

(1) *Common stock.* Common stock is all stock other than disqualified stock and preferred stock.

(2) *Disqualified stock.* Disqualified stock is disqualified stock as defined in section 108(e)(10)(B)(i).

(3) *Liquidation preference.* A liquidation preference exists if the stock's right to share in liquidation proceeds is limited and preferred.

(4) *Preferred stock.* Preferred stock is any stock (other than disqualified stock) that has a limited or fixed redemption price or liquidation preference and does not upon issuance have a right to participate in corporate growth to a meaningful extent. Preferred stock that is convertible into common stock is not treated as preferred stock if the conversion right represents, in substance, a meaningful right to participate in corporate growth. Solely for purposes of this paragraph (d)(4), a right to participate in corporate growth is not established by the fact that the redemption price or liquidation preference exceeds the fair market value of the preferred stock.

(5) *Amount of indebtedness.* Generally, the *amount of indebtedness* is the adjusted issue price of the indebtedness. Appropriate adjustments are made for accrued but unpaid stated interest. (See the example in paragraph (c)(1)(iv) of this section.)

(6) *Undersecured indebtedness—(i) General rule.* If an indebtedness is secured by property with a value less than its adjusted issue price, the indebtedness is considered to be two separate debts: a secured indebtedness with an adjusted issue price equal to the value of the property, and an unsecured indebtedness with an adjusted issue price equal to the remainder. Absent strong evidence to the contrary, the value of the property securing the indebtedness is presumed to be equal to the issue price of any new secured indebtedness received for the indebtedness plus the value of any other consideration (except stock or new unsecured indebtedness) received for the indebtedness. A valuation of that property by a court in a title 11 case is a factor in determining value, but is not controlling.

(ii) *Example.* The following example illustrates these provisions:

Example Corporation X owes an indebtedness with an adjusted issue price of \$100,000. The indebtedness is secured by certain property owned by Corporation X. Corporation X exchanges the indebtedness for \$10,000 of stock and new secured indebtedness with an issue price of \$70,000. Under paragraph (d)(6)(i) of this section, the indebtedness is bifurcated into a secured indebtedness of \$70,000 (the issue price of the new secured indebtedness received in exchange therefor) and an unsecured indebtedness of \$30,000 (the remainder of the adjusted issue price of the indebtedness).

(e) *Effective date.* This section is effective with respect to any issuance of stock for indebtedness on or before December 31, 1994, or any issuance of stock for indebtedness in a title 11 or similar case (as defined in section 368(a)(3)(A) of the Internal Revenue Code) that was filed on or before December 31, 1993—

(1) Pursuant to a plan confirmed by the court in a title 11 case after May 17, 1994; or

(2) If there is no title 11 case, pursuant to an insolvency workout in which all issuances of stock for indebtedness occur after May 17, 1994.

[59 FR 12831, Mar. 18, 1994]

§ 1.108-2 Acquisition of indebtedness by a person related to the debtor.

(a) *General rules.* The acquisition of outstanding indebtedness by a person related to the debtor from a person who is not related to the debtor results in the realization by the debtor of income from discharge of indebtedness (to the extent required by section 61(a)(12) and section 108) in an amount determined under paragraph (f) of this section. Income realized pursuant to the preceding sentence is excludible from gross income to the extent provided in section 108(a). The rules of this paragraph apply if indebtedness is acquired directly by a person related to the debtor in a direct acquisition (as defined in paragraph (b) of this section) or if a holder of indebtedness becomes related to the debtor in an indirect acquisition (as defined in paragraph (c) of this section).

(b) *Direct acquisition.* An acquisition of outstanding indebtedness is a direct acquisition under this section if a person related to the debtor (or a person who becomes related to the debtor on

the date the indebtedness is acquired) acquires the indebtedness from a person who is not related to the debtor. Notwithstanding the foregoing, the Commissioner may provide by Revenue Procedure or other published guidance that certain acquisitions of indebtedness described in the preceding sentence are not direct acquisitions for purposes of this section.

(c) *Indirect acquisition*—(1) *In general.* An indirect acquisition is a transaction in which a holder of outstanding indebtedness becomes related to the debtor, if the holder acquired the indebtedness in anticipation of becoming related to the debtor.

