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In this article, the authors describe the advantages and pitfalls of F reorganizations, arguing that the qualified subchapter S subsidiary election is unnecessary and that eliminating it would benefit taxpayers and the IRS.

I. Introduction

F reorganizations, much like the game of Othello, can take a minute to learn but a lifetime to master. They are often a critical part of structuring the purchase and sale of S corporations. As part of an F reorganization, a target S corporation will file an IRS election to be treated as a qualified subchapter S subsidiary, or a QSub. While making a QSub election has become standard practice in F reorganizations involving S corporations, few practitioners have stopped to ask whether it is required in order to have an effective F reorganization. We explain why a QSub election isn't necessary to have a valid F reorganization.

II. Background on F Reorganizations

F reorganizations have become a commonly used structure in the market when buyers, especially private equity buyers, wish to acquire a closely held corporation in transactions involving tax-free rollover equity. The code defines an F reorganization as a tax-deferred reorganization that consists of a mere change in identity, form, or place of organization of one corporation, however effected.[1] Although the language is short and sweet, its vague words provide plenty of ambiguities.

To clarify the ambiguous words in section 368, the IRS issued Rev. Rul. 2008-18, 2008-1 C.B. 674, which lays out the basic recipe for S corporations to achieve an F reorganization.[2] In Rev. Rul. 2008-18, the IRS blessed the following transaction as an F reorganization:

- Step 1: Create a new corporation (Newco) on day 1.[3]
- Step 2: Contribute stock in the historic company (Oldco) to Newco on day 2.
- Step 3: Make QSub election on behalf of Oldco, using Form 8869, "Qualified Subchapter S Subsidiary Election," on day 2.

[1] Section 368(a)(1)(F).

[2] *See United Dairy Farmers Inc. v. United States*, 107 F. Supp. 2d 937 (S.D. Ohio 2000); Rev. Rul. 64-250, 1964-2 C.B. 333.

[3] As discussed below, Newco will ultimately be treated as an S corporation because of S election continuity rules in Rev. Rul. 64-250.

- Step 4: Convert Oldco to a limited liability company on day 3.[4]
- Step 5: Sell Oldco on day 4.

To further illustrate, we have included figures 1-3, depicting a typical F reorganization of an S corporation.

Figure 1. Step 1: Form New Corporation

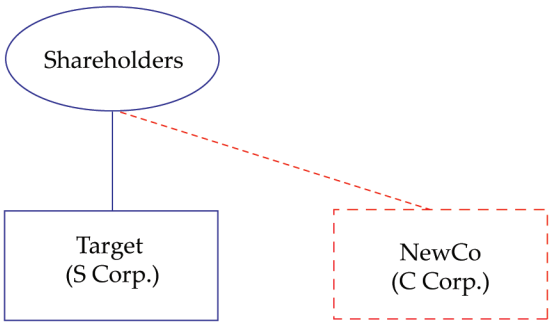


Figure 2. Steps 2 and 3: Contribution and QSub Election

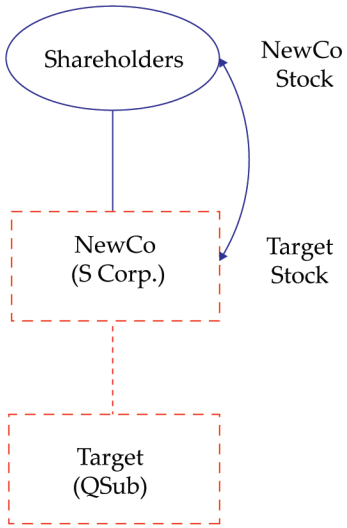
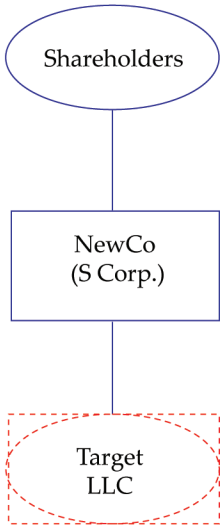


