

**§ 1.338-0**

does not apply to any corporation that—

(A) Immediately prior to qualifying to be taxed as a RIC or REIT was subject to tax as a C corporation for a period not exceeding two taxable years; and

(B) Immediately prior to being subject to tax as a C corporation was subject to tax as a RIC or REIT for a period of at least one taxable year.

(ii) *Property acquired from another corporation while a C corporation.* The exception described in paragraph (d)(2)(i) of this section does not apply to property acquired by the corporation while it was subject to tax as a C corporation from any person in a transaction that results in the acquirer's basis in the property being determined by reference to a C corporation's basis in the property.

(iii) *RICs and REITs previously subject to section 1374 treatment.* If the RIC or REIT had property subject to paragraph (b) of this section before the RIC or REIT became subject to tax as a C corporation as described in paragraph (d)(2)(i) of this section, then paragraph (b) of this section applies to the RIC or REIT upon its requalification as a RIC or REIT, except that the 10-year recognition period with respect to such property is reduced by the portion of the 10-year recognition period that expired before the RIC or REIT became subject to tax as a C corporation and by the period of time that the corporation was subject to tax as a C corporation.

(e) *Special rule for partnerships.* The principles of this section apply to property transferred by a partnership to a RIC or REIT to the extent of any C corporation partner's distributive share of the gain or loss in the transferred property. If the partnership were to elect deemed sale treatment under paragraph (c) of this section in lieu of section 1374 treatment under paragraph (b) of this section with respect to such transfer, then any net gain recognized by the partnership on the deemed sale must be allocated to the C corporation partner, but does not increase the capital account of any partner. Any adjustment to the partnership's basis in the RIC or REIT stock as a result of deemed sale treatment under para-

graph (c) of this section shall constitute an adjustment to the basis of that stock with respect to the C corporation partner only. The principles of section 743 apply to such basis adjustment.

(f) *Effective date.* This section applies to conversion transactions that occur on or after January 2, 2002. For conversion transactions that occurred on or after June 10, 1987, and before January 2, 2002, see §§ 1.337(d)-5 and 1.337(d)-6.

[T.D. 9047, 68 FR 12822, Mar. 18, 2003]

**§ 1.338-0 Outline of topics.**

This section lists the captions contained in the regulations under section 338 as follows:

*§ 1.338-1 General principles; status of old target and new target.*

- (a) In general.
  - (1) Deemed transaction.
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- (b) Treatment of target under other provisions of the Internal Revenue Code.
  - (1) General rule for subtitle A.
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  - (3) General rule for other provisions of the Internal Revenue Code.
- (c) Anti-abuse rule.
  - (1) In general.
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- (d) Next day rule for post-closing transactions.

*§ 1.338-2 Nomenclature and definitions; mechanics of the section 338 election.*

- (a) Scope.
- (b) Nomenclature.
- (c) Definitions.
  - (1) Acquisition date.
  - (2) Acquisition date assets.
  - (3) Affiliated group.
  - (4) Common parent.
  - (5) Consistency period.
  - (6) Deemed asset sale.
  - (7) Deemed sale tax consequences.
  - (8) Deemed sale return.
  - (9) Domestic corporation.
  - (10) Old target's final return.
  - (11) Purchasing corporation.
  - (12) Qualified stock purchase.
  - (13) Related persons.
  - (14) Section 338 election.
  - (15) Section 338(h)(10) election.
  - (16) Selling group.
  - (17) Target; old target; new target.
  - (18) Target affiliate.
  - (19) 12-month acquisition period.
- (d) Time and manner of making election.

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(e) Special rules for foreign corporations or DISCs.

(1) Elections by certain foreign purchasing corporations.

(i) General rule.  
(ii) Qualifying foreign purchasing corporation.

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(iv) Triggering event.  
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(3) Statement of section 338 may be filed by United States shareholders in certain cases.

(4) Notice requirement for U.S. persons holding stock in foreign target.

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(iii) Form of notice.  
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### *§ 1.338-3 Qualification for the section 338 election.*

(a) Scope.  
(b) Rules relating to qualified stock purchases.

