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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

REG-128767-04

RIN 1545-BD48

Treatment of Disregarded Entities under Section 752

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed regulations provide rules under section 752 for taking into account certain obligations of a business entity that is disregarded as separate from its owner under sections 856(i), 1361(b)(3), or §§301.7701-1 through 301.7701-3 (disregarded entity) for purposes of characterizing and allocating partnership liabilities. The rules affect partnerships with partnership debt and partners in those partnerships. These proposed regulations clarify the existing regulations concerning when a partner may be treated as bearing the economic risk of loss for a partnership liability based upon an obligation of a disregarded entity.

DATES: Written or electronic comments and requests for a public hearing must be received by November 11, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-128767-04), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-128767-04), Courier's Desk, Internal

Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the IRS Internet site at: www.irs.gov/regs, or via the Federal eRulemaking Portal at: www.regulations.gov (IRS-REG-128767-04).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael J. Goldman, (202) 622-3070; concerning submissions of the comments and the public hearing, Robin Jones, (202) 622-3521 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by October 12, 2004. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be

enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in §1.752-2(k). This information is required to ensure proper allocations of partnership liabilities. This information will be used to determine the extent to which certain partners or related persons bear the economic risk of loss with respect to partnership liabilities. The collection of information is mandatory. The likely reporters are individuals and small businesses or organizations.

Estimated total annual reporting burden: 500 hours.

The estimated annual burden per respondent varies from 6 minutes to 2 hours, depending on individual circumstances, with an estimated average of 1 hour.

Estimated number of respondents: 500.

Estimated frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26

U.S.C. 6103.

Background

Under section 752, a partner's basis in its partnership interest includes the partner's share of partnership liabilities. The Income Tax Regulations under section 752 provide rules relating to the determination of a partner's share of partnership liabilities. Those rules differ depending upon whether the liability is characterized as recourse or nonrecourse for purposes of section 752. Section 1.752-1(a) provides that a partnership liability is a recourse liability to the extent that any partner or related person bears the economic risk of loss for that liability under §1.752-2. Section 1.752-1(a) also provides that a partnership liability is a nonrecourse liability to the extent that no partner or related person bears the economic risk of loss for that liability under §1.752-2.

In general, a partner bears the economic risk of loss for a partnership liability under §1.752-2 to the extent that the partner or a related person (as defined in §1.752-4(b)) has an obligation to make a payment to any person, including a contribution to the partnership, that is recognized under §1.752-2(b)(3) on account of the partnership liability if the partnership were to constructively liquidate as described in §1.752-2(b) (payment obligation). As provided in §1.752-2(b)(3) and (5), all statutory and contractual obligations relating to the partnership liability and reimbursement rights are taken into account in determining whether a partner or related person has a payment obligation under §1.752-2(b). Moreover, for purposes of determining the extent to which a partner or related person has a payment obligation and the economic risk of loss for a partnership liability, §1.752-2(b)(6) provides that it is presumed that all partners and related persons who have obligations to make payments actually perform those

obligations, irrespective of their actual net worth (presumption of deemed satisfaction), unless the facts and circumstances indicate a plan to circumvent or avoid the obligation.

These proposed regulations clarify the existing regulations concerning when a partner may be treated as bearing the economic risk of loss for a partnership liability based upon a payment obligation of a business entity that is disregarded as separate from its owner under sections 856(i), 1361(b)(3), or §§301.7701-1 through 301.7701-3 of this chapter (disregarded entity). Because a disregarded entity and its owner are treated as a single entity, the presumption of deemed satisfaction of obligations undertaken by the owner arguably should include payment obligations undertaken by the disregarded entity. However, because of statutory limitations on liability, the owner of a disregarded entity may have no obligation to satisfy payment obligations undertaken by the disregarded entity. The current regulations consider such limitations on the payment obligations of a partner or related person to be relevant in determining the extent to which the partner or related person is treated as bearing the economic risk of loss for a partnership liability. The IRS and Treasury Department believe that because only the assets of a disregarded entity may be available to satisfy payment obligations undertaken by the disregarded entity, a partner should be treated as bearing the economic risk of loss for a partnership liability as a result of those payment obligations only to the extent of the net value of the disregarded entity's assets.

