

---

---

# Mergers, Acquisitions, and Buyouts

*A Transactional Analysis of the Governing Tax,  
Legal, and Accounting Considerations*

**June 2024 Edition**

**Martin D. Ginsburg**

*Georgetown University Law Center*

**Jack S. Levin**

*Kirkland & Ellis LLP*

**Donald E. Rocap**

*Kirkland & Ellis LLP*

**Volume 1**

**Chapters 1–5**

**Volumes 1-4 Co-authors**

William R. Welke

Patrick C. Gallagher

Keith E. Villmow

Professor Ginsburg, the finest tax lawyer and human being of all time, passed away on 6/27/10.

**This volume is current through June 18, 2024**



Wolters Kluwer

---

# Summary of Contents

---

<i>About the Authors</i>	vii
<i>Acknowledgments</i>	xii
<i>Detailed Table of Contents</i>	xvii

## Volume 1

1	Introduction, Overview and Definitions	1-1
2	Taxable Purchase of T's Stock and Taxable Reverse Subsidiary Merger	2-1
3	Taxable Purchase of T's Assets and Taxable Forward Merger	3-1
4	Taxable Acquisitions: Acquisition Expenses, Stepped-Up Basis Allocation, Intangibles Amortization, Non-Compete Covenant, Tax Receivable Agreement, Etc.	4-1
5	Unwanted Assets	5-1

## Volume 2

6	Tax-Free Reorganization Basic Principles	6-1
7	"Solely for Voting Stock" Reorganizations	7-1
8	Reorganizations Not "Solely for Voting Stock"	8-1
9	Code §351 Acquisitions and Dispositions	9-1
10	Tax-Free Spin-Offs	10-1

## Volume 3

11	Taxable and Tax-Free S Corp Acquisitions	11-1
12	Acquiring or Restructuring Distressed Company, Including Debt Cancellation Income and NOLs	12-1
13	Tax Aspects of LBO Financing—Debt and Preferred Stock	13-1
14	Tax Aspects of LBO Structuring	14-1

## Volume 4

15	Management Compensation	15-1
16	Acquisitions and Dispositions Using Partnership, LLC, or REIT	16-1
17	Non-Tax Acq'n Issues, Incl'g SEC, State Entity Law, ERISA Group Liability, Acctg, Fraudulent Conveyance, and HSR Antitrust Reporting	17-1

## Summary of Contents

Chapters 18–20 reserved

<i>Table of Internal Revenue Code Sections</i>	T-1
<i>Table of Treasury Regulations</i>	T-29
<i>Table of Treasury Rulings</i>	T-57
<i>Table of Securities Laws</i>	T-75
<i>Table of FASB Statements</i>	T-77
<i>Table of Cases</i>	T-79
<i>Index</i>	I-1

## Volume 5

¶2100 Introduction to Sample Acquisition Agreements	21-1
¶2101 Key Issues in Preparing Acquisition Documents	21-2
¶2102 Principal Structuring Issues	21-24
¶2103 Summary Overview of Sample Acquisition Agreements	21-46
¶2200 P's Purchase of T's Stock for Cash and Notes	22-1
¶2201 Pro-Buyer Stock Purchase	22-4
¶2202 Pro-Seller Stock Purchase	22-87
¶2203 Neutral Stock Purchase	22-138
¶2204 Purchase of Subsidiary Out of Consolidated Group	22-212
¶2205 Purchase Price Adjustment	22-234
¶2206 Purchase of S Corp Stock	22-243
¶2300 P's Purchase of All T's Assets for Cash and Notes	23-1
¶2301 Pro-Buyer Asset Purchase	23-4
¶2302 Pro-Seller Asset Purchase	23-99
¶2303 Neutral Asset Purchase	23-160
¶2304 Purchase Price Adjustment	23-244
¶2400 P's Purchase of T's Divisional Business for Cash and Notes	24-1
¶2401 Pro-Buyer Divisional Purchase	24-4
¶2402 Pro-Seller Divisional Purchase	24-90
¶2403 Neutral Divisional Purchase	24-143
¶2404 Purchase of Divisional Subsidiary Out of Consolidated Group	24-220
¶2405 Purchase Price Adjustment	24-220
¶2500 Reverse Subsidiary Merger of P's Transitory Subsidiary into T for Cash and Notes	25-1
¶2501 Protective Provisions	25-34
¶2600 Tax-Free Merger of T into P for P Stock	26-1
¶2601 Exhibit A—Agreement Regarding Continuity of Shareholder Interest	26-36

---

# Detailed Table of Contents

---

*About the Authors*  
*Acknowledgments*

vii  
xii

## Volume 1

### Chapter 1

---

#### Introduction, Overview and Definitions

---

¶101	IDENTIFIERS AND DEFINITIONS FREQUENTLY USED IN THIS TREATISE	1-3
	¶101.1 Identifiers	1-3
	¶101.2 Definitions	1-4
¶102	BUSINESS ENTITY EXPANSION	1-12
¶103	TOPICS COVERED	1-13
¶104	IMPORTANCE OF LEGAL AND TAX STRUCTURE TO THE ECONOMIC BARGAIN	1-14
¶105	4 BASIC ACQUISITION STRUCTURES AND THEIR TAX RAMIFICATIONS	1-16
¶106	MOST IMPORTANT ACQUISITION TAX AND OTHER ISSUES AND SUMMARY OF CONCLUSIONS	1-25
	¶106.1 Gain or Loss Recognized by T	1-25
	¶106.2 Gain or Loss Recognized by T's Shareholders	1-25
	¶106.3 Tax Rates and Character of Gain or Loss Recognized	1-26
	¶106.3.1 In General	1-26
	¶106.3.2 Taxation of QDI at LTCG Rates	1-30
	¶106.3.3 Additional Individual Rate Issues	1-33
	¶106.3.3.1 Uncapped Medicare Tax on Compensation and Self-Employment Income	1-34
	¶106.3.3.2 Uncapped Medicare Tax on Passive Income	1-35
	¶106.3.3.3 Scope of 2 Medicare Taxes	1-37
	¶106.3.3.4 Other Differences Between OI and CG	1-38
	¶106.3.4 Corporations	1-39

## Contents

¶106.3.5	2018–2025 Reduced Individual OI Rate for “Qualified [U.S.] Business Income”	1–40
¶106.3.5.1	Prong 1: Qualified U.S. Business Income	1–41
¶106.3.5.1.1	Qualified U.S. Business	1–43
¶106.3.5.1.2	Calculation of Prong 1 QBI Deduction	1–48
¶106.3.5.1.3	1 Business or Multiple Businesses	1–55
¶106.3.5.1.4	Netting of Income and Losses from Different Qualified Businesses	1–60
¶106.3.5.2	Prong 2: REIT Dividends and PTP Income	1–61
¶106.3.6	Capital Losses	1–62
¶106.4	Availability of Installment Method	1–62
¶106.5	Basis in T’s Assets After the Acquisition	1–63
¶106.6	Use of T’s Tax Attributes After the Acquisition	1–64
¶106.7	Use of P’s Tax Attributes After the Acquisition	1–65
¶106.8	Allocation of Amounts Paid by P	1–66
¶106.9	Step Transactions and Economic Substance	1–66
¶106.10	Unwanted Assets	1–67
¶106.11	Deductibility or Amortizability of Acquisition Expenses	1–67
¶106.12	Recission Doctrine	1–68
¶106.13	S Corp Status	1–69
¶106.14	Handling T’s Outstanding Management Stock Options	1–70
¶106.15	Imputed Interest and Preferred OID	1–70
¶106.16	Debt/Equity Characterization and Deductibility of Interest	1–71
¶106.17	LBO Structures	1–72
¶106.18	Compensating T’s Management After the Acquisition	1–73
¶106.19	Golden Parachute Tax	1–74
¶106.20	Greenmail Tax	1–74
¶106.21	T’s Liability for Past Taxes	1–75
¶106.22	Non-Tax Issues	1–75
¶106.22.1	Financial Accounting Treatment	1–75
¶106.22.2	Fraudulent Conveyance Laws	1–75
¶106.22.3	FTC Pre-Merger Notification Rules—Hart-Scott-Rodino Act	1–75
¶106.22.4	Responsibility for T Liabilities	1–76
¶106.22.5	Effect on Loans and Contracts	1–76
¶106.22.6	Security for Financial Promises	1–76
¶106.22.7	Securities Law	1–77

## Contents

¶106.22.8	Regulatory Restrictions	1-77
¶106.22.9	State and Local Taxes	1-77
¶107	REPEAL OF <i>GENERAL UTILITIES</i> DOCTRINE	1-77
¶107.1	Implications of <i>GU</i> Repeal for Acquisitions	1-78
¶107.2	Implications of <i>GU</i> Repeal for Corporate Valuations	1-80
¶108	INDIVIDUAL'S LTCG AND QDI TAXED AT LOWER RATE THAN OI	1-81
¶108.1	Historic Tax Law Concepts	1-81
¶108.2	QDI Concepts	1-83
(1)	§306 stock qualification for QDI rate	1-83
(2)	Holding period discontinuity	1-83
(a)	Code §306(a)(1) sale	1-84
(b)	Code §306(a)(2) redemption	1-85
(c)	Charitable gift of §306 stock	1-86
(3)	Installment sale of §306 stock	1-86
(4)	Non-resident alien shareholders	1-87
¶109	BASIC LEGAL AND ACCOUNTING CONSIDERATIONS	1-87

## Chapter 2

---

### Taxable Purchase of T's Stock and Taxable Reverse Subsidiary Merger

---

¶201	INTRODUCTION	2-10
¶202	ACQUISITION STEPS—TAXABLE REVERSE SUBSIDIARY MERGER TREATED LIKE TAXABLE STOCK PURCHASE	2-15
¶203	TREATMENT OF T's SHAREHOLDERS	2-19
¶203.1	Tax Rates	2-20
¶203.2	Holding Period	2-20
¶203.3	Type of Gain or Loss	2-21
¶203.4	Installment Method	2-22
	Installment Method Limitations and Qualification	2-22
¶203.4.1	Impediments to Installment Reporting	2-25
¶203.4.1.1	Receipt of Third-Party Note, Demand Note, Readily Tradable Note, Convertible Note	2-25
¶203.4.1.2	Sale of Traded Stock	2-28
	(1) Non-traded stock convertible into traded stock	2-28
	(2) Stock subject to SEC Rule 144 resale restrictions	2-29
¶203.4.1.3	Dealer in Securities	2-36

## Contents

	<ul style="list-style-type: none"> <li>¶203.4.1.4 Code §453A—Interest on Deferred Tax and Anti-Pledging Rule 2–36               <ul style="list-style-type: none"> <li>(1) Code §453A annual interest charge 2–37</li> <li>(2) The pledging rule 2–41</li> <li>(3) Other provisions of Code §453A 2–42</li> <li>(4) Code §453A in a consolidated return setting 2–44</li> </ul> </li> </ul>	
	¶203.4.2 Letter of Credit, Cash Equivalent Security, or Escrow 2–46	
	<ul style="list-style-type: none"> <li>¶203.4.2.1 Arrangements Protecting Only Seller 2–46</li> <li>¶203.4.2.2 Arrangements Protecting Buyer 2–49</li> <li>¶203.4.2.3 Effect of Code §468B(g)(1) Re Taxation of Escrow’s Income 2–53</li> </ul>	
	¶203.4.3 Disposition of Installment Obligation, Conversion of Convertible Note 2–55	
	¶203.4.4 Contingent Payments 2–57	
	¶203.4.5 Deferred Receipt of P Stock or Property Other Than P Notes 2–59	
¶203.5	Other Methods of Deferral: Open Transaction Method 2–61	
	<ul style="list-style-type: none"> <li>¶203.5.1 Open Transaction Method for Contingent Payments 2–61</li> <li>¶203.5.2 Cash Method Taxpayer Doctrine 2–62</li> <li>¶203.5.3 Post-1980 Narrowing of Open Transaction Doctrine and Elimination of Cash Method Doctrine 2–63</li> </ul>	
¶203.6	Imputed Interest and OID 2–73	
	<ul style="list-style-type: none"> <li>¶203.6.1 Minimum Required Stated Interest Rate—Neither T Stock nor P Debt Market Traded 2–74               <ul style="list-style-type: none"> <li>9% safe harbor when seller financing does not exceed \$6 million adjusted for inflation 2–75</li> <li>Disregarding de minimis discount 2–76</li> </ul> </li> <li>¶203.6.2 Rate and Timing of Interest Imputation—Neither T Stock nor P Debt Market Traded 2–77</li> <li>¶203.6.3 Convertible Notes—Neither T Stock nor P Debt Market Traded 2–79</li> <li>¶203.6.4 Stated Interest Not Paid at Least Annually—Neither T Stock nor P Debt Market Traded 2–79</li> <li>¶203.6.5 Market-Traded T Stock or P Debt 2–80</li> </ul>	

## Contents

	(1) Substantive tax rules	2-80
	(2) 9/12 market-traded regulations	2-81
	(3) Prior market-traded regulations	2-83
¶203.6.6	Contingent Payments	2-84
	(1) Neither P debt nor T stock market traded—Code §1274	2-84
	(2) T stock or P debt market traded	2-86
	(3) Other circumstances and exceptions	2-87
¶203.6.7	Comparison of Contingent-Interest Debt Instrument to Convertible Debt Instrument	2-88
¶203.6.8	Investment Units; Variable Rate Debt	2-90
¶203.7	Accelerated Gain Recognition Under Code §1259	2-91
¶203.8	Charitable Stock Donation Immediately Before Taxable Disposition	2-95
¶204	TREATMENT OF P AND T IF NO CODE §338, §338(h)(10), OR §336(e) ELECTION IS MADE	2-103
¶204.1	T's Net Operating Losses in a Purchase of Stock with No Code §338, §338(h)(10), or §336(e) Election	2-104
¶204.2	T's Asset Basis in a Purchase of Stock with No Code §338, §338(h)(10), or §336(e) Election	2-104
¶204.3	Bifurcated Acquisition (Part Stock and Part Assets) with No Code §338, §338(h)(10), or §336(e) Election	2-105
¶204.3.1	T Is a Freestanding C Corp	2-105
¶204.3.1.1	Impediments to Bifurcated Treatment	2-109
	(1) Step-transaction doctrine	2-109
	(2) Substance-over-form doctrine	2-111
	(3) Consolidated return regulations	2-113
	(4) Code §197 anti-churning rules	2-116
¶204.3.2	T Is a Freestanding C Corp with a Subsidiary TS	2-116
¶204.3.3	T Is a Bigco Subsidiary	2-120
¶204.3.4	T1 and T2 Are Brother-Sister Bigco Subsidiaries	2-126
¶204.4	T Asset Sales and Distributions Outside the Ordinary Course of Business Occurring on the Day Bigco Sells T's Stock to P but After Such Stock Sale	2-127
¶204.5	T's Liabilities That Have Not Yet Matured into a Deduction	2-127
¶205	GENERAL CODE §338 REQUIREMENTS AND TREATMENT OF P AND T IF REGULAR CODE §338 ELECTION IS MADE	2-129
¶205.1	Definition of "Qualified Stock Purchase"	2-129
¶205.1.1	The 80-80 Test	2-129



## Contents

	¶205.1.2 Effect of Options to Buy T Stock	2-130
	¶205.1.3 Meaning of Purchase	2-131
	¶205.1.4 P or T Goes Out of Existence Shortly After Transaction	2-137
	(1) T liquidates (or merges upstream) into P	2-137
	(2) P goes out of existence	2-137
¶205.2	Time for Filing Code §338 Election	2-139
¶205.3	Summary Description of Regular Code §338 Election	2-140
¶205.4	Old T's Gain: Reported on Whose Return	2-141
¶205.5	Calculating Old T's Gain	2-145
	¶205.5.1 Old T Has Subsidiaries	2-147
	¶205.5.1.1 Introduction	2-147
	¶205.5.1.2 Effect of Regular Code §338 Election When Old T Has Subsidiaries	2-149
	¶205.5.1.3 Overview of Reg. §1.338-4(h)	2-151
	¶205.5.1.4 Reg. §1.338-4(h) Does Not Apply When Code §338(h)(10) Election Made for T and Its Subsidiary	2-159
	¶205.5.1.5 2 Traps for the Unwary	2-161
	¶205.5.1.6 Methods of Avoiding Duplicative Taxation	2-162
	¶205.5.1.7 Other Issues	2-164
	¶205.5.1.8 Conclusion	2-164
¶205.6	Old T's Use of the Installment Method to Report Its Corporate-Level Gain	2-165
¶205.7	New T's Basis	2-167
	¶205.7.1 Contingent Liabilities of Old T	2-171
	¶205.7.2 Contingent Payments by P	2-173
	¶205.7.3 Burdensome Contracts	2-173
¶205.8	Consequences to Minority Shareholders	2-173
¶205.9	Consistency Rules	2-174
¶205.10	Avoiding Regulatory Consistency Rules	2-180
¶205.11	T's Liabilities That Have Not Yet Matured into a Deduction	2-181
	¶205.11.1 Cash Method T's Operating Liabilities	2-181
	¶205.11.2 Cash or Accrual Method T's Contingent Liabilities	2-182
	¶205.11.3 T's Unfunded Qualified Pension Liabilities and T's Unfunded Non-Qualified Deferred Compensation Liabilities	2-182
	¶205.11.4 Accrual Method T's Code §461(h) Liabilities	2-183
¶205.12	New T's and Bigco's Liability for Old T's Taxes	2-183
	¶205.12.1 New T Liability for Old T Taxes	2-183
	¶205.12.2 New T Liability for Taxes of Other Members of Old T's Consolidated Group	2-183

## Contents

	¶205.12.3	Bigco's Non-Liability for Old T's Deemed Sale Taxes	2-184
¶206		TREATMENT OF P, T, AND SELLING T SHAREHOLDER(S) IF CODE §338(h)(10) ELECTION IS MADE	2-184
	¶206.1	T Purchased from Bigco Consolidated Group	2-186
	¶206.1.1	Consequences of Code §338(h)(10) Election	2-186
	¶206.1.2	Desirability of Code §338(h)(10) Election	2-187
	¶206.1.3	Eligibility to File Code §338(h)(10) Election	2-191
		(1) QSP	2-191
		(2) QSP risk where new P disqualified as transitory	2-192
		(3) T member of Bigco's consolidated group	2-195
		(4) Selling group	2-197
	¶206.1.4	Filing Code §338(h)(10) Election	2-198
	¶206.1.5	Old T's Gain: Reported on Whose Return	2-199
	¶206.1.6	Calculating Old T's Gain	2-199
	¶206.1.7	Allocation of New T's Basis: Contingent Liabilities; Contingent Purchase Price	2-200
	¶206.1.8	Bigco's and Old T's Use of the Installment Method to Report Old T Corporate-Level Gain	2-201
		(1) Current §338(h)(10) regulations	2-201
		(2) T assets ineligible for installment reporting	2-202
		(3) Pre-1/00 §338(h)(10) regulations	2-205
	¶206.1.9	Consequences to Minority Shareholders	2-207
	¶206.1.10	Consistency Rules	2-207
	¶206.1.11	State Income Tax Consequences	2-209
	¶206.1.12	New T's Liability Under Reg. §1.1502-6(a) for Taxes of Bigco Consolidated Group	2-209
	¶206.1.13	T Has Subsidiaries	2-210
	¶206.1.14	T Unwanted Assets	2-213
¶206.2		T Purchased from Bigco Affiliated (but Not Consolidated) Group	2-215
	¶206.2.1	Eligibility to Make Code §338(h)(10) Election	2-216
	¶206.2.2	Who Owes Tax Imposed on Old T's Deemed Sale Gain	2-219
	¶206.2.3	Calculation of Deemed Asset Sale Gain	2-220
	¶206.2.4	Consequences to Minority Shareholders	2-221
	¶206.2.5	Consistency Rules	2-221
	¶206.2.6	T Unwanted Assets	2-222
¶206.3		T Is an S Corp	2-222
	¶206.3.1	Making QSP of T-S Corp	2-222
	¶206.3.2	Which T-S Corp Shareholders Must Join in Election	2-223
	¶206.3.3	T-S Corp's Deemed Liquidation	2-223
	¶206.3.4	T-S Corp's Code §1374 Tax	2-225

## Contents

	¶206.3.5 Calculation of Deemed Sale Gain	2-225
	¶206.3.6 Bifurcated Purchase of T-S Corp	2-226
¶206.4	Using Code §338(h)(10) to Facilitate Partial Liquidation	2-227
	¶206.4.1 Base Case: Sale of Corporate Divisional Business	2-228
	¶206.4.1.1 Avoiding “Meaningless” Stock Redemption	2-228
	¶206.4.1.2 Partial Liquidation Plan	2-230
	¶206.4.2 Sale of First-Tier Subsidiary’s Business	2-231
	¶206.4.3 Sale of Remote Subsidiary’s Business	2-232
	¶206.4.4 Avoiding “Non-Meaningless” Stock Redemption	2-235
¶206.5	Using Code §338(h)(10) in a Carve Out IPO	2-239
	(1) Busted §351 transaction and Code §338(h)(10) election	2-239
	(2) Code §197 anti-churning rules	2-243
	(3) Code §1239 involvement	2-244
¶207	DEEMED ASSET SALE TREATMENT FOR ACQUISITION INVOLVING FAILED FINANCIAL INSTITUTION	2-246
¶208	TREATMENT OF P AND T IF T LIQUIDATES (OR T MERGES UPSTREAM) INTO P OR IF P IS LIQUIDATED BY ITS SHAREHOLDERS (OR MERGES DOWNSTREAM INTO T)	2-248
¶208.1	P Makes Code §338 or §338(h)(10) Election	2-248
	(1) T liquidates (or merges upstream) into P	2-248
	(2) P goes out of existence soon after purchasing T’s stock	2-248
¶208.2	P Does Not Make Code §338 or §338(h)(10) Election	2-249
¶208.3	Step-Transaction Doctrine When P Makes No Code §338 or §338(h)(10) Election	2-250
¶208.4	T Adopts Plan of Liquidation Before Becoming 80-80 P Subsidiary	2-253
	¶208.4.1 Acquisition Steps	2-253
	¶208.4.2 Tax Consequences to T and P	2-254
	¶208.4.2.1 Treatment of P	2-254
	¶208.4.2.2 P’s Basis in T’s Assets	2-255
	¶208.4.2.3 Treatment of T	2-255
	¶208.4.2.4 Possible IRS Attack on T’s Status as Participant in P’s Consolidated Return	2-256
	¶208.4.3 Avoiding Code §332 Liquidation Status	2-257
	¶208.4.3.1 Precedents Under Code §332	2-257
	¶208.4.3.2 Precedents Under Old Code §337	2-259
	¶208.4.4 Interaction with Code §338	2-259
	¶208.4.5 Interaction with Reorganization Provisions	2-261
¶209	STEPPED-UP BASIS UNDER CODE §336(e)	2-261

