragraphs (i)(2) and (3) as paragraphs (i)(3) and (4), respectively.
- 5. Adding new paragraph (i)(2).
- 6. Adding new paragraph (i)(6).
- 7. Revising the first sentence of paragraph (j)(1).

■ 8. Adding new paragraph (j)(4).

The revisions and additions read as follows:

§ 1.41-6 Controlled groups.

* * * * *

(i) *Transactions between controlled group members*—(1) *In general*—*Treatment of transactions.* Except as otherwise provided in this paragraph, all activities giving rise to amounts included in gross receipts under § 1.41-3(c) (transactions) between members of a controlled group as defined in paragraph (a)(3) of this section (intra-group transactions) are generally disregarded in determining the QREs and gross receipts of a member for purposes of the research credit.

(2) *Exception for certain amounts received from foreign corporate controlled group members*—(i) *In general.* Notwithstanding paragraph (i)(1) of this section, gross receipts (within the meaning of § 1.41-3(c)) from an intra-group transaction are taken into account if—

(A) A foreign corporate controlled group member engages in a transaction with a party outside of the group (an external transaction) involving the same or a modified version of tangible or intangible property or a service that was previously the subject of one or more intra-group transactions (an internal transaction); and

(B) The external transaction does not give rise to gross receipts that are effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States.

(ii) *Timing of inclusion.* The amount described as taken into account in computing gross receipts in paragraph (i)(2)(i) of this section is taken into account in the year a foreign corporate controlled group member engages in the external transaction described in paragraph (i)(2)(i)(B) of this section.

(iii) *Multiple intra-group transactions.* If there is more than one internal transaction, then only the last internal transaction giving rise to gross receipts (within the meaning of section 1.41-3(c)) is taken into account in the research credit computation pursuant to paragraph (i)(2)(i) of this section.

(iv) *Examples.* The following examples illustrate the principles of paragraph (i)(2) of this section.

Example 1. Domestic Controlled Group Member Includes in Gross Receipts Proceeds From Intra-group Sale. D and F are members of the same controlled group. D is a domestic corporation. F is a foreign corporation that is organized under the laws of Country. F does not conduct a trade or business within the United States, Puerto Rico, or any U.S.

possession. In Year 1, D sells Product to F for \$8x. In Year 2, F sells Product to F's unrelated customer for \$10x. Because the Product that F sells outside the group is the same Product that was the subject of an internal transaction (i.e., the sale from D to F), and the \$10x that F receives upon sale of Product outside the group is not effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States, the \$8x that D receives from F is included in D's gross receipts for purposes of computing the amount of the group credit. The \$8x of gross receipts is taken into account in Year 2, the year of the external transaction. See paragraph (i)(2) of this section. The \$10x that F receives from F's customer is excluded from gross receipts under section 41(c)(7) because it is not effectively connected with the conduct of a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States.

Example 2. Domestic Controlled Group Member Includes in Gross Receipts Amounts Received For Intra-group Transfer of License. Assume the same facts as in *Example 1*, except in Year 1, D licenses intellectual property (license) to F for \$8x. F owns similar intellectual property that it plans to license to a customer together with the license it received from D. In Year 2, F licenses its intellectual property and sublicenses D's intellectual property to F's unrelated customer for \$20x. Because the intellectual property that F sublicenses outside the group is the same intellectual property that was the subject of an internal transaction (i.e., the license from D to F), and the \$20x that F receives for the license and sublicense of intellectual property outside the group is not effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States, the \$8x that D receives from F is included in D's gross receipts for purposes of computing the amount of the group credit. The \$8x of gross receipts is taken into account in Year 2, the year of the external transaction. See paragraph (i)(2) of this section. The \$20x that F receives from F's customer is excluded from gross receipts under section 41(c)(7) because it is not effectively connected with the conduct of a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States.

