



Section of Taxation

10th Floor
740 15th Street N.W.
Washington, DC 20005-1022
(202) 662-8670
FAX: (202) 662-8682
E-mail: tax@abanet.org

April 10, 2007

Hon. Mark. W. Everson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Proposed Revision of Rev. Proc. 86-42

Dear Commissioner Everson:

Enclosed is a proposed revision of Rev. Proc. 86-42, 1986-2 C.B. 722. The proposed revision reflects the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Susan P. Serota
Chair, Section of Taxation

Enclosure

- cc: Donald L. Korb, Chief Counsel, Internal Revenue Service
- Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury
- Michael J. Desmond, Tax Legislative Counsel, Department of the Treasury
- Marc A. Countryman, Attorney-Advisor, Department of the Treasury
- William D. Alexander, Associate Chief Counsel (Corporate), Internal Revenue Service
- Mark A. Schneider, Deputy Associate Chief Counsel (Corporate), Internal Revenue Service
- David H. Kessler, Attorney, Branch 2, Internal Revenue Service
- Lauren Laravia, Attorney, Branch 1, Internal Revenue Service

CHAIR
Susan P. Serota
New York, NY
CHAIR-ELECT
Stanley L. Blend
San Antonio, TX
VICE CHAIRS
Administration
Rudolph R. Ramelli
New Orleans, LA
Committee Operations
Elaine K. Church
Washington, DC
Communications
Gregory F. Jenner
Washington, DC
Government Relations
William M. Paul
Washington, DC
Professional Services
Elinore J. Richardson
Toronto, Canada
Publications
Louis Mezzullo
Rancho Sante Fe, CA
SECRETARY
Christine L. Agnew
Houston, TX
ASSISTANT SECRETARY
Armando Gomez
Washington, DC

COUNCIL
Section Delegates to the
House of Delegates
Paul J. Sax
San Francisco, CA
Richard M. Lipton
Chicago, IL
Immediate Past Chair
Dennis B. Drapkin
Dallas, TX
MEMBERS
Ellen P. Aprill
Los Angeles, CA
Samuel L. Braunstein
Fairfield, CT
Glenn R. Carrington
Washington, DC
Peter J. Connors
New York, NY
Richard S. Gallagher
Milwaukee, WI
Sharon Stern Gerstman
Buffalo, NY
Helen M. Hubbard
Washington, DC
Emily A. Parker
Dallas, TX
Priscilla E. Ryan
Chicago, IL
Charles A. Pulaski, Jr.
Phoenix, AZ
Stephen E. Shay
Boston, MA
Barbara Spudis de Marigny
San Antonio, TX

LIAISON FROM ABA
BOARD OF GOVERNORS
Raymond J. Werner
Chicago, IL
LIAISON FROM ABA
YOUNG LAWYERS DIVISION
Brian P. Trauman
New York, NY
LIAISON FROM LAW
STUDENT DIVISION
Heather McKee
Lincoln, NE

DIRECTOR
Christine A. Brunswick
Washington, DC

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION
PROPOSED REVISION OF REV. PROC. 86-42, 1986-2 C.B. 722**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Steven M. Flanagan of the Corporate Tax Committee. Substantive contributions were made by John Barrie, Reggie Clark, Bryan Collins, Jasper L. Cummings, Jr., Jamie Dahlberg, Julie Divola, Lisa Joire, Brian Peabody, Mark Silverman, Karen Gilbreath Sowell, David Strong, R. David Wheat, Rose Williams, and Lisa M. Zarlenga. The comments were reviewed by Robert H. Wellen of the Section of Taxation's Committee on Government Submissions and by Glenn Carrington, Council Director for the Corporate Tax Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Principal Contact: Steven M. Flanagan
(202) 327-8034
steven.flanagan@ey.com

EXECUTIVE SUMMARY

Rev. Proc. 86-42, 1986-2 C.B. 722, requires specific representations in requests for rulings as to certain reorganizations under section 368(a) of the Internal Revenue Code of 1986, as amended (the “Code”). The purpose of the representations is to facilitate the filing and processing of ruling requests by ensuring that the requests themselves are as complete as possible, and that taxpayers have considered the factual requirements for such rulings.

Since the issuance of Rev. Proc. 86-42, a number of changes have occurred in the Code and the Department of the Treasury regulations (the “Regulations”) relevant to reorganizations described under section 368(a). For example, modifications were made to sections 357(c) and (d), and section 362(e) was enacted. Also, the Department of the Treasury and the Internal Revenue Service (the “Service”) have issued regulations significantly modifying the continuity of interest and continuity of business enterprise requirements for certain reorganizations. As a result of these and other changes, some of the representations in Rev. Proc. 86-42 are no longer necessary; others no longer accurately reflect the law; and additional representations are required. Still other representations could be refined, based on experience since 1986. This submission includes the changes to the representations that we believe are necessary or helpful.

In some instances, where current law is unclear, we have sought to resolve the uncertainties. One significant example of our attempt to resolve uncertainties concerns the rule under the continuity of interest regulations providing that a proprietary interest in the Target is not preserved to the extent that consideration received before the reorganization in a redemption of or a distribution on the Target stock is treated as other property or money under section 356. Our revisions to the representations concerning the continuity of interest requirement reflect our belief that section 356 should not apply to cash or other property received by Target shareholders from Target, in either stock or asset acquisitions, provided Acquiring did not indirectly provide the consideration to redeem the Target stock or make distributions.

We wish to emphasize that general representations do not and should not limit a taxpayer’s obligation to disclose fully all aspects of the transactions on which rulings are requested. In our view, this obligation can be best enforced and administered, not by a free-standing list of representations like Rev. Proc. 86-42, but by including the required representations in outline questionnaires, as is done in Rev. Proc. 96-30. In this way, each representation is placed in the context of related information. Rev. Proc. 96-30, 1996-1 C.B. 696, sets forth, in a detailed checklist questionnaire, the information that must be included in a request for rulings under section 355. In earlier times, the Service issued revenue procedures with similar questionnaires. *See, e.g.*, Rev. Proc. 81-60, 1981-2 C.B. 680 (section 368(a)(1)(E) reorganizations); Rev. Proc. 83-59, 1983-2 C.B. 575 (section 351 exchanges); Rev. Proc. 90-52, 1990-2 C.B. 626 (section 332 complete liquidations). In our view, similar checklist questionnaires for the corporate reorganizations listed in Rev. Proc. 86-42 would facilitate more complete ruling requests. Thus, we respectfully recommend that Rev. Proc. 86-42 be updated as soon as possible, but that the updated version be superseded with one or more questionnaires.

In the annotated draft of the proposed revisions that follow:

- Proposed additions are underscored.
- Proposed deletions are stricken through.

- Annotations (Notes) are in bold face.
- The title of each Note corresponds to the section or representation to which it relates. In the case of Notes to section 7 of Rev. Proc. 77-37 (added in section 3 of Rev. Proc. 86-42), including all the Notes to the representations, the titles refer to the portions of section 7 of Rev. Proc. 77-37 to which they relate.
- Each Note appears after the section or representation to which it relates.

PROPOSED REVISIONS TO REV. PROC. 86-42 WITH ANNOTATIONS

Rev. Proc. _____ ~~86-42, 1986-2 CB 722~~

1. PURPOSE

The purpose of this revenue procedure is to supersede Rev. Proc. 86-42, 1986-2 C.B. 722, which amplified Rev. Proc. 77-37, 1977-2 C.B. 568, as amplified by Rev. Proc. 77-41, 1977-2 C.B. 574, Rev. Proc. 83-81, 1983-2 C.B. 598, and Rev. Proc. 84-42, 1984-1 C.B. 521, and superseded in part by Rev. Proc. 79-14, 1979-1 C.B. 496. Rev. Proc. 77-37, as amplified and superseded in part, sets forth certain operating rules of the Internal Revenue Service pertaining to issuing letter rulings and in determining whether it should decline to issue letter rulings.

2. BACKGROUND

The Internal Revenue Service receives many requests for rulings in which the information relating to the proposed transaction is not sufficient to permit a determination to be made. In these cases, it is necessary to obtain additional facts from the taxpayer before the request for a letter ruling can be considered. Obtaining these additional facts is time consuming for both Service personnel and taxpayers and delays issuance of the letter ruling.

