Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 866.3402 is added to subpart D to read as follows:

§ 866.3402 Plasmodium species antigen detection assays.

(a) *Identification.* A *Plasmodium* species antigen detection assay is a device that employs antibodies for the detection of specific malaria parasite antigens, including histidine-rich protein-2 (HRP2) specific antigens, and pan malarial antigens in human whole blood. These devices are used for testing specimens from individuals who have signs and symptoms consistent with malaria infection. The detection of these antigens aids in the clinical laboratory diagnosis of malaria caused by the four malaria species capable of infecting humans: *Plasmodium falciparum*, *Plasmodium vivax*, *Plasmodium ovale*, and *Plasmodium malariae*, and aids in the differential diagnosis of *Plasmodium falciparum* infections from other less virulent *Plasmodium* species. The device is intended for use in conjunction with other clinical laboratory findings.

(b) *Classification.* Class II (special controls). The special control is FDA's guidance document entitled ''Class II Special Controls Guidance Document: *Plasmodium* species Antigen Detection Assays.'' See § 866.1(e) for the availability of this guidance document.

Dated: April 30, 3008.

Daniel G. Schultz,

Director, Center for Devices and Radiological Health.

[FR Doc. E8–11263 Filed 5–19–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9399]

RIN 1545–BE93

Guidance Under Section 7874 for Determining the Ownership Percentage in the Case of Expanded Affiliated Groups

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations under section 7874 of the Internal Revenue Code (Code) relating to the disregard of certain affiliate-owned stock in determining whether a corporation is a surrogate foreign corporation under section 7874(a)(2)(B) of the Code.

DATES: *Effective Date:* These regulations are effective on May 20, 2008.

Applicability Date: For the date of applicability, see § 1.7874–1(g).

FOR FURTHER INFORMATION CONTACT: Milton Cahn, 202–622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 7874 provides rules for expatriated entities and their surrogate foreign corporations. An expatriated entity is defined in section 7874(a)(2)(A) as a domestic corporation or partnership with respect to which a foreign corporation is a surrogate foreign corporation, and any U.S. person related (within the meaning of section 267(b) or section 707(b)(1)) to such domestic corporation or partnership. Generally, a foreign corporation is a surrogate foreign corporation under section 7874(a)(2)(B) if, pursuant to a plan or a series of related transactions, certain conditions are met. One such condition depends on the percentage of owner continuity in the foreign corporation after the acquisition. This condition is satisfied if, after the acquisition, at least 60 percent of the stock (by vote or value) of the foreign corporation is held (in the case of an acquisition with respect to a domestic corporation) by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation, or (in the case of an acquisition with respect to a domestic partnership) by former partners of the domestic partnership by reason of holding a capital or profits interest in the domestic partnership. See section 7874(a)(2)(B)(ii).

The treatment of expatriated entities and surrogate foreign corporations varies depending on this percentage (ownership fraction). If the ownership fraction is 80 percent or more, the surrogate foreign corporation is treated as a domestic corporation for all purposes of the Code. If the ownership fraction is 60 percent or more (but less than 80 percent), the surrogate foreign corporation is treated as a foreign corporation, but certain income or gain recognized by the expatriated entity generally cannot be offset by net operating losses or credits from the first date properties are acquired pursuant to the plan through the end of the 10-year period following the completion of the acquisition.

Section 7874(c)(2)(A) provides that stock held by members of the ''expanded affiliated group'' which includes the foreign corporation is not taken into account for purposes of the ownership fraction (affiliate-owned stock rule). Section 7874(c)(1) defines the term expanded affiliated group (EAG) as an affiliated group defined in section 1504(a), but without regard to the exclusion of foreign corporations in section 1504(b)(3) and with a reduction of the 80 percent ownership threshold of section 1504(a) to a more-than-50 percent threshold.

Section 7874(g) provides that ''[t]he Secretary shall provide such regulations as are necessary to carry out this section, including regulations providing for such adjustments to the application of this section as are necessary to prevent the avoidance of the purposes of this section, including the avoidance of such purposes through * * *. the use of related persons, pass-through or other noncorporate entities, or other intermediaries * * *.'' Section 7874(c)(6) provides that ''[t]he Secretary shall prescribe such regulations as may be appropriate to determine whether a corporation is a surrogate foreign corporation, including regulations * * * to treat stock as not stock.''

