

# Withdrawal of Previous Proposed Regulations; Notice of Proposed Rulemaking and Notice of Public Hearing

## Agent for Consolidated Group

### REG-103805-99

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of previous proposed regulations; notice of proposed rulemaking; and notice of public hearing.

SUMMARY: This document contains proposed regulations regarding the agent for an affiliated group that files a consolidated return (consolidated group). The proposed regulations address certain issues raised by the current regulations concerning the agent for the group when the common parent ceases to be the common parent, as well as questions concerning the scope of the common parent's authority. These proposed regulations affect all consolidated groups. This document also provides notice of a public hearing on these proposed regulations. In addition, this document withdraws a portion of the proposed rulemaking (LR-97-79, 1984-2 C.B. 821) published in the **Federal Register**, July 31, 1984.

DATES: Written and electronic comments must be received by December 26, 2000. Outlines of topics to be discussed at the public hearing scheduled for 10 a.m. on January 22, 2001, must be received by December 26, 2000.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG-103805-99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to CC:M&SP:RU (REG-103805-99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS internet site at [http://www.irs.ustreas.gov/tax\\_reg/regslist](http://www.irs.ustreas.gov/tax_reg/regslist)

t.html. The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Gerald B. Fleming or George R. Johnson, (202) 622-7930; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing, Sonya Cruse, (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Comments on the collection of information should be received by November 27, 2000.

Comments are specifically requested concerning:

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

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

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

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

Estimates of capital or start-up costs and costs of operation, maintenance, and

purchase of services to provide information.

The collection of information in the proposed regulations is in §1.1502-77(d). This information is required for the common parent to notify the IRS of the designation of a new agent for the consolidated group when the common parent's existence is about to terminate and for the designated corporation to confirm that it agrees to serve as the group's new agent and qualifies to be the group's agent. The collection of information is required to obtain a benefit, i.e., to designate a new agent for the consolidated group. The likely respondents are business or other for-profit institutions.

The regulations provide that a common parent or a previously designated agent of a consolidated group should notify the Commissioner in writing, in accordance with procedures prescribed by the Commissioner, that it anticipates going out of existence and that it designates another corporation to serve as the group's agent for specified prior consolidated return years. In addition, the notification should include a statement by the designated corporation agreeing to serve as the group's agent and, if the designated corporation was not itself a member of the group, a statement that it is or will be liable for the tax. An agent designated by the Commissioner is required to give notice to each corporation (or any successor) that was a member of the group during any part of the relevant consolidated return year. The burden for the collection of information in §1.1502-77(d) is as follows:

Estimated total annual reporting burden: 200 hours.

Estimated average annual burden per respondent: 2 hours.

Estimated number of respondents: 100.

Estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become mate-

rial in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

## Background

This document proposes amendments to 26 CFR part 1 under section 1502 of the Internal Revenue Code of 1986 (Code). The proposed amendments clarify and supplement existing rules under §1.1502-77 concerning the agent for a consolidated group and the designation of a new agent to act for the group. The proposed amendments also clarify rules concerning the common parent as agent for a corporation whose income is improperly included in a consolidated return. In addition, the proposed amendments modify and clarify the rules concerning the proper party to apply for and receive a refund payment due to a tentative carryback adjustment under §1.1502-78. The proposed regulations also terminate §1.1502-77T for tax years beginning on or after the effective date of final regulations amending §1.1502-77.

Section 1.1502-77(a) currently provides that the common parent is the “sole agent” for the consolidated group with respect to nearly all procedural tax matters relating to the group’s tax liability for a consolidated return year. Notwithstanding this general rule, §1.1502-77(a) provides that the IRS may, upon notifying the common parent, deal directly with any member of the group in respect of its liability, in which case that member shall have full authority to act for itself.

Because the common parent’s authority to act as agent for the group terminates when the common parent corporation ceases to exist, §1.1502-77(d) provides for the designation of a new agent to act for the group. Section 1.1502-77(d) first grants the terminating common parent, prior to going out of existence, the authority to designate a remaining member to act as agent for the group (a designated agent) regarding the group’s prior consolidated return years. If the common parent goes out of existence without designating a new agent, §1.1502-77(d) provides that the remaining members of the group may designate a new agent. A designation of a new

agent under this provision, by either the common parent or the remaining members, is subject to the approval of the district director with which the group files its return. Section 1.1502-77(d) also grants the IRS the authority to deal separately with each remaining member of the group with respect to its liability in the event that neither the common parent nor the surviving members designate a new agent.

Decisions of the United States Tax Court have highlighted difficulties in applying these rules to situations where a group continues to exist following a transaction described in §1.1502-75(d) (a group structure change), in which a new common parent has replaced the former common parent (which may or may not have remained in existence or remained a member of the group). See *Interlake Corp. v. Commissioner*, 112 T.C. 103 (1999); *Union Oil Co. v. Commissioner*, 101 T.C. 130 (1993); *Southern Pacific Co. v. Commissioner*, 84 T.C. 395, 404 (1985).

On September 8, 1988, various final and temporary regulations under section 1502 were published in the **Federal Register** (T.D. 8226, 1988-2 C.B. 325 [53 F.R. 34729]). At the same time, a notice of proposed rulemaking (LR-66-88, 1988-2 C.B. 848) cross-referenced to the text of the temporary regulations was also published (53 F.R. 34779). Included in the temporary regulations was §1.1502-77T. In situations where the corporation that was the common parent of the group ceases to be the common parent, §1.1502-77T provides alternative agents to act for a consolidated group, but only for purposes of mailing notices of deficiency and waiving periods of limitations. Specifically, §1.1502-77T allows the following alternative agents to act on behalf of the group: (1) the common parent of the group for all or any part of the year to which the notice or waiver applies, (2) a successor to the former common parent in a transaction to which section 381(a) applies, (3) the agent designated by the group under §1.1502-77(d), or (4) if the group remains in existence under §1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

The IRS received no comments on

§1.1502-77T and has not issued final regulations concerning alternative agents.

