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SUBCHAPTER C REFORM OF MERGERS AND ACQUISITIONS AFTER GENERAL UTILITIES:

NOW WHAT IS CONGRESS WAITING FOR?

by

JOHN R. MCGOWAN*

In recent years, many studies have been made in the area of Subchapter C reform in hopes of rationalizing and simplifying the law.¹ This topic has received renewed attention recently with an invitational conference on the reform of Subchapter C.² This conference was put on to assist the Treasury in its ongoing study of Subchapter C³ and to provide a forum for the discussion of views on this important subject. In addition, one of the latest and most comprehensive studies in this area was released on May 20, 1985 as the final report of the Senate Finance Committee.⁴ This proposal, called the "Subchapter C Revision Act of 1985," represents perhaps the largest examination of the fundamental rules in the Internal Revenue Code relating to the Federal income taxation of corporations and their investors. In this study, numerous proposals were very favorably received, among them were the proposals covering mergers and acquisitions (M & A). For example, the Treasury Department stated: "[the acquisitions] proposals have substantial merit in that they provide greater consistency and symmetry to the tax treatment of corporate acquisitions."⁵

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¹ "Revised Report of the Advisory Group on Subchapter C" (1958), Federal Tax Division of the American Institute of Certified Public Accountants, "Taxation of the Formation and Combination of Business Enterprises" (1979), Committee on Corporate Shareholder Relationships, Tax Section Recommendation No. 1981-5, 34 TAX LAWYER 1986 (1981), American Law Institute, Federal Income Tax Project; Subchapter C (1982), STAFF OF THE SENATE COMMITTEE ON FINANCE, 98TH CONG., 1ST SESS., REPORT ON THE INCOME TAXATION OF CORPORATIONS 95 (Comm. Print 1983), See, e.g., New York State Bar Association Tax Section, "Report of the Committee on Corporations on Section 338" (1983); New York State Bar Association Tax section, Committee on Corporations, comments on 1984 Act provisions (April 26, 1984), See, e.g., Association of the Bar of the City of New York, Committee on Taxation, comments on 1984 Act provisions (April 27, 1984); Association of the Bar of the City of New York, Committee on Taxation, comments on staff report of Senate Finance Committee (November 2, 1983), Certain of the recommendations were also enacted in 1984 as part of the Deficit Reduction Act of 1984, P.L. 98-369, A.B.A. Section of Taxation Task Force Report, "Income Taxation of Corporations Making Distributions with Respect to Their Stock," 37 TAX LAWYER 625 (1984), See, e.g., New York State Bar Association Tax Section, American Bar Association Section of Taxation, *Corporate Tax Reform: Report of the Invitational Conference on Subchapter C* (1988).

² The Invitational Conference on Subchapter C, Sponsored by the ABA Section of Taxation and the New York State Bar Association Tax Section, held in Reston, Virginia on April 10-12, 1987.

³ In the 1986 Act, Congress directed the Treasury Department to study Subchapter C and to submit its findings to them by January 1, 1988. As of late 1989, this report has yet to be submitted.

⁴ STAFF OF THE SENATE FINANCE, 99th Cong., 1st Sess., REPORT ON SUBCHAPTER C REVISION ACT OF 1985, 47 (Comm. Print 1985).

⁵ See, e.g., "Reform of Corporate Taxation," Hearing before the Committee on Finance, UNITED STATES SENATE, 98th Cong., 1st Sess. (October 24, 1983), S. Hrg. No. 98-566. p. 17 (Pearlman Testimony).

These proposals and their implementation are the focus of this paper.

PROBLEMS WITH CURRENT M & A RULES

Over the years, the rules governing M & A, as with most of the rules in Subchapter C, have developed largely in a piecemeal fashion, as provisions have been added or modified to address specifically targeted problems or abuses. In total, these rules have been criticized as inconsistent and unnecessarily complex that produce uncertain and, at times, capricious results in various transactions. In recent discussions of tax reform, there have also been repeated calls for the reduction in the levels of transactional complexity inherent within Subchapter C.⁶ In the area of M & A, some examples of this complexity and inconsistency follow.

The different definitional requirements for a "reorganization" create much of the complexity in current law. Some of these requirements are based on statutory rules, and others are of judicial origin. There are persuasive arguments for standardizing and making uniform these rules, as well as the rules prescribing the various forms of taxable acquisitions. Another area of complexity is that of "boot" and "consideration." No consideration other than voting stock is permitted in a B reorganization. A C reorganization permits a limited amount of boot. Finally, no specific statutory rule limits the amount of boot in an A reorganization, although the continuity of interest doctrine imposes some limitation. Additionally, the qualifying consideration in a B or C reorganization, or a reverse triangular merger, must be voting stock. No such limitations apply in an A reorganization or a forward triangular merger.