## Contents

¶209.1	General Principles	2–262
¶209.2	QSD Not Described in Code §355(d) or (e)	2–266
¶209.3	QSD Described in Code §355(d) or (e)	2–278
¶209.4	Consistency Rules	2–280
¶209.5	New T’s Liability Under Reg. §1.1502-6(a) for Taxes of Bigco Consolidated Group	2–281
¶210	LIABILITY PROBLEM IF T MEMBER OF BIGCO’S CONSOLIDATED GROUP BEFORE SALE—REG. §1.1502-6	2–282
¶211	T’s ENTRY INTO P’S CONSOLIDATED RETURN	2–285
¶211.1	Definition of “Affiliated Group”	2–285
¶211.2	Effect of T’s Options, Warrants, and Convertible Debentures on T’s Affiliated Group Membership	2–292
¶211.2.1	General Option Rule	2–293
¶211.2.2	Safe Harbors and Exceptions	2–294
¶211.2.3	Meaning of Option	2–301
¶211.2.3.1	Substance over Form	2–301
¶211.2.3.2	SARs, Phantom Stock, Cash Settlement Options	2–302
¶211.2.3.3	Subsidiary Tracking Stock	2–303
¶211.2.3.4	SRF Stock	2–303
¶211.2.3.5	Redemption Rights	2–304
¶211.2.4	Measurement Date	2–308
¶211.2.5	Anti-Avoidance and Other Rules	2–310
¶211.2.5.1	Changes in Capital Structure and Intent to Change Value of Underlying Stock	2–310
¶211.2.5.2	Related Agreements	2–310
¶211.2.5.3	Related or Sequential Options and Options Issued Pursuant to Plan	2–311
¶211.2.5.4	Valuation of Shares	2–311
¶211.2.6	Effect of Deemed Exercise	2–311
¶211.2.6.1	In General	2–311
¶211.2.6.2	Affiliation and Consolidation	2–312
¶211.2.6.3	Application to Code Provisions Incorporating 80-80 Test, Including Code §332, §336(e), §337, §338, and §338(h)(10)	2–314
¶211.2.6.4	Post-Disaffiliation Events	2–315
¶211.2.6.5	Non-Stock Instruments	2–316
¶211.2.6.6	Convertible Preferred Stock	2–317
¶211.2.6.7	Comparison of Options and Economically Equivalent Stock	2–319
¶211.2.7	Comparison to S Corp One-Class-of-Stock Regulation	2–321
¶211.2.8	Conclusion	2–322

## Contents

¶211.3	Timing of T’s Entry into P’s Consolidated Return	2–322
¶211.3.1	1995 Regulations	2–323
¶211.3.2	2012 Chief Counsel Memorandum	2–325
¶211.3.3	2015 Proposed Regulations	2–325
¶211.4	Allocation of T’s Income Between T’s Final Pre-Acquisition Return and P-T Post-Acquisition Consolidated Return	2–326
¶211.5	Possible Risk T Never Enters P’s Consolidated Return When P Intends to Liquidate T	2–327
¶212	ADDITIONAL CONSIDERATIONS IF T BELONGED TO CONSOLIDATED GROUP BEFORE P ACQUIRED T’S STOCK	2–331
¶212.1	Deferred Intercompany Gain	2–331
¶212.1.1	Adjustment in T’s Stock Basis When T Not Common Parent of Old Group	2–332
¶212.2	Excess Loss Accounts	2–333
¶212.3	Tax Basis in T’s Subsidiaries	2–334
¶212.3.1	Investment Adjustment Rules	2–334
¶212.3.2	Dividend Stripping	2–335
¶212.4	Bigco’s Loss on Sale of T Stock	2–337
¶212.4.1	2 Basic Examples	2–340
¶212.4.2	Disposition of T Stock (and T Deconsolidation)—2008 Unified Loss Regulations and 2004 Expanded Code §1502 Regulatory Authority	2–344
¶212.4.2.1	In General	2–345
¶212.4.2.2	Stock Basis Redetermination Rule	2–346
¶212.4.2.3	Stock Basis Reduction Rule	2–349
¶212.4.2.4	T Attribute Reduction Rule	2–351
¶212.4.2.5	Over-Ride and Anti-Abuse Provisions	2–354
¶212.4.2.6	2004 Expanded Code §1502 Regulatory Authority	2–354
¶212.5	Code §338(h)(10) or §336(e) Election	2–356
¶212.6	T’s Net Operating Loss Carryforwards	2–356
¶212.7	T Asset Sales and Distributions Outside Ordinary Course of Business Occurring on Day Bigco Sells T’s Stock to P but After Such Stock Sale	2–357
¶213	IRS INFORMATION REPORTING FOR ACQUISITIONS OF CORPORATE CONTROL AND CERTAIN OTHER CORPORATE TRANSACTIONS	2–361
¶214	MERGER OF T INTO S AFTER P PURCHASES ALL OR CONTROLLING BLOCK OF T’S STOCK	2–362
¶214.1	Tax Consequences for T’s Minority Shareholders	2–362
¶214.2	Corporate-Level Tax Consequences for T	2–363

## Contents

¶215	INDIVIDUAL REDUCED LTCG TAX RATE AND TAX-FREE ROLLOVER ON DISPOSITION OF T STOCK	2-366
¶215.1	Code §1202 LTCG Rate Reduction to 0% (or 7% or 14%) on “Qualified Small Business Stock”	2-367
¶215.1.1	Qualified Shareholder	2-368
¶215.1.2	Stock Acquired at Original Issuance and Post-8/10/93	2-370
¶215.1.3	5-Year Holding Period	2-372
¶215.1.4	Stock Must Be Acquired for Cash or Other Qualified Consideration	2-373
¶215.1.5	U.S. C Corp Issuer	2-373
¶215.1.6	\$50 Million Maximum Assets at Issuance	2-374
	Gross asset measurement	2-374
	Step-transaction doctrine	2-375
	Application of \$50 million asset test to T stock (a) issued in T’s acquisition of another business entity or (b) issued at any time thereafter	2-376
¶215.1.7	Active Business	2-377
¶215.1.8	No Redemptions	2-381
¶215.1.9	Offsetting Short Positions	2-383
¶215.1.10	Calculating Amount of Gain Qualifying for Code §1202	2-383
	§1202 gain limitation	2-383
	Expanding §1202 \$10 million aggregate limitation by transferring §1202 stock by gift or death	2-386
	Inherent appreciation in property transferred tax-free to T in exchange for §1202 stock reduces §1202 qualifying gain	2-387
¶215.1.11	Alternative Minimum Tax	2-388
¶215.2	Code §1045 Tax-Free Rollover for “Qualified Small Business Stock”	2-388
¶215.2.1	Qualified Small Business Stock	2-389
¶215.2.2	Qualified Shareholder	2-389
¶215.2.3	Holding Period of New §1202 Replacement Stock	2-393
¶216	LEVERAGED DIVIDEND, RECAPITALIZATION, OR REDEMPTION AND CODE §4501	2-394
¶216.1	Distribution of Cash Through Dividend or Share Redemption	2-394
¶216.2	§4501 Excise Tax on Repurchase of Publicly Traded Corporation’s Shares	2-395
¶216.2.1	General Scope of Excise Tax	2-396
¶216.2.2	Redemptions and Economically Similar Transactions	2-397

## Contents

¶216.2.2.1	§317(b) Redemptions to Which Part 1 of Subchapter C Applies	2-399
¶216.2.2.2	Transactions Treated as “Economically Similar”	2-403
¶216.2.3	Code §4501 Exceptions	2-412
¶216.2.3.1	Tax-Free Repurchases	2-412
¶216.2.3.2	Stock Contributed to Employer-Sponsored Retirement Plan	2-414
¶216.2.3.3	Stock Repurchased by Securities Dealer	2-415
¶216.2.3.4	Stock Repurchase Treated as a Dividend	2-416
¶216.2.4	Reduction of Excise Tax Base for Same-Taxable-Year Stock Issuances	2-417
¶216.2.5	Application to Publicly Traded Non-U.S. Corporations and Their U.S. Subsidiaries	2-418
¶217	IRS MAY RECHARACTERIZE—BUT TAXPAYER MAY BE BOUND BY—TRANSACTION FORM	2-421
¶218	SPECIAL ISSUES—S CORPS, BASIS ALLOCATION, ACQUISITION EXPENSES, STOCK OPTIONS, ZERO BASIS PROBLEM, UNWANTED ASSETS, LEVERAGED BUYOUTS, NET OPERATING LOSSES, STOCK REDEMPTIONS, GREENMAIL PAYMENTS, REPORTING REQUIREMENTS, SUBSTANCE-OVER-FORM DOCTRINES, AND SAMPLE ACQUISITION AGREEMENTS	2-428

## Chapter 3

### Taxable Purchase of T’s Assets and Taxable Forward Merger

¶301	ACQUISITION STEPS—TAXABLE FORWARD MERGER TREATED LIKE TAXABLE PURCHASE OF ASSETS	3-3
¶302	TAX TREATMENT IF T DOES NOT LIQUIDATE	3-7
	Code §1231 gain	3-8
	Tax benefit recapture	3-8
	Research and development	3-9
¶302.1	Reasons to Keep T Alive	3-10
¶302.2	Use of Installment Method by T	3-14
	¶302.2.1 Assets Not Qualifying for Installment Method	3-14
	¶302.2.2 Code §453A—Interest on Deferred Tax and Anti-Pledging Rule	3-16

## Contents

	¶302.2.3	Specific Non-Pro Rata Allocation of Cash and Notes Among T's Assets Sold	3-17
	¶302.2.4	Installment Sale of Assets Including Appreciated Code §1245 and §1250 Property	3-18
	¶302.3	T's Use of Open Transaction Method	3-19
	¶302.4	Imputed Interest and OID	3-20
	¶302.5	P's Basis in T's Assets	3-21
	¶302.6	T's Tax Attributes	3-21
	¶302.7	Partial Liquidation Distribution of Asset Sales Proceeds to Shareholders	3-22
	¶302.8	Using Asset Sale in a Carve Out IPO	3-22
¶303		TAX TREATMENT IF T DOES LIQUIDATE	3-24
	¶303.1	Use of Installment Method (or Other Deferral) by T's Shareholders	3-25
		Pre-1980 history	3-25
		Current law	3-25
	¶303.2	P's Basis in T's Assets	3-29
	¶303.3	T's Tax Attributes	3-29
	¶303.4	Reducing the Impact of <i>GU</i> Repeal by Using Code §332	3-29
¶304		T's LIABILITIES THAT HAVE NOT YET MATURED INTO A DEDUCTION	3-33
	¶304.1	T Liabilities Not Yet Deducted	3-33
	¶304.1.1	Cash Method T's Operating Liabilities	3-35
	¶304.1.2	Cash or Accrual Method T's Contingent Liabilities	3-36
	¶304.1.3	Cash or Accrual Method T's Deferred Compensation Liabilities	3-40
	¶304.2	Advance Payments Previously Received by T—Deferred Revenue and <i>Pierce</i> Case	3-54
	¶304.3	T's Unfunded Qualified Pension Liabilities and T's Unfunded Non-Qualified Deferred Compensation Liabilities	3-62
		(1) Qualified plan	3-62
		(2) Non-qualified deferred compensation	3-63
	¶304.4	Accrual Method T's Code §461(h) Liabilities	3-65
	¶304.5	Cash or Accrual Method P's and T's Environmental Cleanup Expenditures	3-68
		(1) P as owner of contaminated property	3-68
		(2) P as seller of contaminated property	3-82
		(3) Environmental liability settlement	3-82
	¶304.6	Cash or Accrual Method P's and T's Asbestos Removal Expenditures	3-83
¶305		COLLAPSIBLE CORPORATIONS—CODE §341 REPEALED	3-88



¶306	SPECIAL ISSUES—S CORPS, STEP-TRANSACTION DOCTRINE, BASIS ALLOCATION, ZERO BASIS PROBLEM, UNWANTED ASSETS, ACQUISITION EXPENSES, HANDLING STOCK OPTIONS, LEVERAGED BUYOUTS, NET OPERATING LOSSES, REPORTING REQUIREMENTS, SUBSTANCE-OVER-FORM DOCTRINES, AND SAMPLE ACQUISITION AGREEMENTS	3–89
------	---	------

## Chapter 4

### Taxable Acquisitions: Acquisition Expenses, Stepped-Up Basis Allocation, Intangibles Amortization, Non-Compete Covenant, Tax Receivable Agreement, Etc.

¶401	INTRODUCTION	4–7
¶402	ACQUISITION EXPENSES FOR TAXABLE AND TAX-FREE ACQUISITIONS	4–8
¶402.1	P’s or T’s Costs of Obtaining Debt Financing	4–9
	(1) General rules	4–9
	(2) §1273 CYTM treatment of “actual” OID	4–9
	(3) §446 CYTM treatment of “as if” OID	4–10
	(4) Interaction with Code §163(e)(5) AHYDO rules	4–10
	(5) §263 regulations’ capitalization rules—3 simplifying conventions but no bright-line-date rule	4–12
¶402.2	P’s Costs of Obtaining Equity Financing	4–13
¶402.3	P’s Costs of Purchasing T’s Assets or Stock	4–14
¶402.3.1	P’s SUB Acquisition	4–15
¶402.3.2	P’s COB Acquisition	4–15
¶402.3.3	§263 Regulations	4–15
¶402.3.3.1	3 Simplifying Conventions	4–16
¶402.3.3.2	Pre-Bright-Line-Date Non-Inherently-Facilitative Costs	4–17
¶402.3.3.3	Capitalization Versus Deduction of Success-Based Fee	4–20
¶402.3.3.4	Capitalization Versus Deduction of Milestone Payment	4–24
¶402.3.3.5	Interrelationship Between §195 and §263	4–26
¶402.3.3.6	Possible 15-Year Amortization of §263 Capitalized Costs	4–30
¶402.3.3.7	Taxable Acquisition	4–30
¶402.3.3.8	Tax-Free Reorganization and T’s Costs in P’s Purchase of T Stock	4–30

## Contents

¶402.4	P's Investigatory and Due Diligence Costs Regarding T—Code §195(b) Elective Amortization and Possible Immediate Deduction	4-31
¶402.4.1	P Not Already in Same Business as T	4-34
¶402.4.2	P Already in Same Business as T	4-38
¶402.4.3	§263 Regulations Applicable Whether or Not P Already in Same Business as T	4-42
¶402.5	P's and T's Normal Business Expenses	4-43
¶402.5.1	Executive Arrangements	4-43
¶402.5.2	Tax Planning Costs	4-45
¶402.5.3	Investment Banking or Advisory Fee	4-45
¶402.5.4	Severance Payments and Integration Costs	4-46
	(1) Severance payment precedents	4-46
	(2) §263 regulations re integration costs and severance payments	4-48
¶402.5.5	Salaries of P and T Personnel Involved in Acquisition	4-48
	(1) Conflicting case law	4-49
	(2) §263 regulations	4-50
	3 simplifying conventions	4-51
¶402.5.6	Legal Retainer Fees	4-52
¶402.6	\$1 Million Executive Compensation Deduction Limitation	4-54
¶402.7	Golden Parachute Payments	4-54
¶402.8	Stock Option and SAR Cancellation Payments	4-54
¶402.9	Costs of Organizing New Corporation	4-54
¶402.10	T's Costs in Friendly Acquisition, Including Investment Banking, Fairness, and Legal Fees	4-55
¶402.10.1	P Acquires T's Stock Without Code §338, §338(h)(10), or §336(e) Election in COB Acquisition	4-55
¶402.10.2	P Acquires T's Assets (or P Acquires T's Stock with Code §338, §338(h)(10), or §336(e) Election) in SUB Acquisition	4-64
¶402.11	T's Costs of Resisting Hostile Acquisition	4-64
¶402.11.1	Hostile Acquisition—Successful Defense by T	4-64
	(1) Post- <i>INDOPCO</i> precedents	4-64
	T's costs of arranging white knight acquisition	4-65
	T's other defense costs	4-65
	(2) 12/02 proposed §263 regulations	4-66
	(3) 12/03 final §263 regulations	4-67
¶402.11.2	Hostile Acquisition—Unsuccessful Defense by T	4-68
	(1) Post- <i>INDOPCO</i> precedents	4-68
	(2) §263 regulations	4-74

## Contents

¶402.12	P's and T's Costs of Failed Acquisition (including Breakup Fee)	4-76
¶402.12.1	Friendly Failed Acquisition	4-76
¶402.12.2	Hostile Failed Acquisition—Successful Defense by T	4-80
¶402.12.3	Hostile Acquisitions—Unsuccessful Defense by T	4-80
¶402.12.4	T's Breakup Fee	4-81
¶402.12.5	Possible CL Characterization for P's Costs (and Possible CG Characterization for P's Breakup Fee Receipt)	4-82
¶402.12.6	Possible CL Characterization for T's Costs (and Possible CG Characterization for T's (or Its Shareholders') Breakup Fee Receipt)	4-99
¶402.12.7	Costs to Defend Title	4-101
¶402.13	Costs Related to T's Redemption of Stock—Code §162(k)	4-103
¶402.14	Costs of Tax-Free Acquisition	4-108
¶402.15	Pre-Closing Interest	4-109
¶403	DETERMINING WHETHER TO STRUCTURE FOR STEPPED-UP BASIS, ALLOCATING BASIS AND OTHER CAPITALIZABLE COSTS AMONG T's ASSETS, AND AMORTIZING INTANGIBLES	4-112
¶403.1	Desirability of Structuring Acquisition to Obtain Full Stepped-Up Basis	4-113
¶403.1.1	T Is Freestanding C Corp	4-114
¶403.1.2	T Is Bigco 80-80 Subsidiary	4-116
¶403.1.3	T Is S Corp	4-121
¶403.2	Significance of Allocation to P, T, and T's Shareholders	4-122
¶403.3	Methods of Allocation	4-123
¶403.3.1	Asset Purchase	4-123
¶403.3.2	Agreement of Parties as to Allocation	4-124
¶403.3.3	Code §338, §338(h)(10), or §336(e) Stock Purchase	4-125
¶403.3.4	Acquisition Costs	4-127
¶403.3.4.1	Prior Approach to Acquisition Costs	4-127
¶403.3.4.2	Acquisition Costs Under Current Regulations	4-128
¶403.3.4.3	Other Reporting Requirements	4-130
¶403.4	Allocation to and Amortization of Purchased Intangibles	4-130
¶403.4.1	Code §197—15-Year Amortization of Purchased Intangibles	4-130
¶403.4.1.1	Code §197 Summary	4-130
¶403.4.1.2	Code §197 General Scope and Effect	4-131
¶403.4.1.3	Code §197 Treatment of Specific Intangibles	4-138

## Contents

(1) Intangibles entirely excluded from Code §197	4-138
Off-the-shelf computer software	4-138
Interests in tangible property leases	4-138
Interests in debt obligations	4-139
Franchises, trademarks, and trade names requiring contingent serial payments	4-140
Interest in corporation, partnership, trust, or estate	4-141
Financial interest	4-141
Interest in land	4-141
Fees for professional services and transaction costs in tax-free organizations and reorganizations	4-141
(2) Intangibles covered by Code §197 only when related acquisition of business assets	4-142
Customized computer software	4-142
Contract rights to receive tangible property or services	4-142
Rights of fixed duration or amount	4-144
Patents or copyrights	4-144
Films, recordings, books, and similar rights	4-145
Mortgage servicing rights	4-145
Most self-created intangibles	4-145
Licenses to use Code §197 intangibles	4-146
(3) Non-compete covenant covered by Code §197 only when related acquisition of business assets or stock	4-150

## Contents

	(4) Intangibles always covered by Code §197	4-150
	Customer-based intangibles	4-151
	Certain supplier-based intangibles	4-152
	Government license, permit, or right	4-153
	Franchise, trademark, or trade name	4-153
	Formulas, processes, designs, know-how, and similar items	4-153
¶403.4.1.4	Limitation on Amortization of Goodwill and Similar Code §197 Intangibles When Purchaser and Seller More Than 20% Related	4-154
	(1) General description of limitation	4-154
	(2) Definition of related party for purposes of anti-churning rules	4-157
	(a) Individual sells assets to C or S corp; individual and related persons own more than 20% by value of corporation's stock	4-161
	(b) S corp sells assets to C or S corp; or C corp sells assets to S corp; more than 20% common ownership of buying and selling corporations	4-162
	(c) Corporation sells assets to another corporation; both corporations part of more than 20% ownership chain (by vote or value)	4-163
	(d) Corporation sells assets to another corporation; 50%-or-more overlapping ownership by 5 or fewer individuals, trusts or estates	4-166

## Contents

	(e) Either seller or buyer or both is partnership or LLC	4-168
	(3) Election to avoid anti-churning rules where relationship does not exceed 50%	4-171
¶403.4.2	Amortization of Purchased Intangibles When Code §197 Does Not Apply	4-172
¶403.4.2.1	Customer Lists and Other Specific Intangibles	4-172
	(1) Customer-based intangibles	4-173
	(2) Bank core deposits	4-176
	(3) Assembled workforce in place	4-176
	(4) Package design costs	4-179
	(5) Form 8594	4-179
	¶403.4.2.2 Goodwill and Going Concern Value	4-179
	¶403.4.2.3 Overfunded Pension Plan	4-182
¶403.5	Post-Acquisition Basis Adjustments	4-184
¶404	PAYMENT FOR SERVICES, NON-COMPETE, PERSONAL GOODWILL, CODE §1253 FRANCHISE, CONTINGENT-INTEREST DEBT, AND THE LIKE	4-185
¶404.1	Payments for Services, Non-Compete Covenants, and Personal Goodwill	4-185
	¶404.1.1 Consulting/Employment Services	4-185
	¶404.1.2 Non-Compete Covenant	4-186
	¶404.1.3 Sale of Personal Goodwill	4-189
¶404.2	Trademarks, Trade Names, and Franchises	4-195
	¶404.2.1 Certain Periodic Payments Contingent on Productivity	4-196
	¶404.2.2 Other Payments for Code §1253 Intangibles	4-196
	¶404.2.3 Governmental License	4-197
¶404.3	Information Reporting	4-198
¶404.4	Incentive to Allocate to Deductible or Amortizable Payments and to Payments Free of Corporate Tax	4-198
¶404.5	Incentive to Issue Contingent-Interest Debt	4-200
¶405	TAX RECEIVABLE AGREEMENT IN CONNECTION WITH IPO	4-201
¶406	AVOIDING INADVERTENT CARRYOVER BASIS	4-203
¶406.1	Overlapping Ownership Between P and T	4-203
	¶406.1.1 Asset Purchase	4-204
	¶406.1.1.1 Expansive Application of “D” Reorganization Rules	4-206

