documentation to the Regional Administrator at the time of application for a limited access permit that the vessel has an operational VMS unit installed on board that meets the minimum performance criteria, unless otherwise allowed under this paragraph (b). If a vessel has already been issued a limited access permit without the owner providing such documentation, the Regional Administrator shall allow at least 30 days for the vessel to install an operational VMS unit that meets the criteria and for the owner to provide documentation of such installation to the Regional Administrator. The owner of a vessel issued a limited access NE multispecies permit that fishes or intends to fish under a Category A or B DAS as specified in paragraph (b)(1)(vi) of this section must provide documentation to the Regional Administrator that the vessel has an operational VMS unit installed on board that meets those criteria prior to fishing under a groundfish DAS. NMFS shall send letters to all limited access NE multispecies DAS and Atlantic surfclam and ocean quahog permit holders and provide detailed information on the procedures pertaining to VMS purchase, installation, certification, and use.

* * * * *

■ 6. In § 648.14, paragraph (a)(25) is revised to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(25) Fail to maintain an operational VMS unit as specified in § 648.9, and comply with any of the notification requirements specified in § 648.15(b) including:

(i) Fish for, land, take, possess, or transfer surfclams or ocean quahogs under an open access surfclam or ocean quahog permit without having provided proof to the Regional Administrator of NMFS that the vessel has a fully functioning VMS unit on board the vessel and declared a surfclam, ocean quahog, or Maine mahogany quahog fishing activity code via the VMS unit prior to leaving port as specified at § 648.15(b);

(ii) Beginning January 1, 2009, fish for, land, take, possess, or transfer ocean quahogs under a limited access Maine mahogany quahog permit without having provided proof to the Regional Administrator of NMFS that the vessel has a fully functioning VMS unit on board the vessel and declared a fishing trip via the VMS unit as specified at § 648.15(b).

* * * * *

■ 7. In § 648.15, paragraph (b) is revised to read as follows:

§ 648.15 Facilitation of enforcement.

* * * * *

(b) *Special notification requirements applicable to surfclam and ocean quahog vessel owners and operators.* (1) *Surfclam and ocean quahog open access permitted vessels.* Vessel owners or operators issued an open access surfclam or ocean quahog open access permit for fishing in the ITQ Program, as specified at § 648.70, are required to declare their intended fishing activity via VMS prior to leaving port.

(2) *Maine mahogany quahog limited access permitted vessels.* Beginning January 1, 2009, vessel owners or operators issued a limited access Maine mahogany quahog permit for fishing for Maine mahogany quahogs in the Maine mahogany quahog zone, as specified at § 648.76, are required to declare via VMS, prior to leaving port, and entering the Maine mahogany quahog zone, their intended fishing activity, unless otherwise exempted under paragraph § 648.4(a)(4)(ii)(B)(*1*).

(3) *Declaration out of surfclam and ocean quahog fisheries.* Owners or operators that are transiting between ports or fishing in a fishery other than surfclams and ocean quahogs must either declare out of fisheries or declare the appropriate fishery, if required, via the VMS unit, before leaving port. The owner or operator discontinuing a fishing trip in the EEZ or Maine mahogany quahog zone must return to port and offload any surfclams or ocean quahogs prior to commencing fishing operations in the waters under the jurisdiction of any state.

(4) *Inspection by authorized officer.* The vessel permits, the vessel, its gear, and catch shall be subject to inspection upon request by an authorized officer.

(5) *Authorization for use of fishing trip notification via telephone.* The Regional Administrator may authorize or require the notification of surfclam or ocean quahog fishing trip information via a telephone call to the NMFS Office of Law Enforcement nearest to the point of offloading, instead of the use of VMS. If authorized, the vessel owner or operator must accurately provide the following information prior to departure of his/her vessel from the dock to fish for surfclams or ocean quahogs in the EEZ: Name of the vessel; NMFS permit number assigned to the vessel; expected date and time of departure from port; whether the trip will be directed on surfclams or ocean quahogs; expected date, time, and location of landing; and name of individual providing notice. If use of a telephone call-in notification is authorized or required, the Regional Administrator shall notify affected permit holders through a letter, notification in the **Federal Register**, e-mail, or other appropriate means.

* * * * *

■ 8. In § 648.75, paragraph (a) is revised to read as follows:

§ 648.75 Cage identification.

