



# Conscious Coupling and Uncoupling – Hot Topics in M&A

May 20, 2025

Transforming tax.  
Redefining connections.

2025 US Cross-Border Tax Summit





# Notices

The following information is not intended to be “written advice concerning one or more Federal tax matters” subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

# Presenter slide

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# Agenda

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01

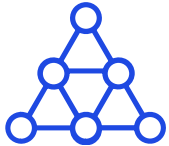
# Cross-Border Spin-Offs



# Proposed Regulations

*On January 13, 2025, the IRS released proposed regulations (the “Proposed Regulations”) focused on tax-free spin-off transactions.*

The Proposed Regulations reflect the IRS’s updated view of numerous spin-off related issues identified in Rev. Proc. 2024-24 and Notice 2024-38 (the “**2024 Guidance**”). The 2024 Guidance made significant revisions to the guidelines for private letter ruling requests and provided the views and concerns of the IRS on the identified issues.



## ***Multi-Year Reporting Requirements for Corporate Separations and Related Transactions***

- Proposed rules require annual information reporting for certain taxpayers on a new Form 7216.



## ***Guidance Regarding Certain Matters Relating to Nonrecognition of Gain or Loss in Corporate Separations, Incorporations, and Reorganizations***

- Proposed rules under Sections 355, 357, 361, and 368, including additional reporting requirements.
- Although spin-offs were the impetus for the proposed rules, the rules apply broadly to non-divisive tax-free reorganizations and Section 351 exchanges.

# Proposed Regulations: Key Issues Addressed

- 1 Eligible Distributing Obligations
- 2 Boot Purges and Post-Spin Payments
- 3 Debt Exchanges, Intermediated Exchanges, and Direct Issuances
- 4 Distributing Debt Replacement and Reborrowing
- 5 Retained Stock and Delayed Distributions
- 6 Plan of Reorganization , Plan of Distribution, and Multi-Year Reporting Requirement
- 7 Effective Dates

# Proposed Regulations: Key Takeaways

More restrictive than IRS private letter ruling practice and views of current law prior to the 2024 Guidance.

More taxpayer favorable on some aspects of the 2024 Guidance and less taxpayer favorable on others.



Generally, would apply to transactions announced after the date of finalization. The IRS will follow the Proposed Regulations for private letter ruling guideline purposes.

Add extensive and onerous documentation and reporting requirements for spin-offs (and tax-free reorganizations).

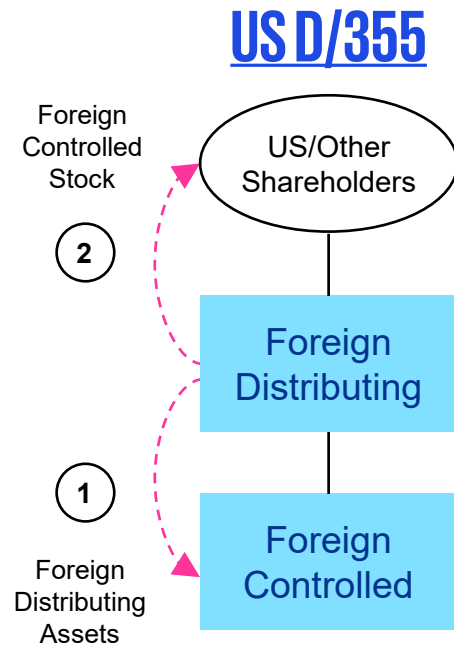
Numerous aspects of the Proposed Regulations must be clarified or corrected. The Trump administration could have different views.



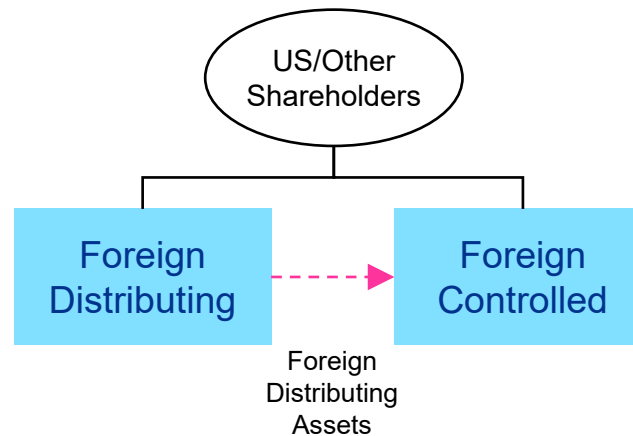
# Cross-Border Spin-Offs: Foreign to US Spin-Offs

*Non-US countries frequently do not have corporate mechanisms that are parallel to D/355 transactions.*

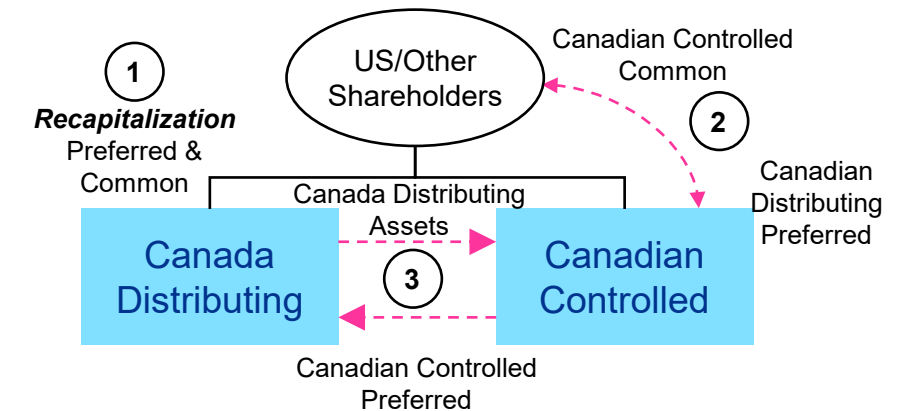
- However, many countries may have different corporate mechanisms that ultimately mirror the result of a spin-off transaction for US federal income tax purposes and are appropriately so recharacterized for US federal income tax purposes:
  - Statutory demergers; and
  - Canada has “butterfly” transactions.



## **Statutory Demerger**



## **Canadian Butterfly**



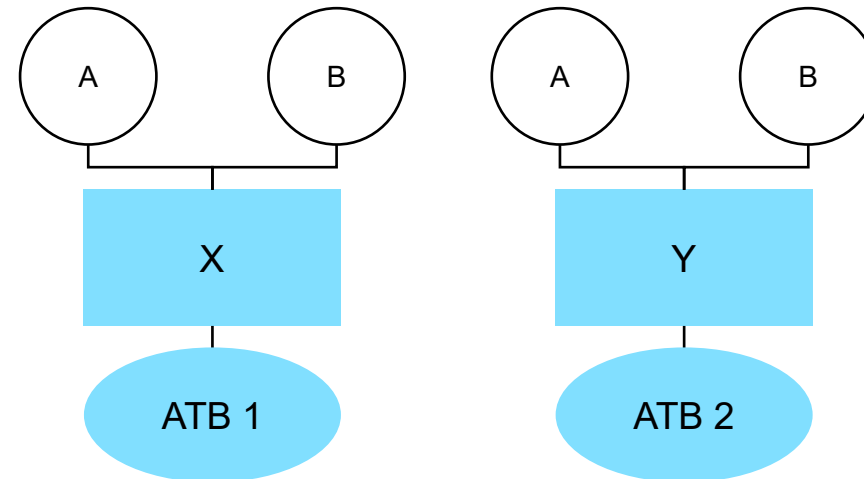
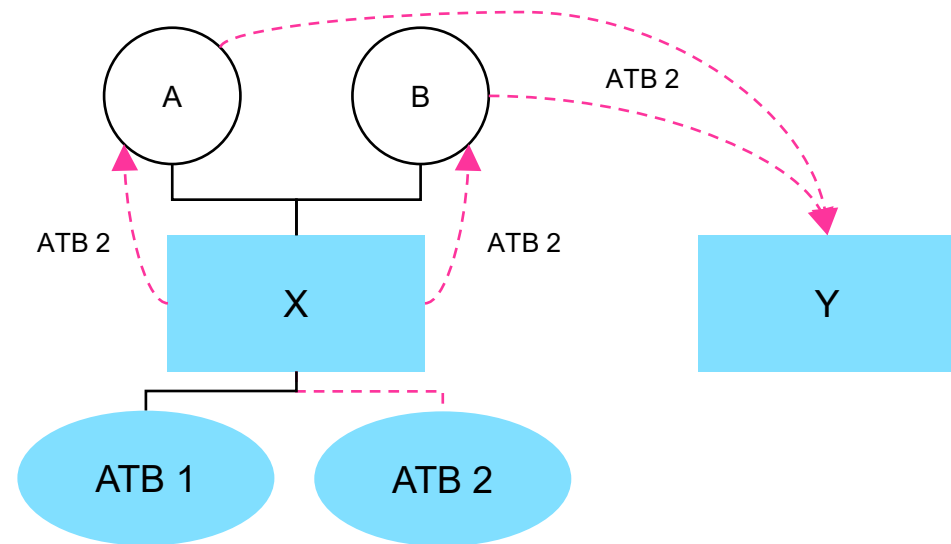
- Not Depicted:** Redemption of Canada Distributing and Canada Controlled Preferred Shares for promissory notes, which are then off-set and cancelled
- 4

# Cross-Border Spin-Offs: Foreign to US Spin-Offs (Indirect Spin)

## Rev. Rul. 77-191

- X corporation (foreign) distributes ATB 2 pro rata to shareholders A and B in partial redemption of their X corporation stock.
- Immediately following the distribution and pursuant to an integrated plan, A and B contribute ATB 2 to Y corporation (foreign).
- Ruling holds the transactions qualify as a D/355.