In addition to the operating rules set forth in Rev. Proc. 77-37, the Service has developed certain standard representations that must be submitted as a prerequisite to the issuance of rulings on the tax consequences of specific transactions. These representations ensure that specific statutory and judicial requirements and administrative ruling guidelines are satisfied. The purpose of this revenue procedure is to facilitate the filing and processing of requests for rulings for certain enumerated transactions under section 368(a)(1) of the Internal Revenue Code by showing specific representations to be included so that the requests will be as complete as possible when initially filed. Because the information and representations necessary to rule on a particular transaction depend upon all the facts and circumstances, representations in addition to those set forth in this revenue procedure may be required. Careful attention to the preparation of the appropriate representations set forth below will aid in the timely processing of the letter ruling requests.

A ruling request should describe fully any transactions undertaken or to be undertaken in anticipation of, in connection with or related to the proposed transaction. Representations must be evaluated under all relevant provisions of law, including the step transaction doctrine. See Treas. Reg. section 1.368-1(a). Accordingly, the step transaction doctrine must be taken into account when submitting representations involving temporal proximity or relatedness; e.g., “immediately after the transaction,” “immediately prior to the transaction,” “in connection with the transaction,” or “related to the transaction.”

Note to section 2: This revision clarifies that taxpayers must evaluate the representations in light of the step transaction doctrine, taking into account any transactions undertaken in anticipation of, in connection with or related to the proposed transaction.

3. PROCEDURE

Rev. Proc. 77-37 is amplified by adding the following as a new section 7 and renumbering the present sections 7 and 8 as sections 8 and 9:

7. REPRESENTATIONS

Each representation set forth in this section ordinarily should be submitted in the application for a ruling under the applicable enumerated subparagraph of section 368(a)(1) of the Code. Each representation set forth in the appropriate subsection below should be submitted precisely in the language requested, except as required by the facts being described in the ruling request. If a representation cannot be submitted exactly as requested, an explanation must be given as to why the change will not adversely affect qualification as a reorganization under the appropriate provisions of the Code and the effect the changes have, if any, on the rulings requested. Unnecessary ~~variations~~ of the language of the representations may delay processing the ruling request and should be avoided as much as possible ~~will not be accepted unless reasons satisfactory to the Service are submitted~~.

Note to Section 7: In our experience, some Service attorneys have interpreted the existing language very narrowly to require strict adherence to the language of the representations, even if the facts are inconsistent with the language. The proposed revision is intended to clarify that variations in the language of the representations are appropriate to incorporate the particular facts of the ruling request, if explained.

The representations relating to the acquisitive reorganizations defined in section 368(a)(1) can be found in the following subsections of this section:

- .01 Section 368(a)(1)(A)
- .02 Section 368(a)(1)(A) and (a)(2)(D)
- .03 Section 368(a)(1)(A) and (a)(2)(E)
- .04 Section 368(a)(1)(B)
- .05 Section 368(a)(1)(C)
- .06 Section 368(a)(1)(D)
- .07 Section 368(a)(1)(F)
- .08 Miscellaneous representations

.01 Section 368(a)(1)(A) mergers or consolidations:

Legend:

- Acquiring = The surviving combining entity of the transferee corporation unit in a merger (as defined in regulations under section 368 of the Code) or the new corporation formed in a consolidation or amalgamation
- Target = The combining entity of the transferor corporation unit (as defined in regulations under section 368 of the Code)

Note to Section 7.01: The proposed revisions take into account definitions provided in regulations (T.D. 9242, 2006-7 I.R.B. 422) defining the term “statutory merger or consolidation”, as that term is used in section 368(a)(1)(A). Also, reference is made to “regulations under section 368”, rather than to the specific citation in the regulations, so that the representation will not need to be modified in the future to keep track of changes to the citation. Note that similar general citations to Code sections, rather than specific citations, are made throughout the revisions proposed in this document. We suggest using this type of general citation to avoid quick obsolescence of the revenue procedure (or the need for frequent updates). We recognize, however, that more specific citations would make the Rev.

Proc. more accessible and understandable to taxpayers and their representatives who are not experts in the reorganization area.

1. The fair market value of the Acquiring stock and other consideration received by each Target shareholder will be approximately equal to the fair market value of the Target stock surrendered in the exchange.

2. There is no plan or intention by Acquiring (or any related person, as defined in regulations under section 368 of the Code) to acquire any of the Acquiring stock received by Target shareholders ~~of Target who own 1 percent or more of the in exchange for their Target stock, and to the best of the knowledge of the management of Target, there is no plan or intention on the part of the remaining shareholders of Target to sell, exchange, or otherwise dispose of a number of shares of Acquiring stock received~~ in connection with the transaction that would reduce the former Target shareholders' ownership of Acquiring stock to a number of shares having a value, as of the date of the transaction, relevant testing date, of less than 5040 percent of the value of all of the formerly outstanding stock of Target as of the same date. ~~For purposes of this representation, shares of Target stock exchanged for cash or other property, surrendered by dissenters, or exchanged for cash in lieu of fractional shares of Acquiring stock will be treated as outstanding Target stock on the date of the transaction. Moreover, shares of Target stock and shares of Acquiring stock held by Target shareholders and otherwise sold, redeemed, or disposed of prior or subsequent to the transaction will be considered in making this representation. (alternatively, for publicly traded companies, submit the above representation substituting "5 percent" for "1 percent" where it appears.)~~ For purposes of this representation, (a) cash or other property furnished by Acquiring (or any related person, as defined in regulations under section 368 of the Code) for redemptions of Target stock (including Target stock surrendered by dissenters or exchanged for cash in lieu of fractional shares) and distributions by Target to its shareholders, in connection with the transaction, are taken into account in determining the value of all of the formerly outstanding stock of Target; and (b) redemptions by Acquiring (or any related person, as defined in regulations under section 368 of the Code) of Acquiring stock received by Target shareholders are not taken into account if such redemptions are (i) pursuant to Acquiring's pre-existing stock repurchase program, (ii) on the open market through a broker for the prevailing market price, and (iii) not negotiated by Acquiring with Target or its shareholders.

Note 7.01-2: Generally, the proposed revisions take into account modifications to the continuity of interest ("COI") rules since 1986, which primarily focus on the consideration provided by Acquiring and related parties in connection with a reorganization. *See generally* T.D. 8760, 1998-1 C.B. 803.

In the first sentence, the term "relevant testing date" is used instead of "date of the transaction" to take into account regulations (T.D. 9225, 2005-42 I.R.B. 716) addressing the determination of whether the COI requirement is satisfied in a transaction in which the Target shareholders receive both money and Acquiring stock, and there is a decline in the value of the Acquiring stock between the date the parties agree to the terms of the transaction (the signing date) and the date the transaction closes (the closing date). The current representation could be interpreted as a representation that the value of the Acquiring stock is determined on the closing date. The regulations provide, however, that the value of Acquiring stock is determined on the signing date when certain conditions are met. By using the term "relevant testing date," the proposed revision to the representation acknowledges

that the appropriate date for the determination of fair market value may not be the same for every transaction.

The first sentence also takes into account the lower 40 percent continuity threshold adopted by T.D. 9225. *See* the Preamble of T.D. 9225 and Example 1 of Treas. Reg. §1.368-1(e)(2)(v) (the Preamble acknowledges that the 40-percent threshold applies regardless of whether or not the “signing date” rule applies).

