SUTHERLAND

LEGAL ALERT

May 13, 2013

At Last: Final Regulations Issued Under Section 336(e)

In a move that was nearly 27 years in the making, the Treasury Department (Treasury) and the Internal Revenue Service (IRS) issued long-awaited final regulations under § 336(e) (the Final Regulations) on May 10. Section 336(e) was enacted in 1986 as part of the legislation repealing the *General Utilities* doctrine and is meant to provide taxpayers relief from the potential multiple taxation that can result when a transfer of appreciated corporate stock is taxed to a seller without providing a corresponding step-up in the basis of the target's assets. Specifically, § 336(e) provides that, "under regulations prescribed by the Secretary," if (1) a corporation (seller) owns stock in another corporation (target) meeting the requirements of § 1504(a)(2) (i.e., at least 80% vote *and* value), and (2) the seller sells, exchanges, *or* distributes *all* of the target's stock, an election (a § 336(e) election) may be made to treat such sale, exchange, or distribution as a disposition of all of the target's assets, and no gain or loss will be recognized on the sale, exchange, or distribution of the target's stock.

In brief, the Final Regulations do not offer a significant departure from the proposed § 336(e) regulations that were issued in August 2008 (the Proposed Regulations). However, the Final Regulations make several important changes to the rules included in the Proposed Regulations, including those that are summarized below.

- In the case of a distribution of the target's stock, the Final Regulations permit the target's realized losses in the deemed asset disposition to offset the target's realized gains in that deemed transaction. Thus, the Final Regulations disallow the losses realized by the target that exceed the target's realized gains on account of the deemed asset disposition, but only in proportion to the target's stock that was disposed of by the seller in one or more distributions.

- For purposes of applying the loss disallowance rule described in the preceding bullet, the Final Regulations take into account (1) target stock distributed *at any time* within the 12-month disposition period, *not* just on or before the disposition date as had been provided in the Proposed Regulations, *and* (2) target stock distributed within the 12-month disposition period that is not part of the qualified stock disposition, such as stock distributed to a related person.

- The Final Regulations permit a § 336(e) election to be made for S corporation targets and provide additional and special rules to allow § 336(e) elections to be made with respect to such targets.

- The Final Regulations provide that, in order to make a § 336(e) election, the seller(s), or in the case of an S corporation target, all of the S corporation shareholders, *and the target* must enter into a written, binding agreement to make a § 336(e) election, and a § 336(e) election statement must be attached to the relevant federal income tax return(s). The Proposed Regulations had contemplated that the seller would be allowed to make a unilateral section 336(e) election.

These and other notable aspects of the Proposed Regulations and the Final Regulations are discussed in greater detail below.

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

The Proposed Regulations

A. General Principles

In keeping with the legislative history of § 336(e), which provides that principles similar to those of § 338(h)(10) should apply in the case of a § 336(e) election, the Proposed Regulations relied upon and used the structure and principles established under § 338(h)(10) and the underlying regulations to a very significant degree. For example, the Proposed Regulations incorporated principles from the § 338 regulations regarding the allocation of consideration, application of the asset and stock consistency rules, treatment of minority shareholders, and the availability of the installment method. Furthermore, under the Proposed Regulations, the results of a § 336(e) election generally coincided with those of a § 338(h)(10) election, except to the extent that such results were inconsistent with the purposes of § 336(e).

For purposes of the Proposed Regulations, a "seller" was defined as a *domestic* corporation that made a "qualified stock disposition," and included a transferor or a distributor of the target's stock. Furthermore, under the Proposed Regulations, all members of a seller's consolidated group generally were treated as a single seller. Thus, similar to an election under § 338(h)(10), the Proposed Regulations provided that a § 336(e) election would have been available to a seller that directly owned stock of the target meeting the requirements of § 1504(a)(2) *and* to a seller that was comprised of members of a consolidated group that, in the aggregate, owned stock of the target meeting the requirements of § 1504(a)(2).

In contrast to § 338, which requires a corporate purchaser, the Proposed Regulations defined a "purchaser" as *any* person (or persons) that received stock of the target in a "qualified stock disposition." Accordingly, under the Proposed Regulations, a § 336(e) election would have been available for sales, exchanges, or distributions (or any combination thereof) of target stock to both corporate *and* non-corporate purchasers.

