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Reorganization Treatment of Acquisitions of Stock Savings and Loan Institutions by Mutual Savings and Loan Associations

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REORGANIZATION TREATMENT OF ACQUISITIONS OF
STOCK SAVINGS AND LOAN INSTITUTIONS BY MUTUAL
SAVINGS AND LOAN ASSOCIATIONS

INTRODUCTION

The acquisition (mutual-stock acquisition) of a stock savings and loan institution (stock institution) by a mutual savings and loan association (mutual association) has received inconsistent treatment\(^1\) under the reorganization provisions of the Internal Revenue Code (Code).\(^2\) Specifically, the disagreement is whether mutual passbook account shares (mutual shares) received by the stock institution shareholders should be characterized as primarily-debt or primarily-equity instruments.\(^3\) This is a result of the "hybrid" nature\(^4\) of mutual shares, which represent both an ownership interest\(^5\) in the association similar to stock, and a debt interest\(^6\) similar to savings deposits.

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3. See Paulsen v. Commissioner, 716 F.2d 563, 566 (9th Cir. 1983) (debt characteristics overwhelmingly predominate), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 411 (6th Cir. 1974) (mutual shares represent definite and material proprietary interest); Everett v. United States, 448 F.2d 357, 358-60 (10th Cir. 1971) (proprietary rights make mutual shares voting stock); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 782 (D. Wyo. 1979) (same); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 974-75 (Ct. Cl. 1979) (rejecting government's argument that mutual shares are debt).


5. West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Everett v. United States, 448 F.2d 357, 360 (10th Cir. 1971); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 974 (Ct. Cl. 1979).

6. West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Everett v. United States, 448 F.2d 357, 360 (10th Cir. 1971); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 974 (Ct. Cl. 1979).
In order to qualify as a tax-deferred reorganization, the acquiring corporation must either continue the business of the acquiree or use a significant portion of the acquiree’s assets. In addition, the acquiree’s shareholders must retain a continuing proprietary interest in the acquiror. Receipt of an equity interest typically will satisfy this require-

7. Although these transactions are commonly referred to as tax-free reorganizations, in actuality they are tax-deferred reorganizations. See L. Solomon, Corporate Acquisitions, Mergers and Divestitures ¶ 74,001 (1983). No gain or loss is recognized at the time of the transaction. See infra notes 15-16 and accompanying text. The acquiree shareholder’s adjusted basis in the property given up, however, is carried over to his interest in the acquiring corporation. I.R.C. § 358(a) (1976). At the corporate level, the adjusted basis of the assets in the hands of the transferor is carried over to the acquiring corporation. Id. § 362(b). The unrecognized gain will be taxed when the taxpayer ultimately disposes of the property, because taxable gain is computed by subtracting the taxpayer’s adjusted basis in the property from the amount realized on the disposition. Id. § 1001(a).

8. Treas. Reg. § 1.368-1(d)(2) (1983); B. Bittker & J. Eustice, supra note 1, ¶ 14.51, at 14-129 to 14-130; L. Solomon, supra note 7, ¶ 74,160, at 74,159-61; see Tarleau, “Continuity of the Business Enterprise” in Corporate Reorganizations and Other Corporate Readjustments, 60 Colum. L. Rev. 792, 792-99 (1960); see, e.g., Bazley v. Commissioner, 331 U.S. 737, 740 (1947) (new form of previous participation in an enterprise); Cortland Specialty Co. v. Commissioner, 60 F.2d 937, 940 (2d Cir. 1932) (continuity of interest in assets of business), cert. denied, 288 U.S. 599 (1933); Standard Realization Co. v. Commissioner, 10 T.C. 708, 715 (1948) (sale of assets after exchange destroys continuity); see also Treas. Reg. § 1.1002-1(c) (1983) (new enterprise is substantial continuation of the old). The acquiror need not continue the historic business of the acquiree, Becher v. Commissioner, 221 F.2d 252, 253 (2d Cir. 1955); Bentsen v. Phinney, 199 F. Supp. 363, 367 (S.D. Tex. 1961); see United States v. Adkins-Phelps, Inc., 400 F.2d 737, 743 (8th Cir. 1968), but must merely continue in a business utilizing the assets of the acquiree. L. Solomon, supra note 7, ¶ 74,160, at 74,159-61. One court has noted that “[a]ll that is required is that the [acquiror] receive and continue to use some minimum amount of the [acquiree’s] assets.” Laure v. Commissioner, 653 F.2d 253, 261 (6th Cir. 1981).

9. Paulsen v. Commissioner, 716 F.2d 563, 566 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass’n v. United States, 494 F.2d 404, 409, 411 (6th Cir. 1974); Capital Sav. & Loan Ass’n v. United States, 607 F.2d 970, 974 (Cl. Ct. 1979); B. Bittker & J. Eustice, supra note 1, ¶ 14.11, at 14-20. The judicially-created continuity of proprietary interest doctrine requires “a showing: (1) that the transferor corporation or its shareholders retained a substantial proprietary stake in the enterprise represented by a material interest in the affairs of the transferee corporation, and, (2) that such retained interest represents a substantial part of the value of the property transferred.” Southwest Natural Gas Co. v. Commissioner, 189 F.2d 333, 334 (5th Cir.) (footnote omitted), cert. denied, 342 U.S. 860 (1951); see LeTulle v. Scofield, 308 U.S. 415, 420-21 (1940); Helvering v. Minnesota Tea Co., 286 U.S. 378, 385 (1935); Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U.S. 462, 470 (1933); Cortland Specialty Co. v. Commissioner, 60 F.2d 937, 940 (2d Cir.), cert. denied, 288 U.S. 599 (1932). See generally B. Bittker & J. Eustice, supra note 1, ¶ 14.11, at 14-17 to 14-21, 14-27 to 14-28 (discussion of the development of the continuity of interest doctrine).

