Basics of U.S. tax-free spin-offs under section 355

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This article describes the basics of U.S. tax-free spin-off transactions under section 355, including the U.S. tax consequences, requirements, restrictions and potential complexities that arise in cross-border transactions.

1. Overview

This article describes the basics of U.S. tax-free spin-off transactions under section 355.[1] Section 355 is an essential tool for restructurings that may have U.S. tax consequences because it allows the movement of corporate entities without U.S. tax.[2]

The corporate income tax system in the United States generally imposes two levels of tax—one at the corporate entity level and one at the shareholder level. As a result, if a corporation distributes appreciated property to its shareholders the corporation will be taxed on the "built-in gain" of the property (*i.e.*, the amount the property has appreciated) and the shareholders will be taxed on the value of the property when it is received as a distribution.[3] Under section 355 of the U.S. Internal Revenue Code, however, the distribution of stock of a subsidiary that is "controlled" by another corporation may not be subject to tax either at the corporate level or to the recipient shareholders, provided a number of requirements are met.

A section 355 transaction generally involves a parent company owned by shareholders and a subsidiary owned by the parent. The transaction generally results in the shareholders of the parent owning stock in two

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separate entities. The parent and distributing corporation is generally referred to as "Distributing" and the subsidiary corporation is generally referred to as "Controlled."

Section 355 transactions are often referred to generally as "spin-offs," but can also be structured as "split-ups" or "split-offs." A spin-off is the *pro rata* distribution of the stock of a corporation that is controlled by Distributing. In a spin-off, Distributing distributes the stock of controlled to its shareholders and the shareholders do not surrender any stock. Thus, after a spin-off, all of the prior shareholders of Distributing now own stock of both Distributing and Controlled. A split-off is the distribution of the stock of Controlled to some, but not all, of the shareholders of Distributing in exchange for stock of Distributing. In a split-off, the shareholders of Distributing that receive stock of Controlled surrender stock of Distributing. Thus, after a split-off, some prior shareholders of Distributing continue to hold stock of Distributing and some other shareholders now hold stock of Controlled instead of stock in Distributing. A split-up is the distribution of the stock of two or more controlled corporations in complete liquidation of Distributing. After a split-up, some prior shareholders of Distributing hold stock in one controlled corporation and other prior shareholders hold stock in another controlled corporation. Distributing is liquidated and ceases to exist.

A section 355 transaction may also be structured as a "divisive D reorganization." In a divisive "D" reorganization, part of the assets of Distributing that constitute a business are transferred to Controlled before the distribution of Controlled stock. In a divisive "D" reorganization, Controlled is often, but not necessarily, newly formed. The stock of Controlled is then distributed to the shareholders of Distributing in a section 355 transaction.[4]

2. Tax Consequences of Transaction Qualifying Under Section 355

A transaction that satisfies the requirements under section 355 will have the following tax consequences:

– *No shareholder-level gain*. A distribution qualifying under section 355 will not result in the imposition of tax at the shareholder level.[5] Shareholders are generally subject to tax on distributions from a corporation with respect to its stock, depending on whether the corporation has earnings and profits and the shareholders' basis in the stock.[6] However, if the transaction qualifies under section 355, this tax will not apply.

– *No corporate-level gain*. A distribution qualifying under section 355 will also not result in the imposition of any corporate-level tax, unless section 355(*d*), (*e*) or (*f*) applies (discussed in more detail in the section on "restrictions" below).[7]

– *Gain on the distribution of boot*. Boot (assets other than stock or securities) distributed as part of a section 355 transaction will, however, be subject to both corporate- and shareholder-level tax.[8] If Distributing distributes any property other than stock or securities in Controlled as part of the distribution, the distribution is taxable to the distributee receiving such property under section 356, and any appreciation in this other property is taxable to Distributing under section 355(c).[9]