## Contents

	(1) Historical development	4-206
	(2) Regulations	4-209
¶406.1.2	Stock Purchase	4-216
¶406.1.2.1	Applicability of Code §304	4-216
¶406.1.2.2	Applicability of Code §351	4-219
¶406.1.2.3	Solutions to Code §351 Problem	4-223
¶406.2	Code §338 Consistency Rules	4-224
¶407	ZERO BASIS PROBLEM WHERE P EQUITY DELIVERED IN ACQUISITION BY P's SUBSIDIARY OR BY PARTNERSHIP IN WHICH P IS PARTNER	4-224
¶407.1	Corporate Context—Pre-Reg. §1.1032-3 Law	4-226
¶407.2	Corporate Context—Regulatory Solution	4-230
¶407.3	Application of Zero Basis Concepts in Partnership Context	4-231
¶408	IRS CONFIDENTIAL TRANSACTION RULES	4-233

## Chapter 5

---

### Unwanted Assets

---

¶501	Disposing of Unwanted Assets (with Stepped-Up Basis) in Carve Out IPO	5-1
¶502	Unwanted Asset Disposition Strategies Without Gain Taxation Generally No Longer Viable	5-1

## Volume 2

## Chapter 6

---

### Tax-Free Reorganization Basic Principles

---

¶601	TAX-FREE ACQUISITIONS IN GENERAL	6-7
¶601.1	Reorganization Examples	6-8
¶601.2	IRS Letter Rulings on Reorganization Qualification	6-18
¶601.3	E&F Reorganizations	6-18
¶601.3.1	“E” Reorganization	6-19
¶601.3.2	“F” Reorganization	6-19
¶601.4	Complete Liquidation of Subsidiary	6-26
¶601.4.1	P's Non-Recognition	6-26
¶601.4.2	S's Non-Recognition	6-28

## Contents

	¶601.4.3	P's Basis in S's Assets	6-28
¶602		TREATMENT OF P	6-29
	¶602.1	Gain or Loss Recognition	6-29
	¶602.2	P's Basis in T's Assets or Stock	6-30
	¶602.2.1	P Succeeds to T's Tax Attributes	6-35
		¶602.2.1.1 Identifying the Acquiring Corporation	6-35
		¶602.2.1.2 T's Non-§381(a) Tax Attributes	6-36
	¶602.3	P's Acquisition Expenses	6-37
		¶602.3.1 Pre-§263 Regulations (and Persisting) Law	6-37
		¶602.3.2 §263 Regulations	6-38
	¶602.4	P's Methods of Accounting	6-39
¶603		TREATMENT OF T WHEN T TRANSFERS ITS ASSETS TO P	6-39
	¶603.1	T's Gain or Loss on Receipt of Stock and Property from P	6-40
	¶603.2	T's Gain or Loss on Disposition of P Stock and Other Property	6-40
	¶603.3	T's Basis in Stock, Securities, and Property Received from P	6-42
¶604		TREATMENT OF T SHAREHOLDER UPON EXCHANGE OF T STOCK FOR P STOCK (OR P STOCK AND BOOT)	6-43
	¶604.1	Gain or Loss Recognition	6-43
		¶604.1.1 General Rules	6-43
		¶604.1.2 Warrants	6-45
		¶604.1.3 Poison Pill	6-54
		¶604.1.4 Installment Method	6-56
		¶604.1.5 Receipt of Unvested P Stock in Exchange for Vested T Stock	6-57
		(1) Expansive Code §83 interpretation with no Code §83(b) election	6-59
		(2) Expansive Code §83 interpretation with Code §83(b) election	6-72
		(3) Argument that Code §83 not applicable at all—narrow Code §83 interpretation	6-73
		(4) Taxable P-T acquisition	6-75
	¶604.1.6	Cash in Lieu of Fractional Shares	6-76
¶604.2		T Shareholder's Basis in P Stock or Property Received from P	6-76
	¶604.2.1	General Rules	6-76
	¶604.2.2	Pre-Reorganization T Shares Held at Different Tax Bases or with Different Holding Periods	6-77
		¶604.2.2.1 Adequate Identification	6-78
		¶604.2.2.2 No Adequate Identification: Permitted Designation	6-80
		¶604.2.2.3 No Adequate Identification—Failure to Timely Designate: FIFO Rule	6-80



## Contents

	¶604.2.2.4	Code §351 Reservation	6–81
	¶604.2.2.5	Commonly Owned Corporations and Stockless Reorganizations	6–83
	¶604.2.2.6	Basis Recovery Regulations Proposed and Subsequently Withdrawn	6–84
¶604.3	T Shareholder Receiving P Preferred Stock		6–85
	¶604.3.1	Non-Qualified Preferred Stock (NQ Pfd)	6–86
	¶604.3.1.1	Significant Participation in Corporate Growth	6–86
	¶604.3.1.2	Retireable NQ Pfd	6–90
	¶604.3.1.3	Indexed Dividend NQ Pfd	6–97
	¶604.3.1.4	Receipt of NQ Pfd for Preferred Stock Issued Pre-6/97	6–98
	¶604.3.2	T Shareholder Receiving P NQ Pfd	6–100
	(1)	Code §368 exchange	6–100
	(2)	Code §351 exchanges	6–102
	(3)	Spin-offs and split-offs	6–102
	(4)	Code §1036 exchange	6–103
	(5)	NQ Pfd and installment method reporting	6–103
	¶604.3.3	Effect of P NQ Pfd on Reorganization Qualification	6–104
	¶604.3.4	Using NQ Pfd to Achieve Tax Advantage—NQ Pfd Rules Under Other Code Sections	6–109
	¶604.3.5	Other Tax Consequences of Receiving P Preferred Stock	6–117
¶604.4	T Shareholders Surrender T Preferred Stock with Dividends in Arrears		6–125
¶605	EXCHANGING T SECURITIES FOR P SECURITIES OR P STOCK		6–129
¶606	POST-CLOSING PRICE ADJUSTMENTS: ESCROW, CONTINGENT STOCK, AND FLEXIBLE CONVERSION RATIO		6–135
	¶606.1	Description of the Arrangements	6–136
	¶606.1.1	Escrow	6–136
	¶606.1.2	Contingent Stock	6–138
	¶606.1.3	Flexible Conversion Ratio Preferred Stock	6–139
	¶606.1.4	Comparing Price Adjustment Mechanisms	6–140
	¶606.2	Is Escrow or Contingent Stock Arrangement Boot?	6–142
	¶606.2.1	Midstream Acquisition of P	6–144
	¶606.3	IRS Ruling Guidelines	6–145
	¶606.4	Imputed Interest	6–147
	¶606.4.1	Contingent Stock	6–147
	¶606.4.2	Flexible Conversion Ratio Preferred Stock	6–148
	¶606.5	Basis/Holding Period Issues	6–149

## Contents

	¶606.5.1	No Separation of Interest and Non-Interest Shares	6–149
	¶606.5.2	Separation of Interest and Non-Interest Shares	6–153
	¶606.6	Return of Escrowed P Shares to P	6–155
	¶606.7	Straddle Issues	6–157
	¶606.8	SEC Rules	6–158
¶607		OLD T SHAREHOLDER’S BASIS AFTER DEATH	6–158
¶608		SUBSTANCE-OVER-FORM, ECONOMIC-SUBSTANCE, STEP-TRANSACTION, AND RECHARACTERIZATION DOCTRINES	6–159
	¶608.1	In General	6–159
	¶608.2	Economic-Substance Doctrine and Code §7701(o)	6–160
	¶608.3	Step-Transaction Doctrine	6–169
	¶608.3.1	Alternative Formulations of Step-Transaction Doctrine	6–172
	¶608.3.2	Key Factors in Applying Step-Transaction Doctrine	6–175
	¶608.3.2.1	Intent	6–176
	¶608.3.2.2	Temporal Proximity	6–177
	¶608.3.3	Limitations on Step-Transaction Doctrine	6–178
	¶608.3.3.1	Independent Significance and Functionally Unrelated Doctrine	6–178
	¶608.3.3.2	Prohibition on Inventing Steps	6–183
	¶608.3.3.3	Real and Meaningful Shareholder Vote	6–190
	¶608.3.3.4	Code §351 Transactions	6–192
		(1) Underwriting transaction	6–193
		(2) Multiple dropdowns	6–195
	¶608.3.3.5	IRS May Recharacterize—but Taxpayer May Be Bound by—Transaction Form	6–198
	¶608.3.3.6	IRS May Forego Step-Transaction Recharacterization	6–205
	¶608.3.3.7	Court May Forego Step-Transaction Recharacterization Where Inconsistent with Statutory/Regulation Scheme	6–209
	¶608.3.4	Consistency Among the Parties	6–210
	¶608.3.5	Integrated Acquisitive Reorganizations	6–212
	¶608.3.5.1	No First-Step QSP	6–214
	¶608.3.5.2	First-Step QSP	6–222
		(1) No Code §338 or §338(h)(10) election for T	6–222

## Contents

	(2) Code §338 or §338(h)(10) election for T	6-226
¶608.3.5.3	Advantages of Integrated Acquisition, Including Use of S-LLC	6-231
	(1) P acquires T stock and T then forward merges into disregarded S-LLC	6-232
	(2) P acquires T stock and T then forward merges into corporate S-LLC	6-232
	(3) P acquires T's stock and then P's non-corporate disregarded subsidiary S-LLC reverse merges into T	6-233
	(4) P acquires T's stock and then P's corporate S-LLC subsidiary reverse merges into T	6-233
	¶608.3.6 Pre-Reorganization Incorporation of T Partnership or LLC	6-233
¶609	BUSINESS PURPOSE	6-236
	¶609.1 <i>Gregory</i> —Genesis of Business Purpose Requirement	6-238
	¶609.2 Whose Business Purpose Counts?	6-240
	¶609.3 Presence of Tax Avoidance Motives	6-242
	¶609.4 Reorganization Undertaken to Qualify for S Status	6-244
¶610	CONTINUITY OF SHAREHOLDER INTEREST	6-245
	(1) General COI description	6-245
	(2) Insolvent T	6-250
	(3) Prior COI doctrine	6-250
	(4) Current law examples	6-250
	¶610.1 What Type of Consideration Counts?	6-257
	¶610.1.1 P Acquires All of Previously Unrelated T	6-257
	¶610.1.2 P Owns Old and Cold T Stock	6-259
	¶610.1.3 P Acquires Less Than All T's Shares	6-259
	¶610.1.4 T Shareholders Receive T Stock with Limited/Specialized Rights	6-260
	¶610.2 Necessary Degree of Continuity	6-260
	¶610.2.1 In General	6-260
	¶610.2.2 Necessary COI Percentage	6-261
	¶610.2.3 Date P Shares and Other Property Valued for COI Purposes	6-265
	¶610.2.4 Good COI Percentage Now 40%	6-271
	¶610.2.5 Planning	6-271
	¶610.2.6 Pre-Acquisition Exercise of T Options or Warrants or Conversion of T Convertible Debt	6-274

## Contents

¶610.2.7	Escrowed Stock and Contingent Stock Arrangements	6-278
	¶610.2.7.1 Escrowed Stock	6-278
	¶610.2.7.2 Contingent Stock Arrangements	6-281
¶610.3	Post-Reorganization and Pre-Reorganization Continuity	6-284
	¶610.3.1 Redemption Rights	6-286
	¶610.3.2 Meaning of Related Person	6-288
	¶610.3.2.1 Related Person as to P	6-289
	¶610.3.2.2 Transactions Involving Partnerships	6-291
¶610.4	Measuring Continuity When P or S Is an Historic T Shareholder	6-292
	¶610.4.1 P Is an Historic T Shareholder—T Merges Upstream into P	6-292
	¶610.4.2 P Is an Historic T Shareholder—T Merges into S	6-294
	¶610.4.3 S Is an Historic T Shareholder—T Merges into S1	6-295
	¶610.4.4 S Is an Historic T Shareholder—T Merges into S	6-295
¶610.5	P Purchases Controlling Interest in T and Merges T into S	6-296
¶610.6	Effect of P's Post-Reorganization Contributions and Distributions of T Assets or T or S Stock—Remote Continuity	6-310
	¶610.6.1 Contributions	6-310
	(1) Qualified group	6-311
	(2) Downstream transfer to subsidiary corporation	6-312
	(3) Downstream transfer to partnership	6-314
	¶610.6.2 Distributions	6-316
¶610.7	COI Requirement Not Applicable to P Shareholders	6-318
¶610.8	Achieving COI by Reversing P and T	6-319
¶610.9	Using Code §351 to Avoid Continuity Problem	6-320
¶610.10	Using Recapitalization to Avoid Continuity Problem	6-321
¶610.11	Pre-1998 COI Issues	6-322
	¶610.11.1 Historic T Shareholders	6-322
	¶610.11.2 Post-Reorganization Continuity	6-325
	¶610.11.3 Rescission Rights	6-330
	¶610.11.4 Post-Reorganization Distributions, Contributions, Gifts, and Donations of P Stock	6-330
	¶610.11.4.1 Distributions—Remote Continuity	6-331
	¶610.11.4.2 Contributions—Remote Continuity	6-337
	¶610.11.4.3 Gifts and Donations	6-340

¶611	CONTINUITY OF BUSINESS ENTERPRISE	6-340
¶611.1	Meaning of COBE	6-340
¶611.2	Pre- or Post-Reorganization Downstream Transfer of T Assets or T or S Stock to Controlled Corporation	6-344
¶611.3	Pre- or Post-Reorganization Downstream Transfer of T Assets or T or S Stock to Partnership	6-345
¶611.3.1	Assets Transfer	6-345
¶611.3.2	Stock Transfer	6-349
¶611.4	Post-Reorganization Upstream Transfers of T Assets or Stock	6-351
¶612	EXCHANGE OF NET VALUE	6-352
¶612.1	Insolvency and COI	6-353
¶612.2	Illustrations	6-355
¶613	DOWNSTREAM REORGANIZATION WITH PARTIALLY OWNED SUBSIDIARY	6-356
¶614	IRS CONFIDENTIAL TRANSACTION RULES	6-360
¶615	SPECIAL ISSUES—FORMS OF REORGANIZATION, S CORPS, ACQUISITION EXPENSES, HANDLING STOCK OPTIONS, CONSOLIDATED RETURN ISSUES, UNWANTED ASSETS, CODE §351 TRANSACTIONS, INVERSION TRANSACTIONS, LEVERAGED BUYOUTS, NET OPERATING LOSSES, GREENMAIL PAYMENTS, REPORTING REQUIREMENTS, AND SAMPLE ACQUISITION AGREEMENTS	6-361

## Chapter 7

### “Solely for Voting Stock” Reorganizations

¶701	“B” REORGANIZATION—STOCK-FOR-STOCK EXCHANGE	7-4
¶701.1	3 Types of “B” Reorganizations	7-4
¶701.1.1	Normal “B”	7-4
¶701.1.2	Subsidiary “B”	7-6
¶701.1.3	Forced “B”	7-7
¶701.1.3.1	Transitory S	7-7
S-into-T merger can qualify as “B”		7-7
Historical background		7-8
¶701.1.3.2	Forced “B” Where S Not Transitory	7-9
¶701.1.3.3	P’s Basis in T’s Stock After Forced “B” or Other Transferred Basis Transaction	7-11
¶701.2	Dropdown Before or After Acquisitive Reorganization	7-13

## Contents

§701.2.1	Dropdown to Corporation After Acquisitive Reorganization	7–13
§701.2.2	Dropdown to Partnership or LLC After Acquisitive Reorganization	7–17
§701.2.3	Dropdown to Corporation Before Acquisitive Reorganization	7–18
§701.2.4	Dropdown to Single-Member LLC Before Acquisitive Reorganization	7–19
§701.3	Certain Applications of “Solely” Rule	7–20
§701.3.1	Redemptions by T	7–20
§701.3.2	Payments to Dissenters	7–21
§701.3.3	Cash in Lieu of Fractional Shares	7–21
§701.3.4	T’s Debentures	7–22
§701.3.5	Capital Contributions by P	7–23
§701.3.6	P NQ Pfd	7–23
§701.4	Creeping “B” Reorganization	7–24
§701.5	Recapitalization by T to Facilitate a “B” Reorganization	7–26
§701.6	Bifurcated Ownership and Solely Rule	7–26
(1)	Direct ownership	7–26
(2)	Upstream dividend	7–27
(3)	Upstream liquidation	7–27
(4)	Downstream contribution	7–27
(5)	Purchase by P shareholders	7–27
(6)	Purchase by S	7–28
§701.7	“B” Reorganization Followed by Liquidation or Upstream Merger	7–28
§701.8	“B” Reorganization Followed by Upstream Dividend to Avoid T’s Code §531 Exposure	7–28
§701.9	Inversion Transaction	7–29
§702	“C” REORGANIZATION—STOCK-FOR-ASSETS EXCHANGE	7–29
§702.1	3 Types of “C” Reorganizations	7–29
§702.1.1	Normal “C”	7–30
§702.1.2	Subsidiary “C”	7–30
§702.1.3	Merging “C”	7–31
§702.2	Dropdown After Acquisitive Reorganization	7–31
§702.3	“Substantially All” Test	7–36
§702.3.1	Substantially All Test in Spinoff Context	7–38
§702.4	Liquidation Requirement	7–38
§702.4.1	IRS Waiver of Liquidation Requirement	7–39
§702.4.2	T Post-Reorganization Disposition of P Stock or Other Assets	7–41
§702.5	Treatment of T’s Liabilities	7–45
§702.5.1	T Liabilities Assumed by P (or S)	7–45
§702.5.2	T Liabilities Avoided by P (and S)	7–46
§702.6	Application of Solely Rule	7–48

## Contents

	¶702.6.1 20% Leeway (Boot Relaxation) Provision	7-48
	¶702.6.2 Purchase by P's Shareholders	7-50
	¶702.6.3 Purchase by S	7-50
	¶702.6.4 Former <i>Bausch &amp; Lomb</i> Problem	7-50
	¶702.6.4.1 Pre-2000 Law	7-50
	¶702.6.4.2 1/00 Elimination of <i>Bausch &amp; Lomb</i> Doctrine	7-52
	¶702.6.5 Purging P's Stock in T	7-54
	¶702.6.6 T Shareholders' Receipt of P NQ Pfd	7-55
¶702.7	Disregarding P's Transitory Ownership of T Stock—"B" Plus Liquidation Tested as "C"	7-55
	¶702.7.1 "B" Acquisition of Unrelated T Plus Liquidation Under Traditional <i>Kimbell-Diamond</i> Doctrine	7-56
	¶702.7.2 1982 Legislative History and Rev. Rul. 2008-25 Applied to "B" (or §368(a)(2)(E)) Acquisition of Unrelated T Plus Liquidation	7-57
	¶702.7.3 Upstream Merger Following P's Acquisition of Unrelated T in "B" Reorganization or Reverse Subsidiary Merger	7-59
	Deemed sidewise variant	7-59
	¶702.7.4 "B" Acquisition of Partially Owned T Plus Liquidation	7-60
	¶702.7.5 "B" Acquisition of Partially Owned T Plus Upstream Merger	7-61
	¶702.7.6 "B" Plus Partial Liquidation or Dividend	7-62
¶703	PROBLEMS UNDER SOLELY RULE	7-63
	¶703.1 Expenses of "B" or "C" Reorganization	7-63
	¶703.1.1 Reorganization Expenses—Rev. Rul. 73-54	7-63
	¶703.1.2 Liabilities to T Dissenters—Rev. Rul. 73-102	7-64
	¶703.1.3 Stock Valuation Costs—Rev. Rul. 75-421	7-64
	¶703.1.4 Finder's Fees—Rev. Rul. 75-450	7-64
	¶703.1.5 Distribution of T Retained Cash—Rev. Rul. 71-364	7-65
	¶703.1.6 Cost of Evaluating Offers—Rev. Rul. 76-365	7-65
¶703.2	Other Potential Boot Problems	7-66
	¶703.2.1 Registration Rights	7-66
	¶703.2.2 Substitution of Options	7-66
	¶703.2.3 Puts and Calls	7-67
	¶703.2.4 Rights to Receive Additional Dividends on P Stock	7-67
	¶703.2.5 Rights to Purchase Additional Stock	7-67
	Poison pill	7-68
	¶703.2.6 Employment Agreements	7-69

## Contents

¶703.2.7	Dividends Paid Before or After Reorganization	7-69
¶703.2.8	Purchases of T's Debentures	7-70
¶703.2.9	Purchases of Other Assets from T's Shareholders	7-70
¶703.2.10	Payment of T's Indebtedness Guaranteed by T's Shareholders	7-70
¶703.3	Meaning of Voting Stock and Voting Power	7-70
¶703.4	Escrows and Contingent Stock	7-74

## Chapter 8

### Reorganizations Not "Solely for Voting Stock"

---

¶801	MERGER OR CONSOLIDATION—"A" REORGANIZATION	8-2
¶801.1	Dropdown After "A" Reorganization	8-8
¶801.2	No "Solely" or "Substantially All" Rule	8-8
¶801.3	Additional Requirements	8-8
¶801.4	Treatment of T's Shareholders	8-9
¶801.4.1	T Shareholder Receiving Only P Stock	8-9
¶801.4.2	T Shareholder Receiving Only Boot	8-9
¶801.4.3	T Shareholder Receiving Stock and Boot	8-13
¶801.4.3.1	Allocating Boot Among P Shares	8-19
¶801.4.4	Attribution Rules	8-21
¶801.4.5	Step-Transaction Doctrine	8-21
¶801.4.6	Boot Taxation	8-22
¶801.5	Overlap with Liquidation Provisions	8-24
¶801.6	Use of P's Wholly Owned LLC Subsidiary to Effect "A" Reorganization	8-25
¶801.6.1	Historical Background and Current Rules	8-26
¶801.6.2	International Mergers	8-32
¶802	FORWARD SUBSIDIARY MERGER	8-36
¶802.1	Treatment of T's Liabilities	8-39
¶802.2	Zero Basis Problem on Old and Cold P Stock	8-39
¶802.3	Treatment of T's Shareholders	8-40
¶802.4	Disregarding S's Transitory Ownership of T Assets	8-40
(1)	Liquidation of S into P	8-40
(2)	Upstream merger of S into P	8-41
¶802.5	P's Basis in Its S Stock	8-42
¶802.6	Dropdown of T's Assets or S's Stock	8-42
¶802.6.1	Dropdown to Corporation	8-42
¶802.6.2	Dropdown to Partnership	8-46
¶802.7	Post-Merger Distribution of S's Stock	8-46