Another example of inconsistency in the present rules is in the "substantially all" requirement.⁷ For example, C reorganizations and subsidiary mergers impose a "substantially all" limitation. Certain D reorganizations have the same requirement. However, no such limitation is contained in an A organization. Furthermore, the exact meaning of "substantially all" is unclear. Ruling guidelines applicable to C reorganizations and subsidiary mergers establish a 70 percent of gross assets and 90 percent of net assets standard.⁸ Case law in the D reorganization area has permitted a much smaller percentage of assets to qualify as "substantially all."⁹ One more area of inconsistency in the present M & A rules is produced by the linkage of

⁶ M. Ginsburg, J. Levin, P. Canellos, J. Eustice, "Reexamining Subchapter C: An Overview and Some Modest Proposals to Stimulate Debate," *CORPORATE TAX REFORM, A REPORT OF THE INVITATIONAL CONFERENCE ON SUBCHAPTER C*, American Bar Association Section of Taxation, New York State Bar Association Tax Section, (1988).

⁷ This requirement specifies that the acquiring corporation must acquire "substantially all" the properties of the acquired corporation.

⁸ Rev. Proc. 77-37, 1977-2 C.B. 568. See also Rev. Rul. 88-48 (1988-1 C.B. 117) where the "substantially all" requirement was satisfied when 50 percent of a corporation's historic assets were sold to an unrelated party for cash and immediately thereafter the remaining assets (including cash from the sale) were transferred to the acquiring corporation in a Type C reorganization.

⁹ See, e.g., *J.E. Smothers v. United States*, 642 F.2d 894 (5th Cir. 1981).

shareholder level consequences to corporate level consequences and to the tax treatment of other shareholders. For example, a transaction that fails reorganization status at the corporate level (e.g., because a predisposition of assets causes failure of the “substantially all” requirement) will therefore be fully taxable at the shareholder level, even though the shareholders of the target corporation all receive stock in the acquiring corporation. This is contrary to the policy decision that stock in an acquiring corporation should entitle a target shareholder to tax-free treatment. A final example is illustrated by *May B. Kass v. Commissioner*.¹⁰ In that case, a single minority target shareholder who received solely stock in the acquiring corporation in an acquisition, was required to treat the exchange as a taxable one because of failure of the overall transaction to satisfy continuity of interest. No apparent policy reason can be found to justify linking the tax consequences for one shareholder of a target corporation to the tax treatment of another shareholder. In light of these examples, the question of why Congress didn’t incorporate these proposals as part of the 1986 Tax Act is reconsidered below.

WHY NOT IMPLEMENT THE NEW M & A SYSTEM?

The Treasury Department indicated that its support for the acquisitions proposals in general was premised upon a complete repeal of General Utilities. The Treasury Department stated:

We strongly believe, however, that corporate level electivity is proper and appropriate only if Target is required to recognize its gains and losses in any case where a taxable election is made. Thus, the General Utilities doctrine must not be applicable in these cases.¹¹

Under the proposals, if a cost basis election were made and General Utilities were not repealed, P could obtain a cost basis in the assets acquired while the transaction would be tax-free to both T (because of the retention of *General Utilities*) and the T shareholders (because of the receipt of qualifying consideration). A second reason in favor of the proposed repeal of General Utilities was the general concern that, by providing markedly different tax consequences for different types of distributions, the law created tremendous pressure in favor of certain types of transactions over others. This pressure made the system non-neutral and subject to manipulation, and added great complexity to the area.

Since General Utilities was repealed as part of the TRA of 1986 this major obstacle to the implementation of the M & A proposals has been removed. Moreover, if the acquisition system put forth in the study is theoretically sound, does nothing to violate horizontal or vertical equity, and makes the tax law easier to

¹⁰ *May B. Kass v. Commissioner*, 60 T.C. 218 (1973), *aff’d* without opinion, 491 F.2d 749 (3d Cir. 1974).

¹¹ *See, e.g.*, REFORM OF CORPORATE TAXATION: HEARING BEFORE THE SENATE COMM. ON FINANCE, 98th Cong., 1st Sess. (1983) (Pearlman Testimony).
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administer, why shouldn't Congress include it along with their next tax bill? A more detailed discussion of these proposals is presented below.