– *Carryover Basis*. The basis of the stock and securities in Controlled received by shareholders of Distributing in a section 355 transaction is determined by reference to the recipient's basis in the stock and securities of Distributing.[10] In other words, the basis that the Distributing shareholders held in their Distributing stock carries over to the basis they take in the stock of Controlled that they receive in the transaction. The recipient's aggregate basis in the stock and securities of Distributing, before the distribution, is allocated based on relative fair market values between the stock and securities retained in Distributing and the stock and securities received in Controlled.[11]

– *Tax Attributes*. In a section 355 transaction that is also a divisive "D" reorganization (*i.e.*, assets are contributed from Distributing to Controlled prior to the distribution of Controlled stock), the tax attributes of Distributing, except for that corporation's earnings and profits, will remain with Distributing.[12] Distributing's earnings and profits will be allocated between Distributing and Controlled in proportion to the value of the retained and transferred assets.[13]

If a section 355 transaction is a spin-off or a split-off, the regulations provide that the earnings and profits of Distributing are decreased by the lesser of (*i*) the amount of the adjustment that would have been made to the earnings and profits of Distributing if it had transferred the stock of Controlled to a new subsidiary in a divisive "D" reorganization, or (*ii*) the net worth of Controlled.[14] The remaining tax attributes of Distributing and the tax attributes of Controlled are generally unaffected. Note, however, that section 382, which limits the use of losses following certain changes in ownership may limit the carryover of Distributing or Controlled's losses after a split-off. If the section 355 transaction is a split-up, the tax attributes of Distributing disappear and the tax attributes of Controlled are not affected.

3. Requirements for Transactions To Qualify under section 355

A transaction must satisfy two sets of requirements to qualify as a section 355 transaction and obtain the tax consequences described above. First, the transaction must satisfy the statutory requirements in section 355 itself—(*i*) control; (*ii*) device; (*iii*) active trade or business; and (*iv*) distribution. Second, the transaction must satisfy certain non-statutory requirements that have developed through case law—(*i*) business purpose; (*ii*) continuity of interest; and (*iii*) continuity of business enterprise. These requirements are discussed in further detail individually below.

3.1 Statutory Requirements

– *Control*. In order for section 355 to apply to the distribution of a corporation's stock, Distributing must be in control of Controlled immediately before the distribution.[15] If a spin-off involves a divisive "D" reorganization, it is also necessary that either Distributing or its shareholders control Controlled "immediately after the transfer."[16]

A corporation is considered to "control" another corporation for purposes of section 355 if it owns stock possessing 80% of the total combined voting power of all classes of stock entitled to vote in the second corporation and at least 80% of the total number of shares of each of the other classes of stock of that corporation.[17] The key factor in determining voting control is generally the ability to elect directors.[18] In certain circumstances, however, a court may look beyond the power to elect directors if there are unusual voting rights allocated to different classes of shares.[19]

It is not necessary that Distributing's control of Controlled be "historic control." Steps may be undertaken in certain cases prior to the section 355 transaction in order to satisfy the control requirement. For example, a recapitalization of Controlled prior to its distribution by Distributing, which results in the control requirement being satisfied, will generally be respected as long as the recapitalization results in a permanent realignment of control.[20] In addition, the merger of two sister corporations that jointly own stock in a subsidiary resulting in the surviving corporation having control of the subsidiary will generally be respected.[21] The transfer of assets for additional stock causing the transferor to be in control of the transferee will also generally be respected.[22] However, control may not be acquired in a taxable transaction, or it could violate section 355(*b*)(2)(D) (discussed in more detail below). For example, the redemption by Controlled of shareholders other than Distributing, giving Distributing control of Controlled, violates section 355(*b*)(2)(D).[23]

As mentioned above, if a spin-off involves a divisive "D" reorganization, either Distributing or its shareholders must control Controlled "immediately after the transfer."[24] Control is defined as ownership of stock possessing 80% of the total combined voting power of all classes of stock entitled to vote and at least 80% of the total number of shares of each of the other classes of stock of that corporation.[25] Where events that could be viewed as part of the same overall transaction as the spin-off reduce the historic shareholders' ownership percentage in the spin-off corporation below 80%, the Internal Revenue Service (the "Service") has historically applied step-transaction principles to reorder the steps so that the transaction fails the control test. However, because there is no requirement that shareholders control Distributing before or after a spin-off, the Service has only applied step-transaction principles in situations where Controlled, rather than Distributing, is acquired.