## Contents

¶802.8	Avoiding Double Tax on Failed Forward Subsidiary Merger	8-49
¶803	REVERSE SUBSIDIARY MERGER	8-49
¶803.1	Creeping Merger	8-57
¶803.2	T Redeems Part of Its Stock in the Merger	8-58
¶803.3	Zero Basis Problem in Failed Reorganization	8-59
¶803.4	Disregarding Transitory Ownership of T Stock	8-59
(1)	Liquidation of T into P	8-59
(2)	Upstream merger of T into P	8-60
¶803.5	Comparison with Forced “B” Reorganization	8-61
¶803.5.1	Post-Merger Upstream Dividend to Avoid T’s Code §531 Exposure	8-61
¶803.6	P’s Basis in Its T Stock	8-62
¶803.7	T Debentures	8-62
¶804	REORGANIZATIONS IN BANKRUPTCY	8-62
¶805	CASH-OPTION MERGER	8-63
¶805.1	“A” Reorganization	8-63
¶805.2	Illustrative Transaction	8-63
¶805.2.1	All P Shares	8-64
¶805.2.2	Dissenters’ Rights	8-64
¶805.2.3	Unconditional and Conditional Cash Elections	8-66
¶805.2.4	Effect of Cash Elections	8-69
¶805.2.5	Cash Cram-Down	8-70
¶805.3	Use of Installment Method	8-71

## Chapter 9

### Code §351 Acquisitions and Dispositions

---

¶901	CODE §351 GENERAL PRINCIPLES	9-3
(1)	Basic Code §351 requirements	9-3
(2)	Business purpose	9-9
(3)	Surrender and receipt of net value	9-11
(4)	Code §351 exchange for more than purely Newco stock	9-11
Cash boot		9-12
Debt boot		9-12
Liability relief		9-12
Liability relief with reorganization/§351 overlap		9-15
¶901.1	Treatment of Newco	9-17
¶901.1.1	Newco Gain or Loss Recognition	9-17
¶901.1.2	Newco’s Basis in T Assets or Stock Received	9-17
¶901.1.2.1	General Basis Rules	9-17

## Contents

	¶901.1.2.2	Basis Adjustments in Loss Importation and Loss Duplication Transactions	9-19
		(1) Loss importation	9-20
		(2) Loss duplication	9-26
	¶901.1.3	Newco's Deduction of Acquired Liabilities	9-34
¶901.2		Treatment of Transferors	9-34
	¶901.2.1	Recognition of Gain or Loss	9-34
		(1) Newco stock	9-34
		(2) Boot	9-34
		(3) NQ Pfd	9-35
	¶901.2.2	Basis in Newco Stock and Other Property Received	9-37
		(1) Basis in Newco stock	9-37
		(2) Basis in depreciated Newco stock adjusted for certain liability assumptions	9-40
		(3) Basis in boot other than Newco indebtedness (and possibly NQ Pfd) reported on installment method	9-40
		(4) Basis in Newco debt reported on installment method	9-41
		(5) Basis following partnership's (or other unincorporated entity's) incorporation	9-42
	¶901.2.3	Receipt of Boot in Transferring More Than 1 Kind of Property to Newco	9-44
	¶901.2.4	Treatment of Newco Notes Received	9-46
		(1) Transferor and transferee file consolidated return	9-47
		(2) Basis after death	9-48
		(3) Newco debt is thin	9-48
¶902		USING TAX-FREE PREFERRED STOCK IN AN OTHERWISE CASH ACQUISITION— <i>NATIONAL STARCH</i> RULING AS LIMITED BY THE NQ PFD RULES	9-48
	¶902.1	<i>National Starch</i> Problem	9-49
	¶902.2	<i>National Starch</i> Solution	9-49
	¶902.3	IRS Treatment of <i>National Starch</i> Transaction	9-50
		¶902.3.1 Part Code §351—Part Purchase	9-51
		¶902.3.2 Basis-Step-Up Aspects	9-51
		(1) Liquidation representation	9-51
		(2) Old Code §334(b)(2)	9-52
		(3) Code §338	9-52
		(4) Additional opportunities for step up under Code §338	9-52
	¶902.4	<i>National Starch</i> Transaction as Limited by the NQ Pfd Rules	9-53

¶903	LBO MANAGEMENT TAX-FREE ROLLOVER USING <i>NATIONAL STARCH</i>	9–59
¶903.1	Mgmt’s Tax Treatment	9–60
	(1) Receipt of Newco stock	9–60
	(2) Receipt of cash	9–60
	(3) Surrender of old ISO shares	9–61
	(4) Receipt of Newco preferred stock	9–61
¶903.2	Newco’s Tax Treatment	9–64
¶903.3	Potential Code §304 Problem	9–66
¶904	HORIZONTAL DOUBLE-DUMMY TECHNIQUE	9–69
¶904.1	Problem	9–69
¶904.2	Solution	9–70
¶904.3	Tax Consequences	9–71
¶904.4	Transactional Variation	9–72
¶904.5	Original Issue Discount	9–72
¶904.6	Analytical Underpinnings of Horizontal Double-Dummy Technique	9–72
¶904.7	Transactional Simplification Using Delaware General Corporation Law §251(g)	9–76
¶905	BREAKUP TRANSACTIONS USING CODE §351 SECURITIES OVERTURNED	9–80
¶906	BREAKUP TRANSACTIONS USING DISTRIBUTED DEBT OVERTURNED	9–82
¶907	BREAKUP TRANSACTIONS USING BUMP AND STRIP TECHNIQUE OVERTURNED	9–84
¶908	INVERSION TRANSACTIONS	9–87
¶909	USE OF CODE §351 IN COMBINATION SPIN-OFF-ACQUISITION TRANSACTION	9–91
¶910	IRS CONFIDENTIAL TRANSACTION RULES	9–95
¶911	SPECIAL ISSUES—REPORTING REQUIREMENTS, STEP-TRANSACTION DOCTRINE, AND OTHER ASPECTS OF THE SUBSTANCE-OVER-FORM DOCTRINES	9–96

## Chapter 10

### Tax-Free Spin-Offs

¶1001	INTRODUCTION	10–4
¶1001.1	Chapter 10 Summary	10–4
¶1001.2	IRS Code §355 Letter Rulings	10–9
¶1001.3	Code §355 Spin-Off Involving a REIT	10–14
¶1002	CODE §355 IN GENERAL	10–15
¶1002.1	General Results if Code §355 Applies	10–15
	¶1002.1.1 Taxation of D	10–15

## Contents

	¶1002.1.1.1	Bifurcated Statutory Responsibility	10–16
	¶1002.1.1.2	Treatment of Certain C Stock	10–18
	¶1002.1.1.3	Gain Recognized Under Consolidated Return Regulations	10–19
	¶1002.1.1.4	Tax Credit Recapture	10–24
	¶1002.1.1.5	E&P Allocation	10–27
	¶1002.1.1.6	D and C Options and SRF Stock	10–28
	¶1002.1.1.7	Transaction Costs	10–28
	¶1002.1.1.8	North/South Transactions	10–29
	¶1002.1.2	Taxation of D Shareholders	10–34
	¶1002.1.2.1	Holder of D Options and Warrants	10–37
	¶1002.2	General Requirements for Tax-Free Treatment Under Code §355	10–37
	¶1002.3	Cash-Rich Split-Off Disqualified by Code §355(g)	10–39
	¶1002.4	Relationship Between Code §355 and Code §368	10–41
¶1003		CONTROL REQUIREMENTS	10–41
	¶1003.1	Predistribution Control Requirement	10–41
	¶1003.1.1	Recapitalization to Create D’s Code §368(c) Control of C	10–42
	¶1003.1.2	Post-Distribution Unwinding of C’s High-Vote/Low-Vote Stock Structure	10–43
	¶1003.1.3	Creeping Acquisitions: IRS Notice 2007-60	10–45
	¶1003.2	Distribution of Control Requirement	10–47
¶1004		5-YEAR ACTIVE TRADE OR BUSINESS	10–50
	¶1004.1	Active Trade or Business	10–50
	¶1004.1.1	D and C Must Each Be Engaged in Active Trade or Business	10–50
	¶1004.1.2	Meaning of Active Trade or Business	10–51
	¶1004.2	5-Year Requirement	10–57
	¶1004.2.1	Business Expansion Doctrine	10–57
	¶1004.2.1.1	Same Line of Business	10–58
	¶1004.2.1.2	Non-Expansion Acquisitions	10–62
	¶1004.2.1.2.1	Current Law	10–62
	¶1004.2.1.2.2	5/07 Proposed Regulations	10–64
	¶1004.2.1.3	Expansion: Acquisition Structure	10–66
	¶1004.3	Acquisition of Control	10–71
	¶1004.3.1	Acquisition of Control in Tax-Free Transaction	10–73
	¶1004.4	Division of Single Business	10–77
	¶1004.5	Satisfying Active Conduct of Trade or Business Requirement Through Partnership	10–77

## Contents

¶1005 BUSINESS PURPOSE	10–80
¶1006 DEVICE FOR E&P DISTRIBUTION	10–87
¶1006.1 Device Factors	10–88
¶1006.2 Non-Device Factors	10–92
¶1006.3 Transactions Ordinarily Not Device	10–93
¶1006.4 Proposed Per Se Device Rule	10–95
¶1007 CONTINUITY OF SHAREHOLDER INTEREST	10–96
Post-distribution tax-free reorganization	10–99
¶1008 CONTINUITY OF BUSINESS ENTERPRISE	10–99
¶1009 DISQUALIFIED DISTRIBUTION	10–100
¶1009.1 Interaction with Code §355(e)	10–106
¶1009.2 Purpose of Disqualified Distribution Rules	10–106
¶1009.3 Definition of Purchase	10–107
¶1009.3.1 Acquiring D by Triangular Reorganization	10–116
¶1009.4 50% or Greater Interest	10–118
¶1009.5 Aggregation Rules	10–119
¶1009.6 Attribution Rules	10–121
¶1009.7 Deemed Purchase Rules	10–124
¶1009.8 5-Year Period	10–128
¶1009.9 Regulatory Authority to Exclude Transactions	10–129
¶1009.10 Regulatory Authority to Include Transactions	10–132
¶1010 CORPORATE DIVISION FOLLOWED BY TAX-FREE REORGANIZATION INVOLVING D OR C OR ISSUANCE OF D OR C STOCK; CODE §355(e)	10–132
¶1010.1 Effect of Subsequent Tax-Free Reorganization on Prior Corporate Division’s Code §355 Qualification	10–144
¶1010.1.1 Device Restriction	10–145
¶1010.1.2 Post-Distribution Control Requirements	10–146
¶1010.1.2.1 New and Hot C	10–148
¶1010.1.2.2 Old and Cold C	10–151
Pre-5/96 transactions	10–152
5/96 through 4/97 transactions	10–152
Post-4/97 transactions	10–155
¶1010.1.2.3 Post-Distribution Issuance of Additional C Stock	10–155
Pre-4/97 transactions	10–155
Post-4/97 transactions	10–159
¶1010.2 Code §355 Corporate-Level Gain Recognition on <i>Morris Trust</i> and Other Distributions Coupled with Acquisitions	10–159
¶1010.2.1 Purpose of Code §355(e) and §355(f)	10–160
¶1010.2.2 Operation of Code §355(e)	10–161
¶1010.2.2.1 Interaction with Code §355(d)	10–161
¶1010.2.2.2 Elements of Code §355(e)	10–161
¶1010.2.2.3 Distribution Followed by Acquisition	10–165

## Contents

¶1010.2.2.4	Distribution and Acquisition in Either Order	10–171
¶1010.2.2.5	Acquisition Followed by Distribution	10–174
¶1010.2.3	Effect on Code §355(e) of Corporate Reorganization Involving D or C	10–185
¶1010.2.3.1	P’s Acquisition of D’s (or C’s) Assets in “A,” “C,” or “D” Reorganization Treated as P Shareholders’ Acquisition of D’s (or C’s) Stock	10–185
¶1010.2.3.2	Predecessors and Successors	10–187
¶1010.2.4	Multiple Distributions	10–192
¶1010.2.5	Intra-Group Distribution Exception to §355(e)	10–193
¶1010.2.6	Operation of Code §355(f)	10–193
¶1010.3	Continuity of Interest	10–195
¶1010.4	5-Year Active Business Requirement	10–196
¶1010.5	Business Purpose	10–196
¶1010.6	Effect of Corporate Division on Qualification of Subsequent Acquisition Under Code §368	10–198
¶1010.6.1	Substantially All Requirement	10–198
¶1010.6.2	Potential Utility of Transitory C	10–199
¶1011	CORPORATE DIVISIONS FOLLOWED BY TAXABLE ACQUISITION OF D OR C	10–200
¶1011.1	Continuity of Interest	10–200
¶1011.2	Device	10–200
¶1012	MONETIZATION STRATEGIES	10–200
¶1012.1	Pre-Spin-Off Distribution or Debt Assumption	10–201
¶1012.2	Distribution of C Stock or Securities to D Creditors as Part of D Reorganization	10–207
¶1012.3	Distribution of C Stock as Alternative to Sale	10–212
¶1013	IRS CONFIDENTIAL TRANSACTION RULES	10–214
¶1014	SPECIAL ISSUES—REPORTING REQUIREMENTS AND SUBSTANCE-OVER-FORM DOCTRINES	10–216

## Volume 3

### Chapter 11

---

### Taxable and Tax-Free S Corp Acquisitions

---

¶1101	ACQUISITIONS INVOLVING S CORP GENERALLY	11–6
-------	---	------

## Contents

¶1102 S CORP DEFINITION	11-9
¶1102.1 100 or Fewer Shareholders	11-10
¶1102.1.1 Members of Family Treated as 1 Shareholder	11-10
¶1102.1.2 SRF Bank Director Stock	11-10
¶1102.2 Eligible S Corp Shareholders	11-11
¶1102.2.1 Treatment of S Corp ESOP Shareholder	11-14
1996 Act	11-14
1997 Act	11-14
2001 Act’s enactment of §409(p)	11-16
ESOP rollover into IRA	11-18
ESOP with floor price agreement	11-19
¶1102.3 1 Class of Stock	11-20
¶1102.3.1 1 Class of Stock Regulation	11-21
¶1102.3.1.1 Identical Rights to Distribution and Liquidation Proceeds	11-21
¶1102.3.1.2 Factual Test of “Principal [Bad] Purpose”	11-23
¶1102.3.1.3 Non-Identical Dividend Payments	11-23
¶1102.3.1.4 Distributions Reflecting Changes in Shareholdings	11-26
¶1102.3.1.5 Below-Market Loans, Unreasonable Compensation, and Other Constructive Dividends	11-28
¶1102.3.1.6 Code §83 SRF Stock	11-31
¶1102.3.1.7 Buy-Sell and Redemption Agreements and Transfer Restrictions	11-33
¶1102.3.1.8 Deferred Compensation Plans	11-39
¶1102.3.1.9 Debt and Other Instruments	11-41
¶1102.3.1.10 Options, Warrants, Convertible Debt, or Similar Instruments	11-43
Certainty of exercise	11-43
Substantially in-the-money	11-44
(1) Lender option	11-46
(2) Service provider option	11-47
(3) 90%-of-FV option	11-48
Convertible debt	11-50
¶1102.3.1.11 Code §338(h)(10) Transaction (or Asset Sale) in Which T-S Corp Shareholders Receive Different Per Share Amounts	11-53
(1) Corporate-level transaction	11-53
(2) Shareholder-level transaction	11-54

## Contents

¶1102.4	Techniques for Avoiding Arbitrary Restrictions on S Corp Shareholders and S Corp Stock	11-56
¶1102.4.1	Dropdown Partnership or LLC	11-57
¶1102.4.2	Debt Instrument with Warrants or Conversion Privilege	11-58
¶1102.5	C or S Corp Subsidiaries	11-59
¶1102.5.1	C Corp Subsidiary	11-59
¶1102.5.2	Elective Disregard of 100% Subsidiary	11-60
¶1102.5.3	QSubs: Issues and Opportunities	11-64
¶1102.5.3.1	QSub Election	11-65
¶1102.5.3.2	Effects of QSub Election	11-66
¶1102.5.3.3	Terminating QSub Status	11-72
¶1102.5.3.4	QSub Makes Acquisitions	11-75
¶1102.5.3.5	Disposition of QSub by Parent S Corp	11-77
¶1102.5.3.6	T-S Corp's Assets Including T-SSub/QSub Acquired by P-S Corp	11-85
¶1102.6	Ineligible Corporations	11-86
¶1103	ADDITIONAL RULES APPLICABLE TO S CORP MERGER, ACQUISITION, OR BUYOUT	11-86
¶1103.1	Calendar Year	11-86
¶1103.2	Allocation of Income	11-87
¶1103.3	Election Effective Date	11-88
¶1103.3.1	Curing Late or Invalid Election	11-88
¶1103.4	S Termination Year	11-90
¶1103.5	Reelection After Termination	11-93
¶1103.6	S Corp Debt/Equity Rules	11-93
¶1103.7	Corporate-Level Penalty Taxes	11-93
¶1103.7.1	Tax Credit Recapture and DIG Trigger	11-94
¶1103.7.2	LIFO Recapture	11-94
¶1103.7.3	Excess Net Passive Income—Code §1375	11-95
¶1103.7.4	Built-In Gain—Code §1374	11-96
(1)	5-year tax on former C corp	11-96
(2)	5-year tax on C corp carryover basis assets	11-96
(3)	Gain recognition	11-97
(4)	Taxable income limitation	11-97
(5)	Avoidance of NUBIG double counting	11-98
(6)	Code §382 NOL rules	11-98
(7)	Code §384 NOL rules	11-99
(8)	Bifurcated acquisition structure—part purchase of assets and part purchase of stock	11-99
(9)	RIC or REIT conversion	11-99



## Contents

¶1103.7.5	Avoiding Corporate-Level Tax on Net Built-In Gain and Excess Capital Gain	11-100
¶1103.8	Distributions Exceeding S Corp Earnings	11-102
¶1103.9	Corporate Preference Items	11-102
¶1104	P-S CORP's TAXABLE PURCHASE OF T's ASSETS	11-103
¶1104.1	Tax Consequences	11-103
¶1104.2	Financing P-S Corp's Taxable Asset Purchase	11-103
¶1104.2.1	Shareholder Contributions	11-104
¶1104.2.2	Shareholder Loans	11-104
¶1104.2.3	Hybrid Shareholder Investment Using Partnership	11-105
¶1104.2.4	Loan by S Corp Non-Shareholder	11-106
(1)	No basis to shareholders	11-106
(2)	Risk that the loans will be recharacterized as equity	11-108
¶1104.2.5	Financing Examples	11-108
¶1104.2.6	Seller Financing	11-110
¶1105	P-S CORP's TAXABLE PURCHASE OF T's STOCK	11-110
¶1105.1	Pre-1997 Limitation on P-S Corp's Ownership of Subsidiaries	11-111
¶1105.2	P-S Corp and Its Shareholders' Joint Acquisition of T's Stock	11-111
¶1105.3	P-S Corp's Shareholders Purchase T's Stock and Merge T and P-S Corp	11-112
¶1105.3.1	P-S Corp Merges into T and T Then Elects S Status	11-112
(1)	Reorganization	11-112
(2)	T's S election	11-113
(3)	Timing of T's S election—avoiding Code §1374 taint on P-S Corp's assets	11-113
(4)	T subject to Code §1374	11-114
¶1105.3.2	T Merges into P-S Corp	11-114
¶1105.3.3	P-S Corp's Shareholders Buy T's Stock and Form Partnership	11-114
¶1105.4	P-S Corp Purchases T's Stock and Merges Downstream into T	11-115
¶1105.5	P-S Corp Merges into T with Old T's Shareholders Receiving Cash and P-S Corp's Shareholders Receiving 100% of T's Stock	11-115
¶1105.6	P-S Corp Purchases T's Stock and Immediately Liquidates T	11-116
¶1105.6.1	Before IRS TAM 9245004 and 1996 Act Confirming Legislation	11-117
¶1105.6.2	Current Law: IRS TAM 9245004 and 1996 Act Confirming Legislation	11-119

## Contents

¶1105.7	P-S Corp Purchases T's Stock and Makes Regular Code §338 Election	11-121
¶1105.8	P-S Corp Purchases T's Stock from Bigco Under Code §338(h)(10) Election	11-121
¶1106	P-S CORP's TAX-FREE ACQUISITION OF T's ASSETS	11-122
¶1106.1	Alternative Approaches	11-123
¶1106.1.1	Acquisitive "D" Reorganization	11-124
¶1106.1.2	Merger of T into P-S Corp in "A" Reorganization	11-124
¶1106.1.3	Acquisition for P-S Corp Voting Stock in "C" Reorganization	11-125
¶1106.1.4	Acquisition of T's Assets by QSub	11-125
¶1106.1.5	Possible "B" Reorganization or Reverse Subsidiary Merger	11-126
¶1106.2	Code §1374 Taint for T's Assets	11-126
¶1106.3	Allocation of P-S Corp's Income	11-127
¶1106.4	T's E&P	11-128
¶1106.5	Carryover of T's Tax Attributes and Certain T-S Corp Shareholder Attributes	11-128
¶1107	P-S CORP's TAX-FREE ACQUISITION OF T's STOCK	11-129
¶1107.1	Code §351	11-129
¶1107.2	"B" Reorganization or Forward or Reverse Subsidiary Merger	11-130
¶1108	P's TAXABLE PURCHASE OF T-S CORP's ASSETS	11-130
¶1108.1	Corporate-Level Tax	11-134
¶1108.1.1	Code §1374 Built-In Gain Rule Inapplicable	11-134
¶1108.1.2	Code §1374 Built-In Gain Rule Applicable	11-134
¶1108.1.3	Built-In Gain on Carryover Basis Assets	11-135
¶1108.2	Comparison of Asset Sale and Stock Sale	11-135
¶1108.3	Liquidating T-S Corp After Sale of Assets on Installment Method—Code §453B(h) Trap	11-140
¶1108.3.1	Problem	11-140
¶1108.3.2	Planning Solution	11-143
¶1108.3.3	Relationship Between Code §453B(h) and Code §453A Interest Charge/Anti-Pledging Rule	11-146
¶1108.3.4	Liquidating T-S Corp After Sale of Assets in Which Open Transaction Obligation Received	11-146
¶1108.3.5	Character of Installment Sale Gain Where T-S Corp Shareholder Did Not Hold T-S Corp Stock More Than 1 Year	11-147
¶1108.4	Other Effects on T-S Corp from Asset Sale	11-148
¶1109	P's TAXABLE PURCHASE OF T-S CORP's STOCK	11-149
¶1109.1	No Code §338, §338(h)(10), or §336(e) Election for T-S Corp	11-149