(2) *Proof of anticipation of relationship.* In determining whether indebtedness was acquired by a holder in anticipation of becoming related to the debtor, all relevant facts and circumstances will be considered. Such facts and circumstances include, but are not limited to, the intent of the parties at the time of the acquisition, the nature of any contacts between the parties (or their respective affiliates) before the acquisition, the period of time for which the holder held the indebtedness, and the significance of the indebtedness in proportion to the total assets of the holder group (as defined in paragraph (c)(5) of this section). For example, if a holder acquired the indebtedness in the ordinary course of its portfolio investment activities and the holder's acquisition of the indebtedness preceded any discussions concerning the acquisition of the holder by the debtor (or by a person related to the debtor) or the acquisition of the debtor by the holder (or by a person related to the holder), as the case may be, these facts, taken together, would ordinarily establish that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor. The absence of discussions between the debtor and the holder (or their respective affiliates), however, does not by itself establish that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor (if, for example, the facts and circumstances show that the holder was considering a potential acquisition of or by the debtor, or the relationship is created within a relatively short period

of time of the acquisition, or the indebtedness constitutes a disproportionate portion of the holder group's assets).

(3) *Indebtedness acquired within 6 months of becoming related.* Notwithstanding any other provision of this paragraph (c), a holder of indebtedness is treated as having acquired the indebtedness in anticipation of becoming related to the debtor if the holder acquired the indebtedness less than 6 months before the date the holder becomes related to the debtor.

(4) *Disclosure of potential indirect acquisition*—(i) *In general.* If a holder of outstanding indebtedness becomes related to the debtor under the circumstances described in paragraph (c)(4)(ii) or (iii) of this section, the debtor is required to attach the statement described in paragraph (c)(4)(iv) of this section to its tax return (or to a qualified amended return within the meaning of §1.6664-2(c)(3)) for the taxable year in which the debtor becomes related to the holder, unless the debtor reports its income on the basis that the holder acquired the indebtedness in anticipation of becoming related to the debtor. Disclosure under this paragraph (c)(4) is in addition to, and is not in substitution for, any disclosure required to be made under section 6662, 6664 or 6694.

(ii) *Indebtedness represents more than 25 percent of holder group's assets*—(A) *In general.* Disclosure under this paragraph (c)(4) is required if, on the date the holder becomes related to the debtor, indebtedness of the debtor represents more than 25 percent of the fair market value of the total gross assets of the holder group (as defined in paragraph (c)(5) of this section).

(B) *Determination of total gross assets.* In determining the total gross assets of the holder group, total gross assets do not include any cash, cash item, marketable stock or security, short-term indebtedness, option, futures contract, notional principal contract, or similar item (other than indebtedness of the debtor), nor do total gross assets include any asset in which the holder has substantially reduced its risk of loss. In addition, total gross assets do not

include any ownership interest in or indebtedness of a member of the holder group.

(iii) *Indebtedness acquired within 6 to 24 months of becoming related.* Disclosure under this paragraph (c)(4) is required if the holder acquired the indebtedness 6 months or more before the date the holder becomes related to the debtor, but less than 24 months before that date.

(iv) *Contents of statement.* A statement under this paragraph (c)(4) must include the following—

(A) A caption identifying the statement as disclosure under § 1.108-2(c);

(B) An identification of the indebtedness with respect to which disclosure is made;

(C) The amount of such indebtedness and the amount of income from discharge of indebtedness is section 108(e)(4) were to apply;

(D) Whether paragraph (c)(4)(ii) or (iii) of this section applies to the transaction; and

(E) A statement describing the facts and circumstances supporting the debtor's position that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor.

(v) *Failure to disclose.* In addition to any other penalties that may apply, if a debtor fails to provide a statement required by this paragraph (c)(4), the holder is presumed to have acquired the indebtedness in anticipation of becoming related to the debtor unless the facts and circumstances clearly established that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor.

(5) *Holder group.* For purposes of this paragraph (c), the holder group consists of the holder of the indebtedness and all persons who are both—

(i) Related to the holder before the holder becomes related to the debtor; and

(ii) Related to the debtor after the holder becomes related to the debtor.

(6) *Holding period—(i) Suspensions.* The running of the holding periods set forth in paragraphs (c)(3) and (c)(4)(iii) of this section is suspended during any period in which the holder or any person related to the holder is protected (directly or indirectly) against risk of

loss by an option, a short sale, or any other device or transaction.

(ii) *Tacking.* For purposes of paragraphs (c)(3) and (c)(4)(iii) of this section, the period for which a holder held the debtor's indebtedness includes—

(A) The period for which the indebtedness was held by a corporation to whose attributes the holder succeeded pursuant to section 381; and

(B) The period (ending on the date on which the holder becomes related to the debtor) for which the indebtedness was held continuously by members of the holder group (as defined in paragraph (c)(5) of this section).