*IRS frequently cites this ruling in addressing tax consequences of foreign law demergers and Canadian butterfly transactions.*

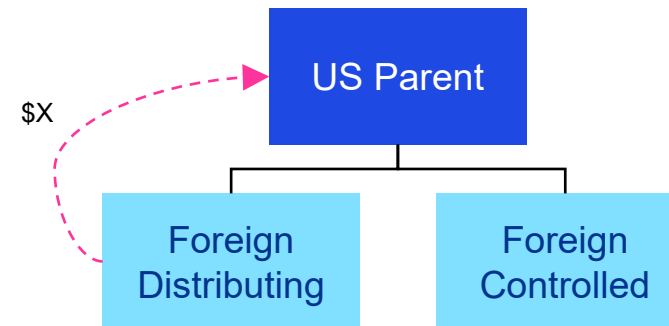
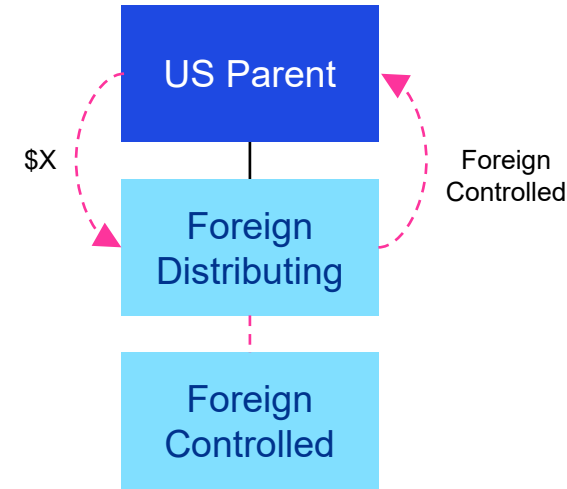




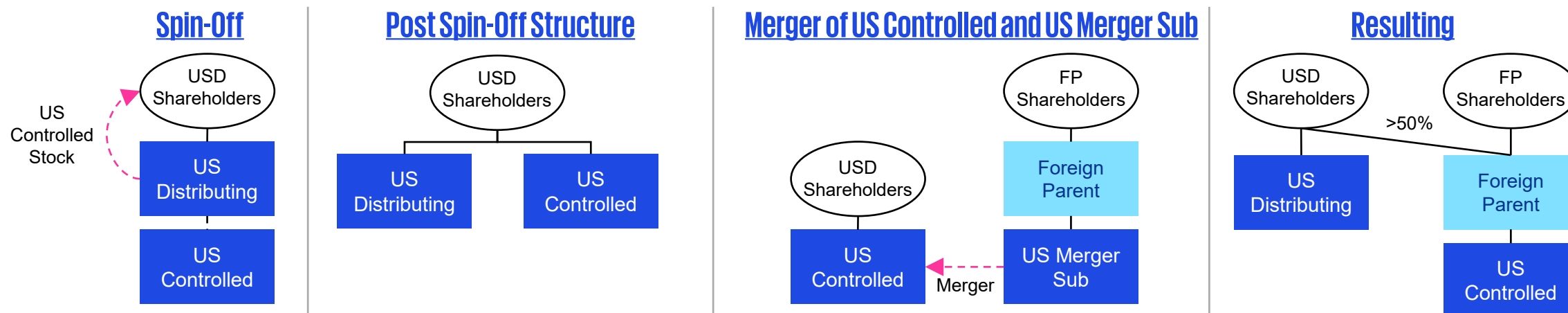
# Cross-Border Spin-Offs: Foreign to US Spin-Offs (Circular Cash)

## *Rev. Rul. 83-142*

- Foreign Distributing sells the stock of Foreign Controlled to US Parent for \$X.
- Foreign Distributing then distributes the cash received in the sale back to US Parent.
- Ruling holds transitory steps/circular cash flows occurring as part of a plan of reorganization are disregarded (where they are undertaken to comply with applicable law).
- Consider local jurisdiction tax and withholding consequences and applicable tax treaty impact.



# Cross-Border Spin-Offs: Expatriations (1/2)



## Section 355 Considerations for Post-Spin-Off Expatriations (assume USD Shareholders receive greater than 50% of Foreign Parent stock):

- **Section 355 - Device:** If US Distributing or US Controlled expatriates after a Section 355 transaction would this violate the device requirement where Section 367(a) causes the US shareholders of the expatriating corporation to recognize any gain inherent in their stock? Potential factors:
  - Distribution is not being used principally as a device for distribution of earnings and profits ("**E&P**");
  - No plan by US Distributing or US Controlled to purchase any of its outstanding stock after the distribution, except where such repurchases are affected through open market purchases, block purchases, and accelerated share repurchases;
  - No knowledge that shareholders of US Distributing will have plan to sell or dispose of its stock in US Distributing or US Controlled after the distribution (other than in the Merger);
  - No motivation to yield any particular/desired tax consequences (e.g., capital gain) to the shareholders by virtue of expatriation; and
  - Treatment of shareholders if distribution was taxable (e.g., potential dividend received deductions, tax sensitivity of shareholders).



# Cross-Border Spin-Offs: Expatriations (2/2)

## *Inversion Considerations:*

- In general, the applicability of the US anti-inversion rules must be considered whenever a foreign corporation (“**Foreign Acquiring Corporation**”) directly or indirectly acquires properties held directly or indirectly by a US corporation or the properties constituting a trade or business of a US partnership (the US corporation or partnership, the “**Domestic Entity**,” and the acquisition, a “**Domestic Entity Acquisition**”).
  - **The Acquisition Test:** Did a Foreign Acquiring Corporation directly or indirectly acquire substantially all of the properties of a Domestic Entity?
  - **The Ownership Test:** After the Domestic Entity Acquisition, does the former Domestic Entity shareholders/partners own 60% or more of the Foreign Acquiring Corporation?
  - **The Lack of Substantial Business Activities Test:** Does the Foreign Acquiring Corporation’s affiliated group lack substantial business activities in the jurisdiction in which the Foreign Acquiring Corporation is located?
- Section 7874 needs to be considered in any spin-off followed by a cross-border merger.