The regulations also require a plan of reorganization which “must be adopted by each of the corporations . . . and appear upon the official records of the corporation.” Treas. Reg. § 1.368-3(a) (1983). See generally Manning, “In Pursuance of the
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ment, while receipt of a debt interest typically will not. Treatment of this transaction under the Code's reorganization provisions, therefore, is dependent on the characterization of a mutual share as debt or equity.

This problem has arisen in two types of transactions. Pursuant to a statutory merger, the stockholders of a stock institution may, after tendering their stock, receive mutual shares in the acquiring mutual association. Alternatively, the stock institution might transfer substantially all of its assets to the mutual association in exchange for mutual shares. In either case, the mutual shares are issued in an


An additional judicial doctrine, now set out in the Treasury Regulations, that must be satisfied is that the underlying transaction be "required by business exigencies." Treas. Reg. § 1.368-1(b) (1983); see Gregory v. Helvering, 293 U.S. 465, 469 (1935) (must have some business or corporate purpose); Wortham Mach. Co. v. United States, 521 F.2d 160, 162-63 (10th Cir. 1975) (taxpayer must show a valid business purpose); Commissioner v. Transport Trading & Terminal Corp., 176 F.2d 570, 572 (2d Cir. 1949) (sole motive cannot be to escape taxation), cert. denied, 338 U.S. 955 (1950); Treas. Reg. § 1.368-1(c) (1983) (necessary to conduct of the enterprises); B. Bittker & J. Eustice, supra note 1, ¶ 14.51, at 14-127 (transaction must have a legitimate corporate purpose); L. Solomon, supra note 7, ¶ 74,165, at 74,161 (same).


11. Paulsen v. Commissioner, 716 F.2d 563, 566 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 974 (Ct. Cl. 1979); see B. Bittker & J. Eustice, supra note 1, ¶ 14.11, at 14-20. Under the general definitions of the Code, "corporation" is defined to include "associations," I.R.C. § 7701(a)(3) (1976), shareholder to include "a member in an association," id. § 7701(a)(3), and stock to include "shares in an association," id. § 7701(a)(7). Mutual shares, therefore, are defined as stock under the Code.

12. Paulsen v. Commissioner, 716 F.2d 563, 565 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); First Fed. Sav. & Loan Ass'n v. United States, 452 F. Supp. 32, 33 (N.D. Ohio 1978), aff'd mem., 615 F.2d 1360 (1980); see Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979). In relevant part, a reorganization is defined as: "a statute merger or consolidation [or] . . . the acquisition by one corporation, in exchange solely for all or a part of its voting stock . . ., of substantially all of the properties of another corporation." I.R.C. § 368(a)(1)(A), (C) (1976).

amount equal to the fair market value of the stock or assets transferred.\textsuperscript{14} Reorganization treatment provides for nonrecognition of gain or loss on the exchange of stock at both shareholder\textsuperscript{15} and corporate levels.\textsuperscript{16} In addition, at the corporate level, the stock institution's tax attributes are carried over\textsuperscript{17} to the acquiring mutual association. Contemporaneous taxation of the acquisition, at the corporate or shareholder level, can thwart an otherwise desirable business combination.

Part I of this Note demonstrates that a stock-mutual merger satisfies the continuity-of-business-enterprise requirement. Part II delineates the continuity-of-proprietary-interest requirement, examines the nature of mutual shares and concludes that the required interest is present in a mutual-stock acquisition. In addition, several safe harbor restrictions that can be placed on mutual shares in order to avoid a debt characterization are proposed.

I. CONTINUITY OF BUSINESS ENTERPRISE

The reorganization provisions presume that after the transaction, "the new enterprise, the new corporate structure and the new property are substantially continuations of the old still unliquidated."\textsuperscript{18} The principle underlying the shareholder provisions\textsuperscript{19} is that an investor should not be taxed when his capital remains invested in the acquiring entity\textsuperscript{20}—continuity of proprietary interest.\textsuperscript{21} At the corpo-

\begin{itemize}
  \item \textsuperscript{14} See West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 406 (6th Cir. 1974) ($200 par value stock exchanged for $2,500 per share); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979) (transferors received accounts in the amount of $56.36 per share of $10 par value stock transferred).
  
  \item \textsuperscript{15} I.R.C. § 354(a)(1) (1976) ("No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.").
  
  \item \textsuperscript{16} Id. § 361(a) ("No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.").
  
  \item \textsuperscript{17} Section 381(a) of the Code states that "[i]n the case of the acquisition of assets of a corporation by another corporation . . . the acquiring corporation shall succeed to and take into account, [the corporate tax attributes described in section 381(c)] of the distributor or transferor corporation . . . ." in a transfer to which section 361 applies. I.R.C. § 381(a) (1976). These items include the transferor's net operating losses, method of accounting, depreciation, and investment tax credit. Id. § 381(c).
  
  \item \textsuperscript{18} Treas. Reg. § 1.1002-1(c) (1983); see McDonald's Restaurants of Ill., Inc. v. Commissioner, 688 F.2d 520, 523 (7th Cir. 1982); Cortland Specialty Co. v. Commissioner, 60 F.2d 937, 939-40 (2d Cir. 1932), cert. denied, 288 U.S. 599 (1933).
  