## Contents

¶1109.1.1	Sale of Stock on Installment Method	11-149
¶1109.1.1.1	Stock Sale or Liquidation Exchange by Qualified Subchapter S Trust	11-153
¶1109.1.1.2	Installment Sale of S Corp Stock by Electing Small Business Trust	11-156
¶1109.1.2	Bifurcated Purchase of T-S Corp—Part Purchase of Assets and Part Purchase of Stock	11-156
¶1109.1.3	Converting Code §304(a)(1) C Corp Dividend to Basis Recovery and Sale Gain	11-161
(1)	Merrill’s transaction	11-161
(2)	Merrill in the Tax Court: 1st round	11-162
(3)	Merrill in the Second Circuit	11-163
(4)	Merrill in the Tax Court on remand	11-164
(5)	S corp planning	11-164
¶1109.2	Code §338 (but Not (h)(10)) Election for T-S Corp	11-166
(1)	Double taxation	11-166
(2)	One or 2 C corp returns	11-166
¶1109.3	Code §338(h)(10) Joint Election for T-S Corp	11-167
(1)	Election permitted by regulation, not statute	11-167
(2)	Requirements for election	11-168
(3)	T must remain S corp	11-169
(4)	QSub election for T	11-170
(5)	Timing of joint election	11-170
(6)	Who must consent	11-170
(7)	Risk an old T-S corp shareholder declines to sign consent form	11-171
(8)	Risk P’s downstream merger into T-S corp disqualifies Code §338(h)(10) election	11-172
(9)	Risk T-S corp’s upstream merger into P disqualifies Code §338(h)(10) election	11-172
¶1109.3.1	Effect of Code §338(h)(10) Election	11-172
¶1109.3.1.1	Effect on QSub’s Assets	11-173
¶1109.3.2	Differences in Shareholder-Level Taxation Between Stock Sale With and Without Code §338(h)(10) Election	11-174
¶1109.3.3	Tax on Asset Sale Gain	11-175
¶1109.3.4	Calculation of Deemed Sale Gain and Basis	11-176
¶1109.3.5	T-S Corp Shareholder Who Retains T Stock	11-176
¶1109.4	Code §336(e) Election for T-S Corp	11-176
¶1109.5	Other Effects	11-181
¶1109.5.1	Effect on T-S Corp’s S Election	11-181
¶1109.5.2	Allocation of T-S Corp’s Income	11-181
¶1109.5.3	Post-Sale Distributions	11-182

## Contents

¶1110 P's TAX-FREE ACQUISITION OF T-S CORP's ASSETS	11-182
¶1110.1 Boot	11-182
¶1110.2 Treatment of Built-In Gain	11-183
(1) Both P and T are S corps	11-183
(2) P is C corp	11-183
¶1110.3 Carryovers from T-S Corp	11-183
¶1110.4 Tax Credit Recapture	11-184
¶1111 P's TAX-FREE ACQUISITION OF T-S CORP's STOCK	11-185
¶1111.1 Termination of T-S Corp's S Status	11-185
¶1111.2 Allocation of T-S Corp's Income	11-185
¶1112 CODE §355 AND S CORPS	11-185
¶1112.1 Application of Built-In Gain Tax to Controlled	11-186
¶1112.2 E&P Allocation	11-187
¶1112.3 AAA Allocation	11-187

## Chapter 12

---

### Acquiring or Restructuring Distressed Company, Including Debt Cancellation Income and NOLs

---

¶1201 OVERVIEW	12-9
¶1202 LOSSCO CONSEQUENCES FROM DEBT RESTRUCTURING	12-9
¶1202.1 Debt Restructuring as Exchange (Including Deemed Exchange) or Not	12-10
¶1202.1.1 In General	12-10
¶1202.1.2 Old Debt Materially Modified or Material Payment to Debtholder Constitutes Debt-for-Debt Exchange	12-11
¶1202.1.2.1 Yield Change	12-12
¶1202.1.2.2 Principal Amount Change	12-14
¶1202.1.2.3 Payment Timing Change	12-14
¶1202.1.2.4 Obligor Change	12-15
¶1202.1.2.5 Change in Security, Credit Enhancement, or Priority	12-16
¶1202.1.2.6 Change in Debt's Nature	12-16
¶1202.1.2.7 Changing Accounting or Financial Covenants	12-17
¶1202.1.2.8 Other "Economically Significant" Modifications	12-17
¶1202.1.2.9 Effect of State Law Entity Conversion	12-17
¶1202.2 Amount of DC from Exchange	12-22
¶1202.2.1 DC in General	12-22
¶1202.2.2 Adjusted Issue Price	12-23
¶1202.2.3 Repurchase Price	12-23

## Contents

	Recourse versus non-recourse debt	12-24
¶1202.2.4	New Debt's Issue Price Turns on Whether Debt Is Market Traded	12-27
	(1) General rules	12-27
	(2) Regulatory definition of market traded	12-28
	(3) Prior market-traded regulations	12-30
¶1202.2.5	Possible Recharacterization of New Debt as Equity	12-31
	¶1202.2.5.1 Financial Deterioration Ignored	12-32
	¶1202.2.5.2 Scope of Financial-Deterioration-Ignored Rule	12-33
¶1202.2.6	Whether Debt Payment Deductible	12-35
¶1202.3	DC as Taxable CODI	12-35
	¶1202.3.1 In General	12-35
	¶1202.3.2 Use of Current Year Loss and NOLs	12-36
¶1202.4	CODI Exceptions	12-36
	¶1202.4.1 Bankruptcy/Insolvency CODI Exceptions and Attribute Reduction	12-36
	¶1202.4.1.1 In General	12-36
	¶1202.4.1.2 Bankruptcy	12-37
	¶1202.4.1.3 Insolvency	12-37
	¶1202.4.1.4 LossCo as Partnership, LLC, or Disregarded Entity	12-40
	¶1202.4.1.5 Attribute Reduction	12-48
	¶1202.4.1.6 Consolidated Group AR Considerations	12-55
	¶1202.4.1.7 LossCo Is S Corp	12-56
	¶1202.4.2 Purchase Price Adjustment CODI Exception	12-58
	¶1202.4.3 Shareholder Capital Contribution CODI Exception	12-59
¶1202.5	Related Person Acquires LossCo Debt	12-62
¶1202.6	Creditor Consequences from Debt Restructuring	12-68
	¶1202.6.1 Tax-Free Reorganization or Contribution	12-68
	¶1202.6.2 Taxable Exchange	12-70
	¶1202.6.3 Cancellation or Worthlessness of Debt	12-70
	¶1202.6.4 Effect of CODI on Equity Holders	12-72
¶1202.7	Related Topics	12-72
¶1203	NOL CARRYFORWARDS AND CARRYBACKS GENERALLY	12-72
	¶1203.1 Net Operating Losses	12-72
	(1) Carryback and carryover period	12-72
	(2) Consolidated group	12-74
	(3) Relinquishing carryback for pre-2021 NOLs	12-74
	(4) Interest on overpayment or deficiency	12-75
	¶1203.2 Pre-2018 AMT Losses	12-76
¶1204	GENERAL DESCRIPTION OF TAX ATTRIBUTE LIMITATIONS IN ACQUISITIONS	12-77

## Contents

¶1205	T NOL WHEN P OR S ACQUIRES T IN TAXABLE ACQUISITION	12-77
¶1205.1	T Sells Assets to P or S	12-77
¶1205.2	T's Shareholders Sell T Stock to P or S	12-78
¶1205.2.1	Code §338 Election	12-79
¶1205.2.2	Code §269(a) Change of Control with Tax Avoidance Principal Purpose	12-79
¶1205.2.3	Code §382 Ownership Change	12-84
¶1205.2.4	Consolidated Return Regulations	12-86
¶1205.3	Potential Reduction of P's Outside Basis in T's Stock When T's NOL Expires While P and T File Consolidated Return	12-97
¶1205.3.1	General Rule	12-97
¶1205.3.2	Exceptions and Strategies	12-98
¶1206	T NOL WHEN P OR S ACQUIRES T IN TAX-FREE ACQUISITION	12-102
¶1206.1	T Transfers Assets to P in "A" or "C" Reorganization	12-102
¶1206.1.1	Code §269(a) Acquisition of Assets with Tax Avoidance Principal Purpose	12-102
¶1206.1.2	Code §382	12-103
¶1206.1.3	Consolidated Return Regulations	12-104
¶1206.2	T Transfers Assets to S in Subsidiary "A" or Subsidiary "C" Reorganization in Exchange for P Stock	12-105
¶1206.2.1	Code §269(a) Acquisition of Assets with Tax Avoidance Principal Purpose	12-105
¶1206.2.2	Code §382	12-106
¶1206.2.3	Consolidated Return Regulations	12-107
¶1206.2.4	S's Later Liquidation into P	12-108
¶1206.3	T's Shareholders Transfer T Stock to P in "B" or Reverse Subsidiary "A" Reorganization	12-109
¶1206.3.1	Code §269(a) Acquisition of Assets with Tax Avoidance Principal Purpose	12-109
¶1206.3.2	Code §382	12-109
¶1206.3.3	Consolidated Return Regulations	12-110
¶1206.3.4	T's Later Liquidation into P	12-111
¶1206.4	Potential Reduction of P's Outside Basis in T's Stock When T's NOL Expires While P and T File Consolidated Return	12-112
¶1207	P NOL WHEN P ACQUIRES T	12-112
¶1207.1	P Acquires T's Assets	12-113
¶1207.1.1	P Acquires T's Assets in Taxable Purchase	12-113
¶1207.1.2	P Acquires T's Assets in "A" or "C" Reorganization	12-113
	(1) Code §269(a) acquisition of assets with tax avoidance principal purpose	12-113
	(2) Code §382	12-113
	(3) Consolidated return regulations	12-114

## Contents

	(4) Code §384 limitation on P’s ability to offset T’s built-in gain	12-114
¶1207.2	P Acquires Sufficient T Stock to File Consolidated Return with T	12-115
¶1207.2.1	“Affiliated Group” Definition	12-115
¶1207.2.2	Code §269(a) Change of Control with Tax Avoidance Principal Purpose	12-116
¶1207.2.3	Code §382	12-116
¶1207.2.4	Consolidated Return Reverse Acquisition Rules	12-117
¶1207.2.5	Code §384 Limitation on P’s Ability to Offset T’s Built-In Gain	12-117
¶1207.2.5.1	Taxable or Tax-Free Stock Acquisition	12-118
	(1) In general	12-118
	(2) P acquires “gain corporation” T group	12-121
¶1207.2.5.2	Tax-Free Asset Acquisition	12-122
¶1207.2.5.3	Code §384 Exceptions	12-123
¶1207.3	T Operated as Partnership with P, PE/VC, and Mgmt as Partners	12-126
¶1208	CARRYBACK OF POST-ACQUISITION OR POST-DISTRIBUTION PRE-2021 NOL TO RECOVER T OR P PRE-ACQUISITION OR PRE-DISTRIBUTION TAXES	12-129
¶1208.1	Pre-2018 Corporate Equity Reduction Transaction Limitation on NOL Carryback	12-130
¶1208.1.1	General Pre-2018 CERT Rule	12-131
¶1208.1.2	Portion of NOL Subject to Pre-2018 CERT Carryback Limitation	12-133
¶1208.1.3	Definition of CERT and Application of Pre-2018 CERT Rules	12-135
¶1208.1.3.1	Major Stock Acquisition	12-135
¶1208.1.3.2	Excess Distribution	12-137
¶1208.1.4	Interest Deduction Allocable to CERT	12-139
¶1208.1.4.1	Limitation on Interest Deduction	12-146
¶1208.1.4.2	Additional Limitations	12-147
¶1208.1.5	Application to Consolidated Group	12-149
¶1208.1.6	Structuring CERT Timing	12-156
¶1208.1.7	Application to Successor Corporation	12-157
¶1208.2	T Freestanding Corporation Before P Acquires T’s Stock	12-158
¶1208.3	T Common Parent of Old T Group Before P Acquires T’s Stock	12-158
¶1208.3.1	P Acquires T and Carries Back Post-Acquisition T Pre-2021 NOL to Prior T Taxable Year	12-159
¶1208.4	T Member of Bigco Group Before P Acquires T’s Stock	12-160

## Contents

¶1208.5	Structuring LBO Acquisition Debt in T Rather Than in Newco	12-161
¶1208.6	Merger or Liquidation of T Following P's Acquisition of T's Stock	12-162
¶1208.7	P (or S) Acquires T's Assets in Taxable or Tax-Free Acquisition or Purchases T's Stock with Code §338, §338(h)(10), or §336(e) Election	12-163
¶1209	CODE §163(j)-LIMITED INTEREST EXPENSE, NET CAPITAL LOSS, AND EXCESS TAX CREDIT	12-164
¶1209.1	T's Tax Attributes	12-164
¶1209.1.1	Taxable Acquisition of T's Assets	12-164
¶1209.1.2	Taxable Acquisition of T's Stock Plus Code §338, §338(h)(10), or §336(e) Election	12-165
¶1209.1.3	Code §269(a) Change of Control and Tax Avoidance Principal Purpose	12-165
¶1209.1.4	Code §382 Ownership Change	12-165
¶1209.1.5	Code §383 Ownership Change	12-165
¶1209.1.6	Consolidated Return Regulations	12-167
	(1) T transfers assets to P in "A" or "C" reorganization (or to S in subsidiary "A" or subsidiary "C" reorganization)	12-167
	(2) P (or S) acquires T's stock by purchase or in "B" or reverse subsidiary "A" reorganization	12-167
¶1209.2	P's Tax Attributes	12-168
¶1209.2.1	Code §269(a) Change of Control and Tax Avoidance Principal Purpose	12-168
¶1209.2.2	Code §382 Ownership Change	12-168
¶1209.2.3	Code §383 Limitations	12-168
¶1209.2.4	Consolidated Return Regulations	12-169
	(1) P acquires T's assets in "A" or "C" reorganization	12-169
	(2) P acquires T's stock in taxable or tax-free acquisition	12-169
¶1209.2.5	Code §384 Limitation on P's Ability to Offset T's Built-In Gain	12-170
¶1210	MORE DETAILED LOOK AT CODE §382	12-170
¶1210.1	Transactions Invoking Code §382 Taint: Ownership Changes	12-171
¶1210.1.1	Definition of Stock	12-172
¶1210.1.2	Owner Shift	12-176
	(1) Purchase or disposition of T stock by 5% shareholder	12-176
	(2) Code §351 exchange affecting percentage of T's stock owned by 5% shareholder	12-177



## Contents

(3) Redemption affecting percentage of T's stock owned by 5% shareholder	12-177
(4) Recapitalization affecting percentage of T's stock owned by 5% shareholder	12-177
(5) T stock issuance affecting percentage of stock owned by 5% shareholder	12-178
¶1210.1.3 Three-Year Testing Period	12-179
¶1210.1.4 Ownership Attribution Rules	12-182
¶1210.1.5 Deemed Exercise of Options and Similar Instruments	12-183
¶1210.1.5.1 In General	12-183
¶1210.1.5.2 Basic Deemed Exercise Rule	12-184
(1) Ownership test	12-184
(2) Control test	12-185
(3) Income test	12-185
¶1210.1.5.3 Exempt and Partly Exempt Options	12-186
¶1210.1.5.4 Exempt Transfer	12-188
¶1210.1.5.5 Subsequent Treatment of Option Deemed Exercised	12-189
¶1210.1.5.6 Bankrupt T	12-190
¶1210.1.6 Identifying 5% Shareholder—Aggregation and Segregation Rules	12-192
¶1210.1.6.1 General Principles and Reporting Requirements	12-193
¶1210.1.6.2 Aggregation Rules	12-195
¶1210.1.6.3 Segregation Rules	12-203
(1) Reorganizations and stock issuances by T	12-204
(2) Redemptions	12-204
(3) Deemed acquisition of T stock resulting from deemed option exercise	12-207
(4) Combination of public groups	12-207
(5) Dispositions by certain 5% shareholders	12-207
(6) Small issuance, cash issuance, secondary transfer, small redemption, and small entity exceptions	12-208
¶1210.1.6.4 Presumptions	12-216
¶1210.1.7 Multiple Transactions	12-219
¶1210.1.8 Stock Ownership Determinations Based on FV	12-220

## Contents

	Each share with same terms has same value	12-220
	Value-fluctuation rule	12-220
	Hold constant principle	12-223
	Notice 2010-50	12-226
¶1210.1.9	Devices to Deter Changes in T Shareholders	12-227
¶1210.2	Computation of Annual Code §382 Limitation	12-228
¶1210.2.1	FV of T Stock Multiplied by Long-Term Tax-Exempt Rate	12-228
¶1210.2.1.1	Definition of Stock	12-229
¶1210.2.1.2	Redemptions and Other Corporate Contractions	12-230
¶1210.2.1.3	Value of Stock	12-234
¶1210.2.1.4	Certain Capital Contributions Disregarded	12-234
¶1210.2.1.5	Title 11 Bankruptcy and Similar Cases—Code §382(l)(5) and (6)	12-236
	(1) Ownership changes not subject to Code §382 limitation	12-236
	(2) Ownership changes subject to Code §382 limitation	12-238
	(3) Title 11 or similar case	12-241
¶1210.2.1.6	Reduction in T's FV When T or Successor Has Substantial Non-Business Assets	12-242
¶1210.2.1.7	Non-U.S. Corporation	12-244
¶1210.2.1.8	Long-Term Tax-Exempt Rate	12-244
¶1210.2.1.9	Computation of Annual Code §382 Limitation Upon 1 or More Subsequent Ownership Changes	12-244
¶1210.2.2	Unused Limitation Carryover	12-246
¶1210.2.3	Built-In Gain	12-247
¶1210.2.3.1	In General	12-247
¶1210.2.3.2	IRS Notice 2003-65 Safe Harbors and Prop. Reg. §1.382-7	12-251
	(1) 1374 approach	12-251
	(2) 338 approach	12-254
	(3) Use of alternative approaches	12-256
	(4) Prop. Reg. §1.382-7	12-256
¶1210.2.3.3	Pre-Notice 2003-65 Guidance on BIG Items	12-261
¶1210.2.3.4	Interaction of Code §382 and Code §384	12-263

## Contents

¶1210.2.4	Code §338(g) Election Gain	12-264
¶1210.2.5	Limitation Not Applicable to Pre-Acquisition Income	12-267
¶1210.3	Continuity of Business Enterprise Requirement	12-267
¶1210.3.1	In General	12-267
¶1210.3.2	Exception for Bankrupt T Subject to Code §382(l)(5)	12-268
¶1210.4	Losses Subject to Limitation	12-269
¶1210.5	Anti-Abuse Rules	12-273
¶1210.6	Code §382 Application When T Has Subsidiaries or Is Acquired from Bigco	12-273
¶1210.6.1	Consolidated Approach for Loss Group or Loss Subgroup	12-274
¶1210.6.1.1	In General	12-274
¶1210.6.1.2	Identifying Loss Groups, Loss Subgroups, and Separate Loss Members	12-275
¶1210.6.2	P Acquires T When T Is Consolidated Group Parent	12-276
¶1210.6.2.1	Determining Ownership Change	12-276
¶1210.6.2.2	Computing Annual Code §382 Limitation	12-280
¶1210.6.2.3	Continuity of Business Enterprise Requirement	12-285
¶1210.6.2.4	Fold-In Rule: End of Separate Tracking of NOL or NUBIL	12-287
¶1210.6.3	P Acquires T (with or Without Subsidiaries) from Bigco	12-289
¶1210.6.3.1	In General	12-290
¶1210.6.3.2	Mandatory Apportionment of Bigco NOL and NUBIL	12-290
¶1210.6.3.3	Elective Apportionment of Code §382 Limitation from T Prior Ownership Change	12-290
¶1210.6.3.4	Elective Apportionment of Bigco NUBIG	12-292
¶1210.6.4	Net Unrealized Built-In Loss	12-292
¶1210.6.5	50%-or-More T Subsidiaries Not Included in T's Consolidated Return	12-295
¶1210.6.5.1	Regulatory Authority Generally	12-295
¶1210.6.5.2	Adjusting Code §382 Limitation	12-295
¶1210.6.6	Conclusion	12-297

## Chapter 13

### Tax Aspects of LBO Financing—Debt and Preferred Stock

---

¶1301	INTRODUCTION—BASIC TAX DIFFERENCES BETWEEN DEBT AND PREFERRED STOCK; OVERVIEW OF INTEREST DEDUCTIBILITY LIMITATIONS	13–6
¶1302	CHARACTERIZING P’S (OR NEWCO’S) INSTRUMENTS AS DEBT OR EQUITY	13–9
¶1302.1	Subjective Standards for Treating Debt as Equity for Tax Purposes	13–9
	Issuer’s Characterization Generally Binding, But Not on IRS	13–12
¶1302.2	Code §385	13–13
¶1302.3	Shareholder Guarantee of Thinly Capitalized Corporation’s Debt— <i>Plantation Patterns</i> Doctrine	13–20
¶1302.4	Recharacterization of Equity as Debt	13–21
¶1303	CODE §163(e)(5) DEFERRING AND/OR PERMANENTLY DISALLOWING OID AND PIK INTEREST DEDUCTIONS	13–23
¶1303.1	Introduction	13–23
¶1303.2	Summary of Statutory Mechanics	13–24
	¶1303.2.1 Definition of Applicable High Yield Discount Obligation	13–24
	¶1303.2.1.1 4-Factor Test	13–24
	¶1303.2.1.2 PIK Feature Treated as OID	13–25
	¶1303.2.1.3 Meaning of “Significant OID”	13–26
	Accrual period	13–27
	Measuring for significant OID	13–28
	Interest to be paid	13–29
	Measurement when debenture issued	13–30
	Practical interpretation of significant OID language	13–31
	¶1303.2.2 Treatment of Interest on Applicable High Yield Discount Obligations	13–34
	¶1303.2.2.1 Treatment of Issuer	13–34
	¶1303.2.2.2 Treatment of Holder	13–34
	¶1303.2.2.3 Determining OID “Disqualified Portion” and Qualified Stated Interest Definition	13–34
	Payments of original issue discount before maturity	13–36
	Qualified stated interest debentures	13–36

## Contents

	¶1303.2.2.4 Dividends-Received Deduction for Corporate Holder	13-37
	¶1303.2.2.5 Effect on E&P	13-39
¶1303.3	Issues and Problems	13-40
	¶1303.3.1 Definition of Applicable High Yield Discount Obligation	13-40
	¶1303.3.1.1 Not Limited to LBOs and Subordinated Debentures	13-40
	¶1303.3.1.2 More Than Five-Year Term	13-41
	¶1303.3.1.3 Yield Exceeding AFR Plus 5 (or 6) Percentage Points	13-42
	Applicable federal rate	13-42
	“Yield to maturity” not defined	13-42
	Debt issuance costs—“actual” or “as if” OID	13-42
	Non-traded debenture issued in exchange for non-traded property	13-44
	Interest paid in stock	13-47
	¶1303.3.1.4 Warrants and Conversion Privileges	13-47
	(1) Allocation of consideration to a warrant or common stock	13-47
	(2) No allocation to conversion privilege	13-48
	(3) Effect of conversion privilege on maturity	13-48
	¶1303.3.1.5 Significant Original Issue Discount Determination	13-49
	(1) Calculation of first 12 months’ yield for purposes of computing significant OID	13-49
	(2) Payment of principal versus payment of interest	13-51
	(3) Payment of interest on or before last day of accrual period	13-52
	(4) Accrual periods	13-52
	¶1303.3.1.6 Payments in Stock	13-53
	¶1303.3.1.7 Variable Interest Rate	13-56
	¶1303.3.1.8 Contingent Interest	13-57
	Significant original issue discount calculation	13-57