On December 28, 2005, a temporary regulation (TD 9238) was published in the **Federal Register** (70 FR 76685) that related to the disregard of affiliate-owned stock under section 7874(c)(2)(A). A notice of proposed rulemaking (REG–143244–05) cross-referencing the temporary regulation was published in the **Federal Register** for the same day (70 FR 76732). No public hearing was requested or held. Written and electronic comments responding to the notice of proposed rulemaking were received. After consideration of all the comments, the proposed regulation is adopted, as amended by this Treasury decision, as final, and the corresponding temporary regulation is removed. The revisions are discussed below.

Summary of Comments and Revisions

A. Temporary and Proposed Regulations

Treasury regulation § 1.7874–1T provides guidance under the affiliated-owned stock rule. Generally, § 1.7874–1T provides that stock owned by members of an EAG is excluded from both the numerator and denominator of the ownership fraction. However, affiliate-owned stock is excluded from the numerator of the ownership fraction, but is included in the denominator of the ownership fraction, in two instances: (1) Certain transactions occurring as part of an internal group restructuring involving a domestic entity; and (2) certain acquisitive business transactions between unrelated

parties where the former shareholders or partners of the domestic entity have a minority interest in the acquired properties after the acquisition.

With respect to internal group restructurings, the special rule applies where the common parent of the EAG after the acquisition owns directly or indirectly at least 80 percent of the domestic entity before the acquisition, and non-members of the EAG hold, by reason of holding an interest in the domestic entity, no more than 20 percent of the stock (by vote or value) of the foreign corporation after the acquisition. With respect to transactions between unrelated parties, the special rule applies where, after the acquisition, the former owners of the domestic entity do not own, in the aggregate, directly or indirectly, more than 50 percent of the stock (by vote or value) of any member of the EAG.

Section 1.7874–1T also provides guidance regarding the treatment of certain ''subsidiary-owned'' interests (which include so-called ''hook stock'') for purposes of the exceptions to the general application of the ownership fraction. These rules apply to stock or partnership interests owned by an entity in which at least 50 percent of the stock (by vote or value), or at least 50 percent of the capital or profits interest, is owned directly or indirectly by the issuer of such stock or by the partnership in question.

These rules are included in the final regulations, with revisions as noted below.

B. Section 1504(a)(4) Preferred Stock

Both the numerator and denominator of the ownership fraction take into account stock described in section 1504(a)(4) (so-called ''plain vanilla preferred stock''). For purposes of determining whether an affiliated group constitutes an EAG, however, such stock is not treated as stock because of the reference to the rules of section 1504(a). See section 7874(c)(1). Commentators have noted the inconsistent treatment of plain vanilla preferred stock in section 7874. In addition, they point out that, due to the debt-like nature of such stock, it should not be treated as stock for any purpose of section 7874, including the ownership fraction.

The Treasury Department and the IRS note that Congress has expressly stated that section 1504(a)(4) preferred stock is not treated as stock in several Code provisions, including certain provisions of section 7874, as noted above. See, for example, sections 243(c)(1), 246A(c)(4), and 355(g)(2)(B)(iv)(III). In contrast, Congress specifically chose not to exclude plain vanilla preferred stock from the ownership fraction. Although section 7874 grants the Treasury Department and the IRS the authority to treat stock as not stock when such treatment would further the purposes of section 7874, the legislative history to section 7874 does not suggest that the treatment of plain vanilla preferred stock in the ownership fraction is inconsistent with the purposes of section 7874. The Treasury Department and the IRS therefore decline to exercise the regulatory authority to exclude plain vanilla preferred stock in the calculation of the ownership fraction. Accordingly, all classes of stock, including plain vanilla preferred stock, are included in the ownership fraction and treated as stock for purposes of section 7874, other than for purposes of determining the EAG.

The Treasury Department and the IRS considered whether the treatment of plain vanilla preferred stock in the EAG definition should be made consistent with the treatment of plain vanilla preferred stock in the ownership fraction. After studying the issue, the Treasury Department and the IRS believe that taking plain vanilla preferred stock into account for purposes of the definition of an EAG may facilitate the avoidance of the rules regarding EAGs. Consequently, the Treasury Department and the IRS also decline to exercise regulatory authority to amend the treatment of plain vanilla preferred stock for purposes of defining an EAG.