  \item \textsuperscript{19} I.R.C. §§ 354, 368 (1976).
  
  \item \textsuperscript{20} See Groman v. Commissioner, 302 U.S. 82, 89 (1937); McDonald's Restaurants of Ill., Inc. v. Commissioner, 688 F.2d 520, 523 (7th Cir. 1982); Treas. Reg. § 1.1002-1(c) (1983); B. Bittker & J. Eustice, supra note 1, ¶ 14.01, at 14-6; E. Krader, S. Leimberg, A. Parker & M. Satinsky, Stanley & Kilcullen's Federal Income Tax Law 7-6 (1983).
  
  \item \textsuperscript{21} See supra note 9.
\end{itemize}
rate level,\textsuperscript{22} taxation is inappropriate when the transaction involves solely a change in the structure of the corporate entity\textsuperscript{23}—continuity of business enterprise.\textsuperscript{24}

If a transaction qualifies as a reorganization, the transferor corporation recognizes no gain or loss under section 361.\textsuperscript{25} In addition, the tax attributes of the acquiree carry over to the acquiror under section 381.\textsuperscript{26} This allows the acquiree to avoid recapture of certain previously beneficial tax deductions and credits.\textsuperscript{27} A mutual-stock acquisition's failure to qualify as a reorganization results in immediate taxation of the gain on the transfer of assets as well as a significant tax liability triggered by recapture of the institution's reserve for bad debts.\textsuperscript{28} The current cost of a taxable combination, therefore, may outweigh its potential benefits.

Section 361 applies to transactions in which the acquiree corporation either transfers its assets or merges with the acquiror.\textsuperscript{29} Congress recognized that in either situation the acquiree corporation acts as a mere conduit: It transfers the consideration received from the acquiring corporation to its own shareholders.\textsuperscript{30} Section 381 reflects a con-

\textsuperscript{22} I.R.C. §§ 361, 368, 381 (1976).

\textsuperscript{23} See Reef Corp. v. Commissioner, 368 F.2d 125, 130 (5th Cir. 1966), cert. denied, 386 U.S. 1018 (1967); King Enters. v. United States, 418 F.2d 511, 515 (Ct. Cl. 1969); Treas. Reg. § 1.1002-1(c) (1983); B. Bittker & J. Eustice, supra note 1, ¶ 14.01, at 14-4.

\textsuperscript{24} See supra note 9.

\textsuperscript{25} I.R.C. § 361(a) (1976).

\textsuperscript{26} Id. § 381.

\textsuperscript{27} See supra note 17.

\textsuperscript{28} See West Seattle Nat'l Bank v. Commissioner, 288 F.2d 47, 49-50 (9th Cir. 1961); Home Sav. & Loan Ass'n v. United States, 223 F. Supp. 134, 136 (S.D. Cal. 1963); Citizens Fed. Sav. & Loan Ass'n v. United States, 290 F.2d 932, 936 (Ct. Cl. 1961). Savings and loan institutions are allowed a deduction for losses on outstanding loans in computing their income. I.R.C. § 593(b) (1976). The deduction is based upon a percentage of the institution's taxable income for the year. Id. § 593(b)(2). This method results in an outstanding reserve for bad debts when the deductions taken exceed the actual amount of loans that have become uncollectible. This amount must be recaptured when the institution is sold. See West Seattle Nat'l Bank v. Commissioner, 288 F.2d 47, 49-50 (9th Cir. 1961); Home Sav. & Loan Ass'n v. United States, 223 F. Supp. 134, 136 (S.D. Cal. 1963); Citizens Fed. Sav. & Loan Ass'n v. United States, 290 F.2d 932, 936 (Ct. Cl. 1961). A taxable sale or disposition of property could also trigger recapture of depreciation, I.R.C. § 1245 (1976) and investment tax credit, id. § 47. Thrift institutions typically do not place a significant portion of their assets in depreciable property. See Moody's Bank & Finance Manual, a9, (Vol. 1, 1983) (less than 5% of industry's total assets are depreciable). Recapture of these items, therefore, is not as significant as recapture of the bad debt reserve, which is based on taxable income.

\textsuperscript{29} I.R.C. § 361 (1982).

gressional intent that the acquiring or successor corporation step into the "tax shoes" of the acquired corporation when the reorganized entities are economically integrated into a unified business enterprise.\textsuperscript{31} This is precisely what occurs in a mutual-stock acquisition. The resulting mutual association is the economic integration of the two separate savings and loan enterprises. Both entities are thrift institutions carrying on the same business prior to the merger. The resulting entity continues to perform these functions following the merger. Congress intended that such transactions not be subject to taxation because the business is simply continuing under a modified corporate form.\textsuperscript{32}

Moreover, the IRS has accorded reorganization treatment to mergers of mutual associations into stock institutions.\textsuperscript{33} The sole difference


This consistent treatment of the two types of transactions allows the form of the transaction to be governed by business and legal considerations and not solely by tax consequences. It may be more desirable to acquire a corporation's assets because a merger may carry with it contingent and undisclosed liabilities of the acquiree. \textit{See} B. Bittker & J. Eustice, \textit{supra} note 1, ¶ 14.05, at 14-14; L. Solomon, \textit{supra} note 7, ¶ 71,701, at 71,305. Additional non-tax factors affecting the form of a merger are the requirement for shareholder appraisal, \textit{id.} ¶ 71,050, at 71,051, convenience, \textit{id.} ¶ 71,250, at 71,151, the handling of unwanted assets, \textit{id.} ¶ 71,300, at 71,151, and accounting considerations, \textit{id.} ¶ 71,500, at 71,152.