## Reasons for Change

Given the common parent’s role as the agent for the group, issues arise about who has authority to act on behalf of the group for consolidated return years where the common parent has ceased to exist (e.g., due to a merger or liquidation) or where, while continuing to exist, it has ceased to be the common parent of the group (e.g., as a result of being acquired by another corporation). Other issues arise concerning the proper agent, as well as the scope of that agency, where a consolidated return improperly includes the income of a corporation that should have filed separately or when the IRS issues a tentative refund in response to a claim filed by a former member of the group.

Although the current provisions of §§1.1502-77 and 1.1502-77T provide guidance in limited situations, numerous issues have arisen in situations outside the scope of these provisions. The alternative agent approach of §1.1502-77T addressed agency issues regarding notices of deficiency and waivers of periods of limitations. It was intended to offer flexibility in allowing both taxpayers and the IRS to choose from among several potential agents to act for the group and also to ensure that whichever corporation is selected would be a permissible agent to act for the group. However, an alternative agent provided by §1.1502-77T is the agent for the group only for purposes of mailing notices of deficiency or for executing consents to extend periods of limitations. Under §1.1502-77T, an alternative agent has no authority to act as the group’s agent for other purposes (e.g., filing a refund claim, receiving refund payments or executing a closing agreement). As a result, under the current rules, absent a designation of one of the remaining members to act as agent under §1.1502-77(d), the IRS may have no option other than to deal separately with each remaining member for any purpose not covered by §1.1502-77T.

The IRS and Treasury initially considered the possibility of expanding the scope of the authority of alternative

agents under §1.1502-77T to include all matters under the common parent's scope of authority as set forth in §1.1502-77(a). However, it was ultimately concluded that the shortcomings of the alternative agent approach outweigh its benefits. In particular, that approach lacks certainty because the IRS could deal with any one of several alternative agents and more than one corporation could initiate actions on behalf of the group. Also, a corporation could serve as an alternative agent without having been related to members of the group during the consolidated return year at issue or without being liable for the consolidated tax for that year.

In lieu of expanding the alternative agent approach of §1.1502-77T, the IRS and Treasury propose to revise the rules of §1.1502-77 and to terminate the application of §1.1502-77T. Under the proposed regulations, as discussed in more detail below, the common parent remains the agent for the group's consolidated return year as long as it remains in existence, regardless of whether it continues to be a common parent or a member of the group, or whether the group continues under §1.1502-75(d).

The proposed regulations set forth procedures for a common parent to designate a new agent for the group when the common parent ceases to exist, and permit the IRS to designate a new agent if the common parent fails to do so. The proposed regulations do not contain a provision allowing the remaining members to designate a new agent if the common parent fails to make a designation before it ceases to exist. The proposed regulations provide that the common parent acts as the agent with regard to the liability of any corporation whose income is improperly included in the group's return but whose liability is subsequently computed on the basis of a separate return or as a member of another consolidated group.

Finally, the proposed regulations modify the rule in §1.1502-78(a) concerning an application under section 6411 for a tentative carryback adjustment with respect to a loss or business credit arising in a separate return limitation year. Under the proposed amendments, the application should be filed by the common parent for the carryback

year instead of the corporation to which the loss or credit is attributable. In addition, the proposed amendments clarify that any refund under §1.1502-78(b) related to a tentative carryback adjustment must be paid to the corporation that was the common parent (or is the designated agent) for the carryback year. The proposed amendments also replace the word "investment" with "business" in the term *unused investment credit* in §1.1502-78(a) to conform to changes in section 6411.

### Explanation of Provisions

In order to reduce uncertainty for both taxpayers and the IRS, the proposed amendments to §1.1502-77(a) provide that the common parent for a consolidated return year remains the agent for the group for that year as long as it continues to exist. This rule applies even if the common parent, for whatever reason, ceases to be the common parent. Thus, for example, if the common parent becomes a subsidiary member of the consolidated group, which continues under §1.1502-75(d), if the common parent becomes a stand-alone corporation, or even if the common parent becomes a subsidiary member of another group, it remains the agent of the group for those consolidated return years during which it was the group's common parent. Cf. *Interlake Corp. v. Commissioner*, 112 T.C. 103 (1999); *Union Oil Co. v. Commissioner*, 101 T.C. 130 (1993).

The proposed regulations provide a rule for situations where a corporation files a consolidated return as the common parent of an affiliated group but is subsequently determined not to be the actual common parent of that group. In such situations, the corporation that filed as the common parent is considered to be the agent for each member of the claimed group even though it was not actually the common parent. This situation may arise, for example, where the common parent fails to own stock satisfying the 80-percent voting and value requirement of section 1504(a)(2).

The proposed regulations clarify that the common parent's authority as agent for a taxable year extends to any successor of a member. For purposes of §1.1502-77 only, the term *successor* means a party that, pursuant to applicable

law, has become primarily liable for the tax liabilities of the common parent or any subsidiary member. Such determination is made without regard to §1.1502-1(f)(4) (defining the term *successor* for purposes of the definition of a separate return limitation year). The proposed regulations also clarify that the common parent remains the sole agent with respect to the consolidated tax liability under §1.1502-6 of a subsidiary (or its successor) that is or becomes a disregarded entity for Federal tax purposes.