Figure 3. Step 4: Convert to LLC



In a continued effort to clarify section 368(a)(1)(F), in 2015 Treasury issued regulations that provide six requirements to qualify as an F reorganization for all transactions occurring after September 20, 2015.[5] The regulations provided two key examples indicating that an S corporation can accomplish an F reorganization as described in Rev. Rul. 2008-18, without a QSub election.[6] Examples 5 and 11 in the regulations read as follows:

> Example 5: P owns all of the stock of S1, a State A corporation. The management of P determines that it would be in the best interest of S1 to change its place of incorporation to State B. Accordingly, under an integrated plan, P forms S2, a new State B corporation; P contributes the S1 stock to S2; and S1 merges into S2 under the laws of State A and State B.
>
> *Under paragraph (m)(3)(i) of this section, a series of transactions that together result in a mere change* of one corporation may qualify as a reorganization under section 368(a)(1)(F). *The contribution of S1 stock to S2 and the merger of S1 into S2 together*

[4] If the state does not have a formless conversion statute for converting a corporation to an LLC (such as New York), a taxpayer must do a merger rather than a state law conversion if it wants to convert a corporation to an LLC. Taxpayers should always double-check a state's conversion statute before structuring an F reorganization. *See* David M. Steingold, "Converting a Corporation to an LLC in New York," Nolo.com (last visited Sept. 28, 2022).

[5] Reg. section 1.368-2(m)(1)-(3).

[6] Reg. section 1.368-2(m)(4), examples 5 and 11.

constitute a mere change of S1. Therefore, the potential F reorganization qualifies as a reorganization under section 368(a)(1)(F) . . . *The result would be the same with respect to qualification under section 368(a)(1)(F) if, instead of merging into S2, S1 completely liquidates or is deemed to liquidate by reason of a conversion* in an entity disregarded as separate from its owner under section 301.7701-3 of this chapter.

Example 11: P owns all of the stock of S1. S1's only asset is all of the equity interest in LLC2, a domestic limited liability company. Under section 301.7701-3 of this chapter, LLC2 is disregarded as an entity separate from its owner, S1. Pursuant to an integrated plan to undergo a reorganization under 368(a)(1)(F), S1 and LLC2 undergo the following two state law conversions.

First, under state law LLC2 converts into S2, a corporation. Second, under state law S1 converts into LLC1, a domestic limited liability company. Under section 301.7701-3 of this chapter, LLC1 is disregarded as an entity separate from its owner, P. As a result of the two conversions, S1 is deemed to transfer its assets to S2 in exchange for all of the stock in S2 and then distribute the S2 stock to P in complete liquidation of S1. *The two conversions, viewed as a potential F reorganization, constitute a mere change of S1, and that potential F reorganization qualifies as a reorganization under section 368(a)(1)(F).* The result would be the same if, instead of converting into S2 pursuant to state law, LLC2 elected under section 301.7701-3(c) to change its classification for federal tax purposes and be treated as an association taxable as a corporation, provided the effective date of the election (and its resulting deemed transactions) occurs before the conversion of S1.

As shown above, the IRS has blessed various F reorganization structures for an S corporation — some performed with QSubs and some without.

III. The Good: Benefits of an F Reorganization

Now that we have covered what F reorganizations are, we need to ask why taxpayers seek them. It's no surprise that the answer is to maximize a transaction's tax benefits and minimize risk. Restructuring S corporations using an F reorganization can solve many problems that may affect the buyer's ability to get a step-up in basis or a tax-deferred rollover.

When a buyer acquires a closely held S corporation and wants to maximize its depreciation or amortization deductions post-acquisition, it will generally need to choose between three alternatives: (1) a section 338(h)(10) election; (2) a section 336(e) election; or (3) an F reorganization.

