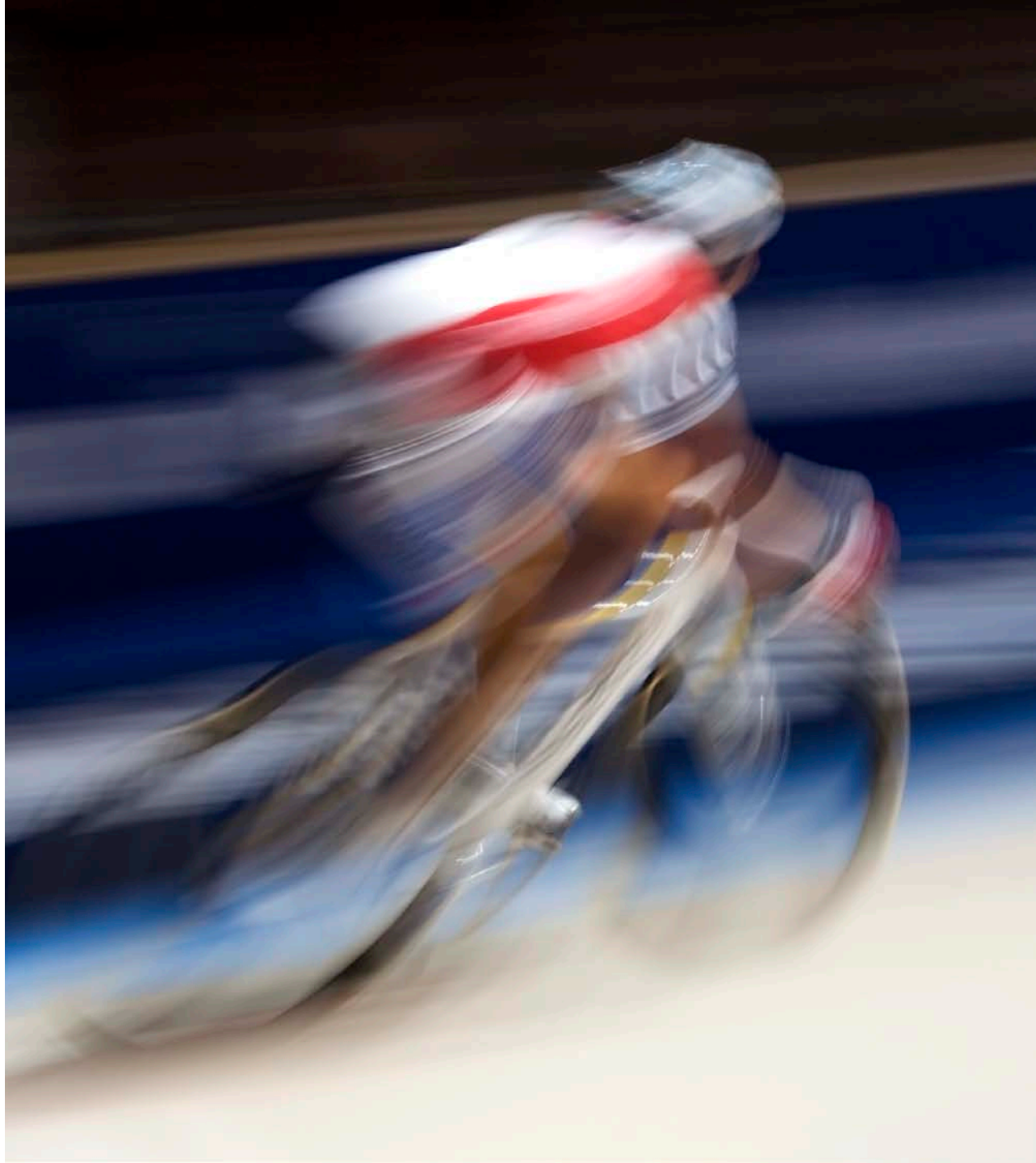




Acquisition and Repatriation Planning

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Agenda

Explain current marketplace activities and planning techniques for structuring inbound and outbound acquisitions

Identify opportunities and methods for pre and post-acquisition IP planning and business integration

Describe methods for funding inbound and outbound acquisitions

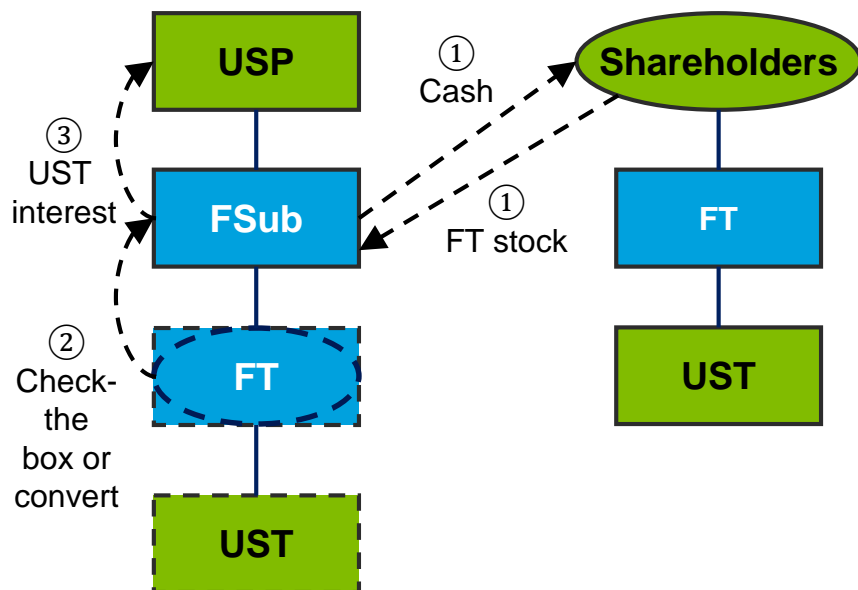
Discuss latest regulatory and legislative action

Acquisition planning



Outbound acquisitions – CFC financing

Use of foreign cash and Section 355



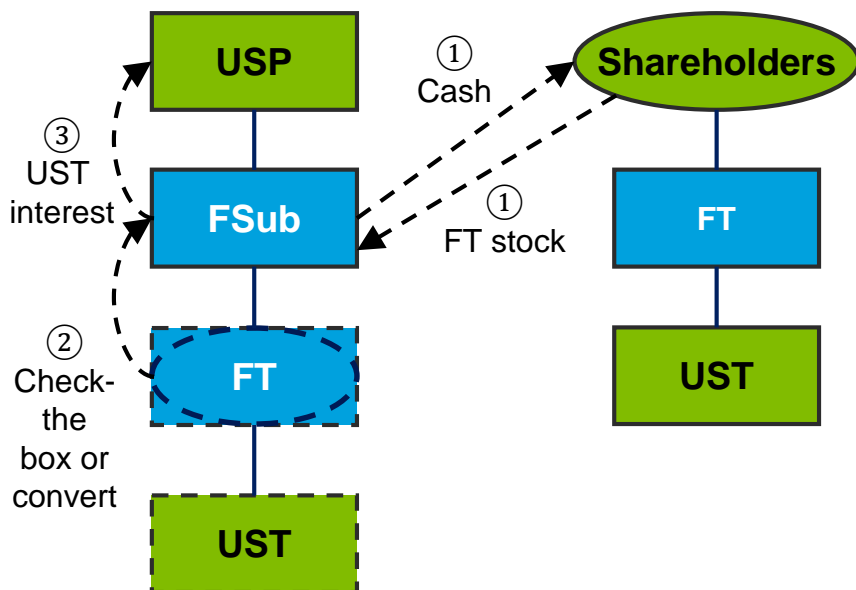
Steps

1. FSub acquires FT stock from shareholders of FT for cash
2. FT checks the box or converts to become an entity that is disregarded as separate from FSub
3. FT distributes all of its interest in USP to FSub, and FSub distributes UST to USP

Issues to Consider

- Section 355
 - Active trade or business/expansion
 - In general, there needs to be a five-year active trade or business in order to qualify as a Section 355 distribution
 - A limited exception applies to an expansion of an existing business
 - “Hot stock” – the acquisition of recently purchased stock (“hot stock”) of a controlled corporation is a member of the DSAG

Use of foreign cash and Section 355



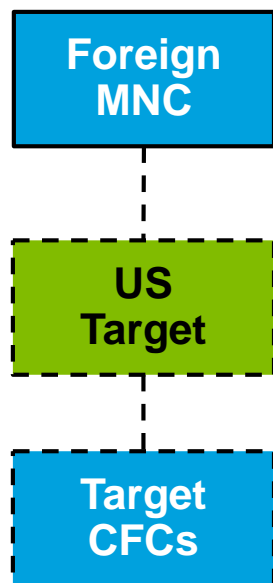
Issues to Consider

- Section 355 (cont'd)
 - Section 355(d)
 - Stock of a distributing or controlled corporation acquired by “purchase” may be tainted for purposes of Section 355(d)
 - There is an exception where basis in the purchased stock is eliminated
 - Business purpose
- Section 956
 - Potential Section 956 risk if FT or FSub continues to hold UST shares after the acquisition over a quarter-end
 - May put pressure on the timing of the Section 355 distribution
- Treas. Reg. § 1.367(b)-5 applied to FSub
- FIRPTA issues

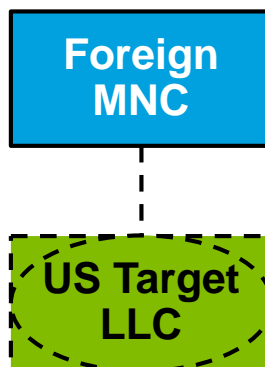
Inbound acquisitions

Inbound acquisition scenarios

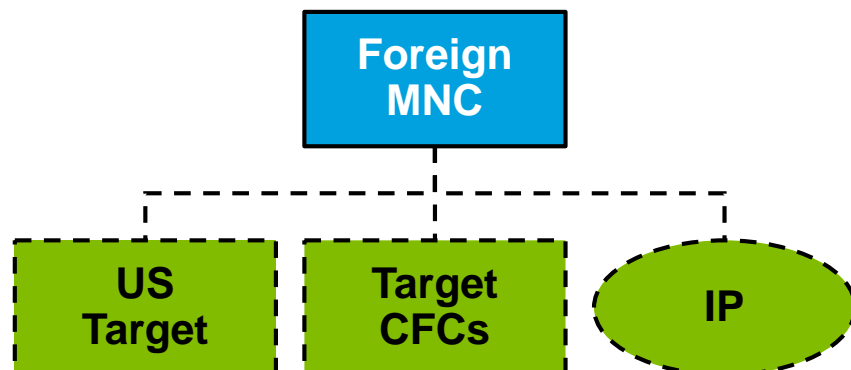
Acquisition of US Target with foreign assets/CFCs by a Foreign multinational (MNC) entity