## Contents

	Applicable federal rate plus 5 (or 6) percentage points calculation	13–59
	Post-issuance facts	13–60
¶1303.3.1.9	Corporate Issuer	13–61
¶1303.3.2	Treatment of Interest on Applicable High Yield Discount Obligations	13–61
¶1303.3.2.1	Determining “Disqualified Portion” of Original Issue Discount; Qualified Stated Interest Debentures	13–61
	(1) Importance of qualified stated interest determination	13–61
	(2) “Unconditionally payable”	13–65
¶1303.3.2.2	Payments of Original Issue Discount Before Maturity	13–66
¶1303.4	Conclusion	13–67
¶1304	CODE §279 LIMITATION ON P’s (OR NEWCO’S) AND T’S DEDUCTION FOR ACQUISITION INTEREST	13–67
¶1304.1	Debt to Which Code §279 Applies	13–68
¶1304.2	Effect of Code §279	13–69
¶1304.3	Important Collateral Rules	13–70
¶1304.4	Avoiding Code §279 by Using Common Stock	13–70
¶1304.5	Avoiding Code §279 by Subordinating Only to Secured Debt	13–71
¶1304.6	Avoiding Code §279 by Using Holding Company	13–71
¶1304.7	Avoiding Code §279 by Redemption	13–74
¶1304.8	Refinancing Code §279 Debt	13–74
¶1305	CODE §163(j) LIMITATION ON INTEREST DEDUCTION WHERE NET INTEREST EXPENSE EXCEEDS 30% OF EBITDA (OR POST-2021 EXCEEDS 30% OF EBIT)	13–75
¶1305.1	Application to C Corp	13–75
¶1305.2	Application to Partnership (or LLC taxed as a partnership)	13–82
¶1305.3	Application to S Corp	13–93
¶1305.4	Businesses Exempted from Code §163(j)	13–94
¶1306	CODE §163(l) INTEREST DISALLOWANCE ON DEBT PAYABLE IN, OR BY REFERENCE TO FV OF, EQUITY	13–96
¶1306.1	In General	13–96
¶1306.2	Debt Issued by Corporation	13–97
¶1306.3	Debt Payable in, or by Reference to FV of, Equity	13–98
	¶1306.3.1 In General	13–98
	¶1306.3.1.1 Three Equity-Linked Tests: Payable in or Convertible into Equity	13–98

## Contents

¶1306.3.1.2	Debt Payable by Reference to Equity FV	13-102
¶1306.3.1.3	Plan or Arrangement	13-103
¶1306.3.1.4	Contingent Equity Feature	13-104
¶1306.3.2	“Substantial Amount” of Principal or Interest	13-106
¶1306.3.3	Payable in, or by Reference to, “Equity”	13-110
¶1306.3.4	“Substantial Certainty” Holder Will Exercise Conversion Right	13-112
¶1306.3.5	Debt Issued with Warrants	13-113
¶1306.4	Related Party Test	13-115
¶1306.5	Application to Partnership Debt	13-117
¶1307	COSTS OF ISSUING DEBT AND EQUITY INSTRUMENTS	13-117
¶1308	INTEREST DEDUCTION LIMITATION FOR INDIVIDUAL P (OR NEWCO) SHAREHOLDERS—CODE §163(d) AND §163(h)	13-118
¶1308.1	Basic Investment Interest Limitation	13-118
¶1308.2	Qualified Residence Interest	13-119
¶1308.3	Employee Holding Stock in Corporate Employer for Business Purpose	13-120
¶1308.4	Active Investor Not Engaged in Business	13-120
¶1308.5	Debt Incurred to Acquire S Corp Stock	13-121
¶1309	ORIGINAL ISSUE DISCOUNT, IMPUTED INTEREST, AND IMPUTED DIVIDENDS WHEN P (OR NEWCO) ISSUES DEBT OR PREFERRED STOCK—CODE §1271–§1275, §483, AND §305	13-122
¶1309.1	Original Issue Discount Debt Instruments	13-122
¶1309.1.1	Newco (or P) Debentures Issued for Cash	13-123
¶1309.1.2	Investment Units Consisting of Newco (or P) Debentures Plus Newco (or P) Common Stock or Warrants Issued for Cash	13-123
¶1309.1.3	Issuance of Newco (or P) Notes to T’s Shareholders	13-125
¶1309.2	Payment-in-Kind Debt Instruments	13-126
¶1309.3	Preferred Stock	13-127
¶1309.3.1	Preferred OID	13-128
(1)	Constructive dividend—preferred issued for cash	13-128
(2)	Preferred issued for cash as part of investment unit	13-128
(3)	Preferred issued for property	13-129
(4)	Participating preferred	13-129
(5)	E&P limitation	13-131
(6)	Dividends-received deduction for corporate holder	13-132
(7)	Determination of preferred OID	13-132
(8)	Timing of OID accrual	13-133
(9)	Merely callable preferred	13-133

## Contents

	(10) Accumulating dividends as disguised redemption premium	13–135
	(11) Limits on OID accrual—E&P ceiling, evergreen preferred, and participation in corporate growth	13–135
	(12) Dividends-received deduction	13–136
	(13) Contingent preferred OID	13–136
	¶1309.3.2 Code §1059(f) Extraordinary Dividends	13–137
¶1310	SUBSEQUENT REDEMPTION OF P’s (OR NEWCO’S) PREFERRED STOCK TREATED AS DIVIDEND	13–138
¶1310.1	Preferred Holders’ Common Stock Ownership and Continued Participation in Control Group	13–139
¶1310.2	Application to Corporate Shareholder	13–143
¶1310.2.1	Dividends-Received Deduction	13–143
¶1310.2.2	Code §1059 Extraordinary Dividend	13–144
¶1310.2.3	Application of Code §1059 to Redemption	13–144
	(1) Entire-existence exception	13–144
	(2) Not pro rata as to all shareholders	13–145
¶1310.2.4	Conclusion	13–147
¶1310.3	Application to Non-Corporate Shareholder	13–147
¶1310.4	Debt Versus Equity	13–147
¶1310.5	Redemption with Dividend in Arrears	13–148
	(1) Dividend declared	13–148
	(2) No dividend declared	13–148
¶1311	BASIS SHIFTING STOCK REDEMPTIONS	13–149
¶1311.1	Adequate E&P: Current “Proper Adjustment” Regime	13–149
¶1311.1.1	IRS Notice 2001-45	13–152
¶1311.1.2	2009 Proposed Basis Recovery Regulations Withdrawn	13–155
¶1311.2	Distribution Exceeds E&P	13–156
¶1311.2.1	Non-Stock Redemption Distribution	13–156
¶1311.2.2	Stock Redemption	13–157
	(1) Recapitalization model	13–158
	(2) Distribution first model	13–159
	(3) Basis aggregation model	13–159
	(4) Retained shares model	13–160
	(5) Redeemed shares model	13–161

## Chapter 14

### Tax Aspects of LBO Structuring

---

¶1401 INTRODUCTION	14–3
--------------------	------



## Contents

¶1402 LBO STRUCTURING CONSIDERATIONS	14-4
¶1402.1 Alternative Structures	14-4
¶1402.1.1 1 Corporation Approach	14-5
(1) Code §1001 versus Code §302 treatment	14-6
(2) Application of Code §302 where old T shareholders invest in Newco	14-7
(3) Code §1059 limitation on dividends-received deduction in redemption from corporate shareholder	14-11
(4) No Code §338 election	14-12
¶1402.1.2 Parent-Subsidiary Approach with Borrowing at Parent Level	14-12
(1) Possible application of Code §304	14-13
(2) Possible application of step-transaction doctrine to Newco’s Code §351 formation and Newco’s purchase of T’s stock	14-15
(3) Interrelation between Code §351 and §304	14-19
(4) Possible Code §338, §338(h)(10), or §336(e) election	14-26
Code §304	14-26
Code §351	14-28
(5) Possible liquidation of T	14-30
(6) Possible merger of Newco into T	14-30
(7) T assumption of Newco acquisition debt	14-30
¶1402.1.3 Parent-Subsidiary Approach with Part of Borrowing at Subsidiary Level	14-30
(1) Application of Code §302 to T’s redemption of its stock	14-31
(2) Tax treatment of Newco’s acquisition of T stock: Code §1001, §304, §351	14-31
(3) Possible Code §338 or §338(h)(10) election	14-39
(4) Possible T liquidation or merger	14-39
(5) T assumption of portion of Newco acquisition debt	14-39
¶1402.1.4 Part Purchase/Part Redemption	14-39
¶1402.1.5 Newco Purchase Partially Funded by T Cash	14-40
¶1402.1.6 Use of Preferred Stock in LBOs: Code §302 Implications	14-42
¶1402.2 IRS May Recharacterize—But Taxpayer May Be Bound by—Transaction Form	14-45
¶1402.3 Additional Considerations	14-52
¶1402.3.1 State Income Tax	14-52
¶1402.3.2 T’s Taxable Year	14-52
¶1402.3.3 Relative Priorities Among Creditors	14-55
¶1402.3.4 Financial Statement Net Worth	14-56
¶1402.3.5 Fraudulent Conveyance Considerations	14-56

## Contents

¶1403 USING CODE §351 TO GIVE T SHAREHOLDERS (INCLUDING MGMT) TAX-FREE ROLLOVER OF T STOCK FOR NEWCO STOCK	14-56
ISO shares	14-58
Receipt of Newco preferred stock	14-58
¶1404 OI RISK WHERE P (OR NEWCO) PLEDGES NON-U.S. SUBSIDIARY STOCK OR CAUSES NON-U.S. SUBSIDIARY TO GUARANTEE OR ASSUME P (OR NEWCO) DEBT	14-61
¶1405 SURVIVAL OF PRE-ACQUISITION NOL AND OTHER TAX ATTRIBUTES	14-64
¶1406 USE OF EMPLOYEE STOCK OWNERSHIP PLAN	14-64
¶1406.1 Tax Considerations	14-65
¶1406.1.1 T's Tax Deduction for Contribution to Employee Stock Ownership Plan	14-65
¶1406.1.2 T's Tax Deductions for Cash Dividend Paid	14-66
(1) Deduction in general	14-66
(2) Deduction denied for avoidance or evasion	14-67
(3) Availability of deduction for stock redemption treated as dividend	14-67
¶1406.1.3 Selling Shareholder's Rollover	14-70
¶1406.1.4 ESOP Owning S Corp Stock	14-71
¶1406.2 Non-Tax Considerations	14-72
¶1407 START-UP EXPENSE DISALLOWANCE	14-73
¶1407.1 Judicially Created Pre-Opening Expense Doctrine	14-73
¶1407.2 Code §195	14-74
¶1408 CODE §5881 GREENMAIL TAX WHERE P ACQUIRES AND THEN RESELLS PART OF T's STOCK	14-75
¶1408.1 1987 Enactment of Code §5881	14-75
¶1408.2 Complex Issues and Traps for Unwary	14-76
¶1408.2.1 Meaning of "Made or Threatened to Make Tender Offer"	14-76
(1) P mentioned possible tender offer in its schedule 13D	14-76
(2) P executive mentioned possible tender offer at meeting	14-76
(3) P executive talked to another company threatening tender offer	14-76
(4) Friendly tender offer	14-77
(5) P proposed purchasing T's assets or merging with T	14-77
¶1408.2.2 Application of Code §5881 Where P Sells Its T Stock to White Knight	14-78
¶1408.2.3 Possible Application of Code §5881 Where P Does Not Sell T Stock	14-79

## Contents

(1) Tender offer and squeeze-out merger at different prices	14-79
(2) Tender offer and squeeze-out upstream liquidation at different prices	14-80
(3) Tender offer and squeeze-out upstream liquidation at same price	14-80
¶1408.3 Conclusion	14-81
¶1409 ERISA GROUP LIABILITIES	14-81

## Volume 4

### Chapter 15

#### Management Compensation

---

¶1501 INTRODUCTION	15-10
¶1502 STOCK-BASED COMPENSATION TO MGMT—STOCK SALES OR AWARDS, OPTIONS, AND SARs	15-11
¶1502.1 Summary	15-11
¶1502.2 Purchased or Awarded Common Stock and Non-Qualified Stock Options—Code §83 and Vesting	15-15
¶1502.2.1 Purchased or Awarded Stock	15-15
¶1502.2.1.1 Immediate Taxation of Bargain Element	15-16
¶1502.2.1.2 Delayed Taxation if Substantial Risk of Forfeiture and Stock Not Transferable Free of Forfeiture Risk	15-17
¶1502.2.1.3 Effect of Code §83(b) Election or Right to Transfer Stock Free of SRF	15-23
(1) Timely Code §83(b) election	15-23
(2) Right to transfer free of SRF; failure to legend stock certificate	15-25
¶1502.2.1.4 Stock Tax Basis	15-28
¶1502.2.1.5 Calculating Stock Holding Period	15-29
¶1502.2.1.6 Paying for Purchased Stock with Note	15-30
(1) Personal liability	15-30
(2) Adequate interest	15-31

## Contents

	(3) Forgiveness of note	15–31
¶1502.2.1.7	1934 Act §13(k)(1)'s Executive Loan Prohibition	15–32
¶1502.2.1.8	Executory Contract to Purchase Stock	15–38
	(1) Shares not subject to SRF	15–38
	(2) Shares subject to SRF	15–42
¶1502.2.1.9	Newco Deduction	15–43
	(1) Timing of deduction	15–43
	(2) Forfeiture of deduction for failure of reporting	15–44
	(3) Recapture of deduction when service provider forfeits stock	15–45
¶1502.2.1.10	Mutual Cooperation Between Mgmt and Newco to Maximize Overall Tax Position—Foregoing §83(b) Election and Paying Formula Cash Bonus at Vesting	15–46
¶1502.2.1.11	Issuance of Newco Stock to Subsidiary's Service Provider	15–49
¶1502.2.2	Non-Qualified Stock Option	15–49
¶1502.2.2.1	In General	15–49
¶1502.2.2.2	NQO in-the-Money at Grant, with Excessively Low Exercise Price	15–51
¶1502.2.2.3	Exercising NQO with Stock in Hand	15–54
¶1502.2.2.4	Sale of Transferable NQO	15–55
¶1502.2.2.5	Gifting Vested NQO	15–57
¶1502.2.2.6	Gifting Unvested NQO	15–60
¶1502.2.2.7	Charitable Donation of NQO	15–62
¶1502.2.2.8	Transfer of NQO Incident to Divorce	15–63
¶1502.2.3	Substantial Risk of Forfeiture Subsequently Imposed on Outstanding Vested Stock	15–63
¶1502.2.4	Compensating Executive for OI Recognized on Stock-Based Compensation	15–67
¶1502.2.5	Rescission of Stock Option Exercise	15–68
¶1502.2.6	Several Alternative Stock and NQO Structures—Executive's Tax and Economic Ramifications	15–69
¶1502.2.7	Code §83(i) Deferred Taxation of Qualified Entity Grants to at Least 80% of Corporation's Employees	15–73
¶1502.3	Accounting Effect of Stock Sales, Awards, and Options	15–78

## Contents

¶1502.3.1	FASB 123R and Codification Topic 718 Rules for Stock-Based Compensation	15-79
¶1502.3.1.1	FV of Stock Sale or Award	15-79
¶1502.3.1.2	FV of Stock Option	15-82
	(1) Option pricing models	15-85
	(2) Non-public entities	15-86
	(3) Market-based pricing for options	15-87
¶1502.3.1.3	Accrual of Expense over Service Period	15-88
¶1502.3.1.4	Vesting Rules	15-88
¶1502.3.2	FASB 123R Special Situations	15-90
¶1502.3.2.1	FV Cannot Be Reasonably Estimated	15-90
¶1502.3.2.2	Award Classified as Liability	15-91
	(1) Option with Newco contingent cash settlement obligation	15-92
	(2) SAR	15-93
	(3) Paying withholding tax with new shares	15-93
	(4) Cashless exercise of stock option or paying option exercise price with old stock	15-94
	(5) Tax-offset or other cash bonus	15-95
	(6) Puts, calls, and repurchase agreements with respect to stock	15-95
¶1502.3.2.3	Paying for Stock with a Note	15-95
¶1502.3.2.4	Partnership/LLC Interest	15-96
¶1502.3.2.5	Cheap Stock Issues in Subsequent IPO	15-97
¶1502.3.2.6	Repurchase of Stock	15-97
¶1502.3.2.7	Repurchase of Stock Option	15-98
¶1502.3.2.8	Award Modification (Including Stock Option Repricing)	15-98
¶1502.3.2.9	Rescission of Stock Option Exercise	15-100
¶1502.3.2.10	Vesting Acceleration	15-101
¶1502.3.2.11	P Subsequently Acquires Newco	15-101
¶1502.3.2.12	Awards Granted by Shareholder or Other Economic Interest Holder	15-103
¶1502.3.2.13	Non-Employee Award	15-103

## Contents

	¶1502.3.2.14 Award Based on Stock of Unrelated Company	15-105
	¶1502.3.2.15 Disclosure	15-105
¶1502.4	Additional Examples of Tax and Accounting Treatment for NQO	15-105
¶1502.5	Incentive Stock Options	15-107
	¶1502.5.1 Taxation of ISO	15-107
	¶1502.5.2 Qualification as ISO	15-108
	¶1502.5.3 Holding Period Requirement	15-109
	¶1502.5.4 Applicability of Code §409A to ISO	15-111
	¶1502.5.5 Restrictions on Exercise	15-111
	¶1502.5.6 Use of Cash Bonus and/or Tandem ISO/SAR	15-111
¶1502.6	Stock Appreciation Rights	15-112
¶1503	HANDLING T's OUTSTANDING MGMT STOCK OPTIONS	15-113
¶1503.1	Cash Payment in Cancellation of T's Stock Option	15-114
	¶1503.1.1 Deduction Generally	15-116
	IRS flawed capitalization argument	15-117
	IRS abandoned Code §162(k) disallowance argument	15-121
	¶1503.1.2 T's Multiple Short Tax Years	15-121
	¶1503.1.2.1 T's Pre-Acquisition Year	15-121
	¶1503.1.2.2 T's Post-Acquisition Year	15-121
	¶1503.1.3 Timing of Stock Option Cancellation Deduction (Ignoring Code §404(a)(5) and §83(h))	15-122
	¶1503.1.3.1 Payment Obligation Becomes Fixed Before Day of Acquisition	15-122
	¶1503.1.3.2 Payment Obligation Becomes Fixed on Day of Acquisition—Is Acquisition Date Part of Pre-Acquisition or Post-Acquisition Year?	15-123
	¶1503.1.3.3 T Is S Corp	15-124
	¶1503.1.3.4 Planning Possibilities	15-124
¶1503.1.4	Does Code §404(a)(5) Change Above Conclusions?	15-125
¶1503.1.5	Does Code §83(h) Rather Than Code §404(a)(5) Apply to Option Cancellation Payment?	15-126
¶1503.1.6	Conclusion re Application of Code §83(h) and §404(a)(5)	15-128
¶1503.1.7	Applicability to Asset Purchases and Tax-Free Reorganizations	15-128
¶1503.1.8	Deferred Compensation	15-129

## Contents

¶1503.2	Newco Assumes T Stock Option, Substituting Newco Stock Instead of T Stock	15-129
¶1503.2.1	ISO for ISO	15-129
¶1503.2.2	NQO for ISO	15-131
¶1503.2.3	NQO for NQO	15-131
¶1503.3	Newco Issues Its Own Stock in Cancellation of T Stock Option	15-132
¶1503.4	Newco or T Issues Deferred Compensation Obligation in Cancellation of T Stock Option	15-133
¶1504	HANDLING T's OUTSTANDING MGMT SRF STOCK	15-133
¶1504.1	Cash Payment	15-134
¶1504.2	Substituting Newco Stock for T Stock	15-135
¶1505	EQUITY-ORIENTED MGMT INCENTIVES IN PARTNERSHIP OR LLC CONTEXT	15-135
¶1505.1	Application of Code §83 to Partnership/LLC Interest	15-136
(1)	Partnership/LLC interest as property	15-136
(2)	Rev. Proc. 93-27 LV approach	15-138
(3)	Rev. Proc. 93-27 in context of a partnership/LLC which owns a corporation	15-143
(4)	2001 revenue procedure adopted deemed §83(b) election	15-145
(5)	2005 proposed regulations	15-146
(6)	7/15 proposed regulations covering waived management fee	15-148
¶1505.2	Taxation of GP Principal's Carried Interest in Partnership's Flow-Through LTCC	15-150
¶1505.2.1	Partnership Character-Flow-Through Rules	15-150
¶1505.2.2	Post-2017 3-year Carried Interest LTCC Holding Period Requirement	15-151
(1)	Definition of applicable partnership interest	15-152
(2)	Netting capital gains and losses	15-182
(3)	Techniques to maximize satisfaction of §1061's 3-year holding period	15-183
¶1505.2.3	Unenacted Legislative Proposals to Treat Carried Interest in LTCC as OI and Legislative Proposal to Recognize Annual Imputed OI	15-192
(1)	2010 House and Senate bills aimed at investment and real estate activities	15-193
Investment services partnership interest		15-194
Possible application to operating entity		15-195
Qualified capital interest		15-197
Family partnership		15-197

## Contents

	Loans	15–198
	Change in services	15–199
	Pure investor in upper-tier entity with carried interest	15–199
	Enterprise value tax	15–200
	Disqualified interest	15–202
	Regulatory authority	15–203
	40% penalty	15–203
	Medicare tax	15–203
	(2) 2011 Obama administration unenacted bill aimed at investment and real estate activities	15–203
	(3) Post-2011 unenacted bills aimed at investment and real estate activities	15–204
	(4) Pre-effective date self-help	15–204
¶1505.3	Application of Code §409A to Partnership/LLC Profits Interest or Option	15–205
	(1) Profits interest	15–205
	(2) Option	15–205
¶1505.4	Application of Code §457A to Partnership/LLC	15–206
¶1506	CODE §409A DEFERRED COMPENSATION TAX PENALTIES	15–206
¶1506.1	Introduction	15–206
¶1506.2	Summary of Code §409A Deferred Compensation Tax Penalties	15–208
¶1506.3	Code §409A Deferred Compensation Definition and Related Rules	15–209
	¶1506.3.1 Deferred Compensation Definition	15–210
	¶1506.3.2 Interrelationship Between Code §457A and Code §409A	15–217
	¶1506.3.3 Written Plan Requirement	15–218
	¶1506.3.4 Employer’s or Service Provider’s Taxable Year	15–220
	¶1506.3.5 Vesting	15–221
¶1506.4	Code §409A Constructive Receipt—Deferral Requirements	15–223
	¶1506.4.1 Timing Requirements for Service Provider Deferral Election	15–224
	¶1506.4.1.1 Initial Election	15–224
	(1) Non-performance-based compensation	15–224
	(2) Performance-based compensation	15–225
	¶1506.4.1.2 Change in Election	15–227
	¶1506.4.2 Permissible Distribution Triggers	15–228
	¶1506.4.3 Acceleration Generally Not Permitted	15–237



