from Michigan's modified accredited zone.

Immediate Action

Immediate action is warranted to relieve restrictions on the interstate movement of cattle and bison from the newly classified modified accredited advanced zone in Michigan. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this action effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities.The analysis is summarized below.The full analysis may be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov) or obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Michigan currently has three bovine tuberculosis status zones: Accredited-free, modified accredited advanced, and modified accredited. This rule will reclassify six counties from modified accredited to modified accredited advanced. The elevation of an area to modified accredited advanced status from modified accredited status removes certain interstate movement and whole herd bovine tuberculosis testing requirements. Cattle owners will benefit from time savings and reduced costs associated with bovine tuberculosis testing. The annual cost savings to all producers could be between $266,000 and $400,000. However, the six counties covered in this rule account for less than 4 percent of cattle operations and less than 2 percent of the total number of cattle in the State of Michigan. In addition, bovine tuberculosis testing costs are about 1 percent or less of the value of the cattle tested. Thus, the expected savings will be relatively small.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Has no retroactive effect and (2) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Reporting and recordkeeping requirements, Transportation, Tuberculosis.

■ Accordingly, we are amending 9 CFR part 77 as follows:

PART 77—TUBERCULOSIS

■ 1. The authority citation for part 77 continues to read as follows:

Authority: 7 U.S.C. 8301-8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. In § 77.11, paragraph (b)(1) is revised to read as follows:

§ 77.11 Modified accredited States or zones.

* * * * *

(b) * * *

(1) A zone in Michigan that comprises Alcona, Alpena, Montmorency, Oscoda, and Presque Isle Counties and those portions of Iosco and Ogemaw Counties that are north of the southernmost boundary of the Huron National Forest and the Au Sable State Forest.

* * * * *

Done in Washington, DC, this 11th day of December 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–30128 Filed 12–17–09: 7:31 am]

BILLING CODE: 3410–34–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9475]

RIN 1545–BF83

Corporate Reorganizations; Distributions Under Sections 368(a)(1)(D) and 354(b)(1)(B)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations under section 368 of the Internal Revenue Code (Code). The regulations provide guidance regarding the qualification of certain transactions as reorganizations described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction. This document also contains final regulations under section 358 that provide guidance regarding the determination of the basis of stock or securities in a reorganization described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction. This document also contains final regulations under section 1502 that govern reorganizations described in section 368(a)(1)(D) involving members of a consolidated group. These regulations affect corporations engaging in such transactions and their shareholders.

DATES: *Effective Date:* These regulations are effective on *December 18, 2009.*

Applicability Date: For dates of applicability, see § 1.368–2(l)(4)(i).

FOR FURTHER INFORMATION CONTACT: Bruce A. Decker, (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Code provides general nonrecognition treatment for reorganizations specifically described in section 368(a). Section 368(a)(1)(D) describes as a reorganization a transfer by a corporation (transferor corporation) of all or a part of its assets to another corporation (transferee corporation) if, immediately after the transfer, the transferor corporation or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the transferee corporation; but only if stock or securities of the controlled corporation

are distributed in pursuance of a plan of reorganization in a transaction that qualifies under section 354, 355, or 356.

Section 354(a)(1) provides that no gain or loss shall be recognized if stock or securities in a corporation that is a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation that is a party to the reorganization. Section 354(b)(1)(B) provides that section 354(a)(1) shall not apply to an exchange in pursuance of a plan of reorganization described in section 368(a)(1)(D) unless the transferee corporation acquires substantially all of the assets of the transferor corporation, and the stock, securities, and other properties received by such transferor corporation, as well as the other properties of such transferor corporation, are distributed in pursuance of the plan of reorganization.

Further, section 356 provides that if section 354 or 355 would apply to an exchange but for the fact that the property received in the exchange consists not only of property permitted by section 354 or 355 without the recognition of gain or loss but also of other property or money, then the gain, if any, to the recipient shall be recognized, but not in excess of the amount of money and fair market value of such other property. Accordingly, in the case of an acquisitive transaction, there can only be a distribution to which section 354 or 356 applies where the target shareholder(s) receive at least some property permitted to be received by section 354.

