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News Analysis: Will PayPal's Spinoff End in an Inversion -- or Two?
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PayPal's announced spinoff from parent company eBay could open the door to one or both resulting entities moving offshore with foreign merger partners. Each of these expatriations, however, would encounter statutory and regulatory hurdles -- including those presaged in Notice 2014-52, 2014-42 IRB 712.

Icahn's Activism

EBay announced September 30 that it would spin off PayPal into a separate, publicly traded company. That decision represents a victory for activist investor Carl Icahn, who holds 30.8 million or about 2 percent of the company's outstanding shares. Since early this year, Icahn has noisily, and often insultingly, urged eBay's management and board to divest the company of its PayPal business.

In late January, when he held an approximate 0.82 percent stake in eBay, Icahn nominated to the company's board two employees at his investment vehicle, Icahn Enterprises LP, a publicly traded master limited partnership. At the same time, he submitted to eBay's board a nonbinding proposal for a spinoff of the PayPal business into a separate company.

Politely dismissing that proposal, an eBay statement noted that its "Board of Directors has concluded that the company and its shareholders are best served by the current strategic direction of the company and does not believe that breaking up the company is the best way to maximize shareholder value."

The civility in the dialogue between Icahn and eBay was short-lived, however, and exchanges between the two quickly degenerated into harsh attacks. On February 24, Icahn sent an open letter to eBay stockholders exhorting them "to vote in favor of our precatory proposal in order to send a clear message to the eBay Board that eBay and PayPal must be separated -- NOW." In response, a blog post on eBay's website called on the company's stockholders to reject Icahn's "charades."

In March, in an interview with Fortune magazine, eBay's CEO John Donahoe characterized Icahn's efforts at mobilizing stockholder support in favor of a PayPal spinoff as "theatrics." (See JP Mangalindan, "EBay's John Donahoe Talks Icahn, Conflicts, and $100 Stock Price (Someday)," Fortune, Sept. 30, 2014.) Just six months later, Donahoe seems to have done an about-face. In touting the PayPal spinoff, he contended that "we can best position eBay and PayPal as independent companies." Donahoe claimed, however, that Icahn's activism had nothing to do with the company's eventual conclusion in favor of a spinoff, maintaining that "we made this decision as part of our annual planning process." (See Ed Baig, "EBay CEO John Donahoe Talks PayPal Spin-off, Mobile Pay," USA Today, Sept. 30, 2014.)
Shortly after an eBay press release announcing the PayPal spinoff hit the wires, Wall Street began buzzing with speculation about possible takeovers of the "new" (that is, post-spinoff) eBay and the spun-off PayPal. On the same day the spinoff was announced, Icahn posted on his shareholder advocacy website that it was his "belief that the payments industry, of which PayPal is an important part, must be consolidated -- either through acquisitions made by PayPal or a merger between PayPal and another strong player in the industry." Several stock analysts, including Gene Munster of Piper Jaffray, described not just PayPal but also eBay, divested of the PayPal business, as "attractive" takeover targets (Bloomberg TV, Sept. 30, 2014).

That attraction would be enhanced in the eyes of foreign acquirers for several reasons -- in fact, 14 billion of them. That was the amount, in dollars, of "trapped" offshore earnings eBay reported as of the end of 2013. The company's annual report on Form 10-K disclosed that as of "December 31, 2013, $14.0 billion of earnings had been indefinitely reinvested outside the U.S., primarily in active non-U.S. business operations."

Those foreign earnings are likely to increase at a rapid clip. In each of the last three years, the combined eBay generated more than half its net revenues from operations outside the United States. In 2013 international operations' share of total net revenues was almost 52 percent, up slightly from the previous year. The company's SEC filings informed stockholders that "our international expansion has been rapid and our international business, especially in Germany, the U.K. and Korea, has also become critical to our revenues and profits."

Two of eBay's three business segments, the legacy marketplaces business and the PayPal business, are each acquiring an increasingly foreign character. For 2013, approximately 60 percent of the gross merchandise volume in the marketplaces business reflected offshore transactions. During the same year, the offshore fraction of the comparable metric in the PayPal business, net transaction payment value, was 48 percent.