AN OVERVIEW OF THE PROPOSALS

A centerpiece of the staff's proposal to replace the acquisitive reorganization provisions of present §368(a)(1)(A), 368(a)(1)(B), and 368(a)(1)(C) and the related triangular acquisition rules of §§368(a)(2)(C), 368(a)(2)(D), and 368(a)(2)(E) is a single elective nonrecognition carryover basis system at the corporate level. Moreover, the common-law doctrines of continuity of interest, continuity of business enterprise, and business purpose would have no applicability in determining whether a transaction qualifies as a qualified acquisition.

Under the proposals, the existing system of transactional electivity would be replaced with an express election regime keyed to the individual parties' decision. If the parties elected to preserve basis for the acquired corporate assets by electing carry-over basis treatment, the transaction would be entitled to nonrecognition treatment regardless of the type of consideration paid for the acquired properties. On the other hand, if cost-basis treatment is elected, full recognition of gain or loss by the corporate transferor would be required. Without question, this is a new paradigm being proposed. This system is decidedly easier to apply than the 1954 Code law, and significantly changes the rules of reorganizations.

The salient features of the new rules are electivity, flexibility and independence.¹² Another pervasive characteristic of the proposals is consistency of treatment to corporate buyers and sellers. Regardless of the shareholder level tax treatment, the tax price for cost-basis treatment will be corporate-level recognition of gain or loss. Moreover, such treatment would be expressly elective by the parties to the transaction.

A CLOSER LOOK AT THE PROPOSALS

Generally speaking, the bill substantially increases the simplicity and uniformity of the rules for classifying mergers and acquisitions, provides for elective tax treatment of the transaction at the corporate level, separates the corporate level tax consequences from the shareholder level tax consequences, and permits shareholder consequences to be determined independent of the tax consequences to other shareholders or investors. The bill as presented also incorporates many other specific acquisition proposals contained in the Staff Report, thereby resolving a number of inconsistencies, removing much complexity and uncertainty under current law.

¹² However, in every cost basis stock acquisition and in asset acquisitions where a premium price is purported to have been paid for goodwill, valuation of assets will be required.

Summer, 1990]

The bill also retains many of the existing code-sections in an effort to facilitate the transition between current law and the new proposals. Additionally, the bill has kept the delegation of regulatory authority to a minimum as an attempt to reduce the uncertainty engendered by another significant tax law change.

Definition of a Qualified Acquisition

The bill simplifies and brings uniformity to the rules classifying corporate mergers and acquisitions. New Sec. 364 defines a "qualified acquisition" as either a "qualified stock acquisition" or a "qualified asset acquisition."¹³ A qualified stock acquisition is defined as any transaction or series of transactions during the 12-month acquisition period in which one corporation acquires stock representing control of another corporation. A qualified asset acquisition means (1) any statutory merger or consolidation, or (2) any other transaction in which one corporation acquires at least 70 percent of the gross fair market value¹⁴ and at least 90 percent of the net fair market value of the assets of another corporation held immediately before the acquisition,¹⁵ and the transferor corporation distributes, within 12 months of the acquisition date, all of its assets to its shareholders or creditors. For these purposes, the definition of "control" is conformed to that contained in section 1504(a)(e.g., 80 percent of vote and value) of the Code.¹⁶

The bill also repeals section 368. Acquisitive reorganizations ("A", "B", and "C" reorganizations and subsidiary mergers) under current law would be replaced by the rules for qualified acquisitions. The "D" reorganization rules would be replaced by special rules relating to qualified acquisitions between related parties. Transactions qualifying under current law as an "E" reorganization (a recapitalization) and a "F" reorganization (a mere change in identity, form, or place of organization of one corporation) are conformed to the definition of qualified acquisitions. Finally, the "G" reorganization rules (bankruptcy reorganization), developed largely in response to continuity of interest problems in those types of transactions, would no longer be needed and therefore would be repealed.

The following comparisons with present law are noteworthy. To meet the requirements of a qualified asset acquisition, the target corporation must distribute all of its assets to its shareholders and creditors.¹⁷ Current law requires liquidation pursuant to the plan in order to qualify as a Type C reorganization.¹⁸ The definition of a qualified stock acquisition prohibits creeping acquisitions beyond the requisite one-year period.¹⁹ This rule conforms to the treatment of a "qualified stock

¹³ Report, *supra* note 4 at 112.