Explanation of Provisions

The proposed regulations provide that in determining the extent to which a partner bears the economic risk of loss for a partnership liability, payment obligations of a disregarded entity are taken into account for purposes of section 752 only to the

extent of the net value of the disregarded entity as of the date on which the partnership determines the partner's share of partnership liabilities pursuant to §§1.752-4(d) and 1.705-1(a). However, the proposed regulations do not apply to an obligation of a disregarded entity to the extent that the owner of the disregarded entity otherwise is required to make a payment (that satisfies the requirements of §1.752-2(b)(1)) with respect to such obligation of the disregarded entity.

Under the proposed regulations, the net value of a disregarded entity equals the fair market value of all assets owned by the disregarded entity that may be subject to creditors' claims under local law, including the disregarded entity's enforceable rights to contributions from its owner but excluding the disregarded entity's interest in the partnership (if any) and the fair market value of property pledged to secure a partnership liability (which is already taken into account under §1.752-2(h)(1)), less obligations of the disregarded entity that do not constitute, and are senior or of equal priority to, payment obligations of the disregarded entity. After the net value of a disregarded entity is initially determined under the rules of the proposed regulations, the net value of the disregarded entity is not redetermined unless the obligations of the disregarded entity that do not constitute, and are senior or of equal priority to, payment obligations of the disregarded entity change by more than a de minimis amount or there is more than a de minimis contribution to or distribution from the disregarded entity. The IRS and Treasury Department request comments on whether other events (such as a sale of substantially all of a disregarded entity's assets) should be specified as revaluation events and whether a partner should be able to make an election to revalue a disregarded entity annually regardless of the occurrence of a revaluation event. An

election to revalue annually would be revocable only with the Commissioner's consent.

The proposed regulations also provide that the net value of a disregarded entity is determined by taking into account a subsequent reduction in the net value of the entity if the subsequent reduction is anticipated and is part of a plan that has as one of its principal purposes creating the appearance that a partner bears the economic risk of loss for a partnership liability. In addition, under the proposed regulations, if one or more disregarded entities have payment obligations with respect to one or more partnership liabilities, or liabilities of more than one partnership, the partnership must allocate the net value of each disregarded entity among partnership liabilities in a reasonable and consistent manner, taking into account priorities among partnership liabilities.

To facilitate the partnership's determination of the net value of a disregarded entity, the proposed regulations provide that a partner that may be treated as bearing the economic risk of loss for a partnership liability based upon a payment obligation of a disregarded entity must provide information as to the entity's tax classification and net value to the partnership on a timely basis.

The IRS and Treasury Department are considering and request comments regarding whether the rules of the proposed regulations should be extended to the payment obligations of other entities, such as entities that are capitalized with nominal equity.

The proposed regulations also include conforming changes to §1.704-2(f)(2), (g)(3) and (i)(4). Section 1.704-2 includes rules that apply when the character of partnership debt under section 752 changes as a result of a guarantee, lapse of a

guarantee, conversion, refinancing or other change in the debt instrument. Under the proposed regulations, those rules would apply upon any change in the character of partnership debt under section 752, whether as a result of the circumstances specified in the current regulations or as a result of changes under the rules of the proposed regulations.

Finally, the proposed regulations clarify that the pledge rules of the regulations under §1.752-2(h) refer to the net fair market value of property pledged to secure a partnership liability. The IRS and Treasury Department are considering and request comments regarding whether partners should be able to make an election, revocable only with the Commissioner's consent, to revalue pledged assets annually.

Proposed Effective Date

The regulations are proposed to apply to liabilities incurred or assumed by a partnership on or after the date the regulations are published as final regulations in the **Federal Register**, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 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) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time necessary to report the required information

will be minimal. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules, how they can be made easier to understand and the administrability of the rules in the proposed regulations. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Michael J. Goldman of the Office of Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

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

Par. 2. Section 1.704-2 is amended as follows:

1. Paragraph (f)(2) is revised.
2. The first sentence of paragraph (g)(3) is revised.
3. The third sentence of paragraph (i)(4) is revised.
4. Paragraph (l)(1)(iv) is added.

The revisions and addition read as follows:

§1.704-2 Allocations attributable to nonrecourse liabilities.

