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TAX TALK

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EDITOR'S NOTE

Tax Talk doesn't remember much about 1985. But we do remember that, after Ronald Reagan was re-elected president in 1984, tax reform was a very hot topic (remember the Tax Reform Act of 1985?). Anyway, for all the talk, it took Congress until October, 1986 to come up with the landmark Tax Reform Act of 1986. We're not saying it will take that long for fundamental tax reform this time around but, for all the talk of Big Tax Reform, we are still only looking at two "plans" actually in writing: the one on the President's campaign website (three pages—and we're being generous) and the one the House Republicans released last June. As discussed in our article below, the rest is speculation, including about how a "destination based cash flow tax" ("DBCFT") would work.

Speaking of a DBCFT, one fascinating tidbit is that the outline of a cash flow tax was set forth in a U.S. Treasury paper in 1977, the first year of the Carter Administration. One of the report's authors, David Bradford, went on to expand the concept in papers written in 2001 and 2003 before his untimely death in 2005. Other authors (and other tax reform panels) have also weighed in so there is quite a bit of academic thought on the topic.[1] Unfortunately, there is no practical experience.

In the meantime, Tax Talk observes that, in the vacuum surrounding Big Tax Reform, bar associations continue to meet and talk about the section 385 regulations, financial institutions are earnestly complying with the Section 871(m) Delta One guidance, seminars are being given on all sorts of topics which may be obsolete by 2018 and tax advisors keep advising based on current law. The only place tax reform is having any impact is in some public securities disclosures. "Kitchen sink" disclosures that anything and everything might change in a Trump tax reform are now creeping into Edgar filings. Also, tax advisors are struggling to develop contract clauses that attempt to protect their clients against the unknowable and unforeseeable tax reform (we've even seen provisions that can be activated based on a Twitter "tweet"). Apart from that, there is not much tax advisors can do except soldier on and watch their Twitter feeds very carefully.

So, is it 1985 or 1986? No one knows...

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1. See Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System, President's Advisory Panel on Federal Tax Reform (Nov. 2005), available at https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Fix-Tax-System-2005.pdf; and Alan J. Auerbach & Douglas Holtz-Eakin, The Role of Border Adjustments in International Taxation, American Action Forum 10 (Nov. 30, 2016), available at https://www.americanactionforum.org/wp-content/uploads/2016/11/The-Role-of-Border-Adjustments-in-International-Taxation.pdf.

TAX REFORM UNDER GOP CONTROL?

In case you haven't heard, Donald Trump is now president of the United States. Republicans now control the House, Senate, and Presidency. With this trifecta, the GOP is in the best position in years to push sweeping tax reform. The question then, is what form that tax reform will take. In terms of official guidance, we only have a few documents to work with: (1) the House GOP plan entitled A Better Way – Our Vision for a Confident America (the "House Plan"),[2] (2) president-elect Trump's tax plan released in September[3] (based on an earlier plan of the Trump campaign entitled Tax Reform That Will Make American Great Again (together the "Trump Plan")).[4] Separately, Republicans are moving forward legislation that could significantly alter the way IRS regulations are interpreted by courts.

Tax Reform Plans

Both plans would reduce the number of individual income tax brackets from seven brackets to three, with the top marginal rate of each plan being 33 percent. Both plans would repeal the 3.8 percent tax on net investment income and the alternative minimum tax. The Trump Plan would put a limit on the use of itemized deductions, while the House Plan would eliminate itemized deductions apart from the home mortgage interest deduction and deductions for charitable contributions.

Currently, under section 1014 of the Code,[5] the basis of property acquired from a decedent is adjusted to be the fair market value of such property, without taxation on this step up. The Trump Plan would eliminate the estate tax, but capital gains held until death valued over $10 million would be subject to tax, with some exceptions. The House Plan would repeal the estate tax, but would no longer allow for a step-up in basis at death.

Both plans call for overhauls to the corporate and business income tax system, although each plan lacks technical detail. Both plans would eliminate the corporate alternative minimum tax, and while the Trump plan calls for a 15 percent corporate tax rate, the House Plan calls for a 20 percent corporate tax rate. The Trump campaign stated the Trump Plan was intended to give all pass-throughs a 15 percent rate, but only if such taxpayers elect to file their taxes as if they were incorporated. It is so far unclear how this would work in practice. The House Plan would tax small businesses and pass-throughs at 25 percent, but such taxpayers will be treated as having paid reasonable compensation to their owners.

The House Plan would repeal the current depreciation system and allow the cost of capital (for both tangible and intangible assets) to be fully and immediately deductible. However, deductions for net interest expenses on debt would only be allowed as a deduction against interest income; unused deductions could be carried forward. The Trump proposals would allow firms engaged in U.S. manufacturing to fully expense capital investments, with no deduction for corporate interest expense.

