

Investment Banking Tax Factors B8318-001

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OUTLINE OF COURSE: As the course title implies, we will endeavor to **familiarize** students with the tax principles that must be considered by corporate managers, and their advisers, with respect to transactions that result in a re-alignment of the corporation's business activities and/or its capital structure. In most respects, the course will be taught from the perspective of the outside adviser (investment banker, attorney, CPA, management consultant), commissioned to provide advice with respect to a major corporate transaction or financing decision. This approach dictates that the tax factors impacting the decision-making process should (and will), wherever possible, be illustrated by reference to actual "deals". In general, it is our intention (and fervent hope) that each student will emerge from the course with an understanding of the tax planning alternatives available under the current state of the law and, in addition, gain an appreciation of the importance of tax results (and, where appropriate, financial accounting impact) as an element in the process of selecting the optimum financing/restructuring vehicle or alternative.

To comprehend the current state of the law, one must consider the myriad factors that motivated both Congress and the Internal Revenue Service (the I.R.S. or the "Service"), in their legislative and administrative efforts, respectively. Accordingly, we will focus a good deal of attention on the types of transactions and financial instruments that characterized that particular "takeover" era that, unofficially at least, concluded with the demise of the (first) UAL buyout. Throughout the 1980s and '90s, advisers devised "tax-efficient" transaction structures that were, after relatively brief periods of utility, interdicted, or summarily eliminated, either by legislation or by administrative fiat. These structures generally found expression in well-known transactions, the particulars of which will be dissected during our review of just how we arrived at where we are today. On May 28, 2003, President Bush signed into law groundbreaking legislation (known as the "JGTRRA") that, most notably, treats "qualified dividend income" as though it were, for purposes of assessing taxes, "net capital gains". This means that dividends will be taxed at no greater than a 15 percent rate. (The favored treatment of qualified dividend income has been extended through 2010 by the Tax Increase Prevention and Reconciliation Act of 2005 and in the waning days of 2010 the provision was further extended through the end of 2012). At the end of 2012, Congress decided to retain the favored treatment of qualified dividend income permanently. However, the highest tax rate imposed on such income, as well as on capital gain income, was increased to 20 percent. This change will alter the tenor of our discussions with respect to the broad topic of "distributions with respect to stock". For example, we spend considerable amount of time addressing the tax consequences of *redemptions* of stock. For individual (non-corporate) shareholders, it has always been critical to insure that the redemption qualifies as a "sale or exchange", rather than as a "distribution" (of property to which

Sec. 301 applies). In the case of a closely-held corporation, unless the redeemed shareholder is willing to terminate his or her involvement in the redeeming corporation entirely (in which event the redeemed shareholder will be eligible to “waive” attribution of the stock owned by his or her family members so that the redemption can qualify as a sale or exchange under Sec. 302(b)(3)), it is exceedingly difficult to structure such an “exchange” redemption. Now, however, with tax rates on dividends identical to those assessed on capital gains, the “pressure” to insure that the redemption qualifies for exchange treatment is much (but not entirely) diminished. (Exchange treatment is still more advantageous for non-corporate shareholders because the **amount** included in gross income is **only** the amount received from the corporation **minus** the basis of the stock surrendered in the transaction; if the redemption is treated as a “distribution”, however, the **entire amount** received from the corporation, undiminished by the basis of the stock surrendered, must be included in the recipient’s gross income). Other topics that will be affected by this convergence of dividend and capital gain tax rates include our discussion of stock dividends and distributions in “partial liquidation”. In addition, in the American Jobs Creation of 2004, Congress enacted Sec. 965 which permitted a corporation that is a “U.S. shareholder” of a “Controlled Foreign Corporation” to obtain an 85 percent deduction with respect to certain cash dividends remitted by the latter to the former. The maximum amount of dividends eligible for this benefit was the greater of (i) \$500 million or (ii) the amount shown on the corporation’s “Applicable Financial Statement” as earnings “indefinitely invested” outside of the United States (the so-called “APB No. 23 amount”). Further, to secure the 85 percent deduction, the dividends were required to be deployed in the United States pursuant to a “Domestic Re-Investment Plan”. Thus, as corporations began extracting sums from their CFCs, under the auspices of Sec. 965 (the extraction had to occur, in most cases, on or before December 31, 2005), dividends were much in the news.

