



D I S T R I C T O F C O L U M B I A B A R
Taxation Section

District of Columbia Bar

Taxation Section -- Corporate Tax Committee¹

Comments Regarding the Section 336(e) Regulations

March 10, 2016

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
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1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner, Internal Revenue Service
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The Honorable William J. Wilkins
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Re: Proposal to Modify Regulations Under Section 336(e)

¹ The following members of the Corporate Tax Committee Advisory Board participated in the preparation of this report: Donald W. Bakke (primary drafter), Scott M. Levine (Chair), Jay M. Singer (Vice Chair), Kristie Khaw, Brian Peabody, Wade Sutton, and David Zimmerman. The views expressed in this report are those of the Corporate Tax Committee of the Taxation Section of the District of Columbia Bar and not those of the District of Columbia Bar or its Board of Governors.

During the week of January 11, 2016, the Steering Committee of the Taxation Section of the D.C. Bar voted without dissent (by a tally of 8-0 with one member recusing herself) to adopt this report.

Dear Messrs. Mazur, Koskinen and Wilkins:

This report of the District of Columbia Bar Section of Taxation (the “Report”) recommends changes and modifications to the Section 336(e) regulations.

I. Introduction and Scope

The Section 336(e) regulations were published in final form in May of 2013.² We applaud the transaction structuring flexibility that the Section 336(e) regulations provide. We also understand that Treasury and the Internal Revenue Service (“Service”) have an open guidance project in this area, and that the focus of the project is intended to involve only minimal changes within the framework of the existing regulations, rather than substantially revising or revisiting policy calls reflected in the current regulations. Thus, our recommendations herein are narrowly tailored toward that purpose.

We are mindful that other commentators have provided recommendations in connection with this project, in particular, the report dated July 21, 2015, from the American Bar Association Section of Taxation to the Honorable John Koskinen, Commissioner of the Internal Revenue Service, regarding Section 336(e) regulations (the “ABA Report”). We generally concur with the recommendations in the ABA Report, but write separately primarily to provide additional background or address other matters that we believe merit your consideration in connection with this project. Consistent with this approach, this Report will seek to minimize repeating background and issues that are covered in the ABA Report.

Please note the following conventions used in this Report: unless otherwise noted, this Report will incorporate by cross reference terms as defined in the current regulations.³ Thus, for example, the use of the term “qualified stock disposition” (or, “QSD”) in this Report means “any transaction or series of transactions in which stock meeting the requirements of Section 1504(a)(2) of a domestic corporation is either sold, exchanged, or distributed, or any combination thereof, by another domestic corporation or by the S corporation shareholders in a disposition, within the meaning of [Reg. Section 1.336-1(b)(5)], during the 12-month disposition period.”⁴

This Report is organized as follows: Part II provides an executive summary of recommendations; Part III provides a summary overview of Section 336(e); Part IV provides a discussion on creeping QSDs; and Part V discusses a number of other issues, including application of step transaction doctrine in the context of a Section 336(e) election.

II. Executive Summary of Recommendations

- a. Mitigate the issues arising from creeping QSDs by requiring that a Section 336(e) election may be made only for those dispositions in which purchaser acquires “stock meeting the requirements of Section 1504(a)(2) from a selling consolidated group, a

² 78 FR 28467 (May 15, 2013).

³ See generally Reg. Section 1.336-1(b).

⁴ Reg. Section 1.336-1(b)(6)(i).

selling affiliate, or the S corporation shareholders" in a QSD, explicitly incorporating the definitions from Reg. Section 1.338(h)(10)-1 for this purpose (with the understanding that further limitations may need to be added to the definition of S corporation shareholders, so as to require a disposition of at least 80% of the target stock from such shareholders on the disposition date).

- b. Accommodate flexibility in the scope of property included in target's plan of liquidation by providing a rule that, unless a formal plan of liquidation that contemplates the Section 336(e) election is adopted on an earlier date, the making of Section 336(e) election is considered to be the adoption of a plan of liquidation immediately before the deemed liquidation described in Reg. Section 1.336-2(b)(1)(iii).
- c. Limit application of the step transaction doctrine (or similar rule of law) by providing a rule to the following effect: "Notwithstanding anything to the contrary in Reg. Section 1.336-3(c)(1)(i), a Section 336(e) election may be made for target where seller's sale, exchange or distribution of target stock, viewed independently, constitutes a qualified stock disposition but prior to the disposition, and pursuant to the same plan, seller transferred property to target in an exchange that would otherwise qualify under Section 351(a)."
- d. Confirm, perhaps through example, the role that target stock redemptions play in effecting a QSD.
- e. Confirm, perhaps through example, the ability to make a Section 336(e) election where seller completely liquidates under Section 336 by distributing an amount of target stock that would constitute a QSD.
- f. Clarify the circumstances in which the installment sale provisions might apply to gain realized by target in a deemed asset disposition under Reg. Section 1.336-2(b)(2)(i) (i.e., a QSD described in Section 355(d) or (e)).
- g. Add Section 1239 to the list of related party exceptions under Reg. Section 1.336(b)-2(b)(2)(ii)(C).
- h. Clarify the substantive requirements necessary to make a valid Section 336(e) election and extend the application of Rev. Proc. 2003-33 to missed Section 336(e) elections.⁵

III. Overview of Section 336(e)

Section 336(e) was added to the Code in the Tax Reform Act of 1986⁶ as part of *General Utilities*⁷ repeal to avoid double- or triple-taxation that may arise from the same economic gain. Congress intended for Section 336(e) to be an expansion of the 338(h)(10) concept,⁸ which provides a stepped-up, fair market value basis in the assets of the target corporation and "offers taxpayers relief from a potential multiple

⁵ Rev. Proc. 2003-33, 2003-1 C.B. 803.

⁶ Tax Reform Act of 1986, Pub. L. No. 99-514, § 631, 100 Stat. 2085, 2269-71.

⁷ *General Utilities & Operating Co. v. Helvering*, 296 U.S. 200 (1935).