Acquisition of US Assets/LLC interests by a Foreign multinational entity

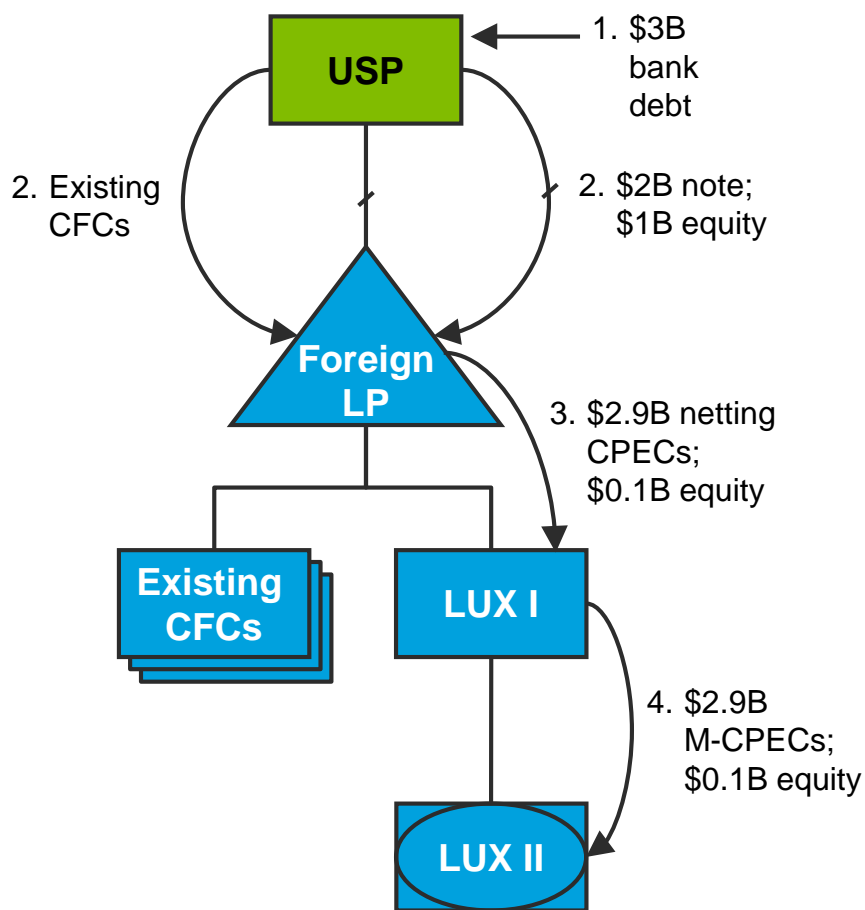


Acquisition of US Target separate from its foreign assets/CFCs by a Foreign multinational entity



Pre and post-acquisition planning

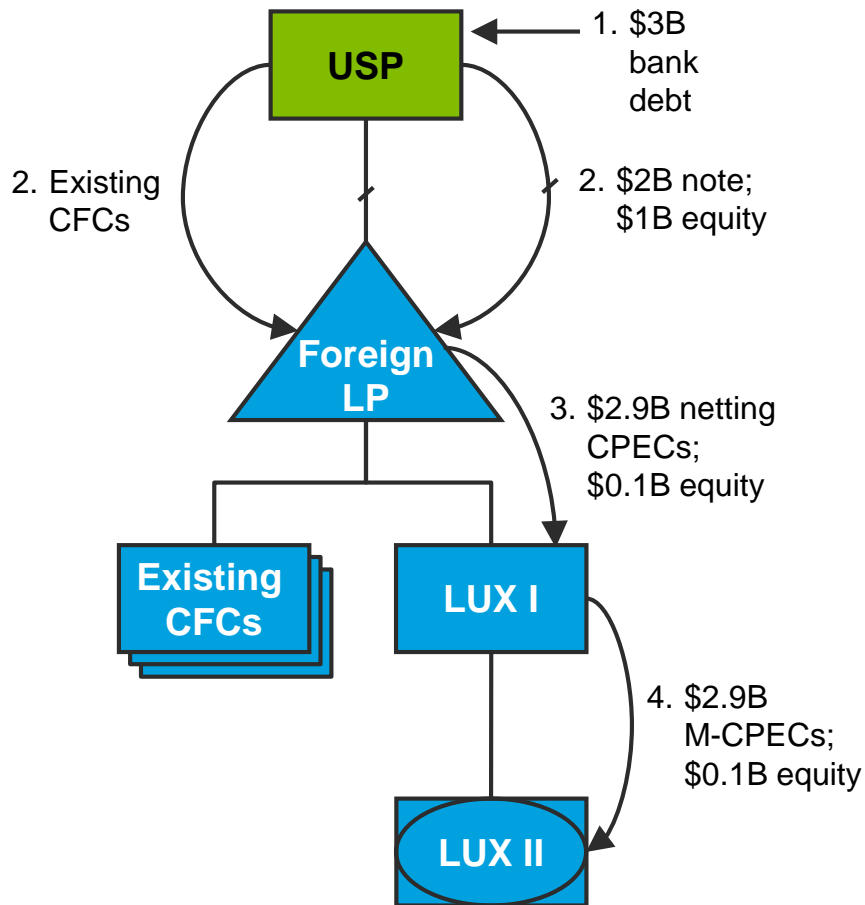
Leveraged partnership and netting CPECs



Steps

1. USP borrows \$3B from third party bank
2. USP, together with a US subsidiary (not pictured), forms Foreign LP by contributing \$3B cash and existing CFCs in exchange for a \$2B note and \$1B equity
3. Foreign LP forms Lux I by contributing \$3B cash in exchange for \$2.9B netting CPECs and \$0.1B common equity
4. Lux I forms Lux II by contributing \$3B cash in exchange for \$2.9B matching CPECs and \$0.1B common equity

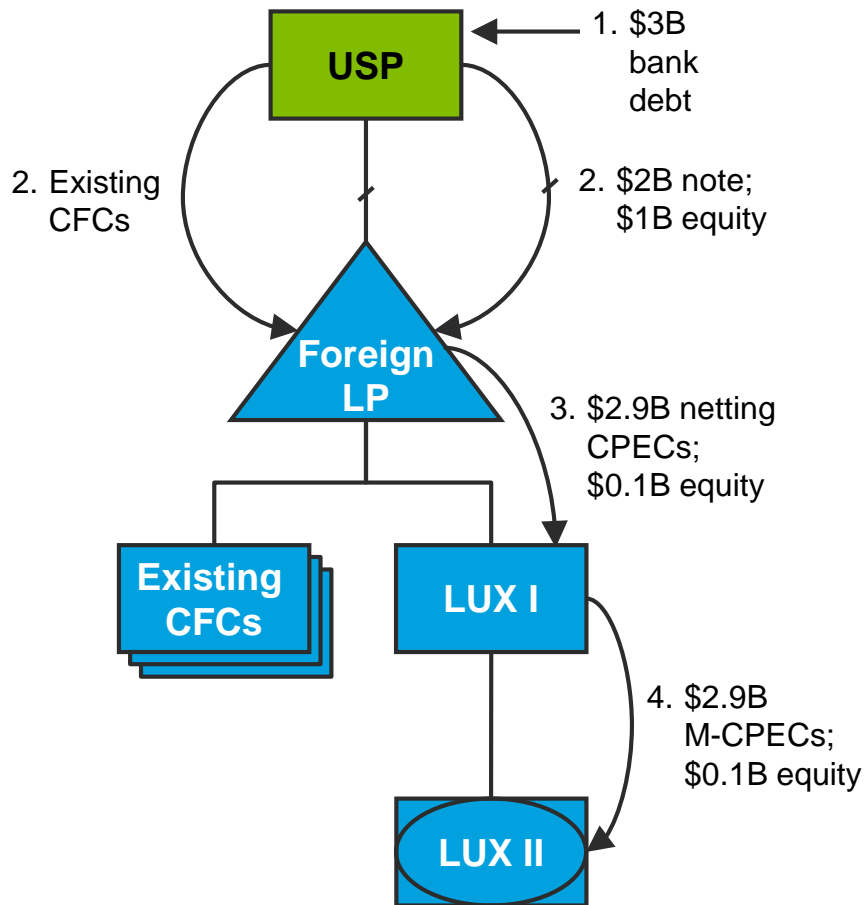
Leveraged partnership and netting CPECs (cont'd)



Analysis

- Foreign LP's \$2B loan creates equal amounts of interest income and interest expense in USP's U.S. consolidated tax return:
 - Interest income 100% foreign source based on assets of Foreign LP
 - Interest expense is apportioned between U.S. and foreign sources based on total worldwide assets (including USP basis in Foreign LP Note)
 - Consider Section 707(a)(2)(B) and Section 1001 on issuance of \$2B note by Foreign LP. Alternatives available

Leveraged partnership and netting CPECs (cont'd)



Analysis (cont'd)

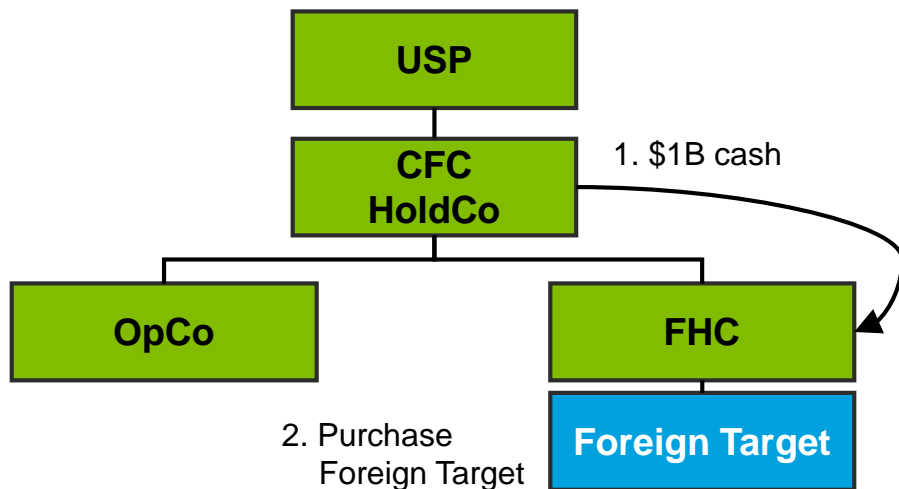
- Lux I netting CPECs qualify as “related group indebtedness” for purposes of CFC netting rules of Treas. Reg. § 1.861-10
 - Lux I’s netting CPECs treated as debt for Luxembourg purposes and equity for US purposes
 - Lux I’s interest expense is deductible against the interest income on Lux II’s matching CPECs for Luxembourg tax purposes

Results

- Net increase to foreign source income from Foreign LP Note
- Exclusion of a portion of investment in Lux I from interest expense apportionment formula

“Cross-chain” sale of target

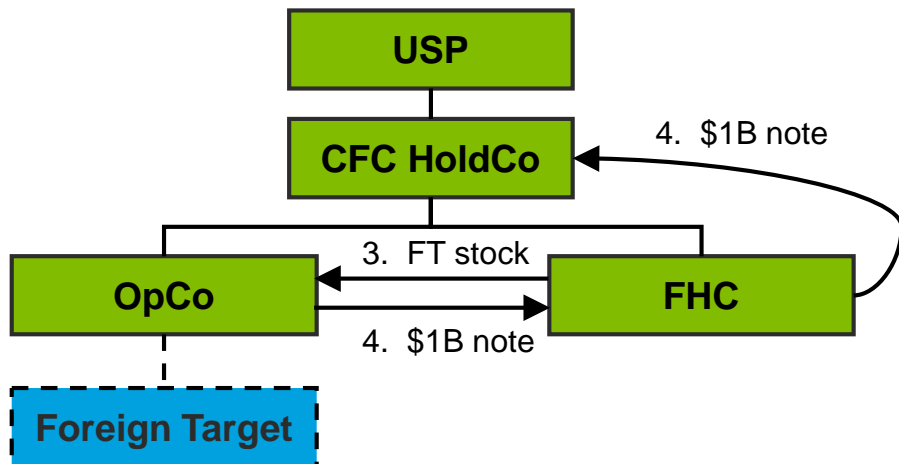
Before transaction



Steps

1. CFC HoldCo forms and capitalizes FHC, a non-U.S. corporation, with \$1B in cash
2. FHC transfers \$1B cash to the Target shareholders in exchange for Foreign Target
3. As part of a plan of integration, FHC sells Foreign Target to OpCo for a \$1B note
4. FHC distributes \$1B note to CFC HoldCo

