regulations provide that personal property includes any stock of a type that is actively traded and that is part of a straddle at least one of the offsetting positions of which is a position with respect to substantially similar or related property (other than stock). For this purpose, a position with respect to substantially similar or related property (other than stock) does not include direct ownership of stock or a short sale of stock but includes any other position with respect to substantially similar or related property. These proposed regulations thus clarify that, for example, stock and an equity swap with respect to property that is substantially similar or related to that stock can constitute a straddle for purposes of section 1092.

The proposed regulations also address the scope of section 1092(d)(3)(B)(i), which provides that stock that is offset by an option with respect to that stock or substantially identical stock or by a position with respect to substantially similar or related property (other than stock) is treated as personal property under section 1092(d)(3)(B). Although this provision does not contain an explicit active trading requirement, the legislative history of the Tax Reform Act of 1984 indicates that Congress contemplated that the stock would be treated as personal property under this test only if it is of a type that is actively traded. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 907 (1984). The regulations, therefore, include this requirement. In contrast, the regulations clarify that, for purposes of section 1092(d)(3)(B)(ii), if a corporation is formed or availed of to take positions in personal property that offset positions taken by any shareholder, stock of the corporation may be treated as personal property under section 1092(d)(3)(B) even if it is not actively traded.

The proposed regulations generally are effective for positions established on or after May 1, 1995. The IRS believes, however, that the regulations merely clarify the rule that applied once § 1.1092(d)–2 was promulgated. There is no implication that the results reached under these proposed regulations would not also be reached for positions established on or after March 17, 1995, and before May 1, 1995.

### **Special Analyses**

It has been determined that this notice of proposed rulemaking 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, 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 Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Wednesday, August 30, 1995, at 10 a.m. The public hearing will be held in the IRS Auditorium, 7th Floor, 1111 Constitution Avenue, NW., Washington DC 20224. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3)

apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments by July 31, 1995 and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by August 9, 1995.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information: The principal author of these regulations is Robert B. Williams, Office of Assistant Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and Treasury Department 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 1.1092(d)–2 is revised to read as follows:

### §1.1092(d)-2 Personal property.

- (a) *Special rules for stock.* As defined by section 1092(d)(1), *personal property* includes—
- (1) Any stock if the stock is of a type that is actively traded and the stock is part of a straddle at least one of the offsetting positions of which is—
- (i) An option with respect to that stock or substantially identical stock or securities: or
- (ii) Under paragraphs (b) and (c) of this section, a position with respect to substantially similar or related property (other than stock); and
- (2) Any stock, whether or not of a type that is actively traded, of a corporation formed or availed of to take positions in personal property as defined by section 1092(d)(1) that offset positions taken, directly or indirectly, by any shareholder.
- (b) Substantially similar or related property. For purposes of section 1092(d)(3)(B)(i)(II) and this section, the term substantially similar or related property is defined in § 1.246-5 (other than § 1.246-5(b)(3)). The rule in § 1.246-5(c)(6) does not narrow the related party rule in section 1092(d)(4).
- (c) Position with respect to substantially similar or related property (other than stock). For purposes of section 1092(d)(3)(B)(i)(II) and this section, a position with respect to substantially similar or related property (other than stock) does not include direct ownership of stock or a short sale of stock but includes any other position with respect to substantially similar or related property.
- (d) *Example*. The following example illustrates the application of this section.
- (1) Facts—(i) The stock. A acquired 10,000 shares of actively traded X stock during 1990. On September 29, 1995, those shares had a fair market value of \$1,000,000.
- (ii) The swap. On September 29, 1995, A entered into an "equity swap" contract with unrelated counterparty C, for a term of three years. Under the terms of that contract, on the last business day of each calendar quarter, A must pay to C an amount equal to the appreciation, if any, during the quarter on 10,000 shares of X stock. A also must pay to C an amount equal to the dividends, if any, that were paid during the quarter on 10,000 shares of X stock. On the last business day of each calendar quarter, A is to receive from C an amount equal to the depreciation, if any, during the quarter on 10,000 shares of X stock. A also is to receive from C an amount equal to the 3-month London Interbank Offered Rate (LIBOR), as determined at the close of the prior quarter, multiplied by the value of the X stock on that date.
- (2) Holdings—(i) The two legs as offsetting positions. Because holding the equity swap