At present, we find ourselves, increasingly, involved in structuring “strategic” transactions that are undertaken for “valid commercial reasons”. Since the late 1990s, merger and acquisition activity, involving, to a significant extent, the use of equity securities of the acquirer, has, albeit at a reduced level, been particularly prevalent. As a result, we will also focus considerable attention on the *tax-free reorganization* provisions of the law. These provisions were altered through the issuance of regulations (See Reg. Sec. 1.368-1(d) and (e)) substantially liberalizing the bedrock “continuity of proprietary interest” and “continuity of business enterprise” doctrines. Nevertheless, LBOs continue to flourish, and we will review common LBO patterns and structures, together with the financial accounting convention, so-called “recap accounting”, that is commonly availed of in LBOs. (Will FASB’s decision, embodied in Statements of Financial Accounting Standards Nos. 141, 141(R), and 142, to, in effect, countenance the permanent capitalization of goodwill render recap accounting obsolete?—Probably not; an acquirer still desires to avoid *acquisition accounting* because the amortization of intangible assets, that are both “separable” from goodwill and possess a “determinable” useful economic life, is still required and avoiding acquisition accounting will also eliminate the possibility of a write-off or write-down of goodwill in the future should this asset be found to have become “impaired”: in fact, recap accounting was recently employed with respect to the LBO of HCA). In addition, we have witnessed a renaissance of the corporate *spin-off* as the divestiture tool of choice; we will consider the significant tax factors—having their genesis in the 1986 repeal of the “General Utilities” doctrine—that have played a role in this phenomenon.

Even spin-offs, however, have been characterized by certain excesses; an exceedingly popular spin-off format, the venerable *Morris Trust* transaction, was exploited (through undue "monetization") in a manner that prompted Congress (in 1997, via its enactment of Sec. 355(e)) to substantially (but by no means entirely) eliminate the technique. More recently, in Rev. Rul. 2001-29, which rendered Rev. Rul. 73-236 obsolete, the I.R.S. finally conceded, in response to changes in the REIT rules that had been enacted in 1986, that, for purposes of the spin-off rules, REITs **can**, in fact, be considered to be engaged in the "active conduct" of a trade or business—As a result, the opportunity to separate a corporation's real estate from the operating business in which such realty is employed, on a fully tax-free basis, presented itself. Penn National Gaming appears to be the first corporation to avail itself of this strategy. It announced, in the waning days of 2012, that it would "drop" its real estate into a newly-created subsidiary the stock of which would be distributed to its shareholders in a "tax-free spin-off." In conjunction with the spin-off, the distributed "Propco" will, at the earliest possible time, elect to be treated as a REIT. Such Propco will then lease its real estate to Penn National ("Opco") which will continue to operate its gaming business on the leased property. In 2014, Windstream received a similar ruling from the I.R.S. and dropped its "transmission assets" into a Propco the stock of which will be spun-off to its shareholders. Propco will immediately elect to be treated as a REIT. However, in late 2015, in connection with the "extenders" legislation, Congress eliminated the ability to effect a tax-free spin-off where one (but not both) of the corporations involved in the spin-off "is a REIT." Further, a corporation participating in a tax-free spin-off will be precluded from electing REIT status for ten years following such spin-off. Moreover, as regards Morris Trust transactions, the I.R.S., in April, 2002, issued Temporary Regulations (See Temp. Reg. Sec. 1.355-7T) and, as a result, we now have definitive and eminently workable guidelines with which to rebut the presumption, embodied in Sec. 355(e)(2)(B), that a spin-off and an acquisition, that occur within two years of one another, are parts of a prohibited "plan" or "series of related transactions"; a finding that renders the spin-off taxable at the corporate level. These regulations are, by any standard, exceedingly permissive, with the result that an acquisition following a spin-off will *only* be regarded as a component part of a prohibited plan which encompasses such spin-off if there was an agreement, understanding, arrangement or "substantial negotiations", regarding the acquisition or a "similar acquisition", at some time during the two year period ending on the date of the distribution. The announcement by Realogy, Inc. (spun-off by Cendant, Inc.) of its agreement to be acquired by a private equity firm in an all-cash deal, in a manner that will not render the prior spin-off taxable, is testimony to the permissiveness of these rules, as is the announcement by First Data Corp. of its agreement to be acquired by KKR only six months after its spin-off of Western Union, as is the disclosure by Trane, Inc., just four months after its spin-off of WABCO, of its agreement to be acquired by Ingersoll-Rand. These Temporary Regulations were finalized in April, 2005 (See Reg. Sec. 1.355-7) without substantial change. Accordingly, acquisitions taking place well within two years of a spin-off will not "taint" the spin-off if the acquisition (or a similar acquisition) was neither agreed to nor "substantially negotiated" within the two year period preceding the date of the spin-off. Google's proposed acquisition of Motorola Mobility, announced some seven months after the latter's spin-off from Motorola Solutions, is confirmation of this observation, as is ETP's announced acquisition of Sunoco, Inc. less than four months after the latter had participated in a spin-off. Ralcorp, just nine months after completing its spin-off of Post Holdings, agreed to be acquired by Conagra even though, during the two-year period preceding such spin-off, Conagra had offered to acquire Ralcorp and, thus, the parties