Post-acquisition integration

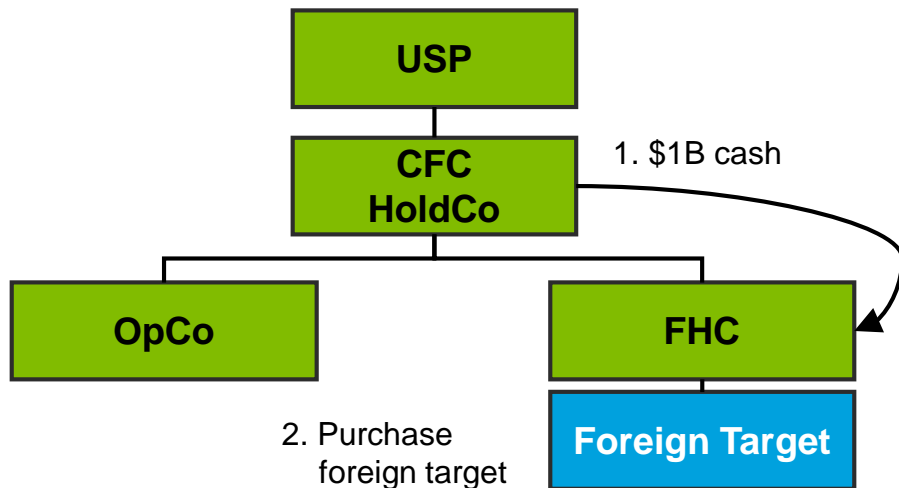


Analysis

- Sale of Foreign Target from FHC to OpCo for \$1B note treated as a Section 304 transaction
 - E&P of OpCo deemed distributed to FHC
- Distribution of \$1B note from FHC to CFC HoldCo is a distribution of all of FHC's E&P

“Cross-chain” sale of target (cont’d)

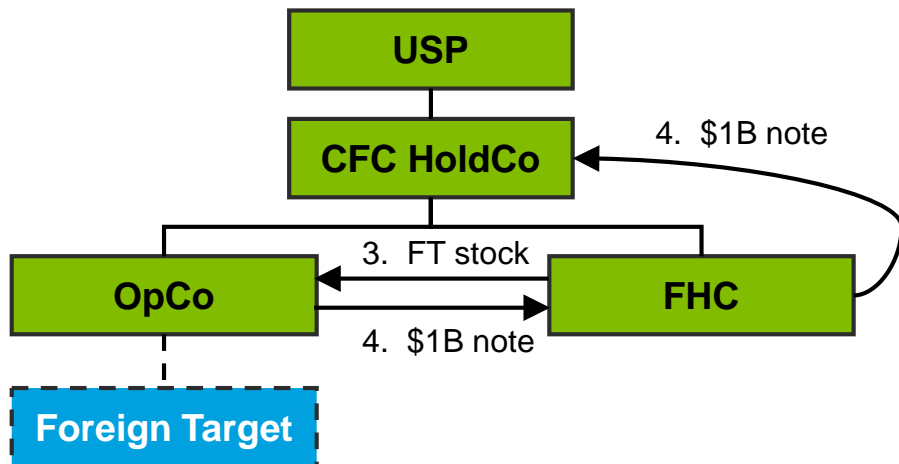
Before Transaction



Results

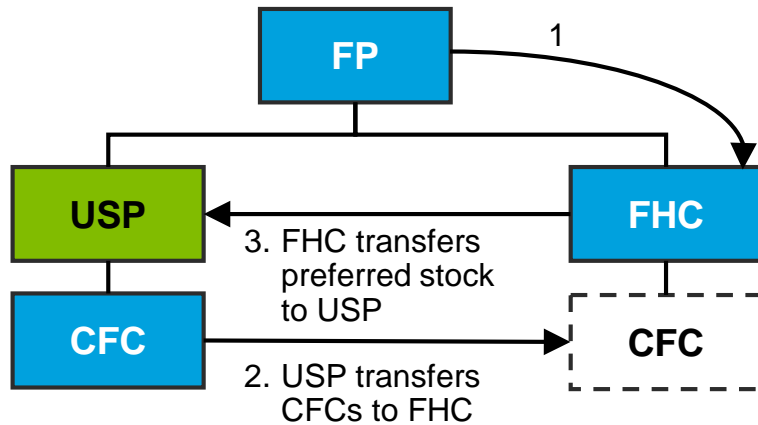
- CFC HoldCo has a built-in loss in FHC shares to the extent its basis (\$1B) exceeds the fair market value of FHC (\$0)
 - Consider: (i) fast pay stock rules, (ii) business purpose and (iii) de-facto liquidation

Post-acquisition integration



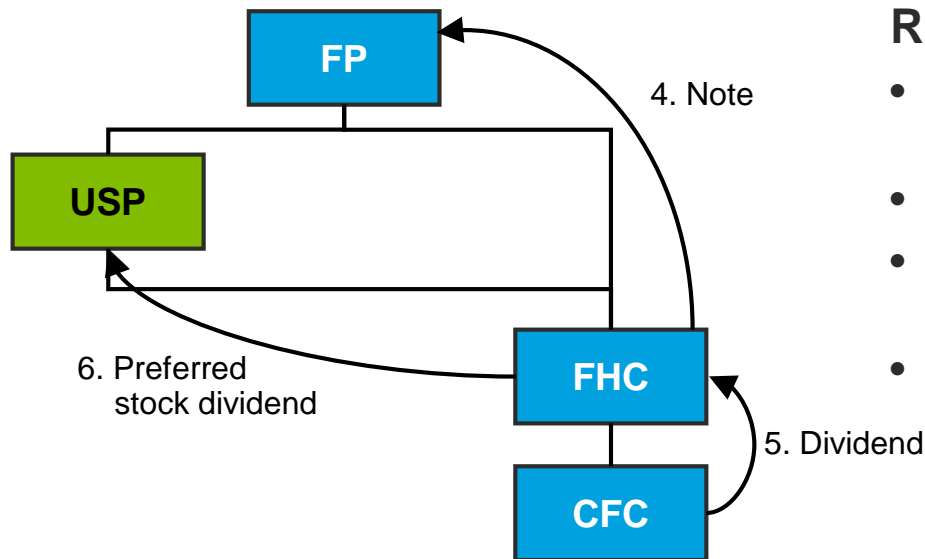
Post-acquisition planning

Preferred stock freeze



Steps

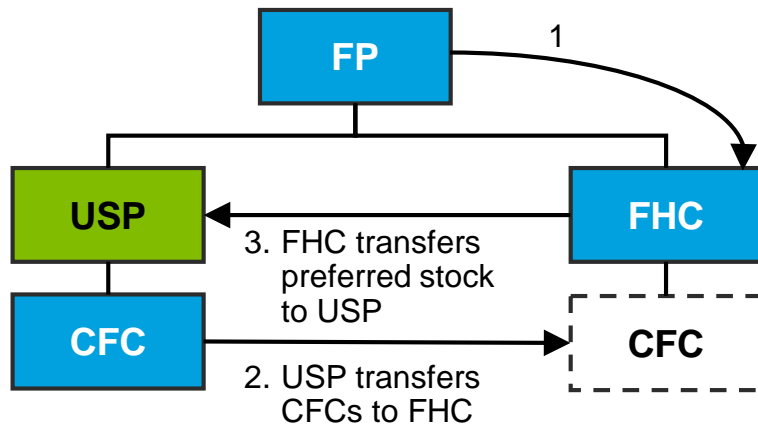
1. FP contributes foreign subs (not shown) to new FHC
2. USP contributes CFC stock to FHC
3. USP receives voting preferred shares which represents >50% of the vote with fixed rate of return



Results

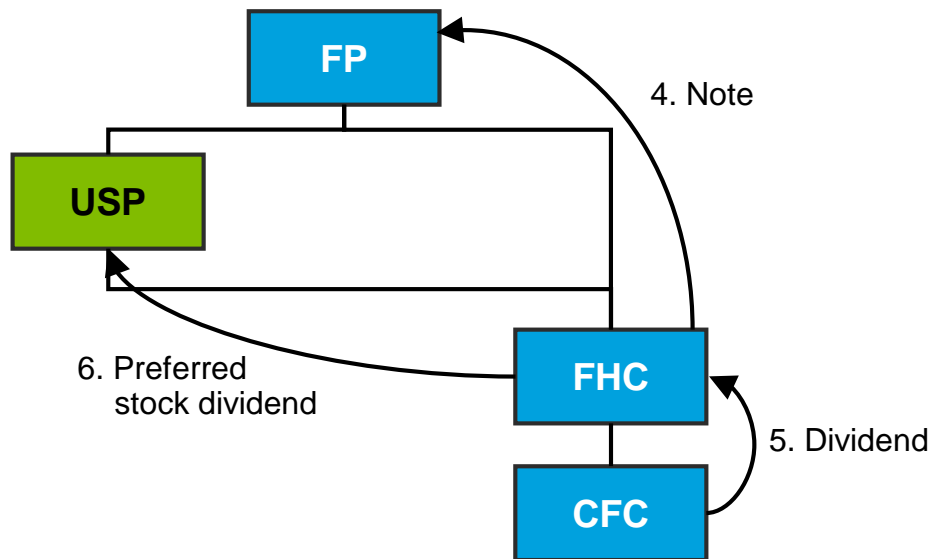
- USP enters into a gain recognition agreement
- No current U.S. tax
- Future growth of CFCs does not accrue to USP
- Consider application of Notice 2014-52

Preferred stock freeze (cont'd)

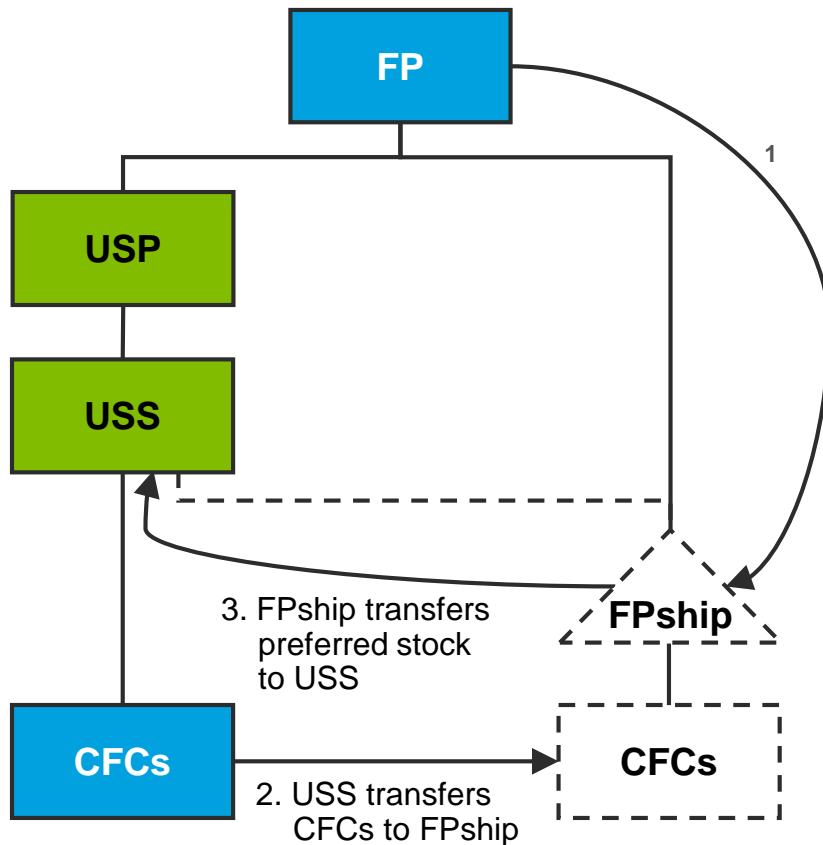


Add-on for FTC planning

- After steps 1-3, FHC distributes an interest bearing Note to FP creating interest expense deduction at FHC
- CFC's pay a dividend to FHC
- FHC pays preferred dividend to USP, which could generate excess foreign tax credits due to FHC's interest expense offsetting E&P from the CFC dividend