33. Rev. Rul. 69-646, 1969-2 C.B. 54, 55. This transaction is identical to a stockmutual merger except for the form of the resulting enterprise. Each mutual shareholder exchanges his mutual shares for passbook accounts in the stock institution bearing the same withdrawal value as their mutual shares. \textit{Id.} In addition, they receive stock in the institution based on their distributive share of the mutual association's undistributed earnings and appreciated assets. \textit{Id.}
between this transaction and a mutual-stock acquisition is the organizational structure of the resulting entity—stock or mutual form. The substantive operations of the resulting enterprises are otherwise identical. Congress intended the reorganization provisions to apply consistently and to "depend less upon the form of the transaction than upon the economic integration of two or more separate businesses into a unified business enterprise." At the corporate level, therefore, reorganization treatment should be applied to both transactions because the continuity of business enterprise requirement is satisfied.

Sections 361 and 381 apply jointly only to transactions classified as reorganizations. A transaction cannot be treated as a tax-deferred reorganization at the corporate level and a taxable sale at the shareholder level. The continuity of proprietary interest requirement, therefore, must be examined to determine the appropriate characterization of the entire transaction.

II. CONTINUITY OF PROPRIETARY INTEREST

A stock institution is a corporation organized under state law and authorized to issue capital stock. Stockholders hold the equity of a stock institution, while depositors of the institution are creditors. A mutual association, on the other hand, is organized pursuant to federal or state banking laws and does not issue capital stock. The


36. I.R.C. §§ 361, 381 (1976); see id. § 368(a)(1) (defining reorganization).


association consists of the depositors of the institution who hold substantially all of the equity interest in the association as represented by mutual shares. Each depositor holds a "hybrid" security. He is both a creditor and an owner of the association. As an owner, the mutual shareholder possesses the right to vote, the right to share in the earnings of the association, and the right to share ratably in any liquidation proceeds. As a creditor, he has a qualified right to liquidate his account at any time, and in some jurisdictions, his claim may not be subordinated to that of a general creditor. In addition, dividends paid to the shareholders are deductible in computing the

(Supp. 1983); Paulsen v. Commissioner, 716 F.2d 563, 564 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 406 (6th Cir. 1974); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979).

42. Borrowers may be considered members of the association, see H. Russell, supra note 34, at 239, and granted voting rights, e.g., 12 C.F.R. § 544.1(a)(4) (1983); Ala. Code § 5-16-13(e) (1981); Ohio Rev. Code Ann. § 1151.47.1 (Page 1968).


44. E.g., Paulsen v. Commissioner, 716 F.2d 563, 564-65 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 781 (D. Wyo. 1979); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979); H. Russell, supra note 34, at 204.


47. Mutual associations may require members to give notice before honoring any withdrawal request, 12 C.F.R. § 544.1(a)(6) (1983) (mutual association must honor request within thirty days), but this is infrequently invoked. See West Side Fed. Sav. & Loan v. United States, 494 F.2d 404, 411 (6th Cir. 1974) (by-laws require thirty days notice); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 782 (D. Wyo. 1979) (accounts redeemable thirty days after request); Capital Sav. & Loan v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979) (deferment of payment authorized by statute); C. Henning, W. Pigott & R. Scott, supra note 34, at 133 (payments to share-account holders could be delayed).

48. Paulsen v. Commissioner, 716 F.2d 563, 568 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984). It is doubtful, however, that a mutual shareholder will be given the same priority as a general creditor. See infra notes 99-104 and accompanying text.
taxable income of the association. The "hybrid" nature of these instruments makes it difficult to determine whether the continuity of proprietary interest requirement has been satisfied.

A. The Nature of the Interest

The continuity-of-proprietary-interest doctrine was developed by the courts to deny tax-deferred treatment to those transactions that satisfied the literal requirements of the Code but were essentially disguised sales. The doctrine requires the acquiree's shareholders to obtain a material interest in the affairs of the post-acquisition enterprise. This requirement is comprised of two elements: First, the acquired interest must represent a proprietary stake in the enter-

49. I.R.C. § 591(a) (1976). A stock institution, on the other hand, is allowed to deduct interest paid to its depositors, id. § 163(a), but because it is a corporation, it may not deduct dividends paid to its shareholders, see B. Bittker & J. Eustice, supra note 1, ¶ 4.01, at 4-2.

50. B. Bittker & J. Eustice, supra note 1, ¶ 14.03, at 14-11; J. Scott, Federal Income Taxation of Corporate Reorganizations and Divisions § 5.2, at 93-94 (1972); L. Solomon, supra note 7, ¶ 74,151, at 74,155; Cohen & Freling, Tax Aspects of Tax-Free Acquisitions, in Practising Law Institute, Tax, SEC and Accounting Aspects of Corporate Acquisitions 40-41 (1977); see United States v. Hendler, 303 U.S. 564, 566 (1938) (assumption and payment of transferor's liabilities constitutes boot); Cortland Specialty Co. v. Commissioner, 60 F.2d 937, 940 (2d Cir. 1932) (cash and short-term notes too much like a sale), cert. denied, 288 U.S. 599 (1933). Several other judicial doctrines have evolved limiting the application of the reorganization provisions, including: the continuity of business enterprise requirement, see supra note 9 and accompanying text; the step-transaction doctrine, see infra notes 94-95 and accompanying text; and the business purpose doctrine, see supra note 9.