Only the third business segment, the enterprise business, which will presumably remain with eBay after the PayPal spinoff, retains a largely domestic character. The company conceded in its filings that "while Enterprise operates on a global basis, nearly all of its net revenues in 2013 were derived from its North American operations." The enterprise segment, however, is a tiny fraction of the company's overall business, contributing about 6.5 percent of total net revenues in 2013, compared with 49 percent for the marketplaces segment and 44 percent for the PayPal business.

Thus, the new eBay and the spun-off PayPal can each be expected to earn a greater share of its income from foreign markets. Indeed, eBay's 2013 annual report declared that "Marketplaces' and PayPal's entry into emerging markets is an increasing focus of our business."

With foreign markets accounting for not just substantial existing business but also the bulk of anticipated future growth, both post-spinoff entities would be better off escaping the U.S. net of worldwide taxation and high corporate rates, and relocating their respective charters overseas. Alternately, if they cling to domestic jurisdictions, then they are likely to confront a choice between two unpleasant outcomes: Keep their foreign earnings offshore, or repatriate them at the cost of both U.S. income taxes and applicable foreign withholding taxes.

**Rethinking Repatriation**

The combined eBay has wrestled with that choice. During 2013 the company "provided U.S. tax on approximately $450 million of our non-U.S. earnings which we expect to repatriate in the future," according to its SEC filings. As of December 31, 2013, the company insisted that "we intend to indefinitely reinvest the $14.0 billion of our non-U.S. subsidiaries' undistributed earnings in our international operations. Accordingly, we currently have no plans to repatriate those funds."

By the time it filed its Form 10-Q for the quarter ended March 31, 2014, however, the company had revised its thinking on the issue. It disclosed a plan to repatriate as much as $6 billion of the $14 billion held abroad. (Prior coverage [3] and [4].)

EBay acknowledged in its Form 10-Q that it changed its intent on the indefinite reinvestment of undistributed foreign earnings of some of its foreign subsidiaries for 2013 and prior years. Thus, a portion of those earnings are no longer considered indefinitely reinvested in its international operations. As a result, eBay "provided for U.S. income and applicable foreign withholding taxes on $9.0 billion of undistributed foreign earnings of those subsidiaries for 2013 and prior years, and recorded a deferred tax liability of approximately $3.0 billion."

The net after-tax repatriation that the 10-Q envisaged therefore amounted to $6 billion, leaving another $5 billion in undistributed foreign earnings. The company declared that "we do not know the time or manner in which we would repatriate those funds."

The "non-cash tax charge to facilitate repatriation of $6.0 billion net in foreign earnings" was announced April 29, when eBay was still unabashedly and vigorously resisting Icahn's unsolicited advice to separate the PayPal business. Limiting itself to a
generic statement about "enhancing our financial flexibility," the company declined to identify any specific uses to which the repatriated funds might be applied. Observers conjectured that eBay might be getting ready for domestic acquisitions, mentioning, among other possible targets, Etsy Inc., an online marketplace for arts and crafts products, and Pinterest Inc., an online scrapbooking service (Antoine Gara, "EBay Tax Hit: Ray of Hope or Storm Cloud for Silicon Valley?" thestreet.com, Apr. 30, 2014).

Having reversed course on the PayPal divestiture, it is unclear whether eBay will stick with the repatriation plans. "We haven't committed to repatriate any of the cash, so we'll make that decision as we go along," Donahoe was reported as saying in May following the disclosure of the related noncash tax charge (Brian Womack and Brooke Sutherland, "EBay's Repatriated Cash Opens Doors to Buy Startups," Bloomberg, May 1, 2014). And eBay CFO Robert Swan confirmed recently, after the decision to separate PayPal was made public, that the money still hasn't been moved (Antoine Gara, "What Went Right for eBay and PayPal Under Outgoing CEO John Donahoe," thestreet.com, Sept. 30, 2014).

Whether, and to the extent, eBay proceeds with the repatriation may reveal if any thought is being given to positioning the post-spinoff entities for expatriation. "It's certainly not out of the realm of possibility that eBay may decide not to go ahead with the repatriation," Robert Willens of Willens LLC told Tax Analysts. In that event, eBay "would probably reverse the deferred tax liability it recorded to reflect the likely tax to be paid with respect to that repatriation," Willens said. If eBay did renge on the repatriation, "that would be an almost certain indication that it is keeping the door open to foreign merger partners," he said.

**Thwarting Liberation**

The regulations proposed by Notice 2014-52 would make it difficult to "liberate" the offshore cash for onshore use following an expatriation for at least two reasons.