might well be viewed as having engaged in substantial negotiations during the prohibited period. In addition, in Rev. Rul. 2005-65, the I.R.S. concluded that a spin-off occurring **after** an acquisition was not part of a plan (or series of related transactions) that included such acquisition, primarily because the spin-off had been publicly announced prior to the commencement of discussions with respect to the acquisition. Further, in Rev. Ruls. 2003-18 and 2003-38, the I.R.S. acknowledged the existence of an “expansion exception” to the five year *active business* requirement. See Reg. Sec. 1.355-3(b)(3)(ii). This is a major breakthrough because, in appropriate cases, it allows the corporation to do what Secs. 355(b)(2)(B), (C) and (D) seemingly prohibit—accumulate surplus funds, and then create or purchase a business (or control of a corporation conducting a business), and then promptly (i.e. within five years) spin-off such created or purchased business, in lieu of paying ordinary dividends. See, also, LTR 200351005. See also Cypress Semiconductor’s split-off of Sunpower, Inc. Further, the I.R.S., in Rev. Rul. 2003-55, substantially liberalized the *business purpose* requirement that must be satisfied if a spin-off is to qualify for tax-free treatment: The ruling clearly indicates that the distribution (of the stock of the controlled subsidiary) need only be *motivated* by a valid corporate business purpose—The regulations do not, as heretofore universally thought, require that the corporation *actually succeed* (but only if the failure to succeed is due to post-distribution “unexpected changes in market or business conditions”) in accomplishing the business purpose which motivated the separation. In Rev. Proc. 2003-48, the Service, surprisingly, announced that it would no longer provide rulings on the issue of whether a spin-off was undertaken for a valid corporate business purpose, or on whether the transaction was used, principally, as a prohibited “device” for the distribution of earnings and profits, and on whether a separation and an acquisition are component parts of a Sec. 355(e) “plan”. The I.R.S. recently announced that it has no plans to lift this embargo. In fact, in the summer of 2013, it went much further and announced that it will no longer issue rulings on any aspect of a spin-off. The Service regards spin-off rulings as nothing more than “comfort” rulings and believes that it should not expend any of its increasingly limited resources in issuing such rulings. However, concurrently, the Service promised that it would issue more “published guidance” on these topics and promptly began delivering on that promise with the issuance not only of Rev. Rul. 2003-55 but also with the issuance of Rev. Ruls. 2003-74 and 75; rulings which expound upon the popular business purpose known as “fit and focus”. In addition, the Service issued Rev. Rul. 2004-23 which concludes that a distribution whose principal objective is to “increase the stock price” (the prototypical “shareholder purpose”) will, nonetheless, satisfy the business purpose requirement where such increase in share price also accomplishes corporate objectives—for example enabling the corporation to make acquisitions, using its stock, in a manner that “preserves capital” and/or enabling it to enhance the value of its equity-based incentive plans. Finally, definitive case law is only now emerging regarding the tax results associated with “positions” taken in planning and implementing leveraged buyouts and other takeover era transactions. We will study many of these cases (including *Kroy, Ft. Howard Corp., Indopco*---and the regulations, Reg. Sec. 1.263(a)-5, implementing the *Indopco* decision, under which a taxpayer must capitalize, and therefore may not currently deduct, amounts paid to “facilitate” any of 10 enumerated “capital” transactions---, *Seagram, A.E. Staley, Wells Fargo, Lychuk, Newark Morning Ledger, PNC Bancorp, Compaq Computer, I.E.S. Industries, United Dairy Farmers, FMR, FNMA, Freddie Mac, Dover Corp., Tribune Corp.* and the *Merrill Lynch* case) and, in the process, gain an understanding of the risks one shoulders when advising on a transaction structure, or financial instrument, the tax profile of which is not adequately