(d) *Definitions—(1) Acquisition date.* For purposes of this section, the acquisition date is the date on which a direct acquisition of indebtedness or an indirect acquisition of indebtedness occurs.

(2) *Relationship.* For purposes of this section, persons are considered related if they are related within the meaning of sections 267(b) or 707(b)(1). However—

(i) Sections 267(b) and 707(b)(1) are applied as if section 267(c)(4) provided that the family of an individual consists of the individual's spouse, the individual's children, grandchildren, and parents, and any spouse of the individual's children or grandchildren; and

(ii) Two entities that are treated as a single employer under subsection (b) or (c) of section 414 are treated as having a relationship to each other that is described in section 267(b).

(e) *Exceptions—(1) Indebtedness retired within one year.* This section does not apply to a direct or indirect acquisition of indebtedness with a stated maturity date on or before the date that is one year after the acquisition date, if the indebtedness is, in fact, retired on or before its stated maturity date.

(2) *Acquisitions by securities dealers.* (i) This section does not apply to a direct acquisition or an indirect acquisition of indebtedness by a dealer that acquires and disposes of such indebtedness in the ordinary course of its business of dealing in securities if—

(A) The dealer accounts for the indebtedness as a security held primarily for sale to customers in the ordinary course of business;

(B) The dealer disposes of the indebtedness (or it matures while held by the dealer) within a period consistent with the holding of the indebtedness for sale to customers in the ordinary course of business, taking into account the terms of the indebtedness and the conditions and practices prevailing in the markets for similar indebtedness during the period in which it is held; and

(C) The dealer does not sell or otherwise transfer the indebtedness to a person related to the debtor (other than in a sale to a dealer that in turn meets the requirements of this paragraph (e)(2)).

(ii) A dealer will continue to satisfy the conditions of this paragraph (e)(2) with respect to indebtedness that is exchanged for successor indebtedness in a transaction in which unrelated holders also exchange indebtedness of the same issue, provided that the conditions of this paragraph (e)(2) are met with respect to the successor indebtedness.

(iii) For purposes of this paragraph (e)(2), if the period consistent with the holding of indebtedness for sale to customers in the ordinary course of business is 30 days or less, the dealer is considered to dispose of indebtedness within that period if the aggregate principal amount of indebtedness of that issue sold by the dealer to customers in the ordinary course of business (or that mature and are paid while held by the dealer) in the calendar month following the month in which the indebtedness is acquired equals or exceeds the aggregate principal amount of indebtedness of that issue held in the dealer's inventory at the close of the month in which the indebtedness is acquired. If the period consistent with the holding of indebtedness for sale to customers in the ordinary course of business is greater than 30 days, the dealer is considered to dispose of the indebtedness within that period if the aggregate principal amount of indebtedness of that issue sold by the dealer to customers in the ordinary course of business (or that mature and are paid while held by the dealer) within that period equals or exceeds the aggregate principal amount of indebtedness of that issue held in inventory at the close of the day on which the indebtedness was acquired.

(f) *Amount of discharge of indebtedness income realized*—(1) *Holder acquired the indebtedness by purchase on or less than six months before the acquisition date.* Except as otherwise provided in this paragraph (f), the amount of discharge of indebtedness income realized under paragraph (a) of this section is measured by reference to the adjusted basis of the related holder (or of the holder that becomes related to the debtor) in the indebtedness on the acquisition date if the holder acquired the indebtedness by purchase on or less than six months before the acquisition date. For purposes of this paragraph (f), indebtedness is acquired “by purchase” if the indebtedness in the hands of the holder is not substituted basis property within the meaning of section 7701(a)(42). However, indebtedness is also considered acquired by purchase within six months before the acquisition date if the holder acquired the indebtedness as transferred basis property (within the meaning of section 7701(a)(43)) from a person who acquired the indebtedness by purchase on or less than six months before the acquisition date.

(2) *Holder did not acquire the indebtedness by purchase on or less than six months before the acquisition date.* Except as otherwise provided in this paragraph (f), the amount of discharge of indebtedness income realized under paragraph (a) of this section is measured by reference to the fair market value of the indebtedness on the acquisition date if the holder (or the transferor to the holder in a transferred basis transaction) did not acquire the indebtedness by purchase on or less than six months before the acquisition date.