The Treasury Department and the IRS will, however, continue to monitor the use of plain vanilla preferred stock and its treatment under section 7874.

C. Internal Restructuring Exception

Treasury regulation § 1.7874–1T(c)(1) provides that stock held by a member of an EAG is included in the denominator, but not the numerator, of the ownership fraction if two conditions are satisfied. First, the common parent of the EAG must own directly or indirectly at least 80 percent of the stock (by vote or value) or the capital or profits interest in the domestic entity prior to the acquisition. Second, following the acquisition non-members of the EAG, by reason of holding stock or a capital or profits interest in the domestic entity, must not own more than 20 percent of the stock (by vote or value) of the foreign corporation.

One commentator suggested that the requirement should merely look to the stock ownership of the common parent of the EAG both before and after the acquisition. The Treasury Department and the IRS agree with this suggestion. In addition, the Treasury Department and the IRS have determined that the rule should be modified to consider the stock by vote and value held by the common parent of the EAG. Consequently, stock of a member of an EAG is included in the denominator, but not the numerator of the ownership fraction, if the common parent of the EAG held directly or indirectly at least 80 percent of the stock (by vote and value) or the capital and profits interest, as applicable, of the domestic entity before the acquisition, and holds at least 80 percent of the stock (by vote and value) of the foreign acquiring corporation after the acquisition. Corresponding revisions have been made to the examples.

D. Hook Stock

One commentator requested clarification of the wording of § 1.7874–1T(d) regarding the treatment of hook stock. In response to this comment, the provision is clarified to exclude hook stock from both the numerator and denominator of the fractions that are used to determine whether the exceptions to the general rule apply (that is, the determination of whether the acquisition resulted in an internal group restructuring or a loss of control of the domestic entity).

Regulations Addressing Avoidance of the Purposes of Section 7874

The Treasury Department and the IRS understand that taxpayers may be taking the position that a foreign corporation that acquires substantially all of the properties of a domestic corporation in a title 11 or similar case may not be a surrogate foreign corporation because it fails to satisfy the stock ownership requirement described in section 7874(a)(2)(B)(ii). These taxpayers maintain that creditors of the domestic corporation, which typically receive all of the stock of the acquiring foreign corporation issued in the title 11 or similar case, are not considered former shareholders of the domestic corporation for purposes of section 7874(a)(2)(B)(ii). Thus, they take the position that the creditors do not hold the stock of the foreign acquiring corporation received by reason of holding stock in the domestic corporation. Under this position, there often would be little or no continuity of ownership for purposes of section 7874(a)(2)(B)(ii) and, as a result, the foreign corporation would not be a surrogate foreign corporation. Taxpayers take this position even though the creditors, in substance, are the equity owners of the domestic corporation at the time of the title 11 or similar case and acquire the stock issued by the

acquiring foreign corporation by reason of their status as creditors of the domestic corporation. *Helvering* v. *Alabama Asphaltic Limestone Co.,* 315 U.S. 179 (1942).

The Treasury Department and the IRS disagree with this characterization under current law and are considering issuing regulations to clarify the proper application of the rules to such transactions. Section 7874(c)(6) provides that the Secretary shall prescribe such regulations as may be appropriate to determine whether a corporation is a surrogate foreign corporation, including regulations: (i) To treat warrants, options, contracts to acquire stock, convertible debt interests, and other similar interests as stock, and (ii) to treat stock as not stock. These regulations would provide, as appropriate, that for purposes of section 7874(a)(2)(B)(ii), creditors of a domestic corporation emerging from a title 11 or similar case are treated as former shareholders of such corporation. The regulations would further provide, as appropriate, that for this purpose, stock issued by the foreign acquiring corporation to such creditors is held by reason of holding stock in the domestic corporation. Similar rules may apply to acquisitions of substantially all the properties constituting a trade or business of a domestic partnership.