* * * * *

(a) *Tagging.* Before offloading, all cages that contain surfclams or ocean quahogs must be tagged with tags acquired annually under paragraph (b) of this section. A tag must be fixed on or as near as possible to the upper crossbar of the cage. A tag is required for every 60 ft^3 (1,700 L) of cage volume, or portion thereof. A tag or tags must not be removed until the cage is emptied by the processor, at which time the processor must promptly remove and retain the tag(s) for 60 days beyond the end of the calendar year, unless otherwise directed by authorized law enforcement agents.

* * * * *

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9358]

RIN 1545–BC99

Treatment of Certain Nuclear Decommissioning Funds for Purposes of Allocating Purchase Price in Certain Deemed and Actual Asset Acquisitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the allocation of purchase price in certain deemed and actual asset acquisitions under sections 338 and 1060. These regulations affect sellers and purchasers of nuclear power plants or of the stock of corporations that own nuclear power plants.

DATES: *Effective Date:* These regulations are effective September 11, 2007.

Applicability Date: For dates of applicability, see §§ 1.338–6(c)(5)(vi) and 1.1060–1(e)(1)(ii)(C)(*4*).

FOR FURTHER INFORMATION CONTACT: Richard Starke at (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On September 16, 2004, the IRS and Treasury Department issued a notice of

proposed rulemaking and temporary regulations in the **Federal Register** (69 FR 55740), modifying regulations under sections 338 and 1060 of the Internal Revenue Code (Code). The text of the temporary regulations was identical to the text of the proposed regulations.

Sections 338 and 1060 and the regulations thereunder provide a methodology by which the purchase or sales price in certain actual and deemed asset acquisitions is computed and allocated among the assets acquired or treated as acquired. The regime employs a residual method of allocation that divides assets into seven classes and allocates the consideration to each of the first six classes in turn, up to the fair market value of the assets in the class. The residual amount is allocated to assets in the last class.

The purchase price generally includes liabilities of the seller that are assumed by the purchaser. Those liabilities, however, must be treated as having been incurred by the purchaser. In order to be treated as having been incurred by the purchaser, in addition to other requirements, economic performance must have occurred with respect to the liability.

In connection with the sale of a nuclear power plant, the assets sold by the seller and purchased by the purchaser may include the plant, equipment, operating assets, and one or more funds holding assets that have been set aside for the purpose of satisfying the owner's responsibility to decommission the nuclear power plant after the conclusion of its useful life (the decommissioning liability), and the purchaser may have agreed to satisfy the decommissioning liability. One or more of such funds may not be a fund described in section 468A. Such other funds are referred to as nonqualified funds. Contributions to nonqualified funds do not give rise to a deduction in the year of contribution. In addition, the assets of a nonqualified fund continue to be treated as assets of the contributor.

The preamble to the proposed and temporary regulations concluded that the decommissioning liability will not satisfy the economic performance test until decommissioning occurs, and therefore that, as of the purchase date, it is not included in the purchase price that the purchaser allocates to the acquired assets. As a result, as of the purchase date, the purchase price to be allocated by the purchaser among the acquired assets may be significantly less than the fair market value of those assets. This situation will generally persist until economic performance with respect to the decommissioning liability is satisfied through decommissioning.

Generally under the residual method, the purchase price is allocated to the nonqualified fund's assets, which are typically Class I and Class II assets, before it is allocated to the plant, equipment, and other operating assets, which are typically Class V assets. Because the purchase price does not reflect the decommissioning liability and is first allocated to the assets of the nonqualified fund, the purchase price allocated to the plant, equipment, and other operating assets may be less than their fair market value. To the extent the purchase price allocated to the plant, equipment, and other operating assets is less than their fair market value, the purchaser will not recover a tax benefit (that is, a depreciation deduction) for the decommissioning liability until economic performance occurs on decommissioning.

To mitigate the tax effect of these decommissioning liabilities' not satisfying the statutory requirements for economic performance as to the purchaser, the temporary regulations added § 1.338–6T. That regulation provides that, for purposes of allocating purchase or sales price among the acquisition date assets of a target, a taxpayer may irrevocably elect to treat a nonqualified fund as if such fund were an entity classified as a corporation the stock of which were among the acquisition date assets of the target and a Class V asset. In these cases, for allocation purposes, the hypothetical subsidiary corporation is treated as bearing the responsibility for decommissioning to the extent assets of the fund are expected to be used for that purpose. A section 338(h)(10) election is treated as made for the hypothetical subsidiary corporation (regardless of whether the requirements for a section 338(h)(10) election are otherwise satisfied).