¹⁴ See generally, the ruling guidelines of Rev. Proc. 77-37, 1977-2 C.B. 568.

¹⁵ Aggregation by affiliates would be permitted in prop. I.R.C. § 365(a)(5). This rule is similar to I.R.C. § 338(h)(8) (1990) of current law.

¹⁶ I.R.C. 1504 (1990).

¹⁷ Report, *supra* note 4, at 113.

¹⁸ I.R.C. § 368(a)(2)(G) (1990).

¹⁹ Report, *supra* note 4, at 112.

purchase'' of current section 338.²⁰ Moreover, assets acquired by distribution (whether or not by liquidation) will not qualify under the new rules.²¹ The definition of a qualified acquisition is transactionally focused. The type of consideration paid (i.e., stock, debt, or cash) is irrelevant. Finally, there seems to be some discontinuity in the rules for stock acquisitions and those for asset acquisitions. Stock control is 80 percent, while 70 percent of gross assets and 90 percent of net assets must be acquired for a qualified asset acquisition. The next section generally covers the proposed Sec. 365 election.

Elective Tax Treatment of Qualified Acquisitions

The corporate level tax consequences of a qualified acquisition are explicitly made elective. Under new section 365, all qualified acquisitions are treated as ''carryover basis acquisitions'' unless an election to be treated as a ''cost basis acquisition'' is made.²²

In general, elections may be made on a corporation-by-corporation basis. Thus, for example, if an acquiring corporation makes a qualified stock acquisition of both a target corporation and a target subsidiary, a cost basis election may be made for the target corporation but, if desired, no such election need be made for the target subsidiary.

Within a single corporation, the same election must generally apply for all of the assets of the corporation.²³ A consistency rule would provide that assets held by a single corporation during the consistency period must be treated consistently, either as all cost basis or all carryover basis when acquired.²⁴ Notwithstanding the consistency rule, an inconsistent carryover basis election may be made with respect to goodwill and certain other unamortizable intangibles.²⁵ For example, a separate carryover basis election may be made with respect to such property even though a cost basis election is made for all of the other assets of the target corporation. However, inventory and securities are specifically excluded from this carryover basis exception.²⁶

In general, no cost basis election may be made with respect to any qualified acquisition between related parties.²⁷ These generally refer to transactions where, after application of the attribution rules, there is 50 percent or greater common

²⁰ I.R.C. § 338(d)(3) (1990).

²¹ It appears this provisions is designed to prevent a form of a creeping acquisition. Report, *supra* note 4, at 113-114.

²² Report, *supra* note 4, at 117.

²³ *Id.* at 119.

²⁴ *Id.*

²⁵ *Id.* at 118.

²⁶ Prop. I.R.C. § 365(b)(2)(C).

²⁷ *Id.* at 121.

ownership between the target and acquiring corporations.²⁸ In addition, no cost basis election could be made with respect to a transaction qualifying as an ‘‘E’’ and ‘‘F’’ reorganization under current law.²⁹ Finally, a mandatory cost basis election generally applies to a qualified asset acquisition where the acquiring corporation is a non-taxable entity (e.g., a tax exempt entity, a regulated investment company, or a foreign corporation).³⁰

An election must be made before the later of (1) the 15th day of the 9th month following the month in which the acquisition date occurs, or (2) the date prescribed in regulations.³¹ Once made, an election is irrevocable.³²

Corporate Level Tax Consequences of Qualified Acquisitions

The corporate level tax consequences of a qualified acquisition result directly from the election made at the corporate level. For example, in the case of a carryover basis acquisition, no gain or loss is recognized by the target corporation and the acquired corporation obtains a carryover basis in any assets acquired.³³ Attributes carry over under section 381.

In the case of a cost basis acquisition, the target corporation recognizes gain or loss and the acquiring corporation obtains a basis in any assets acquired determined under section 1012. Attributes do not carry over. Where the cost basis acquisition is a qualified stock acquisition, the target corporation is deemed to have sold all of its assets for fair market value at the close of the acquisition date in a transaction in which gain or loss is recognized, and then is treated as a new corporation which purchased all of such assets as of the beginning of the day after the acquisition date.³⁴ A special rule is provided in the case where a target corporation is a member of an affiliated group and a cost basis election is made.³⁵ In general, unless the parties elect otherwise, a target corporation in that situation shall not be treated as a member of such group with respect to the gain or loss recognized in the transaction.³⁶

The basis of any property received by a target corporation in a qualified asset acquisition is the fair market value of such property on the acquisition date.³⁷ The basis of stock acquired by an acquiring corporation in a qualified stock acquisition

²⁸ *Id.* at 123.