Tax deferred transaction – partnership freeze



Steps

1. FP contributes FSubs (not shown) to new FPship in exchange for interest in FPship
2. USS contributes CFC stock to FPship
3. USS receives a preferred interest in FPship which represents >50% of the vote with fixed rate of return

Results

- No GRA should be required
- Consider impact if the proposed regulations under Section 337(d) are finalized in current form
- Consider application of Notice 2014-52

Repatriation planning



Triangular B reorganizations

Repatriating killer B transactions: Applicable rules

Treas. Reg. 1.367(b)-10

- In the case where a foreign acquiring corporation acquires its parent's stock in order to purchase a target corporation in a triangular "B" reorganization or other triangular reorganization within the scope of Section 368 (a so-called "Killer B" transaction), regulations under Treas. Reg. § 1.367(b)-10 will treat the consideration paid by the acquiring corporation as a distribution to its parent.
- Treas. Reg. § 1.367(b)-10(a)(2) provides three exceptions to the application of Treas. Reg. § 1.367(b)-10. In particular, Treas. Reg. § 1.367(b)-10(a)(2)(iii) contains a "priority rule" with Section 367(a), which provides that the Killer B regulations will not apply if:
In an exchange under Section 354 or 356, one or more U.S. persons exchange stock or securities of T and the amount of gain in the T stock or securities recognized by such U.S. persons under Section 367(a)(1) is equal to or greater than the sum of the amount of the deemed distribution that would be treated by P as a dividend under Section 301(c)(1) and the amount of such deemed distribution that would be treated by P as gain from the sale or exchange of property under Section 301(c)(3) if this Section would otherwise apply to the triangular reorganization.
- Thus, the Killer B regulations do NOT apply to transactions where the Section 367(a)(1) amount is equal to or greater than the amount treated as dividend or capital gain (hereafter, 367(b) income) if the Killer B regulations did apply.

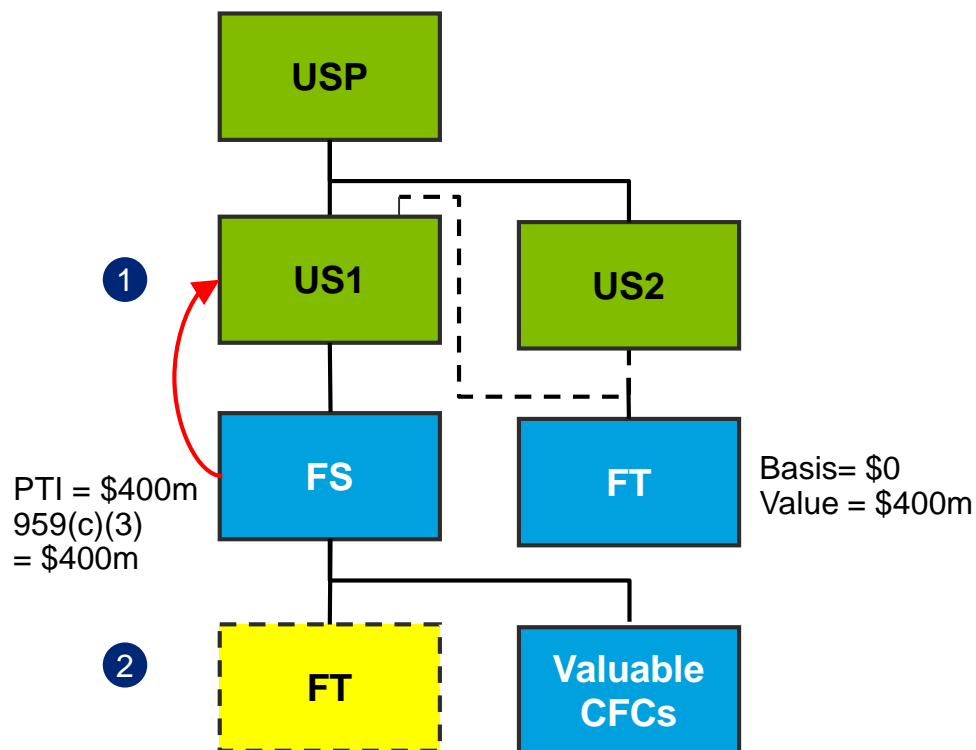
Repatriating killer B transactions: Applicable rules (cont'd)

Notice 2014-32

- Notice 2014-32 announced amendments to the Killer B regulations. In relevant part, Notice 2014-32 announced changes to the 367(a) overlap rule in Treas. Reg. § 1.367(b)-10(a)(2)(iii) by limiting the 367(b) income amount to dividends or capital gain taxable to a U.S. entity.
- Specifically, Notice 2014-32 (“Killer B” Notice) provides: “[r]egulations will provide that Section 367(b) income includes a Section 301(c)(1) dividend or Section 301(c)(3) gain that would arise if §1.367(b)-10 applied to the triangular reorganization only to the extent such dividend income or gain would be subject to U.S. tax or would give rise to an income inclusion under Section 951(a)(1)(A) that would be subject to U.S. tax.”

NOTE: If tax-free treatment is required, all triangular reorganizations must comply with business purpose and other requirements to qualify as Section 368 reorganizations.

Repatriating non-killer B transactions: Use of PTI



Facts

- FS has \$400 of PTI and \$400 of untaxed E&P
- FT's stock has zero tax basis to US2 and a fair market value of \$400

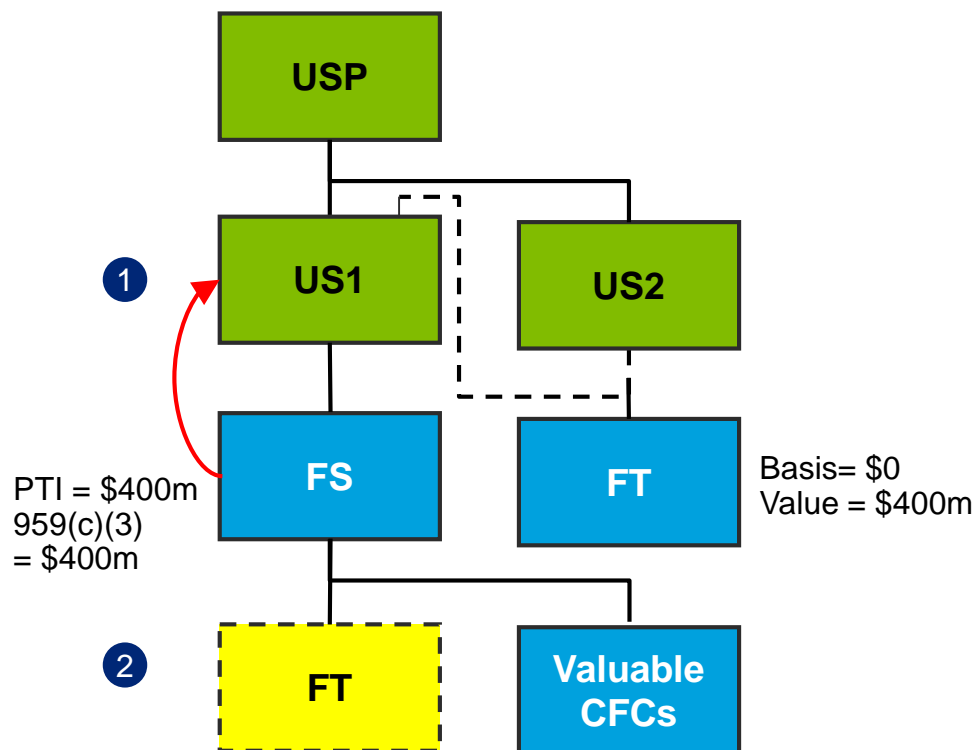
Steps

1. FS acquires US1 stock in exchange for a self-created note in the amount equal to or less than \$400m ("Note 1")
2. FS uses the US1 stock to acquire FT from US2

Steps 1 and 2 taken together are intended to constitute a triangular "B" reorganization

Repatriating non-killer B transactions:

Use of PTI (cont'd)



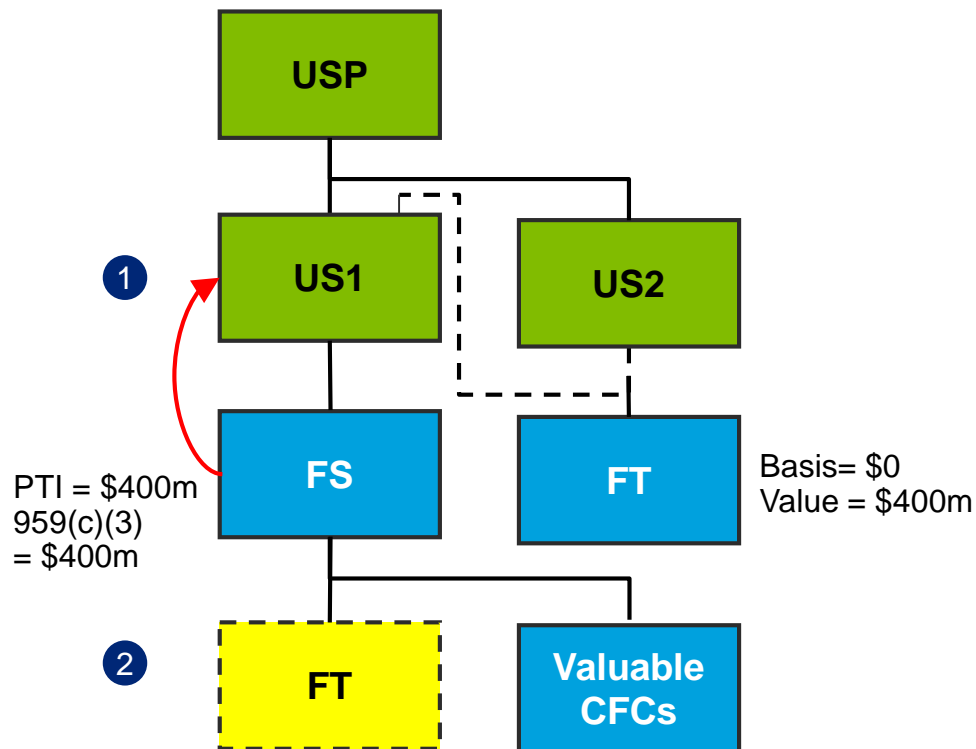
Analysis

Pursuant to Treas. Reg. § 1.367(b)-10(a)(2)(iii) (as modified by Notice 2014-32), Treas. Reg. § 1.367(b)-10 will not apply if the gain recognized under Section 367(a) from FT stock is equal to or greater than the amount that would be the deemed dividend and capital gain under the regulation

The applicable formula is: **Gain recognized on FT \geq 301(c)(1) dividend + 301(c)(3) gain**

In this case, the deemed distribution would be entirely sourced from PTI. Pursuant to Section 959(d), a PTI distribution is not a dividend for purposes of Sections 1 through 1400. Therefore, on these facts, there would be neither an amount taxable “as a dividend under sec. 301(c)(1)” nor a Section 301(c)(3) component of the deemed distribution. Regardless of whether there is a Section 367(a)(1) gain amount or not, the requirements of the formula should be met on these facts