⁸ H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess., Vol. II, at 204 (1986) (providing that principles similar to those of Section 338(h)(10) should apply in the case of a Section 336(e) election).

taxation at the corporate level of the same economic gain, which may result when a transfer of appreciated corporate stock is taxed without providing a corresponding step-up in basis of the assets of the corporation.”⁹ The Conference Committee further provided that “principles similar to those of Section 338(h)(10) may be applied to taxable sales or distributions of controlled corporation stock.”¹⁰

Section 336(e) permits a taxpayer to elect to treat certain sales, exchanges, or distributions of an 80% owned subsidiary as a disposition of all of the subsidiary’s assets, with no gain or loss recognized on the sale, exchange, or distribution of the subsidiary stock.¹¹ Section 336(e) expands the scope of the deemed asset sale treatment under Section 338(h)(10) by making available, for example, a Section 336(e) election for a target corporation that is (i) purchased by a partnership (e.g., a hedge fund); (ii) sold by multiple members of a consolidated group, or (iii) distributed, pro rata, by a distributing corporation to its public shareholders. As a consequence of the election, the selling corporation generally recognizes no gain or loss on the disposition of the target corporation stock, the target is deemed to dispose of all of its assets, and the attributes of the target corporation are generally retained by the seller. The acquirer receives a basis step-up in the assets of the target corporation.

Final Section 336(e) regulations, effective on May 15, 2013 as TD 9619, apply to any QSD on or after the effective date. The final regulations are modeled on the regulations under Section 338(h)(10)¹² and provide that the results and principles of Section 338 should apply to the Section 336(e) regulations.¹³

A Section 336(e) election may only be made for a QSD.¹⁴ To have a QSD, (i) the seller and target must be domestic corporations, or the target must be an S corporation; (ii) the target stock sold, exchanged, or distributed must meet the requirements of Section 1504(a)(2),¹⁵ and (iii) the target stock must be sold,

⁹ *Id.*

¹⁰ *Id.*

¹¹ The text of Section 336(e) provides:

CERTAIN STOCK SALES AND DISTRIBUTIONS MAY BE TREATED AS ASSET TRANSFERS – Under regulations prescribed by the Secretary, if –

- (1) a corporation owns stock in another corporation meeting the requirements of section 1504(a)(2), and
- (2) such corporation sells, exchanges, or distributes all of such stock,

an election may be made to treat such sale, exchange, or distribution as a disposition of all of the assets of such other corporation, and no gain or loss shall be recognized on the sale, exchange, or distribution of such stock.

¹² *Id.*

¹³ Reg. Section 1.336-1(a)(1) (“Generally, except to the extent inconsistent with Section 336(e), the results of Section 336(e) should coincide with those of Section 338(h)(10). Accordingly, to the extent not inconsistent with Section 336(e) or these regulations, the principles of Section 338 and the regulations under Section 338 apply for purposes of these regulations.”).

¹⁴ Reg. Section 1.336-2(a).

¹⁵ Section 1504(a)(2) requires that the corporate parent own at least 80% of the value of the total voting power of the stock of the subsidiary and at least 80% of the total value of the stock of the subsidiary, excluding Section 1504(a)(4) stock.

exchanged, or distributed (or a combination thereof) in a disposition within a 12-month period.¹⁶ A disposition means any sale, exchange, or distribution of stock, but only if (i) the basis of the stock in the hands of the purchaser is not determined in whole or in part by reference to the adjusted basis of such stock in the hands of the selling corporation or under Section 1014(a) (relating to property acquired from a decedent); (ii) except for certain Section 355 distributions, the stock is not sold, exchanged, or distributed in a transaction to which Sections 351, 354, 355, or 356 applies and is not sold, exchanged, or distributed in any transaction described in regulations where the transferor does not recognize the entire amount of the gain or loss realized in the transaction; and (iii) the stock is not sold, exchanged, or distributed to a related person.¹⁷

There are two general deemed transaction models under the final Section 336(e) regulations. In the basic sale model, the selling corporation sells its target corporation stock to a buyer. Upon a joint Section 336(e) election by both the seller and the target, the following are deemed to occur at the close of the disposition date: (i) the target corporation (old target) is treated as selling its assets to an unrelated person, (ii) the target corporation (new target) is treated as acquiring all of the old target assets from an unrelated person, and (iii) the old target is deemed to recognize the tax consequences of the sale and liquidate.¹⁸ In the sale-to-self model under Section 355(d) or (e), at the close of the disposition date of the target stock, (i) old target is deemed to sell its assets to an unrelated person and recognizes gain or loss, subject to the loss disallowance rule; (ii) old target is treated as acquiring all of its assets from an unrelated person in a single, separate transaction, and (iii) the seller is treated as distributing the stock of old target actually distributed to its shareholders without recognizing gain or loss on the distribution.¹⁹

IV. Creeping QSD

A. Generally

We believe the government should revise the current Section 336(e) regulations to prohibit a Section 336(e) election for a creeping QSD in circumstances where a Section 338(h)(10) election could not be made for a creeping “qualified stock purchase” and thereby prevent an asymmetry between a creeping QSD in the Section 336(e) Regulations and a creeping qualified stock purchase in the Section 338(h)(10) regulations. We define a “creeping QSD” as any series of dispositions that occur over multiple dates within a 12-month disposition period that result in a QSD. While providing taxpayers an option to make a Section 336(e) election following a creeping QSD is very commendable, it gives rise to a number of issues involving, e.g., group membership and accounting for the effects of old target’s deemed liquidation, which were well documented in the ABA Report. We write separately on the creeping QSD

¹⁶ Reg. Section 1.336-1(b)(6)(i).

¹⁷ Reg. Section 1.336-1(b)(5).

¹⁸ Reg. Section 1.336-2(b)(1).

¹⁹ Reg. Section 1.336-2(b)(2)(i)-(iii).

issue not only to note additional factors or rationales to consider, but also to emphasize this issue as a priority among others we raise herein.

An example of a creeping QSD is illustrated by Example 5 of Reg. Section 1.336-2(k), which involves a QSD comprised in part of a sale of 50% of the target corporation stock on January 1, for \$88 per share, and a distribution of 30% of the target corporation stock on July 1 of the same year, when the target corporation's stock has appreciated to \$120 per share. Because the QSD is comprised of dispositions that occur over multiple dates within a 12-month disposition period, the QSD in Example 5 is a creeping QSD. As discussed in more detail below, this example raises questions regarding satisfaction of the statutory requirements of a complete liquidation under Section 332, in particular Section 332(b)(1).