The first clause of the second sentence takes into account Treas. Reg. §1.368-1(e)(1)(ii), providing that a proprietary interest in the Target is not preserved to the extent that consideration received before the reorganization in a redemption of or a distribution on the Target stock is treated as other property or money under section 356. The regulations do not elaborate on applying the test, other than to say in the preamble that “taxpayers should consider all facts, circumstances and relevant legal authorities.” In the stock acquisition context, the solely for voting stock authorities suggest that section 356 should not apply to cash or other property received by Target shareholders from Target provided Acquiring did not indirectly provide the consideration to redeem the Target stock or make distributions. *See, e.g.,* Rev. Rul. 75-360, 1975-2 C.B. 110; Rev. Rul. 68-285, 1968-1 C.B. 147; Rev. Rul. 55-440, 1955-2 C.B. 226; *McDonald v. Commissioner*, 52 T.C. 82 (1969), *acq. in result*, 1969 AOD LEXIS 38. The conclusion in Example 9 of Treas. Reg. §1.368-1(e)(7) is consistent with these authorities. In Example 9, T has two shareholders, A and B. P wishes to acquire the T stock. A does not wish to own P stock. T redeems A's shares in T in exchange for cash. No funds have been or will be provided by P for this purpose. P subsequently acquires all the outstanding stock of T from B solely in exchange for voting stock of P. The cash received by A in the pre-reorganization redemption is not treated as other property or money under section 356, and it would not be so treated even if A had received some P stock in exchange for his T stock. The example concludes that the pre-reorganization redemption by T does not affect COI, because B's proprietary interest in T is unaffected and the value of the proprietary interest in T is preserved.

In the asset acquisition context, the law is less clear. For example, in the first situation of Rev. Rul. 71-364, 1971-1 C.B. 182, corporation X acquired the assets of corporation Y in a purported section 368(a)(1)(C) reorganization. Y retained an amount of cash to pay its dissolution expenses. The Service ruled that the distribution by Y of its excess cash not needed to satisfy liabilities was part of a section 356 exchange that did not violate the “solely for voting stock” requirement for a section 368(a)(1)(C) reorganization. *See also Sheldon v. Commissioner*, 6 T.C. 510 (1946), *acq.*, 1946-2 C.B. 5.

Notwithstanding the conclusion in Rev. Rul. 71-364, we believe section 356 should not apply to cash or other property received by Target shareholders from Target, in either stock or asset acquisitions, provided Acquiring did not indirectly provide the consideration to redeem the Target stock or make distributions. The last sentence of the proposed revision reflects this position.

Finally, the second clause of the second sentence is added to take into account the conclusion in Rev. Rul. 99-58, 1999-2 C.B. 701, that certain Acquiring stock repurchase programs are not considered “in connection with” the reorganization and, therefore, have no effect on COI.

~~3. Acquiring has no plan or intention to reacquire any of its stock issued in the transaction.~~

Note 7.01-3: This representation becomes unnecessary if the proposed revision to the first sentence of representation 7.01-2 is accepted. We have not re-numbered representations to account for deletions.

4. Acquiring has no plan or intention to sell or otherwise dispose of any of the assets of Target acquired in the transaction, except for dispositions made in the ordinary course of business or transfers ~~described in~~allowed under section 368(a)(2)(C) of the ~~Internal Revenue~~ Code and the regulations thereunder.

Note 7.01-4: In January 1998, regulations under section 368 (T.D. 8760, 1998-1 C.B. 803) were issued that restate the general rule of section 368(a)(2)(C) but permit the assets or stock acquired in certain types of reorganizations to be successively transferred to one or more corporations controlled (as defined in section 368(c)) in each transfer by the transferor corporation without disqualifying the reorganization. *See* Treas. Reg. §1.368-2(k)(1). The regulations were also modified to provide that such transfers will not disqualify a corporation from being a party to reorganization or violate the continuity of business enterprise requirement. *See* Treas. Reg. §§1.368-2(f) and 1.368-1(d). The proposed revisions reflect the changes to the regulations.

5. The liabilities of Target assumed ~~by Acquiring and~~ (within the meaning of section 357(d) of the liabilities to which the transferred assets of Target are subject Code) by Acquiring were incurred by Target in the ordinary course of ~~its~~ business.

Note 7.01-5: The proposed revisions take into account changes to section 357(d) enacted in the Miscellaneous Trade and Technical Corrections Act of 1999, Pub. L. No. 106-36, § 3001(a)(1), 113 Stat. 127, 181 (1999); *i.e.*, deleting the language “or acquires from the taxpayer property subject to a liability”.

6. Following the transaction, Acquiring will continue the historic business of Target or use a significant portion of Target's historic business assets in a business within the meaning of regulations under section 368 of the Code.

7. Acquiring, Target, and the shareholders of Target will pay their respective expenses, if any, incurred in connection with the transaction.

8. There is no intercorporate indebtedness existing between Target and Acquiring that was issued, acquired, or will be settled at a discount.

9. No two parties to the transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv) of the ~~Internal Revenue~~ Code.

10. Target is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the ~~Internal Revenue~~ Code.

11. The fair market value of the assets of Target transferred to Acquiring will equal or exceed the sum of the liabilities assumed ~~(as determined under~~ within the meaning of section 357(d) of the Code) by Acquiring ~~plus the amount of liabilities, if any, to which the transferred assets are subject.~~

Note 7.01-11: See Note 7.01-5. *Cf.* Proposed Regulations (REG-163314-03) (adopting a “net value” requirement for each of the described nonrecognition rules (sections 332, 351, 354, 361, and 368) in subchapter C).

~~12. (If the transaction also meets the definition of a reorganization under section 368 (a) (1) (D) of the Code, submit the following:)~~

~~The total adjusted basis of the assets of Target transferred to Acquiring will equal or exceed the sum of the liabilities assumed by Acquiring, plus the amount of liabilities, if any, to which the transferred assets are subject.~~

Note 7.01-12: Representation (12) is deleted to take into account Rev. Rul. 2007-8, 2007-7 I.R.B. 469 (concluding that section 357(c) does not apply to transactions that qualify as reorganizations described in sections 368(a)(1)(A), (C), (D) (provided the requirements of section 354(b)(1) are satisfied, or (G) (provided the requirements of section 354(b)(1) are satisfied) and to which section 351 applies).

13. The merger will be effected pursuant to the statute or statutes necessary to effect the merger or consolidation as allowed under section 368(a)(1)(A) of the Code.

Note 7.01-13: This new representation takes into account the regulations (T.D. 9242, 2006-7 I.R.B. 422) defining the term “statutory merger or consolidation” under section 368(a)(1)(A).

14. Alternative 1: The fair market value of any property described under section 362(e)(1)(B) of the Code transferred by Target to Acquiring will equal or exceed the aggregate adjusted basis of such property immediately after the transaction. Alternative 2: The merger will not result in a transaction whereby gain or loss with respect to Target property not subject to tax under the Code prior to the merger will become subject to tax under the Code after the merger.

Note 7.01-14: This new representation takes into account section 362(e)(1), enacted in 2004 by the American Jobs Creation Act of 2004 (Pub. L. No. 108-357, 118 Stat. 1418 (2004)). The taxpayer is given the choice of providing one of the two alternatives.

15. [Section 362(e)(2) reserved.]

Note 7.01-15: We have not drafted a representation to take into account section 362(e)(2), because of the complex issues involved in the application of section 362(e)(2) to a section 351 transaction that overlaps with a section 368(a) reorganization (including transactions that take place within a consolidated group). We expect to address these issues in one or more separate submissions.

.02 Section 368(a)(1)(A) and (a)(2)(D) mergers

Legend:

Parent = The controlling corporation

Sub = The ~~acquiring~~ surviving combining entity of the transferee corporation-unit (as defined in regulations under section 368 of the Code)

Target = The combining entity of the transferor corporation-unit (as defined in regulations under section 368 of the Code)

Note 7.02: See Note 7.01.

1. The fair market value of the Parent stock and other consideration received by each Target shareholder will be approximately equal to the fair market value of the Target stock surrendered in the exchange.