Where transferee liability exists under applicable law, the proposed regulations provide that, for purposes of assessing, paying or collecting transferee liability, actions of the common parent with respect to the group's tax liability will derivatively affect the liability of a transferee of a member, regardless of whether the transferor member remains in existence. This provision is essentially an application of general principles of transferee liability in the context of a consolidated group. Under case law, the actions of a transferor derivatively affect the liability of a transferee, even if the actions are taken after the transfer occurs. See, e.g., *United States v. Vassallo, Inc.*, 274 F.2d 791, 793-794 (3d Cir. 1960). As provided in the proposed regulations, the common parent's actions on behalf of the group are always binding on each member of the group. Therefore, any actions of a common parent with respect to the group's liability for a consolidated return year will derivatively affect the liability of a transferee of a transferor member that remains in existence, even if the action occurs after the transfer giving rise to the transferee liability.

The proposed regulations recognize the derivative effect of the common parent's actions on transferee liability and further provide that actions taken by or with respect to the common parent, as agent for the group, after a transferor member has ceased to exist, also derivatively affect the liability of a transferee of such member to the same extent as if the transferor member had remained in existence. For example, under this provision, a waiver extending the limitations period for assessment, executed by the common parent (as agent for the group) after a member ceases to exist, would have the derivative effect of extending the limitations period with re-

spect to a transferee of such member.

The proposed regulations revise the rules governing the designation of a new agent for the group when the common parent ceases to exist. They retain the current provision under §1.1502-77(d) for the common parent to notify the IRS and designate, subject to the approval of the IRS, another member to act as the group's agent for the consolidated return year.

As under the current rule, the proposed regulations provide that the common parent may designate one of the remaining members of the group as the new agent for the group. The proposed regulations provide that the member designated as the agent for a consolidated return year must have been a member of the group during the consolidated return year and must not subsequently have been disregarded as an entity separate from its owner or treated as a partnership for purposes of Federal taxes. However, the common parent may also designate a domestic corporation (that is not disregarded as an entity separate from its owner or classified as a partnership for Federal tax purposes) that is primarily liable as a successor of any corporation that was a member of the group during the consolidated return year. In addition, the common parent will be permitted to designate any domestic corporation (that is not disregarded as an entity separate from its owner or classified as a partnership for Federal tax purposes) that is to become primarily liable as the common parent's successor in connection with a transaction in which the common parent's existence terminates. If an agent previously designated under this provision ceases to exist, the proposed regulations provide for such terminating agent to designate a new agent in the same manner that is available to a common parent that is going out of existence.

For purposes of the designation provision, a corporation's existence is deemed to cease not only if the corporation ceases to exist under applicable law, but also if the corporation becomes a disregarded entity or reclassified as a partnership for Federal tax purposes. However, if treating a corporation as ceasing to exist when it becomes a disregarded entity or reclassified as a partnership would leave no other corporation eligible to serve as a designated agent for the group, its existence would not be

deemed to terminate. As used in the proposed regulations, the term *disregarded entity* includes a qualified subchapter S subsidiary for which an election is made pursuant to section 1361(b)(3)(B), a qualified REIT subsidiary within the meaning of section 856(i)(2), or an entity that is disregarded as an entity separate from its owner under the "check-the-box" rules of §301.7701-3. If, as a result of becoming a disregarded entity or reclassified as a partnership, the group's agent ceases to exist for Federal tax purposes without designating a new agent and subsequently purports to act on behalf of the group, any actions taken by the purported agent will, to the extent determined appropriate by the Commissioner, have the same effect as if the agent's existence had not terminated.

In the event the common parent (or a previously designated agent) fails to designate a new agent before going out of existence, the proposed regulations authorize the IRS to designate a new agent for the group. The IRS may designate one of the remaining members of the group for the consolidated return year (that has not been disregarded as an entity separate from its owner or reclassified as a partnership for Federal tax purposes), or any domestic corporation (that is not disregarded as an entity separate from its owner or classified as a partnership for Federal tax purposes) that is primarily liable as a successor of such a member, to act as the group's agent. This provides the IRS with a readily available option in cases where it needs to address a consolidated group's tax liability and no new agent has otherwise been designated. Any corporation that the IRS designates as the agent for the consolidated return year generally will continue as the group's agent as long as it remains in existence. At the request of one or more members, however, the IRS may (but is not required to) replace a designated agent with another member (or successor of a member) for the consolidated return year.

The proposed regulations direct the IRS and the designated agent to provide notification of the designation to the other remaining members/successors. Any failure by the IRS and/or the designated agent to give notification to a member/successor does not invalidate the designation.

Under the current regulations, the re-

maining members for a consolidated return year may designate a new agent in the event the common parent does not designate a new agent that is approved by the IRS. In practice, taxpayers have seldom utilized this provision because it is unwieldy and largely impracticable except for groups comprising only a few members. Accordingly, in light of the infrequency with which taxpayers use this provision, and in the interest of providing simple and administrable procedures, the IRS and Treasury have concluded that there is no longer a need to provide for any designation by the remaining members.

As under the current regulations, the proposed regulations provide that a designation by the common parent or a designated agent cannot become effective until it is approved by the IRS. The proposed regulations clarify that the Commissioner's approval of a designation by a common parent (or designated agent) will not be effective before the corporation making the designation ceases to exist. In the absence of an effective approved designation, a notice of deficiency or any other communication mailed to the former common parent or former designated agent, even if no longer in existence, is treated as having been properly mailed to all members and successors.

The proposed regulations retain the provision in the current regulations authorizing the Commissioner, upon notifying the common parent, to deal separately with a member concerning that member's several liability for the consolidated tax. In such a case, the member would have full authority to act for itself.

The proposed regulations eliminate §1.1502-77T for consolidated return years beginning after the date that the final regulations under §1.1502-77 are published in the **Federal Register**.