addressed in the law we currently work with. In addition, the recent past (exacerbated, of course, by the events of September 11, 2001 and 2008's credit crisis) has also been marked by the emergence of a new type of financial counselor; the "workout" expert. A bankruptcy, or out-of-court financial restructuring, is, literally, fraught with taxation considerations, focusing principally on the minimization of debt cancellation (COD) income and the preservation of Net Operating Losses (NOLs) and other valuable "tax attributes". The old Worldcom/MCI, at one point, was perfectly positioned to preserve the bulk of its NOLs (in excess of \$19 billion) for use against taxable income generated after its emergence from bankruptcy—This benefit, however, was ultimately denied when the I.R.S. promulgated regulations that require the use of a "consolidated" or single entity approach (as opposed to a separate entity approach) to the Sec. 108(b) reduction of tax attributes (most notably NOLs), arising from the Sec. 108(a) exclusion, for bankrupt (and insolvent) corporations, of COD income. See Reg. Sec. 1.1502-28. For cases where such income cannot be minimized, and/or such NOLs cannot be preserved, an approach, having its origins in the Bruno's bankruptcy, in which the creditors obtained an amortizable basis in Bruno's assets, in lieu of diminished NOLs, by structuring the transaction to intentionally avoid 'G' reorganization status, will be explored. (The I.R.S. has grudgingly certified the efficacy of the Bruno's approach in LTR 200350016). The economic stimulus legislation signed by President Obama in February, 2009 contained an important new provision, Sec. 108(i), which enabled debtors to exclude COD income from gross income and commence reporting such income, at the rate of 20 percent per year, beginning in the fifth taxable year following the year in which the debt was discharged. In these cases, the debtor need not reduce its tax attributes. This benefit, however, only extended to "re-acquisitions" of "applicable debt instruments" that took place during 2009 and 2010. These deferred amounts are starting to be reported by those debtors that availed themselves of the benefits of Sec. 108(i). For example, Caesars Entertainment Corporation will be required to report, annually, from 2014-2018, some \$700 million of deferred COD income. Our journey through the takeover era will, of necessity, require us to focus much attention on this aspect of corporate life. In addition, 1997's tax legislation focused attention on various forms of securities designed, in some cases, to achieve both tax and financial accounting advantages, or provide an opportunity to defer the tax associated with an appreciated financial position. We will review such securities in connection with our analysis of the tax law's Original Issue Discount (OID) provisions and, in this connection, discuss the I.R.S.'s surprising decision, memorialized in Rev. Rul. 2002-31, that certifies that corporations that issue "contingent convertible debentures" (CoPas) can, in accordance with the contingent payment debt instrument (CPDI) rules described in Reg. Sec. 1.1275-4, obtain interest deductions based on the instrument's "comparable yield"; a yield well in excess of its stated yield. Further, in Rev. Rul. 2003-7, the I.R.S. presented bankers with another present: The ruling certifies the viability of the popular "DECS" product by confirming that the appreciated stock, that forms the corpus of a DECS, will not be deemed to be sold or disposed of (so the deferral objective that motivates the issuance of a DECS is accomplished) so long as the transferor of the appreciated stock retains the right to receive dividends and to exercise voting rights and, most important, retains the (largely theoretical) unrestricted right to reacquire the underlying stock by substituting, for such pledged stock, other property or money. (However, in LTR 200604033, the Service ruled that this deferral would be denied in cases where, in connection with a forward sale, the hypothecated stock is lent to the counterparty—such a transaction constitutes a "present sale" of the appreciated stock.