The election converts the assets of the nonqualified fund from primarily Class I and Class II assets into stock of a hypothetical subsidiary corporation which is a Class V asset and allows the present cost of the decommissioning liability funded by the nonqualified fund, which otherwise cannot be taken into account for income tax purposes, to be netted against the fund assets for the sole purpose of valuing the stock of the hypothetical subsidiary corporation. Therefore, if the election is made, it is expected that a larger amount of the initial purchase price would be available to be allocated to the plant and other operating assets than if no such election had been made. However, in such a case, a much smaller amount of the initial purchase price would be available to be allocated to the assets of the nonqualified fund. Accordingly, a disposition of the nonqualified fund assets would likely result in current gain recognition.

Explanation of Provisions and Summary of Comments

A number of comments on the proposed regulations were received, the most significant of which are discussed below. No public hearing was requested nor held.

Economic Performance Test

The preamble to the proposed and temporary regulations discussed application of the economic performance test of section 461 to the assumption of decommissioning liabilities by the purchaser. Various commentators requested that, with respect to the purchaser of a nuclear power plant, the economic performance rules outlined in the proposed and temporary regulations be modified to provide that economic performance with respect to an assumed decommissioning liability be deemed to occur at the time of purchase rather than upon performance of the decommissioning activities. Specifically, commentators pointed out that the election in the proposed and temporary regulations will typically result in the purchaser holding the assets of the nonqualified fund with little or no tax basis, and subsequent investment reallocations undertaken during the course of portfolio management will result in gain recognition and a current tax liability. Further, the commentators noted that nonqualified trust agreements related to nuclear decommissioning obligations often require the trustees to remit to the purchasers, out of trust assets, the monies necessary to pay the purchasers' taxes resulting from the trusts' sales of assets. The commentators expressed concern that this requirement will result in fewer assets in the trust to be used to decommission the nuclear power plant because trustees will be required to either remit taxes from the fund or restrict changes in the fund's investment portfolio.

The IRS and Treasury Department recognize that requiring the purchaser to satisfy the economic performance of a liability assumed in a purchase transaction can result in the deferral of the basis of the acquired assets in the hands of the purchaser. However, this result is not unique to the assumption of decommissioning liabilities and therefore, the economic performance concerns raised by commentators

extend beyond the scope of these regulations. The final regulations adopt the rules provided in the proposed and temporary regulations which are consistent with the application of economic performance rules of section 461 to liabilities assumed by a purchaser.

The Deemed Section 338(h)(10) Election

Several of the commentators urge that, if the IRS and Treasury Department decline to change the position on economic performance, then the final regulations should eliminate the particular result of the § 1.338–6T(c)(5) election set forth in § 1.338–6T(c)(5)(i)(E). That provision deems a section 338(h)(10) election to be made with respect to the hypothetical subsidiary corporation that results from making the § 1.338–6T(c)(5) election. The deemed section 338(h)(10) election operates to eliminate any carryover of the historic basis in the assets in the nonqualified decommissioning fund from the seller to the buyer. The commentators maintain that, as a substitute for the § 1.338–6T(c)(5) election, the parties to the transaction could preserve the historic basis in the assets in the nonqualified fund by having the seller incorporate the nonqualified fund in a new subsidiary with the subsidiary assuming the appropriate portion of the decommissioning obligation long before the sale of the nuclear power plant.

However, simply eliminating the deemed section 338(h)(10) election that results from making the § 1.338–6T(c)(5) election would not necessarily result in the same tax consequences to the parties as a transaction in which the seller incorporated the nonqualified fund in a new subsidiary prior to the sale of the nuclear power plant. The purchase of a subsidiary as opposed to an assumption of the decommissioning liability generally would result in tax accounting differences not only to the buyer but also the seller. Eliminating the deemed section 338(h)(10) election that results from making the § 1.338–6T(c)(5) election would have the effect of essentially accelerating economic performance with respect to an assumed nuclear decommissioning liability in a manner inconsistent with the economic performance rules of other assumed liabilities. Therefore, the final regulations adopt the deemed section 338(h)(10) election rule as provided in § 1.338–6T(c)(5)(i)(E).