– *Device*. In order for section 355 to apply to the distribution of Controlled's stock, the distribution cannot be principally a device for the distribution of earnings and profits of Distributing, Controlled, or both corporations.[26] Historically, the focus of the anti-device requirement in section 355 has been to preclude shareholders from bailing out earnings and profits at favourable capital gains rates. Even in the absence of a rate disparity between ordinary income and capital gains, this issue remains relevant because of the ability to recover basis on a distribution rather than recognize dividend income.[27] Whether a transaction is used principally as a device for the distribution of earnings and profits is determined by a review of all the facts and circumstances surrounding the transaction.[28] The Treasury regulations under section 355 provide certain factors that are considered evidence of a device and certain factors that are considered evidence that the transaction is not a device.

Factors that are considered evidence of a device include the fact that a distribution is *pro rata* or substantially *pro rata*[29]and a sale or exchange of stock of Distributing or Controlled after the distribution.[30] In addition, consideration is given to the nature, kind, amount, and use of the assets of both Distributing and Controlled (and corporations controlled by them) immediately after the transaction.[31] The existence of a device based on the nature of the assets depends in part on the ratio for each corporation of the value of the assets not used in an active trade or business to the value of the assets used in an active trade or business.[32]

A corporate business purpose for a transaction is evidence that the transaction was not undertaken as a device. The stronger the evidence of a device, the stronger the corporate business purpose must be to overcome the evidence of a device. The fact that Distributing is publicly traded and has no shareholder who is directly or indirectly the beneficial owner of more than five per cent of any class of stock is evidence that the transaction is not a device.[33] The fact that Distributing is publicly traded and has no shareholder who is directly or indirectly the beneficial owner of more than five per cent of any class of stock is evidence that the transaction is not a device.[34] The fact that stock of Controlled is distributed to one or more domestic corporations that, if section 355 did not apply, would be entitled to an 80% or 100% dividends-received-deduction under section 243(c) or section 243(*a*)(2) or (3) is evidence that the transaction is not a device.[35] A distribution is ordinarily not considered to have been used principally as a device if Distributing and Controlled have no current or accumulated earnings and profits as of the date of the distribution, and no distribution of property immediately before the transaction by Distributing would require the recognition of gain resulting in current earnings and profits for the year of the distribution.[36]

– *Active Trade or Business*. Distributing and Controlled must each satisfy the active trade or business requirement immediately after the distribution.[37] A corporation is treated as engaged in the active conduct of a trade or business if each of the following four requirements is satisfied. First, the corporation must be currently engaged in the active conduct of a trade or business.[38] Second, the trade or business must have been actively conducted throughout the five-year period ending on the date of the distribution.[39] Third, the trade or business must not have been acquired during the five-year period ending on the date of the distribution in a transaction in which any gain or loss was recognized.[40] Finally, control of a corporation conducting such trade or business must not have been acquired by Distributing or any distributee corporation directly or through one or more other corporations within the five-year period preceding the distribution in a transaction in which any gain or loss was recognized.[41]

To be considered an "active trade or business," the activities of a corporation (*i*) must be a "trade or business" and (*ii*) must be "actively conducted." The regulations provide a broad definition of what activities constitute a trade or business, primarily focusing on whether the purpose of the activities is to generate a profit. The regulations also provide that the activities must include all steps in the process of earning income, specifically noting that ordinarily these steps must include the collection of income and the payment of expenses.[42] In order for a trade

or business to be considered actively conducted, the corporation itself must perform active and substantial management and operational functions.[43] The Service has ruled that one managerial employee and one operating employee are sufficient.[44] Generally, activities of independent contractors or others outside the corporation are not taken into account.[45] The active conduct of a trade or business generally does not include holding stock, securities, land, or other property for investment purposes,[46] owning and/or leasing real or personal property, unless the owner performs significant services with respect to the operation and management of the property,[47] or holding non-operating assets for use by a related corporation.[48]