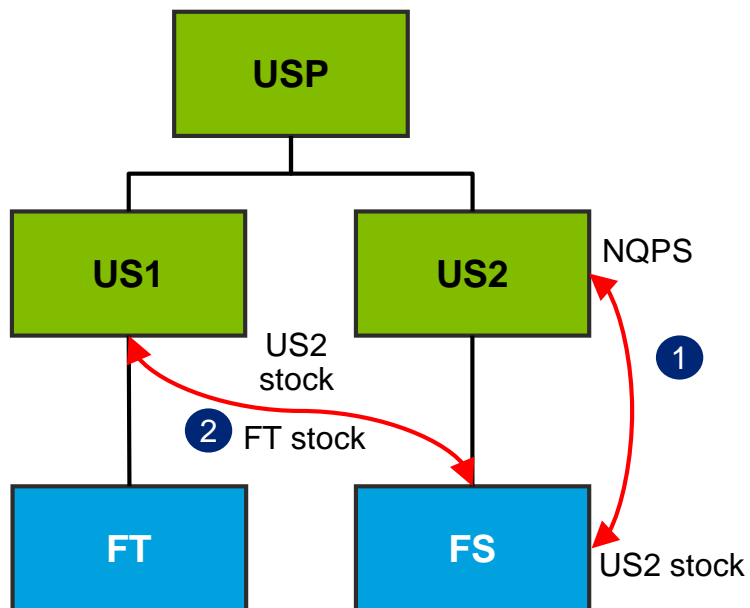
Repatriating non-killer B transactions: Use of PTI (cont'd)



Intended U.S. tax treatment

- Treas. Reg. § 1.367(b)-10 should not apply to these facts
- PTI at FS should remain intact because no actual or deemed PTI distribution
- US1's pre-reorganization basis in FS stock should be unchanged, with no basis bump under Treas. Reg. § 1.358-6 (in these facts)

Repatriating non-killer B transactions: Use of NQPS



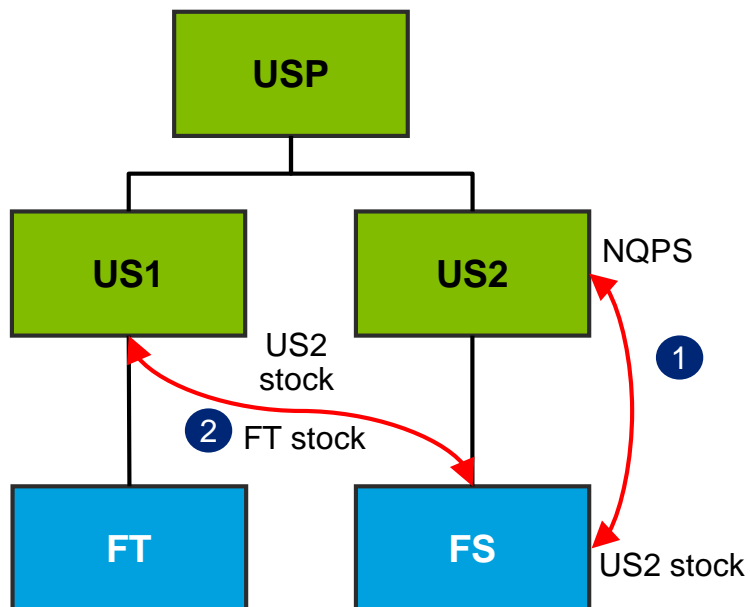
Steps

1. FS issues nonqualified preferred shares (“NQPS”) to US2 in exchange for US2 voting stock
2. FS acquires FT using the US2 voting stock

Analysis

- Treas. Reg. § 1.367(b)-10(a) applies when FS acquires the stock of US2 with “property” as defined under Section 317, plus stock of FS used to acquire US2 stock from a person other than US2
- NQPS issued by FS to US2 will not fall within the scoping rule of Treas. Reg. § 1.367(b)-10(a)
- As consequence, Treas. Reg. § 1.367(b)-10 (as modified by Notice 2014-32) should not apply to the transaction

Repatriating non-killer B transactions: Use of NQPS (cont'd)



Intended U.S. tax treatment

- The two steps together are intended to qualify as a triangular B reorganization
- US2 should take a FMV basis in the NQPS it received in exchange for the voting stock FS uses to acquire FT

Repatriating non-killer B transactions: Use of 30-day rule

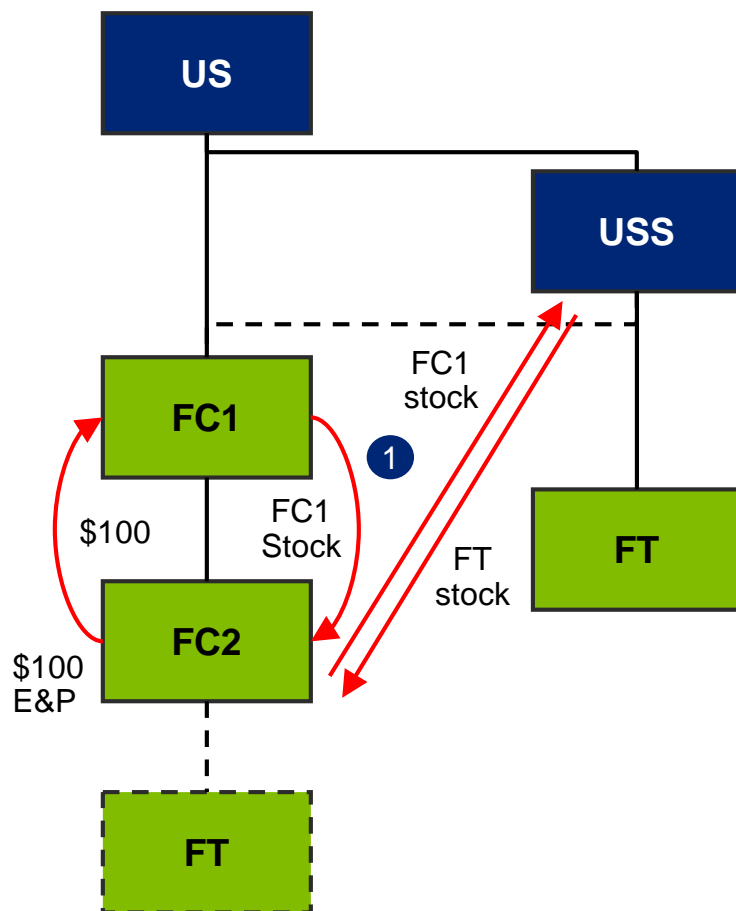
Steps

Within the first 30 days of FC1's taxable year

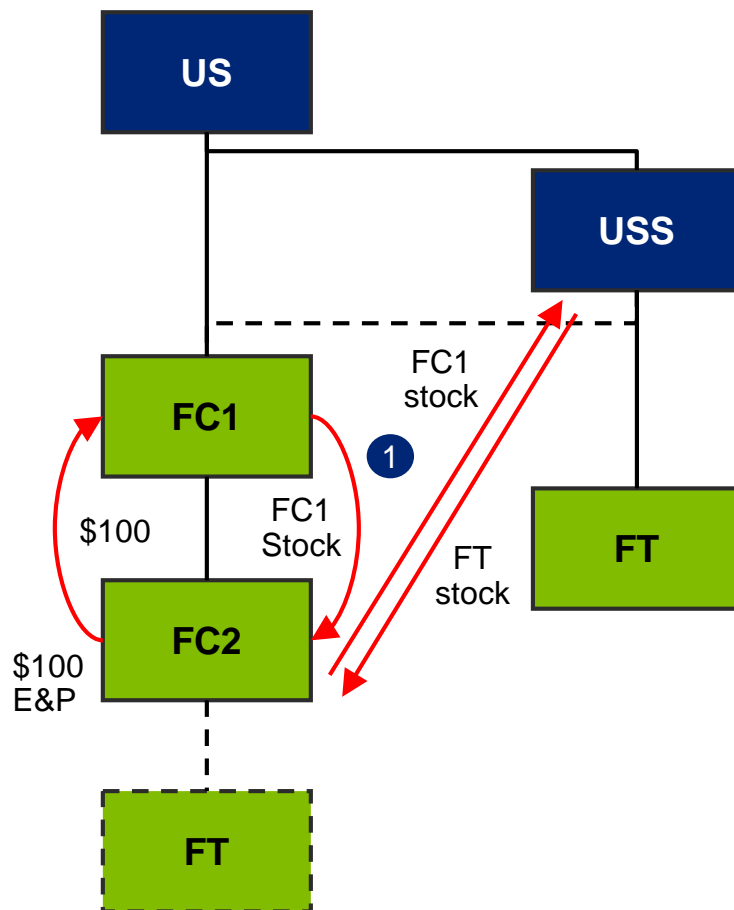
1. FC2 acquires the stock of its parent, FC1, in exchange for cash. FC1 stock used as consideration to acquire the stock of FT from USS. The transaction is treated as a triangular "B" reorganization
2. FC1 comes inbound in an F reorganization

Intended cash flow results

Repatriated 100 of cash with no U.S. tax liability. 100 E&P remaining at FC2



Repatriating non-killer B transactions: Use of 30-day rule (cont'd)

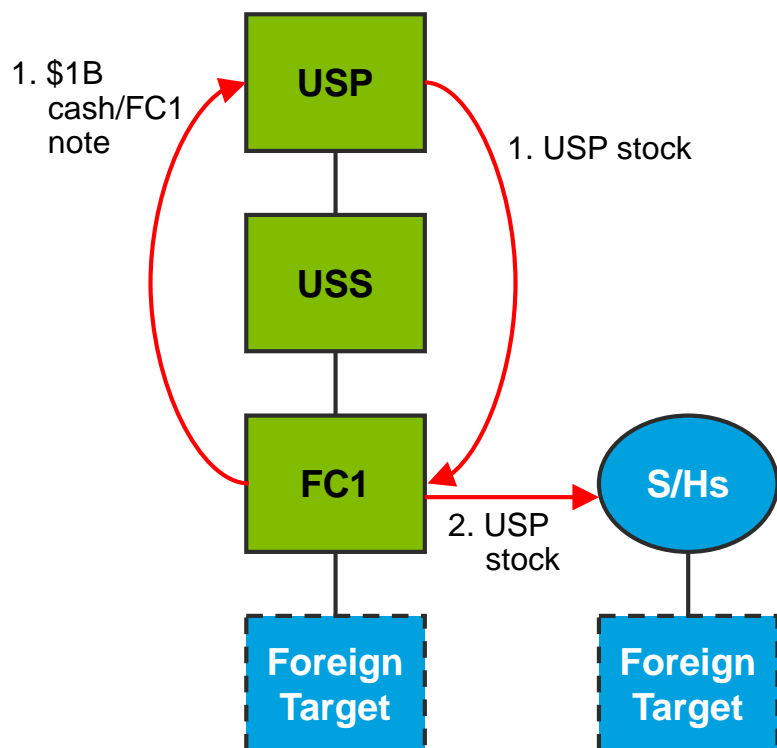


Intended U.S. tax treatment

Rules of Section 367(a)(1) (with zero gain) should trump rules of Treas. Reg. § 1.367(b)-10 (with zero income)

- The Section 367(a) income amount is zero if a GRA is filed by USS with respect to FT in Step 1, as modified by Step 2
- Under Notice 2014-32, the Section 367(b) income amount under Treas. Reg. § 1.367(b)-10(a)(2)(iii) is zero. US should not include in gross income an inclusion under Section 951(a)(1)(A) as FC1 is not a CFC for 30 days during the short year
- If Section 954(c)(6) is extended, the dividend might be excepted from Subpart F even if FC1 comes inbound later than the first 30 days of the taxable year in which the dividend is received