In addition, the House Plan proposes the United States switch to a border adjusted cash flow tax for businesses. Under a cash flow tax, a business is taxed on its cash flow, i.e., its business receipts less its expenditures. With a cash flow tax, assets would be immediately expensed. A border adjusted tax conforms to a "destination-based" principle – generally, tax is levied where goods end up rather than where the goods were produced. This would exclude from the U.S. federal tax base the sale of goods and services to non-U.S. persons, but include sales to U.S. persons, including sales by non-U.S. persons into the U.S. A change to a border adjusted tax flow tax would be a drastic departure from the current U.S. system. Also, there is no clarification on a topic near and dear to Tax Talk: the treatment of financial instruments, financial institutions, and financial transactions in a cash flow tax world.

Ending *Chevron* Deference?

The Regulatory Accountability Act of 2017 (the "Act"), passed by the House on January 11, 2017, would eliminate the deference courts give to agency regulations, including Internal Revenue Service ("IRS") regulations. In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the Supreme Court held that a court cannot overrule an agency regulation under an ambiguous statute unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." Moreover, under *Chevron*, a court is required to give deference to an agency's interpretation. This so-called "*Chevron* deference" allows agencies, including the IRS, to issue interpretive regulations with a high threshold for challenge. The Act would modify a number of the rules surrounding the Administrative Procedure Act, including replacing *"Chevron* deference*"* with a de novo review of regulations. If the Act were to become law, taxpayers would have greater opportunity to argue that IRS regulations should be overturned.

2. Available at https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf. For a more detailed discussion of the House plan, please see our last issue of Tax Talk, available at https://media2.mofo.com/documents/161012-tax-talk.pdf.
3. Available at https://www.donaldjtrump.com/policies/tax-plan.
4. Available at https://assets.donaldjtrump.com/trump-tax-reform.pdf.
5. All section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, unless otherwise indicated.

CURRENT STATUS OF SECTION 871(M) AND RELATED RULES

Overview

Section 871(m) is the Code provision that treats "dividend equivalents" paid under certain contracts as dividends from sources within the Unites States and therefore subject to U.S. withholding tax if paid to a non-U.S. person. The current guidance on section 871(m) exists in three places: (1) the final regulations from September 2015;[6] (2) Notice 2016-76 (the "Notice") from December 2016,[7] which announces changes to the final regulations; and (3) the final qualified intermediary agreement from December 2016, found in Rev. Proc. 2017-15, which implements and expands on Notice 2016-76 regarding the withholding tax liability of qualified derivatives dealers ("QDDs"). For practical purposes, the main takeaways for dividend equivalent withholding generally from the December guidance are threefold. First, the effective date for the application of section 871(m) is January 1, 2017, for delta-one instruments but will be delayed until January 1, 2018, for non-delta-one instruments. Second, QDDs are no longer exempt from withholding on dividends received on physical shares. Third, a QDD will not be liable for withholding tax on dividends paid to the QDD on physical shares or on dividend equivalents the QDD receives in its capacity as an equity derivatives dealer in 2017.[8]

The Notice indicates that the section 871(m) regulations will continue to apply beginning January 1, 2017, to any payment with respect to a potential 871(m) transaction that has a delta of one, including combined transactions; however, 2017 will be a phase-in year for such transactions. As for non-delta-one transactions, the Notice announces the IRS's intent to amend the section 871(m) regulations so that the regulations will not apply to payments made with respect to any non-delta-one transaction before January 1, 2018, and 2018 will also be a phase-in year for these non-delta-one transactions. When enforcing the section 871(m) regulations for the applicable phase-in years, the Notice states the IRS will afford relief to taxpayers or withholding agents who have made a good faith effort to comply with the regulations.

Final regulations were released on January 19, 2017, and published in the Federal Register on January 24, 2017. However, on January 20, 2017, President Trump's Chief of Staff, Reince Priebus, sent a memorandum to all heads of executive departments and agencies instructing, among other things, that all regulations released but not yet published must be immediately withdrawn for review and approval. The IRS on the other hand announced on January 24, 2017 that the new section 871(m) regulations were "approved by the Office of Management and Budget," and had "an effective date of January 19, 2017."[9] Despite this announcement and the publication of the regulations in the Federal Register, practitioners are unclear on whether these regulations were published in contravention of the order from the Executive Branch, and if so, what that means.

FINAL QI AGREEMENT AND AMENDMENTS TO FFI AGREEMENT

On December 30, 2016, the IRS issued Rev. Proc. 2017-15 and 2017-16. Rev. Proc. 2017-15 contains the final qualified intermediary ("QI") agreement in Rev. Proc. 2017-15, originally proposed in July 2016 in the form of Notice 2016-42.[10] Rev. Proc. 2017-16 contains amendments to the foreign financial institution ("FFI") agreement.

New from the proposed QI agreement, the final agreement (1) implements and expands on Notice 2016-76 regarding the withholding tax liability of qualified derivatives dealers ("QDDs"), and (2) generally makes other modifications to compliance rules.

