SIMPSON THACHER MEMORANDUM

Final Regulations under Section 336(e)

May 22, 2013

Recently finalized regulations generally make available an election (under Section 336(e) of the Internal Revenue Code of 1986, as amended[1]) to treat a transfer by a parent U.S. corporation of the stock of a subsidiary U.S. corporation (or the transfer by shareholders of the stock of an S corporation) as a sale of the assets of the sold corporation. This treatment generally enables a step-up in basis of the assets of the sold corporation (similar to the step-up available if an election is made under Section 338(h)(10)). Unlike a Section 338(h)(10) election, however, a Section 336(e) election does not require the purchaser to be a corporation. If a Section 338(h)(10) election is available with respect to a transaction, a Section 336(e) election cannot be made.

The availability of a Section 336(e) election presents the possibility of obtaining the benefits of a step-up in basis of the purchased assets and being able to operate the purchased business in flow-through form (i.e., the purchased entity could convert to flow-through status after its acquisition). While the conversion would be taxable, generally it would not give rise to taxable income due to the stepped-up basis of the corporation's assets. A similar result could also be obtained outside of Section 336(e) if the corporation converted to flow-through status prior to the transfer. In contrast, operating the purchased business in flow-through form would not be possible following a Section 338(h)(10) election.

A Section 336(e) election may also mitigate the tax costs in a taxable spin-off or in a tax-free spin-off that will be taxable to the distributing corporation under Sections 355(d) or (e) as a result of certain shifts in ownership of the spun-off corporation or the distributing corporation. In the case of a spin-off which is intended to be tax-free, a protective Section 336(e) election should be considered to provide a step-up in the basis of the corporation's assets in the event the spin-off were unexpectedly treated as taxable, including as a result of a post-spin-off acquisition of the spun-off corporation or the distributing corporation.

For more information, please contact one of the following members of the Firm's Tax Department or your regular Tax Department contact.

Steven C. Todrys
(212) 455-3750
stodrys@stblaw.com

Gary B. Mandel
(212) 455-7963
gmandel@stblaw.com

Katharine P. Moir
(650) 251-5035
kmoir@stblaw.com

Jonathan Goldstein
(212) 455-2048
jgoldstein@stblaw.com

[1] All "Section" references are to the Internal Revenue Code of 1986, as amended.

This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this memorandum was not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties under federal, state or local tax law. Each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000