See also AM 2007-004). In the *Anschutz* case, the court endorsed the Service's position. Moreover, these arrangements do not constitute “constructive sales”, within the meaning of Sec. 1259, because they do not provide for the delivery of a substantially fixed number of shares at a substantially fixed price; the number of shares to be delivered, upon the maturity of the contract, is subject to “significant variation”—such number varies inversely with the price of the stock. Unfortunately, the I.R.S. continues to embrace the view that a DECS is a “straddle”. In July, 2003, the I.R.S. issued Rev. Rul. 2003-97 in which it found that the interest paid or accrued on the debt component of a popular product, known as FELINE Prides, was deductible because the product, an investment unit comprised of a debt instrument and a forward purchase contract, did not run afoul of Sec. 163(l)’s prohibition on deducting interest with respect to a *disqualified debt instrument*. We will, in addition, study the rules relating to “cross-border” reorganizations—where a foreign corporation acquires a domestic corporation in a transaction that the parties intend will constitute a tax-free reorganization—a topic that necessitates careful consideration of the so-called “Helen of Troy” regulations—These regulations (Reg. Sec. 1.367(a)-3(c)) were promulgated to deter domestic corporations from re-incorporating in tax haven locations, principally Bermuda and the Cayman Islands, for the purpose of eliminating U.S. taxation of their foreign source income. These regulations, however, had not proven to be much of a deterrent (primarily because stock prices were depressed and the “penalty” imposed by the Helen of Troy regulations is visited on the corporation’s shareholders; they are required to currently recognize the gain, if any, inherent in their securities) and, as has been widely publicized, companies such as Stanley Works, Nabors Industries, Cooper Industries, Ingersoll-Rand, Weatherford International, Foster-Wheeler, and Leucadia have either expatriated, or actively explored expatriation, where they will join previous expatriates, most notably Tyco International. In early 2012 and extending through the present day, another round of expatriations, involving companies as varied as Aon, Sara Lee, Jazz Pharmaceuticals, Medtronic, Mylan, AbbVie, Tronox, Rowan Companies, Eaton Corporation, Liberty Global, Omnicom, Chiquita, Actavis, Perrigo, Broadcom, Coca-Cola Enterprises, CF Industries and Endo Health Solutions, was announced. In November 2015, Pfizer, Inc. announced its intention to combine with Allergan plc in what would be the largest “cross-border” combination ever undertaken. We will examine the legislation (2004’s “JOBS” Act) designed to substantially impede this exodus (see Sec. 7874; the so-called “anti-inversion” rule) and discuss the “politicization” of this issue. This politicization led the Treasury Department to issue, on September 22, 2014, Notice 2014-52 which attacked certain common post-inversion strategies, such as “hopscotch loans,” and appeared to have a chilling effect on the rush to invert. In fact, Notice 2014-52 ostensibly caused AbbVie to terminate its inversion agreement with Shire plc and incur a \$1.6 billion termination fee in the process. On November 19, 2015, the Treasury Department issued Notice 2015-79 which, among other things, imposes penalties on inversion transactions in which the foreign acquiring corporation and the foreign target corporation are residents of different foreign countries. This Notice, however, did not deter the Pfizer/Allergan combination. We will also see how the Helen of Troy regulations can impact “legitimate” business combinations of the “outbound” variety; those involving existing operating corporations. We will consider, in this regard, the prototypical legitimate “outbound” business combination; the transaction involving Vodafone plc's acquisition of AirTouch. The Service will not prevent these transactions from being carried out, even if literal compliance with the Helen of Troy regulations is not achieved, so long as the transaction exhibits “substantial compliance” with the “active business” element of such regulations.