(1) Purchasing corporation requirement.

(2) Purchase.

(3) Acquisitions of stock from related corporations.

(i) In general.

(ii) Time for testing relationship.

(iii) Cases where section 338(h)(3)(C) applies—acquisitions treated as purchases.

(iv) Examples.

(4) Acquisition date for tiered targets.

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(ii) Examples.

(5) Effect of redemptions.

(i) General rule.

(ii) Redemptions from persons unrelated to the purchasing corporation.

(iii) Redemptions from the purchasing corporation or related persons during 12-month acquisition period.

(A) General rule.

(B) Exception for certain redemptions from related corporations.

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(1) Post-acquisition elimination of target.

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(1) Scope.

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### *§ 1.338-4 Aggregate deemed sale price; various aspects of taxation of the deemed asset sale.*

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(b) Determination of ADSP.

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(2) Time and amount of ADSP.

(i) Original determination.

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(c) Grossed-up amount realized on the sale

to the purchasing corporation of the purchasing corporation's recently purchased

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(6) Deemed sale of DISC target affiliate.

(7) Anti-stuffing rule.

(8) Examples.

### *§ 1.338-5 Adjusted grossed-up basis.*

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(b) Determination of AGUB.

(1) General rule.

(2) Time and amount of AGUB.

(i) Original determination.

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(c) Grossed-up basis of recently purchased

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(d) Basis of nonrecently purchased stock;

gain recognition election.

(1) No gain recognition election.

(2) Procedure for making gain recognition

election.

(3) Effect of gain recognition election.

(i) In general.

(ii) Basis amount.

(iii) Losses not recognized.

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(1) In general.

(2) Time and amount of liabilities.

(3) Interaction with deemed sale tax con-

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(f) Adjustments by the Internal Revenue

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### *§ 1.338-6 Allocation of ADSP and AGUB among target assets.*

(a) Scope.

(1) In general.

(2) Fair market value.

(i) In general.



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- (A) General rule.
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    - (i) Stock acquisitions.
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  - (C) Purchase of conduit by conduit.
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    - (vi) Character of FT stock as carryover FT stock eliminated upon disposition.
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  - (c) Dividend treatment under section 1248(e).
  - (d) Allocation of foreign taxes.
  - (e) Operation of section 338(h)(16). [Reserved]
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- (a) Returns including tax liability from deemed asset sale.
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    - (2) Old target's final taxable year otherwise included in consolidated return of selling group.
      - (i) General rule.
      - (ii) Separate taxable year.
      - (iii) Carryover and carryback of tax attributes.
      - (iv) Old target is a component member of purchasing corporation's controlled group.
    - (3) Old target is an S corporation.
    - (4) Combined deemed sale return.
      - (i) General rule.
      - (ii) Gain and loss offsets.
      - (iii) Procedure for filing a combined return.
      - (iv) Consequences of filing a combined return.
    - (5) Deemed sale excluded from purchasing corporation's consolidated return.
    - (6) Due date for old target's final return.
      - (i) General rule.
      - (ii) Application of § 1.1502-76(c).

- (A) In general.
  - (B) Deemed extension.
  - (C) Erroneous filing of deemed sale return.
  - (D) Erroneous filing of return for regular tax year.
  - (E) Last date for payment of tax.
  - (7) Examples.
    - (b) Waiver.
      - (1) Certain additions to tax.
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      - (3) Elections or other actions required to be specified on a timely filed return.
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        - (ii) New target in purchasing corporation's consolidated return.
      - (4) Examples.
- § 1.338(h)(10)-1 Deemed asset sale and liquidation.*
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  - (b) Definitions.
    - (1) Consolidated target.
    - (2) Selling consolidated group.
    - (3) Selling affiliate; affiliated target.
    - (4) S corporation target.
    - (5) S corporation shareholders.
    - (6) Liquidation.
  - (c) Section 338(h)(10) election.
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    - (2) Simultaneous joint election requirement.
      - (3) Irrevocability.
      - (4) Effect of invalid election.
    - (d) Certain consequences of section 338(h)(10) election.
      - (1) P.
      - (2) New T.
      - (3) Old T—deemed sale.
        - (i) In general.
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      - (4) Old T and selling consolidated group, selling affiliate, or S corporation shareholders—deemed liquidation; tax characterization.
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          - (i) In general.
          - (ii) T stock sale.
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        - (7) Consolidated return of selling consolidated group.
        - (8) Availability of the section 453 installment method.
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        - (9) Treatment consistent with an actual asset sale.
      - (e) Examples.
      - (f) Inapplicability of provisions.

