

## Part III – Administrative, Procedural, and Miscellaneous

### Request for Feedback Regarding Certain Matters Relating to Section 355 Transactions

Notice 2024-38

#### SECTION 1. OVERVIEW AND PURPOSE

This notice accompanies Rev. Proc. 2024-24, published elsewhere in this Bulletin, which provides procedures for requesting private letter rulings (PLRs) from the Internal Revenue Service (IRS) regarding certain matters relating to Section 355 Transactions.<sup>1</sup> The Department of the Treasury (Treasury Department) and the IRS are continuing to study matters relating to Section 355 Transactions for purposes of developing potential published guidance and are issuing this notice to request public feedback on the provisions set forth in Rev. Proc. 2024-24. This notice also describes the Treasury Department's and IRS's views and concerns relating to certain matters addressed in Rev. Proc. 2024-24, and feedback is requested on these as well. Feedback provided in response to this notice will be considered in developing future guidance.

#### SECTION 2. REQUEST FOR FEEDBACK REGARDING MATTERS ADDRESSED BY REV. PROC. 2024-24

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<sup>1</sup> Unless otherwise specified, all "section" or "§" references are to sections of the Internal Revenue Code (Code) or the Income Tax Regulations (26 CFR part 1). This notice incorporates the definitions set forth in the Appendix to Rev. Proc. 2024-24.

.01 *In General*. The Treasury Department and the IRS request feedback with respect to all provisions set forth in Rev. Proc. 2024-24, as well as on the views and concerns described in section 2.02 of this notice. The Treasury Department and the IRS request that such feedback take into account the following objectives for potential published guidance:

(1) The guidance will be consistent with all relevant provisions of the Code.

(2) The guidance will provide certainty to taxpayers and the IRS regarding the application of all relevant provisions of the Code to purported Section 355 Transactions.

(3) The guidance will be responsive to the manner in which Section 355 Transactions are engaged in by taxpayers and reflect current market practices and preferences to the extent that such approach does not conflict with the objectives set forth in sections 2.01(1) and (2) of this notice.

.02 *Views and Concerns Relating to Certain Matters Addressed by Rev. Proc. 2024-24*. This section 2.02 describes the Treasury Department's and IRS's views and concerns relating to certain matters addressed by Rev. Proc. 2024-24.

(1) *Distinction between Delayed Distributions of Controlled stock and securities and Retentions*. The Code provides separate and distinct treatment for three types of instances in which Distributing temporarily continues to hold Controlled stock or securities following the Control Distribution Date. These three instances occur with regard to: (a) a Delayed Distribution of Controlled stock or securities that is "part of the distribution" (within the meaning of § 355(a)(1)(D)); (b) a Delayed Distribution of Controlled stock or securities that is "in pursuance of the plan of reorganization" (within the meaning of § 361); and (c) a Retention. The Treasury Department and the IRS

have provided required representations, information, and analysis in Rev. Proc. 2024-24 to reflect the discrete application of the Code to each of these instances.

(2) *Degree of connection between Distributing and Controlled that prevents genuine separations.* The Treasury Department and the IRS are considering the degree to which connections between Distributing and Controlled (and, as appropriate, the DSAG and CSAG) after the Control Distribution Date would prevent a transaction from qualifying under § 355. In particular, the Treasury Department and the IRS are considering the impact of (i) overlapping key employees between the DSAG and CSAG (determined immediately after the Control Distribution Date), (ii) overlapping directors or officers between Distributing and Controlled (determined immediately after the Control Distribution Date), and (iii) the existence of continuing contractual agreements between the DSAG and CSAG that include provisions that are not arm's-length. Section 1.355-2(e)(2) provides that, "[o]rdinarily, the corporate business purpose or purposes for the distribution will require the distribution of all of the stock and securities of the controlled corporation." If Distributing distributes an amount of stock in Controlled constituting control (within the meaning of § 368(c)) but retains Controlled stock or securities, the Distribution does not qualify for nonrecognition treatment under § 355(a)(1)(D)(ii) unless Distributing establishes to the satisfaction of the Secretary of the Treasury (through the IRS by delegation) that the Retention was not in pursuance of a plan having as *one of its principal purposes* the avoidance of Federal income tax. Therefore, the statute effectively creates a rebuttable presumption that any Retention evidences a plan to achieve a Federal income tax avoidance purpose. In addition, it is the view of the Treasury Department and the IRS that overlapping directors or officers between

Distributing and Controlled, overlapping key employees between the DSAG and CSAG, and the existence of continuing contractual agreements between the DSAG and CSAG that include provisions that are not arm's-length, weigh against a determination of § 355 qualification—particularly, for example, if the purported business purpose for the Section 355 Transaction is to achieve a fit-and-focus business purpose. Solely for reference to examples of fit-and-focus business purposes, *see generally* Rev. Rul. 2003-75, 2003-2 C.B. 79; Rev. Rul. 2003-74, 2003-2 C.B. 77.