The trade or business must have been actively conducted for the five-year period preceding the distribution.[49] For this reason, the requirement is often referred to as the "5-year active trade or business requirement." If the business has been acquired in a tax-free acquisition, the predecessor's business history is tacked in computing whether the business has been actively conducted for a five-year period.[50] In determining whether a trade or business has been actively conducted for the five-year period preceding the distribution, the fact that during such period the trade or business underwent a change such as the addition of new, or the dropping of old, product lines or a change in production capacity is disregarded as long as the change is not of such a character as to constitute the acquisition of a new or different business.[51] The expansion of an existing business generally constitutes the continuation of the existing business rather than the beginning of a new business.[52]

– *Distribution*. In general, in order for section 355 to apply to the distribution of stock of Controlled, Distributing must generally distribute all of the stock and securities in Controlled held by it immediately before the distribution.[53] Stock in Controlled must be distributed to Distributing's shareholders with respect to their stock, or received in exchange for Distributing's securities by the holders of such securities.[54] A limited exception to the general rule that Distributing must distribute all of the stock and securities of Controlled is provided if Distributing distributes an amount of stock in Controlled constituting control, and it can establish to the satisfaction of the Service that the retention of some stock or securities in Controlled does not have the principal purpose of avoiding federal income tax.[55] The regulations provide, however, that ordinarily the corporate business purpose or purposes for the distribution require that all of Controlled's stock and securities be distributed.[56]

3.2 Non-statutory Requirements

In addition to the statutory requirements discussed above, there are also non-statutory requirements that apply to section 355 transactions. These requirements includes business purpose, continuity of interest, and continuity of business enterprise.

– *Business Purpose*. In *Gregory v. Helvering*, 293 U.S. 465 (1935), the Supreme Court set forth the principle that literal compliance with the express statutory requirements of section 355 is not sufficient — a valid business purpose for the transaction must also be present. The Treasury regulations incorporate this principle and specifically state that the transaction must be "carried out for one or more corporate business purposes" in order to qualify for the tax consequences under section 355.[57] The IRS no longer grants private letter rulings confirming that specific business purposes are sufficient for purposes of section 355. However, prior to 2003, the IRS did grant such rulings. Past rulings that have been published give some indication of the types of business purposes that are considered sufficient to satisfy this requirement. Such purposes include fit and focus (concentrating the activities of a single entity on a single business or group of businesses), risk reduction (segregating businesses with more risks away from other businesses), facilitation of an acquisition by separating wanted and unwanted assets, compensation of employees through stock ownership plans tied to specific businesses, raising capital, and cost savings. This is not an exclusive list. The business purpose does not have to be one of those listed, but does have to be real and supported by facts.

– *Continuity of Interest*. The regulations under section 355 further provide that "section 355 requires that one or more persons who, directly

or indirectly, were owners of the enterprise prior to the distribution or exchange own, in the aggregate, an amount of stock establishing a continuity of interest in each of the modified corporate forms in which the enterprise is conducted after the separation."[58] The regulations provide that the continuity of interest test is satisfied if shareholders of Distributing maintain some minimum level of continuity in both Distributing and Controlled following the section 355 transaction.[59] By way of example, the Service sets forth in the regulations that 20% continuity of interest is insufficient, whereas 50% continuity is sufficient.[60] Note, however, that where the spin-off involves a divisive "D" reorganization, there is an additional requirement that either Distributing or its shareholders control the spun-off corporation immediately after the transaction.