The Proposed Regulations defined a "qualified stock disposition" as any transaction (or series of transactions) in which stock meeting the requirements of § 1504(a)(2) of a *domestic* corporation was sold, exchanged, or distributed (or any combination thereof) by another domestic corporation in a "disposition" (which generally was limited to transactions in which gain or loss was recognized) during a 12-month disposition period. However, any stock that was sold, exchanged, or distributed to a "related person" would *not* have been considered as disposed of for purposes of determining whether there had been a qualified stock disposition. Furthermore, under the Proposed Regulations, (1) relatedness would have been determined *immediately after* the sale, exchange, or distribution of the target's stock had been completed, *and* (2) persons would have been treated as "related" if stock in a corporation owned by one of the persons would be attributed to the other person under § 318(a), other than by reason of § 318(a)(4).

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

Sutherland Observations

1. The Proposed Regulations interpreted § 336(e) as requiring only that an amount of stock meeting the requirements of § 1504(a)(2) be disposed of and not that every share of stock owned by the seller be disposed of. Accordingly, the seller, or a member of the seller's consolidated group, could have retained a portion of the target's stock without running afoul of the requirements of the Proposed Regulations. The Final Regulations contemplate the same result.

2. The Proposed Regulations would have permitted amounts of target stock that were sold, exchanged, or distributed to be aggregated for purposes of determining whether there had been a qualified stock disposition. For example, a domestic corporation's sale of 50% of the target's stock to an unrelated person and distribution of the remaining 50% of the target's stock to unrelated shareholders within a 12-month period would have constituted a qualified stock disposition under the Proposed Regulations. The Final Regulations provide for the same result.

3. As indicated above, the Proposed Regulations would not have authorized the making of § 336(e) elections under all of the circumstances described within the statutory grant of authority. For example, the Proposed Regulations would not have applied to transactions between related persons or to transactions in which either the seller or the target constituted a foreign corporation. The Final Regulations provide for the same result.

4. Consistent with the legislative history of § 336(e), the Proposed Regulations generally would not have changed the federal income tax consequences of the purchaser's receipt of the target's stock, no matter whether the purchaser received such stock by way of a sale, exchange, or distribution. The Final Regulations contemplate the same result.

B. Sales or Exchanges of Target Stock

In general, if a seller sold or exchanged target stock in a qualified stock disposition, the treatment of each of the "old" target, seller, and purchaser under the Proposed Regulations would have been similar to the treatment of old target (old T), S, and P under § 338(h)(10). Specifically, the Proposed Regulations provided that, if a § 336(e) election was made in such an instance:

- The seller would be required to disregard the actual sale or exchange of target stock;
- The target (old target) would be treated as selling all of its assets to an unrelated person in a single transaction as of the close of the disposition date, i.e., the date on which the threshold amount of target stock is disposed of by the seller (the deemed asset disposition);
- Old target would have recognized the federal income tax consequences arising from the deemed asset disposition before the close of the disposition date while it was a subsidiary of the seller; *and*
- After the deemed asset disposition:
    - New target would be treated as acquiring all of its assets from an unrelated person as of the close of the disposition date; *and*

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

- o Old target would be treated as liquidating into the seller as of the close of the disposition date, which, in most cases, would be treated as a distribution in complete liquidation to which § 332 and § 336 or § 337 applies.

Sutherland Observation: Consistent with a § 338(h)(10) election, the Proposed Regulations would have treated the deemed purchase of the assets of old target by new target as a deemed purchase of any subsidiary stock that had been owned by old target. Accordingly, under the Proposed Regulations, a § 336(e) election would have been available for the deemed purchase of the stock of a target subsidiary if that transaction constituted a qualified stock disposition. However, a § 338(h)(10) election would not have been available with respect to the target's subsidiaries in that instance. The Final Regulations have not departed from these results.

C. Distributions of Target Stock

As noted above, the legislative history of § 336(e) provides that it was not intended that a § 336(e) election affect the manner in which a corporation's distribution to its shareholders would be characterized for purposes of determining the federal income tax consequences of the distribution to those shareholders. Accordingly, the Proposed Regulations provided rules to address distributions and to ensure that the federal income tax consequences to a distributee generally would be the same as if a § 336(e) election had *not* been made.