2. ~~There is no plan or intention by Parent (or any related person, as defined in regulations under section 368 of the Code) to acquire any of the Parent stock received by Target shareholders of Target who own 1 percent or more of the in exchange for their Target stock, and to the best of the knowledge of the management of Target, there is no plan or intention on the part of the remaining shareholders of Target to sell, exchange or otherwise dispose of a number of shares of Parent stock received in connection with the transaction that would reduce the Target shareholders' shareholders' ownership of Parent stock to a number of shares having a value, as of the date of the transaction, relevant testing date, of less than 50/40 percent of the value of all of the formerly outstanding stock of Target as of the same date. For purposes of this representation, shares of Target stock exchanged for cash or other property, surrendered by dissenters or exchanged for cash in lieu of fractional shares of Parent stock will be treated as outstanding Target stock on the date of the transaction. Moreover, shares of Target stock and shares of Parent stock held by Target shareholders and otherwise sold, redeemed, or disposed of prior or subsequent to the transaction will be considered in making this representation. (alternatively, for publicly traded companies, submit the above representation substituting "5 percent" for "1 percent" where it appears.)~~ For purposes of this representation, (a) cash or other property furnished by Parent (or any related person, as defined in regulations under section 368 of the Code) for redemptions of Target stock (including Target stock surrendered by dissenters or exchanged for cash in lieu of fractional shares) and distributions by Target to its shareholders, in connection with the transaction, are taken into account in determining the value of all of the formerly outstanding stock of Target; and (b) redemptions by Parent (or any related person, as defined in regulations under section 368 of the Code) of Parent stock received by Target shareholders are not taken into account if such redemptions are (i) pursuant to Parent's pre-existing stock repurchase program, (ii) on the open market through a broker for the prevailing market price, and (iii) not negotiated by Parent with Target or its shareholders.

Note 7.02-2: See Note 7.01-2.

3. Sub will acquire from Target assets with a fair market value of at least 90 percent of the fair market value of the net assets and at least 70 percent of the fair market value of the gross assets held by Target immediately prior to the transaction. For purposes of this representation, amounts paid by Target to dissenters, amounts paid by Target to shareholders who receive cash or other property, Target assets used to pay ~~its~~ reorganization expenses, amounts used by Target to pay liabilities or other obligations (other than operating liabilities incurred in the ordinary course of business), and all redemptions and distributions (except for regular, normal dividends) made by Target immediately preceding the transfer, will be included as assets of Target held immediately prior to the transaction.

Note 7.02-3:

- a. As we understand Rev. Proc. 77-37, Target assets used to pay Target liabilities or other obligations are taken into account for purposes of the "substantially all" requirement. That is, for purposes of the "substantially all" requirement, payments are treated the same as distributions to Target shareholders and payments of reorganization expenses. Payments of normal operating expenses and liabilities (e.g., payroll and accounts payable), however, are not taken into account for this purpose.**
- b. We would also revise the representation to resolve a long-standing ambiguity in the "90% prong" of the 70/90 test under Rev. Proc. 77-37: Under the 90% prong, the denominator is Target's net worth using a fair market value balance sheet. There are, however, two possibilities for computing the numerator: (i) the value of the *net assets* transferred by**

Target to Sub, *i.e.*, asset fair market value less liabilities assumed, or (ii) the value of the *gross assets* transferred by Target to Sub, without reduction for liabilities. Rev. Proc. 77-37 does not specify which method is correct. We believe the numerator should be the value of the *gross assets* that Target transfers to Sub (with no reduction for liabilities). Generally, the “substantially all” test relates to assets, not equity. (By contrast, continuity-of-interest is about equity.) Moreover, using *net asset value* as the numerator would be harsh if Target is leveraged. As an example, assume Target has \$100 gross assets and \$90 liabilities. Target distributes \$1.50 to its shareholders and transfers its remaining assets (\$98.50) to Sub; Sub assumes Target’s liabilities (\$90). Target’s percentage of net-assets over net-assets would be 85% ($\$8.50/\10.00), and, if that is how the 90% prong is computed, the transaction would flunk the 70/90 test. Yet Target has transferred to Sub 98.5% of its gross assets and 98.5% of its net assets ($98.50/10.00$). The effect of the recommended interpretation would be to make the 70/90 test an alternative test. That is, the 70% prong would apply to non-leveraged Targets, and the 90% prong would apply to leveraged Targets.

4. ~~Prior to~~ Immediately after the transaction, Parent will be in control of Sub within the meaning of section 368(c) of the ~~Internal Revenue~~-Code.

Note 7.02-4: The representation takes into account the regulations (T.D. 9242, 2006-7 I.R.B. 422) defining the term “statutory merger or consolidation” for section 368(a)(1)(A). In the preamble to the regulations, the government clarifies that section 368(a)(2)(D) does not require the issuing corporation to control the acquiring corporation immediately prior to the transaction, and that such corporation’s control of the acquiring corporation immediately after the transaction is sufficient to satisfy the requirement of section 368(a)(2)(D). *See also* Example 14 of Treas. Reg. §1.368-2(b)(1)(iii).

5. Following the transaction, Sub will not issue additional shares of its stock that would result in Parent losing control of Sub within the meaning of section 368(c) of the ~~Internal Revenue~~-Code.

~~6. Parent has no plan or intention to reacquire any of its stock issued in the transaction.~~

Note 7.02-6: See Note 7.01-3.

7. Parent has no plan or intention to ~~liquidate Sub; to merge Sub with and into another corporation;~~ cause Sub to cease its separate legal existence for federal income tax purposes; to sell or otherwise dispose of the stock of Sub, except for transfers allowed under section 368(a)(2)(C) of the Code and the regulations thereunder; or to cause Sub to sell or otherwise dispose of any assets of Target acquired in the transaction, except for dispositions made in the ordinary course of business or transfers ~~described in~~ allowed under section 368(a)(2)(C) of the ~~Internal Revenue~~-Code and the regulations thereunder.

Note 7.02-7: See Note 7.01-4 with respect to section 368(a)(2)(C) transfers generally. *See* Rev. Rul. 2001-24, 2001-1 C.B. 1290 (Parent may transfer the stock of Sub to a controlled subsidiary without adversely affecting qualification under section 368(a)(2)(D)). Also, the representation is modified to reflect Treas. Reg. §1.368-2(b)(1)(ii)(B) (T.D. 9242, 2006-7 I.R.B. 422) by referring to the cessation of Sub’s legal existence rather than the liquidation or merger of Sub.

8. The liabilities of Target assumed ~~by Sub and the liabilities to which~~ (within the meaning of section 357(d) of the Code) ~~transferred assets of Target are subject~~ by Sub were incurred by Target in the ordinary course of its business.

Note 7.02-8: See Note 7.01-5.

9. Following the transaction, Sub will continue the historic business of Target or use a significant portion of Target's historic business assets in a business within the meaning of regulations under section 368 of the Code.

Note 7.02-9: The modification is a clarification. The word "historic" appears to have been inadvertently omitted in the current representation.

10. Parent, Sub, Target, and the shareholders of Target will pay their respective expenses, if any, incurred in connection with the transaction.

11. There is no intercorporate indebtedness existing between Parent and Target or between Sub and Target that was issued, acquired, or will be settled at a discount.

12. No two parties to the transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv) of the ~~Internal Revenue~~ Code.

13. Target is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the ~~Internal Revenue~~ Code.

14. The fair market value of the assets of Target transferred to Sub will equal or exceed the sum of the liabilities assumed ~~by Sub, plus the amount of liabilities, if any, to which the transferred assets are subject~~ (as determined under section 357(d) of the Code) by Sub.

Note 7.02-14: See Note 7.01-5.

15. No stock of Sub will be issued to Target shareholders with respect to their Target shares in the transaction.

Note 7.02-15: The modification is a clarification.

16. Alternative 1: The fair market value of any property described under section 362(e)(1)(B) of the Code transferred by Target to Sub will equal or exceed the aggregate adjusted basis of such property immediately after the transaction. Alternative 2: The merger will not result in a transaction whereby gain or loss with respect to Target property not subject to tax under the Code prior to the merger will become subject to tax under the Code after the merger.

Note 7.02-16: See Note 7.01-14.

17. [Section 362(e)(2) reserved.]

Note 7.02-17: See Note 7.01-15.

.03 Section 368(a)(1)(A) and (a)(2)(E) mergers:

Legend:

Parent = The controlling corporation

Sub = The ~~merged corporation~~ combining entity of the transferor unit (as defined in regulations under section 368 of the Code)

Target = The ~~surviving corporation~~ combining entity of the transferee unit (as defined in regulations under section 368 of the Code)

Note 7.03: See Note 7.01.

1. The fair market value of the Parent stock and other consideration received by each Target shareholder will be approximately equal to the fair market value of the Target stock surrendered in the exchange.