On December 19, 2006, the IRS and Treasury Department published a notice of proposed rulemaking (REG–125632–06) in the **Federal Register** (71 FR 75898) that included regulations under section 368 (the Temporary Regulations) providing guidance regarding whether the distribution requirement under sections 368(a)(1)(D) and 354(b)(1)(B) is satisfied if there is no actual distribution of stock and/or securities. The Temporary Regulations provide that the distribution requirement will be satisfied even though no stock and/or securities is actually issued in the transaction if the same persons or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions. In such cases, the transferee will be deemed to issue a nominal share of stock to the transferor in addition to the actual consideration exchanged for the transferor's assets. The nominal share is then deemed distributed by the transferor to its shareholders and, when appropriate, further transferred through chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporations. The IRS and Treasury Department issued the Temporary Regulations in response to taxpayer requests regarding whether certain acquisitive transactions can qualify as reorganizations described in section 368(a)(1)(D) where no stock of the transferee corporation is issued and distributed in the transaction pending a broader study of issues related to acquisitive section 368(a)(1)(D) reorganizations in general. In the notice of proposed rulemaking, the IRS and Treasury Department requested comments on the Temporary Regulations as well as on several broader issues discussed below relating to acquisitive section 368(a)(1)(D) reorganizations.

On February 27, 2007, the IRS and Treasury Department published a clarifying amendment to the Temporary Regulations (REG–157834–06) in the **Federal Register** (72 FR 9284–9285) providing that the deemed issuance of the nominal share of stock of the transferee corporation in a transaction otherwise described in section 368(a)(1)(D) does not apply if the transaction otherwise qualifies as a triangular reorganization described in § 1.358–6(b)(2) or section 368(a)(1)(G) by reason of section 368(a)(2)(D).

No public hearing regarding the Temporary Regulations was requested or held. However, comments were received. After consideration of all of the comments, the Temporary Regulations are adopted as revised by this Treasury decision. The principal comments and changes are discussed in this preamble.

Explanation of Provisions

These final regulations retain the rules of the Temporary Regulations, but make certain modifications to the Temporary Regulations in response to comments received. The following paragraphs describe the most significant comments received and the extent to which they have been incorporated into these final regulations.

Meaningless Gesture Doctrine

Notwithstanding the requirement in section 368(a)(1)(D) that ''stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356'', the IRS and the courts have not required the actual issuance and distribution of stock and/or securities of the transferee corporation in circumstances where the same person or persons own all the stock of the transferor corporation and the transferee corporation. In such circumstances, the IRS and the courts have viewed an issuance of stock by the transferee corporation to be a ''meaningless gesture'' not mandated by sections 368(a)(1)(D) and 354(b). See *James Armour, Inc.* v. *Commissioner*, 43 T.C. 295, 307 (1964); *Wilson* v. *Commissioner*, 46 T.C. 334 (1966); Rev. Rul. 70–240, 1970–1 CB 81. In the notice of proposed rulemaking, the IRS and Treasury Department requested comments on whether the meaningless gesture doctrine is inconsistent with the distribution requirement in sections 368(a)(1)(D) and 354(b)(1)(B), especially in situations in which the cash consideration received equals the full fair market value of the property transferred such that there is no missing consideration for which the nominal share of stock deemed received and distributed could substitute. See § 601.601(d)(2)(ii).

Commentators noted that the doctrine is appropriate in the case where there is some excess in value of the assets transferred over the amount of cash received. In cases where the cash received is equal to the fair market value of the assets transferred, commentators agree that it is the proper approach because as a policy or administrative matter it is inappropriate to require a different outcome when the only factual difference is whether there is a nominal difference between the value of the assets and the cash consideration received. Commentators noted that deeming the distribution requirement to be satisfied in order to prevent an asset sale from being treated as a taxable exchange is not problematic enough to warrant a change from Rev. Rul. 70–240. Commentators have also suggested that the final regulations clarify that the rules apply to transactions regardless of whether the sum paid for the transferor's assets is exactly equal to their value.

The IRS and Treasury Department agree with the comments received regarding the meaningless gesture doctrine. Accordingly, these final regulations retain the rules of the Temporary Regulations which are based in part on the meaningless gesture doctrine. In addition, consistent with the IRS and Treasury Department's view of such transactions and in response to comments, the final regulations provide that if no consideration is received, or the value of the consideration received in the transaction is less than the fair market value of the transferor corporation's assets, the transferee corporation will be treated as issuing stock with a value equal to the excess

of the fair market value of the transferor corporation's assets over the value of the consideration actually received in the transaction. The final regulations further provide that if the value of the consideration received in the transaction is equal to the fair market value of the transferor corporation's assets, the transferee corporation will be deemed to issue a nominal share (discussed in this preamble) of stock to the transferor corporation in addition to the actual consideration exchanged for the transferor corporation's assets.

