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TAXTALK

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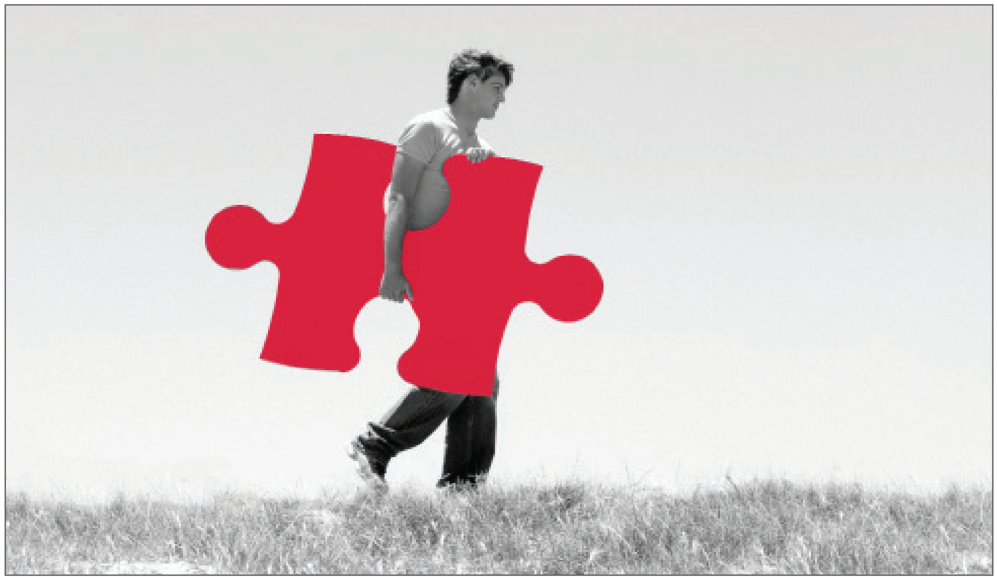

EDITOR'S NOTE

Welcome to Tax Talk 9.02. By this fall, we may look back on Q2 2016 with some nostalgia. Of course, there is the U.S. presidential election on November 8th, but U.S. tax advisors right now are more focused on the proposed Section 385[1] debt-equity regulations released in early April. Despite over 100 comment letters and a three-hour public hearing on July 14, 2016, U.S. Treasury Department officials have not budged from their plan to release final regulations after Labor Day. Once they do, some debt instruments will only have 90 days to live before they are recharacterized as equity for federal income tax purposes. And that's just one of the features of the proposed regulations which have been roundly criticized from every angle. Lost in the shuffle, however, was an IRS announcement[2] that any challenge to a taxpayer brought under the regulations once they are final (assuming they become final) needs an additional layer of approval—the IRS Associate Chief Counsel. This reminds us of the Treas. Reg. §1.702-2 partnership anti-abuse rule and the codification of the economic substance doctrine where similar requirements exist.[3] A cynic might say the government gets the most out of the regulations like these when taxpayers simply don't do their transactions. If the government allowed its audit teams unbridled ability to assert the regulations, they would bring lots of cases, not all of them strong ones. This would also provide

1 All section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

2 I.R.S. Notice CC-2016-009 (June 30, 2016), as revised July 25, 2016. *See Amy S. Elliott*, Debt-Equity Challenges Must Get Associate Office Review, 2016 TNT 144-1 (July 27, 2016).

3 *See IRS Announcement 94-87, 1994-27 I.R.B. 1(June 13, 1994) (partnership anti-abuse announcement); I.R.C. Section 7701(o) (codified economic substance doctrine); I.R.S. Directive LB&I-4-0711-015 (July 15, 2011) (limiting when I.R.S. examining agents can assert the penalty for failure to meet the codified economic substance doctrine).*

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taxpayers more incentive and more opportunities to challenge the regulations. If a taxpayer won, that could begin to undermine the entire effort. But by restricting audit team access to the provision, the government achieves the desired "in terrorem" effect with less risk of a successful taxpayer challenge. The government understands quite well that few taxpayers have the gumption (and resources) to bet the ranch on tax litigation. Having said that, you might be willing to bet the ranch (and a whole lot more) on a taxpayer challenging these particular regulations in the future if they are finalized.[4] We'll be reporting on that in Tax Talk 15.04.