B. The Section 332(b)(1) Foundation of Section 338(h)(10)

As a general matter, the results arising from a Section 336(e) election are intended to coincide with those of an election under Section 338(h)(10), "except to the extent inconsistent with Section 336(e)."²⁰ The existence of creeping QSDs, however, represents a departure from the Section 338(h)(10) model. For instance, if the facts of Example 5 were revised to substitute a sale of 30% of the target stock on July 1 rather than a distribution of 30% of target shares, the January 1 sale of 50% of the Target stock to a purchasing corporation and the July 1 sale of 30% of the Target stock to the same purchasing corporation would not have met the requirements for a Section 338(h)(10) election. Although such a two-step sale may have qualified as a qualified stock purchase within the meaning of Section 338(d)(3),²¹ the regulations under Section 338(h)(10) impose a requirement that, in order to have a valid Section 338(h)(10) election, the purchasing corporation must acquire "stock meeting the requirements of Section 1504(a)(2) from a selling consolidated group, a selling affiliate, or the S corporation shareholders" in a qualified stock purchase.²² Under Reg. Section 1.338(h)(10)-1(b)(2), a "selling consolidated group" is the consolidated group of which the consolidated target is a member *on the acquisition date*. In Example 5, the target was not a member of the selling consolidated group at the time of the July 1 sale. The definition of "consolidated target" further underscores the importance of group membership at the time of the qualified stock purchase. It provides that a consolidated target is (i) a target that is a member of a consolidated group within the meaning of Reg. §1.1502-1(h) *on the acquisition date* and (ii) is not the common parent of the group on that date. Thus, the combined effect of these definitions is that, where target is acquired from a consolidated group, the target must be a member of the selling group on the acquisition date in order for a valid Section 338(h)(10) election to be made. In contrast, the definition of "seller" under Treas. Reg. Section 1.336-1(b)(1) does not contain any "disposition date" limitations that are analogous to the acquisition date limitations in the Section 338(h)(10) regime.

²⁰ Reg. Section 1.336-1(a)(1).

²¹ Section 338(d)(3) defines a qualified stock purchase as "any transaction or series of transactions in which stock (meeting the requirements of section 1504(a)(2)) ... is acquired by another corporation by purchase during the 12-month acquisition period." In this respect, the definition of a QSD is similar, in that both provisions require an acquisition, or a disposition, of stock of a domestic corporation that meets the requirements of Section 1504(a)(2). Reg. Section 1.336-1(b)(6).

²² Reg. Section 1.338(h)(10)-1(c)(1) (emphasis added).

We believe the definitions and policies of the Section 338(h)(10) regulations reflect a close, if not symbiotic, relationship with Section 332, particularly Section 332(b)(1). That this relationship carries over to Section 336(e) is confirmed by the text of the statute: one of the few statutory parameters is that a corporation must own an amount of stock in target that meets the requirements of Section 1504(a)(2).²³ Among other things, Section 332(b)(1) requires that in order for a complete liquidation of a subsidiary to qualify for nonrecognition treatment, the parent corporation receiving distributed property “was, on the date of the adoption of the plan of liquidation, *and has continued to be at all times until the receipt of the property, the owner of stock (in such other corporation) meeting the requirements of section 1504(a)(2)*” (emphasis added). This requirement is consistent with the double-tax avoidance policy of Section 332. Moreover, because the regulatory regime of Section 338(h)(10) appears premised upon the deemed liquidation of the target (other than S corporation targets) generally qualifying as a nonrecognition event that moves any remaining target attributes to the target’s majority corporate shareholder, the key definitions in the Section 338(h)(10) regulations necessarily fit with the structure and requirements of Section 332(b)(1).

However, in the case of certain creeping QSDs, it is not clear how the requirements of Section 332(b)(1) are satisfied. Returning again to Example 5 of Reg. Section 1.336-2(k), the analysis in the example treats Target’s deemed liquidation into Parent on July 1 of Year 1 as a distribution in complete liquidation under Section 332, even though 50% of the Target stock had been sold to an unrelated person six months earlier. Apparently, the continuous ownership requirement is satisfied in this fact pattern because, as a consequence of a Section 336(e) election, under the general rule of Reg. Section 1.336-2(b)(1)(i)(A), Parent is treated as *not* having sold, exchanged, or distributed the stock disposed of in the qualified stock disposition. For the fact pattern in Example 5, this would mean that seller Parent’s perspective controls for purposes of qualifying Target’s deemed liquidation under Section 332. But it is difficult to reconcile this result with the fact that, under Reg. Section 1.336-2(c), the making of a Section 336(e) election does not affect the purchaser; i.e., each purchaser in a creeping QSD really does acquire target stock, with a holding period determined based upon its date of acquisition. Thus, if purchaser’s perspective controlled, then the deemed liquidation in Example 5 could not qualify as a complete liquidation under Section 332 because Parent would not have “continued to be at all times until the receipt of the property, the owner of stock [in Target] meeting the requirements of Section 1504(a)(2).”

The fact pattern described in the preceding paragraph—and creeping QSDs generally—raise something of a quandary under the Section 336(e) regulations: either target stock can be in two places at the same time or purchaser’s actual ownership target is ignored for purposes of certain Code provisions such as Section 332(b)(1). It is worth considering that the Example 5 fact pattern could not have reached the same tax result had all of the deemed transactions contemplated by Section 336(e) actually been undertaken. That is, if Target had actually sold its assets on July 1, and then completely liquidated, such complete liquidation would have been a taxable liquidation under Sections 331 and 336 because the requirements of Section 332(b)(1) would not be satisfied as to Parent’s stock ownership in Target. Moreover, we are aware of no other regulatory context in which the requirements of Section 332(b)(1) could be satisfied where a person other than the parent corporation owns more than 20% of the stock

²³ See Section 336(e)(1).

of the liquidating subsidiary (excluding Section 1504(a)(4) stock for this purpose). In sum, if the government agrees that the Section 336(e) regulations should be modified in the case of creeping QSDs, we believe that any modification should be mindful of, and consistent with, the policies and requirements of Section 332(b)(1).

C. Minimal Creeping QSD

The discussion above is not meant to suggest that no creeping QSDs should be permissible. We believe, at a minimum, a Section 336(e) election should be allowed for a creeping QSD to that same extent that a Section 338(h)(10) election would be allowed under the Section 338(h)(10) regulations for a creeping qualified stock purchase. For example, in the case of a 100% owned target, if parent sells 10% of the target stock to one purchaser on January 1 and distributes 10% of the target stock to another purchaser on May 1, parent would still own 80% of target and target would still be a member of the selling consolidated group. But it would be more consistent with the Section 338(h)(10) regime to limit eligibility for a Section 336(e) election to situations where, on the disposition date, parent owns an amount of stock in target described in Section 1504(a)(2) (i.e., a consolidated target would be a member of the selling consolidated group on the disposition date). If parent were to sell 60% of the target stock on July 1, a Section 336(e) election would be allowed. In this regard, the ability to have some degree of staggered dispositions would mirror the similar ability to have some minimal degree of staggered purchases permissible under the Section 338(h)(10) regime.