* * * * *

(f) * * *

(2) Exception for certain conversions and refinancings. A partner is not subject to the minimum gain chargeback requirement to the extent the partner's share of the net decrease in partnership minimum gain is caused by a recharacterization of nonrecourse partnership debt as partially or wholly recourse debt or partner nonrecourse debt, and the partner bears the economic risk of loss (within the meaning of §1.752-2) for the liability.

* * * * *

(g) * * *

(3) Conversions of recourse or partner nonrecourse debt into nonrecourse debt.
A partner's share of minimum gain is increased to the extent provided in this paragraph

(g)(3) if a recourse or partner nonrecourse liability becomes partially or wholly nonrecourse. * * *

* * * * *

(i) * * *

(4) * * * A partner is not subject to this minimum gain chargeback, however, to the extent the net decrease in partner nonrecourse debt minimum gain arises because a partner nonrecourse liability becomes partially or wholly a nonrecourse liability. * * *

* * * * *

(l) * * * (1) * * *

(iv) Paragraph (f)(2), the first sentence of paragraph (g)(3), and the third sentence of paragraph (i)(4) of this section apply to liabilities incurred or assumed by a partnership on or after the date the regulations are published as final regulations in the **Federal Register**, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. Otherwise, the rules applicable to liabilities incurred or assumed (or subject to a binding contract in effect) prior to the date the regulations are published as final regulations in the **Federal Register** are contained in §1.704-2 in effect prior to the date the regulations are published as final regulations in the **Federal Register**, (see 26 CFR part 1 revised as of April 1, 2004).

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Par. 3. Section 1.752-2 is amended as follows:

1. Paragraph (a) is revised.
2. The last sentence of paragraph (b)(6) is revised.
3. Paragraph (h)(3) is revised.

4. Paragraphs (k) and (l) are added.

The revisions and additions read as follows:

§1.752-2 Partner's share of recourse liabilities.

(a) In general. A partner's share of a recourse partnership liability equals the portion of that liability, if any, for which the partner or related person bears the economic risk of loss. The determination of the extent to which a partner bears the economic risk of loss for a partnership liability is made under the rules in paragraphs (b) through (k) of this section.

(b) * * *

(6) * * * See paragraphs (j) and (k) of this section.

* * * * *

(h) * * *

(3) Valuation. The extent to which a partner bears the economic risk of loss for a partnership liability as a result of a direct pledge described in paragraph (h)(1) of this section or an indirect pledge described in paragraph (h)(2) of this section is limited to the net fair market value of the property at the time of the pledge or contribution. For purposes of this paragraph, if property is subject to one or more other obligations that are senior or of equal priority to the partnership liability, those obligations must be taken into account in determining the net fair market value of pledged property.

* * * * *

(k) Effect of a disregarded entity--(1) In general. In determining the extent to which a partner bears the economic risk of loss for a partnership liability, obligations of a business entity that is disregarded as an entity separate from its owner under

sections 856(i) or 1361(b)(3) or §§301.7701-1 through 301.7701-3 of this chapter (disregarded entity), that may be taken into account under paragraph (b)(1) of this section, are taken into account only to the extent of the net value of the disregarded entity (as determined under paragraph (k)(2) of this section) as of the date on which the partnership determines the partner's share of partnership liabilities pursuant to §1.752-4(d) and 1.705-1(a) that is allocated to the liability under paragraph (k)(4) of this section. The rules of this paragraph (k) do not apply to an obligation of a disregarded entity to the extent that the owner of the disregarded entity otherwise is required to make a payment (that satisfies the requirements of paragraph (b)(1) of this section) with respect to such obligation of the disregarded entity.

(2) Net value of a disregarded entity. For purposes of paragraph (k)(1) of this section, the net value of a disregarded entity equals the fair market value of all assets owned by the entity that may be subject to creditors' claims under local law, including the entity's enforceable rights to contributions from its owner but excluding the entity's interest in the partnership (if any) and the fair market value of property pledged to secure a partnership liability under paragraph (h)(1) of this section, less obligations of the disregarded entity that do not constitute, and are senior or of equal priority to, obligations of the disregarded entity that may be taken into account under paragraph (b)(1) of this section. After the net value of a disregarded entity is initially determined for purposes of paragraph (k)(1) of this section, the net value of the disregarded entity is not redetermined unless the obligations of the disregarded entity that are described in the preceding sentence change by more than a de minimis amount or there is more than a de minimis contribution to or distribution from the disregarded entity of property

other than property pledged to secure a partnership liability under paragraph (h)(1) of this section.