The proposed regulations provide that the common parent is the sole agent for any corporation that is improperly included in the group's return and whose tax liability should have been computed on the basis of a separate return or as a member of another consolidated group. This provision is consistent with the current rule of §1.1502-77(c)(2), relating to the effect of waivers of periods of limitations on assessment that are executed by the common parent. The proposed regulations are also con-

sistent with rulings of the Tax Court in several cases. See *Intervest Enterprises, Inc. v. Commissioner*, 59 T.C. 91, 96–97 (1972); *Lone Star Life Insurance Company v. Commissioner*, T.C. Memo. 1997–465; *INI, Inc. v. Commissioner*, T.C. Memo. 1995–112, *aff'd per curiam*, 107 F.3d 27 (11th Cir. 1997). See also *Alumax Inc. v. Commissioner*, 109 T.C. 133, 196 (1997) (holding that the improper inclusion of a corporation in a consolidated return does not alter the agency relationship established under §1.1502–77(c)), *aff'd on other grounds*, 165 F.3d 822 (11th Cir. 1999).

The proposed regulations amend §1.1502–78(a) to provide that the common parent for the carryback year should file any application under section 6411 for a tentative carryback adjustment with respect to a loss or credit arising in a separate return limitation year that may be carried back to a consolidated return year. The current rule, which provides that the corporation to which such loss or credit is attributable should file such application, is inconsistent with the general rule of §1.1502–77 that the common parent is the sole agent for the group and with the rule of §1.1502–78(b) that payment of any resulting refund is made to the common parent.

In *Interlake Corp. v. Commissioner*, 112 T.C. 103, 112–113 (1999), the Tax Court found that §1.1502–78(b) is unclear as to whether the common parent in the carryback year or the common parent in the loss year should be the group's agent to receive a refund resulting from a tentative carryback adjustment. 112 T.C. at 112–113. The proposed regulations amend §1.1502–78(b) to provide expressly that the refund should be paid to the common parent or designated agent for the group's carryback year.

Finally, because the position of district director will be eliminated in the restructuring of the IRS, the proposed regulations substitute “the Commissioner” for various references to the district director in §1.1502–77. If the proposed rules are adopted, procedures for the designation of a new agent under the new IRS structure, by either a terminating common parent or the Commissioner, will be announced when final regulations are issued. It is anticipated that such procedures will be embodied in a revenue procedure that may also include provisions for one or more members of a group to request that the Commissioner

designate an agent in situations where the common parent or previously designated agent failed to designate a new agent before it ceased to exist, whether or not the Commissioner has already designated an agent. Comments are invited concerning these procedures.

### Proposed Effective Date

The amendments to §1.1502–77 are proposed to apply to consolidated return years beginning on or after the date final regulations are published in the **Federal Register**. The current rules of §§1.1502–77 and 1.1502–77T continue to apply with respect to consolidated return years beginning before the effective date of final regulations under §1.1502–77. Thus, the alternative agent approach of the temporary regulation would continue to apply for purposes of mailing notices of deficiency and executing waivers of periods of limitations on assessment with respect to consolidated return years beginning before the date final regulations are published in the **Federal Register**.

The amendments to §1.1502–78 are proposed to apply to taxable years to which a loss or credit may be carried back and for which the due date (without extensions) of the original return is after the date final regulations are published in the **Federal Register**.

### Special Analyses

It has been determined that this notice of proposed rulemaking 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 will 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 Code, these regulations will be submitted to the Chief Counsel for Advocacy

of the Small Business Administration for comment on their impact on small business.

### Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS.

The IRS and Treasury request comments on the clarity of the proposed rules and how they may be made easier to understand or to implement. In addition, comments are requested on the treatment in the proposed regulations of entities that become disregarded as entities separate from their owners or become partnerships for Federal tax purposes. All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 22, 2001, beginning at 10 a.m. in room 4718, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must request to speak, and submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by December 26, 2000.

A period of ten minutes will be allocated to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

## Drafting Information

The principal authors of these proposed regulations are Gerald B. Fleming, George R. Johnson and Steven J. Hankin, Office of the Assistant Chief Counsel (Field Service). However, other personnel from the IRS and Treasury Department participated in their development.

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## Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

### PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing entries for sections 1.1502–77(e) and 1.1502–78(b) and adding entries in numerical order to read in part as follows:

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

Section 1.1502–77 also issued under 26 U.S.C. 1502 and 6402(j).

Section 1.1502–78 also issued under 26 U.S.C. 1502, 6402(j), and 6411(c). \* \* \*

Section 1.1502–77A also issued under 26 U.S.C. 1502 and 6402(j). \* \* \*

Par. 2. Immediately following §1.1502–41A, an undesignated center heading is added to read as follows:

#### REGULATIONS APPLICABLE TO TAXABLE YEARS BEGINNING BEFORE THE DATE FINAL REGULATIONS ARE PUBLISHED IN THE **FEDERAL REGISTER**

Par. 3. Immediately before §1.1502–79A, an undesignated center heading is added to read as follows:

#### REGULATIONS APPLICABLE TO TAXABLE YEARS BEFORE January 1, 1997

Par. 4. Section 1.1502–77 is redesignated as §1.1502–77A and transferred immediately after the undesignated center heading “REGULATIONS APPLICABLE TO TAXABLE YEARS BEGINNING BEFORE THE DATE FINAL REGULATIONS ARE PUBLISHED IN THE **FEDERAL REGISTER**”; the section heading of newly designated §1.1502–77A is revised; paragraph (e) is redesignated as paragraph (f); and paragraph (g) is added to read as follows:

§1.1502–77A *Common parent agent for subsidiaries applicable for consolidated return years beginning before the date final regulations are published in the **Federal Register**.*

\* \* \* \* \*

(g) *Effective date.* This section applies to consolidated return years beginning before the date final regulations under §1.1502–77 are published in the **Federal Register**, except paragraph (e) of this section applies to statutory notices and waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988, and which begin before the date final regulations under §1.1502–77 are published in the **Federal Register**.