02

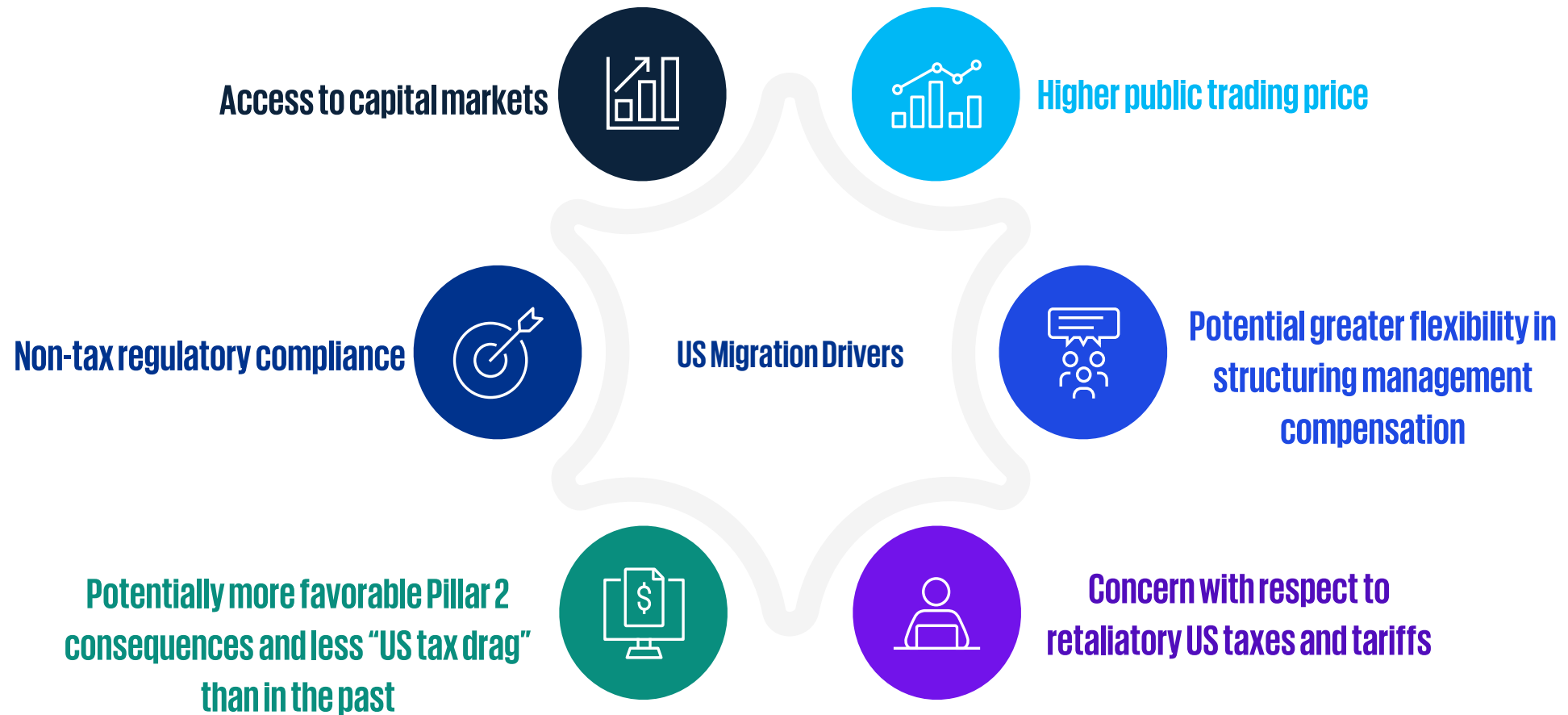
# US Migration



# US Migration Overview

- Foreign-parented multinationals have been considering migrating to the US more frequently than has been the case in the past.
- In general, foreign-parented multinationals are considering a US migration in at least two circumstances:
  - Placing a US holding company (“**US TopCo**”) on top of its existing structure (a “**self migration**”), typically in connection with a listing on a US stock exchange (including an initial public offering); or
  - Choosing a US TopCo as the top parent entity in connection with a combination with a third-party US-parented group (a “**combination migration**”).
- Although foreign-parented multinationals may be able to list on a US stock exchange and be included in certain stock indexes without having a US TopCo parent (and many do), depending on the facts it may be beneficial to use a US TopCo parent structure for listing in the US and being included in certain stock indexes.
  - Note that a US listing without a US migration can impact the application of US income treaties.

# Factors Driving Potential Migration





# Pillar 2 Considerations

- As part of the BEPS Pillar 2 initiative, many foreign countries have implemented a qualified domestic top up tax (“**QDMTT**”) and an income inclusion rule (“**IIR**”).
  - The US has notably not implemented any Pillar 2 taxing regime.
- Thus, all operations in a foreign-parented multinational enterprise (“**MNE**”) group, including those of US subsidiaries, may be subject to the parent country’s IIR.
- A US MNE group’s US operations without an intervening foreign subsidiary can only be subject to a Pillar 2 top-up tax if an under-taxed profits rule (“**UTPR**”) applies to the operations.
  - If a carve-out is made for US MNEs, it could be advantageous for MNE groups to be US parented to avoid Pillar 2 top-up tax on US income.
  - This benefit would increase substantially if a UTPR carve-out is extended to foreign subsidiaries of US MNE groups.
  - The EU Council recently noted the following items that could be revisited to address US concerns about Pillar 2:
    - Treat US tax credits as qualifying credits;
    - Amend UTPR; and
    - Consider global intangible low taxed income (“**GILTI**”) as a qualified IIR.
  - The US has indicated that GILTI co-existence with the IIR is a top priority.

# Retaliatory US Tax Considerations (1/3)

- The US is considering retaliatory measures in response to certain “extraterritorial” taxes (e.g., UTPR) and “discriminatory” taxes (e.g., digital service taxes), which could impact foreign individuals and corporations.
- Migrating to the US could mitigate the impact of these retaliatory measures under the right facts.

## Section 891 – Doubling Tax Rates

- If the President determines that a foreign country is imposing discriminatory or extraterritorial taxes on US citizens or corporations, the US tax rates are doubled for foreign citizens and corporations of that country with respect to US business income (including insurance income) and fixed, determinable, annual, or periodical (“**FDAP**”) income (e.g., dividends, interest, and royalties).
- Tax increase shall not exceed 80% of taxable income.
- Presidential proclamation needed to turn off rate hikes.

## Section 896 – Adjustment of Taxes

- Corporations of foreign countries that impose “more burdensome” taxes than the equivalent US provisions, could be taxed in accordance with pre-1967 tax provisions (e.g., including the force of attraction principle for permanent establishments).
- The tax on similar income of corporations of foreign countries that impose “discriminatory” taxes shall be adjusted to give a substantially similar effective tax rate.
- Provisions only applied after the President has requested taxes to be eliminated and this has not occurred.

# Retaliatory US Tax Considerations (2/3)

- The One Big, Beautiful Bill tax title passed on May 14, 2025, and would add new Section 899, “Enforcement of Remedies Against Unfair Foreign Taxes,” as a tool to retaliate against discriminatory foreign countries that have imposed an “unfair foreign tax” that applies to U.S. persons or certain foreign entities owned by U.S. persons.

## Section 899 would apply to applicable persons:

- ▶ A government of a discriminatory foreign country (turns off 892 benefits in addition to rate increases)
- ▶ An individual (other than a U.S. citizen or resident) that is a resident of a discriminatory foreign country
- ▶ A foreign corporation that is resident of a discriminatory foreign country, other than a United States-owned foreign corporation within the meaning of section 904(h)(6)
- ▶ A private foundation created or organized in a discriminatory foreign country
- ▶ A foreign corporation that is more than 50% owned within the meaning of section 958(a) by an applicable person
- ▶ A trust that is majority owned by one or more applicable persons
- ▶ A foreign partnership, branch, or any other entity identified by the Secretary with respect to a discriminatory foreign country



# Retaliatory US Tax Considerations (3/3)

## Consequences of Section 899

### Increased Rates of Tax

- Increases specified rates of tax under the following sections by 5% (capped at 20% over the statutory rate):
  - Section 871(a): FDAP of nonresident individuals
  - Section 871(b): Graduated rates for individual ECI, but limited to FIRPTA gains
  - Section 881: tax on non-ECI FDAP of corporations
  - Section 882: ECI of corporations
  - Section 884(a): Branch profits tax
  - Section 1441(a): Withholding on individual FDAP
  - Section 1442(a): Withholding on FDAP of corporations
  - Section 1445: Withholding on disposition of U.S. real property interests
  - Section 4948: Foreign private foundation tax

### Super BEAT

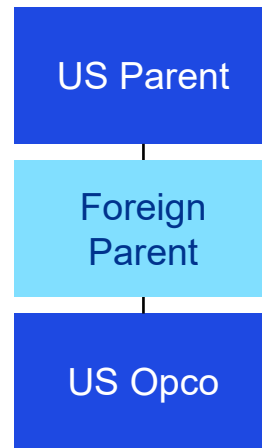
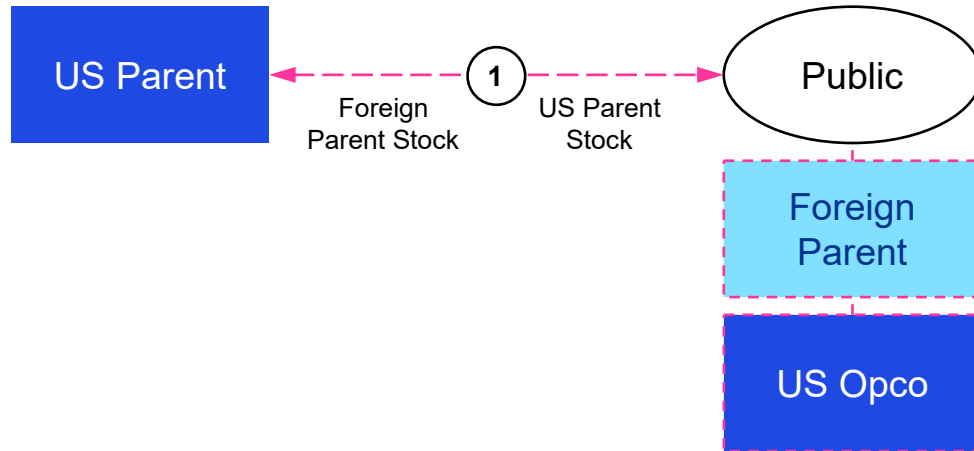
- Harsher base erosion and anti-abuse tax ("**BEAT**") applicable to certain corporations that are more than 50% owned, by vote or value (within the meaning of section 958(a)), by one or more "applicable person":
  - Accelerate the increase in the rate to 12.5% and reduce regular tax liability by all credits allowed under chapter 1 of the Code
  - 2%/3% base erosion percentage threshold and \$500 million gross receipts test do not apply.
  - Treat as base erosion payment any amounts paid to a foreign related party that are capitalized, other than purchase price of depreciable or amortizable property or inventory
  - No services cost method exception.
  - No exception for payments subject to US withholding tax.