Notice 2016-76 announced the IRS's intention to revise the final regulations to provide that a QDD will remain subject to withholding under chapter 3 and 4 on dividends it receives from physical shares held. The Notice announced that a QDD's "section 871(m) amount" will be determined by looking to a QDD's "net delta exposure," which involves aggregating a QDD's delta for all physical positions and potential section 871(m) transactions with respect to an underlying security. Further, the Notice stated that a QDD's tax liability with respect to an underlying security would be reduced, but not below zero, by the amount of withholding tax suffered by the QDD on the receipt of the same dividend payment on that underlying security. This left some ambiguity with respect to whether a cascading withholding tax might apply, because the rule in Notice 2016-76 could have been read to mean that a QDD's liability was determined based on its net delta exposure (which if perfectly hedged by physicals would be zero), and that liability could be reduced, but not below zero, by withholding on dividends from a hedge of physical shares. It was not clear from the proposed QI agreement or Notice

6. For a more detailed discussion of the Final Regulations, see our Client Alert, available at https://media2.mofo.com/documents/150921dividendequivalent.pdf.
7. For a more detailed discussion of Notice 2016-76, see our Client Alert, available at https://media2.mofo.com/documents/161206-irs-guidance-871m.pdf.
8. The QDD changes are discussed in more detail in the following article.
9. Marie Sapirie, Clarification Needed on PTP and Dividend Equivalent Regs, 2017 TNT 17-2 (January 27, 2017).
10. For a discussion of the Proposed QI Agreement, please see Vol. 9 Issue 2 of Tax Talk, available at https://media2.mofo.com/documents/160805taxtalk.pdf.

2016-76 whether a QDD's withholding tax on physical shares could be credited against any amounts a QDD would be required to withhold.

The final QI agreement provides relief to QDDs. Under the final QI agreement, a QDD will not be liable for withholding tax on dividends paid to the QDD on physical shares or on dividend equivalents the QDD receives in its capacity as an equity derivatives dealer in 2017 (but a QDD will remain liable for tax on dividends and dividend equivalents received in any other capacity). The final QI agreement implements the "net delta exposure" concept from Notice 2016-76.

Further, the final QI agreement calculates a QDD's tax liability as the sum of (1) for each dividend on each underlying security, the amount by which its tax liability under section 881 for its section 871(m) amount exceeds the amount of tax paid by the QDD in its capacity as an equity derivatives dealer under section 881(a)(1) on that dividend; (2) its tax liability under section 881 for dividend equivalent payments received as a QDD in its non-equity derivatives dealer capacity; and (3) its tax liability under section 881 for any payments such as dividends or interest, received as a QDD with respect to potential section 871(m) transactions that are not dividend or dividend equivalent payments to the extent the full liability was not satisfied by withholding.

The final FFI agreement contains updates for foreign financial institutions to comply with the Foreign Account Tax Compliance Act ("FATCA"), generally reflecting updates to the FATCA regulations (discussed below) and the expiration of transitional periods.

FINAL AND PROPOSED FATCA REGULATIONS

On December 30, 2016, the IRS published modifications to regulations under FATCA. The regulations generally make technical changes to existing FATCA regulations and incorporate FATCA guidance that was previously issued by the IRS. For example, the regulations provide that no withholding on "foreign passthru payments" will be required until the later of January 1, 2019, or the date on which final regulations are published that define the term "foreign passthru payments." Similarly, withholdable payments under FATCA do not include gross proceeds from a sale of property occurring before January 1, 2019. Both of these provisions were contained in Notice 2015-66, and are now incorporated into the regulations.

DTC SECTION 871(M) REPORTING

DTC Eligibility Procedures

The implementation of the section 871(m) regulations has far reaching impacts that extend beyond the realm of tax law. Recently, the Depository Trust Company ("DTC") has responded to the regulations by adjusting its eligibility procedures.[11] Under the new procedures for a security to qualify as DTC eligible, an officer of the issuer will be required to certify if the security is treated as a "Section 871(m) transaction"; if it is such a transaction, the officer must then certify whether it is a "simple contract" or a "complex contract."[12] If the security is treated as a "simple contract," then the applicable "delta" will also be required to be provided. In connection with the initial qualification, the officer must also agree that the issuer will provide DTC with information on dividend equivalent payments as they occur. DTC has created an "871(m) Dividend Equivalent Payment" template that sets forth the data that is required for the processing of these payments. As the DEPs occur, issuers will need to send this information to a designated DTC e-mail address.

DTC has warned market participants that the failure to timely comply with this new attestation requirement may result in a delay in DTC approval. Of course, a delayed approval could result in delayed settlements, and issuers and underwriters will be updating their procedures.