Another group of commentators urge that the § 1.338–6T(c)(5) election be made retroactively available prior to September 15, 2004. The allocation rules applicable under sections 338 and 1060 prior to September 15, 2004, however, were comprehensive, and the manner in which they operated was well known to participants in the nuclear power industry. Section 1.338–6T(c)(5) originally was proposed with a prospective effective date, and, while the members of the nuclear power industry at that time urged that § 1.338–6T(c)(5) be made available retroactively, the IRS and Treasury Department declined to do so because transactions negotiated prior to September 15, 2004, would have been based on the rules of § 1.338–6 without inclusion of § 1.338–6T(c)(5). Although the commentators state that the nuclear power industry is very competitive and that some purchasers who purchased nuclear power plants prior to September 15, 2004, might be at a disadvantage relative to those who purchased on or after September 15, 2004, these final regulations are only applicable prospectively so as not to retroactively alter the tax consequences of prior transactions.

Finally, one commentator notes that § 1.338–6T(c)(5)(i)(D) treats the hypothetical subsidiary corporation as bearing responsibility for decommissioning only to the extent that assets of the fund are expected to be used for that purpose (the expected use standard). The commentator argues that proving the expected use of the nonqualified assets might be a contentious issue and prove difficult. The commentator proposes that, for purposes of clarity, the hypothetical subsidiary corporation should be treated as bearing the responsibility for decommissioning in an amount equal to the fair market value of the nonqualified fund assets at the time of the closing of the transaction (causing the stock of the hypothetical subsidiary corporation to be assigned a zero value). The commentator suggests that such an approach would eliminate the uncertainty contained in the expected use standard and ensure that no portion of the purchase price is allocated to the nonqualified assets.

The IRS and Treasury Department believe, however, that the implementation of an approach that does not establish a connection between the fund assets and their expected use may lead to the over funding of nonqualified funds in certain circumstances and inappropriate allocations of basis. Accordingly, the final regulations retain the expected use standard.

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 pursuant to 5 U.S.C. 553(d)(3) it has been determined that that a delayed effective date is unnecessary because this rule finalizes currently effective temporary rules regarding the treatment of certain nuclear decommissioning funds for purposes of allocating purchase price in certain acquisitions without substantive change. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will affect sellers and purchasers of nuclear power plants or the stock of corporations that own nuclear power plants in qualified stock purchases, which tend to be larger businesses. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Richard Starke, Office of the Associate Chief Counsel (Corporate).

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

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

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entries for Sections 1.338–6T and 1.1060–1T.

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

■ **Par. 2.** Section 1.338–0 is amended by removing the entry in the list of captions for § 1.338–6T and by revising the entry in the list of captions for paragraph (c)(5) of § 1.338–6 to read as follows:

§ 1.338–0 Outline of topics.

* * * * *

§ 1.338–6 Allocation of ADSP and AGUB among target assets.

* * * * *

(c) * * *

(5) Allocation to certain nuclear decommissioning funds.

* * * * *

■ **Par. 3.** Paragraph (c)(5) of § 1.338–6 is amended to read as follows:

§ 1.338–6 Allocation of ADSP and AGUB among target assets.

* * * * *

(c) * * *

(5) *Allocation to certain nuclear decommissioning funds*—(i) *General rule.* For purposes of allocating ADSP or AGUB among the acquisition date assets of a target (and for no other purpose), a taxpayer may elect to treat a nonqualified nuclear decommissioning fund (as defined in paragraph (c)(5)(ii) of this section) of the target as if—

(A) Such fund were an entity classified as a corporation;

(B) The stock of the corporation were among the acquisition date assets of the target and a Class V asset;

(C) The corporation owned the assets of the fund;

(D) The corporation bore the responsibility for decommissioning one or more nuclear power plants to the extent assets of the fund are expected to be used for that purpose; and

(E) A section 338(h)(10) election were made for the corporation (regardless of whether the requirements for a section 338(h)(10) election are otherwise satisfied).

(ii) *Definition of nonqualified nuclear decommissioning fund.* A *nonqualified nuclear decommissioning fund* means a trust, escrow account, Government fund or other type of agreement—

(A) That is established in writing by the owner or licensee of a nuclear generating unit for the exclusive purpose of funding the decommissioning of one or more nuclear power plants;

(B) That is described to the Nuclear Regulatory Commission in a report described in 10 CFR 50.75(b) as providing assurance that funds will be available for decommissioning;

(C) That is not a Nuclear Decommissioning Reserve Fund, as described in section 468A;

(D) That is maintained at all times in the United States; and

(E) The assets of which are to be used only as permitted by 10 CFR 50.82(a)(8).