1. Distributions of Target Stock *Not* Described in § 355(d)(2) or § 355(e)(2)

The Proposed Regulations provided that, if the seller distributed target stock in a qualified stock disposition that was not described in § 355(d)(2) or § 355(e)(2), the following construct would be used to explain the consequences of that transaction:

- The seller would be required to disregard the actual distribution of the target's stock;
- The target (old target) would be treated as selling all of its assets to an unrelated person in a single transaction as of the close of the disposition date (i.e., the deemed asset disposition);
- Old target would have recognized the federal income tax consequences arising from the deemed asset disposition before the close of the disposition date while it was a subsidiary of the seller; *and*
- After the deemed asset disposition:
    - o New target would be treated as acquiring all of its assets from an unrelated person as of the close of the disposition date;
    - o Old target would be treated as liquidating into the seller as of the close of the disposition date, which, in most cases, would be treated as a distribution in complete liquidation to which § 332 and § 336 or § 337 applies; *and*
    - o Immediately after the deemed liquidation of old target, the seller would be deemed to purchase from new target on the disposition date the amount of stock distributed in the qualified stock disposition and to distribute such new target stock to its shareholders.

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

SUTHERLAND

Sutherland Observation: Under this construct, the seller would not have recognized gain or loss on account of the distribution. Moreover, the distributees' federal income tax consequences generally would have been governed by § 301, which generally would have been the case if the distributees had received the old target stock pursuant to the underlying distribution. However, the deemed asset disposition and the target's deemed liquidation could have impacted the distributees' federal income tax consequences in this instance. For example, any increase in the seller's earnings and profits as a result of the target's deemed asset disposition and liquidation into the seller could have altered the amount of the distribution that constituted a dividend under § 301(c)(1) in relation to the amount of the distribution that would have constituted a dividend if the seller had not made the § 336(e) election. The Final Regulations have not changed these potential results.

If a seller actually made a distribution of property under § 301, the seller generally would be prevented from recognizing any loss on account of that distribution under § 311(a). The Proposed Regulations implemented this result in the context of a distribution of target stock by providing that only a portion of the losses realized by the target on account of the deemed asset disposition could be recognized (the Loss Disallowance Rule). Specifically, the portion of any realized loss that could have been recognized in that instance would have been based on a fraction equal to the value of the target's stock *sold or exchanged* in the qualified stock disposition *on or before the disposition date over* the total value of the target's stock disposed of in the qualified stock disposition *on or before the disposition date*. Thus, any losses realized by the target on account of the deemed asset disposition could *not* have been recognized to the extent that the qualified stock disposition was attributable to the *distribution* of target stock.

2. Distributions of Target Stock Described in § 355(d)(2) or § 355(e)(2)

The Proposed Regulations would have allowed a corporation that otherwise would have been required to recognize the full amount of the gain realized with respect to a qualified stock disposition on account of the application of § 355(d)(2) or § 355(e)(2) to make a § 336(e) election in respect of that distribution. In that instance, the Proposed Regulations contemplated that the following construct would be used to describe the consequences of that transaction:

- The controlled corporation (old target) would be treated as if it sold its assets to an unrelated person in a single transaction as of the close of the disposition date (i.e., the deemed asset disposition);
- Old target would have recognized the federal income tax consequences arising from the deemed asset disposition before the close of the disposition date while it was a subsidiary of the seller;
- Following the deemed asset disposition, old target would be treated as acquiring all of its assets back from the unrelated person in a single, separate transaction as of the close of the disposition date; *and*
- The distributing corporation would be treated as distributing the stock of old target to its shareholders.

Sutherland Observation: Because a liquidation of old target into seller would *not* have been deemed to occur under this construct, old target generally would have retained the federal income tax attributes that it would have had if the § 336(e) election had *not* been made. The Final Regulations provide for the same result.

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

The Proposed Regulations further provided that old target would take into account the effects of the deemed asset disposition and increase or decrease its earnings and profits *immediately before* allocating earnings and profits pursuant to Treas. Reg. § 1.312-10. Moreover, similar to a qualified stock disposition resulting from a distribution *not* involving a transaction described in § 355(d)(2) or § 355(e)(2), the losses realized by old target on account of the deemed asset disposition could be recognized, but only in relation to the amount of target stock *sold or exchanged* in the qualified stock disposition *on or before the disposition date*. Stated differently, the Proposed Regulations also applied the Loss Disallowance Rule in this context.