First, an expatriating domestic parent would be precluded during the 10-year period defined in section 7874(d)(1) from causing controlled foreign corporations with deferred foreign earnings to become direct subsidiaries of a new foreign parent; these "out from under" transactions would be recharacterized under section 7701(l), leaving the CFCs subject to subpart F rules. (Prior analysis[14].)

Second, "hopscotch" transactions, in which money is moved from CFCs with deferred earnings to a new foreign parent that then spends it onshore, may no longer be feasible. Debt or equity investment by any such CFC in the new foreign parent would be deemed an investment in U.S. property under section 956, triggering a subpart F inclusion.

Regardless, the CFCs’ earnings will remain available to fund foreign operations. And cash being fungible, an adequately capitalized foreign acquirer could meet any onshore expenditure requirements with its own resources. Also, all future foreign earnings, placed in new non-CFC foreign subsidiaries, would be beyond the reach of subpart F. Finally, a new foreign parent would open avenues of earnings stripping. Thus, a foreign acquirer would present a compelling merger partner for both post-spinoff entities.

**Keeping the Spinoff Tax Free**

For PayPal's spinoff to be tax free under section 355, any subsequent acquisition of either resulting entity, whether by a foreign or domestic corporation, would have to comply with the anti-Morris Trust rule of section 355(e) and the device test of section 355(a)(1)(B).

Under section 355(e)(2)(A), distribution of stock in PayPal to eBay shareholders will be taxable at the corporate level if the spinoff "is part of a plan (or series of related transactions) pursuant to which 1 or more persons acquire directly or indirectly stock representing a 50-percent or greater interest in the distributing corporation or any controlled corporation." In other words, PayPal's spinoff will cease to be tax free if either the new eBay or the spun-off PayPal is subsequently the subject of a majority acquisition, and both the spinoff and acquisition are held to be "part of a plan."

The phrase "part of a plan" is a term of art in this context, and there is abundant authority that would support a majority acquisition of either the new eBay or PayPal shortly after PayPal's spinoff.

A so-called super safe harbor, established by reg. section 1.355-7(b)(2), applies in the absence of "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." There is no evidence that eBay has thus far negotiated or even discussed any post-spinoff acquisition. Thus, the super safe harbor would be applicable if the company refrains from these discussions until the completion of the spinoff.

Even if these discussions commence before the spinoff closes, Rev. Rul. 2005-65, 2005-38 IRB 564 [14], indicates that a facts-
and-circumstances test could nonetheless salvage the tax-free status of the spinoff.

Further discussion of these authorities need not detain us here. Our inquiry focuses on inversion possibilities -- transactions in which the new eBay or PayPal would be "acquired" only in the narrow sense of being owned by a new foreign parent; each would seek to keep with its existing stockholders as much ownership interest in the new foreign parent as possible. Nothing in section 7874, existing regulations, or Notice 2014-52 precludes or penalizes an outcome in which these stockholders retain majority ownership. If they do, then the anti-Morris Trust rule would not be implicated.

For our purposes, more relevant than the anti-Morris Trust rule of section 355(e) is the device test of section 355(a)(1)(B), under which a section 355 distribution cannot be used "principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both." Running afoul of the device test would result in PayPal's spinoff being taxed at both the corporate and stockholder levels.

Under reg. section l.355-2(d)(2)(i), "the fact that a distribution is pro rata or substantially pro rata is evidence of device." Further, reg. section 1.355-2(d)(2)(iii)(A) provides that a post-distribution "sale or exchange of stock of the distributing or the controlled corporation . . . is [also] evidence of device." Moreover, "the shorter the period of time between the distribution and the sale or exchange, the stronger the evidence of device." Finally, according to reg. section 1.355-2(d)(2)(iii)(B), if this "sale or exchange [is] pursuant to an arrangement negotiated or agreed upon before the distribution," then it comprises "substantial evidence of device."

PayPal's spinoff -- a pro rata distribution of PayPal stock to eBay stockholders -- could thus constitute a prohibited device unless any subsequent acquisition of eBay or PayPal is sufficiently removed in time from the spinoff and no acquisition-related discussions precede completion of the spinoff.