~~2. There is no plan or intention by the shareholders of Target who own 1 percent or more of the Target stock, and to the best of the knowledge of the management of Target, there is no plan or intention on the part of the remaining shareholders of Target to sell, exchange, or otherwise dispose of a number of shares of Parent stock received in the transaction that would reduce the Target shareholders' ownership of Parent stock to a number of shares having a value, as of the date of the transaction, of less than 50 percent of the value of all of the formerly outstanding stock of Target as of the same date. For purposes of this representation, shares of Target stock exchanged for cash or other property, surrendered by dissenters or exchanged for cash in lieu of fractional shares of Parent stock will be treated as outstanding Target stock on the date of the transaction. Moreover, shares of Target stock and shares of Parent stock held by Target shareholders and otherwise sold, redeemed, or disposed of prior or subsequent to the transaction will be considered in making this representation (alternatively, for publicly traded companies, submit the above representation substituting "5 percent" for "1 percent" where it appears).~~

Note 7.03-2: This representation is deleted to take into account modifications to the COI rules since 1986, which primarily focus on the consideration provided by Acquiring and related parties in connection with the reorganization. Unlike the representations under section 368(a)(1)(A) and (a)(2)(D) with respect to COI, this representation is deleted in its entirety because redemptions by Parent of Parent stock issued to Target shareholders in the transaction and exchanges of Target stock for cash or other property originating with Parent are addressed by representations 7.03-6 and 7.03-12, below, as proposed to be revised.

3. Following the transaction, Target will hold assets with a fair market value of at least 90 percent of the fair market value of its net assets and at least 70 percent of the fair market value of its gross assets and at least 90 percent of the fair market value of Sub's net assets and at least 70 percent of the fair market value of ~~the~~ Sub's gross assets held immediately prior to the transaction. For purposes of this representation, amounts paid by Target or Sub to dissenters, amounts paid by Target or Sub to shareholders who receive cash or other property, amounts used by Target or Sub to pay reorganization expenses, amounts used by Target or Sub to pay liabilities or other obligations (other than operating liabilities incurred in the ordinary course of business), and all redemptions and distributions (except for regular, normal dividends) made by Target will be included as assets of Target or Sub, respectively, immediately prior to the transaction.

Note 7.03-3: See Note 7.02-3.

4. Prior to the transaction, Parent will be in control of Sub within the meaning of section 368(c) of the ~~Internal Revenue~~ Code.

5. Target has no plan or intention to issue additional shares of its stock that would result in Parent losing control of Target within the meaning of section 368(c) of the ~~Internal Revenue~~ Code.

6. Neither Parent nor any related person, as defined in regulations under section 368 of the Code, has ~~no~~ any plan or intention to ~~reacquire~~ any of ~~its~~ the Parent stock issued to the Target shareholders in the transaction.

Note 7.03-6: See Note 7.03-2.

7. Parent has no plan or intention to ~~liquidate Target; to merge Target with or into another corporation~~ cause Target to cease its separate legal existence for federal income tax purposes; to sell or otherwise dispose of the stock of Target except for transfers ~~of stock to corporations controlled by Parent~~ allowed under section 368(a)(2)(C) of the Code and the regulations thereunder; or to cause Target to sell or otherwise dispose of any of its assets or any of the assets acquired from Sub, except for dispositions made in the ordinary course of business or transfers ~~of assets to a corporation controlled by Target~~ allowed under section 368(a)(2)(C) of the Code and the regulations thereunder.

Note 7.03-7: See Note 7.01-4 with respect to section 368(a)(2)(C) transfers. Also, the representation is modified to reflect Treas. Reg. §1.368-2(b)(1)(ii)(B) (T.D. 9242, 2006-7 I.R.B. 422) by referring to the cessation of Target's legal existence rather than the liquidation or merger of Target.

8. The liabilities of Sub assumed by Target ~~and the liabilities to which the transferred assets of Sub are subject~~ were incurred by Sub in the ordinary course of its business. (Alternatively) Sub will have no liabilities assumed by Target, ~~and will not transfer to Target any assets subject to liabilities, (within the meaning of section 357(d) of the Code)~~ in the transaction.)

Note 7.03-8: See Note 7.01-5.

9. Following the transaction, Target will continue its historic business or use a significant portion of its historic business assets in a business within the meaning of regulations under section 368 of the Code.

10. Parent, Sub, Target, and the shareholders of Target will pay their respective expenses, if any, incurred in connection with the transaction.

11. There is no intercorporate indebtedness existing between Parent and Target or between Sub and Target that was issued, acquired, or will be settled at a discount.

12. In the transaction, shares of Target stock representing control of Target, as defined in section 368(c) of the Code, will be exchanged solely for voting stock of Parent. For purposes of this representation, shares of Target stock exchanged for cash or other property originating with Parent (or any related person, as defined in regulations under section 368 of the Code) will be treated as outstanding Target stock on the date of the transaction.

Note 7.03-12: This representation has been modified to take into account Rev. Rul. 85-139, 1985-2 C.B. 123 (purchase of target stock by wholly owned subsidiary of Parent taken into account for purposes of the solely-for-voting-stock requirement for a reorganization under section 368(a)(1)(B)). Cf. Rev. Rul. 85-138, 1985-2 C.B. 122 (similar analysis with respect to the solely-for-voting-stock requirement for a reorganization under section 368(a)(1)(C)). Although Rev. Rul. 85-139 involves a wholly-owned subsidiary, we believe that shares purchased by any "related person" as defined in the COI regulations should be taken into account. See Treas. Reg. §1.368-1(e)(4).

13. ~~At the time of~~ Following the transaction, Target will not ~~have outstanding any warrants, options, convertible securities, or any other type of right pursuant to which any person could acquire~~ issue additional shares of its stock ~~in Target that, if exercised or converted,~~ would affect

~~Parent's~~Parent's acquisition or retention of control of Target, as defined in section 368(c) of the ~~Internal Revenue~~ Code.

Note 7.03-13: The proposed revision conforms this representation to representation 7.02-5 for section 368(a)(2)(D) reorganizations, and takes into account any Target stock issued in connection with the transaction that would affect Parent's control of Target, not just Target stock issued with respect to outstanding warrants or other rights to acquire Target stock. Note, as discussed in section 2 of this revenue procedure, only Target stock considered issued as part of the transaction under the step transaction doctrine would be taken into account for purposes of the control requirement.

14. Parent does not own, nor has it owned during the past ~~five~~two years, any shares of the stock of Target.

Note 7.03-14: Presumably, this representation refers to 5 years because that time period was considered to be the maximum time period in which transactions might be combined under the step transaction doctrine. For purposes of determining qualification as an acquisitive reorganization, including whether the Target shareholders surrender control of Target in exchange for Parent voting stock, we believe transactions should not be combined under the step transaction doctrine if separated by at least 2 years. Cf. section 355(b)(2) and (d) (which include a 2-year testing period for divisive transactions). Accordingly, we recommend that a 2-year period be substituted for the 5-year period in this representation.

15. No two parties to the transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv) of the ~~Internal Revenue~~ Code.

16. On the date of the transaction, the fair market value of the assets of Target will exceed the sum of its liabilities, plus the amount of liabilities, if any, to which the assets are subject.

17. Target is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the ~~Internal Revenue~~ Code.

18. Alternative 1: The fair market value of any property described under section 362(e)(1)(B) of the Code transferred by Sub to Target will equal or exceed the aggregate adjusted basis of such property immediately after the transaction. Alternative 2: The merger will not result in a transaction whereby gain or loss with respect to Sub property not subject to tax under the Code prior to the merger will become subject to tax under the Code after the merger.

Note 7.03-18: See Note 7.01-14.

19. [Section 362(e)(2) reserved.]

Note 7.03-19: See Note 7.01-15.

.04 Section 368(a)(1)(B) reorganizations:

Legend:

Acquiring = The acquiring corporation
Target = The corporation whose stock is acquired

1. The fair market value of the Acquiring stock received by each Target shareholder will be approximately equal to the fair market value of the Target stock surrendered in the exchange.