Each alternative can treat a stock sale as an asset sale for U.S. federal income tax purposes, thereby stepping up the basis of each asset to its fair market value. However, both the section 338 and section 336 election have limitations that don't exist under an F reorganization. Below are some restrictions that arise with a section 338 or section 336 election, along with a comparison of how each restriction is treated under the three alternative structures:

- *Restriction 1.* Limitations on entity of buyer:
  - Section 338(h)(10): The buyer must be a corporation.
  - Section 336(e): The buyer can be any entity.
  - Section 368(a)(1)(F): The buyer can be any entity.
- *Restriction 2.* Rollover limitations:
  - Section 338(h)(10): The buyer *must acquire at least 80 percent* of the total voting power and value of the stock of the target in a taxable transaction (a qualified stock purchase (QSP)).
  - Section 336(e): The seller *must sell at least 80 percent* of the shares in target, by both vote and value in a taxable transaction (a qualified stock disposition (QSD)).[7]
  - Section 368(a)(1)(F): No limitation on rollover amount or amount that must be acquired in a taxable transaction.

[7] Reg. section 1.336-1(b)(6)(i).

- *Restriction 3.* Requires a valid S election for basis step-up:
  - Section 338: The seller must be a member of a consolidated group or shareholder of an S corporation. If the target has blown its S election, the taxpayer can no longer make a section 338(h)(10) election since it will not be an S corporation or a C corporation in a consolidated group. Thus, the purchased assets will not get a step-up in basis.
  - Section 336(e): The seller must be a shareholder of an S corporation or a corporation that made a QSD. If the target has blown its S election, the taxpayer can no longer make that election because it won't be an S corporation or have any corporate shareholders (to be a valid S corporation, it can have only individuals and specific trusts as shareholders). As a result, the purchased assets will not get a step-up in basis.
  - Section 368(a)(1)(F): An F reorganization doesn't require a valid S election from the buyer's point of view because the seller will be selling a single-member LLC. Thus, there will be a step up in the basis because the buyer is treated as purchasing the assets of the single-member LLC for U.S. federal income tax purposes.

Restriction 2 (preserving the tax-free rollover for sellers) is the most common reason to restructure a corporation using an F reorganization. If the rollover amount in the transaction equals about 20 percent, taxpayers may be best advised to avoid a section 338(h)(10) or section 336(e) election because the IRS may disagree on the valuation of the stock and argue that a QSP or QSD never occurred. If the IRS prevails on the position, the section 338(h)(10) or section 336(e) election will be invalid, and the taxpayer won't receive the step-up in basis.

While restrictions 1 and 2 tend to be more commonly focused on, it is important to consider restriction 3 when acquiring an older S corporation. It is common for an S election to be invalidated because of (1) disproportionate distributions, (2) failing to get spousal signatures for taxpayers living in community property states, or (3) transfers to ineligible shareholders. As a practical matter, any purchaser planning to use a section 338(h)(10) or section 336(e) election should review the past five years of Forms K-1 to ensure that the rules of subchapter S have been respected.

As shown above, an F reorganization can become a critical part of effectively structuring a transaction because it allows the buyer to obtain a step-up in tax basis while avoiding potential issues with the target's historic S election. Also, using an F reorganization gives sellers much greater flexibility to structure a tax-free rollover.

IV. The Bad: QSub Election and a Trap

An F reorganization is generally rather mechanical, and some of its steps are — for lack of a better term — academic theater. As noted, the steps in an F reorganization under Rev. Rul. 2008-18 are: (1) Create a new corporation (Newco) on day 1;[8] (2) contribute stock in the historic company (Oldco) to Newco on day 2; (3) make a QSub election on behalf of Oldco, using Form 8869, on day 2; (4) convert Oldco to LLC on day 3; and (5) sell Oldco on day 4.

