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## New Election to Treat Stock Sale as Deemed Asset Sale

The IRS recently issued final regulations under Section 336(e) that permit parties to a transaction to treat the sale of stock as a deemed sale of assets in the case of (i) a corporation selling stock in its subsidiary and (ii) the sale of stock in an S corporation. This 336(e) election is similar to the existing 338(h)(10) election, except that the buyer in a 336(e) transaction may be an individual, partnership, LLC, or trust, while 338(h)(10) transactions are limited to corporate buyers. In the case of a corporation selling stock in its subsidiary, the selling corporation must own at least 80% of the vote and value of the subsidiary corporation and must sell at least 80% of the vote and value of the stock of the subsidiary corporation within a 12-month period. In the case of an S corporation, the selling shareholders must sell at least 80% of the vote and value of the stock in the S corporation within a 12-month period. The 336(e) election may be made for sales on or after May 15, 2013 and must be jointly made by the target and the seller (or all the shareholders in the case of an S corporation stock sale).

Similar to a 338(h)(10) election, the 336(e) election may be beneficial to both the seller and buyer. If the election is made, the buyer will receive the benefit of a step-up in the basis of the assets that it is deemed to purchase if the purchase price is greater than the net tax basis of the assets. A step-up in basis allows the buyer to claim higher depreciation and cost recovery deductions on the assets that it is deemed to purchase. From a non-tax perspective, the seller benefits because it can transfer to the buyer any liabilities, including contingent liabilities, inherent in the subsidiary since the transaction is structured as a stock sale. As a stock sale, the transaction will generally not be subject to state transfer taxes or sales taxes, and difficulties in retitling assets and assigning contracts may be avoided. The seller in a 336(e) transaction will be subject to only one level of taxation, although an S corporation target may be subject to the corporate-level built-in gain tax if it was previously a C corporation and may also be subject to depreciation recapture.

The 336(e) election may be an attractive option for non-corporate buyers in a transaction in which the seller wants to sell stock but the buyer wants to receive the tax benefits of an asset purchase. While buyers in 338(h)(10) transactions are restricted to corporations, buyers in 336(e) transactions may take advantage of more flexible entities such as LLCs. Immediately following a 336(e) transaction, the buyer may convert the acquired corporation into an LLC to achieve flow-through tax treatment and to have greater flexibility in terms of structuring economics, such as granting profits interests to employees and making special allocations to members.

Please contact any member of the Tax and Employee Benefits Team if you have any questions regarding the 336(e) election.

*The following summary is not intended, and should not be relied upon, as legal advice. Any tax advice contained herein was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code of 1986, as amended, or applicable state or local tax law provisions.*