A second aspect of the continuity of interest requirement is whether the recipient shareholders must retain the stock of Distributing and Controlled for a period of time after the transaction. The continuity of interest requirement, as set forth in the regulations, requires a continuing level of equity participation in both Distributing and Controlled. Where subsequent dispositions of stock cause the shareholder's ownership to drop below this minimum level, the Service can be expected to argue that continuity of interest is lacking. Nevertheless, at some point in time, the shareholder should be able to dispose of his entire stock interest without risking a loss of continuity (i.e., the shareholder's stock becomes "old and cold"). In the context of a reorganization under Section 368, the Service has stated that it will treat a five-year period of unrestricted ownership as a sufficient period of time for purposes of satisfying the continuity of interest requirement (i.e., the stock will be treated as "old and cold").[61] A disposition of the stock after that point in time will not violate continuity of interest. Nonetheless, the courts have held, in the context of a reorganization, that post-reorganization sales of stock less than five years after the reorganization did not violate the continuity of interest requirement.[62] Whether a shareholder sells his stock before it becomes "old and cold" often turns on step-transaction principles. Determining factors include, for example, whether the disposition occurred in close proximity to the distribution, whether the disposition was a sale or a reorganization, and whether the disposition was pursuant to a binding contract at the time of the distribution. A third aspect of the continuity of interest requirement is whether the "historic" shareholders must be the ones who receive (or maintain) the requisite stock interest in Distributing and Controlled. The regulations require continuity of interest on the part of the "owners of the enterprise prior to the distribution or exchange" and specifically provide that the continuity of interest must be with respect to historic shareholders.[63] Another key aspect of the continuity of interest requirement is whether continuity must be maintained in both Distributing and Controlled. The regulations explicitly provide that continuity must be maintained in both corporations.[64] To satisfy this requirement, it is not necessary for each shareholder to continue to own an equity interest in each corporation following the transaction. Rather, the continuing shareholders in one corporation do not necessarily have to be the same as the continuing shareholders in the other corporation (*e.g.*, a split-off).[65]

– *Continuity of Business Enterprise*. The regulations also appear to impose a continuity of business enterprise requirement on section 355 transactions, stating that "section 355 contemplates the continued operation of the business or businesses existing prior to the separation."[66] This, however, is not a separately stated requirement in the regulations and the Service apparently has not applied the continuity of business enterprise requirement to prevent a distribution from qualifying under Section 355 when the other requirements are satisfied.

4. Restrictions

A transaction that satisfies the requirements described above may still be subject to certain restrictions that may limit the benefits of Section 355. Section 355(d) provides limitations that preclude corporations from distributing recently acquired businesses tax-free. Section 355(e) and Section 355(f) are limitations that are intended to limit the benefits from what are known as "Morris Trust" transactions. In *Commissioner v.*

– *Mary Archer W. Morris Trust*,[67], a state bank entered into a merger agreement with a national bank. The state bank had an insurance department, which the national bank did not want to acquire. In order to facilitate the merger, the state bank contributed its insurance department to a newly formed corporation and spun off the corporation to its shareholders. Thus, transactions in which a target company spins off unwanted assets to its shareholders to facilitate an acquisition became known as "Morris Trust" transactions. Such transactions were blessed as tax free under Section 355 for more than 30 years until the enactment of Section 355(e) in 1997.[68] These limitations are discussed in more detail below.

– *Section 355(d)*. Section 355(*d*) requires that Distributing recognize gain (but does not require that the distributee shareholders recognize income) on a "disqualified distribution" of subsidiary stock or securities. A disqualified distribution means any distribution to which Section 355 applies if, immediately after the distribution, a shareholder holds stock representing a 50% or greater interest (by vote or value) in either Distributing or a controlled subsidiary that is attributable to stock or securities that were acquired by "purchase" after October 9, 1990, and during the 5-year period ending on the distribution date ("disqualified stock"). Under the section 355(*d*) rules, gain will be recognized by Distributing on a disqualified distribution. If a disqualified distribution is made, then all gain in respect of the distributed shares will be realized — not just that relating to disqualified stock. Congress granted Treasury regulatory authority to exclude from section 355(*d*) transactions that do not violate the purposes thereof. Treasury has issued regulations that limit the reach of section 355(*d*) to transactions that violate its purposes. Under the regulations, if section 355(*d*) would otherwise apply to a distribution, the distribution will not be subject to section 355(*d*) if it meets a two-prong test: a "disqualified person" neither (1) increases its direct or indirect ownership in Distributing or Controlled nor (2) obtains a "purchased basis" in Controlled stock (the "purpose exception").[69]