While simple on its face, step 3 provides a potential trap for the unwary regarding the timing of the QSub election when structuring an F reorganization.[9]

The trap arises from the general rules governing a QSub election. Traditionally, an S corporation can make a QSub election for its subsidiary at any time during the tax year,[10] with the effective date being no earlier than two months and 15 days before the date of filing and no later than 12 months after the date of filing.[11] However, at the time the election is made, the subsidiary must be a corporation.[12] Thus, if the QSub election isn't made at least one day before the state law conversion to an LLC, it will be deemed ineffective because it doesn't qualify

[8] As discussed below, Newco will ultimately be treated as an S corporation under S election continuity rules found in Rev. Rul. 64-250.

[9] LTR 201724013.

[10] Reg. section 1.1361-3(a)(3) ("A QSub election may be made by the S corporation parent at any time during the taxable year.").

[11] Reg. section 1.1361-3(a)(4) (a requested effective date not more than two months and 15 days before the date the election is filed).

[12] Section 1361(b)(3)(B) ("For purposes of this paragraph, the term 'qualified subchapter S subsidiary' *means any domestic corporation* which is not an ineligible corporation.") (emphasis added).

under section 1361(b)(3)(B), which requires that the entity be a corporation at the time of the election.[13] Therefore, if the QSub election is made on the same day or any day after the conversion to an LLC is made, it will be considered ineffective and — some may argue — blows the F reorganization (granted, we argue the opposite here).[14]

When filing the F reorganization documents under Rev. Rul. 2008-18, an inadvertently ineffective QSub election can occur for various reasons including:

- a merger filing or the article of incorporation filed with the state may be rejected for innocuous reasons, only to be accepted the day after the QSub election is made;
- the conversion may accidently be made on the same day as the QSub election; or
- the drafter may leave key details off the QSub election form, such as the effective date.

A transaction that fails to qualify as an F reorganization because of an ineffective QSub election can have adverse tax consequences at the corporate and shareholder level.[15] Also, the S election continuity rules of Rev. Rul. 64-250, 1964-2 C.B. 333, wouldn't apply, so Newco would be required to make an S election as well to avoid two levels of tax. This may pose a unique problem because filing an S election for the new corporation is a step often skipped because of the S election continuity rules in an F reorganization. Luckily, as discussed below, the IRS provides a way to remedy an ineffective QSub election.

V. The Wasteful: Removing the QSub Election

The crux of the issue here is whether taxpayers must follow the steps in Rev. Rul. 2008-18 and file a QSub election when structuring an F reorganization or whether they can rely on the examples in reg. section 1.368-2(m)(4), skip filing a QSub election, and still have an effective F reorganization.

The market tends to take the conservative position that to avoid any issues and have an effective F reorganization, a QSub election should be filed. But we feel that logic is akin to a tax superstition, which is done only out of tradition and not necessity or purpose. We suggest, for a mix of administrative, technical, and policy reasons, that a QSub election is unnecessary in order to have an effective F reorganization.

A. Authority for Conflicting Guidance

Before diving into the more technical aspects of the guidance, taxpayers should look at when each piece of guidance was issued and, more importantly, the level of authority afforded to each piece of guidance.

A Treasury regulation "picks up where the IRC leaves off" and provides the Treasury Department's official interpretation of how a section of the code is to be applied.[16] Treasury regulations are given great weight by the courts and will generally be upheld unless they are found to be clearly contrary to congressional intent.[17] While courts aren't bound by Treasury regulations, the IRS is.[18] Revenue rulings, on the other hand, are simply the conclusions of the IRS on the application of law to a specific given set of facts. When a revenue ruling and a Treasury regulation conflict, the IRS clearly states that Treasury regulations should prevail:

> PLEASE NOTE. [Revenue rulings and procedures] reported in the IRB do not have the force and effect of Treasury tax regulations, but they may be used as precedents.[19]
>
> [Revenue Rulings] do not carry the same force of authority as do Treasury

[13] *See generally* Rev. Rul. 2008-18; and LTR 202114013.