Issuance of Nominal Share

As described in this preamble, if the same person or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions in a transaction otherwise described in section 368(a)(1)(D), the transferee will be deemed to issue a nominal share of stock to the transferor in addition to the actual consideration exchanged for the transferor's assets. The nominal share is then deemed distributed by the transferor to its shareholders and, when appropriate, further transferred through the chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporations.

Commentators have asked for clarification as to whether the deemed issuance of a nominal share has any tax significance beyond satisfying the distribution requirement of section 354(b)(1)(B). Commentators have suggested that instead of deeming a stock issuance in a purported section 368(a)(1)(D) reorganization, the final regulations should simply state that such transactions are deemed to be transactions described in section 356. Furthermore, commentators believe that if the transferor corporation owns stock of the transferee corporation before the reorganization and the transferor corporation distributes such transferee corporation stock (and no other stock) to its shareholders, the transaction would qualify under section 354(b)(1)(B) and therefore would qualify under section 368(a)(1)(D). Commentators believe the IRS and Treasury Department have the authority to reach that result without deeming a nominal share to be issued as this approach has been adopted elsewhere. See § 1.368–2(d)(4) (a subsidiary liquidation not subject to section 332 can qualify as a section 368(a)(1)(C) reorganization by effectively treating old and cold subsidiary stock that the parent holds as exchanged for hypothetical parent voting stock issued in exchange for the subsidiary's assets). Commentators have suggested that if the final regulations retain the nominal share concept, then the final regulations should clarify that the nominal share has no significance other than to meet the distribution requirement of section 354(b)(1)(B).

The IRS and Treasury Department have carefully considered the comments regarding the nominal share concept and believe that it is preferable to an approach that simply deems the statutory requirements satisfied because the nominal share also provides a useful mechanism with respect to stock basis consequences to the exchanging shareholder. As noted above, following the deemed issuance of the nominal share, it is deemed distributed by the transferor to its shareholders and, when appropriate, further transferred through the chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporation (the final regulations provide similar treatment where, in a transaction involving no consideration or partial consideration, the transferee corporation is deemed to issue stock). Beyond satisfying section 354(b)(1)(B), the IRS and Treasury Department believe that the nominal share should be treated as nonrecognition property under section 358(a), and thus substituted basis property. Following basis adjustments (for example, under section 358 or § 1.1502–32), the nominal share preserves remaining basis, if any, and facilitates future stock gain or loss recognition by the appropriate shareholder.

With respect to the comment regarding previously owned stock of the transferee by the transferor qualifying under section 354(b)(1)(B), this raises issues that are beyond the scope of this regulation project and therefore are not addressed in this document. Accordingly, the final regulations retain the rule that if the same persons or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions, the transferee will be deemed to issue a nominal share of stock to the transferor in addition to the actual consideration exchanged for the transferor's assets.

Basis Allocation

While the IRS and Treasury Department believe that all of the normal tax consequences occur from the issuance of a nominal share in a transaction described in these final regulations, commentators have noted that such consequences are unclear with respect to the allocation of basis in the shares of the stock or securities surrendered when the consideration received in the transaction consists solely of cash. While commentators believe that the basis in the shares of the stock or securities surrendered should be preserved in the basis of the stock of the transferee, the mechanics of achieving this result are unclear.

The regulations under § 1.358–2(a)(2)(iii) address how basis is determined in the case of a reorganization in which no property is received or property (including property permitted by section 354 to be received without the recognition of gain or ''other property'' or money) with a fair market value less than that of the stock or securities surrendered is received in the transaction. The regulations treat the acquiring corporation as issuing an amount of stock equal to the fair market value of the stock surrendered, less any amount of consideration actually received by the exchanging shareholder in the form of stock, securities, other property, or money. The basis of that deemed issued stock is determined by reference to the basis of the shares surrendered in the reorganization, and adjusted as provided in the regulations. The shareholder's stock in the acquiring corporation is then treated as being recapitalized. In the recapitalization, the shareholder is treated as surrendering all of its shares of the acquiring corporation, including those shares owned immediately prior to the reorganization and those shares the shareholder is deemed to receive, in exchange for the shares that the shareholder actually holds immediately after the reorganization. The basis of the shares that the shareholder actually owns is determined under the rules that would have applied had the recapitalization actually occurred with respect to the shareholder's actual shares and the shares the shareholder is deemed to have received. However, these rules do not literally apply to a transaction involving solely other property or money because the rules address situations in which a shareholder of the target corporation receives no property or property with a fair market value less than that of the stock or securities the shareholder surrendered in the transaction.