(3) Reduction in net value of a disregarded entity. For purposes of paragraph (k)(2) of this section, the net value of a disregarded entity is determined by taking into account a subsequent reduction in the net value of the disregarded entity if at the time the net value of the disregarded entity is determined it is anticipated that the net value of the disregarded entity will subsequently be reduced and the reduction is part of a plan that has as one of its principal purposes creating the appearance that a partner bears the economic risk of loss for a partnership liability.

(4) Allocation of net value. If one or more disregarded entities have obligations that may be taken into account under paragraph (b)(1) of this section with respect to one or more partnership liabilities, or liabilities of more than one partnership, the partnership must allocate the net value of each disregarded entity among partnership liabilities in a reasonable and consistent manner, taking into account priorities among partnership liabilities.

(5) Information to be provided by the owner of a disregarded entity. A partner that may be treated as bearing the economic risk of loss for a partnership liability based upon an obligation of a disregarded entity that may be taken in account under paragraph (b)(1) of this section must provide information as to the entity's tax classification and net value to the partnership on a timely basis.

(6) The following examples illustrate the rules of this paragraph (k):

Example 1. Disregarded entity with net value of zero. (i) In 2005, A forms a wholly owned domestic limited liability company, LLC, with a contribution of \$100,000. A has no liability for LLC's debts, and LLC has no enforceable right to contribution from

A. A files no election with respect to LLC under §301.7701-3 of this chapter. Also in 2005, LLC contributes \$100,000 to LP, a limited partnership with a calendar year taxable year, in exchange for a general partnership interest in LP, and B and C each contributes \$100,000 to LP in exchange for a limited partnership interest in LP. The partnership agreement provides that only LLC is required to make up any deficit in its capital account. On January 1, 2006, LP borrows \$300,000 from a bank and uses \$600,000 to purchase nondepreciable property. The \$300,000 debt is secured by the property and is also a general obligation of LP. LP makes payments of only interest on its \$300,000 debt during 2006. Under §§1.752-4(d) and 1.705-1(a), LP determines its partners' shares of the \$300,000 debt at the end of its taxable year, December 31, 2006. As of that date, LLC holds no assets other than its interest in LP.

(ii) Under §301.7701-3(b)(1)(ii) of this chapter, LLC is a disregarded entity. Because LLC is a disregarded entity, A is treated as the partner in LP for federal tax purposes. Only LLC has an obligation to make a payment on account of the \$300,000 debt if LP were to constructively liquidate as described in paragraph (b)(1) of this section. Therefore, under paragraph (k) of this section, A is treated as bearing the economic risk of loss for LP's \$300,000 debt only to the extent of LLC's net value. Because that net value is \$0 on December 31, 2006, when LP determines its partners' shares of its \$300,000 debt, A is not treated as bearing the economic risk of loss for any portion of LP's \$300,000 debt. As a result, LP's \$300,000 debt is characterized as nonrecourse under §1.752-1(a) and is allocated as required by §1.752-3.

Example 2. Disregarded entity with positive net value. (i) The facts are the same as in Example 1 except that on January 1, 2007, A contributes \$250,000 to LLC and LLC shortly thereafter uses the \$250,000 to purchase unimproved land. LP makes payments of only interest on its \$300,000 debt during 2007. Under §§1.752-4(d) and 1.705-1(a), LP again determines its partners' shares of the \$300,000 debt at the end of its taxable year, December 31, 2007. As of that date, LLC holds its interest in LP and the land, the value of which has declined to \$175,000.