In summary, the student **will** (we can guarantee it) gain an ability to **recognize** common restructuring/financing scenarios confronting management and should be in a position to propose solutions to these problems in a way that minimizes tax outlays, but in a manner which is consistent with prudent **and ethical** business practice. We will obtain an understanding of the current state of the law through a study of its recent history and secure an appreciation of the outside adviser's crucial role in this process through an analysis of actual transactions. For example, during the course of the semester, we will look at Seagate's "monetization", through the mechanism of a *downstream merger*, of its highly appreciated stake in Veritas Software; the equally bold monetization of Janus's appreciated stake in DST Systems—accomplished via a so-called "cash rich split-off" in which the controlled corporation, the stock of which was distributed to Janus, in exchange for the bulk of its DST stock, was capitalized, largely, with cash in addition to a small five year active business (a strategy profitably duplicated by Houston Exploration which used such a cash rich split-off to reduce, in a tax-efficient manner, KeySpan's substantial equity stake in Houston Exploration; and by Liberty Media with respect to the retirement of its stock owned by Comcast; and by Clorox in connection with the "redemption", via such a split-off, of the 29 percent stake owned by Henke; and by none other than Berkshire Hathaway which, in 2014, engaged in no fewer than three cash rich split-offs, the most recent being its surrender of its PG stock for the stock of a corporation capitalized with cash and the Duracell business----this technique, popularly known as a "cash rich split-off" was specifically addressed in The Tax Increase Prevention and Reconciliation Act of 2005; under new Sec. 355(g), tax-free treatment may be denied if either the distributing corporation or the distributed corporation is a *disqualified investment company*, a corporation whose "investment assets" represent two-thirds or more of the value of its total assets—the first major cash rich split-off to be undertaken under the yoke of these new rules was announced on December 22, 2006: News Corp. distributed the stock of a corporation whose principal asset was News Corp.'s 39 percent stake in DirecTV to Liberty Media in exchange for the latter's 19 percent stake in News Corp. The distributed corporation will not be a disqualified investment corporation, so the split-off can proceed on a tax-free basis, because DirecTV is a "20 percent controlled entity" and, therefore, its stock is not an investment asset; in determining whether the distributed corporation is a disqualified investment corporation, such corporation is deemed to own, instead, its ratable share of DirecTV's assets); the Cable & Wireless/NTL Morris Trust transaction; the innovative "reverse" Morris Trust transactions undertaken by Plum Creek Timber and Georgia-Pacific, by Procter & Gamble and J.M Smucker (twice and counting), by Heinz and Del Monte, by AT&T and Comcast, by Fortune Brands and General Binding, by Forest Oil and Mariner Energy, by Disney and Citadel Broadcasting, by WY and Domtar (in which the distribution step of the transaction took the form of a split-off), by Alltel and Valor Communications Group, by Kraft Foods and Ralcorp and by AmerisourceBergen Corp. and Kindred Healthcare, Inc. (in which **each distributing corporation avoided the penalties imposed by Sec. 355(e) even though each group of shareholders emerged with exactly 50 percent of the stock of the corporation emanating from the post-spin-off business combination, a strategy that will be duplicated by Dow and DuPont whose own "merger of equals" will be followed by multiple spin-offs**) and gain insights into why (Rev. Rul. 2003-79 provides the answer) there has been nothing short of a renaissance for this technique; the perpetually proposed (and, finally, consummated) spin-off by Lucent of Agere Systems which, among other things, featured the preliminary disposal of **in excess**