Par. 5. New §1.1502–77 is added to read as follows:

§1.1502–77 *Agent for the group.*

(a) *Scope of agency—(1) In general—*

(i) *Common parent.* Except as provided in paragraphs (a)(3) and (6) of this section, the common parent for a consolidated return year, for all matters relating to the tax liability for the consolidated return year, shall be the sole agent for—

(A) Each subsidiary in the group; and

(B) Any successor of any member (including the common parent).

(ii) *Other agents.* For purposes of this section, any corporation described in paragraphs (a)(1)(ii)(A) and (B) of this section will act as the agent in place of the common parent to the same extent and subject to the same limitations as are applicable to the common parent, and any reference in this section to the common parent will include any such other agent—

(A) Any corporation designated as the agent pursuant to paragraph (d) of this section to replace the common parent or a previously designated agent; and

(B) Any corporation that files a consolidated return as the common parent for a group, notwithstanding that such corporation is subsequently determined not to have been the proper agent for the claimed group.

(iii) *Successor.* For purposes of this section only, the term *successor* means a party that is primarily liable, pursuant to applicable law (including, for example,

by operation of a state or Federal merger statute), for the tax liability of the common parent or any subsidiary of the group. Such determination is made without regard to §1.1502–1(f)(4).

(iv) *Disregarded entity.* If a subsidiary of a group or its successor is or becomes a disregarded entity for Federal tax purposes, the common parent will continue to serve as the sole agent with respect to that subsidiary’s tax liability under §1.1502–6 for consolidated return years during which it was a member of the group, even though the entity generally is not treated as a person separate from its owner for Federal tax purposes.

(v) *Transferee liability.* For purposes of assessing, paying and collecting transferee liability, any action taken by or directed to the common parent with respect to the group’s tax liability will derivatively affect the liability of a transferee (or subsequent transferees) of a member, regardless of whether the member terminates its existence prior to such action.

(2) *Specific matters subject to agency.* As sole agent, the common parent is authorized to act in its own name for all matters relating to the tax liability for the consolidated return year. Except as provided in paragraphs (a)(3) and (6) of this section, no subsidiary or successor shall have authority to act for or to represent itself in any such matter. For example—

(i) Any election available to a subsidiary corporation in the computation of its separate taxable income must be made by the common parent, as must any change in an election previously made by or for a subsidiary corporation;

(ii) All correspondence will be carried on directly with the common parent;

(iii) The common parent shall file for all extensions of time, including extensions of time for payment of tax under section 6164;

(iv) The common parent in its own name will give waivers, give bonds, and execute closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, shall be considered as having also been given or executed by each member or any successor thereof;

(v) The common parent will file claims for refund, and any refund will be made directly to and in the name of the common

parent and will discharge any liability of the Government to any member or any successor thereof with respect to such refund;

(vi) Notices of claim disallowance will be mailed only to the common parent, and the mailing to the common parent shall be considered as a mailing to each member or any successor thereof;

(vii) Notices of deficiencies will be mailed only to the common parent, and the mailing to the common parent shall be considered as a mailing to each member or any successor thereof;

(viii) The common parent will file petitions and conduct proceedings before the United States Tax Court, and any such petition shall be considered as also having been filed by each member or any successor thereof;

(ix) Any assessment of tax may be made in the name of the common parent, and an assessment naming the common parent shall be considered as an assessment with respect to each member and any successor thereof; and

(x) Notice and demand for payment of taxes will be given only to the common parent and such notice and demand will be considered as a notice and demand to each member or any successor thereof.

(3) *Matters reserved to subsidiaries.* Notwithstanding the role of the common parent as exclusive agent under paragraph (a)(1) of this section, the following matters shall be reserved to each subsidiary and, if applicable, to a successor of a subsidiary—

(i) The making of the consent required by §1.1502-75(a)(1);

(ii) The making of an election under section 936(e);

(iii) The making of an election to be treated as a DISC under §1.992-2; and

(iv) A change of the annual accounting period pursuant to §1.991-1(b)(3)(ii).

(4) *Term of agency*—(i) *In general.* Except as provided in paragraph (a)(4)(iii) of this section, the common parent for the consolidated return year shall remain the sole agent with respect to that year until its existence terminates, regardless of whether one or more subsidiaries become or cease to be members of the group at any time, whether the group files a consolidated return for any subsequent year, whether the common parent ceases to be the common parent or

a member of the group in any subsequent year, or whether the group continues pursuant to §1.1502-75(d) with a new common parent in any subsequent year.

(ii) *Replacement of agent designated by Commissioner.* If the Commissioner replaces a previously designated agent pursuant to paragraph (d)(2)(ii) of this section, the term of the replaced agent shall terminate when the Commissioner designates another agent.

(iii) *New common parent after a group structure change.* If the group continues in existence with a new common parent pursuant to §1.1502-75(d) during a consolidated return year, the common parent at the beginning of the year is the group's sole agent through the date of the transaction, and the new common parent becomes the continuing group's sole agent beginning the day after the transaction.

(5) *Identifying members in notices.* Notwithstanding the provisions of this paragraph (a)—

(i) Any notice of deficiency with respect to the tax for a consolidated return year will name each corporation that was a member of the group during any part of such period (but a failure to include the name of any such member will not affect the validity of the notice of deficiency as to the other members or their successors), and any notice of deficiency that is valid as to a member so named will be valid as to any successor of such member;

(ii) Any notice and demand for payment will name each corporation that was a member of the group during any part of the applicable consolidated return year (but a failure to include the name of any such member will not affect the validity of the notice and demand as to the other members or their successors), and any notice and demand for payment that is valid as to a member so named will be valid as to any successor of such member;

(iii) Any notice of a lien, any levy or any other proceeding to collect the amount of any assessment, after the assessment has been made, will name the taxpayer from which such collection is to be made;

(iv) Any notice described in paragraphs (a)(5)(i) through (iii) of this section that fails to include the name of a member during the consolidated return year shall still be valid as to that mem-

ber's successor, if such successor is named in the notice; and

(v) If a notice of deficiency fails to name a member or its successor, any assessment of tax based on such notice shall still be a valid assessment as to the other members or their successors.

