

Instructions for Form 8023

(Rev. September 1997)

Elections Under Section 338 for Corporations Making Qualified Stock Purchases

Section references are to the Internal Revenue Code unless otherwise noted.



Department of the Treasury
Internal Revenue Service

General Instructions

Purpose of Form

The purpose of Form 8023 is to permit elections to be made under section 338 for a corporation (the "target" corporation) if the purchasing corporation has made a qualified stock purchase (QSP) of the target corporation.

If a section 338(a) election is made for the target, the target is treated for purposes of Subtitle A of the Code as having sold all of its assets on the acquisition date and then as having purchased the assets as a new corporation ("new" target) on the day after the acquisition date. (For periods on or before the acquisition date, the target is sometimes referred to as the "old" target.) In addition, the target must recognize gain or loss on the deemed sale of its assets (the "deemed sale gain").

If a section 338(h)(10) election is made for the target, the target generally is treated as making the deemed sale and liquidating. The treatment of the target shareholders generally is consistent with the sale and liquidation treatment. A section 338(h)(10) election cannot be made for a target corporation unless it is acquired from a selling consolidated group, a selling affiliate (as defined in Regulations section 1.338(h)(10)-1(c)(4)), or an S corporation shareholder (or shareholders).

Who Must File

Persons making elections under section 338 must file Form 8023.

Generally, a purchasing corporation must file Form 8023 for the target. If a section 338(h)(10) election is made for a target, Form 8023 must be filed jointly by the purchasing corporation and the common parent of the selling consolidated group (or the selling affiliate or S corporation shareholder(s)).

When and Where To File

File Form 8023 by the 15th day of the 9th month beginning after the acquisition date to make a section 338 election for the target corporation. File Form 8023 with the District Director (Attention: Chief of Examination) for the Internal Revenue district where the main corporate office (headquarters) of the purchasing corporation is located (or, if the purchasing corporation is a member of a consolidated group, with the District Director (as identified above) of the common parent of the consolidated

group). If an affiliated group that does not file consolidated returns makes its QSP of the target through more than one member, a section 338 election for the target is made by filing Form 8023 with the District Director (as identified above) of the affiliate that acquired the largest percentage (by value) of the target stock in the QSP (or, if there is more than one such affiliate, file Form 8023 with the District Director of any one such affiliate).

A copy of Form 8023 must be attached to the final income tax return of the old target, to the first income tax return of the new target, and to the income tax return of the purchasing corporation for its tax year that includes the acquisition date; but failure to do so will not invalidate a section 338 election. If a section 338(h)(10) election is made, a copy of Form 8023 is considered to be attached to the final income tax return of the old target if a copy of Form 8023 is attached to the income tax return of the selling consolidated group (or the selling affiliate) for the tax year of the seller that includes the acquisition date (or, in the case of a target that is an S corporation, attach Form 8023 to the final income tax return of the S corporation with additional copies distributed to each electing S corporation shareholder with his or her Schedule K-1 (Form 1120S)).

Electing for Multiple Targets

One Form 8023 (rather than multiple Forms 8023) may be used for targets that each have the same acquisition date, were members of the same affiliated group immediately before the acquisition date, and are members of the same affiliated group immediately after the acquisition date. All of the information that would be required for the additional targets if a separate Form 8023 were filed must be provided for that target in schedules attached to the form. If a form is used to make an election under section 338 for more than one target, check line 15. In an attached schedule, provide the information requested in Sections A-1, A-2, B, C, D, E, and F for each target corporation other than the one shown in Section B of the form. In the schedule, also state which elections are made for each target (i.e., information corresponding to lines 12, 13, and 14 of Section G). Include the appropriate signature or signature attachment for each target. See **Signature** on page 3.

Some special instructions apply to section 338 elections for lower-tiered targets, whether one or more Forms 8023

are filed to make the elections. For example, if P purchases target A, target A owns target B, and P makes a section 338 election for target A, resulting in a deemed QSP of target B, these special instructions apply to make a section 338 election for the target B. To make an election for target B: **(1)** for purposes of completing and signing Form 8023 treat the purchasing corporation(s) of the directly purchased target as the purchasing corporation(s) of the lower-tiered target and **(2)** file Form 8023 with the District Director (as identified above) of the purchasing corporation of the directly purchased target.

Definitions

Qualified stock purchase. A QSP is the purchase of at least 80% of the total voting power and value of the stock of a corporation by another corporation during a 12-month acquisition period. Preferred stock (as described in section 1504(a)(4)) is not included in computing voting power or value. See section 338(h)(3) for the definition of "purchase."

Acquisition date. The acquisition date is the first day on which a QSP has occurred.

12-month acquisition period. In general, the 12-month acquisition period is the 12-month period beginning with the first acquisition by purchase of stock included in the QSP. See section 338(h)(1) for additional special rules.