## Contents

<ul style="list-style-type: none"> <li>¶1506.5 Consequences of Failure to Comply with Code §409A Constructive Receipt Deferral Rules</li> <li>    ¶1506.5.1 Penalties for Failure</li> <li>    ¶1506.5.2 Aggregation Rules</li> <li>    ¶1506.5.3 Amount of Income Inclusion</li> <li>    ¶1506.5.4 Limited Relief Rules <ul style="list-style-type: none"> <li>¶1506.5.4.1 Relief from Certain Operational Failures</li> <li>¶1506.5.4.2 Relief from Certain Document Failures</li> <li>¶1506.5.4.3 Correcting Ambiguous Deferred Compensation Arrangement Terms</li> </ul> </li> <li>¶1506.6 Code §409A Deemed Funding Rules</li> <li>¶1506.7 Code §409A’s Scope: Employees, Independent Contractors, Partners <ul style="list-style-type: none"> <li>¶1506.7.1 Employees and Independent Contractors</li> <li>¶1506.7.2 Partnerships and LLCs</li> </ul> </li> <li>¶1506.8 Application of Code §409A to Specific Compensation Arrangements <ul style="list-style-type: none"> <li>¶1506.8.1 Cash Payment <ul style="list-style-type: none"> <li>¶1506.8.1.1 Annual or Long-Term Bonus</li> <li>¶1506.8.1.2 Severance</li> <li>¶1506.8.1.3 Commissions or Other Contingent Compensation</li> </ul> </li> <li>¶1506.8.2 Equity-Based Compensation <ul style="list-style-type: none"> <li>¶1506.8.2.1 NQO <ol style="list-style-type: none"> <li>(1) NQO in-the-money at grant</li> <li>(2) 20% penalty also applies to exercise-year appreciation</li> <li>(3) No double taxation</li> <li>(4) Short-term deferral exception</li> <li>(5) Calculating amount by which NQO is in-the-money each year</li> <li>(6) NQO on service recipient stock</li> <li>(7) Valuation issues</li> <li>(8) Post-grant NQO modifications</li> <li>(9) Substituting P NQO for Newco/T NQO</li> <li>(10) Extraordinary dividend pre-NQO exercise</li> </ol> </li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>15–240</li> <li>15–240</li> <li>15–241</li> <li>15–243</li> <li>15–251</li> <li>15–252</li> <li>15–256</li> <li>15–262</li> <li>15–263</li> <li>15–267</li> <li>15–267</li> <li>15–268</li> <li>15–272</li> <li>15–272</li> <li>15–272</li> <li>15–273</li> <li>15–276</li> <li>15–277</li> <li>15–277</li> <li>15–277</li> <li>15–277</li> <li>15–277</li> <li>15–278</li> <li>15–278</li> <li>15–278</li> <li>15–278</li> <li>15–278</li> <li>15–279</li> <li>15–281</li> <li>15–283</li> <li>15–285</li> <li>15–287</li> </ul>
---	--

## Contents

	(11) Canceling NQO in exchange for deferred payment right	15-289
	(12) Net exercise	15-290
	(13) Right to cancel NQO on sale of company	15-291
	(14) Deep discount option may be treated as underlying stock	15-291
	(15) §409A-compliant NQO	15-291
	(16) Service provider deduction where underlying stock is forfeited or declines in FV	15-291
	¶1506.8.2.2 ISO	15-293
	¶1506.8.2.3 SAR	15-293
	¶1506.8.2.4 Restricted Stock Unit (“RSU”)	15-294
	¶1506.8.2.5 SRF-Restricted Stock	15-295
¶1506.9	Code §409A Effective Date and Transition Issues	15-297
	¶1506.9.1 Effective Date	15-297
	¶1506.9.1.1 Constructive Receipt Deferral Rules	15-297
	¶1506.9.1.2 Deemed Funding Rules	15-298
¶1506.10	Reporting and Withholding Requirements	15-299
¶1506.11	Employer Deduction	15-299
¶1507	CODE §457A DEFERRED COMPENSATION RULES COVERING WHOLLY OR PARTIALLY TAX-INDIFFERENT EMPLOYERS	15-300
¶1507.1	Summary	15-300
¶1507.2	Code §457A Deferred Compensation Definition	15-302
	¶1507.2.1 In General	15-302
	¶1507.2.2 Equity-Based Compensation	15-303
	¶1507.2.3 Short-Term Deferral Exceptions	15-304
	¶1507.2.4 No Accrual Method Exception	15-305
¶1507.3	Code §457A’s Vesting Definition	15-305
¶1507.4	Non-Qualified Entity Definition	15-306
	¶1507.4.1 Corporate Employer	15-306
	¶1507.4.2 Partnership Employer	15-308
	¶1507.4.3 S Corp	15-309
¶1507.5	Code §457A’s Consequences	15-310
	¶1507.5.1 In General	15-310
	¶1507.5.2 Deferred Compensation Deductible Against Income Effectively Connected with U.S. Trade or Business	15-311
	¶1507.5.3 Earnings on Deferred Amounts	15-311
	¶1507.5.4 Amount Not Determinable as of Vesting Date	15-311

## Contents

¶1507.5.5	Single Investment Asset Exception	15-312
¶1507.6	Interrelationship Between Code §457A and Code §409A	15-313
¶1507.7	Effective Date	15-315
¶1508	TAX PENALTIES FOR CHANGE-OF-OWNERSHIP-OR-CONTROL GOLDEN PARACHUTE PAYMENT	15-317
¶1508.1	Tax Penalties and Excess Parachute Payment Definition	15-317
¶1508.2	Definition of Change in Ownership or Control	15-319
¶1508.3	Definition of Contingent on Change in Ownership or Control	15-324
¶1508.3.1	In General	15-324
¶1508.3.2	Payment Resulting from Change	15-324
¶1508.3.3	Payment Resulting from Closely Associated Event	15-325
¶1508.3.4	Agreement Within 1 Year Before Change	15-327
¶1508.3.5	Agreement After Change in Control	15-328
¶1508.3.6	Accelerated Payment of Previously Vested Benefits	15-330
¶1508.3.7	Accelerated Vesting of Benefits Previously Subject Only to Time Vesting	15-333
¶1508.3.8	Agreement Violating Securities Laws	15-340
¶1508.3.9	Employment Termination Not Required	15-341
¶1508.4	Reduction for Reasonable Compensation	15-341
¶1508.4.1	Compensation for Future Services	15-341
¶1508.4.2	Compensation for Past Services	15-341
¶1508.4.3	Determination of Reasonable Compensation	15-342
¶1508.5	Additional Important Definitions and Rules	15-344
¶1508.5.1	Identity of Payor	15-344
¶1508.5.2	Service Providers Covered: Disqualified Individuals	15-344
¶1508.5.3	Entities Covered: T as Corporation, Partnership, or LLC	15-345
¶1508.5.4	Definition of Base Amount	15-348
¶1508.5.5	Deferred Payment	15-349
¶1508.5.6	Definition of Payment: Options and SRFs	15-350
¶1508.5.7	Future Uncertain Parachute Payment	15-351
¶1508.5.8	Withholding	15-353
¶1508.6	Application to Private Companies and Friendly Acquisitions	15-353
¶1508.6.1	Exemption for Small or Privately Held Company	15-353
¶1508.6.2	Friendly Acquisition	15-365
¶1508.7	Economic Effect of Code §280G	15-366
¶1508.8	Conclusion	15-368
¶1509	\$1 MILLION DEDUCTION LIMIT ON PUBLICLY HELD CORPORATION'S COMPENSATION TO TOP EXECUTIVES—CODE §162(m)	15-368
(1)	Summary	15-368

## Contents

(2)	11/2/17 §162(m) grandfather rule	15-369
(3)	Manifestly unsound tax policy	15-369
¶1509.1	Compensation Subject to Deduction Limit	15-369
¶1509.2	Publicly Held Corporation	15-371
¶1509.2.1	Publicly Held S Corp, Disregarded Entity, or Partnership	15-373
¶1509.2.2	Affiliated Group	15-374
¶1509.2.3	Foreign Issuer	15-380
¶1509.2.4	Grandfather Rule	15-381
¶1509.3	Covered Employee	15-382
¶1509.3.1	General	15-382
¶1509.3.2	Coordination with 1934 Securities Exchange Act and Primacy of SEC Reporting Principles	15-385
¶1509.3.3	Employee of Predecessor	15-387
¶1509.3.4	Employee of Subsidiary	15-388
¶1509.3.5	Payment After Status Change	15-390
¶1509.4	Prior Law Exceptions	15-391
¶1509.4.1	Prior Law Exception #1: Adoption of Plan or Agreement When Corporation Privately Held	15-391
¶1509.4.1.1	General	15-391
¶1509.4.1.2	Reliance Period	15-392
¶1509.4.2	Prior Law Exception #2: Performance-Based Compensation	15-393
¶1509.4.3	Prior Law Exception #3: Compensation Not Paid for Services as Employee	15-393
¶1509.4.4	Prior Law Exception #4: Commissions	15-394

## Chapter 16

### Acquisitions and Dispositions Using Partnership, LLC, or REIT

---

¶1601	INTRODUCTION	16-5
¶1602	PARTNERSHIP/LLC OVERVIEW	16-5
¶1602.1	Some Comparisons Between C Corp, Partnership, and LLC	16-5
¶1602.2	Flexible Sharing Ratios for Partnerships and LLCs	16-6
¶1602.3	Partnership and LLC Fiduciary Duties	16-7
(1)	General	16-7
(2)	Delaware statutes	16-7
(3)	Delaware statutory ambiguity	16-8

## Contents

(4) Transactions between managing equity owner and its affiliates	16–9
(5) Delaware precedents re non-waivable implied covenant of good faith and fair dealing	16–10
(6) Contrasting (i) effect of conclusive-presumption clause on non-waivable covenant of good faith and fair dealing to (ii) effect of such clause on contractual fiduciary duty breach	16–15
(7) Delaware courts' reliance upon partnership/LLC agreement's precise language in evaluating LP's breach of fiduciary duty claim against GP	16–17
(8) Conclusion: careful drafting essential	16–20
¶1602.4 Flow-Through Taxation of Partnerships and LLCs	16–21
¶1602.5 Partnership/LLC Tax Aspects Compared to C Corp	16–23
¶1602.6 IRS Entity Classification Rules	16–24
¶1602.7 State and Non-U.S. Entity Classification	16–25
¶1602.8 Equity-Oriented Mgmt Incentives in Context of Partnership/LLC	16–27
¶1602.9 Publicly Traded Partnership/LLC	16–27
¶1602.9.1 PTP Definition and 90%-Qualifying-Income Exception	16–27
¶1602.9.2 PE/VC Mgmt Company as PTP	16–28
¶1602.9.3 PTP Effect of Legislative Carried Interest Proposals	16–29
¶1602.10 Incorporation of Partnership/LLC in Anticipation of IPO	16–30
¶1602.10.1 Traditional IPO	16–30
¶1602.10.2 Up-C Structure	16–30
¶1603 PURCHASE OF T ASSETS BY PARTNERSHIP OR LLC	16–32
¶1604 POST-ACQUISITION DROPDOWN TO PARTNERSHIP OR LLC	16–33
¶1605 ACQUISITION THROUGH DEFERRED EXCHANGE MIXING-BOWL PARTNERSHIP OR LLC	16–35
¶1605.1 General Anti-Abuse Regulation	16–37
¶1605.2 Partner Gain on Distribution of Marketable Securities	16–37
¶1605.3 Code §707(a)(2)(B) Disguised Sale	16–38
¶1605.4 Code §704(c) and §737 7-Year Requirement	16–39
¶1605.5 Unsuccessful Variation of Mixing-Bowl Partnerships	16–40
¶1606 IN-HOUSE PARTNERSHIP OR LLC TO FACILITATE DISPOSITIONS	16–41
¶1607 REIT QUALIFICATION AND USE OF UPREIT AND DOWNREIT STRUCTURES	16–43
¶1607.1 REIT Overview	16–43
¶1607.2 REIT Qualification	16–45
¶1607.2.1 Qualifying Management	16–46
¶1607.2.1.1 Decision Making	16–46
¶1607.2.2 Transferable Shares	16–46

## Contents

	¶1607.2.2.1	Restrictions to Preserve REIT Status and Minimize FIRPTA	16–46
	¶1607.2.2.2	Restrictions to Comply with Securities Laws	16–47
	¶1607.2.2.3	Restrictions on Stock Granted to Employees	16–47
	¶1607.2.2.4	Restrictions to Protect REIT NOLs	16–47
	¶1607.2.2.5	Right of First Refusal	16–47
	¶1607.2.2.6	Transferability with Consent of Other Venturers	16–48
	¶1607.2.3	U.S. Corporation	16–48
	¶1607.2.4	100 Shareholders	16–48
	¶1607.2.5	Not Closely Held	16–49
	¶1607.2.5.1	Excess Share Provisions	16–49
	¶1607.2.6	Income and Asset Tests	16–50
	¶1607.2.6.1	Asset Composition	16–50
	¶1607.2.6.2	Income Tests	16–51
	¶1607.2.7	Distribution Requirement	16–52
	¶1607.2.8	No E&P	16–53
¶1607.3		UPREITs	16–53
	¶1607.3.1	Code §351 May Be Unavailable or Unattractive	16–54
	¶1607.3.2	UPREIT Structure	16–55
	¶1607.3.2.1	Advantages of UPREIT Compared to Regular REIT	16–56
	¶1607.3.2.2	Contributing Partners’ Tax Issues	16–57
	¶1607.3.2.2.1	General Rule: Code §721	16–57
	¶1607.3.2.2.2	Contributions of Property Subject to Liabilities	16–58
	¶1607.3.2.2.3	Liabilities Assumed in Anticipation of Contribution	16–59
	¶1607.3.2.2.4	Code §704(c) Considerations	16–59
	¶1607.3.2.2.5	Code §465: At-Risk Rules	16–60
	¶1607.3.2.2.6	Continuing Protection to the OP Unit Holders	16–60

## Contents

	<ul style="list-style-type: none"> <li>¶1607.3.2.2.7 Tax Rate on Conversion of OP Units into REIT Stock</li> </ul>	16-61
¶1607.4	DownREITs	16-63
	<ul style="list-style-type: none"> <li>¶1607.4.1 DownREIT Compared to UPREIT</li> <li>¶1607.4.2 Tax Risks in DownREIT Structure</li> </ul>	16-63 16-64
¶1608	REIT ACQUISITIONS AND DISPOSITIONS	16-65
¶1608.1	P-REIT's Taxable Purchase of T's or T-REIT's Assets	16-65
	<ul style="list-style-type: none"> <li>¶1608.1.1 No T-REIT Entity-Level Tax</li> <li>¶1608.1.2 Code §1374 BIG Taint</li> <li>¶1608.1.3 Prohibited Transactions</li> <li>¶1608.1.4 Failure to Distribute</li> </ul>	16-65 16-66 16-66 16-66
¶1608.2	P-REIT's Taxable Purchase of T's or T-REIT's Stock	16-67
	<ul style="list-style-type: none"> <li>¶1608.2.1 REIT Qualification Rules Prohibit Certain Stock Acquisitions</li> <li>¶1608.2.2 Private REIT Subsidiary</li> <li>¶1608.2.3 Taxable REIT Subsidiary</li> <li>¶1608.2.4 Qualified REIT Subsidiary                             <ul style="list-style-type: none"> <li>¶1608.2.4.1 Built-In Gain Rule</li> <li>¶1608.2.4.2 P-REIT Purchases T's Stock with Regular Code §338 Election or from Bigco with Code §338(h)(10) or §336(e) Election</li> <li>¶1608.2.4.3 Regular Code §338, §338(h)(10), or §336(e) Election for P's or P-REIT's Purchase of T-REIT's Stock</li> <li>¶1608.2.4.4 Liquidating T-REIT                                     <ul style="list-style-type: none"> <li>¶1608.2.4.4.1 QSP with No Code §338 Election Followed by T-REIT's Code §332 Liquidation</li> <li>¶1608.2.4.4.2 Non-QSP Followed by T-REIT's Code §331 Liquidation</li> <li>¶1608.2.4.4.3 Avoiding T-REIT's Code §332 Liquidation by Other Means</li> </ul> </li> </ul> </li> </ul>	16-67 16-67 16-67 16-68 16-69 16-69 16-70 16-71 16-72 16-72 16-73
¶1608.3	P-REIT's Tax-Free Acquisition of T's Assets	16-74
	<ul style="list-style-type: none"> <li>¶1608.3.1 Alternative Approaches                             <ul style="list-style-type: none"> <li>¶1608.3.1.1 "A" Merger of T into P-REIT</li> </ul> </li> </ul>	16-74 16-74

## Contents

¶1608.3.1.2	“C” Reorganization Acquisition for P-REIT Voting Stock	16-75
¶1608.3.1.3	Acquisitive “D” Reorganization	16-75
¶1608.3.1.4	QRS Acquisition of T’s Assets	16-75
¶1608.3.2	Possible Recharacterization of Purported “B” Reorganization or Reverse Subsidiary Merger	16-75
¶1608.3.3	Code §1374 Taint for T’s Assets	16-76
¶1608.3.4	T’s E&P	16-76
¶1608.3.5	Carryover of T’s Tax Attributes	16-76
¶1608.4	P-REIT’s Tax-Free Acquisition of T’s Stock	16-77
¶1608.4.1	Code §351	16-77
¶1608.4.2	“B” Reorganization or Reverse Subsidiary Merger	16-77
¶1608.5	Preservation of UPREIT Structure	16-77
¶1609	CODE §355 SPIN-OFF INVOLVING REIT	16-78

## Chapter 17

---

### Non-Tax Acq’n Issues, Incl’g SEC, State Entity Law, ERISA Group Liability, Acctg, Fraudulent Conveyance, and HSR Antitrust Reporting

---

¶1701	INTRODUCTION	17-13
¶1702	SEC, STATE ENTITY LAW, AND OTHER NON-TAX ACQUISITION CONSIDERATIONS	17-14
¶1702.1	Evaluation of T	17-14
¶1702.1.1	Shareholder Profile	17-15
¶1702.1.2	Asset Profile	17-15
¶1702.1.3	Other Practical Considerations	17-15
¶1702.2	Acquiring Less Than 100% of T	17-16
¶1702.2.1	Acquisition of Stock	17-16
¶1702.2.2	Merger or Acquisition of Assets	17-16
¶1702.3	Liability for T’s Indebtedness	17-16
¶1702.3.1	Acquisition of Stock	17-17
¶1702.3.2	Merger	17-17
¶1702.3.3	Acquisition of Assets	17-17
	(1) Bulk sales act	17-18
	(2) De facto merger and successor liability	17-18
¶1702.3.4	State and Local Taxes	17-19
¶1702.3.5	ERISA Group Liabilities	17-19
¶1702.3.5.1	Summary	17-19



## Contents

¶1702.3.5.2	ERISA Obligations of T and T's Pre-Acquisition Affiliates	17–20
¶1702.3.5.3	Definition of ERISA Control Group: 80%-or-Greater Ownership Sometimes Includes 50%-or-Greater Ownership	17–22
¶1702.3.5.4	T Withdrawal Liability for Underfunded Multiemployer and Possibly Single-Employer Pension Plan	17–25
¶1702.3.5.5	ERISA Liability Incurred by T After Its Acquisition by P (or by PE/VC Fund) Migrates Upstream and Sideways to T's New Post-Acquisition Parent and Sister Entities	17–26
¶1702.3.5.6	ERISA Group Liability Exception for Partnership or LLC Not Engaged in Trade or Business	17–27
	(a) Supreme Court income tax precedents	17–28
	(b) 2007 PBGC Appeals Board ruling	17–30
	(c) 2010 <i>Palladium</i> case	17–30
	(d) District court 2012 <i>Sun Capital</i> decision	17–31
	(e) Court of Appeals 2013 reversal of 2012 district court <i>Sun Capital</i> decision	17–31
¶1702.3.5.7	Possible ERISA Group Liability Expansion Where Multiple PE/VC Entities (and/or Other Persons) in Aggregate Own Requisite Percentage of T (or of Newco Which Invests in T)	17–33
	(a) ERISA multiemployer "evade or avoid" statute	17–33
	(b) ERISA single-employer "evade" statute	17–35
	(c) Possible judicial amalgamation of entities (or persons) acting in concert	17–35
¶1702.4	Mechanical Problems in Transferring T's Assets	17–42

## Contents

¶1702.4.1	Acquisition of Assets	17-42
¶1702.4.2	Acquisition of Stock	17-42
¶1702.4.3	Forward Merger	17-43
¶1702.4.4	Reverse Merger	17-43
¶1702.4.5	Forward or Reverse Merger	17-44
¶1702.5	Transfer, Sales, and Use Taxes	17-44
¶1702.6	Non-Pro Rata Consideration	17-45
¶1702.6.1	Acquisition of Stock	17-45
¶1702.6.2	Merger or Acquisition of Assets	17-45
¶1702.6.3	Legality of Premium for Control	17-45
¶1702.7	Dissenters' Rights of Appraisal	17-46
¶1702.7.1	Acquisition of T Corp Stock	17-46
¶1702.7.2	Acquisition of T Corp Assets	17-46
¶1702.7.3	Acquisition of T Corp by Merger	17-46
¶1702.7.4	Acquisition of T Corp by Any Method	17-47
¶1702.7.5	Acquisition of T Partnership or LLC	17-47
¶1702.8	Shareholder Vote, SEC Proxy Rules, SEC Tender Offer Rules, and SEC Equity Ownership Disclosure Rules	17-48
¶1702.8.1	Acquisition of T Corp Stock	17-48
¶1702.8.1.1	Necessity of Shareholder Vote	17-48
¶1702.8.1.2	Tender Offer Rules	17-49
¶1702.8.1.3	Schedule 13D and 13G Equity Ownership Disclosure Rules	17-55
¶1702.8.1.4	Going Private Rules	17-59
¶1702.8.2	Acquisition of T Corp Assets	17-59
¶1702.8.3	Acquisition of T Corp by Merger (Including First-Step Tender Offer)	17-60
(1)	Overview	17-60
(2)	Avoiding P shareholder vote	17-60
(3)	Inherent delay where vote of stock covered by SEC proxy rules is necessary	17-61
(4)	Squeezing out T minority shareholders by tender offer plus merger without T shareholder vote	17-62
¶1702.8.4	Notice Period for Acquisition of T Corp	17-67
¶1702.8.5	Action by Consent for Acquisition of T Corp	17-67
¶1702.8.6	SEC Proxy Rules	17-67
¶1702.8.7	T Corp's State Disclosure Obligations	17-70
¶1702.8.8	T Partnership or LLC's Disclosure Obligations	17-71
¶1702.9	T Board's State Law Fiduciary Duty, Including Use of Independent Committee and Other Protective Measures	17-72
¶1702.9.1	T Corp Board's Fiduciary Duty in Corporate Context	17-72
¶1702.9.2	Fiduciary Duty in Partnership/LLC Context	17-78