Compliance in January 2017

Historically, the DTC eligibility process was completed by the relevant distributors, without significant participation from the applicable issuers. The new required procedures, especially for frequent issuers, will require ongoing involvement from the relevant officer or officers from the issuers who make the required certifications, and accordingly, issuers will want to establish a means to reliably verify their accuracy. Together with their tax advisors and underwriters, these issuers will need to establish procedures to ensure that the certifications can be accurately completed on a timely basis, and that any required periodic notifications can be made to DTC.[13]

11. The DTC announcement is available at www.dtcc.com/~/media/Files/pdf/2016/10/31/4463-16.pdf.
12. A complex contract is any NPC or ELI that is not a simple contract; a simple contract is an NPC or ELI that has a fixed term and references a fixed number of underlying shares.
13. For more information, please see our December 27, 2016 special issue of Structured Thoughts, available at https://media2.mofo.com/documents/161227-structured-thoughts.pdf.

LAFA 20164001F – IRS EXPLAINS ISSUES DEALING WITH RIC'S DIVIDENDS-RECEIVED DEDUCTION

On September 30, 2016 the IRS released a Legal Advice memorandum (the "Memo"). The Memo was highly redacted, so the background, facts and issues considered are unknown. Nevertheless, the Memo does provide insight into a number of issues that relate to regulated investment companies ("RICs") and their shareholders:

Background

A RIC is generally not taxed on income that it distributes to its shareholders, but it is subject to tax on income it retains. In order to qualify as a RIC, the RIC is required to distribute at least 90% of its "investment company taxable income" annually.

Investment company taxable income does not include net capital gain, defined as the excess net long term capital gain for the year over the net short term capital loss for the year. On the other hand, net short term capital gain is included in investment income and is treated as ordinary income for purposes of determining dividend distributions and the dividends paid deduction.

Memo Guidance

A RIC is required to report the character of dividends distributed because the character of the dividend can have various consequences depending on the shareholder. For instance, a RIC is required to report short term capital gain dividends to enable nonresident alien shareholders to avail themselves of a special exemption from withholding. However, the Memo notes dividends received from a RIC are subject to limitations under section 854, which affect a corporate shareholder's dividends received deduction ("DRD"). Since these limitations apply to the shareholder's tax treatment for purposes of the DRD, the burden of proper reporting under section 854 is on the RIC shareholders, regardless of whether the amounts reported by the RIC are correct.

The Memo also noted, in order for a corporate shareholder to receive a DRD for distributions by a RIC, first the source of the dividend distributions must be dividend income received by the RIC that would have been deductible by the RIC. A capital gain dividend received from a RIC is not considered a dividend for purposes of the DRD. Second the corporate shareholder, not the RIC, must satisfy the requirements to be eligible for a DRD.

Lastly, in making dividend designations permitted under sections 852(b)(3)(C) and (b)(5)(A), 854(b)(1) and (2), and 871(k)(1)(C) a RIC may designate the maximum amount permitted under each provision even if the aggregate of all of the amounts so designated exceeds the total amount of the RIC's dividend distributions. The Memo noted that the RIC in question was allocating expenses differently for purposes of determining the maximum amount permitted under each provision. As a result, the individual shareholders of the RIC who were U.S. persons could apply designations to the dividends they receive from the RIC that differed from designations applied by shareholders who were nonresident alien individuals.

AM 2016004 – WHEN INFORMATION FROM FOREIGN TAX ADMINISTRATION BECOMES CONFIDENTIAL

In legal advice 2016-004 issued by the Associate Chief Counsel (International) (the "Legal Advice"), the IRS gave its opinion on the exact moment when information provided to and received from foreign tax administrations through the Common Transmission System (the "CTS") becomes protected from disclosure under the Code and tax conventions. The CTS is a common system being developed by the Organization for Economic Cooperation and Development (the "OECD") for the purpose of facilitating the automatic exchange of information between tax administrations.

Returns, return information, and tax convention information are categories of information related to taxes that are generally protected from disclosure under Code sections 6103 and 6105. Section 6103(a) provides the general rule that returns and return information must be kept confidential and can only be disclosed as authorized under the Code. In addition to the protection under section 6103, information received from a foreign government pursuant to a tax convention is also subject to the confidentiality rules of section 6105. Data transmitted via the CTS will fall within one or more of these categories of information protected by the Code. Additionally, the tax conventions, tax information exchange agreements, and intergovernmental agreements to which the United States is a party all contain provisions regarding the obligation to protect covered information from disclosure.

The Legal Advice concludes that information transmitted by the IRS to foreign tax administrations ("outbound transmissions") through the CTS is return information under section 6103 in the hands of the IRS, which

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throughout the exchange process should be protected as required by section 6103. Furthermore, that information becomes treaty-protected in the hands of the foreign country when the information is exchanged pursuant to a tax convention or other international agreement on taxes.

In the case of information provided to the IRS by foreign tax administrations ("inbound transmissions"), the Legal Advice notes that the moment when legal protection arises is less certain than in the case of outbound transmissions. While there are two moments when legal protection could arise in an inbound transmission (i.e., the moment information is uploaded to the CTS by the foreign tax authority, and the moment when the IRS downloads the information from the CTS), the Legal Advice concludes that the most likely moment is when the IRS downloads the information from the CTS (whether directly or through an IRS-designed system called the International Data Exchange Service ("IDES")). The IRS based this conclusion on a close reading of the various statutes and tax convention language, as well as related court decisions that seem to indicate that protection will not arise until the information is actually held by the IRS.