(6) *Direct dealing with a member.* Notwithstanding the provisions of this paragraph (a), the Commissioner may, upon notifying the common parent, deal directly with any member of the group or any successor of a member with respect to its several liability for the consolidated tax of the group, in which event such member or successor shall have full authority to act for itself.

(b) *Copy of notice of deficiency to corporation which has ceased to be a member of the group.* If a corporation has ceased to be a member of the group during or after a consolidated return year and if such corporation or its successor files written notice of such cessation with the Commissioner, then the Commissioner upon request of such corporation or its successor will furnish a copy of any notice of deficiency with respect to the tax for a consolidated return year for which the corporation was a member or a copy of any notice and demand for payment of such deficiency. The filing of such written notification and request by a corporation or its successor shall not have the effect of limiting the scope of the agency of the common parent provided for in paragraph (a) of this section. Any failure by the Commissioner to comply with such written request shall not have the effect of limiting the tax liability under §1.1502-6 of such corporation or its successor.

(c) *References to member or subsidiary.* For purposes of this section, all references to a member or subsidiary shall include—

(1) Each corporation that was a member of the group during any part of such taxable year (except that any reference to a subsidiary shall not include the common parent); and

(2) Each claimed member the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such claimed member should have been computed on the basis of a separate return, or as a member of another consol-

idated group, under the provisions of §1.1502-75.

(d) *Termination of common parent—*  
(1) *Designation by common parent.* (i) If the common parent will terminate its existence, it shall—

(A) Designate, subject to the approval of the Commissioner, for each consolidated return year for which the period of limitations for assessment, for collection after assessment, or for claiming a credit or refund has not expired, one of the following to act as agent in its place—

(1) Any corporation that was a member of the group during any part of the consolidated return year and, except as provided in paragraph (e)(3)(ii) of this section, has not subsequently been disregarded as an entity separate from its owner or reclassified as a partnership for Federal tax purposes; or

(2) Any successor (as defined in paragraph (a)(1) of this section) of such a corporation or of the common parent that is a domestic corporation (and, except as provided in paragraph (e)(3)(ii) of this section, is not disregarded as an entity separate from its owner or classified as a partnership for Federal tax purposes), including a corporation that will become a successor at the time that the common parent ceases to exist; and

(B) Notify the Commissioner (under procedures prescribed by the Commissioner) of the designation, including—

(1) A statement by the designated corporation agreeing to serve as the group's new agent; and

(2) If the designated corporation was not itself a member of the group during the consolidated return year (because the designated corporation is a successor of a member of the group for the consolidated return year), a statement by the designated corporation acknowledging that it is or will be primarily liable for the consolidated tax as a successor of a member.

(ii) A designation under paragraph (d)(1)(i)(A) of this section will not be effective until it is approved by the Commissioner. The Commissioner's approval of such a designation will not be effective before the existence of the common parent terminates.

(2) *Designation by the Commissioner.*  
(i) In the event the common parent terminates its existence and no designation is made and approved under paragraph

(d)(1) of this section, the Commissioner may, with or without the request of any member of the group or its successor, at any time designate, effective immediately, a corporation described in paragraph (d)(1)(i)(A) of this section to act as the agent. The designation will be made in accordance with procedures prescribed by the Commissioner.

(ii) At the request of any member or successor of a member, the Commissioner may, but is not required to, replace an agent previously designated under this paragraph (d)(2) with another corporation described in paragraph (d)(1)(i)(A) of this section.

(iii) The Commissioner and the designated agent shall give notice of any designation to each corporation that was a member of the group during any part of the consolidated return year or its successor. A failure by the Commissioner and/or designated agent to notify any such member of the group or its successor does not invalidate the designation.

(3) *Absence of designation.* Until either a notice in writing designating a new agent has become effective or the Commissioner has designated a new agent, any notice of deficiency or other communication mailed to the common parent, even if no longer in existence, shall be considered as having been properly mailed to the agent of the group; or if the Commissioner has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member or its successor with respect to the member's several liability under §1.1502-6 without having to give notice pursuant to paragraph (a)(6) of this section.

(e) *Termination of a corporation's existence—*(1) *In general.* For purposes of paragraphs (a)(1)(v), (a)(4)(i), and (d) of this section, the existence of a corporation is deemed to terminate if—

(i) It ceases to exist under applicable law; or

(ii) Except as provided in paragraph (e)(3) of this section, it becomes, for Federal tax purposes, either—

(A) An entity that is disregarded as an entity separate from its owner; or

(B) An entity that is reclassified as a partnership.

(2) *Purported agency.* If the group's agent ceases to exist under circumstances

described in paragraph (e)(1)(ii) of this section without designating a new agent for the group pursuant to paragraph (d)(1) of this section, and the agent subsequently purports to act as agent for the group, any actions by that purported agent on behalf of the group will, to the extent determined appropriate by the Commissioner, have the same effect as if the agent's existence had not terminated.

(3) *Exceptions where no eligible corporation exists.* (i) For purposes of paragraphs (a)(4)(i) and (d) of this section, if a corporation becomes either disregarded as an entity separate from its owner or reclassified as a partnership for Federal tax purposes, its existence shall not be deemed to terminate if the effect of such termination would be that no corporation remains eligible to serve as the designated agent for the group's consolidated return year.

(ii) Similarly, an entity that is either disregarded as an entity separate from its owner or reclassified as a partnership for Federal tax purposes shall not be precluded from designation as an agent merely because of such classification if the effect of the inability to make such designation would be that no corporation remains eligible to serve as the designated agent for the group's consolidated return year.