[14] LTR 201724013; LTR 201821011; and LTR 202114013.

[15] *See generally* section 1374.

[16] IRS, "Tax Code, Regulations and Official Guidance" (updated Aug. 19, 2022).

[17] IRS, "Chapter H: Review of Tax Research Materials," IRS Exempt Organizations CPE Technical Instruction Program Textbook (1987).

[18] *Id.*

[19] IRS, *supra* note 16.

Regulations because each revenue ruling is limited to the facts provided.[20]

Based on the IRS's own guidance, the examples in the Treasury regulation should be granted greater authority than the examples in Rev. Rul. 2008-18, and the Service should rule that an F reorganization can be effective without a QSub election.

Further, the IRS notes that when reviewing revenue rulings, taxpayers should consider the effect of subsequent legislation, Treasury regulations, and court decisions.[21] Rev. Rul. 2008-18, which suggests that a QSub is required in an F reorganization, was issued in 2008. On the other hand, the Treasury regulations, which suggest that a QSub isn't required in an F reorganization, were issued in 2015. Even if both pieces of guidance were of equal authority (and they aren't), the later-issued Treasury regulations should better represent the IRS's view of the law and prevail over any other previous, ambiguous guidance, especially when there is a difference in facts.

Finally, one can argue that those two pieces of authority don't conflict but simply illustrate two alternatives to performing an F reorganization. Rev. Rul. 2008-18, which is limited to its facts (as discussed above), never takes the position that a QSub election is required; it merely states that the transaction in question had a QSub election and that the transaction qualified as an F reorganization. As noted, an F reorganization can take many forms, so Rev. Rul. 2008-18 may be covering just one set of applicable facts for an effective F reorganization, similar to Rev. Rul. 64-250, but it may not be the only fact pattern to generate an effective F reorganization. Thus, practitioners might have placed too much emphasis on the importance of the QSub election in the facts and less on the code mechanics that bring about a valid F reorganization.

B. No Harm, No Foul for Bad QSub

Another reason the QSub election should be done away with is that the IRS is more than willing to grant relief to an ineffective QSub election connected with an F reorganization.[22] Many private letter rulings[23] involve F reorganizations under Rev. Rul. 2008-18 in which the taxpayers inadvertently filed ineffective QSub elections and the IRS granted relief — and ultimately ruled that the F reorganization was valid.[24]

Generally, the IRS will grant relief and the subsidiary will be treated as a QSub as of the effective date listed on the QSub election if the ineffective QSub election was "inadvertent" under section 1362(f) and the corporation took steps within a reasonable time to cure the issues.[25] The common theme in each piece of guidance is the IRS's conclusion that a QSub election slip-up was inadvertent and its granting of relief whenever that error occurred, thereby making the F reorganization effective even when the QSub election was ineffective. The taxpayer generally has the burden of proof for demonstrating something was inadvertent.

The IRS's consistent rulings that an F reorganization is proper even if there is an ineffective QSub election resulting from the trap described above further show how unnecessary this step is.

C. Why Are QSub Elections Required?

Now that we have analyzed the levels of authority, the trap for the unwary, and how the IRS addresses those issues, we must ask: What is the legal framework for pushing practitioners and IRS agents to request a QSub with each F reorganization?

Unfortunately, there is no clear technical reason why a QSub election should be required for an F reorganization to be effective. The

[20] IRS, *supra* note 17 ("Although revenue rulings represent the conclusions of the Service on the application of the law to a given set of facts, they do not carry the same force of authority as do Treasury Regulations because each revenue ruling is limited to the facts provided. Consequently, revenue rulings provide valid precedent only if a taxpayer's facts are substantially the same as those described in the ruling.").

[21] *Id.* ("In applying revenue rulings, the effect of subsequent legislation, regulations, court decisions, and other revenue rulings should always be considered.").