The continuity of proprietary interest requirement has been waived for reorganizations involving financially-troubled thrift institutions. I.R.C. § 386(a)(3)(D) (West Supp. 1983); B. Bittker & J. Eustice, supra note 1, ¶ 14.20, at 14-21 (Supp. III 1983). The merger of savings and loans should be encouraged beyond financially-troubled institutions. This would enable thrifts to avert financial difficulties before the situation becomes critical and allow mergers to be consummated on competitive terms. During the early 1980's, the failure or near failure of thrift institutions was common. Fingleton, The Thrifts, Forbes, Jan. 3, 1983, at 78; While Congress Fiddles, More Thrifts Burn, The Economist, Feb. 27, 1982, at 73. Many ailing thrifts were forced to merge with larger thrifts on unfavorable terms. Id. Although many mutuals are currently seeking to merge into or convert into stock institutions, see Cieply, The Thrifts, Forbes, Jan. 2, 1984, at 62, in order to attract investment capital, this does not mean that mergers of stock institutions into mutual associations should not be encouraged. Such mergers result in operating efficiencies that may allow the resulting institution to survive. The merger may also result in a diversification of the resulting entity's loan portfolio. Vartanian, supra note 34, at 829. Diversification lessens the risk of insolvency caused by interest rate fluctuations. Mergers among thrifts, regardless of the pre-transaction form, therefore, should not be discouraged by tax considerations.
prise, and second, the value of the proprietary interest must constitute a substantial part of the value of that which was transferred.

The first prong of the continuity of proprietary interest doctrine can be satisfied only if the transferee receives an equity interest in the new enterprise. The recipient need not, however, acquire an equity interest in the new enterprise identical to the interest transferred. A material change in the substantive character of the transferor's original interest, such as a change from equity to debt, however, can cause the transaction to be characterized as a sale rather than a reorganization. In a mutual-stock acquisition, the inquiry, therefore, must focus on the nature of the mutual share.

The second prong of the continuity doctrine is a quantitative test requiring that the equity portion of the consideration received represent a substantial part of the value of the consideration given up.

52. Southwest Natural Gas Co. v. Commissioner, 189 F.2d 332, 334 (5th Cir.), cert. denied, 342 U.S. 860 (1951); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979); see LeTulle v. Scofield, 308 U.S. 415, 420 (1940); B. Bittker & J. Eustice, supra note 1, ¶ 14.11, at 14-20.


54. B. Bittker & J. Eustice, supra note 1, ¶ 14.11, at 14-20; see J. Scott, Corporate Reorganizations and Divisions § 5.201, at 94 n.265 (1972); L. Solomon, supra note 7, ¶ 74,155.2, at 74,157.


56. See John A. Nelson Co. v. Helvering, 296 U.S. 374, 377 (1935) (preferred stock, even though non-voting, represents a substantial proprietary interest); B. Bittker & J. Eustice, supra note 1, ¶ 14.11, at 14-20 (same); L. Solomon, supra note 7, ¶ 74,155.2, at 74,157 (same). In an asset acquisition under § 368(a)(1)(C), however, the transferee must receive voting stock. I.R.C. § 368(a)(1)(C) (1976).

57. See, e.g., LeTulle v. Scofield, 308 U.S. 415, 416, 420-21 (1940) ($750,000 in bonds not a proprietary interest even though secured by the assets transferred in reorganization); Roebling v. Commissioner, 143 F.2d 810, 811, 814 (3d Cir.) (100 year bonds not a proprietary interest, merely a creditor's interest), cert. denied, 323 U.S. 773 (1944); Cortland Specialty Co. v. Commissioner, 60 F.2d 937, 938, 940 (2d Cir. 1932) (cash and short-term promissory notes do not satisfy the continuity of interest doctrine), cert. denied, 288 U.S. 599 (1933); see L. Solomon, supra note 7, ¶ 74,155.2, at 74,157.

58. Helvering v. Minnesota Tea Co., 296 U.S. 378, 385 (1935); Southwest Natural Gas Co. v. Commissioner, 189 F.2d 332, 334 (5th Cir.), cert. denied, 342 U.S. 860 (1951); L. Solomon, supra note 7, ¶ 74,155.1, at 74,156; see LeTulle v. Scofield,
The merger of a stock institution into a mutual association involves only one instrument—a mutual share. Consequently, the characterization of the share as debt or equity is determinative of the second prong of the test as well.  