Finally, we note that, even if the rules regarding the timing of target's Section 1504(a) relationship with seller were tightened, other aspects of the Section 336(e) regulations that permit structuring flexibility could continue to exist. For example, a distribution of 50% of the target stock and a sale or exchange of 50% of the target stock on the same day, could constitute a QSD for which a Section 336(e) election would be effective, provided that such dispositions occurred on the same day.²⁴

D. S Corporation targets

Our focus in this Report is primarily upon creeping QSDs and C corporation targets. We acknowledge that the ability to effect a QSD through a creeping QSD presents issues for S corporation targets, which were well documented in the ABA Report, and that the policies of Section 332 are not implicated by the deemed liquidation of an S corporation target. However, we also believe the most expedient way to deal with creeping QSD issues in the context of S corporation targets is to simply adopt a requirement that

²⁴ A minority of our members felt that creeping QSDs could be accommodated by treating stock that is disposed of in a creeping QSD as owned by the seller(s) until the disposition date for limited purposes. For example, Treasury could adopt this rule for determining when a target leaves or joins a consolidated group, with the result that a target's activities, attributes and earnings would be reflected in the results of the seller's consolidated group until the disposition date. These members felt that such a rule would not result in undue complexity or uncertainty given that both the target and the seller must consent to a Section 336(e) election and, as it pertains to membership in a consolidated group, will most often be represented by sophisticated parties that will negotiate knowing the attendant consequences of the election. Although there may be certain unforeseen glitches associated with such an approach, these members felt that it would be preferable to preserve taxpayer flexibility to avail of the election and to identify and address problem over time as taxpayers and the IRS interpret the regulations.

the disposition or dispositions that constitute a QSD for an S corporation target must occur on a single day.²⁵

E. Plan of Liquidation

A related issue involving the operation of Section 332(b) concerns satisfying the plan of liquidation requirement for old target's deemed liquidation, although this is not as critical as the uncertainty surrounding creeping QSPs more generally. It is not as critical because it appears that the requirement that a complete liquidation be effected pursuant to a plan of liquidation is deemed satisfied, based upon the operation of the Section 338(h)(10) regulations and their incorporation into the Section 336(e) regulations.²⁶ However, in an analogous context, the entity classification regulations ("check-the-box" regulations) provide a default timing rule for the deemed adoption of a plan of liquidation, but also permit taxpayers the option of adopting a more formal plan of liquidation on an earlier date that contemplates the election.²⁷ Such an option would be a welcome addition to the Section 336(e) regulations, too.

F. Recommendation

Permitting a greater mix of sales, exchanges and distributions to qualify for asset basis step-up through a Section 336(e) election may well be exactly what Congress envisioned in enacting Section 336(e), given the constraints in qualifying for a Section 338(h)(10) election. However, as long as Section 338(h)(10) functions as the baseline conceptual model for a Section 336(e) election and transaction, absent a substantial rewrite of the Section 336(e) Regulations, we recommend that the rules of the Section 336(e) regulations be modified to more closely conform to the limitations governing a Section 338(h)(10) election, in particular, Reg. Section 1.338(h)(10)-1(c)(1). That is, at a minimum, we recommend revising the regulations to provide that a Section 336(e) election may be made only for those dispositions in which purchaser(s) acquires "stock meeting the requirements of Section 1504(a)(2) from a selling consolidated group, a selling affiliate, or the S corporation shareholders" in a QSD, explicitly incorporating the definitions from Reg. Section 1.338(h)(10)-1 for this purpose (with the understanding that further limitations may need to be added to the definition of S corporation shareholders, so as to require a disposition of at least 80% of the S corporation target stock from such shareholders on the disposition date).

²⁵ A minority of our members were concerned that limiting Section 336(e) elections to situations in which S corporation shareholders dispose of stock meeting the requirements of Section 1504(a)(2) in a single day will severely limit the availability of Section 336(e) elections in the context of an S corporation. For example, it may be practically impossible to meet this requirement where a purchaser acquires stock of an S corporation with several shareholders via a tender offer, since several individual shareholder would be required to sign a sale agreement on the same day in order for a Section 336(e) election to be made. Although this issue may be mitigated through careful planning, it may significantly curtail the number of situations in which a Section 336(e) election might otherwise be made.

²⁶ Reg. Section 1.338(h)(10)-1(e), Example 2 (assets unwanted by purchaser distributed pursuant to complete liquidation, in connection with Section 338(h)(10) election; plan of liquidation requirement deemed satisfied).

²⁷ Reg. Section 301.7701-3(g)(2)(ii).

We further recommend providing a rule similar to the rule in the entity classification regulations in connection with the plan of liquidation for the deemed liquidation of old target.²⁸ Thus, such a rule could provide that unless a formal plan of liquidation that contemplates the Section 336(e) election is adopted on an earlier date, the making of Section 336(e) election is considered to be the adoption of a plan of liquidation immediately before the deemed liquidation described in Reg. Section 1.336-2(b)(1)(iii).

V. Other Considerations

The remainder of this report will highlight other issues beyond creeping QSDs that could be addressed within the scope of this guidance project. The remaining issues, beginning with step transaction considerations, are not discussed in any particular order of importance.

A. Step transaction

There are unique step transaction fact patterns that are implicated by the rules and operation of the Section 336(e) regulations, and we respectfully request that the government consider providing limited relief from likely unintended consequences of the application of the step transaction doctrine or similar doctrines.