²⁹ *Id.* at 124.

³⁰ *Id.* at 125.

³¹ *Id.* at 126.

³² *Id.*

³³ *Id.* at 106-110.

³⁴ *Id.* at 107.

³⁵ *Id.* at 108.

³⁶ *Id.*

³⁷ *Id.* at 117.

is determined under new section 1020 of the Code.³⁸

Under the bill, sections 337 and 338 of the current law are repealed. As discussed further in the following section, the target's shareholders could receive tax-free exchange treatment to the extent that they receive qualified consideration. Qualified consideration generally consists of stock of the acquiring corporation or its affiliates, regardless of the corporate level treatment.

Shareholder Level Tax Consequences of Qualified Acquisitions

In general, shareholder level tax consequences of a qualified acquisition are determined independent of the corporate level tax consequences and independent of the election made at the corporate level. Thus, even if a transaction is treated as a cost basis acquisition at the corporate level, it may be wholly or partly taxfree at the shareholder level. In addition, shareholder level consequences are generally determined on a shareholder-by-shareholder basis. Moreover, the consequences to one shareholder do not affect the tax treatment of other shareholders or investors of the target corporation.

As a general rule, nonrecognition treatment is provided to shareholders or security holders of the target corporation upon receipt of "qualifying consideration," i.e., stock or securities of the acquiring corporation.³⁹ Where the acquiring corporation is a member of an affiliated group, such shareholders may also receive "qualifying consideration" from the common parent of such group and any other member of such group specified in the regulations. The nonrecognition rule applies to the receipt of securities only to the extent the issue price of any securities received does not exceed the adjusted basis of any securities surrendered.⁴⁰ The rules for "nonqualifying consideration" are presented below.

Receipt of "nonqualifying consideration" (i.e., any consideration other than qualifying consideration) generally results in recognition of gain to the shareholder or security holder.⁴¹ Such gain is treated as gain from the sale or exchange of property unless the receipt of nonqualifying consideration has the effect of a distribution of a dividend.⁴² The determination of dividend effect is made by treating the shareholder as having received only qualifying consideration in the exchange, and then as being redeemed of all or a portion of such qualifying consideration (to the extent of the nonqualifying consideration received).⁴³ For these purposes, earnings and profits of both the target and acquiring corporations are generally taken into account.⁴⁴

³⁸ See generally, *Id.* at 160.

³⁹ *Id.* at 83.

⁴⁰ *Id.* at 85.

⁴¹ *Id.* at 94.

⁴² *Id.* at 95.

⁴³ *Id.* at 96.

In general, shareholders or security holders obtain a substitute basis in any qualifying consideration received, and a fair market value basis in any nonqualifying consideration received.⁴⁵ Controlling corporate shareholders of the target corporation generally obtain a basis in any qualifying consideration received equal to the lesser of substitute basis or fair market value basis.⁴⁶

Basis in Stock of Controlled Subsidiary

Under new section 1020, the basis of a controlling corporate shareholder in the stock of a controlled subsidiary is generally equal to the net inside basis of the assets of the subsidiary, i.e., the aggregate basis of the assets of the subsidiary reduced by the aggregate adjusted issue price of the liabilities of the subsidiary. By setting the basis of the stock of the subsidiary generally equal to the basis of the assets of the subsidiary, many of the discontinuities under current law between transactions involving the assets of a subsidiary and transactions involving the stock of such subsidiary are eliminated. Moreover, complex continuing adjustments to the stock basis, such as those contained in the consolidated return regulations, are not required.⁴⁷ This proposal would replace existing law which gives the parent a substituted basis if the subsidiary is incorporated, a carryover basis if the stock is acquired in a reorganization,⁴⁸ and a cost basis if the stock is purchased.⁴⁹

The final report also contains an additional provision which is designed to address the problem of disappearing or excessive basis. For a three year period, the net inside basis of the controlled subsidiary must be increased by any balance in a "premium account" or decreased by any balance in a "discount account."⁵⁰ The premium (or discount) account is initially the amount by which the controlling corporate shareholder's basis in the stock of the controlled subsidiary exceeds (or is less than) the net inside basis of the subsidiary. This situation arises only when cost basis treatment is not elected. Thus, for example, if a corporation acquires all of the stock of another corporation for \$100 and the net inside basis of the assets of such corporation at the time of the acquisition is \$80, then there is an initial premium account of \$20. Should the corporation, the next day, sell all the stock of the subsidiary for \$100, its basis in such stock would be the net inside basis of the assets of the subsidiary (\$80) plus the premium account (\$20) or a total basis of \$100. Accordingly, no gain or loss would be realized or recognized by the corporation upon disposition.