The Treasury Department and the IRS also understand that some taxpayers may be taking the position that, where two or more domestic entities described in section 7874(a)(2)(B)(i) are acquired pursuant to an overall plan, section 7874(a)(2)(B) is applied separately to each such domestic entity. For example, taxpayers may take this position where a foreign corporation is formed to acquire, in exchange for its stock, 100 percent of the stock of two domestic corporations that have approximately the same value. In such a case, after the acquisition the former shareholders of the two domestic corporations, in the aggregate, would hold 100 percent of the stock of the foreign acquiring corporation by reason of holding stock in the domestic corporations. However, the taxpayers may claim that the ownership fraction applies separately to each acquisition such that the ownership fraction would be approximately 50 percent, rather than 100 percent. Under this interpretation, the acquiring foreign corporation would not be a surrogate foreign corporation because the condition described in section 7874(a)(2)(B)(ii) would not be satisfied.

The Treasury Department and the IRS disagree with this interpretation under current law and are considering issuing regulations to clarify the proper application of the rules. These regulations would clarify that the references in section 7874(a)(2)(B) to ''a domestic corporation'' shall, as appropriate, mean ''one or more domestic corporations'' where the properties of such corporations are, directly or indirectly, acquired pursuant to the same plan. Similar clarifications will be made with respect to acquisitions involving properties of domestic partnerships.

Finally, the Treasury Department and the IRS understand that some taxpayers may be attempting to avoid the application of section 7874 by structuring acquisitions of domestic entities by foreign corporations through the use of intervening partnerships. For example, a foreign acquiring corporation may issue new shares to a newly formed domestic partnership in exchange for a 99 percent interest in the partnership. The shares transferred to the domestic partnership constitute 70 percent of the outstanding stock of the foreign acquiring corporation. An affiliate of the foreign acquiring corporation would transfer cash or other property to the partnership for the remaining one percent interest. The foreign acquiring corporation then transfers its 99 percent interest in the domestic partnership to the shareholders of a domestic corporation in exchange for 100 percent of the stock of the domestic corporation.

The taxpayers take the position that this transaction is not subject to section 7874 even though, in substance, the foreign acquiring corporation acquired 100 percent of the stock of the domestic corporation and the former shareholders of the domestic corporation, through their 99 percent interest in the domestic partnership, hold more than 60 percent of the stock of the foreign acquiring corporation by reason of holding stock in the domestic corporation. Under this interpretation, which relies on treating the partnership as an entity (rather than as an aggregate of its partners), the ownership fraction would be zero because none of the foreign acquiring corporation stock held by the partnership was held by former shareholders of the domestic corporation. Thus, section 7874 would not apply to the transaction.

The Treasury Department and the IRS disagree with this characterization under current law and are considering issuing regulations to clarify the proper application of the rules to these transactions. The regulations would provide, as appropriate, that for purposes of applying section 7874(a)(2)(B)(i) to these structures, the exchange of an interest in a domestic entity for an interest in a partnership shall be treated as an exchange of the interest in the domestic entity for a pro rata share of the assets of the partnership.

The regulations described above, which may be issued in conjunction with the finalization of the § 1.7874–2T regulations, may be effective as of May 20, 2008. However, no inference is intended as to the potential applicability of other Code or regulatory provisions, or judicial doctrines (including substance over form) to the transactions described above.

Effective/Applicability Date

Section 1.7874–1 applies to acquisitions completed on or after May 20, 2008, subject to transition relief for certain acquisitions entered into pursuant to binding commitments. In addition, taxpayers may elect to apply this section to prior acquisitions, but must apply it consistently to all acquisitions within its scope.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and because these regulations do not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small business.

Drafting Information

The principal author of this regulation is Milton Cahn, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry

in numerical order to read, in part, as follows:

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

Section 1.7874–1 also issued under 26 U.S.C. 7874(c)(6) and (g).

§ 1.7874–1T [Removed]

■ **Par. 2.** Section 1.7874–1T is removed.

■ **Par. 3.** Section 1.7874–1 is added to read as follows:

§ 1.7874–1 Disregard of affiliate-owned stock.

(a) *Scope.* Section 7874(c)(2)(A) provides that stock of the foreign corporation referred to in section 7874(a)(2)(B) held by members of the expanded affiliated group (EAG) that includes such foreign corporation shall not be taken into account in determining ownership for purposes of section 7874(a)(2)(B)(ii). This section provides rules under section 7874(c)(2)(A). The rules provided in this section are also subject to section 7874(c)(4).

(b) *General rule.* Except as provided in paragraph (c) of this section, for purposes of the ownership percentage determination required by section 7874(a)(2)(B)(ii), stock held by one or more members of the EAG is not included in either the numerator or the denominator of the fraction that determines such percentage (ownership fraction).