(iii) *Availability of election.* P may make the election described in this paragraph (c)(5) regardless of whether the selling consolidated group (or the selling affiliate or the S corporation shareholders) also makes the election. In addition, the selling consolidated group (or the selling affiliate or the S corporation shareholders) may make the election regardless of whether P also makes the election. If T is an S corporation, all of the S corporation shareholders, including those that do not sell their stock, must consent to the election for the election to be effective as to any S corporation shareholder.

(iv) *Time and manner of making election.* The election described in this paragraph (c)(5) is made by taking a position on an original or amended tax return for the taxable year of the qualified stock purchase that is consistent with having made the election. Such tax return must be filed no later than the later of 30 days after the date on which the section 338 election is due or the day the original tax return for the taxable year of the qualified stock purchase is due (with extensions).

(v) *Irrevocability of election.* An election made pursuant to this paragraph (c)(5) is irrevocable.

(vi) *Effective/applicability date.* This paragraph (c)(5) applies to qualified stock purchases occurring on or after September 11, 2007. For qualified stock purchases occurring before September 11, 2007 and on or after September 15, 2004, see § 1.338–6T as contained in 26 CFR Part 1 in effect on April 1, 2007. For qualified stock purchases occurring before September 15, 2004, see § 1.338–6 as contained in 26 CFR Part 1 in effect on April 1, 2004.

§ 1.338–6T [Removed]

■ **Par. 4.** Section 1.338–6T is removed.

■ **Par. 5.** Section 1.1060–1 is amended by:

■ 1. Revising in the *Outline of Topics* in paragraph (a)(3), the entry for paragraph (e)(1)(ii)(C).

■ 2. Removing the last sentence of paragraph (c)(3) and adding four new sentences in its place.

■ 3. Revising paragraph (e)(1)(ii)(C).

The revisions read as follows:

§ 1.1060–1 Special allocation rules for certain asset acquisitions.

(a) * * *

(3) * * *

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(C) Election described in § 1.338–6(c)(5).

* * * * *

(c) * * *

(3) *Certain costs.* * * * If an election described in § 1.338–6(c)(5) is made with respect to an applicable asset acquisition, any allocation of costs pursuant to this paragraph (c)(3) shall be made as if such election had not been made. The preceding sentence applies to applicable asset acquisitions occurring on or after September 11, 2007. For applicable asset acquisitions occurring before September 11, 2007, and on or after September 15, 2004, see § 1.1060–1T as contained in 26 CFR Part 1 in effect on April 1, 2007. For applicable asset acquisitions occurring before September 15, 2004, see §§ 1.338–6 and 1.1060–1 as contained in 26 CFR Part 1 in effect on April 1, 2004.

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(C) *Election described in § 1.338–6(c)(5)*—(*1*) *Availability.* The election described in § 1.338–6(c)(5) is available in respect of an applicable asset acquisition provided that the requirements of that section are satisfied. Such election may be made by the seller, regardless of whether the purchaser also makes the election, and may be made by the purchaser, regardless of whether the seller also makes the election.

(*2*) *Time and manner of making election.* The election described in § 1.338–6(c)(5) is made by taking a position on a timely filed original tax return for the taxable year of the applicable asset acquisition that is consistent with having made the election.

(*3*) *Irrevocability of election.* The election described in § 1.338–6(c)(5) is irrevocable.

(*4*) *Effective/applicability date.* This paragraph (e)(1)(ii)(C) applies to applicable asset acquisitions occurring on or after September 11, 2007. For applicable asset acquisitions occurring before September 11, 2007 and on or after September 15, 2004, see § 1.1060–1T as contained in 26 CFR Part 1 in effect on April 1, 2007. For applicable asset acquisitions occurring before September 15, 2004, see §§ 1.338–6 and 1.1060–1 as contained in 26 CFR Part 1 in effect on April 1, 2004.

* * * * *

§ 1.1060–1T [Removed]

■ **Par. 6.** Section 1.1060–1T is removed.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Dated: August 31, 2007.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

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