The IRS and Treasury Department agree with the commentators that the basis in the shares of the stock surrendered should be preserved in the basis of the stock of the transferee in a transaction described in these final regulations. The IRS and Treasury Department also agree that current law does not adequately address the manner in which the basis in the shares of the stock or securities surrendered is

preserved in the basis of the stock of the transferee. Accordingly, the regulations under § 1.358–2(a)(2)(iii) are amended to provide that in the case of a reorganization in which the property received consists solely of non-qualifying property equal to the value of the assets transferred (as well as a nominal share described in these final regulations), the shareholder or security holder may designate the share of stock of the transferee to which the basis, if any, of the stock or securities surrendered will attach. The IRS and Treasury Department believe this approach is the most consistent with current law regarding basis determination as a similar result would occur under § 1.358–2 if stock was actually issued in the transaction. Nonetheless, as part of its broader study of basis issues, the IRS and Treasury Department will re-examine these regulations and the rules may change upon completion of this broader study.

Application of Final Regulations to Consolidated Groups

In the notice to proposed rulemaking, the IRS and Treasury Department requested comments on whether the Temporary Regulations should apply when the parties to the reorganization are members of a consolidated group. Commentators have stated that the Temporary Regulations should apply because there is no reason to distinguish a consolidated group member's reorganization treatment from that of a member of a nonconsolidated affiliated group. Commentators have suggested that the consolidated return regulations should be coordinated with the Temporary Regulations. Specifically, § 1.1502–13(f)(3) provides that, in the case of an acquisitive intercompany reorganization involving the receipt of money or other property (boot), boot is taken into account immediately after the reorganization in a separate transaction. *See* § 1.1502–13(f)(7), *Example 3* (an intercompany reorganization with boot is treated as if the acquirer had issued only its stock in the reorganization, and the deemed shares were then redeemed by the acquirer in exchange for the boot). The effect of this rule is to remove the boot from section 356 (dividend within gain treatment) and treat it as received in a redemption which is in turn taxed as a section 301 distribution.

Commentators have suggested that the nominal share concept under the Temporary Regulations is consistent with the deemed shares in *Example 3* under § 1.1502–13(f)(7) as the nominal share fiction deems a transaction to qualify as a section 368 reorganization, and the shares deemed issued under the § 1.1502–13(f)(3) fiction determine the consequences of the reorganization. Commentators have requested that an example be added to § 1.1502–13 to illustrate the interaction of the Temporary Regulations and § 1.1502–13(f)(3). Specifically, commentators have requested that the example clarify that the nominal share does not exist for any purpose other than to satisfy the distribution requirement of section 354(b)(1)(B). Therefore, § 1.1502–13(f)(3) should apply in the same way to the post-reorganization deemed redemption of stock in exchange for the boot actually received (that is, as if the distributee did not own the nominal share). Commentators believe that any remaining stock basis or ELA in the deemed shares under the § 1.1502–13(f)(3) fiction should shift to the member(s) that actually own stock in the transferee corporation under the principles of § 1.302–2(c).

As discussed in this preamble, the IRS and Treasury Department believe that the nominal share has significance beyond satisfaction of the distribution requirement of section 354(b)(1)(B), most notably for purposes of determining stock basis consequences to the appropriate shareholder. In an all cash sale of assets between members of a consolidated group, the IRS and Treasury Department believe that giving significance to the nominal share for purposes beyond the distribution requirement is consistent with the fundamental premise underlying the intercompany transaction deferral system which is to preserve the location of gain or loss within a consolidated group. Therefore, if an all cash transaction described in these final regulations occurs between members of a consolidated group, the selling member (S) will be treated as receiving the nominal share and additional stock of the buying member (B) under § 1.1502–13(f)(3), which it will distribute to its shareholder member (M) in liquidation. Immediately after the sale, the B stock (with the exception of the nominal share which is still held by M) received by M is treated as redeemed, and the redemption is treated under section 302(d) as a distribution to which section 301 applies. M's basis in the B stock will be reduced under § 1.1502–32(b)(3)(v). Under the rules of § 1.302–2(c), any remaining basis will attach to the nominal share. If applicable, the nominal share will be further transferred through chains of ownership to the extent necessary to reflect the actual ownership of B. An example has been added to § 1.1502–13 to illustrate the interaction of these final regulations and the consolidated return regulations.

Additional Comments Received

The IRS and Treasury Department also requested comments on the extent, if any, to which the continuity of interest requirement should apply to a reorganization described in section 368(a)(1)(D) as well as the continued vitality of various liquidation-reincorporation authorities after the enactment of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2085 (1986)). Comments were received on these issues. The IRS and Treasury Department continue to study these issues as part of a broad study of reorganizations under section 368(a)(1)(D).