of 20 percent of the value (but not the voting power) of the distributed subsidiary's stock and the use of such stock to retire, in a "tax-efficient" manner, a portion of the parent's indebtedness; the spin-off by Citigroup of Traveler's, which also featured the use of high vote/low vote stock and embodied, as well, the "retention" by Citigroup of a substantial portion of the spun-off entity's equity securities; the spin-off by Safeway of its stock in BlackHawk which was followed by an acquisition of Safeway by Albertson's and the making of a Sec. 336(e) basis step-up election for BlackHawk; the "split-off" by McDonald's of the Class B, high vote, stock of Chipotle Mexican Grill, Inc.; the split-off by Met Life of the stock of RGA which was followed, **less than 45 days following consummation**, by the recombining of the dual classes of voting stock that had been created by RGA for the express purpose of facilitating the split-off; acquisitions featuring the execution of Sec. 338(h)(10) elections by the buyer and seller of a subsidiary's stock—affording the buyer a coveted *cost basis* in the target's assets and, therefore, access to the amortization benefits of Sec. 197(a)—exemplified by Procter & Gamble's acquisition of Clairol from Bristol-Myers and Cadbury's acquisitions of Snapple from Triarc and of Adams from Pfizer; the possibility of combining a Sec. 338(h)(10) election with a public offering of a subsidiary's stock, a so-called "supercharged IPO", a technique employed by General Electric in connection with the divestiture of its Genworth Financial subsidiary; the taxation rules that necessitated an eleventh hour shift in the format used by Amgen to acquire Immunex (a planned reverse merger was re-structured as a forward merger); the use of the "horizontal double dummy" technique, as an alternative to a conventional merger structure (where the merger cannot satisfy the continuity of interest requirement or where the acquiring corporation desires to obtain basis for the cash component of the merger consideration), as illustrated by the Devon/Mitchell Energy deal; the LifePoint Hospitals/Province Healthcare deal; the Oracle/Seibel Systems transaction; the Vulcan Materials/Florida Rock Industries transaction; the Gemstar-TV Guide/Macrovision transaction and, most notably,—although the circumvention of the continuity of interest requirement was not an issue there—the Sears, Roebuck/Kmart transaction; the merger of Chris-Craft with and into News Corp. and the accompanying "drop-downs" of the former CC assets into a partnership, comprised exclusively of News Corp. affiliates, that was necessitated by regulatory concerns as well as the re-capitalizations effected by such luminaries as Ford, Readers Digest, Robert Mondavi Corp., General Motors and AT&T; the latter two being characterized by an innovative use of *tracking stock*. Tracking stock also plays a prominent role in the acquisition of EMC by Dell. The shareholders of EMC will be receiving Class V stock of Denali, Inc. (the holding company for Dell) which will track the performance of EMC's valuable subsidiary, VMWare. We will look, also, at the acquisition of Guidant by Boston Scientific and compare it to the acquisition by PG of Gillette and the acquisition by Wachovia Corp. of Golden West Financial Corp.—In each case, 60 percent (or more) of the consideration provided to the target's shareholder's consisted of stock and the balance consisted of cash. However, despite this similarity, the tax consequences were substantially different because of almost imperceptible differences in the formats employed.

These transactions highlight the crucial role that form can play in securing desired tax results. In addition, we'll look at the Verizon/MCI deal; a "three party" transaction that is treated, for tax purposes, as a "two party" 'A' reorganization; a transaction format that has gained popularity and that renders the so-called forward triangular merger all but obsolete. Further, we will study in great detail Sam Zell's ill-fated plan to take Tribune Corp. private and how, through the introduction of an ESOP and the election by TRB of 'S' corporation status, he was able to convert TRB into what amounted to a tax-exempt entity. Moreover, we will look at the way in which TRB sought to circumvent Sec. 1374's "built-in gain" rules by divesting assets, such as Newsday and the Chicago Cubs and Wrigley Field, through a "leveraged partnership" arrangement. Unfortunately, the I.R.S. recently ruled that TRB's leveraged partnership was "defective" with the result that, absent a successful court challenge by TRB, its gain from the disposal of both Newsday and the Cubs will be required to be recognized. We will also examine Schering-Plough's "acquisition" of Merck, Inc.—in the transaction, in order to insure that Schering's joint venture with Johnson & Johnson regarding Remicaid is not imperiled, Schering was designated and served as the "issuing" corporation. For tax purposes, the Schering shareholders, who received cash in the transaction and retained a portion of their stock in Schering, will be treated as having participated in a redemption that qualifies, thanks to Rev. Rul. 75-447, for "exchange" treatment. We will also examine the split-off (with "boot") engineered by Coca-Cola Enterprises in connection with which Coca-Cola, the 34 percent shareholder of CCE, effectively swapped its interest in CCE's non-North American bottling operations for the interest held by the minority shareholders of CCE in CCE's North American bottling activities. In addition, we will look at the Treasury Department's "relaxation" of the rules that inhibit "trafficking" in net operating losses and how such relaxation contributed to the acquisition by Wells Fargo of Wachovia and by PNC of National City Corporation. See Notice 2008-83. That beneficial Notice was repealed, with respect to ownership changes occurring after January 16, 2009, in the stimulus legislation signed by President Obama in February, 2009. We will also explore the recent proliferation of "rights" plans, entered into by corporations with significant Net Operating Losses, for the purposes of discouraging an ownership change the occurrence of which often places severe limits on the amount of taxable income that can be offset by those NOLs. These plans have been adopted by Citigroup, Ford Motor Co., CIT, Ambac, AIG, General Motors, and Hovnanian, among many others. We will also explore the most controversial "tax oriented" transaction ever proposed, Yahoo! Inc.'s seemingly endless attempt to divest its Alibaba stake on a "tax-efficient" basis. Ultimately, it is hoped, the student will evaluate transaction possibilities through the eyes of a seasoned investment banker and, we are entirely confident, perceive opportunities for rendering sound advice in areas and situations that he or she previously thought to be unremarkable.