Failing to abide with these conditions, however, will not necessarily be fatal for satisfying the device test. If acquisition discussions cannot await the spinoff's completion or the acquisition follows close on the heels of the spinoff, then reg. section 1.355-2(d)(2)(iii)(E) may provide a fallback. Complying with that regulation would require that any post-spinoff acquisition be structured as a transaction in which "stock is exchanged for stock in pursuance of a plan of reorganization and either no gain or loss is recognized or an insubstantial amount of gain is recognized." In short, the consideration for the acquisition should comprise no more than a trivial amount of taxable boot.

The financial press may have mistakenly exaggerated the severity of the section 355 requirements for a tax-free spinoff outlined above. For example, a blog post in The Wall Street Journal noted that "for up to two years after the spin-off, an acquisition of either PayPal or eBay (regardless of which company is spun off) could destroy the tax-free status of the deal and trigger an enormous corporate tax." (See Ronald Barusch, "Dealpolitik: EBay, PayPal Takeover Talk May Be Premature," The Wall Street Journal, Oct. 3, 2014.) Willens said that "the market, erroneously, feels that there is some sort of two-year embargo on acquisitions of spun-off, or distributing, corporations."

For his part, Willens is confident that the section 355 obstacles are eminently surmountable. In a client report issued October 2, he predicted that "any acquisition of either eBay or PayPal that occurs 'in connection with' the spinoff will, undoubtedly closely adhere to the well-understood guidelines that have been developed in this area of the law."

Spinoffs and Inversions

The state of the law on post-spinoff acquisitions summarized above has been mostly unchanged for a decade. The relevant guidance and pronouncements make no distinction between a domestic and foreign acquirer. But as noted above, both post-spinoff entities, eBay and PayPal, will stand to reap significant tax savings on inverting. Under that scenario, the law is anything but constant.

Spinoffs have constituted a recurrent theme in the inversion saga. The accompanying table lists the 10 largest spinoffs by market capitalization of the spun-off entity since 2005 that have been completed or recently announced. With an estimated market capitalization of $31.5 billion, PayPal's spinoff would rank sixth on that list. Of the remaining eight completed deals, two -- Abbott Laboratories and Tyco International -- have generated multiple inversion deals.

Top 10 Spinoffs Since 2005

<table>
<thead>
<tr>
<th>Rank</th>
<th>Parent</th>
<th>Spinoff</th>
<th>Market Cap ($ billions)</th>
<th>Year</th>
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<tbody>
<tr>
<td>1</td>
<td>Altria Group</td>
<td>Philip Morris</td>
<td>$106.6</td>
<td>2008</td>
</tr>
<tr>
<td>2</td>
<td>Abbott Labs</td>
<td>AbbVie</td>
<td>$55.5</td>
<td>2013</td>
</tr>
</tbody>
</table>
3  Altria Group         Kraft Foods            $46.2                2007
4  CBS Corp.1           Viacom                 $32.2                2006
5  Hewlett-Packard      HP2                    $32 (estimate)     2015
6  eBay                 PayPal                 $31.5 (estimate)     2015
7  Mondelez Int.3       Kraft Foods Group      $26.9                2012
8  Time Warner          Time Warner Cable      $22.5                2009
9  Tyco Int.            Covidien               $21.5                2007

Source: Dealogic (HP and PayPal estimates).

FOOTNOTES TO TABLE

1 Earlier called Viacom.

2 New name for Hewlett-Packard's computing and printing business.

3 Earlier called Kraft Foods.

END OF FOOTNOTES TO TABLE

AbbVie Inc., which was spun off from Abbott in 2013, announced in July that it plans to invert in conjunction with its acquisition of the Jersey-registered pharmaceuticals company Shire PLC; however, the company may now be reconsidering the transaction. (Related coverage and.) Abbott itself is accommodating an inversion by Mylan Inc. Mylan is acquiring Abbott's non-U.S. developed markets specialty and branded generics business, and relocating its charter to the Netherlands.

Covidien PLC, now an Irish company, was spun off in 2007 from Tyco, which a decade earlier had famously inverted to Bermuda. Covidien moved its headquarters from Bermuda to Ireland in 2009, about the same time Tyco moved to Switzerland, but it has since also relocated to Ireland. In 2013, Covidien, in turn, spun off another Irish company, Mallinckrodt PLC. Both Covidien and Mallinckrodt are now enabling other domestic companies to emigrate to the emerald isle: Medtronic in the case of Covidien (prior coverage; and Questcor Pharmaceuticals in the case of Mallinckrodt. (Prior coverage.)