(f) *Examples.* The following examples illustrate the principles of this section. In each example, as of January 1 of Year 1, the P group consists of P and its two subsidiaries, S and S-1. P, as the common parent of the P group, files consolidated returns for the P group in Years 1 and 2. On January 1 of Year 1, domestic corporations S-2, U, V, W, W-1, X, Y, Z and Z-1 are not related to P or the members of the P group. All corporations are calendar year taxpayers. Any surviving corporation in a merger is a successor as described in paragraph (a)(1)(iii) of this section. Any notification to the Commissioner of the designation of the P group's new agent also contains a statement signed on behalf of the designated agent that it consents to act as the group's new agent and, in the case of a successor, that it is primarily liable as a successor of a member. The examples are as follows:

*Example 1. Disposition of all group members.* On December 31 of Year 1, P sells all the stock of S-1 to X. On December 31 of Year 2, P distributes all the stock of S to P's shareholders. P files a separate return for Year 3. Although P is no longer a common



parent after Year 2, P remains the sole agent of the P group for Years 1 and 2. Except as provided in paragraph (a)(6) of this section, for as long as P remains in existence, only P may execute a waiver of the period of limitations on assessment on behalf of the group for Years 1 and 2.

*Example 2. Acquisition of common parent by another group.* The facts are the same as in *Example 1*, except on January 1 of Year 3, P is acquired by Y. P thereafter joins in the Y group consolidated return as a member of Y group. Although P is a member of Y group in Year 3, P remains the agent of the P group for Years 1 and 2. Except as provided in paragraph (a)(6) of this section, for as long as P remains in existence, only P may execute a waiver of the period of limitations on assessment on behalf of the P group for Years 1 and 2.

*Example 3. Merger of common parent—designation of remaining member as new agent.* On December 31 of Year 1, P sells all the stock of S-1 to X. On July 1 of Year 2, P acquires all the stock of S-2. On November 30 of Year 2, P distributes all the stock of S to P's shareholders. On January 1 of Year 3, P merges into Y corporation. Just before the merger, P notifies the Commissioner in writing of the planned merger and of its designation of S as the new agent of the P group for Years 1 and 2. S is the only member that P can designate as the new agent for both Years 1 and 2 because it is the only subsidiary that was a member of P group during part of both years. Although S-2 is the only remaining subsidiary of the P group when P merges into Y, S-2 was a member of the P group only in Year 2. For that reason, S-2 cannot be the group's agent for Year 1. Alternatively, P could designate a different agent for each year, selecting S or S-1 as the new agent for Year 1; and S or S-2 as the new agent for Year 2. P could also designate its successor Y as the new agent for both Years 1 and 2.

*Example 4. Forward triangular merger of common parent.* On January 1 of Year 3, P merges with and into Z-1, a subsidiary of Z, in a forward triangular merger described in section 368(a)(1)(A) and (a)(2)(D). The transaction constitutes a reverse acquisition under §1.1502-75(d)(3)(i) because P's shareholders receive more than 50% of Z's stock in exchange for all of P's stock. Just before the merger, P notifies the Commissioner in writing of the planned merger and its designation of Z-1, the corporation that will survive the planned merger, as the new agent of the P group for Years 1 and 2. Because Z-1 will be P's successor (within the meaning of paragraph (a)(1) of this section) after the planned merger, P may designate Z-1 as the new agent for the P group for Years 1 and 2, pursuant to paragraph (d)(1) of this section. Alternatively, P could have designated S or S-1 as the new agent for the P group for Years 1 and 2. Although Z is the new common parent of the P group, which continues pursuant to §1.1502-75(d)(3)(i), P may not designate Z as the new agent for Years 1 and 2 because Z was not a member of the group during any part of Years 1 or 2 and is not a successor of P or any other member of the group.

*Example 5. Reverse triangular merger of common parent.* On March 1 of Year 3, W-1, a subsidiary of W, merges into P, in a reverse triangular merger described in section 368(a)(1)(A) and (a)(2)(E). P survives the merger with W-1. The transaction constitutes a reverse acquisition under

§1.1502-75(d)(3)(i) because P's shareholders receive more than 50% of W's stock in exchange for all of P's stock. Under paragraph (a) of this section, P remains the agent of the P group for Years 1 and 2, even though the P group continues with W as its new common parent. Because the transaction constitutes a reverse acquisition, the P group is treated as remaining in existence with W as its common parent. Before March 2 of Year 3, P is the sole agent for the P group for Year 3. Beginning on March 2 of Year 3, W becomes the sole agent for the P group with respect to all of Year 3 (including the period through March 1) and subsequent consolidated return years.

*Example 6. Reverse triangular merger of common parent—spinoff of common parent.* The facts are the same as in *Example 5*, except that on April 1 of Year 3, P distributes the stock of its subsidiaries S and S-1 to W, and W then distributes the stock of P to the W shareholders. Although P is no longer a member of the P group and W is the continuing P group's new common parent, P remains the agent for the P group under paragraph (a) of this section for Years 1 and 2. Before March 2 of Year 3, P is the sole agent for the P group for Year 3. Beginning on March 2 of Year 3, W becomes the sole agent for the P group with respect to Year 3 (including the period through March 1) and subsequent consolidated return years.

*Example 7. Qualified stock purchase and section 338 election.* On March 31 of Year 2, V purchases the stock of P in a qualified stock purchase (within the meaning of section 338(d)(3)), and V makes a timely election pursuant to section 338(g) with respect to P. Section 338(a)(2) provides that P is treated as a new corporation as of the beginning of the day after the acquisition date for purposes of subtitle A. For purposes of other subtitles, such as subtitle F (Procedure and Administration), however, new P is treated as a continuation of old P. Therefore, new P remains the agent of the P group for Year 1 and the period ending March 31 of Year 2 (short Year 2). Except as provided in paragraph (a)(6) of this section, for as long as new P remains in existence, only new P may execute a waiver of the period of limitations on assessment on behalf of the P group for Year 1 and short Year 2.