(3) *Solvency and continued viability of Distributing and Controlled.* The Treasury Department and the IRS are of the view that § 355 qualification is limited to Divisive Reorganizations after which Distributing and Controlled are capable of carrying on sustained businesses after the reorganization, and that § 355 and related Code provisions were not enacted to provide nonrecognition treatment for Divisive Reorganizations that burden Controlled with excessive leverage, jeopardizing its ability to continue as a viable going concern. *See, for example, S. Rep. No. 82-781, at 58 (1951)* (providing, in relevant part, that the predecessor statute to § 355 was drafted “so as to limit its benefits to reorganizations in which all of the new corporations as well as the parent are intended to carry on a business after the reorganization”, and emphasizing that “all of the new corporations as well as the parent [must] carry on a business”).

(4) *Plan of Reorganization requirement for Divisive Reorganizations.* The required representations, information, and analysis in Rev. Proc. 2024-24 are intended to ensure that Plans of Reorganization for purported Divisive Reorganizations provide adequate specificity and clarity to satisfy the requirements set forth in current Treasury

Regulations. The Treasury Department and the IRS understand that confusion and disagreement exists regarding the application of the Plan of Reorganization requirement to Divisive Reorganizations. For instance, it is the understanding of the Treasury Department and the IRS that some tax advisors incorrectly view the applicability of the Plan of Reorganization requirement to be potentially obviated by the temporal requirements that were set forth in section 3.04(6) of Rev. Proc. 2018-53. The Treasury Department and the IRS view the Plan of Reorganization requirement as incorporating a degree of transactional flexibility, a view consistent with feedback received from tax advisors. However, the Treasury Department and the IRS also are of the view that such flexibility is limited by the current Treasury Regulations. See §§ 1.368-1(c); 1.368-2(g). In particular, the Treasury Department and the IRS view the Plan of Reorganization requirement as helpful to ensure that Delayed Distributions are not used to avoid the application of the repeal of *General Utilities & Operating Co. v. Helvering*, 296 U.S. 200 (1935).

(5) *Application of substance over form, agency, and other relevant theories to intermediated exchanges and direct issuance transactions.* The Treasury Department and the IRS are considering the application of the Code, as well as general principles of Federal income tax law (including substance over form, agency, or other relevant theories), to intermediated exchanges and direct issuance transactions (as those terms are described in Rev. Proc. 2024-24). With regard to a so-called direct issuance transaction in which Distributing Debt is issued to an Intermediary and redeemed in close temporal proximity, it is the view of the Treasury Department and the IRS that general principles of Federal income tax law could recast the transaction such that the

Intermediary (that is, the direct holder) is not treated as a creditor described in § 361(b)(3) or (c)(3). Similarly, general principles of Federal income tax law potentially could recast an intermediated exchange, or treat the Intermediary engaged in that exchange as an agent of Distributing, such that Distributing likewise would not be treated as exchanging Section 361 Consideration for Distributing Debt. The Treasury Department and the IRS would welcome feedback from Intermediaries to help ensure that future guidance is responsive to the business and market-risk considerations that inform the mechanics of intermediated exchanges and direct issuance transactions, as opposed to mere differences in transaction costs (with the understanding that differences in transaction costs are one consequence of such business and market risk considerations).

*(6) Federal income tax treatment and consequences of Post-Distribution*

*Payments.* The Treasury Department and the IRS are considering the application of the Code to Post-Distribution Payments. It is the view of the Treasury Department and the IRS that a Post-Distribution Payment is treated for Federal income tax purposes as Section 361 Consideration only if the taxpayer establishes that (i) the character of the Post-Distribution Payment is Section 361 Consideration, (ii) as of the First Distribution Date, the fair market value of Distributing's right to receive the Post-Distribution Payment was not (or will not be) reasonably ascertainable (within the meaning of that phrase as used in *Burnet v. Logan*, 283 U.S. 404, 413 (1931)), and (iii) the Post-Distribution Payment will be properly accounted for when the Post-Distribution Payment is received. For the avoidance of doubt, the Treasury Department and the IRS view *Arrowsmith v. Commissioner*, 344 U.S. 6 (1952), as applying solely to the requirement

described in clause (i) of the preceding sentence (that is, the characterization of the Post-Distribution Payment for Federal income tax purposes). *See generally* sections 3.05(10)(b) and (c) of Rev. Proc. 2024-24.

*(7) Effect of transaction related to Divisive Reorganization on Controlled securities.*

The Treasury Department and the IRS are considering the impact of Controlled's modification (including refinancing) of any of its securities or other Debt on the qualification of those securities or other Debt as Section 361 Consideration. In particular, the Treasury Department and the IRS are considering the impact of the application of general principles of Federal income tax law (including substance over form and other relevant theories) to acquisitions of Controlled following the Control Distribution Date that result in a modification of Controlled's securities. For example, the Treasury Department and the IRS have considered such application to a merger of Controlled into an acquiring corporation following the Control Distribution Date for transactions in which Controlled had issued Controlled securities that were treated by the taxpayer as purported Section 361 Consideration in an exchange for Distributing Debt. It is the view of the Treasury Department and the IRS that general principles of Federal income tax law (including substance over form and other relevant theories) could apply to recast such a situation for Federal income tax purposes to preclude qualification under § 361(c)(3). As noted in section 3.05(11)(b) of Rev. Proc. 2024-24, Rev. Rul. 98-27, 1998-1 C.B. 1159, is not relevant to determine whether any such transaction or series of transactions should cause the Divisive Reorganization to be recast, because that revenue ruling addresses solely whether Controlled was a "controlled corporation" under § 355(a) immediately before the Distribution. *See also*

*generally* Rev. Rul. 98-44, 1998-2 C.B. 315.