As is the case with Section 338(h)(10) transactions, the Section 336(e) regulations provide a rule to the effect that no provision in the Section 336(e) regulations shall produce a federal income tax result that would not occur if the parties had actually engaged in the transactions deemed to occur because of the Section 336(e) deemed transactions, taking into account other transactions that actually occurred or are deemed to occur.²⁹ Moreover, the Section 336(e) regulations expressly incorporate the rules of Reg. Section 1.338-1(a)(2), to the effect that other rules of law shall apply to determine the tax consequences to the parties as if they had actually engaged in the transactions deemed to occur under Section 338 and the regulations thereunder except to the extent otherwise provided in those regulations.³⁰ For example, other rules of law may characterize the transaction as something other than, or in addition to, a sale and purchase of assets. Finally, in describing the deemed liquidation of target, the Section 336(e) regulations note that the transfer from old target to seller or S corporation shareholders is characterized for Federal income tax purposes in the same manner as if the parties had actually engaged in the transaction deemed to occur, “taking into account other transactions that actually occurred or are deemed to occur.”³¹ The regulations note that typically, the transfer will be treated as a distribution in complete liquidation, implicating Sections 331, 332, 336 or 337, as the case may be, but note the possibility, too, that the transfer may be treated as “part of a circular flow of cash.”³²

²⁸ See Reg. Section 301.7701-3(g)(2)(ii).

²⁹ Reg. Section 1.336-2(e).

³⁰ *Id.*

³¹ Reg. Section 1.336-2(b)(1)(iii)(A).

³² *Id.*

Thus, it seems clear that the step transaction doctrine *could* play a role in characterizing the effects of a Section 336(e) election. Indeed, the Section 338(h)(10) regulations have an example that assumes the application of step transaction in disregarding and recharacterizing the transfer of actively traded securities to a newly formed corporation.³³ However, it also seems likely that the application of the step transaction doctrine could thwart or frustrate the purpose of Section 336(e) and its regulations, similar to the way such doctrine may have frustrated the efforts of two parties to undertake a Section 338(h)(10) election with respect to a multi-step acquisition involving a target corporation, prior to the 2003 amendment of Reg. Section 1.338(h)(10)-1(c)(2).³⁴

For example, assume a standalone corporation (“Parent”), owned by a closely held group of non-corporate shareholders, operates two divisions of roughly equal value, neither of which could qualify as an active trade or business under Section 355(b)(2)(B). An unrelated purchaser offers to acquire one of the divisions (“Target Business”) but is not interested in the other division (“Retained Business”). To effect its acquisition of the Target Business, and pursuant to an integrated plan that occurs over the course of one day, the parties agree to the following steps:

1. Parent will transfer the Retained Business to a newly formed corporation (“Newco”) in exchange for Newco stock and the assumption by Newco of associated liabilities;
2. Parent will distribute, pro rata, all of the stock of Newco to Parent’s shareholders, in a transaction that will be taxable to such shareholders under Section 301;
3. The shareholders of Parent will sell all of their stock of Parent, which holds the Target Business, to an unrelated purchaser.

Given that the time for testing relatedness is at the end of a series of steps, the distribution of Newco stock, by Parent to unrelated purchasers, should qualify as a QSD. Assuming that Parent’s distribution of Newco stock otherwise qualified as a QSD, and if the terms of the overall transaction were such that Parent and Newco had agreed to make a Section 336(e) election for such distribution, would the expected consequences envisioned by such election naturally follow, or might step transaction recharacterize some portions of the transaction?

The risk of recast arises here because the deemed transactions that arise from a Section 336(e) election, together with the actual transactions, result in a transfer of assets to Newco in an incorporation exchange, followed by a sale by Newco of such assets, followed by a complete liquidation of Newco, all of which occur on the same day, i.e., the disposition date. Under general step transaction principles,

³³ See Reg. Section 1.338(h)(10)-1(e), Example 4(ii) (illustrating an assumption “for tax purposes” that a transfer of assets by a target corporation to a newly formed subsidiary will be recharacterized as a direct transfer of such asset to the purchasing corporation and a transfer by the purchasing corporation to the newly formed subsidiary, where such transfer is made at the purchaser’s request and occurs in connection with a Section 338(h)(10) election for the target).

³⁴ TD 9071, 68 FR 40766 (Jul. 9, 2003).

there would be a significant risk that such incorporation, sale of assets and deemed liquidation of target, pursuant to an integrated plan, would be recharacterized.³⁵

We believe the transaction described above is consistent with the purposes of the Section 336(e) regulations and ought to qualify for deemed sale treatment under Section 336(e). Thus, in this context, if the parties desire to effect a Section 336(e) election and if the transaction otherwise qualifies for such treatment, the purposes and policies of Section 336(e) would be furthered by “turning off” the application of step transaction doctrine to the fact pattern above. To this end, we recommend consideration of a rule that is similar in effect to Reg. Section 1.338(h)(10)-1(c)(2), where a purchasing corporation engages in a multi-step transaction for a target corporation for which a Section 338(h)(10) election is made. Such a “turn-off” in the context of a Section 338(h)(10) transaction generally means that the purchasing corporation and the sellers will achieve expected tax treatment consistent with the policies of Section 338(h)(10), notwithstanding authorities that would otherwise recharacterize a multi-step acquisition.³⁶ In the case of a Section 336(e) election, given its sell-side focus, we would expect such a rule would be directed toward mitigating step transaction as between actual and deemed transactions involving seller and target, rather than purchasers.

We anticipate there would be limits in the ability to turn off step transaction doctrine in connection with various scenarios for which a Section 336(e) election may otherwise be desirable. For example, presumably the sale of all of the stock of a qualified Subchapter S corporation (“QSub”) by an S corporation would be subject to the special statutory recast in Section 1361(b)(3)(C), rendering such sale ineligible for a Section 336(e) election.³⁷ But in most scenarios, we believe the government has the authority to alter the application of step transaction in connection with a transaction or series of transactions for which a Section 336(e) election is desired. Thus, we recommend that the government confirm that such transactions will generally be treated in accordance with their deemed and actual form, preferably through a specific rule whose effect is similar to that of Reg. Section 1.338(h)(10)-1(c)(2). We could envision, and recommend, a rule to the following effect: “Notwithstanding anything to the contrary in Reg. Section 1.336-3(c)(1)(i), a Section 336(e) election may be made for target where seller’s sale, exchange or distribution of target stock, viewed independently, constitutes a qualified stock

³⁵ See, e.g., ILM 200818005 (applying Rev. Rul. 68-602 principles, IRS disregards contribution of intercompany debt to target corporation for which a Section 338(h)(10) election will be made, given the subsequent deemed liquidation of target); Reg. Section 1.338(h)(10)-1(e), Example 4 (target’s formation of, and transfer of class II property to, new corporation is “assumed” to be disregarded, where purchaser requested such transfer in connection with a Section 338(h)(10) election for target). See also *Estate of Kluener v. Comm’r*, T.C. Memo. 1996-519 (disregarding transfer of assets to subsidiary, where pursuant to same plan, subsidiary sold assets); Rev. Rul. 67-448, 1967-2 CB 144 (transitory existence and merger of subsidiary disregarded; acquisition treated as a Section 368(a)(1)(B) reorganization).