# US Tax Considerations – Tax-Free vs. Taxable Stock Transactions

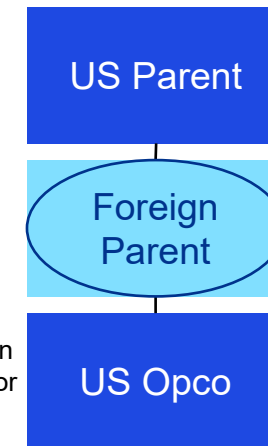
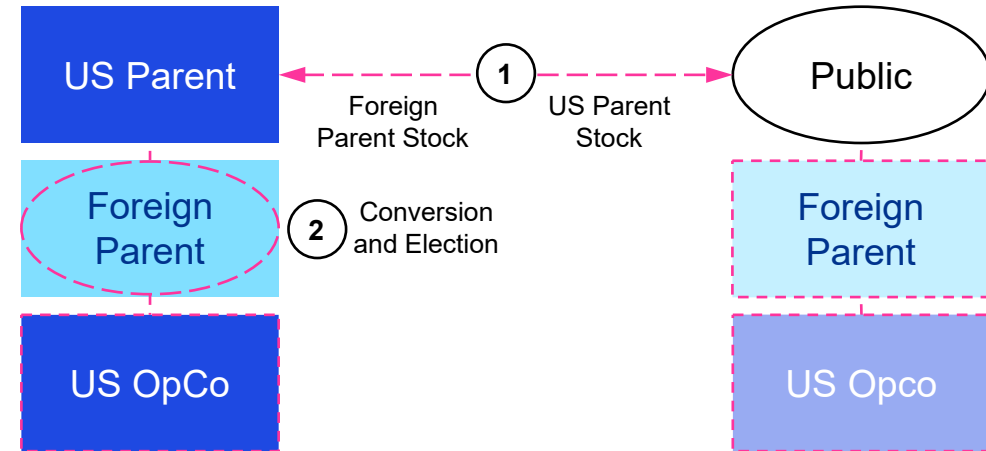
	Tax-Free Stock Transactions	Taxable Stock Transactions
General Considerations	<ul style="list-style-type: none"> <li>• Must satisfy requirements for nonrecognition treatment.</li> <li>• A Section 338(g) election cannot be made.</li> </ul>	<ul style="list-style-type: none"> <li>• Not preferred by US shareholders unless gain can be offset.</li> <li>• A Section 338(g) election may be made for certain taxable stock acquisitions.</li> </ul>
US Shareholders	<ul style="list-style-type: none"> <li>• Not subject to US tax on a transfer of foreign stock for US stock.</li> <li>• Subject to US tax on gain or an “all E&amp;P amount” dividend on an inbound asset reorganization.</li> </ul>	<ul style="list-style-type: none"> <li>• Subject to tax on gain at applicable rates.</li> <li>• Taxable structure may be difficult if 80% or more of foreign target shareholders are shareholders in US entity.</li> </ul>
Foreign Shareholders	<ul style="list-style-type: none"> <li>• Not subject to US tax.</li> </ul>	<ul style="list-style-type: none"> <li>• Not subject to US tax.</li> </ul>
Post-transaction Considerations	<ul style="list-style-type: none"> <li>• Absent planning, no basis step up in assets and other attributes carry over for US tax purposes.</li> <li>• In a stock transaction: (i) US Topco takes a carryover basis in the stock of the foreign target; and (ii) limited tax-efficient options for restructuring out of US “sandwich” structure.</li> </ul>	<ul style="list-style-type: none"> <li>• Absent planning or Section 338(g) election, no step up in asset basis and other attributes carry over for US tax purposes in a stock transaction.</li> <li>• US TopCo takes fair market value basis in the foreign target stock.</li> <li>• If a Section 338(g) election is made, step up in asset basis and cleanses E&amp;P and other attributes of the foreign target.</li> </ul>

# Inbounding through Stock and Asset Reorganizations

## Stock Reorganization



## Asset Reorganization\*



\* Depending on the jurisdictions in question, a cross-border merger or continuation may be feasible.



03

# Proactive Loss and Gain Planning with respect to Foreign Target Acquisitions



# Background: Loss Recognition Considerations (1/2)

## Sales:

- A sale by a US corporate seller of loss shares in a controlled foreign corporation (“**CFC**”) to an unrelated party normally results in capital loss recognition to the US corporate seller under Section 1001 and sale of loss shares to a related party (where Section 304 does not apply) normally results in loss deferral (if corporate buyer) or disallowance (if non-corporate buyer) under Section 267.
  - Note that Section 267 does not apply to losses recognized upon a complete liquidation.
  - Note that Section 961(d) effectively disallows loss to extent of prior distributions from the CFC eligible for the Section 245A dividends received deduction.

## Worthlessness:

- *Section 165(g)(1)* – Deduction allowed for worthless securities.
- *Section 165(g)(3)* – Ordinary loss potentially available to 80% corporate shareholder where more than 90% of the CFC’s gross receipts are from sources other than specified passive sources.
- Identifiable event to permit loss recognition (see, e.g., check-the-box (“**CTB**”) scenario in Rev. Rul. 2003-125).
- Section 166 deduction allowable for wholly or partially worthless debts.

# Background: Loss Recognition Considerations (2/2)

## Other Considerations:

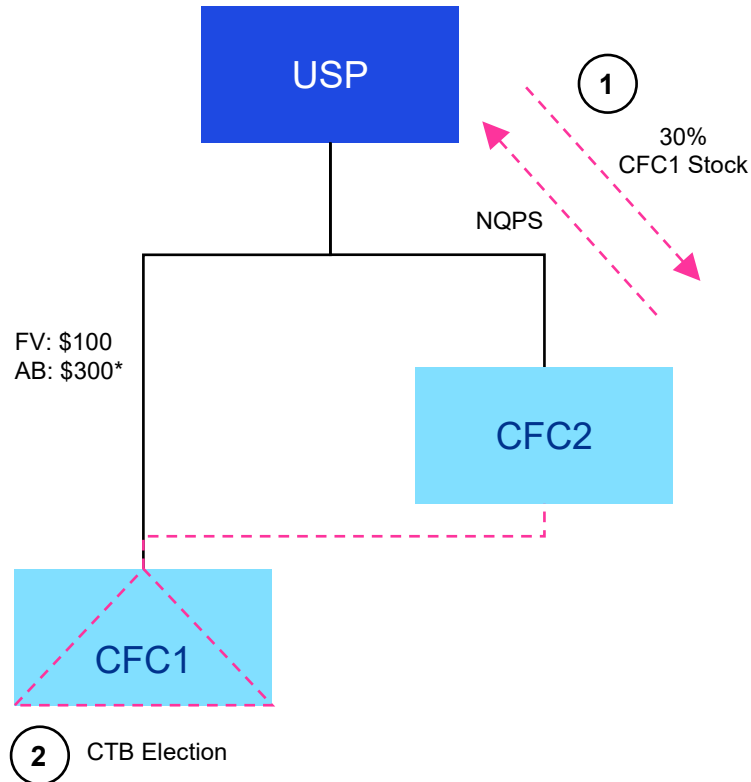
- Note *Commissioner v. Spaulding Bakeries, Inc.*, 252 F.2d. 693 (2nd Cir. 1958) and *H.K. Porter Company, Inc., v. Commissioner of Internal Revenue*, 87 T.C. No. 689 (1986) and the use of preferred stock in a capital structure (including potential for capital loss as regards the preferred stock if the CFC is liquidated).
- Note Treas. Reg. Section 1.1502-34, aggregating all shares held by members of a consolidated group for purposes of, among other things, determining the satisfaction of Section 332 and Section 165(g)(3)(A) stock ownership requirements.
- Also note Section 267(h) included in the House version of the Build Back Better Act in 2021, but not enacted, which would have deferred certain related party losses allowable under current law.
  - No similar provision included in the May 12, 2025 Chairman's Mark of the tax package currently working its way through Congress.
- Consideration must be given to whether a liquidation (or deemed liquidation as a result of a CTB election) might instead classified as a tax-free transaction (e.g., Section 332 liquidation or some type of tax-free reorganization) and, if so, implications for loss recognition.



# Background: Gain Recognition Considerations

- Gain on a sale of shares in a CFC by a US corporate seller to an unrelated party generally is treated as capital gain subject to US federal income tax at a 21% rate.
  - Note exception for Section 1248 dividend treatment to extent of certain earnings and profits of the CFC.
- A CFC's gain on sale of assets that produce tested income under the GILTI rules generally treated as tested income that is subject to a reduced effective rate of US federal income tax to the US corporate seller (10.5% for 2025; 13.125% for years after 2025 – although the May 2025 Chairman's Mark, proposes to extend the 10.5% effective rate indefinitely).
- Section 961(a) provides for a basis increase with respect to the stock of a CFC equal to the amount of tested income included by the US corporate seller (i.e., before application of the Section 250 deduction), allowing for the potential to reduce stock gain on sale of a CFC by recognizing inside gain taxable at a lower effective tax rate.
- Ideally, any inside gain could be recognized without incurring any local country tax.
- Note also that Pillar 2 and/or CAMT considerations, if relevant, must be kept in mind.