– *Section 355(e)*. Under section 355(*e*), if there is a section 355 distribution that is part of a plan pursuant to which one or more persons acquire stock representing at least a 50% interest in Distributing or any controlled corporation, Distributing must recognize gain. There is no gain recognition at the shareholder level. Section 355(*e*)(2)(B) creates a rebuttable presumption that any acquisition occurring two years before or after a Section 355 distribution is part of a plan including such distribution. The Service has issued several sets of regulations providing guidance on what constitutes a plan or series of related transactions and how to rebut this presumption.[70] Distributing recognizes gain in the amount that it would have recognized had it sold the Controlled stock for its fair market value on the date of the distribution. Any gain recognized is treated as long-term capital gain.

Final regulations under Section 355(*e*) provide guidance as to what constitutes a "plan (or series of related transactions)" for purposes of Section 355(*e*).[71] The final regulations provide that a post-distribution acquisition can be part of a plan only if there was an agreement, understanding, arrangement, or substantial negotiations regarding the acquisition or a similar acquisition at some time during the two-year period ending on the date of the distribution.[72] This rule (hereinafter referred to as the "super safe harbor") acts as sort of a super safe harbor. If the requirements for the super safe harbor are satisfied, there is no need to look at the safe harbors or do a facts-and-circumstances analysis. The existence of an agreement, understanding, arrangement, or substantial negotiations during the two-year period tends to show that the distribution and acquisition are part of a plan, but such showing may still be rebutted using the safe harbors or the facts-and-circumstances approach.

– *Section 355(f)*. Under Section 355(*f*), intragroup spins are generally not taxed (but are subject to the issuance of regulations under Section 358). However, Section 355(*f*) provides that Section 355 will not apply to distributions of stock from one member of an affiliated group to another member if the distribution is part of a Morris Trust transaction described in Section 355(*e*). Because Section 355 in its entirety does not apply to such intragroup spin-offs, the intragroup

spin-off will be taxable to both Distributing and the shareholder.

5. Specific International Considerations

If Distributing, Controlled, or the shareholders of Distributing are not U.S. persons, then one must also consider the potential application of Section 367 to the transaction. Section 367 is intended to prevent the avoidance of U.S. tax that can arise from the application of non-recognition provisions in the cross-border context. In certain circumstances, Section 367 prevents gain from being permanently moved out of the U.S. tax jurisdiction by changing the consequences of non-recognition transactions, including those qualifying under Section 355.

Section 367(*e*) applies to a distribution under Section 355 from a U.S. corporation to a foreign person. In general, a U.S. Distributing corporation must always recognize it gain on the distribution of the stock or securities of a foreign Controlled corporation to a foreign distribute. On the other hand, a U.S. distributing corporation generally does not recognize gain under Section 367(*e*)(*1*) on the distribution of stock or securities of a domestic corporation. To the extent that Section 367(*e*) does not require gain recognition, then Section 367(*b*) may apply. The regulations under Section 367(*b*) generally do not require the further recognition of income or gain in the case of a distribution under Section 355 by a U.S. Distributing corporation to a distributee that is a corporation. However, if the Distributee is an individual, the regulations provide that the foreign Controlled corporation is not considered to be a corporation for purposes of determining the gain recognized by Distributing. This will cause the non-recognition provisions not to apply and gain to be recognized. If Distributing is a foreign corporation, then the regulations under Section 367(*b*) operate to preserve the application of Section 1248, which provides for dividend treatment of gain on certain dispositions of stock in controlled foreign corporations. The regulations under Section 367(b) may require an adjustment to basis or to earnings in profits after a Section 355 transaction, or may require a deemed dividend to the extent the potential impact of Section 1248 would be reduced in the transaction.

6. Conclusion

There are many other additional complexities that arise in the application of Section 355 to specific transactions. This article covers only the basics. While the requirements and complexities can be burdensome, the potential U.S. tax advantages can be significant. Section 355 transactions are an essential tool for restructurings with potential U.S. tax consequences.