B. Characterization of Mutual Shares

1. The Equity Characteristics

With the exception of minimal voting rights granted to borrowers, mutual shares represent the only proprietary interest in the mutual association. The mutual shareholder has the right to participate in
the profits of the association,\footnote{404, 409 (6th Cir. 1974); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 782 (D. Wyo. 1979); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 976 (Ct. Cl. 1979); see H. Russell, supra note 34, at 246.} share in any liquidation proceeds,\footnote{62. Paulsen v. Commissioner, 716 F.2d 563, 565 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Everett v. United States, 448 F.2d 357, 360 (10th Cir. 1971); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 782 (D. Wyo. 1979); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979); H. Russell, supra note 34, at 2.} and vote in elections for the board of directors and on other important business matters such as mergers.\footnote{63. Paulsen v. Commissioner, 716 F.2d 563, 564 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Everett v. United States, 448 F.2d 357, 360 (10th Cir. 1971); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 782 (D. Wyo. 1979); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979); see H. Russell, supra note 34, at 2.} These are the same rights traditionally associated with corporate stock ownership.\footnote{64. Paulsen v. Commissioner, 716 F.2d 563, 564 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass'n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Everett v. United States, 448 F.2d 357, 360 (10th Cir. 1971); Rocky Mountain Fed. Sav. & Loan Ass'n v. United States, 473 F. Supp. 779, 782 (D. Wyo. 1979); Capital Sav. & Loan Ass'n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979); see H. Russell, supra note 34, at 204.} The ownership of mutual shares, however, also grants rights typically associated with debt instruments.\footnote{65. See B. Bittker & J. Eustice, supra note 1, ¶ 14.31, at 14-94 to 14-95; R. Harvey, A Hand-Book on Corporation Law 236-37 (1906); H. Henn, supra note 30, § 124, at 208; R. Stevens, supra note 30, § 91, at 413. Mutual shareholders have been held to have additional rights associated with stock ownership. See Tcherepnin v. Knight, 389 U.S. 332, 345 (1967) (mutual shareholders entitled to protection under the Securities and Exchange Act of 1934); Fahey v. Mallonee, 332 U.S. 245, 255 (1947) (right to bring stockholders' derivative actions).} A mutual-stock acquisition, therefore, involves an exchange of a pure equity interest for an "equity plus" interest. The acquiree shareholders' proprietary investment is retained, and they are granted additional rights. These additional rights do not materially affect the continuity of a stockholder's proprietary rights and should not cause the transaction to be treated as a taxable sale.

Mutual shareholders possess one of the primary rights of an equity holder, the right to share in profits.\footnote{66. See supra notes 47-48 and accompanying text.} The payment of dividends to mutual shareholders is similar to the payment of dividends to stockholders of a stock institution. In both instances, dividends must be
declared by the board of directors, and may be limited when the entity lacks sufficient earnings. Thus, dividends are contingent on management's ability to run the association profitably.

It has been argued that mutual shares, in reality, provide a steady rate of return similar to a savings account, a debt instrument. This is based on the belief that competition will compel mutual associations to provide a return comparable to that paid on deposits in commercial banks and stock institutions. While a comparable rate of return may indeed be paid, this reasoning ignores the true proprietary nature of a mutual share. In addition to receiving distributions based on the association’s profits, each mutual share represents an undivided interest in a proportionate share of the association’s assets and undistributed profits, which will inure to the shareholders upon liquidation.

69. See 12 C.F.R. § 563.14 (1983) (mutual association must limit distributions); Kan. Stat. Ann. § 17-5412 (1981) (“no dividends shall be declared except from the earnings and undivided profits of the association”); H. Henn, supra note 30, § 318, at 630 (corporation may make distributions only out of legally available funds); R. Stevens, supra note 30, § 100, at 448-49 (distributions generally limited when capital is impaired).
71. Id. at 567-68. In practice, this will probably be true. Equal rates of return, however, do not make investment instruments identical. In addition to this return, mutual shareholders may benefit from the undistributed earnings of the association. See infra note 73.
72. See supra note 45 and accompanying text.
73. See Paulsen v. Commissioner, 716 F.2d 563, 565 (9th Cir. 1983) (net earnings and any surplus), cert. granted, 104 S. Ct. 1271 (1984); Rev. Rul. 69-646, 1969-2 C.B. 54 (undistributed earnings of the association effectively distributed pro-rata in form of acquiror’s capital stock). Mutual shareholders will not benefit from the association’s undistributed earnings by redeeming their shares because the withdrawable value of the shares does not change. H. Russell, supra note 34, at 282. They will, however, benefit from such earnings in several situations. First, upon liquidation, each mutual shareholder is entitled to his pro-rata share of the remaining assets. E.g., Paulsen v. Commissioner, 716 F.2d 563, 565 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass’n v. United States, 494 F.2d 404, 409 (6th Cir. 1974); Capital Sav. & Loan Ass’n v. United States, 607 F.2d 970, 973 (Ct. Cl. 1979); see H. Russell, supra note 34, at 2. Second, should the association become acquired by a stock institution, mutual shareholders may receive, in exchange for their liquidation rights, either stock in the acquiror, see Rev. Rul. 69-646, 1969-2 C.B. 54, 55, or a pro-rata interest in a liquidation account in an amount equal to the net worth of the mutual association, see LTR 8,346,052 (Aug. 16, 1983); LTR 8,327,088 (Apr. 8, 1983). This account gives the mutual shareholders priority over stockholders in the event of a liquidation of the stock institution, to the extent of their interest in the account, and is reduced to reflect subsequent withdrawals from the savings accounts. See LTR 8,346,052 (Aug. 16, 1983); LTR 8,327,088 (Apr. 8, 1983). Third, in a mutual-to-stock conversion, the mutual shareholders receive an interest in a similar liquidation account. See LTR 8,333,098 (May 19, 1983); LTR 8,333,061 (May 18, 1983); LTR 8,327,044 (April 6, 1983); LTR 8,310,078 (Dec. 9, 1982).
It has been suggested that the value of these rights is speculative and immaterial because a solvent association is highly unlikely to liquidate.74 This assertion, however, does not recognize that mutual shareholders also benefit from these rights if the association is converted into or acquired by a stock institution,75 not an uncommon occurrence.76 The liquidation rights, therefore, along with the right to share in the association's distributed and undistributed earnings, represent a proprietary interest in the mutual association similar to a stockholder's interest in a stock institution.