Example 3. Domestic Controlled Group Member Includes in Gross Receipts Proceeds From Intra-group Sale Following Multiple Internal Transactions. D, F1, and F2 are members of the same controlled group. D is a domestic corporation. F1 and F2 are foreign corporations that are organized under the laws of Country. F1 and F2 do not conduct a trade or business within the United States, Puerto Rico, or any U.S. possession. In Year 1, D sells Product to F1 for \$8x. In Year 2, F1 sells Product to F2 for \$9x, and F2 sells Product to F2's unrelated customer for \$10x. Both D's sale to F1 and F1's sale to F2 are internal transactions involving Product that precede F2's external transaction involving Product. The \$10x that F2 receives upon sale of Product outside the group is not effectively connected with a trade or business within the

United States, the Commonwealth of Puerto Rico, or any possession of the United States. Accordingly, the group will include gross receipts from an internal transaction in its research credit computation pursuant to paragraph (i)(2)(i) of this section. Because F1's sale of Product to F2 does not produce gross receipts that are effectively connected with the conduct of a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States, those gross receipts are not taken into account even though that sale is the most recent internal transaction preceding the external transaction. See section 41(c)(7) and paragraph (i)(2)(i) of this section. Therefore, D will include \$8x of gross receipts in its research credit computation in Year 2, the year of the external transaction, because the transfer from D to F1 is the last internal transaction giving rise to includible gross receipts. See paragraph (i)(2)(iii) of this section.

Example 4. Foreign Partnership Controlled Group Member Includes in Gross Receipts Proceeds From Intra-group Sale. Assume the same facts as in *Example 3*, except that F1 is a foreign partnership for federal income tax purposes and is part of the controlled group (within the meaning of § 1.41-6(a)(3)(ii)) that includes D and F2. Both D's sale to F1 and F1's sale to F2 are internal transactions involving Product that precede F2's external transaction involving Product. The \$10x that F2 receives upon sale of Product outside the group is not effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States. Accordingly, the group will include gross receipts from an internal transaction in its research credit computation pursuant to paragraph (i)(2)(i) of this section. F1's sale to F2 is the most recent internal transaction preceding the external transaction giving rise to gross receipts (see paragraph (i)(2)(iii)). The gross receipts from F1's sale to F2 are not excluded under section 41(c)(7) and paragraph (i)(2)(i) of this section because F1 is a partnership. Therefore, F1 will include \$9x of gross receipts in its research credit computation in Year 2 because the transfer from F1 to F2 is the last internal transaction giving rise to gross receipts. See paragraph (i)(2)(iii) of this section.

Example 5. Domestic Controlled Group Member Includes in Gross Receipts Proceeds From Intra-group Sale Following Multiple Internal Transactions that Include a Section 721 Exchange.

Assume the same facts as *Example 3*, except that in an exchange meeting the requirements of section 721(a), F2 transfers Product to PRS, a partnership that is not part of the controlled group within the meaning of § 1.41-6(a)(3)(ii). Both D's sale to F1 and F1's sale to F2 are internal transactions involving Product that precede F2's transfer of Product to PRS. The exchange engaged in by F2 does not give rise to gross receipts that are effectively connected with a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States. Because F1's sale of Product to F2 does not produce gross receipts that are effectively connected with

the conduct of a trade or business within the United States, the Commonwealth of Puerto Rico, or any possession of the United States, those gross receipts are not taken into account even though that sale is the most recent internal transaction preceding the external transaction. See section 41(c)(7) and paragraph (i)(2)(i) of this section. Therefore, D will include \$8x of gross receipts in its research credit computation in Year 2, the year of the external transaction, because the transfer from D to F1 is the last internal transaction giving rise to includible gross receipts. See paragraphs (i)(2)(i) and (i)(2)(iii) of this section.

* * * * *

(6) *Consistency requirement.* In computing the research credit for taxable years beginning on or after the

date of publication of these regulations as final regulations in the **Federal Register**, QREs and gross receipts taken into account in computing a taxpayer's fixed-base percentage and a taxpayer's base amount must be determined on a basis consistent with the definition of QREs and gross receipts for the credit year, without regard to the law in effect for the taxable years taken into account in computing the fixed-base percentage or the base amount. This consistency requirement applies even if the period for filing a claim for credit or refund has expired for any taxable year taken into account in computing the fixed-base percentage or the base amount.

(j) *Effective/applicability dates—(1) In general.* Except as otherwise provided in this paragraph (j), these regulations apply to taxable years ending on or after May 24, 2005.

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(4) *Intra-group transactions.* Paragraphs (i)(1) and (2) of this section apply to taxable years beginning on or after the date of publication of these regulations as final regulations in the **Federal Register**.

Beth Tucker,
Deputy Commissioner for Operations Support.

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