[22] Reg. section 1.1362-4(a)(2); and section 1362(f).

[23] A letter ruling may not be relied on as precedent by taxpayers (other than the taxpayer who submitted the letter ruling) or IRS personnel. However, in practice, letter rulings provide a guiding light for how the IRS will act.

[24] LTR 201724013; LTR 201821011; and LTR 202114013.

[25] LTR 201724013; LTR 201821011; and LTR 202114013.

Treasury regulations lay out six requirements for an F reorganization to be effective, none of which require a QSub election:

1. resulting corporation stock must be distributed in exchange for transferor corporation stock;[26]
2. identity of same person stock ownership;[27]
3. no prior assets or attributes of resulting corporation;[28]
4. liquidation of transferor corporations;[29]
5. resulting corporation is the only acquiring corporation;[30] and
6. transferor corporation is the only acquired corporation.[31]

Further, a QSub election is superfluous. Reg. section 1.1361-4(a)(2) specifies that when a QSub election is made, the subsidiary corporation is deemed to have liquidated into the parent S corporation. When a corporation is converted to a single-member LLC, the corporation is similarly deemed to have liquidated.[32] Therefore, the tax implications are the same regardless of whether a QSub election is made.

It appears practitioners and IRS agents alike only look for a QSub election in an F reorganization because one was used in the fact pattern in Rev. Rul. 2008-18. The revenue ruling never stated that a QSub election was required, but to avoid any issues with the IRS, taxpayers typically take the most conservative position possible and follow the exact steps in the revenue ruling, despite the IRS's clarification in reg. section 1.368-2(m)(4) (Example 5) that an F reorganization can take place without a QSub election. That logic is akin to saying the only way to make brownies is to follow the exact recipe on the Betty Crocker box. While safer, a recipe generally isn't the only way to prepare a dish.

One may point to the reference to reg. section 1.1361-4(a)(2) in Rev. Rul. 2008-18, which states that the acquisition of the stock of a corporation by an S corporation followed by a QSub election can be stepped together as part of a larger transaction, providing the unique benefit driving the QSub:

> The tax treatment of the liquidation or of a larger transaction that includes the liquidation will be determined under the Internal Revenue Code and general principles of tax law, *including the step transaction doctrine*.[33] [Emphasis added.]

However, these same step transaction provisions were also included in reg. section 1.368-2(m)(1), issued seven years after Rev. Rul. 2008-18 was published, for F reorganizations without the use of a QSub election:

> For purposes of this paragraph (m), a transaction or a series of related transactions that can be tested against the requirements set forth in paragraphs (m)(1)(i) through (vi) of this section (a potential F reorganization) begins when the transferor corporation begins transferring (or is deemed to begin transferring) its assets, directly or indirectly, to the resulting corporation, and it ends when the transferor corporation has distributed (or is deemed to have distributed) to its shareholders the consideration it receives (or is deemed to receive) from the resulting corporation and has completely liquidated for federal income tax purposes. . . . *Deemed transfers also include those resulting from the application of step transaction principles*.

One could argue that the QSub is essential to help preserve the S election for the Newco in the F reorganization. However, this position doesn't appear to be supported by law. In Rev. Rul. 64-250, there was a merger of Newco into Oldco, and the IRS ruled that the S election of Oldco continued for Newco.[34] Considering that Rev. Rul. 64-250 is the authority that Rul. Rul. 2008-18 uses to support the S election continuity rules, it stands to reason that Rev. Rul. 64-250 states that an S election will continue for the Newco in any type of

[26] Reg. section 1.368-2(m)(1)(i).

[27] Reg. section 1.368-2(m)(1)(ii).

[28] Reg. section 1.368-2(m)(1)(iii).

[29] Reg. section 1.368-2(m)(1)(iv).

[30] Reg. section 1.368-2(m)(1)(v).

[31] Reg. section 1.368-2(m)(1)(vi).