(3) *Acquisitions of indebtedness in non-recognition transactions.* [Reserved]

(4) *Avoidance transactions.* The amount of discharge of indebtedness income realized by the debtor under paragraph (a) of this section is measured by reference to the fair market value of the indebtedness on the acquisition date if the indebtedness is acquired in a direct or an indirect acquisition in which a principal purpose for the acquisition is the avoidance of federal income tax.

(g) *Correlative adjustments—(1) Deemed issuance.* For income tax purposes, if a debtor realizes income from discharge of its indebtedness in a direct or an indirect acquisition under this section (whether or not the income is excludible under section 108(a)), the debtor's indebtedness is treated as new indebtedness issued by the debtor to the related holder on the acquisition date (the deemed issuance). The new indebtedness is deemed issued with an issue price equal to the amount used under paragraph (f) of this section to compute the amount realized by the debtor under paragraph (a) of this section (*i.e.*, either the holder's adjusted basis or the fair market value of the indebtedness, as the case may be). Under section 1273(a)(1), the excess of the stated redemption price at maturity (as defined in section 1273(a)(2)) of the indebtedness over its issue price is original issue discount (OID) which, to the extent provided in sections 163 and 1272, is deductible by the debtor and includible in the gross income of the related holder. Notwithstanding the foregoing, the Commissioner may provide by Revenue Procedure or other published guidance that the indebtedness is not treated as newly issued indebtedness for purposes of designated provisions of the income tax laws.

(2) *Treatment of related holder.* The related holder does not recognize any gain or loss on the deemed issuance described in paragraph (g)(1) of this section. The related holder's adjusted basis in the indebtedness remains the same as it was immediately before the deemed issuance. The deemed issuance is treated as a purchase of the indebtedness by the related holder for purposes of section 1272(a)(7) (pertaining to reduction of original issue discount where a subsequent holder pays acquisition premium) and section 1276 (pertaining to acquisitions of debt at a market discount).

(3) *Loss deferral on disposition of indebtedness acquired in certain exchanges.*

(i) Any loss otherwise allowable to a related holder on the disposition at any time of indebtedness acquired in a direct or indirect acquisition (whether or not any discharge of indebtedness income was realized under paragraph (a) of this section) is deferred until the

date the debtor retires the indebtedness if—

(A) The related holder acquired the debtor's indebtedness in exchange for its own indebtedness; and

(B) The issue price of the related holder's indebtedness was not determined by reference to its fair market value (e.g., the issue price was determined under section 1273(b)(4) or 1274(a) or any other provision of applicable law).

(ii) Any comparable tax benefit that would otherwise be available to the holder, debtor, or any person related to either, in any other transaction that directly or indirectly results in the disposition of the indebtedness is also deferred until the date the debtor retires the indebtedness.

(4) *Examples.* The following examples illustrate the application of this paragraph (g). In each example, all taxpayers are calendar-year taxpayers, no taxpayer is insolvent or under the jurisdiction of a court in a title 11 case and no indebtedness is qualified farm indebtedness described in section 108(g).

Example 1. (i) P, a domestic corporation, owns 70 percent of the single class of stock of S, a domestic corporation. S has outstanding indebtedness that has an issue price of \$10,000,000 and provides for monthly interest payments of \$80,000 payable at the end of each month and a payment at maturity of \$10,000,000. The indebtedness has a stated maturity date of December 31, 1994. On January 1, 1992, P purchases S's indebtedness from I, an individual not related to S within the meaning of paragraph (d)(2) of this section, for cash in the amount of \$9,000,000. S repays the indebtedness in full at maturity.

(ii) Under section 61(a)(12), section 108(e)(4), and paragraphs (a) and (f) of this section, S realizes \$1,000,000 of income from discharge of indebtedness on January 1, 1992.

(iii) Under paragraph (g)(1) of this section, the indebtedness is treated as issued to P on January 1, 1992, with an issue price of \$9,000,000. Under section 1273(a), the \$1,000,000 excess of the stated redemption price at maturity of the indebtedness (\$10,000,000) over its issue price (\$9,000,000) is original issue discount, which is includible in gross income by P and deductible by S over the remaining term of the indebtedness under sections 163(e) and 1272(a).

(iv) Accordingly, S deducts and P includes in income original issue discount, in addition to stated interest, as follows: in 1992, \$289,144.88; in 1993, \$331,286.06; and in 1994, \$379,569.06.