Against the backdrop of that inversion-rich history of prior large spinoffs, it is natural to conjecture that one or more inversions may follow in the wake of PayPal's spinoff.

No 'Skinny-Down,' Please!

As discussed above, the regulations proposed under Notice 2014-52 may slightly dull the allure of an inversion by limiting access to existing deferred foreign earnings for onshore uses. That, however, is unlikely to be a deal breaker -- the potential of protecting future foreign earnings from subpart F and the prospect of stripping domestic earnings are likely to remain compelling motivations for inverting. But would the proposed regulations inhibit executing an inversion transaction in the first place?

The only provisions with any consequential impact would seem to be the ones addressing "skinny-down" transactions. The notice warns that "non-ordinary course distributions . . . made by the domestic entity . . . during the 36-month period . . . ending on the acquisition date . . . will be disregarded for purposes of section 7874."

EBay's distribution of PayPal stock in the spinoff would undoubtedly constitute a "non-ordinary course distribution" within the meaning of the notice. As a threshold matter, the word "distribution" is not limited to taxable dividends and includes a tax-free distribution that "qualifies under section 355." Further, the exceptional size of the PayPal spinoff will render the stock distribution "non-ordinary course," a term that refers to "the excess of all distributions made during a taxable year . . . over 110 percent of the average of such distributions during the thirty-six month period immediately preceding such taxable year."

Thus, PayPal's spinoff would be disregarded for purposes of section 7874 if the new eBay subsequently inverts. The upshot? The new eBay would have to look for a larger foreign merger partner that could enable it to invert without incurring the costs imposed by section 7874. To see this, let us briefly recap the essential mechanics of section 7874.
The Costs Imposed by Section 7874

If the new eBay were to invert by merging with a subsidiary of a new foreign parent, and the resulting "expanded affiliate group" lacked "substantial business activities" in the new foreign parent's country of incorporation, then section 7874 could impose one of two different kinds of costs.

In a "60 percent inversion," one in which stockholders in the new eBay end up with between 60 and 80 percent ownership interest (by vote or value) in the new foreign parent, section 7874(a) would preclude use of net operating losses and foreign tax credits for up to 10 years after the inversion. In an "80 percent inversion," one in which stockholders in the new eBay end up with at least an 80 percent ownership interest (by vote or value) in the new foreign parent, section 7874(b) would recharacterize the new foreign parent as a domestic corporation for all purposes of the code.

The threat of a temporary loss of NOLs and FTCs under section 7874(a) has generally been unsuccessful in deterring 60 percent inversions. For example, Horizon Pharma Inc. recently proceeded with such an inversion, declaring that "notwithstanding this [section 7874(a)] limitation, Horizon expects that it and its domestic affiliate will be able to fully utilize their net operating losses prior to their expiration." (Prior coverage [4].)

The section 7874(a) limitation is similarly unlikely to be a material consideration in a cost-benefit analysis for inverting the new eBay. EBay's 2013 annual report discloses that "as of December 31, 2013, our federal . . . net operating loss carryforwards for income tax purposes were approximately $146 million." That number is less than a third of the company's total provision for income taxes of $455 million for 2013. Moreover, a delay imposed by section 7874 in using those losses may not matter. The annual report acknowledges that "if not utilized, the federal net operating loss carryforwards will begin to expire in 2016."

By comparison, an 80 percent inversion would wipe out all tax benefits from inverting, so that would be the binding constraint -- keeping the ownership interest of the new eBay stockholders below 80 percent by both vote and value. Contractual provisions would take care of the vote limit. Satisfying the value limit would require that the new foreign parent be large enough, and Notice 2014-52 would increase that lower bound.

The Impact of Notice 2014-52

The anti-skinny-down provisions of Notice 2014-52 would disregard the value of the PayPal stock distributed in the spinoff in the event of a subsequent inversion by the new eBay. As a result, the section 7874 ownership fraction of the value of the new foreign parent would be computed by using the market capitalization of not just the new eBay but also that of the spun-off PayPal. Presumably, PayPal's market capitalization would be added to both the numerator and denominator of that ownership fraction.

PayPal's market value at spinoff in 2015 is expected to be just under half of that of the combined eBay-PayPal entity -- about $31.5 billion at the current share price. Notice 2014-52 would thus nearly double the minimum acceptable size of a suitable foreign merger partner for the new eBay.