³⁶ See, e.g., Rev. Rul. 2001-46, 2001-2 C.B. 321 (two-step acquisition in which X acquired the stock of T in a qualified stock purchase consisting of X stock and cash, followed by an upstream merger of T into X, is collapsed into a direct Section 368(a)(1)(A) reorganization of T into X).

³⁷ Under Section 1361(b)(3)(C), where a QSub termination occurs by reason of the sale of its stock, such sale is treated as if it were a sale of an undivided interests in the assets of such corporation (based on the percentage of the corporation’s stock sold), followed by an incorporation exchange to which Section 351(a) applies). In that case, an S corporation would generally not be treated as a seller that has disposed of target stock in a QSD, if for no other reason than it is treated as having sold assets, not stock.

disposition but prior to the disposition, and pursuant to the same plan, seller transferred property to target in an exchange that would otherwise qualify under Section 351(a).”³⁸

4. Target Redemptions

Another area of ambiguity under the current Section 336(e) regulations is the effect that target redemptions have in obtaining a QSD. As is the case with the effect of redemptions on qualified stock purchase treatment, redemptions should generally “count” toward obtaining a QSD if the rules of Reg. Section 1.338-3(b)(5) are essentially “the principles of section 338” and such regulations under Section 338 are “not inconsistent with section 336(e)” and associated regulations.³⁹

For example, assume that corporation S owns 80 of the 100 outstanding shares of target; shareholder A, who is unrelated to corporation S, owns the remaining 20 target shares. On January 1, Year 1, target redeems shareholder A’s 20 shares; on July 1, Year 1, corporation S distributes 70 target shares to its unrelated shareholders, in a distribution that qualifies as a disposition under Reg. Section 1.336-1(b)(5).

We believe that, applying the principles of Section 338 and its regulations, the July 1 distribution is a QSD, i.e., that the distribution by corporation S to its shareholders is a disposition by which corporation S has disposed of 70 of the 80 outstanding target shares, representing 87.5% of all outstanding target stock. This computation takes into account the effect of the January 1 redemption in reducing target’s outstanding stock for purposes of determining whether target stock is disposed of during the 12-month disposition period.⁴⁰ We are aware of no policy reason why such a transaction should be viewed as inconsistent with Section 336(e), and respectfully request that this point be confirmed, perhaps through the addition of an example.⁴¹

5. Taxable Liquidations of Seller

One of the unique and commendable characteristics of the Section 336(e) regulations is in accommodating taxable distributions under Section 311 as a disposition that may qualify toward a QSD. It is less clear whether certain taxable distributions of target stock under Section 336 would so qualify. Where the distribution of target stock is pursuant to a complete liquidation of the distributing company under Sections 336 and 331, such distribution facially satisfies the definition of “disposition,” in which case the liquidating corporation would qualify as a seller under Reg. Section 1.336-1(b)(1). However, in

³⁸ This recommendation assumes that, for this purpose, post-reorganization transfers that are described in Section 368(a)(2)(C) would also “otherwise qualify under Section 351(a).” See also Reg. Section 1.368-2(k) (describing permissible post-reorganization property transfers).

³⁹ Reg. Section 1.336-1(a).

⁴⁰ Reg. Section 1.336-1(b)(5), (7). Cf. Reg. Section 1.338-3(b)(5)(ii).

⁴¹ However, if the distributing seller did not own 80% or more of target stock at the beginning of the disposition period, consideration should be given to whether the redemption of a minority shareholder could affect the characterization of the subsequent deemed liquidation of target. See, e.g., Rev. Rul. 70-106 (where corporation had a 75% corporate shareholder, but redeemed the 25% minority shareholder prior to the adoption of a formal plan of complete liquidation, corporation’s subsequent complete liquidation did not qualify for nonrecognition treatment under Section 332).

order to qualify as a disposition, the distribution cannot be made to a related person; the principles of Section 338(h)(3)(C) and Reg. Section 1.338-3(b)(3) apply for this purpose.⁴²

The timing test for relatedness in the context of a Section 336(e) disposition is incorporated by cross-reference to the Section 338 regulations.⁴³ An example in the current regulations illustrates this: it involves the distribution of target stock in redemption of a shareholder who owned 51% of the stock of the seller/distributing corporation as being eligible for a Section 336(e) election, where such redemption completely terminated the interest of the redeemed shareholder in the redeeming corporation.⁴⁴ In analyzing the redemption, the example notes that immediately after the redemption, the redeemed shareholder does not own any stock of seller, and thus the redeemed shareholder and seller are not related persons within the meaning of Reg. Section 1.336-1(b)(12).

However, the Section 338 time-for-testing-relatedness test appears to be premised upon the continued existence of each of seller and purchaser(s). Thus, there is some uncertainty as to its application where one of the parties to a disposition goes out of existence in a taxable transaction, distributing stock of a target in a distribution that otherwise qualifies as a disposition.⁴⁵

If the transaction in the cited example instead represented a pro rata distribution of the stock of target to the 49% and 51% shareholders of seller, in complete liquidation of seller under Sections 331 and 336, we would expect that such a distribution could be eligible for a Section 336(e) election. That is, as a technical matter, and applying the same rationale as demonstrated by the example in the context of a Section 302(a) redemption, seller and purchasers would be unrelated, under the timing rules of Reg. Section 1.338-3(b)(3)(ii), because immediately after the last of a series of liquidating distributions, the liquidating corporation/seller would cease to exist, and no corporation would be its Section 381(a) successor. Thus, seller could not be related to anyone, notwithstanding that one of its shareholders owned enough stock in seller such that they would otherwise be related.⁴⁶ Moreover, the other requirements for a "disposition" would be satisfied: (i) the basis of the target stock in the hands of the purchaser would not be determined in whole or in part by reference to the adjusted basis of such stock in the hands of the seller/distributing corporation (or under Section 1014); and (ii) the target stock was not sold, exchanged, or distributed in a transaction to which Sections 351, 354, 355, or 356 applies, and the distributor recognized any gain or loss realized in the distribution.

⁴² Reg. Section 1.336-1(b)(5); see also Reg. Section 1.338-3(b)(3).