2. ~~There is no plan or intention by the shareholders of Target who own 1 percent or more of the Target stock, and to the best of the knowledge of the management of Target, there is no plan or intention on the part of the remaining shareholders of Target to sell, exchange, or otherwise dispose of a number of shares of Acquiring stock received in the transaction that would reduce the Target shareholders' ownership of Acquiring stock to a number of shares having a value, as of the date of the transaction, of less than 50 percent of the value of all of the formerly outstanding stock of Target as of the same date. For purposes of this representation, shares of Target stock surrendered by dissenters or exchanged for cash in lieu of fractional shares of Acquiring stock will be treated as outstanding Target stock on the date of the transaction. Moreover, shares of Target stock and shares of Acquiring stock held by Target shareholders and otherwise sold, redeemed, or disposed of prior or subsequent to the transaction will be considered in making this representation. (Alternatively, for publicly traded companies, submit the above representation substituting "5 percent" for "1 percent" where it appears.)~~

Note 7.04-2: This representation is deleted to take into account modifications to the COI rules since 1986, which primarily focus on the consideration provided by Acquiring and related parties in connection with the reorganization. Unlike the representations under section 368(a)(1)(A) and (a)(2)(D) with respect to COI, this representation is deleted in its entirety because redemptions by Acquiring of Acquiring stock issued to Target shareholders in the transaction and exchanges of Target stock for cash or other property originating with Acquiring are addressed by the proposed revisions to representations 7.04-5 and 7.04-7, below.

3. Target has no plan or intention to issue additional shares of its stock that would result in Acquiring losing control of Target within the meaning of section 368(c) of the ~~Internal Revenue~~ Code.

4. Acquiring has no plan or intention to ~~liquidate Target; to merge Target into another corporation~~ cause Target to cease its separate legal existence for federal income tax purposes; to cause Target to sell or otherwise dispose of any of its assets, except for dispositions made in the ordinary course of business or transfers allowed under section 368(a)(2)(C) of the Code and the regulations thereunder; or to sell or otherwise dispose of any of the Target stock acquired in the transaction, except for transfers ~~described in~~ allowed under section 368(a)(2)(C) of the ~~Internal Revenue~~ Code and the regulations thereunder.

Note 7.04-4: See Note 7.01-4, with respect to section 368(a)(2)(C) transfers. Also, the representation is modified to reflect Treas. Reg. §1.368-2(b)(1)(ii)(B) (T.D. 9242, 2006-7 I.R.B. 422) by referring to the cessation of Target's legal existence rather than the liquidation or merger of Target.

5. Neither Acquiring ~~(nor any related person, as defined in regulations under section 368 of the Code)~~ has ~~no any~~ plan or intention to ~~re~~acquire any of its stock issued to the Target shareholders in the transaction.

Note 7.04-5: See Note 7.04-2.

6. Acquiring, Target, and the shareholders of Target will pay their respective expenses, if any, incurred in connection with the transaction.

7. Acquiring will acquire Target stock solely in exchange for Acquiring voting stock. For purposes of this representation, Target stock redeemed for cash or other property furnished by Acquiring (or any related person, as defined in regulations under section 368 of the Code) will be considered as acquired by Acquiring. ~~Further, no~~ No liabilities of Target or the Target shareholders will be assumed ~~by Acquiring, nor will any of (within the Target stock be subject to any liabilities~~ meaning of section 357(d) of the Code) by Acquiring or any related person, as defined in regulations under section 368 of the Code.

Note 7.04-7: See Notes 7.01-5, 7.03-12 and 7.04-2.

8. At the time of and following the transaction, Target will not ~~have outstanding any warrants, options, convertible securities, or any other type of right pursuant to which any person could acquire stock in Target issue additional shares of its stock that, if exercised or converted,~~ would affect ~~Acquiring's~~ Acquiring's acquisition or retention of control of Target, as defined in section 368(c) of the ~~Internal Revenue~~ Code.

Note 7.04-8: See Note 7.03-13.

9. Acquiring does not own, directly or indirectly, nor has it owned during the past ~~five~~ two years directly or indirectly, any stock of Target.

Note 7.04-9: Presumably, the representation refers to five years because that time period was considered to be the maximum time period in which transactions might be combined under the step transaction doctrine. For purposes of determining qualification as an acquisitive reorganization, including whether the solely-for-voting-stock requirement is satisfied, we believe that transactions should not be combined under the step transaction doctrine if separated by at least two years. Cf. section 355(b)(2) and (d) (which include a five-year testing period for divisive transactions).

10. Following the transaction, Target will continue its historic business or use a significant portion of its historic business assets in a business within the meaning of regulations under section 368 of the Code.

11. No two parties to the transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv) of the ~~Internal Revenue~~ Code.

~~12. Target will pay its dissenting shareholders the value of their stock out of its own funds. No funds will be supplied for that purpose, directly or indirectly, by Acquiring, nor will Acquiring directly or indirectly reimburse Target for any payments to dissenters. (Alternatively) There will be no dissenters to the transaction.~~

Note 7.04-12: This representation is no longer required if our proposed revision to representation 7.04-7 is adopted.

13. On the date of the transaction, the fair market value of the assets of Target will exceed the sum of its liabilities plus the liabilities, if any, to which the assets are subject.

14. Alternative 1: The fair market value of any Target stock described under section 362(e)(1)(B) of the Code transferred by Target shareholders to Acquiring will equal or exceed the aggregate adjusted basis of such stock immediately after the transaction. Alternative 2: The exchange will not result in a transaction whereby gain or loss with respect to Target stock not

subject to tax under the Code prior to the exchange will become subject to tax under the Code after the exchange.

Note 7.04-14: See Note 7.01-14.

15. [Section 362(e)(2) reserved.]

Note 7.04-15: See Note 7.01-15.

.05 Section 368(a)(1)(C) reorganizations:

Legend:

Acquiring = The acquiring transferee corporation

Target = The transferor corporation

1. The fair market value of the Acquiring stock and other consideration received by each Target shareholder will be approximately equal to the fair market value of the Target stock surrendered in the exchange.

Note 7.05-1: The proposed revision to this representation conforms to the suggested change to representation 7.05-2, below.

~~2. There is no plan or intention by the shareholders of Target who own 1 percent or more of the Target stock, and to the best of the knowledge of management of Target, there is no plan or intention on the part of the remaining shareholders of Target to sell, exchange, or otherwise dispose of a number of shares of Acquiring stock received in the transaction that would reduce the Target shareholders' ownership of Acquiring stock to a number of shares having a value, as of the date of the transaction, of less than 50 percent of the value of all of the formerly outstanding stock of Target as of the same date. For purposes of this representation, shares of Target stock exchanged for cash or other property, surrendered by dissenters, or exchanged for cash in lieu of fractional shares of Acquiring stock will be treated as outstanding Target stock on the date of the transaction. Moreover, shares of Target stock and shares of Acquiring stock held by Target shareholders and otherwise sold, redeemed, or disposed of prior or subsequent to the transaction will be considered in making this representation. (alternatively, for publicly traded companies, submit the above representation substituting 5 percent" for "1 percent" where it appears.)~~ Acquiring will acquire, solely for its voting stock, assets of Target that have a fair market value equal to or greater than 80 percent of the fair market value of all of the assets of Target. For this purpose, if Target or its shareholders receive consideration from Acquiring (or any related person, as defined in regulations under section 368 of the Code) other than Acquiring voting stock, the amount of any liabilities assumed by Acquiring (within the meaning of section 357(d) of the Code) shall be treated as money paid for the Target assets.

Note 7.05-2: The COI representation is deleted to take into account modifications to the COI rules since 1986, which primarily focus on the consideration provided by Acquiring and related parties in connection with the reorganization. We recommend, in its place, the provided representation with respect to the solely-for-voting-stock requirement and the boot relaxation rule of section 368(a)(2)(B), along with a revision to representation 7.05-4, below, to take into account subsequent redemptions of Target stock by Acquiring or purchases of Target stock by related parties.