Furthermore, the Legal Advice concludes that protections under section 6105 and tax conventions are likely to follow the conclusion under section 6103. In other words, in the case of inbound transmissions, the protections under section 6105 and tax conventions arise, not when the data is uploaded to the CTS by the foreign tax authority, but only when the data is downloaded by the IRS from the CTS, either directly or through IDES.

IRS ISSUES FINAL REGULATIONS ON EXEMPT BONDS REVISING DEFINITION OF "ISSUE PRICE"

On December 9, 2016, the IRS issued final regulations (the "Final Regulations") clarifying the definition of "issue price" in arbitrage investment restrictions that apply to tax-exempt and other tax-advantaged bonds under section 103. The Final Regulations adopt special rules in the context of initial offerings to the public and competitive sales, and clarify the treatment of private placements and the choice of rules when multiple apply.

Under section 103, the interest earned from state or local bonds is excluded from an investor's gross income, but the interest earned from arbitrage bonds is included and thus taxable. Section 148 defines arbitrage bonds as bonds used directly or indirectly to acquire higher yielding investments or to replace funds that were used to acquire higher yielding investments. The yield on a bond issuance is determined on the basis of the issue price (within the meaning of sections 1273 and 1274).

The IRS first introduced regulations on arbitrage investment restrictions in 1993 (the Prior Regulations). In 2013 and again in 2015, the IRS issued proposed regulations concerning the definition of the issue price. After receiving public comments and recommendations, the IRS adopted the 2015 proposed regulations as revised.

Initial Offerings to the Public and Competitive Sales

The Final Regulations have adopted special rules regarding initial offerings to the public and competitive sales, and have imposed certification requirements on underwriters in order to take advantage of these rules. In the case of an initial offering to the public, an issuer may treat as the issue price the initial offering price to the public as of the sale date if certain criteria are met. First, the underwriters must offer the bonds to the public for purchase at a specified initial offering price on or before the sale date. Second, the lead underwriter in the underwriting syndicate or selling group (or sole underwriter, if applicable) must provide the issuer with a certification to that effect, along with reasonable supporting documentation, on or before the issue date. Third, each underwriter must agree in writing that it will neither offer nor sell the bonds to any person at a price that is higher than the initial offering price to the public during the period starting on the sale date and ending on the earlier of either (1) the close of the fifth business day after the sale date, or (2) the date on which the underwriters have sold a substantial amount of the bonds to the public at a price that is no higher than the initial offering price to the public. The IRS explained that this "hold-the-offering-price" requirement provides a standardized time period in which to apply the requirement regardless of the differing time periods among issuers between sales and closings of municipal bond issues, and that its relatively short period should reduce the associated risks to underwriters that were of concern to public commenters.

When bonds are issued for money in a competitive sale, an issuer may treat as the issue price the reasonably expected initial offering price to the public as of the sale date. To qualify for this special rule, the issuer must obtain from the winning bidder a certification of the reasonably expected initial offering price to the public as of the sale date upon which the price in the winning bid is based. A competitive sale is defined as a sale of bonds by an issuer to an underwriter in a bidding process in which the issuer offers the bonds for sale to underwriters at specified written terms, where certain requirements ensuring fair competition are met.

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Clarification on Private Placements and Choice of Rules

Under the Final Regulations, as under the Prior Regulations, the issue price is generally the first price at which a substantial amount (defined as 10 percent) is sold to the public. Public comments requested that, given the increasing prevalence of private placement transactions in the municipal bond industry since 2008, the 2015 proposed regulations explicitly provide that buyers in private placements are to be treated as the public rather than underwriters.[14]

In response to these comments, the Final Regulations provide that if, instead of a public offering, a bond is issued for money in a private placement to a single buyer that is not an underwriter or a related party, the issue price is the price paid by that buyer. The public is defined as any person other than an underwriter or a party related to an underwriter. An underwriter is defined as (a) any person who agrees pursuant to a written contract with the issuer (or, in the case of an underwriting syndicate, with the lead underwriter) to participate in the initial sale of the bonds to the public, and (b) any person who agrees pursuant to a written contract directly or indirectly with any person described in (a) to participate in such sale.

Finally, the Final Regulations provide that, if more than one rule for determining the issue price of the bonds is available, the issuer may select the rule it will use to determine the issue price and must identify the rule selected in its books and records on or before the issue date.

The Final Regulations will apply to bonds sold on or after June 7, 2017.