*Example 8. Fraudulent conveyance of assets.* On March 15 of Year 2, P files a consolidated return that includes the income of S and S-1 for Year 1. On December 1 of Year 2, S-1 transfers assets having a fair market value of \$100x to U in exchange for \$10x. This transfer of assets for less than fair market value constitutes a fraudulent conveyance under applicable state law. On March 1 of Year 5, P executes a waiver extending to December 31 of Year 6 the period of limitations on assessment with respect to the group's Year 1 consolidated return. On February 1 of Year 6, the Commissioner issues a notice of deficiency to P asserting a deficiency of \$30x for the P group's Year 1 consolidated tax liability. P does not file a petition for redetermination in the Tax Court, and the Commissioner makes a timely assessment against the P group. P, S and S-1 are all insolvent and are unable to pay the deficiency. On February 1 of Year 8, the Commissioner sends a notice of transferee liability to U, which does not file a petition in the Tax Court. On August 1 of Year 8, the Commissioner assesses the amount of the P group's deficiency against U. Under sec-

tion 6901(c), the Commissioner may assess U's transferee liability within one year after the expiration of the period of limitations against the transferor S-1. By operation of section 6213(a) and 6503(a), the issuance of the notice of deficiency to P and the expiration of the 90-day period for filing a petition in the Tax Court have the effect of further extending by 150 days the P group's limitations period on assessment from the previously extended date of December 31 of Year 6 to May 30 of Year 7. Pursuant to paragraph (a)(1)(v) of this section, the waiver executed by P on March 1 of Year 5 to extend the period of limitations on assessment to December 31 of Year 6 and the further extension of the P group's limitations period to May 30 of Year 7 (by operation of sections 6213(a) and 6503(a)) have the derivative effect of extending the period of limitations on assessment of U's transferee liability to May 30 of Year 8. By operation of section 6901(f), the issuance of the notice of transferee liability to U and the expiration of the 90-day period for filing a petition in the Tax Court have the effect of further extending the limitations period on assessment of U's liability as a transferee by 150 days, from May 30 of Year 8 to October 27 of Year 8. Accordingly, the Commissioner may send a notice of transferee liability to U at any time on or before May 30 of Year 8 and assess the unpaid liability against U at any time on or before October 27 of Year 8. The result would be the same even if S-1 ceased to exist before March 1 of Year 5, the date P executed the waiver.

(g) *Cross-reference.* For further rules applicable to groups that include insolvent financial institutions, see §301.6402-7 of this chapter.

(h) *Effective date—(1) Application.* This section applies with respect to taxable years beginning on or after the date final regulations are published in the **Federal Register**.

(2) *Prior law.* For taxable years beginning before the date final regulations are published in the **Federal Register**, see §1.1502-77A.

Par. 6. Section 1.1502-77T(a) is redesignated as §1.1502-77A(e) and §1.1502-77T is removed.

Par. 7. The amendments to §1.1502-78(a), as contained in the notice of proposed rulemaking (LR-97-79) published in the **Federal Register** on July 31, 1984 (49 F.R. 30528), are withdrawn.

Par. 8. Section 1.1502-78 is amended as follows:

1. Paragraph (a) is revised.
2. Paragraph (b)(1) is amended by adding the language “for the carryback year (or agent designated under §1.1502-77(d) for the carryback year)” at the end of the first sentence.
3. In paragraph (c), the last sentence of *Example (1)* is amended by adding the

language “for the carryback year” after “parent.”

4. In paragraph (c), the last sentence of *Example (2)* is amended by removing the language “S-1” and adding “P” in its place.

5. In paragraph (c), *Example (3)*, the seventh sentence is amended by removing “Z must” and adding “X must” in its place.

6. Paragraphs (e) and (f) are added.

The revision and additions read as follows:

*§1.1502–78 Tentative carryback adjustments.*

(a) *General rule.* If a group has a consolidated net operating loss, a consolidated net capital loss, or a consolidated unused business credit for any taxable year, then any application under section 6411 for a tentative carryback adjustment of the taxes for a consolidated return year or years preceding such year shall be made by the common parent corporation for the carryback year (or agent designated under §1.1502–77(d) for the carryback year) to the extent such loss or unused business credit is not apportioned to a corporation for a separate return year pursuant to §1.1502–21(b), 1.1502–22(b), or 1.1502–79(c). In the case of the portion of a consolidated net operating loss or consolidated net capital loss or consolidated unused business credit to which the preceding sentence does not apply and which is to be carried back to a corporation that was not a member of a consolidated group in the carryback year, the corporation to which such loss or credit is attributable shall make any application under section 6411. In the case of a net capital loss or net operating loss or unused business credit arising in a separate return year which may be carried back to a consolidated return year, after taking into account the application of §1.1502–21(b)(3)(ii)(B) with respect to any net operating loss arising in another consolidated group, the common parent for the carryback year (or agent designated under §1.1502–77(d) for the carryback year) shall make any application under section 6411.

\* \* \* \* \*

(e) *Cross-reference.* For further rules applicable to groups that include insol-

vent financial institutions, see §301.6402–7 of this chapter.

(f) *Effective date—(1) In general.* This section applies to taxable years to which a loss or credit may be carried back and for which the due date (without extensions) of the original return is after the date final regulations are published in the **Federal Register**.

(2) *Prior law.* For taxable years to which a loss or credit may be carried back and for which the due date (without extensions) is on or before the date final regulations are published in the **Federal Register**, see §1.1502–78 in effect prior to the date final regulations are published in the **Federal Register**, as contained in 26 CFR part 1 revised as of April 1, 2000.

Robert E. Wenzel,  
*Deputy Commissioner  
of Internal Revenue.*

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