1. Unless otherwise clear from context, all references to "Section" are to the United States Internal Revenue Code of 1986, as amended, and all references to "Treas. Reg. §" are to the United States Treasury regulations thereunder.

2. For a more detailed and comprehensive discussion of transactions under section 355, *see* "Corporate Divisions under section 355," Mark J. Silverman, Steptoe & Johnson LLP, Practising Law Institute, Tax Strategies for Corporate Acquisitions, Dispositions, Spin-offs, Joint Ventures, Financings, Reorganizations and Restructurings 2011, June 2011.

3. *See* Section 311; Section 301
4. Section 368(a)(1)(D). There are different types of "reorganization" transactions that may be accomplished under Section 368(a)(1)(A)-(G). A "D" reorganization under Section 368(a)(1)(D) is one type of reorganization and involves the transfer of assets to a corporation controlled by the transferor.
5. *See* Section 355(a)(1).
6. *See* Section 301.
7. *See* Section 355(c)(1).
8. *See* Section 355(c)(2).
9. *See* Treas. Reg. § 1.355-2(a).
10. *See* Section 358(a)(1); 358(b)(2). But see Section 358(g) (authorizing the Service to provide adjustments to the stock basis of members in connection with intragroup distributions).
11. *See* Section 358(b)(2).
12. *See* Section 381(a).
13. Treas. Reg. § 1.312-10(a).
14. Treas. Reg. § 1.312-10(b).
15. *See* Section 355(a)(1)(A).
16. *See* Section 368(a)(1)(D).
17. Section 368(c); Rev. Rul. 59-259, 1959-2 C.B. 115.
18. *See Hermes Consol., Inc.* v. *United States*, 14 Cl. Ct. 398 (1988); Rev. Rul. 69-126, 1969-1 C.B. 218.
19. *See, e.g., Framatone Connectors USA, Inc.* v. *Commissioner*, 118 T.C. 32 (2002) (stating in dicta that supermajority and unanimous approval requirements for certain corporate actions prevented the corporation from being a controlled foreign corporation); *Alumax* v. *Commissioner* 109 T.C. 133 (1997), aff'd, 165 F.3d 822 (11th Cir. 1999) (involving disproportionate voting rights as a result of certain class vote and veto provisions); *Hermes*, 14 Cl. Ct. at 405 (stating in dicta that the power to approve or disapprove fundamental changes in the corporate structure may be relevant in determining voting power of minority shareholders).
20. *See, e.g.,* Rev. Rul. 69-407, 1969-2 C.B. 50
21. *See, e.g.,* Rev. Rul. 70-18, 1970-1 C.B. 74.
22. *See, e.g.,* Rev. Rul. 71-593, 1971-2 C.B. 181.
23. *See McLaulin* v. *Commissioner*, 276 F.3d 1269 (11th Cir. 2001); Rev. Rul. 57-144, 1957-1 C.B. 123.
24. Section 368(a)(1)(D)
25. Section 368(c)
26. Section 355(a)(1)(B); Treas. Reg. § 1.355-2(d)(1)
27. The regulations specifically provide that a device can include a transaction that affects the recovery of basis. Treas. Reg. § 1.355-2(d)(1).
28. Treas. Reg. § 1.355-2(d)(1).
29. Treas. Reg. § 1.355-2(d)(2)(ii).
30. Treas. Reg. § 1.355-2(d)(2)(iii)(A).
31. Treas. Reg. § 1.355-2(d)(2)(iv)(A).
32. Treas. Reg. § 1.355-2(d)(2)(iv)(B).
33. Treas. Reg. § 1.355-2(d)(3)(iii).
34. Treas. Reg. § 1.355-2(d)(3)(iii).
35. Treas. Reg. § 1.355-2(d)(3)(iv).
36. Treas. Reg. § 1.355-2(d)(5)(ii); Rev. Rul. 71-384, 1971-2 C.B. 181.
37. Section 355(b)(1)(A).
38. Section 355(b)(2)(A).
39. Section 355(b)(2)(B).