FIVE-YEAR RECOGNITION PERIOD FOR REITS AND RICS

Before the Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act"), the Code imposed a corporate-level tax on an S-Corporation, REIT, or RIC on gain recognized on sales of property held by such entity when it converted into its respective status for a specified "recognition period." The "recognition period" was originally the ten-year period beginning with the first day of the first taxable year for which the corporation changed its status. Congress shortened this recognition period to seven years for sales occurring in 2009 and 2010, and to five years for sales occurring in 2010, 2013, and 2014. In the PATH Act, Congress made the five-year recognition period permanent, effective for tax years beginning after December 31, 2014, and the Joint Committee on Taxation's technical explanation of the PATH Act indicated that the permanent five-year recognition period would apply to REITs and RICs. In August 2016, the IRS issued temporary regulations and proposed regulations that reinstated the ten-year recognition period for REITs and RICs, effective for conversion transactions occurring on or after August 8, 2016. In October 2016, chairmen of the Congressional tax-writing committees voiced their displeasure with the temporary IRS regulations, stating that it was the intent of Congress that the five-year recognition period apply to REITs and RICs.[15] On January 17, 2017, the IRS released final regulations that reduce the recognition period for REITs and RICs back to five years.

JOINT RESOLUTION AGAINST THE FINAL SECTION 385 REGULATIONS

On October 13, the IRS released final and temporary regulations under section 385 of the Code, which were the subject of significant controversy in their proposed form.[16] The section 385 regulations generally impose documentation requirements for certain related-party interests to be treated as indebtedness and automatically treat debt issued in certain related party contexts as equity for federal income tax purposes. On January 31, 2017, Representative Todd Rokita (R-IN) introduced a Joint Resolution to the House that would repeal the final regulations.[17] The Joint Resolution was issued pursuant to the Congressional Review Act of 1996, which allows Congress to cancel an agency regulation within sixty legislative days of the regulation's promulgation by a federal agency. The Congressional Review Act was only successfully used once before 2017, but the 115th Congress is attempting to use it to repeal regulations passed by the Obama administration.[18] The Joint Resolution has not yet been passed by the House, so it will be interesting to see if this method of repealing regulations gains traction in Congress.

14. A private placement in the municipal bond market typically involves a commercial bank purchasing bonds for its own account for investment purposes. See the American Bar Association Section of Taxation, Comments on Proposed Issue Price Regulations (Jan. 4, 2016), http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/010416comments-2.authcheckdam.pdf.

15. See Letter to Secretary Lieu Regarding Temporary Section 337(d) Regulations, available at https://waysandmeans.house.gov/wp-content/uploads/2016/10/REIT-Built-in-Gain-Letter-to-Treasury-10-18-16.pdf.

16. For a more detailed discussion of the final section 385 regulations, see our Client Alert, available at https://media2.mofo.com/documents/161020-irs-debt-equity-regulations.pdf.

17. H. J. Res. 54, 115th Congress (2017).

18. See Jason Pye, Congress Moves to Cancel Obama-Era Regulations Under the Congressional Review Act (February 3, 2016), available at http://www.freedomworks.org/content/congress-moves-cancel-obama-era-regulations-under-congressional-review-act.

MOFO IN THE NEWS; AWARDS – TAX TALK – FEBRUARY 2017

Morrison & Foerster was named "Global Law Firm of the Year" by *GlobalCapital* magazine for its 2016 Global Derivatives Awards. Morrison & Foerster was also named 2016 Americas Law Firm of the Year for the second year in a row by *GlobalCapital* in its Americas Derivatives Awards. We were named Americas Law Firm of the Year for the seventh time in eleven years by *Structured Products Magazine*. Morrison & Foerster was also named the 2016 Equity Derivatives Law Firm of the Year at the *EQDerivatives* Global Equity & Volatility Derivatives Awards. myCorporateResource.com awarded MoFo with the 2015 Client Content Law Firm of the Year Award in recognition of law firms that produce worldbeating, client-facing content. Morrison & Foerster was nominated for the 2016 *Chambers USA* Awards for Excellence in three categories, including Tax. These awards are based on *Chambers & Partners*' research for the 2016 edition of *Chambers USA*: America's Leading Lawyers for Business and reflect a law firm's pre-eminence in key practice areas.