(c) *Exceptions to general rule*—(1) *Overview.* Stock held by one or more members of the EAG shall be included in the denominator, but not in the numerator, of the ownership fraction, if the acquisition qualifies as an *internal group restructuring* or results in a *loss of control*, as described in paragraph (c)(2) and (c)(3) of this section.

(2) *Internal group restructuring.* For purposes of paragraph (c)(1) of this section, an acquisition qualifies as an internal group restructuring if:

(i) Before the acquisition, 80 percent or more of the stock (by vote and value) or the capital and profits interest, as applicable, of the domestic entity was held directly or indirectly by the corporation that is the common parent of the EAG after the acquisition; and

(ii) After the acquisition, 80 percent or more of the stock (by vote and value) of the acquiring foreign corporation is held directly or indirectly by such common parent.

(3) *Loss of control.* For purposes of paragraph (c)(1) of this section, the acquisition results in a loss of control if after the acquisition, the former shareholders or partners of the domestic entity do not hold, in the aggregate, directly or indirectly, more than 50 percent of the stock (by vote or value) of any member of the EAG.

(d) *Treatment of certain hook stock.* This paragraph applies to stock of a corporation that is held by an entity in which at least 50 percent of the stock (by vote or value) or at least 50 percent of the capital or profits interest, as applicable, in such entity, is held directly or indirectly by the corporation. The stock to which this paragraph applies shall not be included in either the numerator or denominator of any fraction for the following purposes:

(1) For applying paragraph (c)(1) of this section; and

(2) For determining whether the acquisition qualifies as an internal group restructuring (described in paragraph (c)(2) of this section) or results in a loss of control (described in paragraph (c)(3) of this section).

(e) *Stock held by a partnership.* For purposes of section 7874, stock held by a partnership shall be considered as held proportionately by its partners.

(f) *Examples.* The application of this section is illustrated by the following examples. It is assumed that all transactions in the examples occur after March 4, 2003. In all the examples, if an entity or other person is not described as either domestic or foreign, it may be either domestic or foreign. In addition, each entity has only a single class of equity outstanding. Finally, the analysis of the following examples is limited to a discussion of issues under section 7874, even though the examples may raise other issues (for example, under section 367).

Example 1. Disregard of hook stock—(i) *Facts.* USS, a domestic corporation, has 100 shares of stock outstanding. USS's stock is held by a group of individuals. Pursuant to a plan, USS forms FS, a foreign corporation, and transfers to FS the stock of several wholly owned foreign corporations, in exchange for 90 shares of FS stock. FS then forms Merger Sub, a domestic corporation. Under a merger agreement and state law, Merger Sub merges into USS, with USS surviving the merger. In exchange for their USS stock, the former shareholders of USS receive, in the aggregate, 100 shares of newly issued FS stock. As a result of the merger FS holds 100 percent of the USS stock. USS continues to hold 90 shares of FS stock.

(ii) *Analysis.* FS has indirectly acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. After the acquisition, the former shareholders of USS hold 100 shares of FS stock by reason of holding stock in USS, and USS holds 90 shares of FS stock. Under paragraph (b) of this section, the 90 shares of FS stock held by USS, a member of the EAG, are not included in either the numerator or the denominator of the ownership fraction. Accordingly, the ownership fraction is 100/100. If the condition in section 7874(a)(2)(B)(iii) is satisfied, FS is a surrogate foreign corporation which is treated as a domestic corporation under section 7874(b).

Example 2. Internal group restructuring; wholly owned corporation—(i) *Facts.* P, a corporation, owns all 100 outstanding shares of USS, a domestic corporation. USS forms FS, a foreign corporation, and transfers all its assets to FS in exchange for all 100 shares of the stock of FS, in a reorganization described in section 368(a)(1). P exchanges its USS stock for FS stock under section 354.

(ii) *Analysis.* FS has directly acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. The acquisition is an internal group restructuring described in paragraph (c)(2) of this section because P, the common parent of the EAG after the acquisition, held directly or indirectly 80 percent or more of the stock (by vote and value) of USS before the acquisition, and after the acquisition, P holds directly or indirectly 80 percent or more of the stock (by vote and value) of FS. Accordingly, under paragraph (c)(1) of this section, the FS stock held by P is included in the denominator, but not in the numerator of the ownership fraction. Therefore, the ownership fraction is 0/100. FS is not a surrogate foreign corporation.