(8) *Replacement of Distributing Debt.* The Treasury Department and the IRS are considering the application of the Code to borrowings by Distributing that replace Distributing Debt satisfied with Section 361 Consideration in a Divisive Reorganization. As one example, the Treasury Department and the IRS are considering situations in which Distributing, as of the date of the contribution of assets to Controlled, anticipates entering into a borrowing that reverses the de-leveraging that Distributing effectuated through the use of Section 361 Consideration as part of the Divisive Reorganization—effectively rendering such de-leveraging as merely transitory and without real economic effect. The Treasury Department and the IRS are of the view that, in certain circumstances, the replacement of Distributing Debt satisfied with Section 361 Consideration can be used as an artifice for increasing the aggregate Debt and other Liabilities of Distributing and Controlled. That result, in effect, replicates a tax-free sale of a portion of Controlled, which the Treasury Department and the IRS are of the view should not qualify for nonrecognition treatment under § 361. Tax advisors have provided feedback consistent with this view following the publication of Rev. Proc. 2018-53, in particular with regard to section 3.04(7) of that revenue procedure.

(9) *Separate and distinct relevance and application of §§ 357 and 361.* Section 357, which addresses the assumption by Controlled of a Liability of Distributing, generally functions to provide that the assumption is not treated as the receipt by Distributing of money or Other Property from Controlled. See *generally* § 357(a); H.R. Rep. No. 76-855, 18-19 (1939) (Conf. Rep.) (“The practical effect of [*United States v. Hendler*, 303 U.S. 564 (1938)] is to say that an *assumption of a liability* is property in the



sense that it may be taxable immediately to the first corporation. . . . [W]e have, therefore, recommended that bona fide transactions of this type shall be carried on hereafter without the recognition of immediate gain taxable to the corporation going through reorganization.”) (emphasis added). In contrast, § 361 generally permits Distributing to qualify for nonrecognition treatment on the transfer to Distributing’s creditors in connection with a Divisive Reorganization of money, Other Property, or Controlled securities received from Controlled in the transaction. *See generally* § 361(b)(3) and (c)(3); S. Rep. No. 445, at 393 (1988) (“The bill amends prior law by providing that transfers of property to creditors in satisfaction of *the corporation’s indebtedness* in connection with the reorganization are treated as distributions pursuant to the plan of reorganization for this purpose. . . . This overrules the holding in [*Minnesota Tea Co. v. Helvering*, 302 U.S. 609 (1938)].”) (emphasis added). It is the understanding of the Treasury Department and the IRS that there is confusion and disagreement among some tax advisors regarding the interaction and separate operations of §§ 357 and 361 in situations, for example, in which Section 361 Consideration is used to satisfy Distributing Liabilities that do not qualify as Debt. Some tax advisors mistakenly believe that, in such a situation, the Section 361 Consideration would qualify for nonrecognition treatment under § 361. It is the understanding of the Treasury Department and the IRS that some tax advisors also incorrectly contend that Distributing would enjoy nonrecognition treatment under § 361 through the use of Section 361 Consideration to satisfy Distributing Contingent Liabilities, which are not subject to an adjusted basis limitation under § 357(c)(3) (and, therefore, would not be subject to an adjusted basis limitation under § 361(b)(3)). The Treasury Department

and the IRS view such assertions as contrary to the plain language of the Code and violative of the text and policy of §§ 357 and 361, in general, and the adjusted basis limitations of § 357(c)(3) and 361(b)(3), in particular.

### SECTION 3. PROCEDURES FOR SUBMITTING FEEDBACK

.01 *Deadline.* Written feedback should be submitted by July 30, 2024. However, consideration will be given to any written feedback submitted after July 30, 2024, if such consideration will not delay the issuance of future published guidance.

.02 *Form and Manner.* The subject line for the feedback should include a reference to Notice 2024-38. All stakeholders are strongly encouraged to submit feedback electronically. Feedback may be submitted in one of two ways:

(1) Electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (type IRS-2024-0021 in the search field on the <https://www.regulations.gov> homepage to find this notice and submit feedback); or

(2) By mail to: Internal Revenue Service, CC:PA:01:PR (Notice 2024-38), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

.03 *Publication of Feedback.* The Treasury Department and the IRS will publish for public availability any feedback submitted electronically or on paper to its public docket on <https://www.regulations.gov>.

### SECTION 4. DRAFTING AND CONTACT INFORMATION

The principal author of this notice is Grid Glycer of the Office of the Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, please contact Mr. Glycer at (202) 317-3181 (not a toll-free number).