Repatriating non-killer B transactions: Taxable acquisition



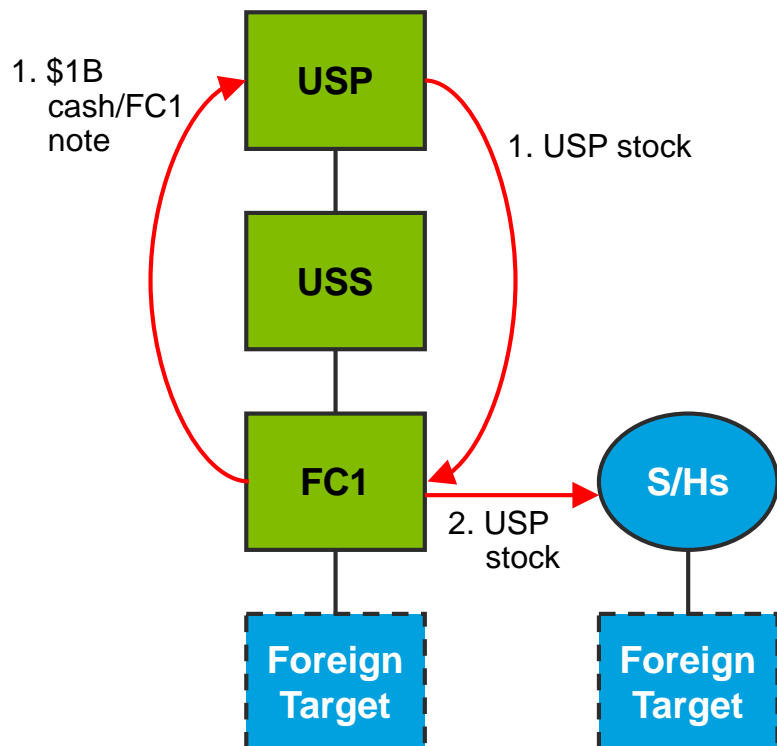
Facts/Steps

FC1 intends to acquire F Target from unrelated shareholders, and F Target's value is \$1,000m

1. In order to acquire F Target, FC1 purchases \$1,000m of USP stock from the market or USP in exchange for cash or a FC1 note
2. FC1 transfers the USP stock to the shareholders in exchange for the stock of F Target

Repatriating non-killer B transactions:

Taxable acquisition (cont'd)



Analysis

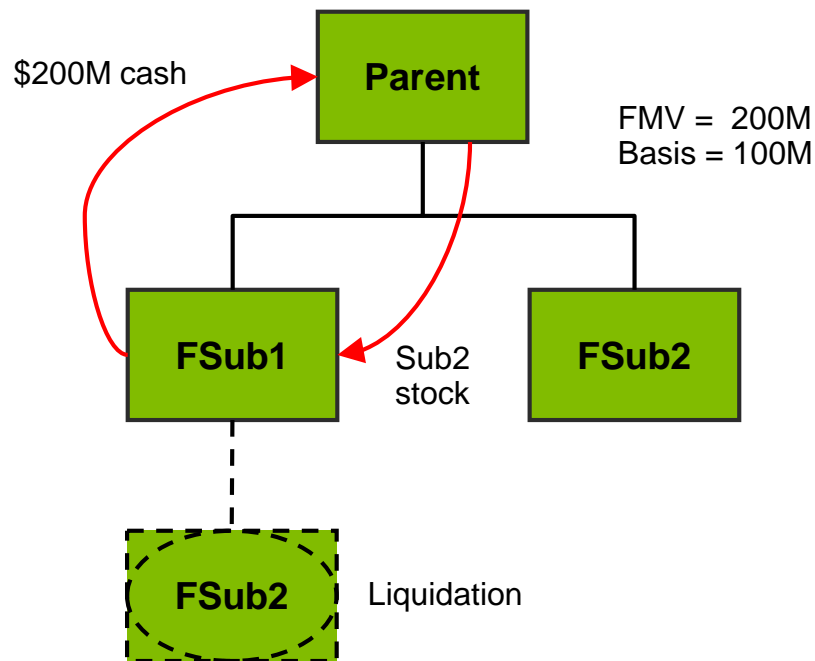
- Transaction does not qualify as a Section 368 reorganization. Therefore, Treas. Reg. § 1.367(b)-10 does not apply
- FC1 treated as purchasing F Target in a Section 1001 transaction. Potential to make a Section 338 election
- USP should not have a deemed dividend, even if its stock is issued directly to FC1
- Section 956 is not applicable, provided FC1 does not hold the USP stock over a quarter-end

Intended U.S. tax treatment

- FC1 has repatriated \$1,000m of value to USP
- FC1 has no change in stock basis or E&P

All cash D reorganizations

All cash D reorganization



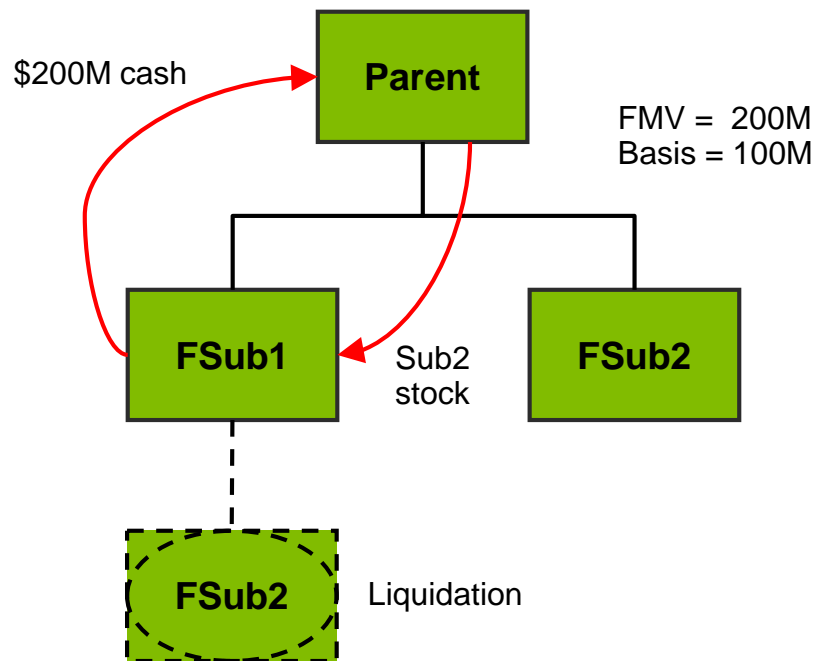
Facts/Steps

Basis in FSub2 stock < FMV

1. FSub1 (a CFC) purchases all the stock of FSub2 (a CFC) from Parent in exchange for cash
2. FSub2 liquidates into FSub1
 - The liquidation is either an actual liquidation under local company law or is the result of an election to treat FSub2 as a “disregarded entity” for US federal tax purposes

WARNING: Potential legislative changes

All cash D reorganization (cont'd)



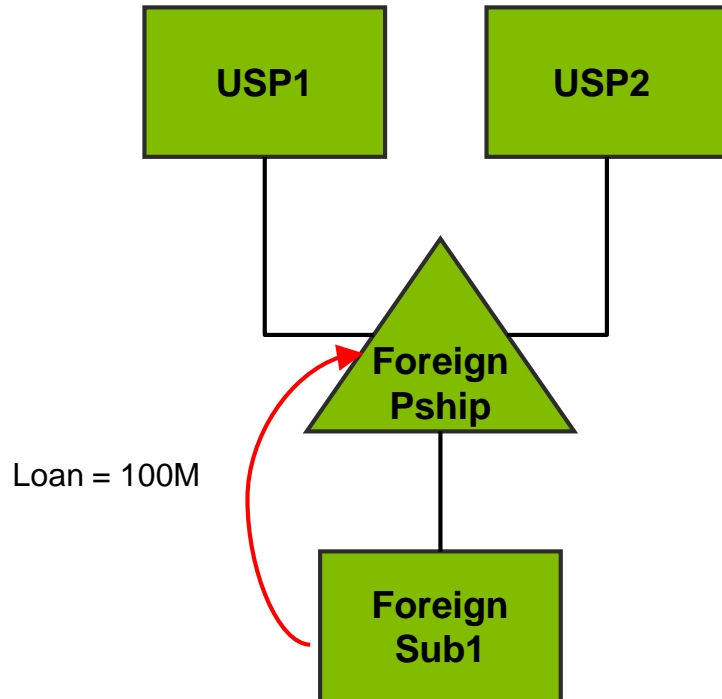
WARNING: Potential legislative changes

Analysis

- Based on Rev. Rul. 2004-83, transaction is a D reorganization; step transaction doctrine applies to stock sale followed by a liquidation
- Under Section 356(a)(2), gain will be recognized by Parent in an amount equal to the lesser of
 - i. The cash, i.e. “boot”, received
 - ii. The gain realized by Parent on its exchange
- The gain will be treated as a dividend to the extent of the positive E&P of FSub2 and (potentially) FSub1 (see Rev. Rul. 70-240)
- In accordance with Rev. Rul. 74-387, Parent should be entitled to a Section 902 deemed paid foreign tax credit, provided Parent has the requisite direct ownership in FSub¹ and FSub2

Loans to foreign partnerships

Loans to foreign partnerships



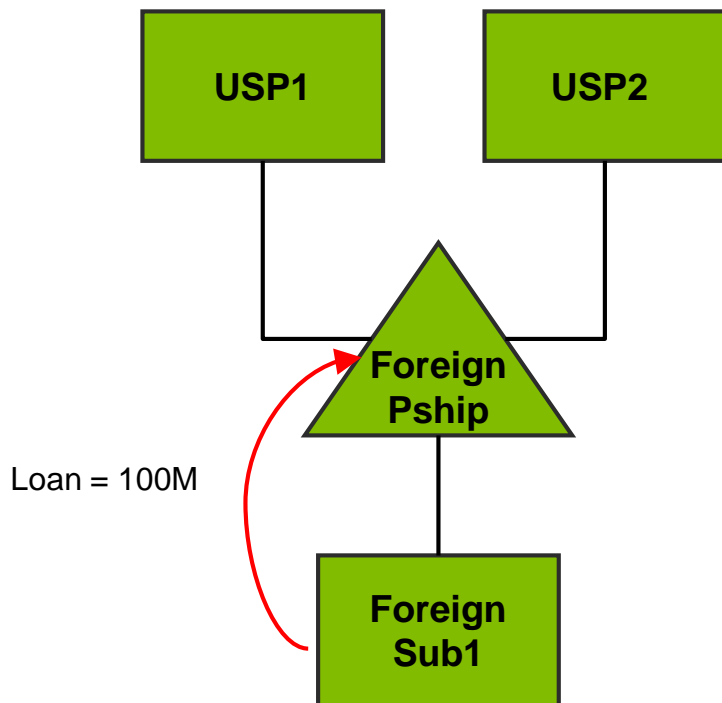
WARNING: Potential legislative and/or regulatory changes

Facts

- USP1 and USP2 are both partners in Foreign Partnership
 - Foreign Partnership is organized under the laws of foreign Country X
 - All partners have limited liability
- Foreign Partnership owns Foreign Sub 1 and other assets
- Foreign Sub 1 loans Foreign Partnership 100M

What is the treatment of the loan to Foreign Partnership under Section 956?