- On December 19, 2016, Partner Oliver Ireland hosted a teleconference entitled "Fed's Final TLAC Rule" to discuss the Federal Reserve Board's final rules relating to a long-term debt, total loss absorbing capacity (TLAC), and clean holding company requirement. Topics included: The Fed's final rules; principal differences between the proposed rules and the final rules; considerations for foreign banks subject to the rules; an assessment of the U.S. internal TLAC requirement compared to the IHC requirement proposed by the European Commission; and the anticipated effect of the Fed's final rules on various financial products.
- On December 16, 2016, Partner Oliver Ireland and Partner Anna Pinedo co-hosted a teleconference with the Structured Products Association entitled "Total Loss-Absorbing Capacity Update" to provide a post-meeting analysis on changes from the TLAC proposed rule, with a focus on those changes affecting the structured products market. Topics included: the Fed's final TLAC, long-term debt and clean holding company requirements; key differences from the proposed rule; and the effects for structured products.
- On December 14, 2016, Partner Nathan Taylor hosted a telephone briefing entitled "Financing Fintech: Financial Privacy and Cybersecurity" regarding financial privacy and cybersecurity issues unique to Fintech, as well as recent regulatory developments.
- On December 13, 2016, Partner Anna Pinedo and Partner James Tanenbaum were joined by Yael Naftaly (EY), Leonard Rosen (Barclays), Glenn Yago, Ph.D. (Milken Innovation Center) in hosting a seminar in Tel Aviv, Israel entitled "Capital Markets Reinvented?" Topics included: The IPO market in the United States and the ReIPO™ for listed companies; club IPOs: insider participation in IPOs; the "better" reverse merger: merging into already public operating companies with failed clinical programs; is the pre-IPO private the new IPO? A look at private financing markets in the United States; block trades and bought deals; areas of SEC focus for reporting companies; and recent U.S. securities laws developments.
- On November 30, 2016, Partner Thomas Humphreys and Partner Remmelt Reigersman hosted an IFLR webinar entitled "Moving Away from the C-corporation: Understanding REITs, MLPs, PTPs, and BDCs" to explain the structures, restrictions and pitfalls in this evolving hybrid world of C-corporations mixed with tax pass-throughs. Topics included: Master limited partnerships; REITs and alternative assets that may qualify as 'real estate'; business development companies; consolidated groups of corporations and disregarded entities; Up-C structures; and potential tax reform.
- On November 17, 2016, Partner Peter Green spoke on a panel entitled "Update on PRIIPs - What Will Happen Next?" at the Structured Products Europe conference in London, U.K. Partner Peter Green and Partner Jeremy Jennings-Mares also hosted a panel entitled "Morrison & Foerster Bootcamp: Structured Products and Brexit." The bootcamp explored the impact of the UK's referendum vote to leave the UK on the European structured products markets. The timing of the UK's exit from the EU and future relationship between the UK and the rest of the EU remains uncertain and the bootcamp provided an update on recent developments.
- On November 15, 2016, Partner Peter Green, Partner Jeremy Jennings and Partner Oliver Rochman hosted a teleconference entitled "AIFMD – The First 3 Years and What Non-EU Fund Managers Need to Know" to discuss the AIFMD, the most far-reaching piece of legislation affecting investment funds since the UCITS regime. Topics included: When the management or marketing of a fund will be caught by AIFMD; marketing, pre-marketing and passive marketing/reverse enquiries; national private placement regimes and their usability; and access to the AIFMD passport.
- On November 10, 2016, Of Counsel Julian Hammar and Of Counsel James Schwartz were joined by William Scott (Partner, Stikeman Elliott LLP), Margaret Grottenthaler (Partner, Stikeman Elliott LLP), Darin Renton (Partner, Stikeman Elliott LLP), and Terence Doherty (Principal, Stikeman Elliott LLP) in hosting a seminar in New York entitled "Canadian Derivatives and Financial Services Regulatory Developments"; a presentation and an engaged discussion of Canadian regulatory and legal developments affecting trading in derivatives with financial institutions, public mutual funds and other Canadian counterparties. Topics included: Current issues in derivatives trade reporting;

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Margin requirements for non-centrally cleared derivatives–an overview of OSFI E-22 and CSA Consultation Paper 95-401; future use of the ISDA Regulatory Margin Self-Disclosure Letter and the ISDA Variation Margin Protocol by market participants in Canada; recent amendments to legislation affecting netting and collateral enforcement involving federal deposit taking institutions; domestic recognized clearing agency recovery plans; anticipated derivatives dealer/large derivatives participant registration regime; considerations involving transactions with public mutual funds; the proposed alternative investment fund regime; and implications of changes to personal property security laws affecting cash collateral.