⁴³ See Reg. Section 1.336-1(a)(1) (principles of Section 338 and its regulations generally apply for purposes of Section 336(e) regulations); Reg. Section 1.338-3(b)(3)(ii) (time for testing relationship between Section 338 purchasing corporation and another person).

⁴⁴ See Reg. Section 1.336-2(k), Example 8.

⁴⁵ See, e.g., Private Letter Ruling 201330004 (July 26, 2013) (a transaction was treated as a dividend equivalent Section 304 transaction where, following the Section 304 sale of the target, the target corporation went out of existence in a Section 331 liquidation).

⁴⁶ See Reg. Section 1.336-1(b)(12). Seller and its 51% shareholder would "otherwise" be related, under Section 318(a), where stock held by the majority shareholder would be attributed to seller under Section 318(a)(3)(C).

We respectfully request that you consider adding an example illustrating the availability of a Section 336(e) election in the context of a complete liquidation of a seller corporation, whose distributed assets include the stock of a target corporation.

6. Section 355(d)/(e) QSDs and Installment Sales

Reg. Section 1.336-2(b)(2)(i)(B)(1) provides that old target shall recognize all gains realized on the deemed asset disposition, “[e]xcept as provided in § 1.338(h)(10)-1(d)(8) (regarding the installment method).” The rule’s language as to the availability of installment sale treatment for QSDs under Section 355(d) or (e) mimics the rule that applies for “regular” QSDs, where the disposition structure for target, as well as the mechanics of old target’s deemed sale and liquidation, more clearly support similar treatment as a Section 338(h)(10) transaction where an installment obligation is involved.⁴⁷ However, as discussed below, it is not clear how the installment sale provisions should apply in the case where a Section 336(e) election is made for a QSD under Section 355(d) or (e).

To understand how the installment sale rules *could* work in the case of a QSD under Section 336(d) or (e), it is worth briefly reviewing how they work for Section 338(h)(10) transactions. In the case of a qualified stock purchase to which a Section 338(h)(10) election applies, the cited rule provides two modifications to accommodate each of the deemed asset sale by old target and the deemed liquidation of old target, as part of a Section 338(h)(10) transaction, solely for purposes of applying Sections 453, 453A and 453B. For example, the regulation provides that old target is treated as receiving in the deemed asset sale “new T installment obligations, the terms of which are identical (except as to the obligor) to P installment obligations issued in exchange for recently purchased stock of T.” Thus, for example, the rule ensures that old target in its deemed asset sale is treated as receiving an installment obligation from *new target*, even though the obligation was actually issued by the purchasing corporation to the sellers of target as consideration for the stock of target. In addition, old target is treated as distributing in the deemed liquidation the new target installment obligation that it is treated as receiving in the deemed asset sale, leaving such obligation in the hands of the corporate shareholder that sold the stock of target in a qualified stock purchase.

In the context of Section 336(e) elections, it seems clear enough that, by expressly acknowledging an exception to immediate gain recognition in the case of realized gain subject to the installment method, the government contemplated that such rules could apply in the context of a QSD for a disposition of target stock described in Section 355(d) or (e).⁴⁸ As a practical matter, the purchasers in such a transaction are those shareholders of seller who typically receive their target stock as distributees with respect to seller stock, in a transaction in which no gain or loss is recognized on their part, under Section 355(a). Such distributees do not typically offer consideration in exchange for target stock, other than perhaps the stock of the seller in a split-off or split-up exchange. However, even if there is a scenario by which seller were to receive an installment obligation from “purchasers,” the mechanics outlined in the preceding paragraph, which envision a deemed sale and deemed liquidation of target, do not align with

⁴⁷ See Reg. Section 1.336-2(b)(1)(i)(B)(1).

⁴⁸ Indeed, the opening paragraph to the regulations reinforces the fact that installment sale treatment is generally available in connection with a Section 336(e) election. See Reg. Section 1.336-1(a)(1).

the sale-to-self model of Reg. Section 1.336-2(b)(2)(i) and (ii). That is, in the sale-to-self model, old target does not liquidate, but continues its existence for federal tax purposes. Thus, if old target were *treated* as receiving an installment obligation from the purchasers, under Reg. Section 1.336-2(b)(2)(i)(B)(1), presumably old target would retain such obligation, for installment sale reporting purposes, as there are no circumstances in which seller (the distributing corporation) is treated as recognizing gain or loss with respect to target stock.⁴⁹ This raises the question of how seller would report items received with respect to an installment obligation it actually holds.

We respectfully request that the government clarify the circumstances in which the installment sale provisions might apply to gain realized by target in a deemed asset disposition under Reg. Section 1.336-2(b)(2)(i).

7. Other Related Party Exceptions Under Reg. Section 1.336(b)-2(b)(2)(ii)(C)

In the case of a Section 336(e) election with respect to a distribution of target stock described in Section 355(d) or (e), Reg. Section 1.336-2(b)(2)(i) generally provides that old target is treated as selling its assets to an unrelated person in a single transaction at the close of the disposition date in exchange for the aggregate deemed asset disposition price, or ADADP. In this type of QSD, Reg. Section 1.336-2(b)(2)(ii) treats new target as acquiring all of its assets from an unrelated person in a single, separate transaction at the close of the disposition date (but prior to the deemed distribution described in Reg. Section 1.336-2(b)(2)(iii)(A)) in exchange for an amount equal to the AGUB. For such deemed purchase by new target, a special rule in Reg. Section 1.336-2(b)(2)(ii)(C) provides that, solely for purposes of Section 197(f)(9), Section 1091, “and any other provision designated in the Internal Revenue Bulletin by the Internal Revenue Service,” old target in its capacity as seller shall be treated as a separate and distinct taxpayer from, and unrelated to, old target in its capacity as acquirer of assets in the deemed purchase.

We believe that Section 1239 should be added to the list of related party exceptions. Section 1239 generally requires the characterization of gain as ordinary income, where the gain is recognized by a transferor in the sale or exchange between related persons of certain depreciable assets that would otherwise qualify as capital. Just as there is no policy reason why old target’s deemed sale and purchase, in this context, should be treated as between related persons for purposes of Section 197 and 1091, old target should similarly be treated as separate, distinct and unrelated from old target in its capacity as deemed purchaser for purposes of Section 1239.