## Contents

¶1702.10	P’s Deal Protective Provisions	17-79
	¶1702.10.1 General	17-79
	¶1702.10.2 No-Shop Clause with Fiduciary-Out	17-79
	¶1702.10.3 Expense Reimbursement and/or Breakup Fee	17-80
	¶1702.10.4 Go Shop	17-81
	¶1702.10.5 Hybrid No Shop/Go Shop	17-81
	¶1702.10.6 P Matching Right	17-82
	¶1702.10.7 P Option to Buy T Stock	17-82
	¶1702.10.8 Timing of Deal Protective Provisions	17-82
	¶1702.10.9 Validity of P Deal Protective Provisions	17-82
¶1702.11	SEC Securities Registration Rules	17-84
	¶1702.11.1 Public Offering	17-84
	¶1702.11.1.1 Full 1933 Act Registration	17-84
	¶1702.11.1.2 Abbreviated Reg. A Small Public Offering Registration	17-85
	¶1702.11.1.3 Crowdfunding	17-87
	¶1702.11.2 Private Placement	17-91
	¶1702.11.2.1 SEC Rule 504 1934 Act registered and reporting company definitions	17-92
	¶1702.11.2.2 SEC Rule 506 Exemption	17-99
	¶1702.11.2.3 Accredited Investor Definition	17-104
	¶1702.11.2.4 Reg. D Entity Look-Through Rules	17-106
	¶1702.11.2.5 Form D	17-107
	¶1702.11.3 SEC Integration Rules	17-108
	¶1702.11.4 Stock Sales to Service Providers—SEC Rule 701 Exemption	17-111
	¶1702.11.5 Intrastate Offering Exemption	17-115
	¶1702.11.6 Raising Capital Without 1933 Act or 1934 Act Registration	17-115
	¶1702.11.7 Raising Capital with 1933 Act Registration	17-116
	¶1702.11.8 Restrictions on Old T Shareholders’ Resale of P Securities	17-117
	¶1702.11.8.1 P (or S) Acquires T’s Stock in Voluntary Exchange Offer for P Securities Registered Under 1933 Act	17-118
	¶1702.11.8.2 P (or S) Acquires T’s Assets or Merges with T in Exchange for P Securities Registered Under 1933 Act	17-118

## Contents

¶1702.11.8.3	P (or S) Acquires T's Stock in Voluntary Exchange Offer for P Securities Without 1933 Act Registration—Contractual Registration Rights, Form S-3, Rule 144, Rule 144A, and Private Resales	17-119
(1)	Contractual registration rights	17-119
(2)	Public resale of P SEC-restricted stock—SEC Rule 144	17-120
(3)	Private resale of P SEC-restricted stock	17-129
(4)	Public resale of P unrestricted stock by P affiliates	17-132
(5)	Rule 144A	17-133
¶1702.11.8.4	P (or S) Acquires T's Assets or Merges with T in Exchange for P Securities Not Registered Under 1933 Act	17-135
¶1702.11.9	Compliance with State Securities Laws	17-135
¶1702.11.10	Additional Post-IPO Obligations and Restrictions	17-136
¶1702.11.10.1	SEC Rule 10b-5 Material Non-Public Information	17-136
¶1702.11.10.2	1934 Act Mandatory Clawback of Incentive-Based Compensation	17-138
¶1702.12	Summary of Other Considerations	17-139
¶1702.12.1	GAAP Accounting Rules	17-139
¶1702.12.2	Fraudulent Conveyance Considerations	17-139
¶1702.12.3	Hart-Scott-Rodino Act	17-139
¶1702.12.4	State Law Takeover Issues	17-140
¶1702.13	Drafting Acquisition Agreements	17-140
¶1702.13.1	Contractual Representations, Warranties, and Indemnification from T's Old Owners	17-140
¶1702.13.1.1	Sellers' Contractual Asset R&W	17-141
¶1702.13.1.2	Sellers' Contractual Liability R&W	17-141
¶1702.13.1.3	Qualifying Contractual R&W by Knowledge and/or Materiality	17-141
¶1702.13.1.4	Survival of Contractual R&W	17-142

## Contents

¶1702.13.1.5	Contractual Deductible, Threshold, and/or Ceiling	17-142
¶1702.13.1.6	Contractual Escrow, Set-Off, Security Interest, Etc.	17-142
¶1702.13.1.7	Public T	17-142
¶1702.13.2	R&W Insurance in Lieu of T's Old Owners' R&W Indemnification Liability	17-143
¶1702.13.3	Contractual Covenants	17-144
¶1702.13.4	Closing Conditions, Including Material Adverse Effect	17-145
¶1702.13.5	Reverse Breakup Fee and LBO Stub Equity	17-149
¶1702.13.6	Sample Acquisition Agreements (Where T Is a Corporation) in Volume 5	17-150
¶1702.14	Stock Acquisition	17-150
¶1702.14.1	Acquiring Less Than 100% of T	17-151
¶1702.14.2	Liability for T's Indebtedness	17-151
¶1702.14.3	Mechanical Problems in Transferring T's Assets	17-151
¶1702.14.4	Transfer, Sales and Use Taxes	17-151
¶1702.14.5	Non-Pro Rata Consideration	17-151
¶1702.14.6	Dissenters' Rights of Appraisal	17-152
¶1702.14.7	Shareholder Vote	17-152
¶1702.14.8	Application of 1933 Act	17-152
¶1702.14.8.1	Public Offering	17-152
¶1702.14.8.2	Private Placement	17-153
¶1702.14.8.3	Intrastate Offering	17-153
¶1702.14.8.4	Resale Restrictions	17-153
¶1702.14.9	Other Considerations	17-153
¶1702.14.9.1	Existing Buy-Sell Agreements and Rights of First Refusal	17-153
¶1702.14.9.2	Plan of Exchange	17-154
¶1702.14.9.3	Tender Offer Rules	17-154
¶1702.14.9.4	SEC Stock Ownership Reporting	17-154
¶1702.14.9.5	Sample Acquisition Agreements	17-154
¶1702.15	Asset Acquisition	17-155
¶1702.15.1	Liability for T's Indebtedness	17-155
¶1702.15.2	Mechanical Problems in Transferring T's Assets	17-155
¶1702.15.3	Transfer, Sales and Use Taxes	17-156
¶1702.15.4	Non-Pro Rata Consideration	17-156
¶1702.15.5	Dissenters' Rights of Appraisal	17-156
¶1702.15.6	Shareholder Vote and Proxy Rules	17-156
¶1702.15.7	Application of 1933 Act	17-158

## Contents

¶1702.15.8	Sample Acquisition Agreements	17-158
¶1702.16	Merger	17-158
¶1702.16.1	Acquiring Less Than 100% of T	17-159
¶1702.16.2	Liability for T's Indebtedness	17-159
¶1702.16.3	Mechanical Problems of Transferring T's Assets	17-159
¶1702.16.4	Transfer, Sales and Use Taxes	17-160
¶1702.16.5	Non-Pro Rata Consideration	17-160
¶1702.16.6	Dissenters' Rights of Appraisal	17-160
¶1702.16.7	Shareholder Vote and Proxy Rules	17-161
¶1702.16.8	Application of 1933 Act	17-164
¶1702.16.9	Sample Acquisition Agreements	17-164
¶1702.17	Having Previously Acquired Majority of T's Stock, P Subsequently Acquires Remainder	17-164
¶1702.17.1	Acquisition Techniques	17-164
¶1702.17.2	State Law Fairness Requirements	17-165
¶1702.17.2.1	Entire Fairness Standard	17-165
¶1702.17.2.2	Impact of <i>Weinberger Case</i>	17-165
¶1702.17.2.3	Tender Offer by Controlling Shareholder	17-166
¶1702.17.2.4	Other States	17-166
¶1703	GAAP ACQUISITION ACCOUNTING	17-166
¶1703.1	Overview of GAAP Acquisition Accounting Rules and Their Relationship to Transaction Form, Entity Type, SEC Reporting Rules, and Tax Rules for Acquisitions	17-168
	Accounting at the P level	17-168
	Accounting at the T level where T survives as a P (or S) subsidiary	17-169
	Entity type	17-171
	SEC reporting rules	17-171
	Tax rules	17-172
¶1703.2	P-Level Purchase Accounting	17-172
¶1703.2.1	Introduction	17-172
¶1703.2.2	Detailed Rules	17-174
	(1) Identity of acquirer	17-174
	(2) Residual goodwill; impairment not amortization	17-175
	(3) Identifiable assets, including intangible assets other than goodwill	17-176
	(4) FV measurement	17-178
	(5) No part-purchase accounting	17-178
	(6) Acquisition date	17-179
	(7) Measurement date and valuation methodology for P stock and other consideration	17-179

## Contents

	(8) Contingent consideration	17-179
	(9) T contingent assets and liabilities	17-180
	(10) Seller indemnification	17-182
	(11) In-process R&D	17-182
	(12) Replacement of T stock-based compensation awards with P stock-based awards	17-183
	(13) P's acquisition costs	17-184
	(14) Certain assets and liabilities not recorded at acquisition-date FV	17-184
	(15) Termination costs	17-185
¶1703.2.3	Goodwill Impairment, Not Amortization	17-185
¶1703.2.4	Alternative Goodwill Amortization and Impairment for Electing Private P	17-188
¶1703.2.5	Treatment of Intangibles Other Than Goodwill	17-190
¶1703.2.6	Alternative Accounting Method Available to Electing Private P for Certain Identifiable Intangible Assets	17-191
¶1703.2.7	Example of Purchase Accounting	17-193
¶1703.2.8	T as Unconsolidated P Subsidiary	17-196
¶1703.3	T-Level Acquisition Accounting, Including Tax and Structuring Alternatives	17-197
¶1703.3.1	Effective Date/Transition Rules	17-199
¶1703.3.2	Use of Transitory MergerCo to Achieve No-Purchase Accounting	17-200
¶1703.3.3	Use of Newco Partnership/LLC to Acquire T Without Double Tax on Sale	17-201
¶1703.3.4	Use of Recap Structure to Acquire T Without Double Tax on Sale	17-202
¶1703.3.5	Effect on P's or Newco's Financial Statements	17-203
¶1703.3.6	Acquisition Accounting Where T Is Partnership or LLC	17-203
¶1703.3.7	Acquisition Accounting Tax Issues	17-203
	(1) Tax SUB for T's assets	17-203
	Eliminating corporate Newco	17-204
	Corporate downstream "C" or "D"	17-204
	LLC downstream "C" or "D"	17-204
	T partnership or LLC	17-205
	(2) Taxation of new investors	17-205
¶1703.3.8	T as Bigco Division	17-205
	Route #1	17-205
	Route #2	17-206
¶1703.4	Old Pre-11/18/14 Recapitalization Accounting	17-206

## Contents

¶1704 ACCOUNTING FOR STOCK-BASED COMPENSATION TO MANAGEMENT	17-207
¶1705 ACCOUNTING FOR STOCK-BASED KICKER TO LENDERS	17-207
(1) Stock purchase warrants	17-207
(2) Conversion features	17-208
¶1706 FRAUDULENT CONVEYANCE AND RELATED RISKS	17-210
(1) Transaction has no impact on T's creditors	17-210
(2) Transaction adversely impacts T's creditors	17-210
¶1706.1 LBO Structure Creates Fraudulent Conveyance Risk by Prejudicing T's Creditors	17-213
¶1706.1.1 Newco Purchases T's Stock	17-214
¶1706.1.2 Newco Purchases T's Stock and T Guarantees Newco's Acquisition Debt	17-214
¶1706.1.3 Newco Purchases T's Stock with Money Borrowed by T and Reloaned to Newco	17-215
¶1706.1.4 Newco Purchases T's Stock and Newco and T Combine	17-217
¶1706.1.5 Newco Purchases T's Assets or T and Newco Merge	17-218
¶1706.1.6 Newco Purchases Part of T's Stock and T Borrows to Redeem Remainder	17-219
¶1706.1.7 Newco Acquires T by Forward or Reverse Subsidiary Merger	17-219
¶1706.2 Parties Exposed to Liability in Fraudulent Conveyance LBO	17-220
¶1706.2.1 Lender	17-220
¶1706.2.2 T's Shareholders	17-220
¶1706.2.3 Newco and Its Shareholders	17-221
¶1706.2.4 T's (or Its Successor's) Directors	17-221
¶1706.2.5 T's and Newco's Professionals	17-221
¶1706.2.6 Guarantors of LBO Acquisition Debt	17-221
¶1706.2.7 Guarantors of T's Pre-Acquisition Debts	17-222
¶1706.3 Principal Defenses to Fraudulent Conveyance Claim	17-222
(1) No prejudice to creditors	17-222
(2) No violation of constructive fraud tests	17-222
(3) Adequate consideration	17-223
(4) Good faith	17-223
(5) No standing	17-224
(6) T shareholder is, or receives settlement payment from, a financial intermediary	17-224
¶1706.3.1 No Prejudice to Creditors	17-224
¶1706.3.2 No Violation of Constructive Fraud Tests	17-224
(1) Solvent	17-225
(2) Adequate capital	17-225
(3) Ability to pay maturing debts	17-225
(4) Objective versus subjective tests	17-225



## Contents

	(5) Contemporaneous evidence	17-229
¶1706.3.3	Adequate Consideration	17-233
	(1) Amount of consideration required	17-233
	(2) Step-transaction doctrine	17-234
	(3) Direct and indirect consideration	17-235
¶1706.3.4	Good Faith	17-236
	(1) Step-transaction doctrine	17-236
	(2) Due diligence	17-236
¶1706.3.5	No Standing	17-237
	(1) Statute of Elizabeth states	17-237
	(2) UFTA and UFCA states	17-237
	(3) Bankruptcy Code §548	17-239
	(4) Bankruptcy Code §544(b) claim under state or federal law	17-240
¶1706.3.6	T Shareholder Is, or Receives Payment for LBO Stock Sale from, Financial Intermediary	17-240
	Statutory backdrop	17-240
	T shareholder is itself a §546(e) protected person	17-241
	Pre-2/18 court decisions protecting T shareholder receiving proceeds through such shareholder’s financial institution	17-241
	Supreme Court 2018 decision rejecting T shareholder protection where shareholder’s financial institution is mere conduit to deliver T stock sale proceeds	17-242
	Several post- <i>Merit Management Group</i> court decisions (including the Second Circuit) create a new path to qualify for §546(e) protection where the acquiring entity hires a financial institution to deliver the purchase price to T’s equity owners, by viewing the acquiring entity itself as a financial institution, although 1 bankruptcy court decision rejects this approach	17-243
¶1706.3.7	Allocating Liability Among Various LBO Participants	17-246
¶1706.3.8	Subsidiary Upstream Guarantee of Parent’s Acquisition Debt	17-247
¶1706.4	Sources of Fraudulent Conveyance Law	17-249
¶1706.4.1	U.S. Bankruptcy Code	17-249
	(1) §548	17-249
	(2) Time period and standing	17-250

## Contents

	(3) Reasonably equivalent value	17-252
	(4) Step-transaction doctrine	17-253
	(5) Insolvent	17-253
	(6) Unreasonably small capital	17-254
	(7) Ability to pay debts as they mature	17-255
	(8) Good faith	17-255
¶1706.4.2	Uniform Fraudulent Transfer Act and Uniform Voidable Transactions Act	17-255
	(1) UFTA	17-255
	(2) UVTA	17-256
	(3) Standing	17-257
	(4) Insolvent	17-257
	(5) Unreasonably small assets	17-258
	(6) Step-transaction doctrine	17-259
	(7) Good faith	17-259
¶1706.4.3	Uniform Fraudulent Conveyance Act	17-259
	(1) Generally	17-259
	(2) Standing	17-260
	(3) Insolvent	17-261
	(4) Unreasonably small capital	17-261
	(5) Limitation on extent of avoidability	17-261
	(6) Step-transaction doctrine	17-262
¶1706.4.4	Statute of Elizabeth States	17-262
	(1) Generally	17-262
	(2) Standing	17-262
	(3) Inadequate consideration	17-263
	(4) Insolvent	17-263
	(5) Step-transaction doctrine	17-263
¶1706.5	LBO Risks for T's Directors and Professionals	17-263
¶1706.5.1	Directors	17-263
¶1706.5.2	Professionals	17-266
¶1706.6	Principal Decided Cases in Which LBO Attacked as Fraudulent Conveyance	17-267
¶1706.6.1	<i>Gleneagles</i> Case	17-267
¶1706.6.2	<i>Ohio Corrugating</i> Case	17-268
¶1706.6.3	<i>Wieboldt Stores</i> Case	17-270
¶1706.6.4	<i>Buckhead America</i> Case	17-273
¶1706.6.5	<i>Munford</i> Case	17-275
¶1706.6.6	<i>HealthCo</i> Case	17-276
¶1706.6.7	<i>Crown</i> Case	17-281
¶1707	HART-SCOTT-RODINO ANTITRUST REPORTING	17-284
¶1707.1	P Acquires T Voting Securities, Assets, or Partnership/LLC Interests	17-288
¶1707.1.1	Size-of-Transaction Test	17-288
¶1707.1.1.1	HSR Value of Non-Publicly Traded Voting Securities	17-290

## Contents

	¶1707.1.1.2 HSR Value of Acquired Assets	17–291
	¶1707.1.1.3 HSR Value of Partnership/LLC Interests	17–291
	¶1707.1.1.4 Determining FV	17–291
	¶1707.1.1.5 Acquisition Price	17–291
	¶1707.1.1.6 HSR Value of Publicly Traded Voting Securities	17–292
	¶1707.1.1.7 No Present Voting Rights	17–294
	¶1707.1.1.8 Indirect Acquisitions	17–295
	¶1707.1.1.9 Recapitalizations and Redemptions	17–295
	¶1707.1.1.10 Beneficial Ownership	17–295
¶1707.1.2	Size-of-Person Test	17–297
	¶1707.1.2.1 Annual Net Sales and Total Assets	17–298
	¶1707.1.2.2 Control	17–298
	¶1707.1.2.3 Measurement of Sales and Assets	17–299
	¶1707.1.2.4 Measurement of Assets Without Regularly Prepared Balance Sheet	17–300
	¶1707.1.2.5 Size of Natural Person	17–300
	¶1707.1.2.6 Control over Trust	17–300
	¶1707.1.2.7 Size-of-Person (and Size-of-Transaction) Test as Applied to Private Equity Funds	17–301
¶1707.1.3	Principal Exemptions	17–302
	¶1707.1.3.1 Passive 10%-or-Less Ownership of T Corporation Voting Securities	17–303
	¶1707.1.3.2 Acquisition of Voting Securities or Partnership/LLC Interests in Entity Holding Non-Exempt Assets with FV \$119.5 Million or Less	17–304
	¶1707.1.3.3 Cash and Cash Equivalents in Asset Acquisition	17–305
	¶1707.1.3.4 Non-Control T Corporation Securities in Asset Acquisition	17–305
	¶1707.1.3.5 Acquisition of Certain Goods and Real Property	17–306
	¶1707.1.3.6 Intraperson Acquisition	17–307
	¶1707.1.3.7 Non-U.S. Asset Acquisition	17–307
	¶1707.1.3.8 Non-U.S. Voting Securities Acquisition	17–308

## Contents

	¶1707.1.3.9	P Financing T Partnership/LLC	17-309
	¶1707.1.3.10	Debt Work-Out and Related Exemption	17-309
	¶1707.1.4	Examples of P Acquisition of T Voting Securities, Assets, or Partnership/LLC Interests	17-310
¶1707.2	P1, P2, and P3 Form New Entity		17-314
	¶1707.2.1	Newco Is Corporation	17-314
	¶1707.2.1.1	Size-of-Transaction Test Applied to Formation of NewCorp	17-315
	¶1707.2.1.2	NewCorp Formation Size-of-Person Test	17-316
	¶1707.2.1.3	Waiting Period Start	17-316
	¶1707.2.1.4	Principal Exemptions	17-316
	¶1707.2.1.5	Examples of NewCorp Formation	17-316
	¶1707.2.2	Newco Is Partnership/LLC	17-317
	¶1707.2.2.1	Size-of-Transaction Test Applied to Formation of NewPartnership/LLC	17-318
	¶1707.2.2.2	NewPartnership/LLC Formation Size-of-Person Test	17-319
	¶1707.2.2.3	Waiting Period Start	17-320
	¶1707.2.2.4	Principal Exemptions	17-320
	¶1707.2.2.5	Partnership/LLC Distribution of Assets	17-320
	¶1707.2.2.6	Examples of NewPartnership/LLC Formation	17-320
¶1707.3	Newly Formed Acquisition Vehicle Acquires T Voting Securities, Assets, or Partnership/LLC Interests		17-321
	¶1707.3.1	Entity Controls New V	17-321
	¶1707.3.2	No Entity Controls New V	17-321
	¶1707.3.3	Size-of-Transaction Test	17-322
	¶1707.3.4	Size-of-Person Test	17-323
	¶1707.3.5	Principal Exemptions	17-324
	¶1707.3.6	Examples of Acquisitions by New V	17-324
¶1707.4	Reporting Obligations		17-325
¶1707.5	Waiting Period		17-331
¶1707.6	Non-Compliance Penalties		17-332
¶1707.7	Filing in Countries Other Than U.S.		17-334

Chapters 18-20 reserved

*Table of Internal Revenue Code Sections*

T-1

*Table of Treasury Regulations*

T-29

## Contents

<i>Table of Treasury Rulings</i>	T-57
<i>Table of Securities Laws</i>	T-75
<i>Table of FASB Statements</i>	T-77
<i>Table of Cases</i>	T-79
<i>Index</i>	I-1

*The Detailed Table of Contents for Volume 5, Sample Acquisition Agreements, is set forth at the beginning of Volume 5.*