Special rules are provided to adjust the accounts for recognized gains and losses of the subsidiary during the three-year period that the accounts are to be

⁴⁵ *Id.* at 104.

⁴⁶ *Id.*

⁴⁷ See TREAS. REG. 1.150Z-32A (1981).

⁴⁸ I.R.C. § 362(b) (1990).

⁴⁹ I.R.C. § 1012 (1990).

⁵⁰ Report, *supra* note 4, at 160-61.

maintained.⁵¹ In general, these rules are made necessary to eliminate the problem under current law of permitting double gains or double losses upon the sale of the stock and assets of the subsidiary. After three years, the accounts would automatically be zero and no further adjustments would need to be made to them.⁵²

The primary effect of proposed §1020 appears whenever a parent attempts to dispose of its subsidiary in a taxable acquisition. Subsidiary liquidations would result in a carryover asset basis to the parent, and its basis in the subsidiary's stock would disappear. In the case of a sale of the subsidiary's stock, §1020 would have the same effect as if the parent liquidated its subsidiary, reincorporated it, and then sold its stock. The parent's gain or loss on the sale would be the same whether the subsidiary sold its assets or the parent sold the subsidiary stock. To illustrate, consider the following example. Suppose parent P has a subsidiary S which holds assets having a basis of \$600 and a value of \$1,000. P's sale of S would rise to the same \$400 of gain whether S sells its assets and liquidates into P or whether P sells the stock of S, since P's basis for the S stock would conform to S's basis for its assets under proposed §1020.

RELATED DEVELOPMENTS: TAX REFORM ACT OF 1986

As mentioned earlier, the Tax Reform Act of 1986 (TRA) did not include the Finance Committee staff acquisition proposals, but it did incorporate the staff's proposal to repeal the General Utilities doctrine, though in a different form than the staff version. Although the staff proposal provided relief provisions at the shareholder level, TRA provided no permanent nonrecognition exceptions at either the corporate or shareholder levels. Generally, TRA repealed the nonrecognition rules of Section 336 and 337. These changes should lead taxpayers to structure their corporate acquisition transactions as tax-free reorganizations. Shareholders may also make Sec. 338 elections and pay the tax on any resulting gain if it is relatively insubstantial or can be sheltered by loss carryovers of the target.

CONCLUSION

The provisions of the federal tax laws governing corporations and their shareholders have undergone many changes over the years. However, this evolution has led to anything but a rational and consistent structure. Subchapter C of the Internal Revenue Code has many inconsistent and complex provisions. This is also the case in the area of mergers and acquisitions. Recently, the ABA held an invitational conference on Subchapter C reform. At this conference, the acquisition

⁵¹ These accounts can fluctuate during their three-year life to reflect corporate level realized gains and losses attributable to preacquisition built-in appreciation or depreciation in value. Realized built-in gains decrease the premium account and increase the discount account; realized built-in losses increase the premium account and decrease the discount account.

⁵² Prop. I.R.C. § 1020(d)(5).

proposals were discussed along with other topics of potential reform in Subchapter C.⁵³ These proposals were also vigorously debated when the staff of the Senate Finance Committee released its final report in 1985. At that time, a large obstacle to implementing these proposals was the existence of the *General Utilities* doctrine. Since that time, Congress has eliminated General Utilities and its accompanying nonrecognition provisions as part of the Tax Reform Act of 1986. Consequently, since these proposals in the area of mergers and acquisitions unquestionably increase the levels of consistency, simplicity and equity in the Internal Revenue Code, the question of why Congress doesn't implement them gets harder and harder to answer.

⁵³ The questions the ABA addressed were: Should dividend income be used to offset capital losses, without limitation? Should there be some sort of mark to market each year to recognize capital gains? Should there be a shareholder credit to offset the corporate tax after repeal of General Utilities? Should the penalty taxes of I.R.C. 531, 541 be repealed? Should the acquisition proposals include the special rule for goodwill that allows a carryover basis when the corporation otherwise elects the cost basis acquisition?