# Reactive Planning: *Granite Trust* Structure (1/2)



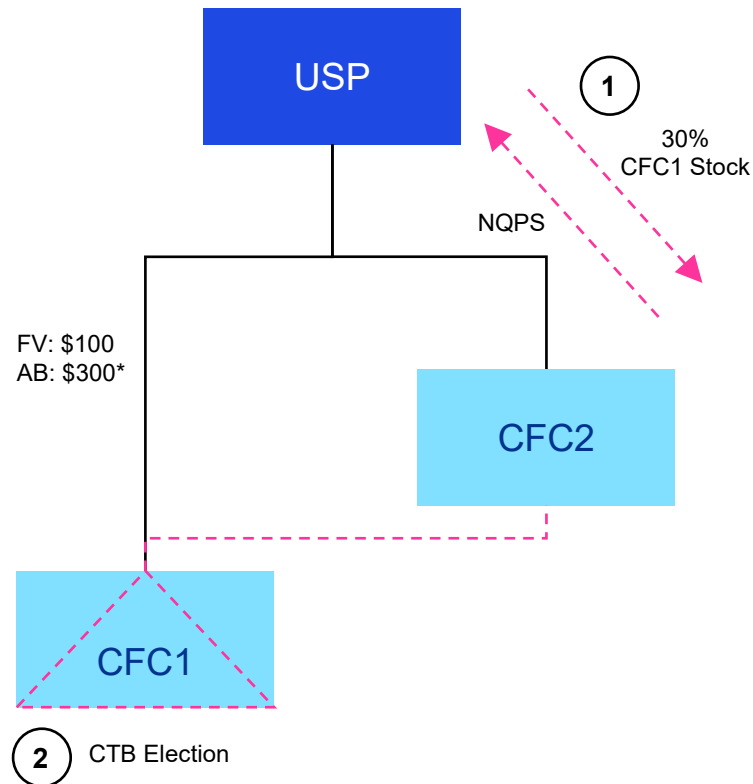
\* Assumes each share has a uniform basis

## Facts:

- USP's basis in the shares of CFC1 exceeds the fair market value of CFC1 by \$200. Thus, there is a \$200 built-in-loss in the CFC1 shares.
- USP transfers 30% of the CFC1 stock (having a basis of \$90) to CFC2 in exchange for non-qualified preferred stock ("**NQPS**") with a value of \$30.
- CFC1 liquidates (actual or CTB liquidation).

## Intended Results:

- USP realizes \$60 capital loss on the transfer of the CFC1 shares to CFC2 in exchange for the NQPS. This loss is deferred under Section 267(f).
- USP realizes and recognizes a \$140 capital loss on the taxable liquidation of CFC1. See, e.g., *Granite Trust Co. v. U.S.*, 238 F.2d 670 (1st Cir. 1956).



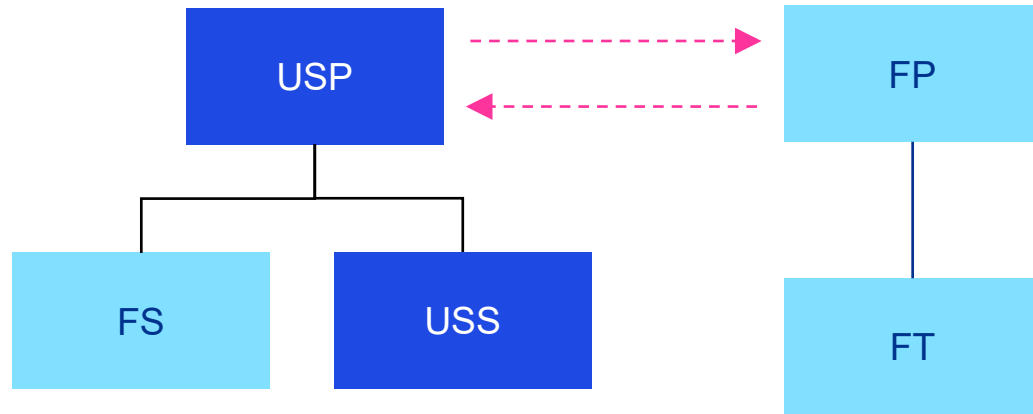
### Other Considerations:

- Implications if the CFC1 shares are sold to CFC2 for cash/note rather than NQPS.
- Recent IRS challenges to *Granite Trust* type transactions, including, depending on the facts, reorganization treatment, economic substance doctrine and *Merrill Lynch* “firm and fixed plan.”
- Note that any built-in gain and built-in-loss in CFC1's assets will be recognized upon the actual or deemed liquidation of CFC1, which may be a positive, negative or neutral depending on the particular facts.

\* Assumes each share has a uniform basis



# Proactive Planning: Base Case



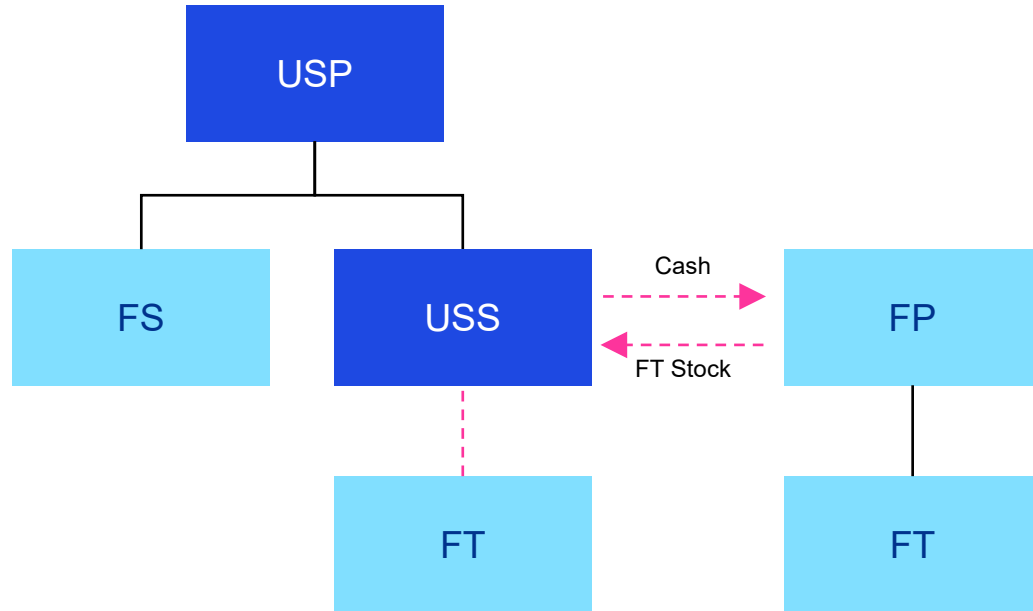
## Facts:

- Acquiring US Group (“**USG**”) acquires a foreign target corporation (“**FT**”) from an unrelated foreign parent corporation (“**FP**”), with or without making a Section 338(g) election.
- **Loss Scenario:** FT subsequently drops in value and the USG wishes to recognize the loss.
- **Gain Scenario:** FT subsequently appreciates in value and the USG wishes to sell FT to a third party.

## Considerations:

- Can the USG set up its capital structure at the outset to facilitate either recognition of a loss in the value of FT in the Loss Scenario, or minimization of its effective tax rate in the Gain Scenario?
- Impact of intercompany debt, either from USP, or alternatively from a related party (e.g., a brother/sister subsidiary).
- Impact of setting up capital structure with preferred stock.
- Facilitation of *Granite Trust* or Rev. Rul. 2003-125 loss in the future.

# Proactive Planning: Single Tier Capital Structure (1/2)



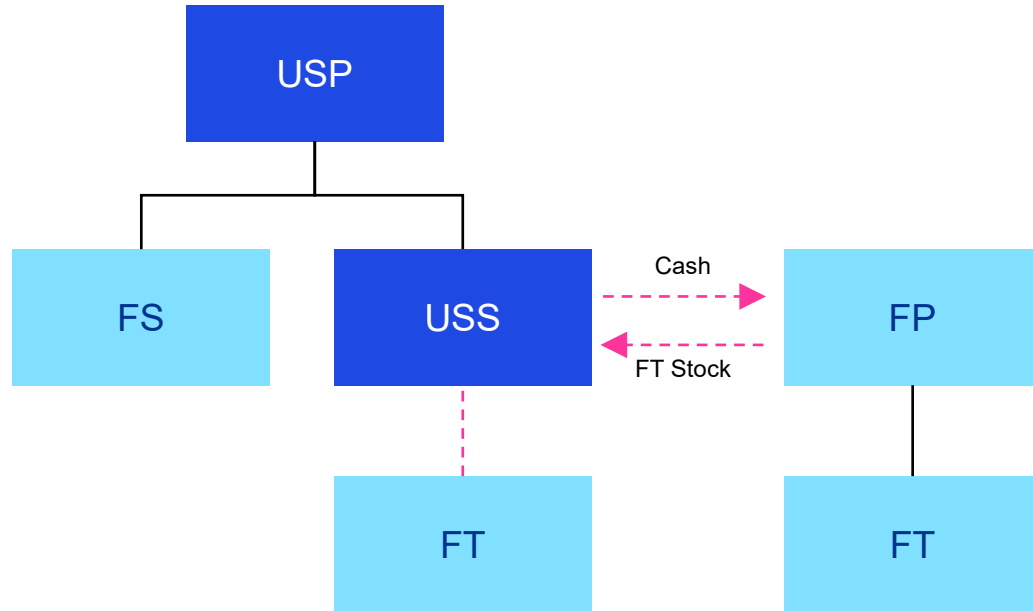
## Facts:

- USS, a wholly owned subsidiary of USP, acquires 100% of the equity of FT for cash consideration.
- FT has only common stock outstanding, and there is no debt push down.