Specific Instructions

Employer identification number. An employer identification number (EIN) must be included for each corporation identified in Section A-1, A-2, B, or C on attached schedules. An EIN is not required if the corporation does not have, and is not otherwise required to have, an EIN.

Country of incorporation. When identifying the country of incorporation, include political subdivisions, if any.

Tax year ending. The tax year ending date of any corporation is determined without regard to any QSP.

Section A-1. Purchasing Corporation

If more than one member of an affiliated group purchases stock of the target corporation listed in Section B or identified in an attached schedule, attach a schedule that lists which target stock was acquired by each purchasing corporation. Also provide the information requested on

this Form 8023 and instructions for each purchasing corporation (other than the purchasing corporation listed in Section A-1).

Section A-2. Common Parent of the Purchasing Corporation

If the purchasing corporation is a member of a consolidated group, complete Section A-2.

Section C. Selling Shareholders

If Form 8023 is filed for a target corporation that is an S corporation and a section 338(h)(10) election is made for the target, the information requested in Section C must be provided for each shareholder who sells target stock in the QSP. Attach a schedule if necessary.

Line 4b. Identifying number. Enter the social security number (SSN) for an individual. Enter the EIN for a corporation.

Sections E and F. Purchasing Corporation's and Seller's Statements

If a section 338 election is made, the old target is deemed to sell all of its assets to the new target. Sections E and F concern the amount and allocation of the purchase price for this deemed sale. Do not file **Form 8594**, Asset Acquisition Statement Under Section 1060, for the deemed sale. Instead, provide the information requested in this form. The information in Section E is to be provided by the purchasing corporation. The information in Section F is to be provided by the selling consolidated group, selling affiliates, or selling S corporation shareholders. Complete Section F only if a section 338(h)(10) election is made. Failure to provide any of the information in Section E or F will not invalidate a section 338 election.

Lines 9 and 11. Line 9 concerns the determination and allocation of the new target's adjusted grossed-up basis (AGUB). The AGUB is the amount for which the new target is deemed to have purchased all of its assets from the old target. Line 11, to be completed only in the case of a section 338(h)(10) election, concerns the determination and allocation of the old target's modified aggregate deemed sale price (MADSP). The aggregate deemed sale price (ADSP) (if a section 338(h)(10) election is not made for the target) or MADSP (in the case of a section 338(h)(10) election) is the price at which the old target is deemed to have sold all of its assets to the new target. The ADSP or MADSP is allocated among the old target's assets, and the AGUB is allocated among the new target's assets. This allocation is done under a residual method that groups the assets into several classes and, beginning with Class I, allocates an amount to each asset in the class in proportion to its fair market value. Except in the last class (Class V), the amount allocated to any asset cannot exceed its fair market value. See Temporary Regulations section

1.338(b)-2T for application of the residual method, and Regulations section 1.338-3 for special rules relating to the allocation of ADSP and MADSP.

Recently and nonrecently purchased stock. Target stock held by the purchasing corporation on the acquisition date is either recently purchased stock or nonrecently purchased stock. It is recently purchased stock if it was purchased (within the meaning of section 338(h)(3)) by the purchasing corporation during the 12-month acquisition period. Otherwise it is nonrecently purchased stock. Target stock that is not held by the purchasing corporation on the acquisition date is neither recently nor nonrecently purchased stock.

AGUB. In general, the AGUB is the sum of (1) the grossed-up basis in the purchasing corporation's recently purchased stock, (2) the purchasing corporation's basis in its nonrecently purchased stock, and (3) the liabilities of the new target. In computing the AGUB, the basis of the recently purchased stock is "grossed-up" if any target stock is not held by the purchasing corporation on the acquisition date. The grossed-up basis is the product of (1) the basis of the recently purchased stock, times (2) a fraction, the numerator of which is 100% minus the percentage of the target stock (by value) attributable to the nonrecently purchased stock and the denominator of which is the percentage of target stock (by value) attributable to the recently purchased stock. Special rules apply if there is nonrecently purchased stock and a section 338(h)(10) election or a gain recognition election is made. See Regulations section 1.338(b)-1 for rules about AGUB.

MADSP. MADSP is used if a section 338(h)(10) election is made for the target. In general, the MADSP is (1) the grossed-up basis in the purchasing corporation's recently purchased stock, plus (2) the liabilities of the new target, minus (3) both the acquisition costs capitalized in the purchasing corporation's basis in the recently purchased stock and the selling costs of the selling consolidated group (or selling affiliate or S corporation shareholders) incurred in connection with the QSP that reduce the amount realized on the sale of the recently purchased stock. MADSP generally will be the same as AGUB, except reduced by the acquisition and selling costs. In computing the MADSP, the basis of the recently purchased stock is "grossed-up" if any target stock is not recently purchased stock (whether or not held by the purchasing corporation). The grossed-up basis is (1) the basis of the recently purchased stock, divided by (2) the percentage of target stock (by value) attributable to the recently purchased stock. See Regulations sections 1.338(h)(10)-1(f) and 1.338-3 for rules about MADSP. (In general, ADSP, used if a section 338(h)(10) election is not made for the target, is computed in the same manner as MADSP except that, for

ADSP, the seller's selling costs are not subtracted. (See Regulations section 1.338-3 for rules about ADSP.)