If, in this instance, old target had any subsidiaries for which a § 336(e) election also was made, the Proposed Regulations provided that the general deemed asset disposition methodology applied to those subsidiaries. Accordingly, old target subsidiary would have been treated as though it had sold all of its assets to an unrelated person as of the close of the disposition date, old target subsidiary would have recognized the federal income tax consequences arising from the deemed asset disposition before the close of the disposition date while it was a subsidiary of old target, new target subsidiary would have been treated as acquiring all of its assets from an unrelated person as of the close of the disposition date, and old target subsidiary would have been deemed to liquidate into old target.

Sutherland Observation: Without a § 336(e) election, triple taxation could result in an instance where a distribution is subject to § 355(d)(2) or § 355(e)(2), i.e., one at the controlled corporation level, one at the distributing corporation level, and, ultimately, one at the shareholder level. Allowing a § 336(e) election in these circumstances generally limits taxation to two layers, one at the controlled corporation level and one at the shareholder level when the shareholders dispose of the controlled corporation stock, which is consistent with the repeal of the *General Utilities* doctrine.

D. Making the § 336(e) Election

The Proposed Regulations provided that a § 336(e) election could be made only by the *seller* by attaching a statement to its timely filed federal income tax return for the taxable year that includes the disposition date. If the seller was a member of a consolidated group, the statement was to be filed with the group's consolidated return for such taxable year. Once made, the Proposed Regulations provided that a § 336(e) election would be irrevocable.

Sutherland Observation: It is apparent that Treasury and the IRS concluded that, for purposes of the Proposed Regulations, it would be appropriate to allow the seller (or the common parent of the seller's consolidated group) to make the § 336(e) election *unilaterally*. Several explanations could attach to that conclusion, including (1) the practicality of requiring each distributee to join in the § 336(e) election, (2) the fact that the distributees' interests generally should be protected because of the distributing corporation's fiduciary responsibilities to its shareholders, and (3) in the case of a sale or exchange, the purchasers' ability to protect their interests in any purchase contract. As discussed below, Treasury and the IRS have reconsidered this approach to making the § 336(e) election in the Final Regulations.

The Proposed Regulations contemplated that taxpayers would be allowed to make a "protective" § 336(e) election if they were unsure of whether a transaction constituted a qualified stock disposition. If such a protective election was made, the Proposed Regulations provided that it would not have any effect if the transaction did not constitute a qualified stock disposition, but otherwise would be binding and irrevocable.

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

The Final Regulations

As noted above, the Final Regulations largely follow the approach of the Proposed Regulations with some modifications. The more significant modifications are discussed below.

A. Loss Disallowance Rule Modified

After considering the comments concerning the Loss Disallowance Rule, Treasury and the IRS determined that the Loss Disallowance Rule, as set forth in the Proposed Regulations, was broader in scope than necessary to serve the purposes of § 336(e). Accordingly, the Final Regulations modify the Loss Disallowance Rule to permit the target's realized losses in the deemed asset disposition to offset the target's realized gains in that deemed transaction. Thus, the Final Regulations disallow the losses realized by the target that exceed the target's realized gains on account of the deemed asset disposition, but only in proportion to the target's stock that was disposed of by the seller in one or more distributions.

As noted above, in the Proposed Regulations, the Loss Disallowance Rule only would have applied to distributions that were taken into account as part of the qualified stock disposition on or before the disposition date. Thus, stock distributions that occurred *after* 80% of the target was disposed of were not subject to the Loss Disallowance Rule of the Proposed Regulations. The Final Regulations modify the Loss Disallowance Rule to take into account (1) target stock distributed *at any time* within the 12-month disposition period, *not* just on or before the disposition date, *and* (2) target stock distributed within the 12-month disposition period that is not part of the qualified stock disposition, such as stock distributed to a related person. Accordingly, under the Loss Disallowance Rule of the Final Regulations, if a § 336(e) election is made and any stock of the target is distributed during the 12-month disposition period, whether or not as part of the qualified stock disposition, any net loss attributable to such stock distribution will be disallowed.

Sutherland Observation: As suggested by the Final Regulations, if disallowed losses were limited to stock distributed on or before the disposition date, it seems that sellers that otherwise would have distributed target stock on the disposition date could have delayed the distribution in order to decrease the disallowed loss recognized by the target. Furthermore, if stock distributions that are not part of the qualified stock disposition, such as a distribution to a related person, were not taken into account under the Loss Disallowance Rule, the target may have been able to recognize a greater portion of its net loss by distributing stock to a related person than it would have been able to recognize if it distributed the stock to an unrelated person.