## Considerations:

- USS receives a fair market value basis in the stock of FT acquired from a third party for cash.
- During its holding period, USS recognizes current income inclusions based on the earnings of FT during the year, either as Subpart F or tested income (unless a high tax election is available and is made), with a Section 961(a) basis increase.
  - For the sake of simplicity, assume no income earned by FT that is neither Subpart F nor tested income, no high tax election is available or made and no pre-acquisition earnings and profits for FT if no Section 338(g) election made.

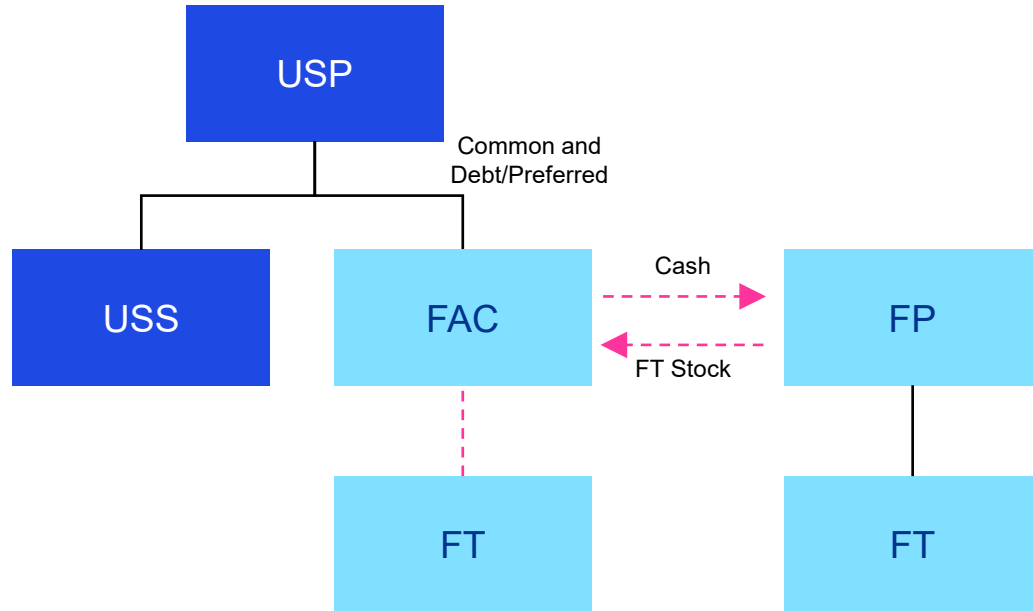
# Proactive Planning: Single Tier Capital Structure (2/2)



## Considerations (cont.):

- Absent additional structuring, in the future:
  - Loss Scenario:** If FT depreciates in value below USS's cost basis plus Section 961(a) basis in the stock of FT, USS's ability to recognize the built-in-loss generally limited to a third-party sale and such loss generally would be capital.
  - Gain Scenario:** If FT appreciates in value above USS's cost basis plus Section 961(a) basis in the stock of FT and USS sells the FT stock, USS recognizes capital gain subject to US federal income tax at 21%.

# Proactive Planning: Multiple Tier Capital Structure (1/3)



## Facts:

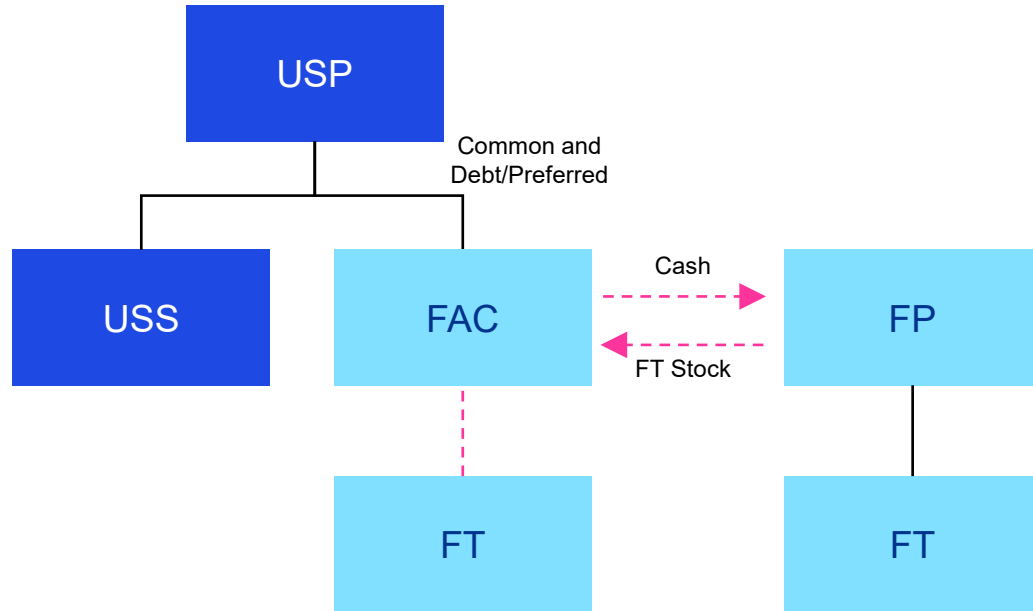
- USP capitalizes FAC, a wholly owned foreign subsidiary that is an eligible entity, in the first instance with common equity and preferred equity, and in the second instance, with common equity and debt.
- FAC acquires 100% of the equity of FT for cash consideration.
- FT has only common stock outstanding, and there is no debt push down.

## Intended Results:

- **Loss Scenario:** If FT's and, hence, FAC's assets depreciate below face amount of the preferred stock or debt, a CTB election may be filed with respect to FAC, resulting in a deemed liquidation of FAC for US federal income tax purposes.
- Preferred Stock Case:
  - Section 332 cannot apply to the liquidation because nothing received on the common stock (see *Spaulding Bakeries* and *H.K. Porter*).
  - No loss recognized on the preferred stock if the liquidation is treated as an upstream C reorganization; otherwise intended that capital loss be recognized on the preferred stock.



# Proactive Planning: Multiple Tier Capital Structure (2/3)



## Intended Results (cont.):

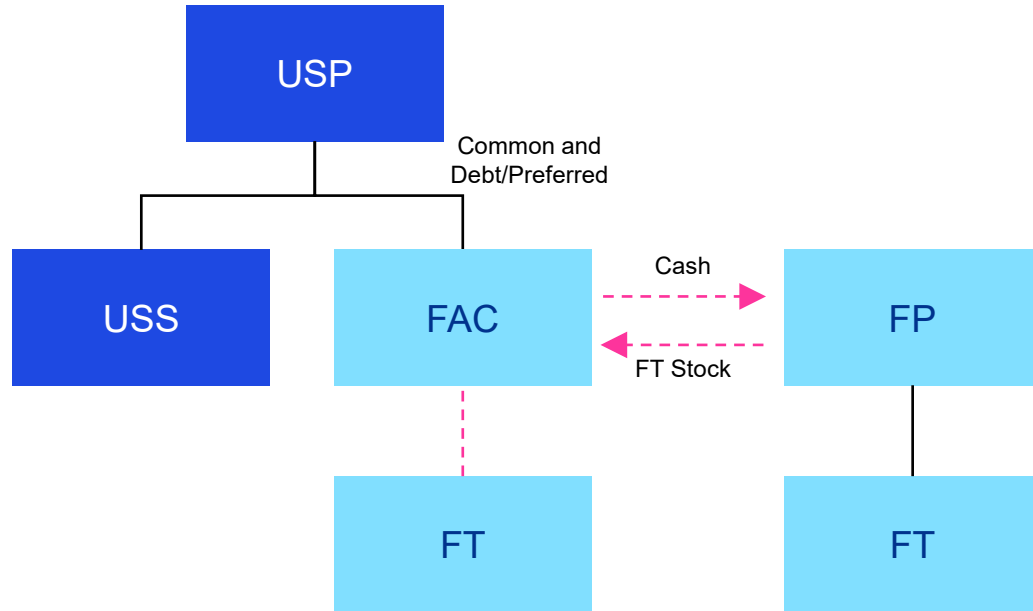
### - Preferred Stock Case (cont.):

- A Section 165(g) loss intended to be recognized with respect to the common stock of FAC.
  - If there is even a small amount of gross receipts at FAC level, at least 90% of which are from other than specified passive sources, the loss on the FAC common intended to be ordinary under Section 165(g)(3).
  - Loss on common intended to be recognized even if the liquidation is treated as an upstream C reorganization.

### - Debt Case:

- Same as preferred stock case as regards treatment of the common stock.
- As regards the debt, debt intended to preclude upstream C reorganization and, hence, loss on the debt intended to be recognized.
- Cancellation of debt implications to the parties?