Time of computation. AGUB, ADSP, and MADSP are initially determined at the beginning of the day after the acquisition date, and are subject to subsequent adjustments (see Regulations section 1.338(b)-1 and Temporary Regulations section 1.338(b)-3T). Under the regulations, adjustment events that occur during the new target's first tax year are taken into account as if they had occurred at the beginning of the day after the acquisition date. For purposes of completing this form, you may, but need not, take into account these first year adjustments.

Line 9a. Enter the amount of the consideration paid for the recently purchased target stock. Include only amounts actually paid to the seller(s) of the target stock. Do not include other amounts that are also includible in the purchasing corporation's basis in the recently purchased target stock.

Line 9b. Enter any other amounts (such as acquisition costs) capitalized in the purchasing corporation's basis in the recently purchased stock.

Line 9c. Enter the amount of the new target's liabilities as of the beginning of the day after the acquisition date, that is, the amount taken into account to determine AGUB (see Regulations section 1.338(b)-1(f)).

Note: If a section 338(h)(10) election is not made for the target, this amount includes the amount of the old target's income tax liability on the deemed sale, which is separately shown on line 9d.

In order to be included in AGUB at the beginning of the day after the acquisition date, an obligation must be a bona fide liability of the target as of that date which is properly includible in basis under principles of tax law that would apply if the new target had acquired the old target's assets from an unrelated person and, as part of the transaction, had assumed or taken property subject to the obligation. Thus, the amount of an obligation of the target that, as of the acquisition date, is contingent or speculative is not initially includible in AGUB.

Line 9d. Complete this line only if a section 338(h)(10) election is not made for the target. Enter the amount of the old target's income tax liability on the deemed sale of its assets. This amount is also included as part of the amount on line 9c.

Note: The new target's obligations to pay taxes on the old target's deemed sale gain increase the overall purchase price and cause this element of ADSP and AGUB to "gross-up" or "pyramid."

Lines 9f, g, and h. Enter the amount of AGUB allocated to Class I, II, and III assets, respectively. "Class I assets" are cash, and demand deposits and similar accounts in banks, savings and loan associations, and other similar depository institutions. "Class II assets" are certificates of deposits, U.S. government

securities, readily marketable stock or securities, and foreign currency. "Class III assets" are all assets other than Class I, Class II, and section 197 intangibles (whether or not amortizable) (see section 197).

Line 11a. Enter the amount of the consideration received for the recently purchased target stock. Include all amounts paid to the seller(s) of target stock, and do not subtract other amounts (such as selling costs) that can be subtracted from the purchase price in determining the seller's (or sellers') amount realized for the recently purchased target stock.

Line 11c. Enter the selling costs of the selling consolidated group (or selling affiliates or S corporation shareholders) incurred in connection with the QSP that reduce the amount realized on the sale of the recently purchased stock (e.g., brokerage commissions or any similar costs incurred by the selling group or shareholders to sell the target stock).

Lines 11e, f, and g. Enter the amount of MADSP allocated to Class I, II, and III assets, respectively. See the instructions for lines 9f, g, and h.

Section G. Elections Under Section 338

Line 14. Gain recognition election. If a gain recognition election is made for a target corporation, it applies to each "P" group member (that is, each corporation that, on the acquisition date, is a member of the affiliated group that includes the purchasing corporation and holds nonrecently purchased stock). See Regulations section 1.338(b)-1(e). If a section 338(h)(10) election is made for a target, a gain recognition election is deemed made by each P group member. If a gain recognition election is actually made (not deemed made) for a target corporation, attach a schedule providing the target corporation's name and the name, address, and EIN of each P group member holding nonrecently purchased target stock. The schedule must also contain the following declaration (or a substantially similar declaration):

"EACH CORPORATION HOLDING STOCK SUBJECT TO THIS GAIN RECOGNITION ELECTION AGREES TO REPORT ANY GAIN UNDER THE GAIN RECOGNITION ELECTION IN ITS FEDERAL INCOME TAX RETURN (INCLUDING AN AMENDED RETURN, IF NECESSARY) FOR THE TAX YEAR IN WHICH THE ACQUISITION DATE OF THE TARGET OCCURS."

The schedule must be signed on behalf of each P group member holding nonrecently purchased target stock by a person who states under penalties of perjury that he or she is authorized to act on behalf of the corporation.