[32] Reg. section 301.7701-3(g)(1)(iii).

[33] Reg. section 1.1361-4(a)(5).

[34] Rev. Rul. 64-250; *see* Rev. Rul. 2008-18; *see also* LTR 200835002.

F reorganization of an S corporation, and not just one under Rev. Rul. 2008-18 (that is, with a QSub).

The lack of clear technical purpose under the code or Treasury regulations is another reason why the QSub election should be removed from the F reorganization structure. As it stands, it seems the election serves only as a trap for the unwary.

D. Helping the IRS and Taxpayers

Removing the QSub from the typical F reorganization structure is a win-win for taxpayers, tax practitioners, and the IRS. To reiterate: The QSub serves only as a trap, and the QSub election creates a material amount of administrative work without any benefit to the IRS or the taxpayer.

F reorganizations have been a commonly used structure for decades. In 2008, because of its proliferation in the tax world, the IRS even updated the QSub election form by adding a check box to indicate whether the taxpayer was performing an F reorganization. By removing the QSub election from the F reorganization structure, the IRS may reduce some of its workload in some of its most overburdened divisions.

The workload has increased for IRS agents because of the growing complexity of tax returns resulting from cross-border and other transactions that are administratively difficult to track (such as cryptocurrency), and the IRS has lost a large number of agents over the past 10 years.[35] The agency has made several announcements stating that it is overburdened and needs additional employees to clear its backlog of work.[36] Just in the early portion of 2022, the IRS has made public announcements that it is looking to hire:

- 450 revenue agents for the Small Business/Self-Employed Division;[37]
- 100 tax litigation attorneys;[38]
- 200 technologists to focus on modernizing the job;[39] and
- 5,000 positions in Austin, Texas; Kansas City, Missouri; and Ogden, Utah.[40]

Based on the crisis it is facing, the IRS should seek to make its operations as efficient as possible with the agents they have. Considering that most S corporations would be governed by SB/SE, and the QSub elections get sent to Austin, Kansas City, and Ogden for processing, the IRS could help alleviate some of its backlog by eliminating the useless QSub election step in an F reorganization. That doesn't reflect the additional time agents must take to grant relief for all the inadvertently ineffective QSub elections, which most likely make up a larger number of the ineffective elections filed and create no additional revenue for the IRS.

VI. Conclusion

For the benefit of taxpayers, practitioners, and the IRS, we suggest the Service issue guidance to remove the QSub election step from the typical F reorganization structure. That will make it easier for taxpayers to comply with the law and easier and more cost-efficient for the IRS by reducing the pointless administrative actions and hurdles in an F reorganization with S corporations. If the IRS doesn't issue guidance, we humbly suggest that practitioners stop using the QSub when structuring an F reorganization because it serves only as a trap for the unwary. ■

[35] "IRS Continues Hiring Trend; Looks to Add Over 400 Revenue Agents in the SB/SE Division," *JD Supra*, July 18, 2022; and IRS, "Special Virtual Sessions Coming Up for Those Interested in Compliance Positions; IRS Hiring 470 Revenue Agents," IR-2022-136 (July 12, 2022).

[36] IRS, "IRS Continues Work to Help Taxpayers; Suspends Mailing of Additional Letters," IR-2022-31 (Feb. 9, 2022).

[37] IRS, *supra* note 35.

[38] IRS, "IRS Chief Counsel Looking for 200 Experienced Attorneys to Focus on Abusive Tax Deals; Job Openings Posted," IR-2022-17 (Jan. 21, 2022).

[39] IRS, "IRS Information Technology Looking for Over 200 Technologists to Focus on Modernization; Job Openings Posted With More to Come," IR-2022-59 (Mar. 16, 2022).

[40] IRS, "IRS Hiring More Than 5,000 Positions in Austin, Kansas City, Ogden," IR-2022-55 (Mar. 10, 2022).