Specifically, to remain below the 80 percent value limit, the new foreign parent should have a market value of at least $16 billion, or 25 percent of the current market capitalization of about $64 billion for the combined eBay-PayPal entity. In the absence of Notice 2014-52, the foreign parent could have had a market value of as low as $8.13 billion, or 25 percent of the current market capitalization of $32.5 billion for a stand-alone eBay. The pool of potential "inversion enablers" for the new eBay would certainly be reduced; however, whether that reduction would ultimately make a difference is uncertain given the generally lofty valuations for technology companies.

On the other hand, PayPal would seemingly remain unaffected by the warning in Notice 2014-52 that non-ordinary course distributions will be disregarded for section 7874 purposes. According to Willens, "There does not appear to be any requirement that, where the extraordinary distribution is a spinoff, the distributed corporation, should it engage in an inversion, make any adjustments to the ownership fraction." In fact, as shown below, far from curbing spinoff-related inversions, Notice 2014-52 may merely serve as a guidepost for tax planning in this area.

Spinversion 2.0

Notice 2014-52 seeks to clamp down on "spinversions," which involve a U.S. corporation inverting a discrete business line by placing its assets in a domestic subsidiary, contributing that domestic subsidiary's stock to a new foreign subsidiary, and spinning off that foreign subsidiary by means of a section 355 distribution to existing shareholders. That transaction exploits a loophole in the temporary regulations, which exclude the contributed domestic subsidiary stock from both the numerator and denominator of the ownership fraction of section 7874. The notice proposes amendments to those regulations, which would include the contributed domestic subsidiary stock in the ownership fraction's denominator as long as the subsequent section
355 distribution of the new foreign subsidiary stock is related to the earlier contribution of the domestic subsidiary stock. Those proposed amendments, however, are unlikely to eliminate spinoffs from the tool box of structuring inversion transactions. To the contrary, Notice 2014-52 could, by negative implication, validate a variant of the spinversion in which a domestic subsidiary, devoid of NOLs but disproportionately loaded with CFCs containing deferred foreign earnings, is spun off and subsequently merged with a foreign entity as small as one-fourth its size by value. The surviving foreign entity would then satisfy the 80 percent ownership limit of section 7874(b).

It’s unclear whether eBay might follow that blueprint in preparing PayPal for a spinoff. Some market observers told Tax Analysts that inversion planning might influence how CFCs are apportioned between PayPal and the new eBay. Willens, however, suggested that this process is likely to follow business lines, "such that those CFCs that conduct businesses more closely associated with PayPal's activities will be assigned to it; and those whose activities are more closely associated with the 'historic' eBay business will remain with eBay." Regardless, Willens said he believes that a post-spinoff PayPal will be "a tempting target -- for both domestic and foreign suitors."

Professor Reuven Avi-Yonah of the University of Michigan School of Law wrote recently that section 7874 shut down "naked" inversions only to spawn the "new wave" kind (Reuven Avi-Yonah, "Reflections on the 'New Wave' Inversions and Notice 2014-52," ). He told Tax Analysts that Notice 2014-52 may end up having a similar effect on spinversions.

### Conclusion

Ever since the Viacom transaction of 1996, which showed the way, a spinoff has been available as a means of extracting equity without tax from an "unwanted" business. The Viacom deal involved the spinoff of part of the media company’s cable and non-cable TV businesses and the merger of the spun-off entity with Tele-Communications Inc. After the dust settled, the distributing company ended up with significant additional cash and the spun-off entity with significant additional indebtedness, borrowed in part against the credit of the acquiring company. In short, section 355, the last remaining exception to the statutory repeal of the General Utilities doctrine, had been deployed to effectively receive tax free a portion of the value built up in corporate solution.

Section 355(e), which Congress enacted in 1997 in response to that unappetizing outcome, is both overinclusive and underinclusive. It precludes a majority acquisition that contemplates no equity extraction. More relevant for our purposes here, it permits an acquisition motivated solely by the desire to remove value from corporate solution, as long as the distributing company’s shareholders retain majority ownership.

Extractable value within a modern-day U.S.-based multinational enterprise, such as eBay, includes existing and potential future deferred foreign earnings. Notwithstanding Notice 2014-52, a spinoff may be used to disentangle this value from (domestic) corporate solution at minimal tax cost.