READING LIST: Our textbook will be Bittker and Eustice's *Federal Income Taxation of Corporations and Shareholders*, Seventh Edition (Warren Gorham & Lamont) from which the readings will be **optional**. We will draw most heavily (almost exclusively in fact) upon Lehman Brothers "Tax and Accounting" Research Reports and "The Willens Report" and articles from professional taxation journals which will be provided to students on the first day of class. From time to time, we will review decided cases, as well as I.R.S. and FASB pronouncements, such as revenue rulings, regulations, Notices, and Accounting Series Updates (ASUs). In each case, I will supply these materials to the class.

GENERAL APPROACH: I expect the course to be primarily qualitative in nature since our primary learning tools will be the provisions of the Internal Revenue Code and associated regulations, revenue rulings, private letter rulings (LTRs) and cases. Interspersed throughout, however, will be computations of tax liabilities incurred and (hopefully) avoided, or at least deferred, along with other calculations embodied within various Code provisions such as, for example, the determination of the limitations imposed on NOL usage following the occurrence of an *ownership change* of a loss corporation; or the question of whether the redeeming shareholder, in the case of a redemption of his or her stock, has suffered, within the meaning of Sec. 302(b), a “sufficient” reduction of his or her proportionate interest (the existence of which will ensure that the redemption is treated as a “sale or exchange” of the redeemed stock) in the corporation; or the decision whether to execute a Sec. 338 election with respect to the *qualified stock purchase* of a loss corporation. We will use a lecture format, and because so much of what we will do will be derived from a study of actual deals, there will be extensive opportunity for class participation as we explore the reasons why these transactions evolved in the manner they did. In all events, I strongly encourage questions and student observations in light of our primary goal of stimulating the very type of give and take that characterizes the deliberations leading up to the formulation and consummation of an actual transaction. Finally, there will be no mandatory use of computers. It is perfectly permissible for students to use their computer to take notes.

FORMAL REQUIREMENTS: We are planning a final examination as well as a term paper. The exam will probably consist of 25-30 brief problems in which a factual situation will be presented and the student will be asked to provide a True or False response and provide a very brief rationale for selecting the particular response. The term paper (which can, and probably should, be prepared on a group basis) ought to focus on an actual deal (or financing), or general tax principle (i.e., what are the tax consequences associated with the execution of a Sec. 338 election), and, where an actual deal is selected, must address the problem confronting management, the business environment in which management was then operating, the alternatives available for solving the problem, a discussion of the route actually selected and, **most importantly**, the tax consequences of the plan ultimately adopted. I would expect the exam and paper to account for roughly 90 percent of the final grade with class participation, including attendance, and other subjective factors, comprising the balance. **Students are strongly encouraged to contact me whenever they feel the need to discuss matters we have covered in class. Historically, students who took the time to reflect on these matters, and also made time to discuss them with me, have enjoyed great success in this class.** Finally, students from the fall and spring semesters will be competing for *The Robert and Jacqueline Willens Tax Research Prize*. This is an award we instituted in 1999. It consists of a cash stipend of \$6,000—divided between a winner (\$3,000) and two runners-up (\$1,500 each). The winner is honored at the Recognition Ceremony and receives a plaque commemorating his or her achievement as well as a nice entry on one’s CV. Good luck!