Additional Comments Requested

The IRS and Treasury Department request comments on the application of the final regulations to reorganizations involving foreign corporations or shareholders, including comments regarding: (1) Whether any section 1248 amount attributable to the stock of the transferor corporation can be preserved in the nominal share deemed issued by the transferee corporation; (2) the manner in which earnings and profits (E&P) are (or should be) taken into account for purposes of section 902 when an exchanging shareholder recognizes gain under section 356(a) that is treated as a dividend under section 356(a)(2) from the E&P of the transferor and transferee corporations (including whether the E&P of the corporation is combined for this purpose or whether an ordering rule applies); (3) whether and how section 902 should apply when an exchanging shareholder does not actually own stock in the transferee corporation but the exchanging shareholder recognizes gain under section 356(a) that is treated as a dividend from the E&P of the transferee corporation (including whether a limitation similar to that of section 304(b)(5) is appropriate in such cases); (4) whether and how, under section 959, an exchanging shareholder should be able to access previously taxed E&P of a foreign transferor and/or transferee corporation before any non-previously taxed E&P of either corporation; and (5) whether and how section 897 applies if the transferor corporation is a United States real property holding corporation with at least one foreign shareholder.

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. It is hereby certified that these regulations do not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses, and, moreover, that any burden on taxpayers is minimal. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

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

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of 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 continues to read in part as follows:

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

■ **Par. 2.** Section 1.358–2 is amended by adding a sentence at the end of paragraph (a)(2)(iii) to read as follows:

§ 1.358–2 Allocation of basis among nonrecognition property.

(a) * * *

(2) * * *

(iii) * * * If a shareholder or security holder surrenders a share of stock or a security in a transaction under the terms of section 354 (or so much of section 356 as relates to section 354) in which such shareholder or security holder is deemed to receive a nominal share described in § 1.368–2(l), such shareholder may, after adjusting the basis of the nominal share in accordance with the rules of this section and § 1.358–1, designate the share of stock of the issuing corporation to which the basis, if any, of the nominal share will attach.

* * * * *

■ **Par. 3.** Section 1.368–2 is amended by revising paragraph (l) to read as follows:

§ 1.368–2 Definition of terms.

* * * * *

(l) *Certain transactions treated as reorganizations described in section 368(a)(1)(D)*—(1) *General rule.* In order to qualify as a reorganization under section 368(a)(1)(D), a corporation (transferor corporation) must transfer all or part of its assets to another corporation (transferee corporation) and immediately after the transfer the transferor corporation, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, must be in control of the transferee corporation; but only if, in pursuance of the plan, stock or securities of the transferee are distributed in a transaction which qualifies under section 354, 355, or 356.

(2) *Distribution requirement*—(i) *In general.* For purposes of paragraph (l)(1) of this section, a transaction otherwise described in section 368(a)(1)(D) will be treated as satisfying the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) notwithstanding that there is no actual issuance of stock and/or securities of the transferee corporation if the same person or persons own, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions. In cases where no consideration is received or the value of the consideration received in the transaction is less than the fair market value of the transferor corporation's assets, the transferee corporation will be treated as issuing stock with a value equal to the excess of the fair market value of the transferor corporation's assets over the value of the consideration actually received in the transaction. In cases where the value of the consideration received in the transaction is equal to the fair market value of the transferor corporation's assets, the transferee corporation will be deemed to issue a nominal share of stock to the transferor corporation in addition to the actual consideration exchanged for the transferor corporation's assets. The nominal share of stock in the transferee corporation will then be deemed distributed by the transferor corporation to the shareholders of the transferor corporation, as part of the exchange for the stock of such shareholders. Where appropriate, the nominal share will be further transferred through chains of ownership to the extent necessary to reflect the actual ownership of the transferor and transferee corporations. Similar treatment to that of the preceding two sentences shall apply where the transferee corporation is treated as issuing stock with a value equal to the excess of the fair market value of the transferor corporation's assets over the value of the consideration actually received in the transaction.

(ii) *Attribution.* For purposes of paragraph (l)(2)(i) of this section, ownership of stock will be determined by applying the principles of section 318(a)(2) without regard to the 50 percent limitation in section 318(a)(2)(C). In addition, an individual and all members of his family described in section 318(a)(1) shall be treated as one individual.