Example 2. The facts are the same as in *Example 1*, except that on January 1, 1992, P sells S's indebtedness to J, who is not related to S within the meaning of paragraph (d)(2) of this section, for \$9,400,000 in cash. J holds S's indebtedness to maturity. On January 1, 1993, P's adjusted basis in S's indebtedness is \$9,289,144.88. Accordingly, P realizes gain in the amount of \$110,855.12 upon the disposition. S and J continue to deduct and include the original issue discount on the indebtedness in accordance with *Example 1*. The amount of original issue discount includible by J is reduced by the \$110,855.12 acquisition premium as provided in section 1272(a)(7).

Example 3. The facts are the same as in *Example 1*, except that on February 1, 1992 (one month after P purchased S's indebtedness), S retires the indebtedness for an amount of cash equal to the fair market value of the indebtedness. Assume that the fair market value of the indebtedness is \$9,022,621.41, which in this case equals the issue price of indebtedness determined under paragraph (g)(1) of this section (\$9,000,000) plus the accrued original issue discount through February 1 (\$22,621.41). Section 1.61-12(c)(3) provides that if indebtedness is repurchased for a price that is exceeded by the issue price of the indebtedness plus the amount of discount already deducted, the excess is income from discharge of indebtedness. Therefore, S does not realize income from discharge of indebtedness. The result would be the same if P had contributed the indebtedness to the capital of S. Under section 108(e)(6), S would be treated as having satisfied the indebtedness with an amount of money equal to P's adjusted basis and, under section 1272(d)(2), P's adjusted basis is equal to \$9,022,621.41.

Example 4. (i) P, a domestic corporation, owns 70 percent of the single class of stock of S, a domestic corporation. On January 1, 1986, P issued indebtedness that has an issue price of \$5,000,000 and provides for no stated interest payments and a payment at maturity of \$10,000,000. The indebtedness has a stated maturity date of December 31, 1995. On January 1, 1992, S purchases P's indebtedness from K, a partnership not related to P within the meaning of paragraph (d)(2) of this section, for cash in the amount of \$6,000,000. The sum of the debt's issue price and previously deducted original issue discount is \$7,578,582.83. P repays the indebtedness in full at maturity.

(ii) Under section 61(a)(12), section 108(e)(4), and paragraphs (a) and (f) of this section, P realizes \$1,578,582.83 in income from discharge of indebtedness (\$7,578,582.83 minus \$6,000,000) on January 1, 1992.

(iii) Under paragraph (g)(1) of this section, the indebtedness is treated as issued to S on January 1, 1992, with an issue price of \$6,000,000. Under section 1273(a), the \$4,000,000 excess of the stated redemption price at maturity of the indebtedness (\$10,000,000) over

its issue price (\$6,000,000) is original issue discount, which is includible in gross income by S and deductible by P over the remaining term of the indebtedness under sections 163(e) and 1272(a).

(iv) Accordingly, P deducts and S includes in income original issue discount as follows: in 1992, \$817,316.20; in 1993, \$928,650.49; in 1994, \$1,055,150.67; and in 1995, \$1,198,882.64.

(h) *Effective date.* This section applies to any transaction described in paragraph (a) and in either paragraph (b) or (c) of this section with an acquisition date on or after March 21, 1991. Although this section does not apply to direct or indirect acquisitions occurring before March 21, 1991, section 108(e)(4) is effective for any transaction after December 31, 1980, subject to the rules of section 7 of the Bankruptcy Tax Act of 1980 (Pub. L. 96-589, 94 Stat. 3389, 3411). Taxpayers may use any reasonable method of determining the amount of discharge of indebtedness income realized and the treatment of correlative adjustments under section 108(e)(4) for acquisitions of indebtedness before March 21, 1991, if such method is applied consistently by both the debtor and related holder.

[T.D. 8460, 57 FR 61808, Dec. 29, 1992]

§ 1.108-3 Intercompany losses and deductions.

(a) *General rule.* This section applies to certain losses and deductions from the sale, exchange, or other transfer of property between corporations that are members of a consolidated group or a controlled group (an intercompany transaction). See section 267(f) (controlled groups) and § 1.1502-13 (consolidated groups) for applicable definitions. For purposes of determining the attributes to which section 108(b) applies, a loss or deduction not yet taken into account under section 267(f) or § 1.1502-13 (an intercompany loss or deduction) is treated as basis described in section 108(b) that the transferor retains in property. To the extent a loss not yet taken into account is reduced under this section, it cannot subsequently be taken into account under section 267(f) or § 1.1502-13. For example, if S and B are corporations filing a consolidated return, and S sells land with a \$100 basis to B for \$90 and the \$10 loss is deferred under section 267(f) and