The right to participate in the management of the enterprise77 is another indicator of the nature of the interest held by mutual shareholders. Mutual shareholders vote for directors and on other matters affecting the enterprise.78 Their counterparts in a stock institution, the stockholders, vote in similar corporate elections.79 The materiality of the mutual shareholder's voting rights has been questioned in two respects. First, in practice, many mutual shareholders sign proxies when they invest in the association, and thus it is argued that such voting rights are illusory.80 This practice of voting by proxy, however, is no different than that used by many corporations.81 Further, in either enterprise, the proxy is revocable.82 Thus, the right to vote is no more illusory than that of a corporate stockholder. Second, the mutual shareholder's voting rights may be limited to a maximum number of votes, regardless of the number of shares owned.83 While this reduces

75. See supra note 73 and accompanying text.
76. E.g., LTR 8,346,052 (Aug. 16, 1983) (stock acquiring mutual); LTR 8,327,088 (April 8, 1983) (same); LTR 8,333,098 (May 19, 1983) (mutual converting to stock); LTR 8,333,061 (May 18, 1983) (same); LTR 8,327,044 (April 6, 1983) (same); see Cieply, supra note 51, at 62; Vartanian, supra note 34, at 828-29.
77. This is represented by the right to vote. See supra note 44 and accompanying text.
79. H. Henn, supra note 30, § 189, at 363-64; R. Stevens, supra note 30, § 112, at 517-18.
81. See H. Henn, supra note 30, § 196, at 381-82; R. Stevens, supra note 30, § 118, at 532.
82. See H. Henn, supra note 30, § 196, at 383 (corporations); H. Russell, supra note 34, at 206 (mutual associations); R. Stevens, supra note 30, § 118, at 533 (corporations).
83. 12 C.F.R. § 544.1(a)(4) (1983) (federal mutual association shareholders entitled to one vote per $100 on deposit, limited to 50 votes); see Paulsen v. Commissioner, 716 F.2d 563, 567 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West
the voting rights of a mutual shareholder, it does not materially affect the continuity of the acquiree stockholders' proprietary rights. The continuity-of-proprietary-interest doctrine does not require that the interest received be identical to the interest transferred, and the receipt of nonvoting stock will satisfy the continuity requirement. This limitation on voting rights, therefore, should not adversely affect the characterization of a mutual-stock acquisition as a reorganization.

The proprietary rights of a mutual shareholder arguably differ from those held by ordinary stockholders because they have a greater potential to be infinitely dilutable. Any additional transfer of funds to the association increases the total number of shares outstanding. This increases the transferor's proportionate interest in the entity and reduces the relative interest of the other shareholders. This dilution of proportionate interest may also be encountered by a corporate shareholder. In the absence of preemptive rights, a stockholder's interest would be diluted if the corporation issues and sells additional shares. In addition, federal law permits the board of directors to limit the amount of capital that may be accepted for deposit, and thus, the number of shares outstanding. This has the effect of preventing dilution beyond acceptable limits. The proprietary interest of a mutual shareholder, therefore, is substantially similar to the proprietary interest of a corporate stockholder.
2. Debt Characteristics—Negating Their Effect

The analysis of a mutual-stock acquisition differs from that of a traditional reorganization because there is no change in interest. Rather, the acquiree shareholders receive rights in addition to their original proprietary rights. The stockholders become owners of the mutual association just as they were before the transaction. This transfer of proprietary rights should be sufficient to satisfy the continuity requirement. The additional rights received, however, are typically associated with debt instruments. These rights may include the right to be treated as a general creditor upon liquidation and the qualified right to liquidate their investments on demand. As a result, the interest of the mutual shareholder may cross into the realm of a non-equity interest. The effect of these debt-like characteristics may be negated, and the likelihood of reorganization treatment increased, if proper restrictions are placed on the mutual shares as part of the merger agreement.

Mutual shareholders have a qualified right to liquidate their investments on demand. The savings and loan charter may allow the association to require that shareholders give at least thirty days notice of their intention to redeem their shares. This restriction, however, is usually not imposed. Although the right to liquidate does not make a mutual share the equivalent of a demand deposit, it does make the instrument similar to a thirty-day demand note. In order to avoid such a characterization, restrictions can be placed on the right to redeem mutual shares received in the merger. This restriction would ensure preservation of the ownership interest for a certain period of time. In addition, such a restriction avoids application of the step-transaction doctrine which may collapse the exchange for mutual

89. Paulsen v. Commissioner, 716 F.2d 563, 564 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984); West Side Fed. Sav. & Loan Ass’n v. United States, 494 F.2d 404, 411 (6th Cir. 1974); Capital Sav. & Loan Ass’n v. United States, 607 F.2d 970, 976 (Ct. Cl. 1979).
90. See Paulsen v. Commissioner, 716 F.2d 563, 568 (9th Cir. 1983), cert. granted, 104 S. Ct. 1271 (1984). This right, however, may not have been correctly interpreted in Paulsen. See infra notes 99-104 and accompanying text.
91. See supra note 47.
94. The step-transaction doctrine is another judicial limitation on reorganizations that emphasizes the substance of a transaction over its form. See McDonald’s Restaurants of Ill., Inc. v. Commissioner, 688 F.2d 520, 524 (7th Cir. 1982); Red-
shares and subsequent redemptions into a single transaction,\(^9\) resulting in a taxable sale.