(iii) *De minimis variations in ownership and certain stock not taken into account.* For purposes of paragraph (l)(2)(i) of this section, the same person or persons will be treated as owning, directly or indirectly, all of the stock of the transferor and transferee corporations in identical proportions notwithstanding the fact that there is a de minimis variation in shareholder identity or proportionality of ownership. Additionally, for purposes of paragraph (l)(2)(i) of this section, stock described in section 1504(a)(4) is not taken into account.

(iv) *Exception.* Paragraph (l)(2) of this section does not apply to a transaction otherwise described in § 1.358–6(b)(2) or section 368(a)(1)(G) by reason of section 368(a)(2)(D).

(3) *Examples.* The following examples illustrate the principles of paragraph (l) of this section. For purposes of these examples, each of A, B, C, and D is an individual, T is the acquired corporation, S is the acquiring corporation, P is the parent corporation, and each of S1, S2, S3, and S4 is a direct or indirect subsidiary of P. Further, all of the requirements of section 368(a)(1)(D) other than the requirement that stock or securities be distributed in a transaction to which section 354 or 356 applies are satisfied. The examples are as follows:

Example 1. A owns all the stock of T and S. The T stock has a fair market value of $100x. T sells all of its assets to S in exchange for $100x of cash and immediately liquidates. Because there is complete shareholder identity and proportionality of ownership in T and S, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to A. The transaction qualifies as a

reorganization described in section 368(a)(1)(D).

Example 2. The facts are the same as in *Example 1* except that C, A's son, owns all of the stock of S. Under paragraph (l)(2)(ii) of this section, A and C are treated as one individual. Accordingly, there is complete shareholder identity and proportionality of ownership in T and S. Therefore, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to A. A will be deemed to transfer the nominal share of S stock to C. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 3. P owns all of the stock of S1 and S2. S1 owns all of the stock of S3, which owns all of the stock of T. S2 owns all of the stock of S4, which owns all of the stock of S. The T stock has a fair market value of $70x. T sells all of its assets to S in exchange for $70x of cash and immediately liquidates. Under paragraph (l)(2)(ii) of this section, there is indirect, complete shareholder identity and proportionality of ownership in T and S. Accordingly, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $70x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to S3. S3 will be deemed to distribute the nominal share of S stock to S1, which, in turn, will be deemed to distribute the nominal share of S stock to P. P will be deemed to transfer the nominal share of S stock to S2, which, in turn, will be deemed to transfer such share of S stock to S4. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 4. A, B, and C own 34%, 33%, and 33%, respectively, of the stock of T. The T stock has a fair market value of $100x. A, B, and C each own 33% of the stock of S. D owns the remaining 1% of the stock of S. T sells all of its assets to S in exchange for $100x of cash and immediately liquidates. For purposes of determining whether the distribution requirement of sections 368(a)(1)(D) and 354(b)(1)(B) is met, under paragraph (l)(2)(iii) of this section, D's ownership of a de minimis amount of stock of S is disregarded and the transaction is treated as if there is complete shareholder identity and proportionality of ownership in T and S. Because there is complete shareholder identity and proportionality of ownership in T and S, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, T will be deemed to distribute all such consideration to A, B, and C, and the nominal S stock will be deemed transferred among the S shareholders to the extent necessary to reflect their actual ownership of S. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 5. The facts are the same as in *Example 4* except that A, B, and C own 34%, 33%, and 33%, respectively, of the common stock of T and S. D owns preferred stock in S described in section 1504(a)(4). For purposes of determining whether the distribution requirement of sections 368(a)(1)(D) and 354(b)(1)(B) is met, under paragraph (l)(2)(iii) of this section, D's ownership of S stock described in section 1504(a)(4) is ignored and the transaction is treated as if there is complete shareholder identity and proportionality of ownership in T and S. Because there is complete shareholder identity and proportionality of ownership in T and S, under paragraph (l)(2)(i) of this section, the requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are treated as satisfied notwithstanding the fact that no S stock is issued. Pursuant to paragraph (l)(2)(i) of this section, S will be deemed to issue a nominal share of S stock to T in addition to the $100x of cash actually exchanged for the T assets, and T will be deemed to distribute all such consideration to A, B, and C. The transaction qualifies as a reorganization described in section 368(a)(1)(D).

Example 6. A and B each own 50% of the stock of T. The T stock has a fair market value of $100x. B and C own 90% and 10%, respectively, of the stock of S. T sells all of its assets to S in exchange for $100x of cash and immediately liquidates. Because complete shareholder identity and proportionality of ownership in T and S does not exist, paragraph (l)(2)(i) of this section does not apply. The requirements of sections 368(a)(1)(D) and 354(b)(1)(B) are not satisfied, and the transaction does not qualify as a reorganization described in section 368(a)(1)(D).

