

and a combining unit is a combining entity and all of its disregarded entities.

The 2001 proposed regulations provide that the merger of a disregarded entity into a corporation will not qualify as a statutory merger or consolidation under section 368(a)(1)(A) because all of the transferor unit's assets may not be transferred to the transferee unit and the separate legal existence of the combining entity of the transferor unit does not terminate as a matter of law. The 2001 proposed regulations, however, generally provide that the merger of a corporation into a disregarded entity will qualify as a statutory merger or consolidation if it satisfies the requirements of the regulations.

No public hearing regarding the 2001 proposed regulations was requested or held. Nonetheless, a number of written comments were received.

#### Explanation of Provisions

The IRS and Treasury have studied the comments received regarding the 2001 proposed regulations. Although the IRS and Treasury are continuing to study a number of the comments received regarding the proposed regulations, in response to a number of comments requesting immediate guidance in this area upon which taxpayers may rely, the IRS and Treasury are promulgating these regulations as temporary regulations in this Treasury Decision. The temporary regulations retain the general framework of the 2001 proposed regulations, but make certain modifications in response to comments received. The following sections describe a number of the most significant comments and the extent to which they have been incorporated in these temporary regulations. Further changes to the temporary regulations, however, are possible before these regulations are finalized.

##### A. Definition of Combining Entity

As described above, the 2001 proposed regulations define a combining entity as a business entity that is a corporation that is not a disregarded entity. Although the preamble to the 2001 proposed regulations clarifies that, for this purpose, the term corporation is defined as provided in § 301.7701-2(b), commentators requested that that clarification also be provided in the text of the regulations. In response to these comments, the temporary regulations provide that a combining entity is a corporation (as defined in § 301.7701-2(b)) that is not a disregarded entity.

##### B. The All of the Assets Requirement

As stated above, the 2001 proposed regulations require that all of the assets of a transferor unit become the assets of a transferee unit. A number of comments were received regarding this requirement. The following paragraphs describe these comments and the extent to which the temporary regulations reflect them.

One comment suggested that the regulations be amended to clarify that whether the all of the assets requirement is satisfied is determined by reference to the assets of the transferor unit immediately prior to the merger. These temporary regulations add an example that illustrates that a transaction that is preceded by a distribution by the transferor unit to its shareholders may qualify as a statutory merger under these temporary regulations, even if the "substantially all" requirement applicable to certain other types of reorganizations would not be satisfied. The example is provided solely to illustrate the meaning of the all of the assets requirement. No inference is intended regarding the shareholder level and other tax consequences of the transaction described therein.

Another comment stated that the proposed regulations are unclear as to whether a transaction in which an entity that is disregarded as an entity separate from the combining entity of the transferor unit becomes an entity that is disregarded as an entity separate from the combining entity of the transferee unit satisfies the all of the assets requirement. These temporary regulations amend *Example 2* of the 2001 proposed regulations, as described below, to clarify that this transaction may satisfy the all of the assets requirement and, therefore, qualify as a statutory merger or consolidation.

##### C. The Cessation of Separate Legal Existence Requirement

The 2001 proposed regulations require that the combining entity of each transferor unit "ceases its separate legal existence for all purposes." One comment requested that the phrase "for all purposes" be deleted from this requirement. The comment suggested that under some corporate laws a merged corporation may continue its existence for a specified time period and for certain limited purposes, such as bringing and defending against lawsuits. This limited continued existence of a combining entity of a transferor unit, the comment suggested, should not prevent a transaction from being treated as failing to satisfy the requirement that the combining entity of each transferor

unit cease its separate legal existence for all purposes.

The IRS and Treasury do not believe that the deletion of "for all purposes" from the regulation will alter the terms of the requirement. Nonetheless, these temporary regulations provide that this requirement will be satisfied even if, pursuant to the laws of the United States or a State or the District of Columbia, after the effective time of the transaction, the combining entity of the transferor unit (or its officers, directors, or agents) may act or be acted against, or a member of the transferee unit (or its officers, directors, or agents) may act or be acted against in the name of the combining entity of the transferor unit, provided that such actions relate to assets or obligations of the combining entity of the transferor unit that arose, or relate to activities engaged in by such entity, prior to the effective time of the transaction, and such actions are not inconsistent with the all of the assets requirement.

##### D. Example 2 of the 2001 Proposed Regulations

A number of comments were received regarding *Example 2* of the 2001 proposed regulations, which involves the merger of a target corporation into a disregarded entity. The last sentence of the facts of *Example 2* states that, "[p]rior to the transaction, [the combining entity of the transferor unit] is not treated as owning any assets of an entity that is disregarded as an entity separate from its owner for Federal tax purposes." One commentator indicated that it is not clear why this fact is relevant to the conclusion that the transaction qualifies as a statutory merger or consolidation and suggested either deleting or clarifying this fact.

As described above, in order to qualify as a statutory merger or consolidation, all of the assets of a transferor unit must become assets of the transferee unit. In order to determine whether this requirement has been satisfied, it is necessary to know whether the combining entity of the transferor unit owns the interests of any entity that is disregarded as an entity separate from its owner for Federal tax purposes. The last sentence of the facts of *Example 2* was merely intended to convey the fact that the only assets of the transferor unit were those that the combining entity owned directly. To clarify the significance of this fact, the temporary regulations amend the analysis in *Example 2* to indicate that the transaction would still qualify as a statutory merger or consolidation even if the combining entity of the transferor unit were treated as owning assets of an