Also, see Note 7.03-12 with respect to Rev. Rul. 85-138, 1985-2 C.B. 122 (nonstock consideration provided by a wholly owned subsidiary of Parent is taken into account for

purposes of the solely-for-voting-stock requirement for a reorganization under section 368(a)(1)(C)) and Rev. Rul. 85-139, 1985-2 C.B. 123 (similar analysis with respect to the solely-for-voting-stock requirement for a reorganization under section 368(a)(1)(B)).

3. Acquiring will acquire from Target assets with a fair market value of at least 90 percent of the fair market value of the net assets and at least 70 percent of the fair market value of the gross assets held by Target immediately prior to the transaction. For purposes of this representation, amounts paid by Target to dissenters, amounts used by Target to pay ~~its~~ reorganization expenses, amounts used by Target to pay liabilities or other obligations (other than operating liabilities incurred in the ordinary course of business), amounts paid by Target to shareholders who receive cash or other property, and all redemptions and distributions (except for regular, normal dividends) made by Target immediately preceding the transfer will be included as assets of Target immediately prior to the transaction.

Note 7.05-3: See Note 7.02-3.

4. Neither Acquiring (nor any related person, as defined in regulations under section 368 of the Code.) has ~~no~~ any plan or intention to reacquire any of its stock issued to the Target shareholders in the transaction.

Note 7.05-4: See Note 7.05-2.

5. Acquiring has no plan or intention to sell or otherwise dispose of any of the assets of Target acquired in the transaction, except for dispositions made in the ordinary course of business or transfers ~~described in~~ allowed under section 368(a)(2)(C) of the ~~Internal Revenue~~ Code and the regulations thereunder.

Note 7.05-5: See Note 7.01-4.

6. Target will distribute the stock, securities, and other property it receives in the transaction, and its other properties, in pursuance of the plan of reorganization.

7. The liabilities of Target assumed ~~and (within the liabilities to which meaning of section 357(d) of the transferred assets of Target are subject~~ Code) by Acquiring were incurred by Target in the ordinary course of ~~its~~ business.

Note 7.05-7: See Note 7.01-5.

8. Following the transaction, Acquiring will continue the historic business of Target or use a significant portion of Target's historic business assets in a business within the meaning of regulations under section 368 of the Code.

9. Acquiring, Target, and the shareholders of Target will pay their respective expenses, if any, incurred in connection with the transaction.

10. There is no intercorporate indebtedness existing between Acquiring and Target that was issued, acquired, or will be settled at a discount.

11. No two parties to the transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv) of the ~~Internal Revenue~~ Code.

12. Acquiring does not own, directly or indirectly, nor has it owned during the past ~~five~~ two years, directly or indirectly, any stock of Target.

Note 7.05-12: See Note 7.04-9.

13. The fair market value of the assets of Target transferred to Acquiring will equal or exceed the sum of the liabilities assumed ~~by Acquiring, plus the amount of liabilities, if any, to which the transferred assets are subject~~ (as determined under section 357(d) of the Code) by Acquiring.

Note 7.05-13: See Note 7.01-5.

14. Target is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the ~~Internal Revenue~~-Code.

15. Alternative 1: The fair market value of any property described under section 362(e)(1)(B) of the Code transferred by Target to Acquiring will equal or exceed the aggregate adjusted basis of such property immediately after the transaction. Alternative 2: The transfer will not result in a transaction whereby gain or loss with respect to Target property not subject to tax under the Code prior to the transfer will become subject to tax under the Code after the transfer.

Note 7.05-15: See Note 7.01-14.

16. [Section 362(e)(2) reserved.]

Note 7.05-16: See Note 7.01-15.

.06 Section 368(a)(1)(D) acquisitive reorganizations:

Legend:

Acquiring = The transferee corporation

Target = The transferor corporation

1. The fair market value of the Acquiring stock and other consideration received by each Target shareholder will be approximately equal to the fair market value of the Target stock surrendered in the exchange.

2. There is no plan or intention by ~~the shareholders of Target who own 1 percent~~ Acquiring (or ~~more of the Target stock, and to any related person, as defined in regulations under section 368 of the best of the knowledge of the management of Target, there is no plan or intention on the part of the remaining shareholders of Target to sell,~~ Code) to acquire any of the Acquiring stock received by Target shareholders in exchange, or otherwise dispose of a number of shares of Acquiring for their Target stock received in connection with the transaction that would reduce the Target ~~shareholders'~~ shareholders' ownership of Acquiring stock to a number of shares having a value, as of the ~~date of the transaction, relevant testing date,~~ of less than ~~50~~40 percent of the value of all of the formerly outstanding stock of Target as of the same date. ~~For purposes of this representation, shares of Target stock exchanged for cash or other property, surrendered by dissenters or exchanged for cash in lieu of fractional shares of Acquiring stock will be treated as outstanding Target stock on the date of the transaction. Moreover, shares of Target stock and shares of Acquiring stock held by Target shareholders and otherwise sold, redeemed, or disposed of prior or subsequent to the transaction will be considered in making this representation. (alternatively, for publicly traded companies, submit the above representation substituting "5 percent" for "1 percent" where it appears.)~~ For purposes of this representation, (a) cash or other property furnished by Acquiring (or any related person, as defined in regulations under section 368 of the Code) for redemptions of Target stock (including Target stock surrendered by dissenters or exchanged for cash in lieu of fractional shares) and distributions by Target to its shareholders, in connection with the transaction,

are taken into account in determining the value of all of the formerly outstanding stock of Target; and (b) redemptions by Acquiring (or any related person, as defined in regulations under section 368 of the Code) of Acquiring stock received by Target shareholders are not taken into account if such redemptions are (i) pursuant to Acquiring's pre-existing stock repurchase program, (ii) on the open market through a broker for the prevailing market price, and (iii) not negotiated by Acquiring with Target or its shareholders.

Note 7.06-2: See Note 7.01-2. In the preamble to the temporary and proposed regulations (TD 9303 and REG-125632-06) providing guidance with respect to all-cash "D" reorganizations, the Service and Treasury request comments on the extent, if any, to which the COI requirement should apply to a "D" reorganization. We expect to address this issue in a separate submission.

-3. Acquiring will acquire from Target assets with a fair market value of at least 90 percent of the fair market value of the net assets and at least 70 percent of the fair market value of the gross assets held by Target immediately prior to the transaction. For purposes of this representation, amounts paid by Target to dissenters, amounts paid by Target to shareholders who receive cash or other property, amounts used by Target to pay ~~its~~ reorganization expenses, amounts used by Target to pay liabilities or other obligations (other than operating liabilities incurred in the ordinary course of business), and all redemptions and distributions (except for regular, normal dividends) made by Target immediately preceding the transfer will be included as assets of Target held immediately prior to the transaction.

Note 7.06-3: See Notes 7.02-3 and 7.06-2.

4. After the transaction, the shareholders of Target will be in control of Acquiring within the meaning of section 368~~(e)(2)(a)(2)(H)(i)~~ of the ~~Internal Revenue~~ Code.

Note 7.06-4: The representation is revised to take into account the current citation to the control requirement for acquisitive Type "D" reorganizations.

5. ~~Acquiring has no plan or intention to reacquire any of its stock issued in the transaction.~~

Note 7.06-5: See Notes 7.01-3 and 7.06-2.

6. Acquiring has no plan or intention to sell or otherwise dispose of any of the assets of Target acquired in the transaction, except for dispositions made in the ordinary course of business or transfers allowed under section 368(a)(2)(C) of the Code and the regulations thereunder.

Note 7.06-6: See Note 7.01-4 with respect to section 368(a)(2)(C) transfers generally, and Rev. Rul. 2002-85, 2001-2 C.B. 986, ruling that Acquiring may transfer former Target assets to a controlled subsidiary without adversely affecting qualification under section 368(a)(1)(D).

7. The liabilities of Target assumed ~~by Acquiring plus the liabilities, if any, to which the transferred assets are subject~~ (within the meaning of section 357(d) of the Code) by Acquiring were incurred by Target in the ordinary course of ~~its business, and are associated with the assets transferred~~

Note 7.06-7: See Note 7.01-5.

8. Following the transaction, Acquiring will continue the historic business of Target or use a significant portion of Target's historic business assets in a business within the meaning of regulations under section 368 of the Code.