Loans to foreign partnerships (cont'd)

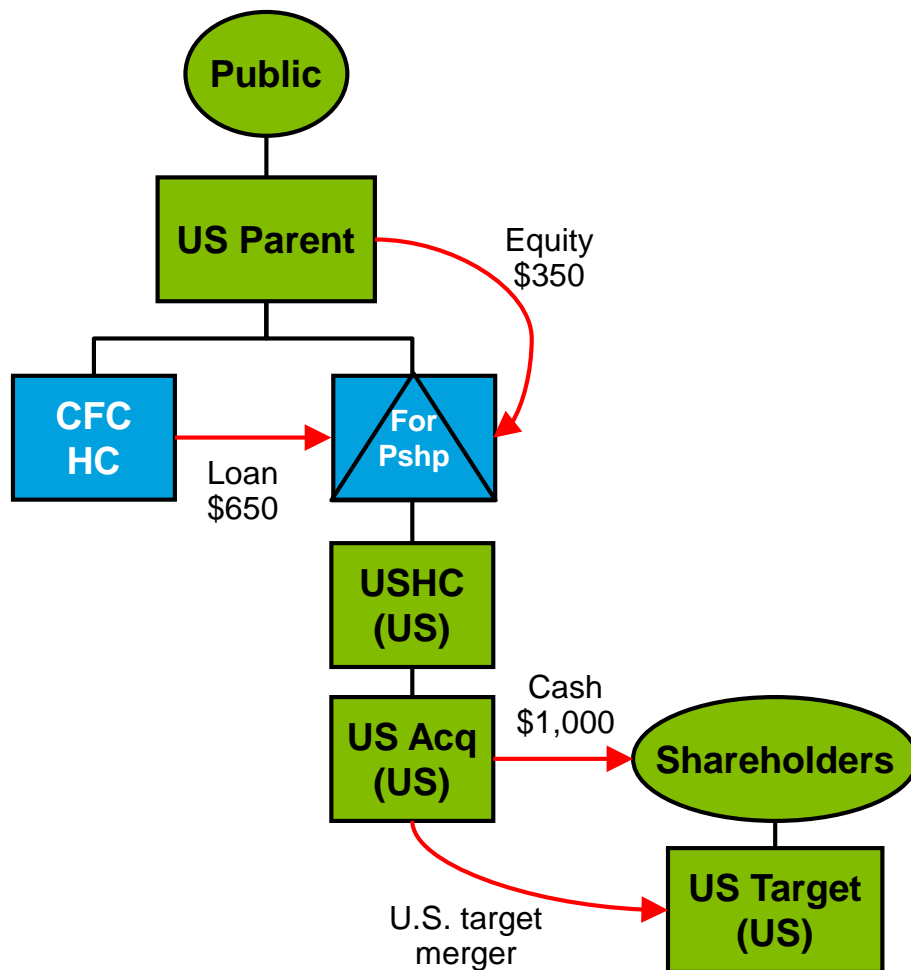


WARNING: Potential legislative and/or regulatory changes

Considerations

- Section 956 “U.S. Property” includes an obligation of a U.S. person
 - Thus, neither USP1 nor USP2 can be a “general” partner
- How is Foreign Partnership treated -- as an entity or aggregate of its partners?
- Use of cash -- is the loan used to acquire, develop, construct or invest in U.S. property?
- Status of the loan as “debt” or a “distribution” by Foreign Sub1?

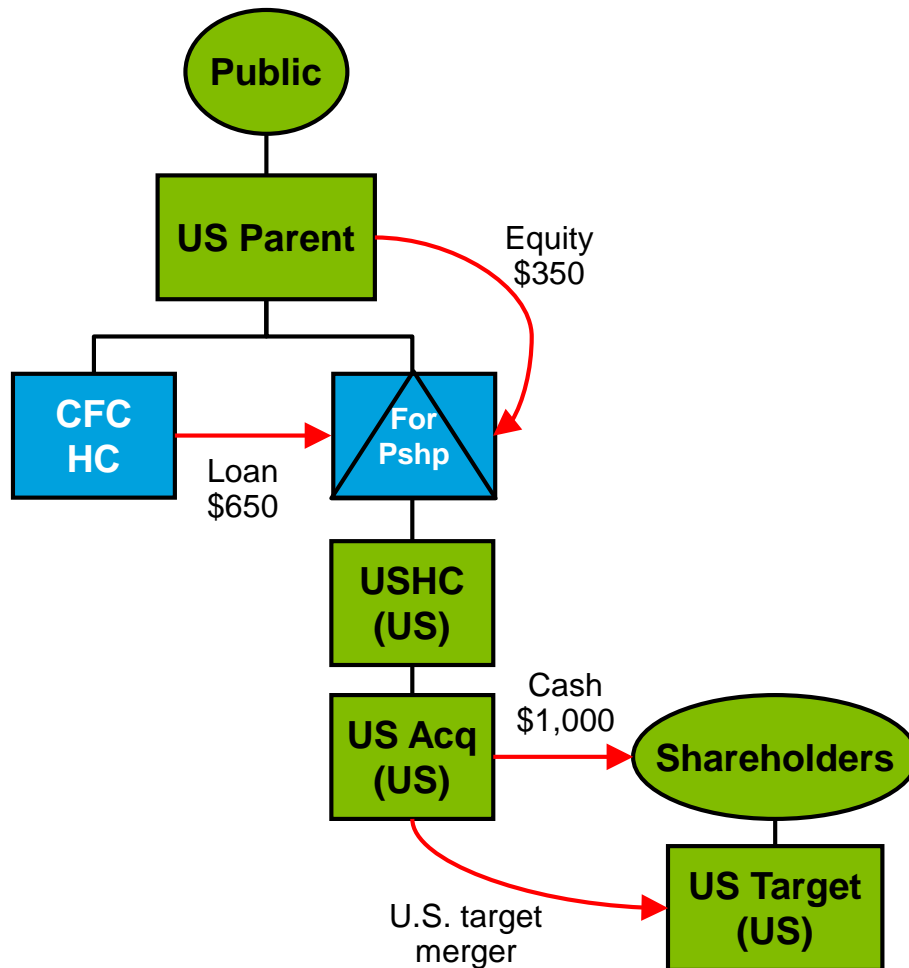
CFC funded partnership



Steps

1. CFC HC loans \$650 of cash and US Parent contributes \$350 of cash to For Pship. For Pship transfers \$1000 of cash to USHC and on to US Acq
2. US Acq merges into US Target, with US Target being the survivor, and the former shareholders of US Target receiving cash from US Acq

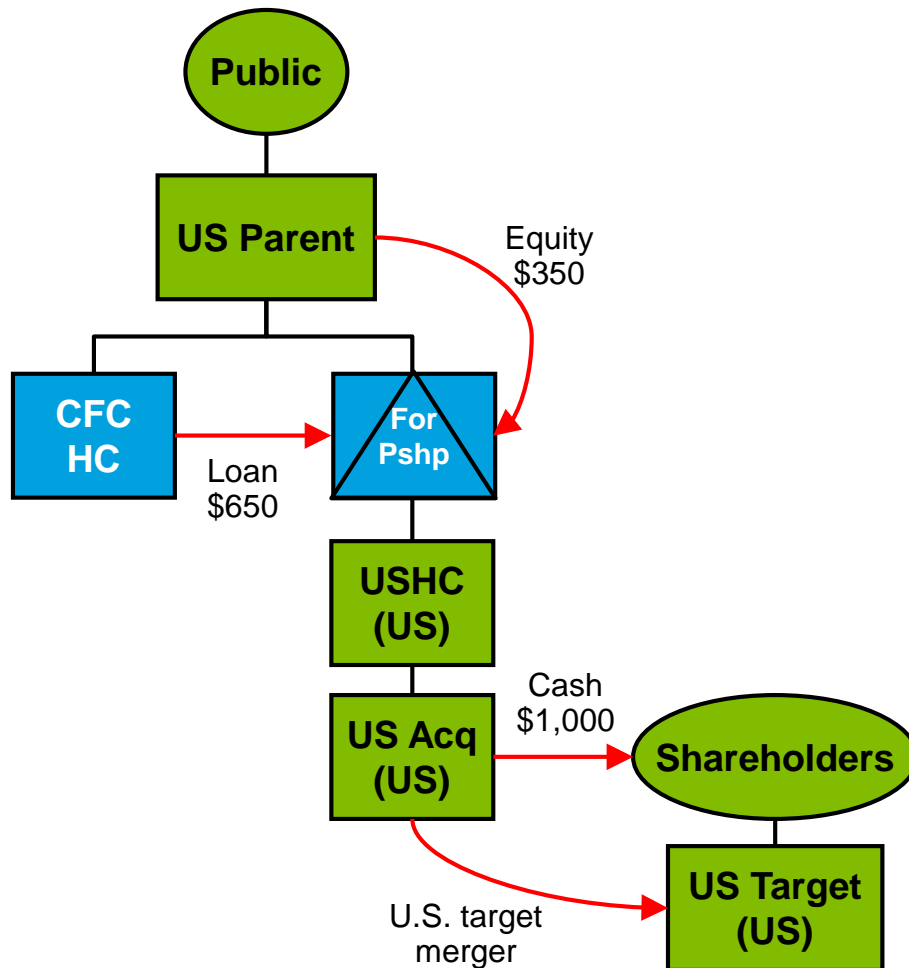
CFC funded partnership (cont'd)



Intended benefits

- Foreign Partnership not a “U.S. Person” for Section 956 rules
- Use cash and/or borrowing capacity of existing CFCs to fund the acquisition of a portion of the stock of US Target
- The amount of CFC cash (loan at For Pship) is dependent upon the cash flows of the US Target – need appropriate debt:equity ratio in For Pship under Section 385 debt-equity principles
- Potential to integrate non-U.S. operations and non-U.S. IP of US Target with the non-U.S. operations and non-U.S. IP of CFC HC through a internal corporate or partnership joint venture

CFC funded partnership (cont'd)

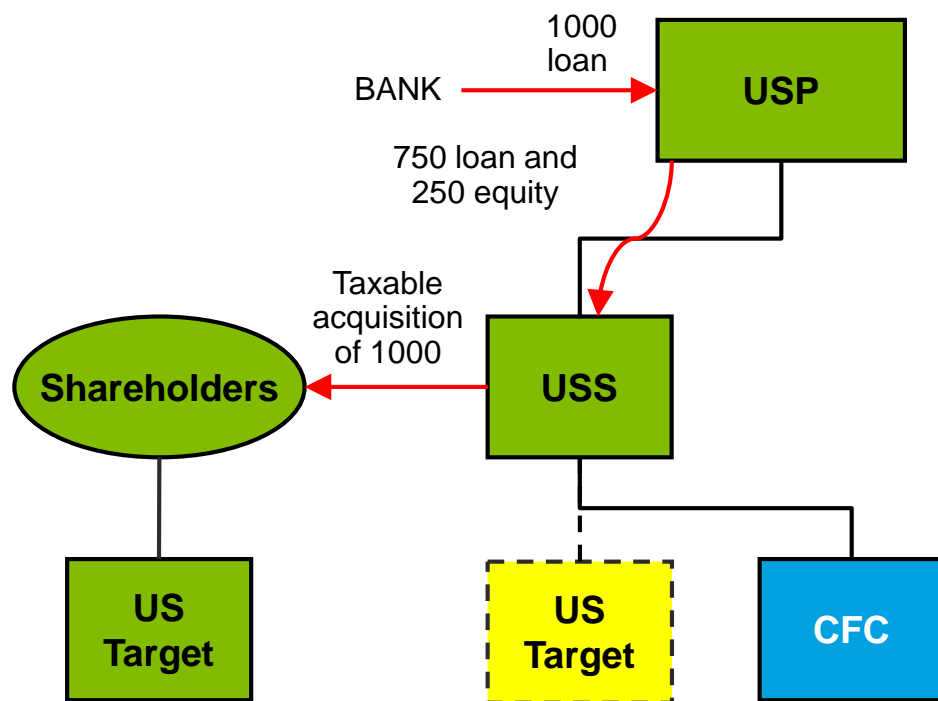


Additional considerations

- Ability to integrate the U.S. business of US Target with the remainder of the US Parent group more difficult
- Management of US Target cash position done via lending
- Business purpose for Pshp, if newly formed
- Potential for imminent legislation and/or regulations to negate benefits