Example 3. Internal group restructuring; wholly owned corporation—(i) *Facts.* The facts are the same as in *Example 2*, except that USS does not transfer any of its assets to FS. Instead, P transfers all 100 shares of USS stock to FS in exchange for all 100 shares of FS stock.

(ii) *Analysis.* FS has indirectly acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. The acquisition is an internal group restructuring described in paragraph (c)(2) of this section because P, the common parent of the EAG after the acquisition, held directly or indirectly 80 percent or more of the stock (by vote and value) of USS before the acquisition, and after the acquisition, P holds directly or indirectly 80 percent or more of the stock (by vote and value) of FS. Accordingly, under paragraph (c)(1) of this section, the FS stock held by P is included in the denominator, but not in the numerator of the ownership fraction. Accordingly, the ownership fraction is 0/100. FS is not a surrogate foreign corporation.

Example 4. Internal group restructuring; less than wholly owned corporation—(i) *Facts.* The facts are the same as in *Example 3*, except that P holds 85 shares of USS stock. The remaining 15 shares of USS stock are held by A, a person unrelated to P. P and A transfer their shares of USS stock to FS in exchange for 85 and 15 shares of FS stock, respectively.

(ii) *Analysis.* FS has indirectly acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. The acquisition is an internal group restructuring described in paragraph (c)(2) of this section because P, the common parent of the EAG after the acquisition, held directly or indirectly 80 percent or more of the stock (by vote and value) of USS before the acquisition, and after the acquisition P holds directly or indirectly 80 percent or more of the stock (by vote and value) of FS. Therefore, under

paragraph (c)(1) of this section, the FS stock held by P is included in the denominator, but not in the numerator of the ownership fraction. Accordingly, the ownership fraction is 15/100. FS is not a surrogate foreign corporation.

Example 5. Internal group restructuring exception not applicable; less than 80 percent owned corporation—(i) *Facts.* The facts are the same as in Example 2, except that P owns 55 shares of USS stock, and A, a person unrelated to P, holds 45 shares of USS stock. P and A exchange their shares of USS stock for 55 shares and 45 shares of FS stock, respectively.

(ii) *Analysis.* FS has acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. P, the common parent of the EAG after the acquisition, did not hold directly or indirectly 80 percent or more of the stock (by vote and value) of USS before the acquisition, and after the acquisition P does not hold directly or indirectly 80 percent or more of the stock (by vote and value) of FS. Thus, the acquisition is not an internal group restructuring described in paragraph (c)(1) of this section, and the general rule of paragraph (b) of this section applies. Under paragraph (b) of this section, the FS stock held by P, a member of the EAG, is not included in either the numerator or the denominator of the ownership fraction. Accordingly, the ownership fraction is 45/45. If the condition in section 7874(a)(2)(B)(iii) is satisfied, FS is a surrogate foreign corporation which is treated as a domestic corporation under section 7874(b).

Example 6. Internal group restructuring; hook stock—(i) *Facts.* USS, a domestic corporation, has 100 shares of stock outstanding. P, a corporation, holds 80 shares of USS stock. The remaining 20 shares of USS stock are held by A, a person unrelated to P. USS owns all 30 outstanding shares of FS, a foreign corporation. Pursuant to a plan, FS forms Merger Sub, a domestic corporation. Under a merger agreement and state law, Merger Sub merges into USS, with USS surviving the merger as a subsidiary of FS. In exchange for their USS stock, P and A, the former shareholders of USS, respectively receive 56 and 14 shares of FS stock. USS continues to hold 30 shares of FS stock.