8. Clarify the Making of a Valid Section 336(e) Election and the Remediation of a Missed Section 336(e) Election

If seller(s) and target are members of the same consolidated group, a Section 336(e) election is made by satisfying the following requirements: (i) Seller(s) and target must enter into a written, binding

⁴⁹ See Reg. Section 1.336-2(b)(2)(iii)(A) (no gain or loss is recognized by seller).

agreement, on or before the due date (including extensions) of the consolidated group's consolidated Federal income tax return for the taxable year that includes the disposition date, to make a Section 336(e) election; (ii) The common parent of the consolidated group must retain a copy of the written agreement; (iii) The common parent of the consolidated group must attach the Section 336(e) election statement, described in Reg. Section 1.336-2(h)(5) and (6),⁵⁰ to the group's timely filed (including extensions) consolidated Federal income tax return for the taxable year that includes the disposition date; and (iv) The common parent of the consolidated group must provide a copy of the Section 336(e) election statement to target on or before the due date (including extensions) of the consolidated group's consolidated Federal income tax return.⁵¹ Similar requirements must be satisfied in the case of a subchapter C target corporation that is not a consolidated group member and in the case of a subchapter S target corporation.⁵²

As a threshold matter, it is unclear whether each of the requirements set forth in Reg. Sections 1.336-2(h)(1), (2), or (3) (as applicable), or in Reg. Sections 1.336-2(h)(5) and (6) through reference, must be satisfied in order for a Section 336(e) election to be valid. For example, if the common parent of the consolidated group fails to retain a copy of the written agreement as required by Reg. Section 1.336-2(h)(1)(ii) (e.g., the agreement is accidentally discarded years after the transaction), or if an incorrect TIN, taxable year, or state of incorporation is provided in the Section 336(e) election statement under Reg. Section 1.336-2(h)(6)(i), does this preclude the making of a valid Section 336(e) election? The fact that these items appear in the rule that establishes the requirements for making a valid election would strongly suggest that each such item must indeed be satisfied. However, a number of these items are non-substantive in nature and not of a quality designed to make clear to the Service the taxpayers' intention to make the election. Because non-substantive requirements are not essential to establishing a clear expression of the taxpayer's intention to make a Section 336(e) election, we recommend

⁵⁰ Reg. Section 1.336-2(h)(5) requires that the Section 336(e) election statement be entitled "THIS IS AN ELECTION UNDER SECTION 336(e) TO TREAT THE DISPOSITION OF THE STOCK OF [insert name and employer identification number of target] AS A DEEMED SALE OF SUCH CORPORATION'S ASSETS" and that it must include the information described in Reg. Section 1.336-2(h)(6). Reg. Section 1.336-2(h)(6) requires, in part, that the Section 336(e) election statement include: (i) The name, address, taxpayer identifying number (TIN), taxable year, and state of incorporation (if any) of the seller(s) or the S corporation shareholder(s); (ii) The name, address, employer identification number (EIN), taxable year, and state of incorporation of the common parent, if any, of seller(s); (iii) The name, address, EIN, taxable year, and state of incorporation of target; and (iv) The name, address, TIN, taxable year, and state of incorporation (if any) of any 80% purchaser. Note that in the case of a QSD in which the "purchaser" is the public shareholders of the seller because the QSD is a distribution under Sections 301 and 311 or under Section 355(d)(2) or (e)(2)), we assume that a valid Section 336(e) statement may be filed without providing the name, TIN, etc., of each public shareholder. Confirmation by the Service of this point in regulatory or other guidance would be helpful.

⁵¹ See Reg. Section 1.336-2(h)(1). It is unclear whether the requirement of Reg. Section 1.336-2(h)(1)(iv) (i.e., that the common parent of the consolidated group provide a copy of the Section 336(e) election statement to target on or before the due date (including extensions) of the consolidated group's consolidated Federal income tax return) may be satisfied, under the principles of Section 7502, through mailing a copy of the election statement by such due date. Additional certainty concerning this issue would be helpful.

⁵² See Reg. Sections 1.336-2(h)(2) and (3).

relocating such requirements to a separate rule in order that the failure to meet one or more of such requirements will not invalidate the Section 336(e) election itself.⁵³

Additional issues arise where the taxpayer is unable to file timely a Section 336(e) election. In the case of an untimely Section 338(h)(10) election, the Service provides, through Rev. Proc. 2003-33, a mechanism under which taxpayers may obtain an automatic extension of time to file a valid Section 338(h)(10) election. In light of the close ties Section 336(e) shares with Section 338(h)(10), we recommend that, until more specific guidance with respect to missed Section 336(e) elections is provided, the Service permit taxpayers to apply Rev. Proc. 2003-33 (making appropriate adjustments to reflect the rules of Section 336(e)) to missed Section 336(e) elections. Moreover, in the event our above recommendation regarding the relocation of the election's ministerial requirements from the operative provisions is not adopted, we recommend the provision of guidance as to whether relief under Rev. Proc. 2003-33 or Reg. Section 301.9100-1 *et. seq.* (authorizing the extension of due dates for missed elections in certain circumstances) is available in the event that the seller and target fail to enter timely into a written, binding agreement or to satisfy any of the other ministerial requirements.⁵⁴

⁵³ For example, Reg. Section 1.336-2(h)(7), which requires the filing of Form 8883, "Asset Allocation Statement Under Section 338," is not referenced in Reg. Sections 1.336-2(h)(1), (2), or (3) as a requirement for making a Section 336(e) election. Perhaps a similar approach could be taken with respect to the ministerial items currently set forth in Reg. Sections 1.336-2(h)(1), (2), (3), (5), and (6).

⁵⁴ See GLENN CARRINGTON, TAX ACCOUNTING IN MERGERS AND ACQUISITIONS, ¶105.2.2 (2015) ("It is important to note that, although relief under Reg. §§301.9100-1 and 301.9100-3 may be available for a missed Code §336(e) election..., there is a significant risk that such relief would not extend to the failure to timely enter into the written, binding agreement; thus, such a failure may preclude relief under Reg. §§301.9100-1 and 301.9100-3 due to the taxpayer's ineligibility for the election unless the IRS determines that the agreement is part of the election as opposed to a prerequisite to qualification for the election."). Cf. PLR 200848013 (September 2, 2008) (granting relief under Reg. §301.9100-3 to make an election under Reg. §1.1502-13(f)(5), including an extension of time to undertake the reincorporation of assets otherwise required to have been made within 12 months of the filing of the return).