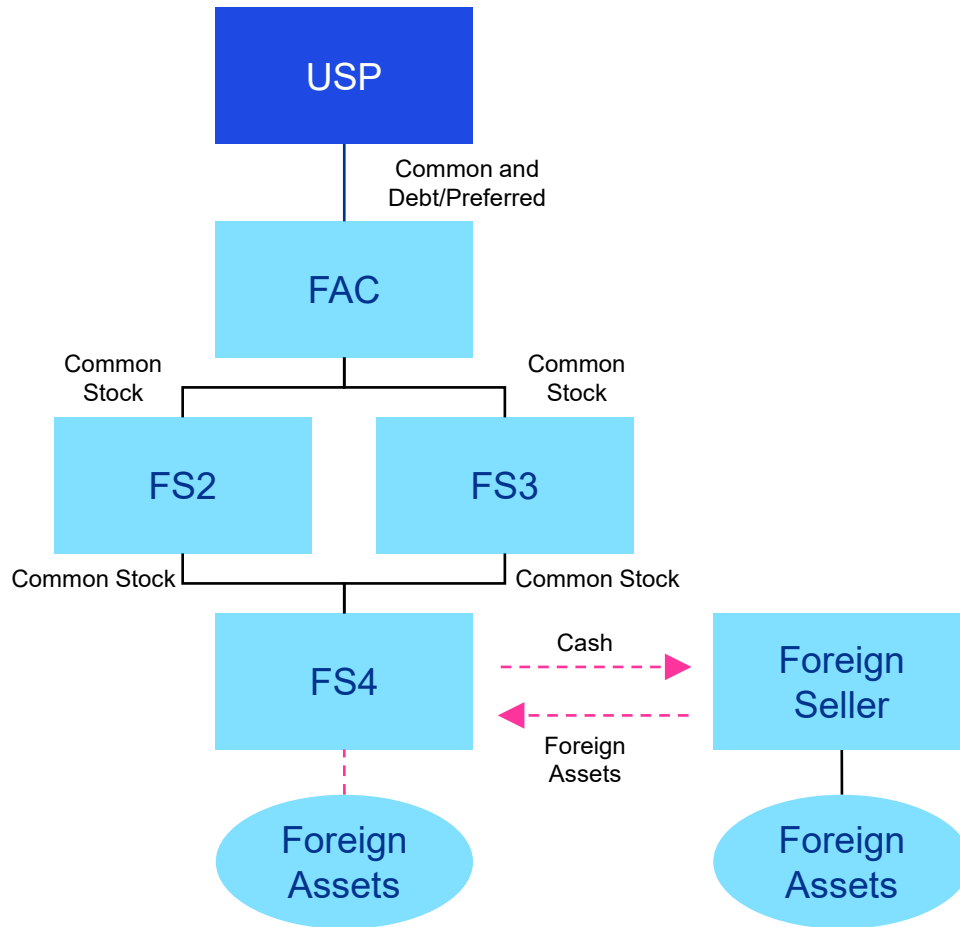
# Proactive Planning: Multiple Tier Capital Structure (3/3)



## - Other Considerations

- Consider potential application and implication of sourcing rules for the loss under and Treas. Reg. Section 1.865-2.
- Ignoring any other assets at the FAC level, any built-in loss in the FAC shares should be duplicated in the FT shares.
  - If FAC liquidates taxably, that inside loss will be recognized.
  - But having FT held through FAC at least makes inside and outside loss (and gain) the same as compared to a taxable liquidation of FT where inside and outside gain could vary substantially
- **Gain Scenario:** Absent additional planning (see, e.g., the Diamond Pattern Capital Structure slides below), if FT's and, hence, FAC's assets appreciate in value and USP sells FAC, the resulting built-in gain is subject to a 21% US federal income tax rate.
  - Note that selling at FT level will result in Subpart F income to USP, which may or may not be preferable to selling at the FAC level, depending on the facts.

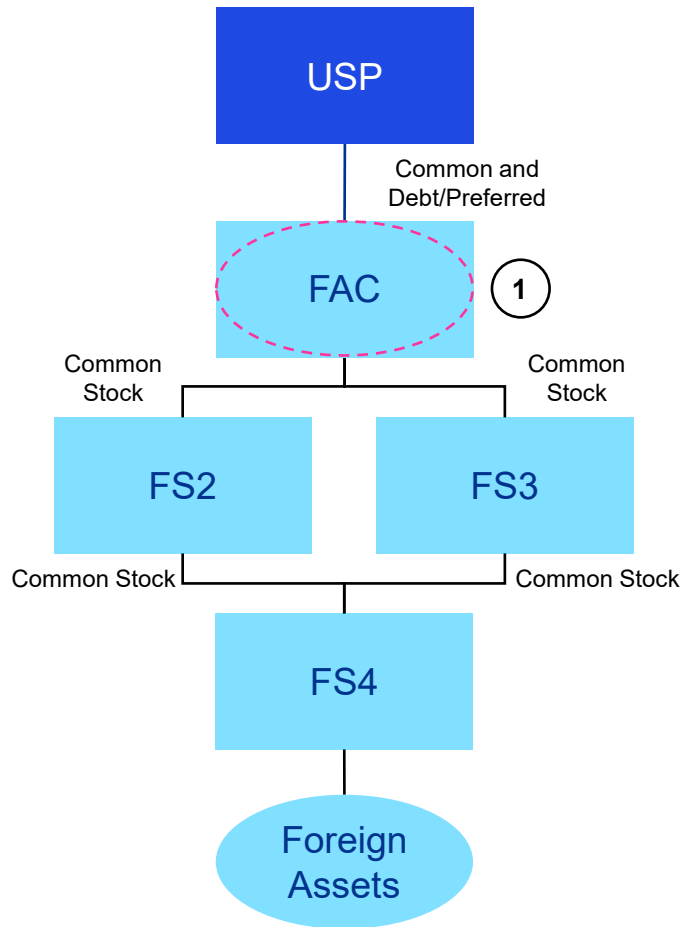
# Proactive Planning: Diamond Pattern Capital Structure (1/5)



## Facts:

- USP capitalizes FAC, a wholly owned foreign subsidiary that is an eligible entity, with common and preferred equity, or common equity and debt, as in the Multiple Tier Capital Structure above.
- FAC capitalizes FS2 and FS3, each wholly owned by FAC, with common stock.
- FS2 and FS3 capitalize FS4 with common stock.
- FS4 acquires Foreign Assets from Foreign Seller.
  - Acquisition of Foreign Assets may take the form of an actual asset acquisition, an acquisition of a disregarded entity owning the Foreign Assets or an acquisition of regarded entity followed by a CTB liquidation of the entity for US federal income tax purposes.

# Proactive Planning: Diamond Pattern Capital Structure (2/5)



## Loss Scenario

*After the acquisition of Foreign Assets, assume the value of FS4 decreases to below the debt/preferred outstanding at FAC.*

### • Proposed Step(s):

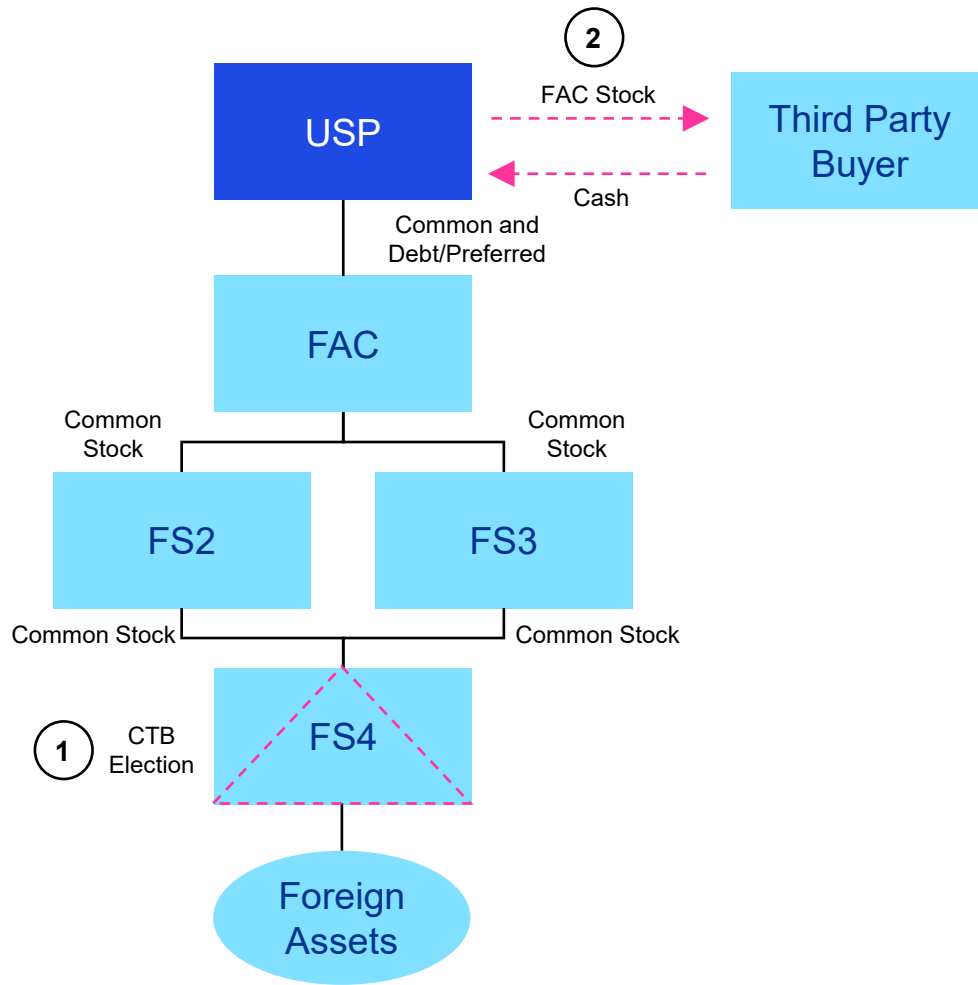
1. File a CTB election for FAC electing to be treated as a disregarded entity for US federal income tax purposes.