Section 304(b)(3)(B) repatriation strategy

Section 304(b)(3)(B) repatriation strategy



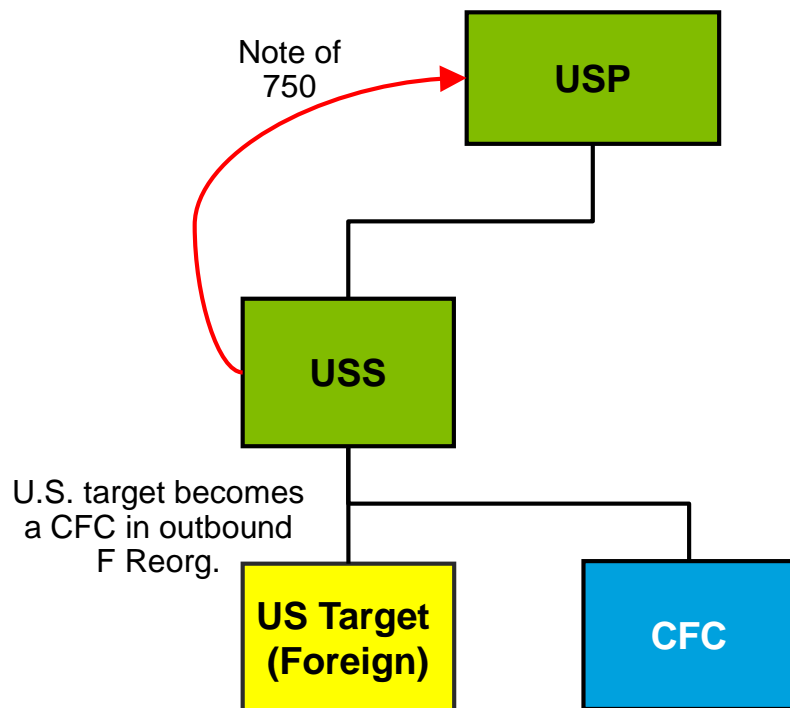
Beginning structure

- USP, a domestic corporation, is the parent company of USS, a domestic corporation
- USS owns of CFC, a controlled foreign corporation

Steps

1. USP takes out a third-party loan and subsequently contributes the loan proceeds to USS in exchange for a 750 note and 250 of USS equity
2. USS uses the 1000 of proceeds to acquire US Target in a taxable acquisition

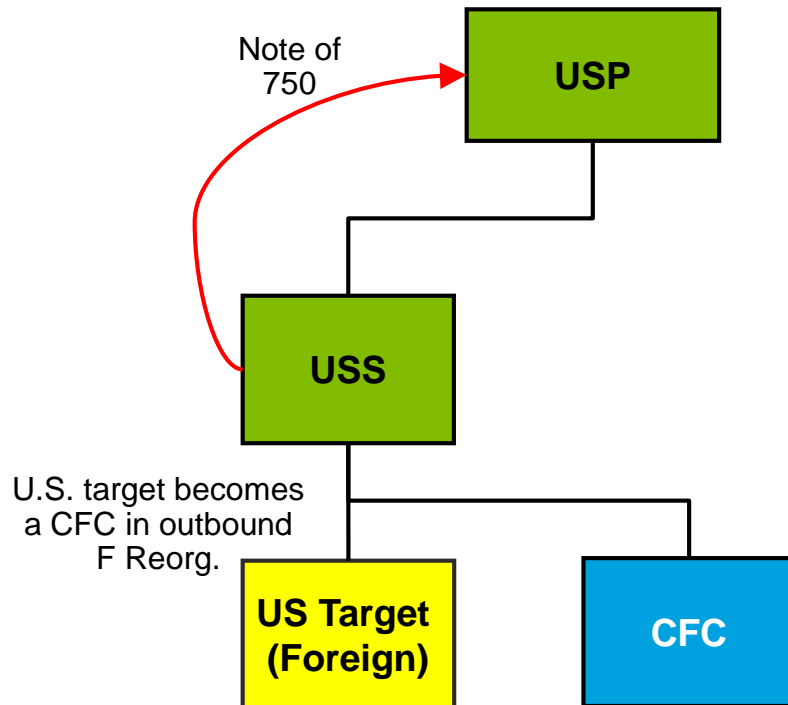
Section 304(b)(3)(B) repatriation strategy



Steps (cont'd)

3. US Target re-incorporates in Foreign country in a transaction described in Section 368(a)(1)(F)

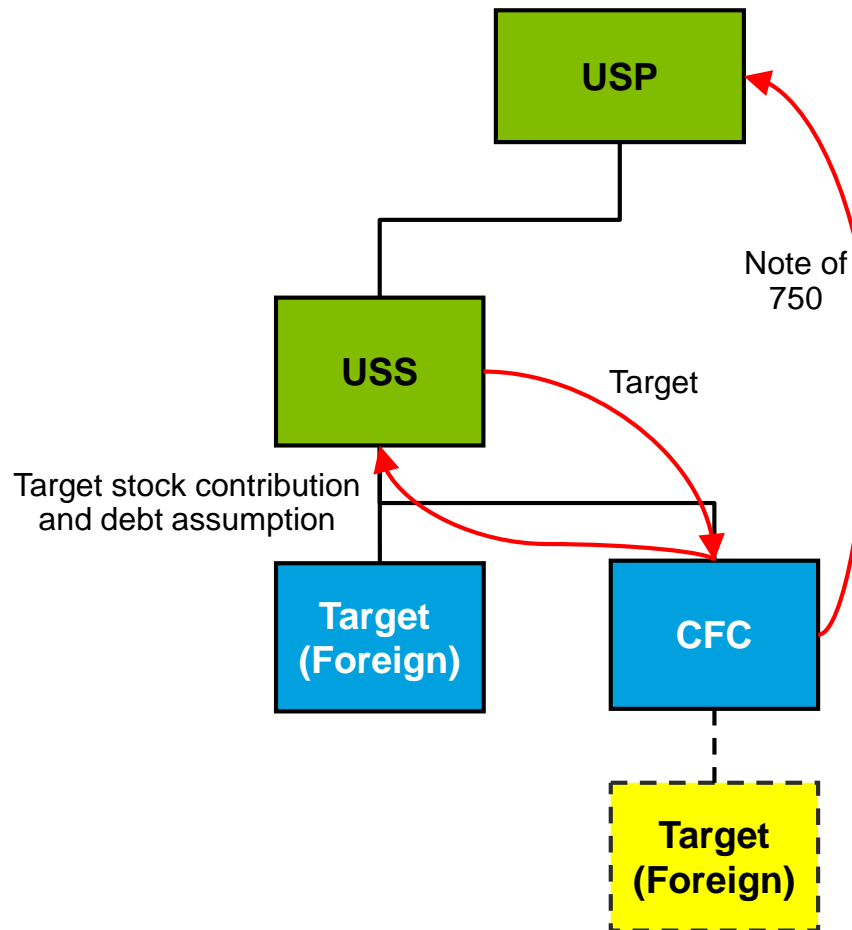
Section 304(b)(3)(B) repatriation strategy (cont'd)



Considerations

- Is there an active foreign trade or business under Section 367(a)(3)(A) to avoid gain recognition on the outbound transfer?
- Application of Section 367(d) to covered intangibles
- Adjustments to US Target stock basis under Treas. Reg. §§ 1.367(a)-7 and 1.1248(f)-2
- Does U.S. Parent Group has an OFL under Section 904(f) that could be recaptured?
- Does US Target have subsidiaries requiring GRAs under Treas. Reg. § 1.367(a)-3T(e)?
- Notice 2012-39 should not apply as no boot is received in the transaction, nor are 'non-ordinary' course liabilities assumed
- Section 367(a) could potentially require current taxation of any goodwill at US Target

Section 304(b)(3)(B) repatriation strategy (cont'd)



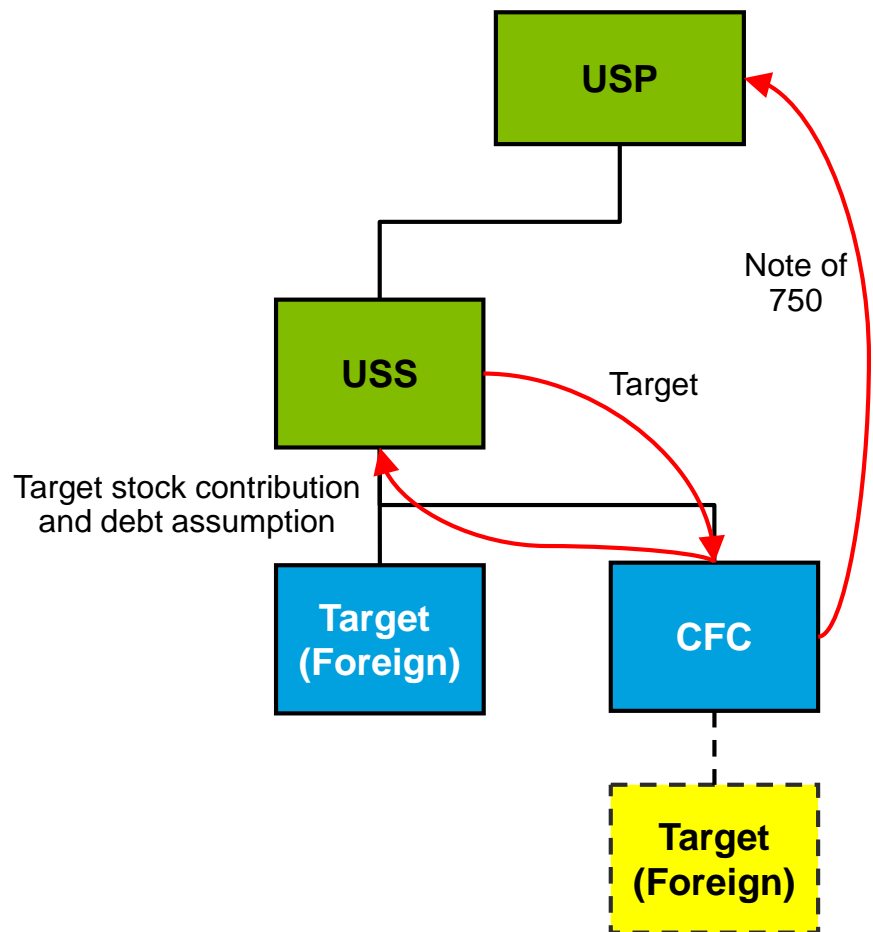
Step

4. USS transfers the stock of Target in exchange for CFC stock and an assumption of USS's acquisition indebtedness

Considerations

- Section 304(b)(3)(B) provides that in the case of a transaction described in both Sections 304 and 351, Sections 351 and 357 and not Section 304 will apply to a liability assumed by the transferor if "such liability was incurred by the transferor to acquire the stock"
- Section 357(c) provides that no gain or loss is recognized on the assumption of indebtedness unless liabilities assumed exceed USS's adjusted basis in Target (Foreign) stock

Section 304(b)(3)(B) repatriation strategy



Considerations (cont'd)

- Authority suggests related party indebtedness used to acquire target falls within the Section 304(b)(3)(B) exception. See *Combrink v. Commissioner*
- Notice 2012-39 should not apply to the final step as it does not involve a Section 361 transfer

Please remember
to complete your
evaluation

Speaker bios

E.J. Forlini is a Principal in the Corporate Tax Group of Deloitte's Washington National Tax office. He serves multinational corporations in a variety of industries, specializing in a number of areas including domestic and cross-border reorganizations, spin-offs, and taxable stock and asset acquisitions. In addition, E.J. regularly advises clients on consolidated return matters and has been a frequent speaker on the subject.

Prior to joining Deloitte Tax in 2005, E.J. served in the Corporate Tax Division of the Office of Chief Counsel in the Internal Revenue Service in Washington, D.C. as an Attorney-Adviser and later as an Assistant Branch Chief. While serving in the Internal Revenue Service, E.J. was the author of final regulations governing basis and boot allocations in tax-free spin-offs and reorganizations and the application of those rules in the consolidated return context. In addition, E.J. reviewed requests for and drafted private letter rulings related to spin-offs and other corporate restructurings.

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Jeffrey O'Donnell is a Principal in the International Tax Practice of Washington National Tax of Deloitte Tax LLP. Jeff has extensive experience in, and his practice concentrates on, the international tax aspects of cross-border tax planning, cross-border mergers, acquisitions and restructurings, and financial products and derivatives. Jeff specializes in the development and implementation of business strategies to reduce the tax inefficiencies faced by the largest U.S. and non-U.S.-based multinational corporations in their conduct of global business operations, including global tax reduction and tax efficient financing and repatriation.

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