(4) *Effective/applicability date.* (i) *In general.* This section applies to transactions occurring on or after *December 18, 2009.* For rules regarding transactions occurring before *December 18, 2009,* see section 1.368–2T(l) as contained in 26 CFR part 1.

(ii) *Transitional rule.* A taxpayer may apply the provisions of these regulations to transactions occurring before *December 18, 2009.* However, the transferor corporation, the transferee corporation, any direct or indirect transferee of transferred basis property from either of the foregoing, and any shareholder of the transferor or transferee corporation may not apply the provisions of these regulations unless all such taxpayers apply the provisions of the regulations.

§ 1.368–2T [Removed]

■ **Par. 4.** Section 1.368–2T is removed.

■ **Par. 5.** Section 1.1502–13 is amended by:

■ 1. Revising the heading and entries for § 1.1502–13(f)(7) in paragraph (a)(6)(ii).

■ 2. Redesignating *Examples 4, 5, 6, 7,* and *8* as *Examples 5, 6, 7, 8,* and *9* respectively and adding a new *Example 4* to paragraph (f)(7)(i).

The revision and addition reads as follows:

§ 1.1502–13 Intercompany transactions.

(a) * * *

(6) * * *

(ii) * * *

Stock of members. (§ 1.1502–13(f)(7))

Example 1. Dividend exclusion and property distribution.

Example 2. Excess loss accounts.

Example 3. Intercompany reorganizations.

Example 4. All cash intercompany reorganization under section 368(a)(1)(D).

Example 5. Stock redemptions and distributions.

Example 6. Intercompany stock sale followed by section 332 liquidation.

Example 7. Intercompany stock sale followed by section 355 distribution.

* * * * *

(f) * * *

(7) * * *

(i) * * *

Example 4. All cash intercompany reorganization under section 368(a)(1)(D). (a) Facts. P owns all of the stock of M and B. M owns all of the stock of S with a basis of $25. On January 1 of Year 2, the fair market value of S's assets and its stock is $100, and S sells all of its assets to B for $100 cash and liquidates. The transaction qualifies as a reorganization described in section 368(a)(1)(D). Pursuant to § 1.368–2(l), B will be deemed to issue a nominal share of B stock to S in addition to the $100 of cash actually exchanged for the S assets, and S will be deemed to distribute all of the consideration to M. M will be deemed to distribute the nominal share of B stock to P.

(b) *Treatment as a section 301 distribution.* The sale of S's assets to B is a transaction to which paragraph (f)(3) of this section applies. In addition to the nominal share issued by B to S under § 1.368–2(l), S is treated as receiving additional B stock with a fair market value of $100 (in lieu of the $100) and, under section 358, a basis of $25 which S distributes to M in liquidation. Immediately after the sale, the B stock (with the exception of the nominal share which is still held by M) received by M is treated as redeemed for $100, and the redemption is treated under section 302(d) as a distribution to which section 301 applies. M's basis of $25 in the B stock is reduced under § 1.1502–32(b)(3)(v), resulting in an excess loss account of $75 in the nominal share. (See § 1.302–2(c)). M's deemed distribution of the nominal share of B stock to P under § 1.368–2(l) will result in M generating an

intercompany gain under section 311(b) of $75, to be subsequently taken into account under the matching and acceleration rules.

* * * * *

Approved: December 14, 2009.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 219

RIN 0596–AB86

National Forest System Land and Resource Management Planning

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (the Department) is issuing this final rule to comply with a June 30, 2009, Federal District Court order that has the effect of reinstating the National Forest System Land and Resource Management Planning Rule of November 9, 2000, as amended (2000 rule). This action announces the court's decision and takes the ministerial (formal) action of reinstating the rule in the Code of Federal Regulations. This action also makes technical amendments to that rule, including the interpretative rules issued in 2001 and 2004, to update transition provisions that will be in effect until a new planning rule is issued, as announced elsewhere in today's **Federal Register**.

DATES: *Effective Date:* This rule is effective December 18, 2009.

ADDRESSES: You can send a written request for more information to the Director, Ecosystem Management Coordination Staff, Forest Service, USDA, Mail Stop 1104, 1400 Independence Avenue, SW., Washington, DC 20250–1104. For more information, including an electronic copy of the 2000 rule and amendments see *http://www.fs.fed.us/emc/nfma/2000_planning_rule.html.*

FOR FURTHER INFORMATION CONTACT: Ecosystem Management Coordination staff's Assistant Director for Planning Ric Rine at (202) 205–1022 or Planning Specialist Regis Terney at (202) 205–1552.