40. Section 355(b)(2)(C).
41. Section 355(b)(2)(D).
42. Treas. Reg. § 1.355-3(b)(2)(ii).
43. Treas. Reg. § 1.355-3(b)(2)(iii); Rev. Rul. 88-19, 1988-1 C.B. 114.
44. Rev. Rul. 73-234, 1973-1 C.B. 180, distinguished Rev. Rul. 86-126, 1986-2 C.B. 58.
45. Treas. Reg. § 1.355-3(b)(2)(iii).
46. Treas. Reg. § 1.355-3(b)(2)(iv)(A).
47. Treas. Reg. § 1.355-3(b)(2)(iv)(B);
48. See Martin Ice Cream Co. v. Commissioner, 110 T.C. 189 (1998).
49. Treas. Reg. § 1.355-3(b)(3).
50. See Atlee v. Commissioner, 67 T.C. 395, 405 n.17 (1976), acq., 1977-1 C.B. 1; P.L.R. 9405022 (Nov. 8, 1993).
51. Treas. Reg. § 1.355-3(b)(3)(ii).
52. Treas. Reg. § 1.355-3(b)(3)(ii)
53. Section 355(a)(1)(D)(i).
54. Section 355(a)(1)(A).
55. Section 355(a)(1)(D)(ii); see also Reg. § 1.355-2(e).
56. Treas. Reg. § 1.355-2(e)(2).
57. Treas. Reg. § 1.355-2(b)(1).
58. Treas. Reg. § 1.355-2(c)(1).
59. Treas. Reg. § 1.355-2(c)(1).
60. Treas. Reg. § 1.355-2(c)(2), Exs. 1-4.
61. See Rev. Rul. 66-23, 1966-1 C.B. 67; Rev. Rul. 78-142, 1978-1 C.B. 111.
62. *See Penrod* v. *Commissioner*, 88 T.C. 1415 (1987) (sale within nine months of reorganization did not violate continuity). But *see McDonald's Restaurants of Illinois* v. *Commissioner*, 688 F.2d 520 (7th Cir. 1982) (sale within seven months of reorganization violated continuity); Section 355(e) and (f), which effectively eliminated tax-free *Morris Trust* transactions and intragroup spins related to such transactions.
63. Treas. Reg. § 1.355-2(c)(1), (2), Ex. 3. (The reference to owners presumably refers to shareholders, but query whether the phrase would include creditors of a financially troubled corporation.)
64. Treas. Reg. § 1.355-2(c)(2), Exs. 3 and 4.
65. Treas. Reg. § 1.355-2(c)(2), Exs. 1 and 2.
66. Treas. Reg. § 1.355-1(b).
67. 367 F.2d 794 (4th Cir. 1966), acq. Rev. Rul. 68-603, 1968-2 C.B. 148
68. *See, e.g.,* Rev. Rul. 78-251, 1978-1 C.B. 89; Rev. Rul. 75-406, 1975-2 C.B. 125; Rev. Rul. 72-530, 1972-2 C.B. 212; Rev. Rul. 70-434, 1970-2 C.B. 83.
69. Treas. Reg. § 1.355-6(b)(3)(i)(A), (B); For a more detailed and comprehensive discussion of these regulations, *see* "Final Section 355(e) Plan Regulations– The Section 355(d) Regulations: Narrowing the Scope of an Overly Broad Statute," Mark J. Silverman, Steptoe & Johnson LLP, Practising Law Institute, Tax Strategies for Corporate Acquisitions, Dispositions, Spin-offs, Joint Ventures, Financings, Reorganizations and Restructurings 2011, June 2011.
70. For a more detailed and comprehensive discussion of these regulations, *see* "Final Section 355(e) Plan Regulations – The Final Chapter in the Saga," Mark J. Silverman, Steptoe & Johnson LLP, Practising Law Institute, Tax Strategies for Corporate Acquisitions, Dispositions, Spin-offs, Joint Ventures, Financings, Reorganizations and Restructurings 2011, June 2011.
71. Treas. Reg. § 1.355-7.
72. Treas. Reg. § 1.355-7(b)(2).