(ii) *Analysis.* FS has indirectly acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. Under paragraph (b) of this section, the shares of FS stock held by P and USS, both of which are members of the EAG, are not included in either the numerator or denominator of the ownership fraction, unless the acquisition results in an internal group restructuring or loss of control of USS such that the exception of paragraph (c)(1) of this section applies. In determining whether the acquisition of USS is an internal group restructuring, under paragraph (d)(2) of this section, the FS stock held by USS is disregarded. Because P held directly or indirectly 80 percent or more of the stock (by vote and value) of USS before the acquisition, and after the acquisition P holds directly or indirectly 80 percent or more of the stock (by vote and value) of FS (when disregarding the FS stock held by USS), the acquisition is an internal group restructuring and the exception of paragraph (c)(1) of this section applies. Accordingly, when determining whether FS is a surrogate foreign corporation, the FS stock held by P is included in the denominator, but not the numerator of the ownership fraction. However, under paragraph (b) of this section, the FS stock held by USS is not included in either the numerator or denominator of the ownership fraction. Accordingly, the ownership fraction is 14/70, or 20 percent, since only the stock held by A is included in the numerator, and the stock held by both P and A is included in the denominator. Accordingly, FS is not a surrogate foreign corporation.

Example 7. Loss of control—(i) *Facts.* P, a corporation, holds all the outstanding stock of USS, a domestic corporation. B, a corporation unrelated to P, holds all 60 outstanding shares of FS, a foreign corporation. P transfers to FS all the outstanding stock of USS in exchange for 40 newly issued shares of FS.

(ii) *Analysis.* FS has indirectly acquired substantially all the properties held directly or indirectly by USS pursuant to a plan. After the acquisition, B holds 60 percent of the outstanding shares of the FS stock. Accordingly, B, FS and USS are members of an EAG. After the acquisition, P does not hold directly or indirectly more than 50 percent of the stock (by vote or value) of any member of the EAG and, thus, the acquisition results in a loss of control described in paragraph (c)(3) of this section. Accordingly, under paragraph (c)(1) of this section, the FS stock owned by B is included in the denominator, but not in the numerator, of the ownership fraction. Therefore, the ownership fraction is 40/100. FS is not a surrogate foreign corporation.

Example 8. Internal group restructuring; partnership—(i) *Facts.* LLC, a Delaware limited liability company, is engaged in the conduct of a trade or business. P, a corporation, holds 90 percent of the interests of LLC. A, a person unrelated to P, holds 10 percent of the interests of LLC. LLC has not elected to be treated as an association taxable as a corporation. P and A transfer their interests in LLC to FS, a newly formed foreign corporation, in exchange for 90 shares and 10 shares, respectively, of FS's stock, which are all of the outstanding shares of FS. Accordingly, LLC becomes a disregarded entity.

(ii) *Analysis.* Prior to the FS's acquisition of the interests of LLC, LLC was a domestic partnership for Federal income tax purposes. FS has acquired substantially all the properties constituting a trade or business of LLC pursuant to a plan. After the acquisition, P holds 90 percent of FS's stock (by vote and value) by reason of holding a capital and profits interest in LLC, and A holds 10 percent of FS's stock (by vote and value) by reason of holding a capital and profits interest in LLC. The internal group restructuring exception under paragraph (c)(2) of this section applies, because before the acquisition, P held 80 percent or more of the capital and profits interest in LLC, and after the acquisition, P holds 80 percent or more of the stock (by vote and value) of FS. Under paragraph (c)(1) of this section, the FS stock held by P is included in the denominator, but not the numerator, of the ownership fraction. Accordingly, the ownership fraction is 10/100. FS is not a surrogate foreign corporation.

(g) *Effective/applicability date.* Except as otherwise provided in this paragraph, this section shall apply to acquisitions completed on or after May 20, 2008. This section shall not, however, apply to an acquisition that was completed on or after May 20, 2008, provided such acquisition was entered into pursuant to a written agreement which was (subject to customary conditions) binding prior to May 20, 2008, and at all times thereafter (binding commitment). For purposes of the preceding sentence, a binding commitment shall include entering into options and similar interests in connection with one or more written agreements described in the preceding sentence. Notwithstanding the general application of this paragraph, taxpayers may elect to apply this section to prior acquisitions, but must apply it consistently to all acquisitions within its scope.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: May 8, 2008.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E8–11285 Filed 5–19–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 57

RIN 1219–AB55

Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of enforcement of DPM final limit; withdrawal of intent to issue a proposed rule.

SUMMARY: This notice informs the public of MSHA's decision to implement the diesel particulate matter (DPM) final permissible exposure limit (PEL) of 160 micrograms of total carbon (TC) per cubic meter of air (160_{TC} g/m^3). MSHA has developed a practical sampling strategy to account for interferences from non-diesel exhaust sources when TC is used as a surrogate for measuring a miner's exposure to DPM. The Agency