Outbound C Reorganization - No Inversion

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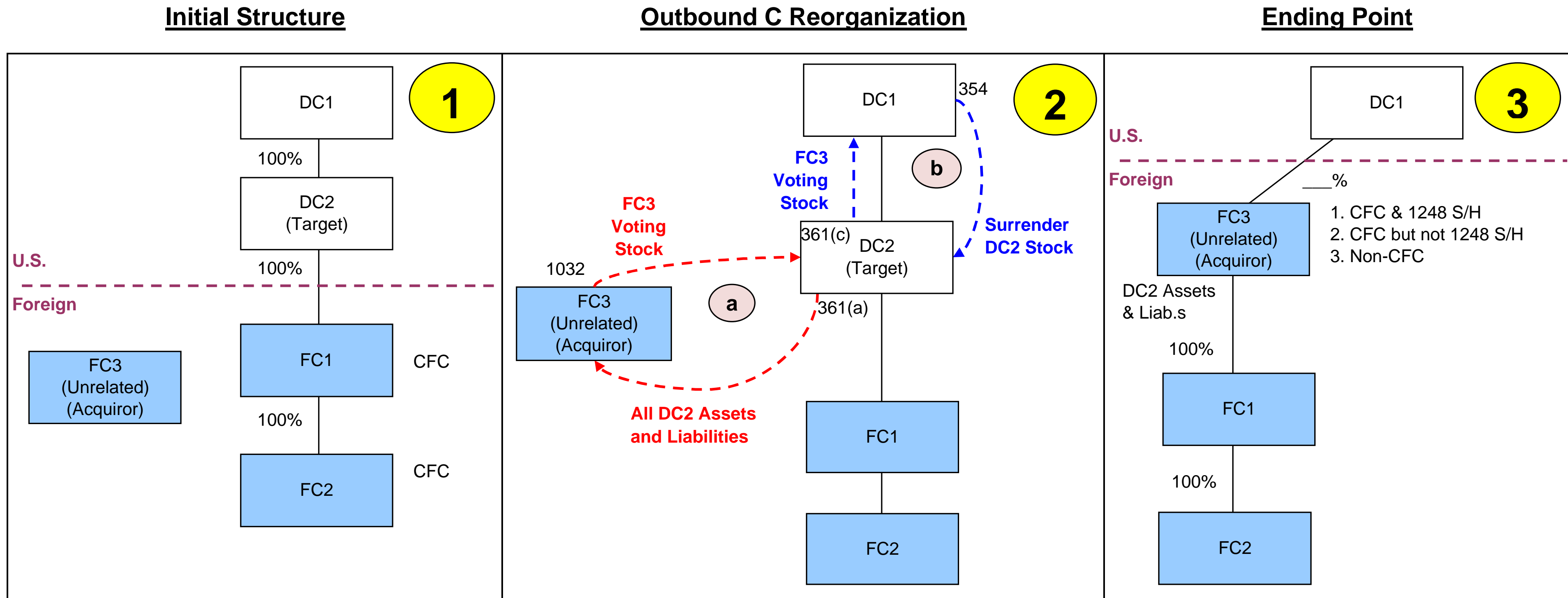

Section 367(a) applies because DC2 is a U.S. transferor. If DC1 receives less than 5% of the stock of FC3, then no gain will be required to be recognized under section 367(a). If DC1 receives 5% or more of the stock of FC3, then DC1 must file a gain recognition agreement ("GRA") to avoid gain. If gain is recognized under section 367(a), then 367(b) does not apply.

If DC2 transfers assets other than stock or securities to FC3, then those assets must be used in the active conduct of a trade or business outside the U.S. to avoid gain recognition. Sec. 367(a)(3). Section 367(a)(5) does not apply to a stock or asset transfer because DC2 (the transferor corporation) is controlled (within the meaning of section 368(c)) by 5 or fewer domestic corporations.

The exchanges are subject to section 367(b) because they are described in section 361 (DC2) and the status of a foreign corporation (FC3) as a corporation is relevant in determining tax attributes. If, after the exchange, FC3 is a CFC and DC1 is a section 1248 shareholder of FC3, then there are no exceptions to corporate treatment and no income inclusion is required under section 367(b). If, however, FC3 is not a CFC or DC1 is not a section 1248 shareholder with respect to FC3, then DC1 must include in income as a deemed dividend the section 1248 amount attributable to the FC1 stock.

Section 7874 may also apply. If any of the assets transferred are intangible assets, see section 367(d).

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