### **Intended Results:**

- Essentially the same results as intended in equivalent CTB election in the Multiple Tier Capital Structure above.



# Proactive Planning: Diamond Pattern Capital Structure (3/5)



## Gain Scenario

*After the acquisition of Foreign Assets, assume the value of the foreign assets increase and USP decides to sell FAC.*

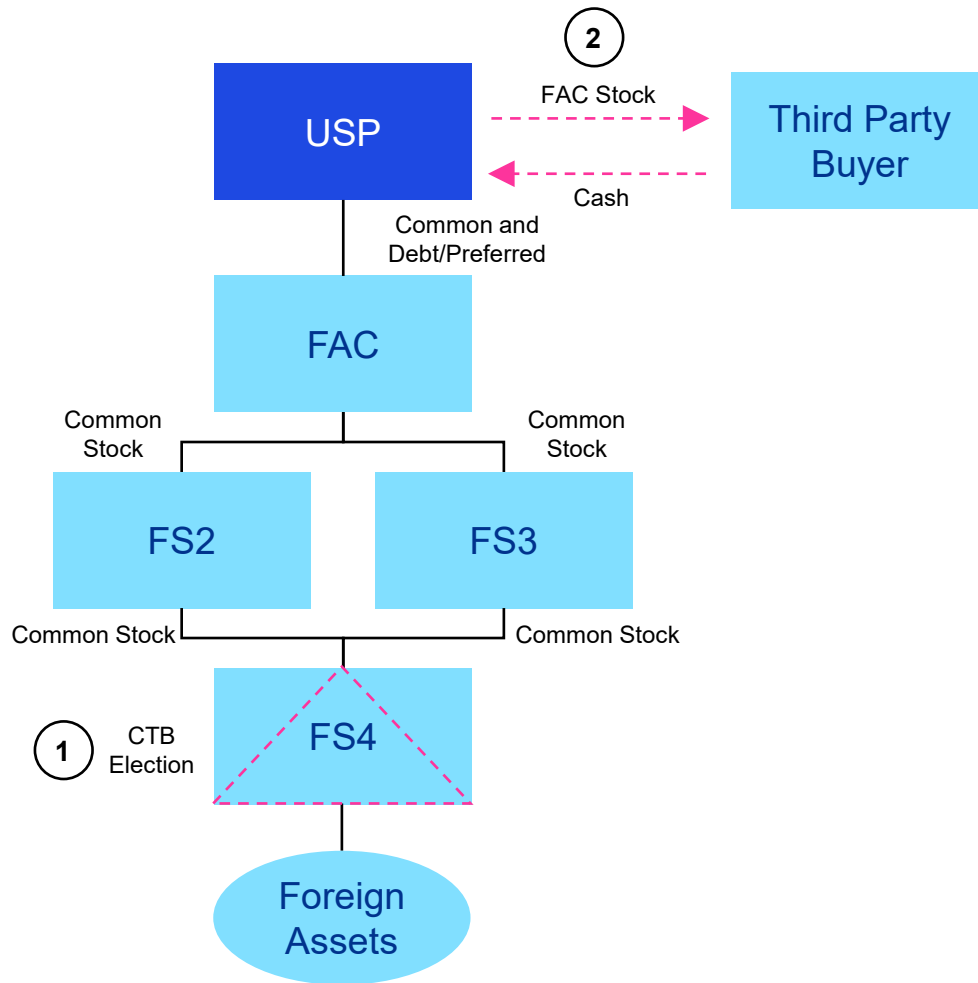
### Proposed Step(s):

1. File a CTB election for FS4 electing to be treated as a disregarded entity for US federal income tax purposes.
2. USP sells FAC to third party buyer.

## Intended Results:

- The CTB election as regards FS4 is intended to be a taxable liquidation of FS4 that is not a reorganization.
  - FS2 and FS3 are not members of the same consolidated group so their ownership of FS4 is not aggregated under Treas. Reg. Section 1.1502-34 for purposes of applying Section 332. Accordingly, the deemed liquidation of FS4 is intended to not be a Section 332 liquidation.
  - FS2 and FS3 each own 50% of FS4 so substantially all the assets of FS4 go to neither FS2 or FS3, precluding reorganization treatment.

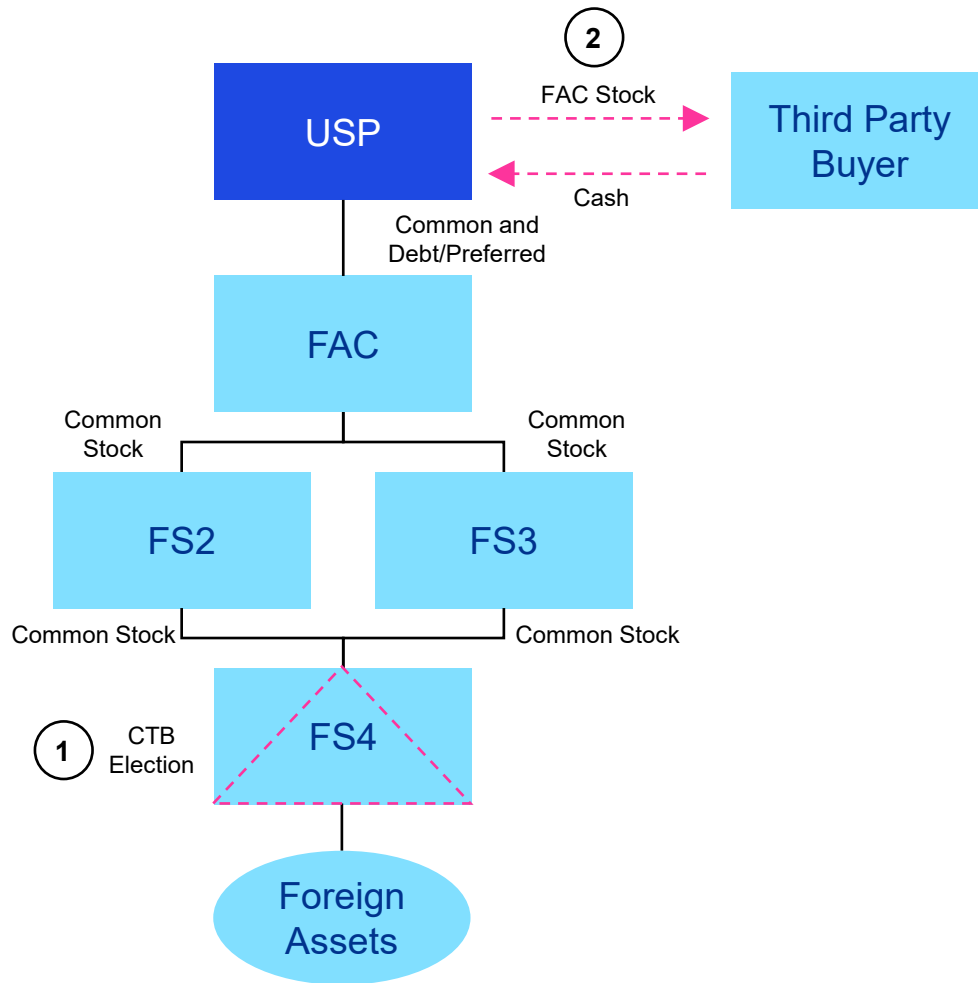
# Proactive Planning: Diamond Pattern Capital Structure (4/5)



## Intended Results (cont.):

- Gain is recognized by FS4 with respect to the Foreign Assets and, assuming the Foreign Assets produce tested income, the gain is tested income that is taxed to USP at favorable US federal income tax rates and increases USP's basis in the FAC shares by the amount of tested income, thereby reducing USP's gain on the sale of the FAC shares.
  - If, however, inside gain recognized by FS4 is greater than the outside gain that USP has in the FAC stock then a stock loss will be created at the USP level as a result of the "excess inside gain". Whether this loss is beneficial or detrimental will depend on USP's ability to utilize the loss.
- FS2's and FS3's "Section 961(c) basis" in FS4 is increased proportionately. As a result, no gain generally would be expected to be recognized by FS2 or FS3 on the deemed liquidation of FS4 (but note some uncertainty regarding Section 961(c) basis being able to be used to in determining tested rather than Subpart F income).
  - Any loss recognized by FS2 and FS3 with respect to FS4's stock upon the deemed liquidation of FS4 would be a Subpart F loss and unlikely to be of use on these facts.

# Proactive Planning: Diamond Pattern Capital Structure (5/5)



## Other Possible Approaches:

- Other possible approaches not involving a diamond pattern capital structure but rather direct ownership of FS4 by FAC include:
  - Non-liquidating Section 311 distributions of some appreciated Foreign Assets by FS4 to FAC.
  - Transferring the Foreign Assets to a lower tier subsidiary for NQPS or debt. *Cf. Liberty Global v. United States*, 2023 U.S. Dist. LEXIS 209613 (U.S. Dist. Ct. Col.); appeal filed December 28, 2023.
  - Cross chain sales of Foreign Assets.



# 04 Q&A





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