(ii) A's contribution of \$250,000 to LLC on January 1, 2007, constitutes a more than de minimis contribution of property to LLC. Accordingly, under paragraph (k)(2) of this section, LLC's value is redetermined on December 31, 2007, when LP determines its partners' shares of its \$300,000 debt. As of that date, LLC's net value is \$175,000. Therefore, under paragraph (k) of this section, A is treated as bearing the economic risk of loss for \$175,000 of LP's \$300,000 debt. As a result, \$175,000 of LP's \$300,000 debt is recharacterized as recourse under §1.752-1(a) and is allocated to A under this section, and the remaining \$125,000 of LP's \$300,000 debt remains characterized as nonrecourse under §1.752-1(a) and is allocated as required by §1.752-3.

Example 3. Allocation of net value among partnership liabilities. (i) The facts are the same as in Example 2 except that on January 1, 2008, A forms another wholly owned domestic limited liability company, LLC2, with a contribution of \$120,000. Shortly thereafter, LLC2 uses the \$120,000 to purchase stock in X corporation. A has

no liability for LLC2's debts, and LLC2 has no enforceable right to contribution from A. A files no election with respect to LLC2 under §301.7701-3 of this chapter. On July 1, 2008, LP borrows \$100,000 from a bank and uses the \$100,000 to purchase nondepreciable property. The \$100,000 debt is secured by the property and is also a general obligation of LP. The \$100,000 debt is senior in priority to LP's existing \$300,000 debt. Also on July 1, 2008, LLC2 agrees to guarantee both LP's \$100,000 and \$300,000 debts. LP makes payments of only interest on both its \$100,000 and \$300,000 debts during 2008. Under §§1.752-4(d) and 1.705-1(a), LP determines its partners' shares of its \$100,000 and \$300,000 debts at the end of its taxable year, December 31, 2008. As of that date, LLC holds its interest in LP and the land, and LLC2 holds the X corporation stock which has appreciated in value to \$140,000.

(ii) Under §301.7701-3(b)(1)(ii) of this chapter, LLC2 is a disregarded entity. Both LLC and LLC2 have obligations to make a payment on account of LP's debts if LP were to constructively liquidate as described in paragraph (b)(1) of this section. Therefore, under paragraph (k) of this section, A is treated as bearing the economic risk of loss for LP's \$100,000 and \$300,000 debts only to the extent of the net values of LLC and LLC2, as allocated among those debts in a reasonable manner pursuant to paragraph (k)(4) of this section.

(iii) No events have occurred that would allow a revaluation under paragraph (k)(2) of this section. Therefore, LLC's net value remains \$175,000. LLC2's net value on December 31, 2008, when LP determines its partners' shares of its liabilities, is \$140,000. Under paragraph (k)(4) of this section, LP must allocate the net values of LLC and LLC2 between its \$100,000 and \$300,000 debts in a reasonable and consistent manner. Because the \$100,000 debt is senior in priority to the \$300,000 debt, LP first allocates the net values of LLC and LLC2, pro rata, to its \$100,000 debt. Thus, LP allocates \$56,000 of LLC's net value and \$44,000 of LLC2's net value to its \$100,000 debt, and A is treated as bearing the economic risk of loss for all of LP's \$100,000 debt. As a result, all of LP's \$100,000 debt is characterized as recourse under §1.752-1(a) and is allocated to A under this section. LP then allocates the remaining \$119,000 of LLC's net value and LLC2's \$96,000 net value to its \$300,000 debt, and A is treated as bearing the economic risk of loss for a total of \$215,000 of the \$300,000 debt. As a result, \$215,000 of LP's \$300,000 debt is characterized as recourse under §1.752-1(a) and is allocated to A under this section, and the remaining \$85,000 of LP's \$300,000 debt is characterized as nonrecourse under §1.752-1(a) and is allocated as required by §1.752-3. This example illustrates one reasonable method for allocating net values of disregarded entities among multiple partnership liabilities.

(l) Effective dates. Paragraphs (a), (b)(6), (h)(3), and (k) of this section apply to liabilities incurred or assumed by a partnership on or after the date the regulations are

published as final regulations in the **Federal Register**, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. Otherwise, the rules applicable to liabilities incurred or assumed (or subject to a binding contract in effect) prior to the date the regulations are published as final regulations in the **Federal Register** are contained in §§1.752-2 and 1.752-3 in effect prior to the date the regulations are published as final regulations in the **Federal Register**, (see 26 CFR part 1 revised as of April 1, 2004).