A gain recognition election for the target also applies to any target affiliate that has the same acquisition date as the target and for which a section 338 election is made. Attach a schedule with the

information requested above for each such target affiliate.

Signature

If the common parent of a consolidated group is the agent of the purchasing corporation under Regulations section 1.1502-77, the person authorized to sign the statement of section 338 election is the person authorized to act on behalf of that common parent.

If a QSP of a target corporation is made by two or more corporations that are members of the same affiliated (but not consolidated) group, Form 8023 must be signed by a person authorized to sign on behalf of each corporation.

If a section 338(h)(10) election is made for an S corporation, Form 8023 must be signed by each S corporation shareholder who sells target stock in the QSP.

Where multiple signatories are required, the signatures, dates, and titles (if applicable) of all signatories must be provided on a "SIGNATURE ATTACHMENT" to the form under the appropriate "declaration under penalties of perjury" (this is the statement that appears on the Form 8023 immediately above the relevant signature line). Write "See attached" in the signature area of the Form 8023.

Filing Rules for Foreign Purchasing Corporations

Unless otherwise specifically noted, the general rules and requirements in these instructions apply to foreign purchasing corporations.

Who must file. Generally, the purchasing corporation must file Form 8023. However, the U.S. shareholders of controlled foreign purchasing corporations described in Regulations section 1.338-1(g)(3) may make the section 338 election for the corporation. To take advantage of this special rule, complete Form 8023 and attach a statement to the form showing the name, address, identifying number, and stock interest of each U.S. shareholder. The statement must be signed by each U.S. shareholder. When signing the statement, each U.S. shareholder must state under penalties of perjury that the stock interest for that shareholder specified in the statement is correct. Write "See attached" in the signature area of Form 8023. As an alternative to a jointly signed statement, the shareholder signatures may be shown on separate statements attached to Form 8023. If a U.S. shareholder is not an individual or does not have delegated authority to sign the statement, the person signing must state under penalties of perjury that he or she is authorized to sign the statement for the U.S. shareholder.

Copies. Each U.S. shareholder making the election must attach a copy of Form 8023 to **Form 5471**, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, and file the forms generally for the foreign purchasing

corporation's tax year that includes the acquisition date; however, failure to do so will not invalidate a section 338 election.

When and where to file. Special rules may apply to foreign purchasing corporations or foreign targets. The time during which a qualifying foreign purchasing corporation may make a section 338 election for a qualifying foreign target is described in Regulations section 1.338-1(g)(1)(i).

Foreign purchasing corporations that file a U.S. income tax return must file Form 8023 with the District Director (Attention: Chief of Examination) for the Internal Revenue district having jurisdiction over the purchasing corporation. If the foreign purchasing corporation does not file a U.S. income tax return, it must file Form 8023 with the Assistant Commissioner (International) (Attention: Chief of Examination, CP:IN:D:C:EX:E), 950 L'Enfant Plaza, SW, Washington, DC 20224.

However, if U.S. shareholders of the foreign purchasing corporation make an election for the foreign purchasing corporation under Regulations section 1.338-1(g)(3), the Form 8023 must instead be filed with the District Director (Attention: Chief of Examination) for the Internal Revenue district having audit jurisdiction over the U.S. shareholder with the largest ownership percentage in the foreign purchasing corporation. If there are two or more U.S. shareholders with equally large ownership percentages, the shareholders may file the Form 8023 with the District Director (Attention: Chief of Examination) for the Internal Revenue district having audit jurisdiction over one of those U.S. shareholders.

Filing Instructions With Respect To Foreign Targets

Unless otherwise specifically noted, the general rules and requirements in these instructions apply to foreign targets.

A section 338 election will not be valid for a target that is a controlled foreign corporation, a passive foreign investment company, or a foreign personal holding company unless affected U.S. persons who own stock in these targets are notified, in writing, as set forth in Regulations section 1.338-1(g)(4).

Copies. In addition to the filing of the original Form 8023 and the attaching of copies to returns, discussed above, if a section 338 election is made for a foreign target for which a Form 5471 is filed, attach a copy of Form 8023 to the last Form 5471 for the old target and first Form 5471 filed by the new target. However, failure to do so will not invalidate a section 338 election.

Attachments. Attach a schedule listing the date of each purchase of foreign target stock, each purchaser's name, the percentage purchased by each purchaser, and the name and place of incorporation of any selling entities. If affected U.S. persons owning stock in the target are notified, attach a schedule

containing the name and EIN or SSN of each U.S. person.

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unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this tax form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping 14 hr., 7 min.
Learning about the law or the form 2 hr., 17 min.
Preparing and sending the form to the IRS 2 hr., 37 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **DO NOT** send this form to this address. Instead, see **When and Where To File** on page 1.