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Legal Alerts

The Section 336(e) Election: An Important New Tool in Corporate Acquisitions

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Introduction

Section 336(e)1 expressly delegates authority to Treasury to issue regulations, allowing taxpayers to elect to treat the sale, exchange or distribution of corporate stock as a deemed sale of the corporation's underlying assets. On May 15, 2013, Treasury finalized regulations under Section 336(e).

What is the 336(e) Election?

A Section 336(e) election allows certain taxpayers to treat the sale, exchange or distribution of corporate stock as an asset sale. The benefit of an asset sale is obvious-the basis of the target corporation's assets is stepped up to fair market value.

If an election is made, "old target" is treated as selling all of its assets to "new target." New target is treated as purchasing those assets, resulting in a step-up in basis of the assets. Old target recognizes the gain or loss from the deemed asset sale immediately before the close of the stock transaction.

Section 336(e) is intended to provide taxpayers relief from multiple levels of tax on the same economic gain-economic gain attributable to the appreciation of assets held in corporate solution. Such multiple levels of tax can result from the taxable transfer of appreciated corporate stock where the assets in corporate solution do not receive a corresponding step-up in basis.

Who Can Use the 336(e) Election?

The Section 336(e) election is available if certain requirements are met:

• First, the seller (or sellers) must be a domestic corporation, a consolidated group of corporations, or an S corporation shareholder (or shareholders).
• Second, the seller must own sufficient stock in the target corporation to satisfy certain "vote and value requirements." Under the vote and value requirements, the seller must own at least 80% of the total voting power of the target corporation's stock and 80% of the total value of the target corporation's stock.

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• Third, within a 12-month period, the seller must sell, exchange or distribute a sufficient amount of stock to satisfy the vote and value requirements-80% of the total value and 80% of the voting power of the target stock.

Why Use a 336(e) Election Instead of the 338 Election?

A Section 338(h)(10) election also allows certain taxpayers to treat a stock sale as an asset sale, which results in a step-up in the basis of the target corporation's assets. The final Section 336(e) regulations adopt many of the principles set forth in the Section 338(h)(10) regulations. However, there are significant differences between the Section 338(h)(10) regulations and the final Section 336(e) regulations, including:

• Unlike a Section 338(h)(10) election, Section 336(e) does not require the acquirer of the stock to be a corporation (or even a purchaser). This critical difference allows the corporation to be converted to a flow-through entity after the acquisition.
• While a Section 338(h)(10) election generally requires a single purchasing corporation acquire the target stock, a Section 336(e) election allows the taxpayer to aggregate all target stock sold, exchanged or distributed to different acquirers when determining whether the vote and value requirements are met.
• Unlike a Section 338(h)(10) election, a Section 336(e) election is unilaterally made by the seller attaching a statement to its Federal tax return for the year of the acquisition.
• A Section 336(e) election is available in certain spin-off transactions under Section 355.

Section 336(e) offers many planning opportunities. It allows a deemed asset sale in many situations where an election under Section 338(h)(10) is unavailable. It is an important tool to consider when planning and negotiating a corporate acquisition. Because of the dramatic shift in tax liability resulting from a Section 336(e) election, it is necessary to understand the tax implications and to have the proper agreements in place before making the election.

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