Federal securities law requires that securities be held for at least two years to establish that they were purchased for investment and not resale.\(^9\) Such a standard can be applied to a stock-mutual merger. An extended holding period implies that the mutual shares are held for investment and would rebut the argument that the acquiree's shareholders have "cashed in" their position. Time restrictions on the right to redeem mutual shares will ensure that the merger and subsequent redemptions of mutual shares are treated as separate transactions.\(^9\)

Even if the shareholder were required to hold his shares for a specified period of time, he could effectively "cash in" his investment by borrowing against the shares.\(^9\) Thus, restrictions should be placed on the ability to pledge the shares to prevent the shareholder from "cashing in" his investment.

Placing the mutual shareholder on an equal footing with general creditors militates against reorganization treatment. In *Paulsen v. Commissioner*,\(^9\) the Court of Appeals for the Ninth Circuit interpreted prior California decisions as granting general creditor status to mutual shareholders upon liquidation.\(^10\) This would represent a substantial change in the equity-risk position\(^10\) of the investor potentially


\(^9\) The length of time between transactions, although not determinative, is one factor used by courts in determining the applicability of the step-transaction doctrine. See J. Rabkin & M. Johnson, *Federal Income, Gift and Estate Taxation* § 32.07, at 3252 (1983); L. Solomon, *supra* note 7, ¶ 74,176, at 74,162; Mintz & Plumb, *supra* note 94, at 249.

\(^9\) This persuaded the Ninth Circuit in *Paulsen v. Commissioner*, 716 F.2d 563 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 1271 (1984), to find that the stock institution shareholders had cashed in their investment. *Id.* at 568. In this case, the merger agreement authorized the shareholders of the acquiree to borrow against their mutual shares at preferred rates. *Id.* The mutual shares were found to be "essentially the equivalent of cash." *Id.* at 569.


\(^9\) *Id.* at 568.

\(^10\) A change in the risk associated solely with the nature of the investment represents a substantive change in the taxpayer's investment that may result in the
warranting taxation of the transaction. Upon closer examination, however, these decisions merely recognize that membership shareholders in a stock institution, who are depositors with limited voting rights, have priority over the stockholders. Membership shareholders are not subordinated to the claims of general creditors. Therefore, mutual shareholders, even if treated as membership shareholders, would be subordinated to the claims of general creditors. Even in a jurisdiction that grants mutual shareholders the same priority as general creditors, the acquisition agreement can provide that the acquiree's shareholders will be subordinated to the claims of general creditors. The mutual-stock acquisition, therefore, should not result in a substantial change of the equity-risk position of the stockholder and should not affect the characterization of the mutual share.

Finally, dividends paid to mutual shareholders are deductible in computing the taxable income of the association, just as interest on indebtedness is deductible. It has been argued that this precludes classifying mutual shares as equity. Such an argument ignores the rationale for the deduction. Mutual associations were originally exempt from income tax. The exemption was removed by the Revenue Act of 1951 which simultaneously provided for the deduction.

transaction failing to satisfy the continuity of proprietary interest requirement. See id. at 569; McDonald's Restaurants of Ill., Inc. v. Commissioner, 688 F.2d 520, 523 (7th Cir. 1982); J. Scott, supra note 54, § 5.201, at 94.

102. Membership shareholders are members in a stock institution but have limited voting rights and have no right to the undistributed earnings of the institution. See In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal. 2d 134, 141, 99 P.2d 251, 254 (1940).

103. See Home Sav. & Loan Ass'n v. United States, 514 F.2d 1199, 1207 (9th Cir.), cert. denied, 423 U.S. 1015 (1975); In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal. 2d 134, 142, 99 P.2d 251, 254 (1940).

104. See Home Sav. & Loan Ass'n v. United States, 514 F.2d 1199, 1207 (9th Cir.), cert. denied, 423 U.S. 1015 (1975); In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal. 2d 134, 142, 99 P.2d 251, 254 (1940).


107. I.R.C. § 591 (1976). In addition, it is argued that mutual shares are more like debt because the dividends received are not entitled to the dividend exclusion. Id. § 116(c)(1). Dividends from foreign corporations or regulated investment companies also do not qualify for the exclusion. Id. § 116(d). Therefore, this is not determinative as to whether a particular interest is debt or equity.


The purpose of the Act was to prevent the accumulation of tax-exempt income in mutual associations.\(^{113}\) Accordingly, a deduction was granted for distributions made by mutual associations.\(^{114}\) Thus, the deduction of dividends does not support the classification of the shares as debt.

Although mutual shareholders clearly retain a substantial interest in a mutual association, it is uncertain whether that interest is sufficiently similar to the stockholder's proprietary interest in a stock institution to qualify the transaction for reorganization treatment. Proper planning, however, increases the likelihood of favorable treatment.

**CONCLUSION**

A mutual-stock acquisition is not readily characterized as a tax-deferred reorganization because of the unique capital structure of mutual associations. The transaction should be accorded reorganization treatment because "the nature and extent of [the stockholder's] continued participation in the corporation's control, earnings, and assets, and the relationship of their interests to those of other shareholders and security holders after the transaction has been consummated"\(^{115}\) remains unchanged. Further, by following the suggestions contained herein, the debt characteristics of mutual shares can be minimized to a point where they do not affect the continuity of the shareholders' investment interest. Mutual-stock acquisitions, therefore, should be found to satisfy the continuity of proprietary interest doctrine and thereby qualify as tax-deferred reorganizations.

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