B. Construct for Distributions of Target Stock *Not* Described in § 355(d)(2) or § 355(e)(2) Modified

In general, the Final Regulations retain the rules of the Proposed Regulations with respect to the deemed transactions described above for sales or exchanges of target stock and distributions of target stock not described in § 355(d)(2) or § 355(e)(2). However, the Final Regulations modify the construct of the Proposed Regulations with respect to distributions of target stock not described in § 355(d)(2) or § 355(e)(2) by providing that, in such a distribution (and also with respect to stock in the target that the seller retains after the disposition date), the seller is deemed to purchase the new target stock that is distributed (or retained) *not* from new target, but from an unrelated person in a taxable transaction.

Sutherland Observation: The revised construct included in the Final Regulations generally confirms that the seller should not recognize any gain or loss on the deemed distribution of new target stock, and the purchaser should have a fair market value basis in the new target stock received.

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

SUTHERLAND

C. Potential Consequences of Distributions of Target Stock Described in § 355(d)(2) or § 355(e)(2) Clarified

The Final Regulations adopt the “sale-to-self” model of the Proposed Regulations with respect to distributions of target stock described in § 355(d)(2) or § 355(e)(2) and treat the transaction as the distribution of old target stock. Furthermore, as a clarification, the Final Regulations provide that, for purposes of the anti-churning rules of § 197(f)(9), the wash sale rules of § 1091, and any other provision designated in the Internal Revenue Bulletin by the IRS, old target, in its capacity as the seller of assets in the deemed asset disposition, will be treated as a separate and distinct taxpayer from, and unrelated to, old target in its capacity as the acquirer of assets in the subsequent deemed purchase and for subsequent periods.

Sutherland Observation: Taking into account the clarification offered by the Final Regulations, if one of the target’s assets immediately before old target’s deemed asset disposition was stock or securities within the meaning of § 1091, old target, as the seller of the stock or securities in the deemed asset disposition, should not be treated for purposes of § 1091 as the same taxpayer that acquires substantially identical stock or securities in the deemed purchase of assets or that actually acquires substantially identical stock or securities in periods after the deemed asset disposition. Therefore, § 1091 should not disallow any of old target’s loss on the deemed sale of the stock or securities as a result of either old target’s deemed purchase of the same stock or securities or an actual purchase of substantially identical stock or securities within the 30-day period after the disposition date.

D. § 336(e) Elections Allowed for S Corporation Targets

The Proposed Regulations did not provide for a § 336(e) election with respect to the sale of stock of an S corporation. In response to comments on the Proposed Regulations, the Final Regulations permit a § 336(e) election to be made for S corporation targets and provide additional and special rules to allow § 336(e) elections to be made with respect to such targets. Specifically, under the Final Regulations, if a § 336(e) election is made for an S corporation target, old target’s S election continues in effect through the close of the disposition date (including the time of the deemed asset disposition and the deemed liquidation) at which time old target’s S election terminates, and old target ceases to exist.

Sutherland Observation: If new target qualifies as a small business corporation within the meaning of § 1361(b) and wants to be an S corporation, a new election under § 1362(a) will have to be made for new target.

E. Seller and Target Must Make § 336(e) Election

Under the Final Regulations, in order to make a § 336(e) election, the seller(s), or in the case of an S corporation target, all of the S corporation shareholders, *and the target* must enter into a written, binding agreement to make a § 336(e) election, and a § 336(e) election statement must be attached to the relevant federal income tax return(s). If the seller(s) and the target are members of a consolidated group, the election statement must be filed with a timely filed consolidated return for the consolidated group, and the common parent of the consolidated group must provide a copy of the § 336(e) election statement to the target on or before the due date (including extensions) of the consolidated group’s consolidated return. If the target is an S corporation, the election statement must be filed with the S corporation’s timely filed federal income tax return. If the seller(s) and the target are members of an affiliated group but do not join in filing a consolidated return, the election statement must be filed with both the seller’s *and* the target’s timely filed federal income tax returns.

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

Sutherland Observation: By requiring that (1) the seller(s), or all of the S corporation shareholders, *and the target* enter into a written, binding agreement, (2) in the case of a consolidated group, the common parent of the consolidated group provide a copy of the § 336(e) election statement to the target, and (3) in a case where the seller(s) and the target are members of an affiliated group but do not join in filing a consolidated return, both the seller and the target file the election statement on their respective federal income tax returns, the Final Regulations may reduce the potential for unwanted results or unfair surprises in an instance where a § 336(e) election is made.