- On November 9, 2016, Partner Lloyd Harmetz moderated the opening panel entitled "Disclosure practices, new product approval, post-sale review, conflicts of interest and other emerging issues" at the Structured Products Washington 2016 conference in Washington, D.C. Of Counsel Bradley Berman moderated a panel entitled "Distribution agreements, distribution arrangements and thoughts from distributors." Partner Remmelt Reigersman participated in a panel entitled "Tax developments." Partner Anna Pinedo moderated a panel entitled "The Department of Labor's Fiduciary Duty Rule and structured products." Senior of Counsel Hillel Cohn participated as a panelist.
- On November 2, 2016, Partner Scott Ashton delivered the Chair's opening remarks and participated in a panel discussion entitled "Private Placements for Academic Institutions" at the Private Placements Global Forum – Europe 2016 in London, U.K. Partner Brian Bates spoke on a panel entitled "Cross Border Private Placements." Topics included: The current options for European issuers when choosing to finance through the Private Placement market; Why do issuers like using the private placement market? What matters to an issuer when financing through a private placement (flexibility, pricing, currency; the increase in common term documentation; and framework for bringing together multi jurisdiction and denomination investors to the same financing (are there any extra burdens on issuers?)
- On November 1, 2016, Partner Anna Pinedo was joined by Thomas Connell (Managing Director, Standard & Poor's), Todd Mahoney (Managing Director, UBS Securities), and Wendi Locke (Partner, McCarthy Tétrault LLP) in hosting a joint briefing session entitled "Toronto Seminar Series" at the Fairmont Royal York Hotel in Toronto, Canada. During the first session, entitled "The Debt Capital Markets, Regulatory Developments, and Recent Issuances", the speakers provided an overview of debt capital market trends in 2016 and what to expect in the months ahead. The speakers also discussed some of the regulatory developments that are, and will continue to, impact issuances by financial institutions, including the Canadian banks. In particular, the speakers discussed the proposed US Federal Reserve long term debt, TLAC and clean holding company requirement, bank regulatory developments in Europe and the proposed bail-in and high loss absorbency requirement in Canada. The speakers also discussed recent NVCC issuances in the United States by Canadian banks. During the second session, entitled "Update on US and Canadian Corporate and Securities Law Developments", Partner Anna Pinedo and Wendi Locke focused on regulatory developments affecting SEC and Canadian reporting issuers, including the increased focus on non-GAAP financial measures, the SEC's disclosure effectiveness initiative, the mining disclosure update and modernization release, board diversity, and related matters.
- On October 27, 2016, Partner Obrea Poindexter and Associate Jeremy Mandell hosted a telephone briefing entitled "Financing Fintech: Prepaid Accounts" regarding the Consumer Financial Protection Bureau's (CFPB) final rules concerning prepaid accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z).
- On October 26, 2016, Partner Peter Green hosted a panel entitled "US Beneficial Ownership Regulation Affecting European Financial Services Institutions – An Overview" at the International Forum on Beneficial Ownership in London, U.K. The program provided essential information on the latest beneficial ownership legislation and regulation.
- On October 25, 2016, Partner Scott Ashton and Partner Brian Bates were joined by Tarun Sakhrani (Vice President, Barclays) in leading an IFLR webinar entitled "Latest Developments in the Global Private Placement Market." The session focused on the cross-border private placement market and recent trends. Topics included: market participants; documentation requirements for traditional and structured transactions; Financial covenants, "MFLs" and model form provisions; new issuers using the market (social housing trusts, universities, investment trusts, etc); marketing process with Agented and "direct" Private Placements; and ratings and the NAIC.
- On October 25, 2016, Partner Anna Pinedo participated in a panel discussion entitled "Industry Perspective: Financial Markets Compliance" on Day 1 of the NICE Actimize Forum in Brooklyn, New York. The Forum brought together leading financial institution executives, industry experts, and NICE Actimize product and subject matter experts for thought-provoking sessions focusing on today's financial crime and compliance challenges.
- On October 20, 2016, Of Counsel Bradley Berman hosted a teleconference entitled "FINRA Rule 2210 – Communications with the Public" to discuss the FINRA communications rule, which governs all aspects of communications by member firms. FINRA is in the process of amending Rule 2210. Topics included: upcoming amendments to Rule 2210; the scope of Rule 2210; FINRA enforcement actions relating to

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communications; and social media use by broker-dealers and their associated persons.

- On October 19, 2016, Partner David Lynn and Partner Marty Dunn led a teleconference entitled "Sending Your Message: Communications Rules for Offerings" to discuss the SEC's communications rules applicable to public and private companies when they are engaged in securities offerings. Topics included: materiality; press releases; research reports; non-deal roadshows; Free Writing Prospectuses; Regulation FD; and general solicitation and general advertising, revisited.
- On October 18, 2016, Of Counsel Julian Hammar and Of Counsel James Schwartz hosted a teleconference entitled "Derivatives Regulation Update: Latest U.S. Developments" to review the latest developments in U.S. derivatives regulation. Topics included: CFTC De Minimis exception developments; uncleared swaps Margin Rules update; CFTC position limits supplemental proposal; CFTC proposed rules regarding registration relief for certain foreign persons and annual reports for commodity pool operators; sec title vii implementation; sec proposal regarding investment companies' use of derivatives; federal reserve's proposal to further limit FHCs' commodities activities; and federal reserve and OCC proposed rules for financial contracts of GSIBS and related matters.
- On October 13, 2016, Partner Peter Green and Partner Jeremy Jennings hosted a teleconference entitled "From MAD to MAR – The New EU Market Abuse Regime" to discuss the coming into force of the EU's Market Abuse Regulation, which introduced many new obligations for issuers and arrangers of capital instruments, as well as changes to existing practices. Topics included: the key obligations for issuers, both EU and non-EU, in relation to the safeguarding, control and disclosure of inside information and the requirements on their executives and managers and connected persons under MAR. Additionally, the speakers examined the scope of exemptions designed to allow legitimate market transactions, such as buy-backs, stabilization and market-soundings, as well as "legitimate behavior" defenses.
- On October 11, 2016, Partner Jeremy Jennings-Mares presented on the "Subordination of MREL-Eligible Liabilities" during Session #2: "National Case Studies – The 'Outs' Perspective" at the European University Institute's "European Banking Union and Its Instruments" conference in Florence, Italy.

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