9. At the time of and following the transaction, Acquiring will not ~~have outstanding any warrants, options, convertible securities, or any other type~~ issue additional shares of right pursuant to ~~which any person could acquire its~~ stock in Acquiring that, ~~if exercised or converted,~~ would affect the Target ~~shareholders'~~ shareholders' acquisition or retention of control of Acquiring, as defined in section 368~~(e)(2)(a)(2)(H)(i)~~ of the ~~Internal Revenue~~ Code.

Note 7.06-9: See Note 7.03-13.

10. Acquiring, Target, and the shareholders of Target will pay their respective expenses, if any, incurred in connection with the transaction.

11. There is no intercorporate indebtedness existing between Acquiring and Target that was issued, acquired, or will be settled at a discount.

12. No two parties to the transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv) of the ~~Internal Revenue~~ Code.

13. The fair market value of the assets of Target transferred to Acquiring will equal or exceed the sum of the liabilities assumed ~~by Acquiring, plus the amount of liabilities, if any, to which the transferred assets are subject~~ (as determined under section 357(d) of the Code) by Acquiring.

Note 7.06-13: See Note 7.01-5.

~~14. The total adjusted basis of the assets of Target transferred to Acquiring will equal or exceed the sum of the liabilities to be assumed by Acquiring, plus the amount of liabilities, if any, to which the transferred assets are subject.~~

Note 7.06-14: See Note 7.01-12.

15. Target is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the ~~Internal Revenue~~ Code.

16. Alternative 1: The fair market value of any property described under section 362(e)(1)(B) of the Code transferred by Target to Acquiring will equal or exceed the aggregate adjusted basis of such property immediately after the transaction. Alternative 2: The transfer will not result in a transaction whereby gain or loss with respect to Target property not subject to tax under the Code prior to the transfer will become subject to tax under the Code after the transfer.

Note 7.06-16: See Note 7.01-14.

17. [Section 362(e)(2) reserved.]

Note 7.06-17: See Note 7.01-15.

.07 Section 368(a)(1)(F) reorganizations:

Legend:

Oldco = The transferor corporation

Newco = The surviving transferee corporation

1. The fair market value of the Newco stock and other consideration received by each Oldco shareholder will be approximately equal to the fair market value of the Oldco stock surrendered in the exchange.

~~2. There is no plan or intention by the shareholders of Oldco who own 1 percent or more of the Oldco stock, and to the best of the knowledge of management of Oldco, there is no plan or intention~~

~~on the part of the remaining shareholders of Oldeo to sell, exchange or otherwise dispose of any of the shares of Newco stock received in the transaction. (alternatively, for publicly traded companies, submit the above representation substituting "5 percent" for "1 percent" where it appears.)~~

Note 7.07-2: The representation is deleted to take into account regulations (T.D. 9182, 2005-11 I.R.B. 713) providing, in part, that the COI and continuity of business enterprise requirements do not apply for reorganizations under section 368(a)(1)(F).

3. ~~Immediately following consummation of the~~ As a result of the transaction, the shareholders of Oldco will own all of the outstanding Newco stock and will own such stock solely by reason of their ownership of Oldco stock immediately prior to the transaction.

Note 7.07-3: This representation takes into account Rev. Rul. 96-29, 1996-1 C.B. 50, which illustrates two reincorporation transactions and concludes that each transaction qualifies as a reorganization under section 368(a)(1)(F) notwithstanding other transactions effected, after the reincorporation transactions, but pursuant to the same plan. Notwithstanding the conclusion, Rev. Rul. 96-29 cites with approval Rev. Rul. 66-284, 1966-2 C.B. 115 (a transaction will not fail to qualify as a reorganization under section 368(a)(1)(F) if dissenters owning fewer than one percent of the outstanding shares of the target corporation do not participate in the transaction), thereby confirming that the "identity of shareholder" and "identity of assets" requirements can be adversely affected by more than a de minimis change in existing shareholders or target assets if such changes occur pursuant to the transaction that effects the potential Type "F" reorganization.

4. Newco has no plan or intention to issue additional shares of its stock ~~following~~ in the transaction.

Note 7.07-4: See Note 7.07-3.

5. ~~Immediately following consummation of~~ As a result of the transaction, Newco will possess the same assets and liabilities, except for assets distributed to shareholders who receive cash or other property, assets used to pay dissenters to the transaction, and assets used to pay expenses incurred in connection with the transaction, as those possessed by Oldco immediately prior to the transaction. Assets distributed to shareholders who receive cash or other property, assets used to pay expenses, assets used to pay dissenters to the transaction, and all redemptions and distributions (except for regular, normal dividends) made by Oldco ~~immediately preceding the transaction~~ in the transaction will, in the aggregate, constitute less than one percent of the net assets of Oldco. Dissenting shareholders will own less than one percent of the Oldco stock.

Note 7.07-5: See Note 7.07-3.

6. ~~At the time of the transaction, Oldeo will not have outstanding any warrants, options, convertible securities, or any other type of right pursuant to which any person could acquire stock in Oldeo.~~

Note 7.07-6: See Note 7.07-3.

7. ~~Newco has no plan or intention to reacquire any of its stock issued in the transaction.~~

Note 7.07-7: See Note 7.07-3.

~~8. Newco has no plan or intention to sell or otherwise dispose of any of the assets of Oldeo acquired in the transaction, except for dispositions made in the ordinary course of business.~~

Note 7.07-8: See Note 7.07-3.

9. The liabilities of Oldco assumed ~~by Newco plus the liabilities, if any, to which the transferred assets are subject~~ (within the meaning of section 357(d) of the Code) by Newco were incurred by Oldco in the ordinary course of ~~its business and are associated with the assets transferred.~~

Note 7.07-9: See Note 7.01-5.

~~10. Following the transaction, Newco will continue the historic business of Oldeo or us a significant portion of Oldeo's historic business assets in a business.~~

Note 7.07-10: See Note 7.07-2.

11. The shareholders will pay their respective expenses, if any, incurred in connection with the transaction.

12. Oldco is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the ~~Internal Revenue~~ Code.

13. Alternative 1; The fair market value of any property described under section 362(e)(1)(B) of the Code transferred by Target to Acquiring will equal or exceed the aggregate adjusted basis of such property immediately after the transaction. Alternative 2: The transfer will not result in a transaction whereby gain or loss with respect to Oldco property not subject to tax under the Code prior to the transfer will become subject to tax under the Code after the transfer.

Note 7.07-13: See Note 7.01-14.

14. [Section 362(e)(2) reserved.]

Note 7.07-14: See Note 7.01-15.

.08 Miscellaneous representations to be submitted, if applicable:

1. The payment of cash in lieu of fractional shares of (Acquiring, Parent, or Oldco) stock is solely for the purpose of avoiding the expense and inconvenience to (Acquiring, Parent, or Oldco) of issuing fractional shares and does not represent separately bargained-for consideration. The total cash consideration that will be paid in the transaction to the Target shareholders instead of issuing fractional shares of (Acquiring, Parent, or Oldco) stock will not exceed one percent of the total consideration that will be issued in the transaction to the Target shareholders in exchange for their shares of Target stock. The fractional share interests of each Target shareholder will be aggregated, and no Target shareholder will receive cash in an amount equal to or greater than the value of one full share of (Acquiring, Parent, or Oldco) stock.

2. None of the compensation received by any shareholder-employees of Target will be separate consideration for, or allocable to, any of their shares of Target stock; none of the shares of Acquiring stock received by any shareholder-employees will be separate consideration for, or allocable to, any employment agreement; and the compensation paid to any shareholder-employees will be for services actually rendered and will be commensurate with amounts paid to third parties bargaining at arm's-length for similar services.

3. Acquiring will pay or assume only those expenses of Target that are solely and directly related to the transaction in accordance with the guidelines established in Rev. Rul. 73-54, 1973-1 C.B. 187.

4. EFFECTIVE DATE

This revenue procedure will apply to all ruling requests received in the National Office subsequent to _____, 2007, the date of publication of this revenue procedure in the Internal Revenue Bulletin.

5. EFFECT ON OTHER REVENUE PROCEDURES

Rev. Proc. 77-37 is amplified; Rev. Proc 86-42 is superseded.