In the preamble to the Final Regulations, the IRS announced that it intends to modify Form 8883 (Asset Allocation Statement Under Section 338) or create a new form, to include an election under § 336(e). However, until Form 8883 is modified or a new form is created, the IRS confirmed that Form 8883 should be used to report the results of the deemed asset disposition and deemed asset purchase, making adjustments as necessary to account for a § 336(e) election.

F. Other Miscellaneous Modifications

In brief, the Final Regulations also include the changes that are summarized below.

- The Final Regulations modify the definition of "related persons" as pertaining to partnerships by providing that, solely for purposes of determining whether a purchaser and a seller are related for purposes of § 336(e), the attribution rules of § 318(a)(2)(A) and § 318(a)(3)(A) will *not* apply to attribute stock ownership from a partnership to a partner, or from a partner to a partnership, if such partner owns, directly or indirectly, *less than 5% of the value* of the partnership.

- The Final Regulations confirm that a taxpayer may make an election under Treas. Reg. § 1.1502-13(f)(5)(ii)(C) to treat the deemed liquidation of the target into the seller as a result of a § 336(e) election as a taxable liquidation. The election under Treas. Reg. § 1.1502-13(f)(5)(ii)(C) generally allows taxpayers to treat the deemed liquidation resulting from a § 338(h)(10) election as a taxable liquidation in order to provide the consolidated group with a stock loss that may be used to offset intercompany gain.

- The Final Regulations provide that, with respect to a distribution of target stock described in § 355(d)(2) or § 355(e)(2) for which a § 336(e) election is made that is preceded by a sale, exchange, or distribution of the target's stock within an affiliated group, the target will be deemed to liquidate into the seller immediately after the deemed asset disposition for the limited purpose of making an election under Treas. Reg. § 1.1502-13(f)(5)(ii)(C).

- The Final Regulations provide that, if the target holds an interest in a disregarded entity or a partnership, the foreign tax allocation rules of Treas. Reg. § 1.901-2(f)(4) apply with respect to foreign tax imposed at the entity level on the income of such entities. The Final Regulations also include other modifications that are intended to achieve consistency with Treas. Reg. § 1.901-2(f)(4).

- The Final Regulations contain a cross-reference to the rules under § 901(m), which provides special rules for "covered asset acquisitions." In the context of a § 336(e) election, the rules of § 901(m) may apply if the target has foreign branch operations.

- The Final Regulations provide that stock of the target is "retained" if it is owned by the seller *after the disposition date*. The Proposed Regulations had provided that, if the seller held any

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

stock in the target *after the 12-month disposition period*, the seller generally would have been treated as having "retained" such stock and as having purchased the stock so retained on the day after the disposition date.

- The Final Regulations provide that the consistency rules of Treas. Reg. § 1.338-8 apply to an asset only if the asset is owned, immediately after its acquisition and on the disposition date, by a person (or by a related person with respect to such a person) that acquires *at least 5% of the value* of the stock of the target in a qualified stock disposition. In this regard, Treasury and the IRS expressed that (1) they do not believe that the purposes of the consistency rules mandate a carryover basis for an asset unless the same person (or a related person) acquires both the asset of the target (or a subsidiary of the target) and more than a minimal amount of the stock of the target, *and* (2) it would be inappropriate to limit the consistency rules for purposes of § 336(e) to corporate purchasers.

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Dennis L. Allen	202.383.0906	dennis.allen@sutherland.com
Robert S. Chase II	202.383.0194	robb.chase@sutherland.com
Reginald J. Clark	404.853.8032	reggie.clark@sutherland.com
Jeffrey H. Mace	212.389.5049	jeffrey.mace@sutherland.com
Daniel R. McKeithen	404.853.8342	daniel.mckeithen@sutherland.com
Michael R. Miles	202.383.0204	michael.miles@sutherland.com
David A. Roby, Jr.	202.383.0137	david.roby@sutherland.com
Carol P. Tello	202.383.0769	carol.tello@sutherland.com
H. Karl Zeswitz, Jr.	202.383.0518	karl.zeswitz@sutherland.com
William R. Pauls	202.383.0264	william.pauls@sutherland.com
Christopher W. Schoen	202.383.0934	christopher.schoen@sutherland.com
William E. Sheumaker	404.853.8023	wes.sheumaker@sutherland.com

© 2013 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.