

Section 351.—Transfer to Corporation Controlled by Transferor

26 CFR 1.351-1: Transfer to corporation controlled by transferor.

T.D. 8665

**DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1**

Treatment of Underwriters in Section 351 and Section 721 Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations concerning transfers of cash to a corporation or a partnership. The final regulations will affect taxpayers in transactions under section 351 or section 721 when there is an offering of stock or partnership interests through an underwriter.

EFFECTIVE DATE: May 1, 1996.

FOR FURTHER INFORMATION CONTACT: Concerning the regulation under section 351(a), Susan T. Edlavitch, (202) 622-7750; concerning the regulation under section 721(a), James A. Quinn, (202) 622-3060 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations under section 351 and section 721. The final regulations provide for the treatment of transfers of cash to a corporation or a partnership pursuant to an offering of stock or partnership interests through an underwriter.

Section 351(a) provides that no gain or loss is recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in the corporation and immediately after the exchange the person or persons are in control (as defined in section 368(c)) of the corporation.

Section 721(a) provides that no gain or loss is recognized to a partnership or

to any of its partners in the case of a contribution of property to the partnership in exchange for an interest in the partnership.

On August 10, 1995, the IRS published in the Federal Register a notice of proposed rulemaking (CO-26-95 [1995-2 C.B. 466]), adding regulations under section 351 and section 721 of the Internal Revenue Code relating to transfers of cash to a corporation or a partnership (60 FR 40792). The proposed rules were based on the conclusion that Situation 2 of Rev. Rul. 78-294 (1978-2 C.B. 141) does not reflect current underwriting practices. The proposed rules were also based on the conclusion that underwritings of partnership interests should be treated similarly to underwritings of stock. The rules, under certain circumstances, disregard underwriters of stock and partnership interests for purposes of section 351 and section 721.

Public comments and the final regulations

The IRS received few comments from the public on the proposed regulations. The comments received were generally supportive of the proposed regulations but sought guidance beyond the intended scope of the rules. No public hearing was requested and none was held. After consideration of all the comments, the regulations proposed by CO-26-95 are adopted by this Treasury decision.

In the notice of proposed rulemaking, the IRS and Treasury invited public comment with respect to three issues: (a) Whether the proposed rules should apply for all tax purposes; (b) whether the proposed rules should be limited to underwriters; and (c) whether the proposed rules should be limited to cash transactions. After consideration of these issues, the regulations proposed by CO-26-95 are adopted without any change in language. However, although the regulations specifically concern underwriters, it is intended that its principles could apply equally in factually analogous situations. For example, if the ownership by other intermediaries in the distribution of stock or partnership interests, such as broker-dealers, is transitory, that ownership should also be disregarded.

Effect on other documents

The following publication is obsolete as of May 1, 1996: Rev. Rul. 78-294 (1978-2 C.B. 141).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these 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 authors of these regulations are Susan T. Edlavitch of the Office of Assistant Chief Counsel (Corporate) and Brian J. O'Connor, formerly of the Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury participated in their development.

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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 adding entries in numerical order to read as follows:

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

Section 1.351-1 also issued under 26 U.S.C. 351. * * *

Section 1.721-1 also issued under 26 U.S.C. 721. * * *

Par. 2. In §1.351-1, paragraph (a)(3) is added to read as follows:

§1.351-1 Transfer to corporation controlled by transferor.

(a) * * *

(3) *Underwritings of stock*—(i) *In general.* For the purpose of section 351, if a person acquires stock of a corporation from an underwriter in exchange for cash in a qualified underwriting transaction, the person who acquires stock from the underwriter is treated as transferring cash directly to the corporation in exchange for stock of the corporation and the underwriter is disregarded. A qualified underwriting transaction is a transaction in which a corporation issues stock for cash in an underwriting in which either the underwriter is an agent of the corporation or the underwriter's ownership of the stock is transitory.

(ii) *Effective date.* This paragraph (a)(3) is effective for qualified underwriting transactions occurring on or after May 1, 1996.

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Par. 3. In §1.721-1, paragraph (c) is added to read as follows:

§1.721-1 Nonrecognition of gain or loss on contribution.

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(c) *Underwritings of partnership interests*—(1) *In general.* For the purpose of section 721, if a person ac-

quires a partnership interest from an underwriter in exchange for cash in a qualified underwriting transaction, the person who acquires the partnership interest is treated as transferring cash directly to the partnership in exchange for the partnership interest and the underwriter is disregarded. A qualified underwriting transaction is a transaction in which a partnership issues partnership interests for cash in an underwriting in which either the underwriter is an agent of the partnership or the underwriter's ownership of the partnership interests is transitory.

(2) *Effective date.* This paragraph (c) is effective for qualified underwriting transactions occurring on or after May 1, 1996.

Margaret Milner Richardson,
Commissioner of Internal Revenue.

Approved March 26, 1996.

Leslie Samuels,
Assistant Secretary of Treasury.

(Filed by the Office of the Federal Register on April 30, 1996, 8:45 a.m., and published in the issue of the Federal Register for May 1, 1996, 61 F.R. 19188)