SUPPLEMENTARY INFORMATION:

Background

The 2000 National Forest System Land and Resource Management Planning Rule as amended (2000 rule) is available online at *http://www.fs.fed.us/emc/nfma/2000_planning_rule.html. See also* final rule at 65 FR 67568 (Nov. 9, 2000); amendments at 67 FR 35434 (May 20, 2002); 68 FR 53297 (Sept. 10, 2003); and interpretative rules at 66 FR 1865 (Jan. 10, 2001) and 69 FR 58057 (Sept. 29, 2004). Although this rule is now in effect as a consequence of a court injunction, it is not found in the most recent version of the Code of Federal Regulations (CFR). This final rule reinstates the rule in the Code of Federal Regulations. In addition, the Department is making several technical amendments to the final rule.

Reinstating the 2000 Rule

The Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 476 *et seq.*), as amended by the National Forest Management Act of 1976 (NFMA) (90 Stat. 2949 *et seq.;* 16 U.S.C. 1601–1614), requires the Secretary of Agriculture (the Secretary) to issue regulations under the principles of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) that set up the process for the development and revision of land management plans (16 U.S.C. 1604(g)).

The first planning rule, adopted in 1979, was amended on September 30, 1982 (47 FR 43037) (1982 rule). The 1982 rule was itself amended, in part, on June 24, 1983 (48 FR 29122) and on September 7, 1983 (48 FR 40383). The 1982 rule, as amended, has guided the development, amendment, and revision of all the land management plans currently in effect throughout the National Forest System (NFS).

The Department has undertaken rulemaking several times to revise the planning rule provisions. The Forest Service published an advance notice of proposed rulemaking on February 15, 1991 (56 FR 6508) for possible revisions to the 1982 rule. The Forest Service published a proposed rule on April 13, 1995 (60 FR 18886); however, the Secretary chose not to continue with that proposal. Another proposed rule was published on October 5, 1999 (64 FR 54074), and the 2000 rule was issued on November 9, 2000 (65 FR 67514). Shortly after the issuance of the 2000 rule, a review of the rule found that it would be unworkable. The Department proposed a new planning rule on December 6, 2002 (67 FR 72770).

In the meantime, on February 16, 2001, a coalition of twelve environmental groups sued the Department in Federal District Court to challenge the validity of the 2000 rule. The district court did not rule on the merits of plaintiffs' claims. Instead, the plaintiffs stipulated to a dismissal shortly after the Department issued a new planning rule to take the place of the 2000 rule (*Citizens for Better Forestry* v. *USDA,* No. 01–0728 (N.D. Cal. March 7, 2005) (Stipulation and Order dismissing case with prejudice)).

The 2005 rule, intended to replace the 2000 rule, was issued on January 5, 2005 (70 FR 1055). Shortly thereafter, Citizens for Better Forestry and others challenged it in Federal District Court. On March 30, 2007, the United States District Court for the Northern District of California enjoined the Department from further carrying out the 2005 rule pending additional steps to comply with the court's opinion with respect to the Administrative Procedure Act (APA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) (*Citizens for Better Forestry* v. *USDA,* 481 F. Supp. 2d 1059 (N.D. Cal. 2007)). The effect of the injunction against the 2005 rule was to reinstate the 2000 rule (the rule previously in effect).

To respond to the district court's injunction of the 2005 rule, the Forest Service proposed a new planning rule. A notice of intent to prepare an environmental impact statement (EIS) was published in the **Federal Register** on May 11, 2007 (72 FR 26775) with a public comment period ending June 11, 2007. The proposed rule was published on August 23, 2007 (72 FR 48514), and the notice of availability for the supporting draft EIS was published in the **Federal Register** on August 31, 2007 (72 FR 50368). The notice of availability of the final EIS was published in the **Federal Register** on February 15, 2008 (73 FR 8869) and the final rule was issued and published in the **Federal Register** on April 21, 2008 (73 FR 21468). Citizens for Better Forestry and others promptly challenged the 2008 rule in court.

On June 30, 2009, the United States District Court for the Northern District of California invalidated the Forest Service's 2008 rule, holding that it was developed in violation of NEPA and ESA. The district court vacated the 2008 rule, enjoined the USDA from further implementing it and remanded it to the USDA for further proceedings (*Citizens for Better Forestry* v. *USDA,* 632 F. Supp. 2d 968 (N.D. Cal. 2009)). The court stated that, although the effect of invalidating an agency rule is to reinstate the rule previously in force, the Agency may choose whether to reinstate the 2000 rule or the 1982 rule.