## § 1.338-1

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(g) Required information.

*§ 1.338(i)-1 Effective dates.*

[T.D. 8940, 66 FR 9929, Feb. 13, 2001]

### § 1.338-1 General principles; status of old target and new target.

(a) *In general—(1) Deemed transaction.* Elections are available under section 338 when a purchasing corporation acquires the stock of another corporation (the target) in a qualified stock purchase. One type of election, under section 338(g), is available to the purchasing corporation. Another type of election, under section 338(h)(10), is, in more limited circumstances, available jointly to the purchasing corporation and the sellers of the stock. (Rules concerning eligibility for these elections are contained in §§ 1.338-2, 1.338-3, and 1.338(h)(10)-1.) Although target is a single corporation under corporate law, if a section 338 election is made, then two separate corporations, old target and new target, generally are considered to exist for purposes of subtitle A of the Internal Revenue Code. Old target is treated as transferring all of its assets to an unrelated person in exchange for consideration that includes the discharge of its liabilities (see § 1.1001-2(a)), and new target is treated as acquiring all of its assets from an unrelated person in exchange for consideration that includes the assumption of those liabilities. (Such transaction is, without regard to its characterization for Federal income tax purposes, referred to as the deemed asset sale and the income tax consequences thereof as the deemed sale tax consequences.) If a section 338(h)(10) election is made, old target is deemed to liquidate following the deemed asset sale.

(2) *Application of other rules of law.* Other rules of law apply to determine the tax consequences to the parties as if they had actually engaged in the transactions deemed to occur under section 338 and the regulations thereunder except to the extent otherwise provided in those regulations. See also § 1.338-6(c)(2). Other rules of law may characterize the transaction as something other than or in addition to a sale and purchase of assets; however, the transaction between old and new target must be a taxable transaction.

For example, if target is an insurance company for which a section 338 election is made, the deemed asset sale would be characterized and taxed as an assumption-reinsurance transaction under applicable Federal income tax law. See § 1.817-4(d).

(3) *Overview.* Definitions and special nomenclature and rules for making the section 338 election are provided in § 1.338-2. Qualification for the section 338 election is addressed in § 1.338-3. The amount for which old target is treated as selling all of its assets (the aggregate deemed sale price, or ADSP) is addressed in § 1.338-4. The amount for which new target is deemed to have purchased all its assets (the adjusted grossed-up basis, or AGUB) is addressed in § 1.338-5. Section 1.338-6 addresses allocation both of ADSP among the assets old target is deemed to have sold and of AGUB among the assets new target is deemed to have purchased. Section 1.338-7 addresses allocation of ADSP or AGUB when those amounts subsequently change. Asset and stock consistency are addressed in § 1.338-8. International aspects of section 338 are covered in § 1.338-9. Rules for the filing of returns are provided in § 1.338-10. Eligibility for and treatment of section 338(h)(10) elections is addressed in § 1.338(h)(10)-1.

(b) *Treatment of target under other provisions of the Internal Revenue Code—(1) General rule for subtitle A.* Except as provided in this section, new target is treated as a new corporation that is unrelated to old target for purposes of subtitle A of the Internal Revenue Code. Thus—

(i) New target is not considered related to old target for purposes of section 168 and may make new elections under section 168 without taking into account the elections made by old target; and

(ii) New target may adopt, without obtaining prior approval from the Commissioner, any taxable year that meets the requirements of section 441 and any method of accounting that meets the requirements of section 446. Notwithstanding § 1.441-1T(b)(2), a new target may adopt a taxable year on or before the last day for making the election