Back to Tax Talk 9.02, however, we cover the fallout from the proposed Section 385 regulations in detail. We also cover proposed changes to the model qualified intermediary agreement, proposed regulations for disregarded entities wholly owned by foreign persons, the Republican tax reform plan, and more.

SECTION 385 UPDATE: COMMENT LETTERS AND POLITICS

On April 4, 2016, the Treasury Department issued proposed regulations under Section 385 (the "Proposed Regulations") which could dramatically change how related-party indebtedness is treated for federal income tax purposes. As expected, the Proposed Regulations were immediately controversial and, as of July 12, have provoked at least 115 comment letters[5] that the Treasury Department will have to consider before making the regulations final. In particular, several commentators provided the Treasury Department with extensive comments on the Proposed Regulations which (1) authorize the IRS to bifurcate an instrument into part-equity and part-debt (the "Bifurcation Rules"), (2) impose documentation requirements for certain relatedparty indebtedness to be respected as indebtedness for federal income tax purposes (the "Documentation Rules"), and (3) automatically treat debt instruments as equity for federal income tax purposes if they are issued in situations that the Treasury Department views as having limited non-tax effect (the "Automatic Equity Rules").

The New York State Bar Association issued a report outlining comments and criticisms of various aspects of the Proposed Regulations. The report acknowledges that the primary aims of the Proposed Regulations include limiting earnings, stripping transactions, and the use of intercompany transactions to repatriate offshore earnings without current U.S. tax. However, the report cautions that the Proposed Regulations would have "significant and disruptive effects on ordinary commercial activities" and act as a trap for the unwary for taxpayers that were not well advised. The report makes specific recommendations on the Proposed Regulations. For example, the report suggests that the Bifurcation Rules may cause administrative difficulty because the Proposed Regulations do not provide guidance on how a single debt instrument should be bifurcated into part-debt and part-equity for tax purposes, or what values should be ascribed to the pieces. The report recommends that the Bifurcation Rules be narrowed to situations involving overleveraged members of a multinational group. Although the report generally approves of the substance of the Documentation Rules, the report recommends administrative changes to make the rules more workable, such as amending the deadlines for the appropriate documentation. The report raises "serious concerns" about the Automatic Equity Rules and "strongly recommend[s] against issuing this proposed regulation in final form." Generally, the report identifies the Automatic Equity Rules as being both over- and under-inclusive and producing "arbitrary results." The report recommends a number of alternatives to the Automatic Equity rules, including provisions that are more targeted to inverted companies, guidance based on a group's third-party debt-equity ratio, or significantly narrowing the scope of the Automatic Equity Rules.

The Securities Industry and Financial Market Association ("SIFMA") also submitted comments to the Treasury Department that requested exceptions from the Proposed Regulations for financial institutions. In particular, the comments point out that, in order to effectively satisfy its role as an intermediary, a financial institution must be able to move funds quickly between jurisdictions, including through the use of intercompany loans. Furthermore, SIFMA argues that financial institutions are already subject to significant regulation that impose economic discipline on members of a financial group. The SIFMA letter generally requests that members of a regulated financial group should not be subject to the Automatic Equity Rules, or at least should be granted specific exceptions in certain situations. Furthermore, the comments recommend easing the requirements of the Documentation Rules and softening the consequences for failure to comply with the Documentation Rules, as well as delaying the effective date of the Proposed Regulations to give financial institutions more time to comply.

4 On August 4, the U.S. Chamber of Commerce and the Texas Association of Business filed a lawsuit seeking to overturn an aspect of the "inversion" targeted regulations issued at the same time as the Section 385 regulations (generally, an effort by the government to prevent U.S. parent corporations from shifting to foreign-parent structures). *See* Complaint, Chamber of Commerce of the United States of America et al. v. IRS et al.; No. 1:16-cv-00944 (W.D. Tex. Aug. 4, 2016).

5 Collected Comments on Proposed Regs: Debt-Equity, 2016 TNT 134-34 (July 12, 2016).

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Republican members of the House Ways and Means Committee wrote a letter to Treasury Secretary Jacob Lew expressing "grave concerns" over the Proposed Regulations. In particular, the letter criticizes the Proposed Regulations as "broadly applicable to a wide array of ordinary business transactions, creating unacceptably high levels of uncertainty and adverse collateral consequences for non-tax motivated business activity." The letter also cautions that, because earnings stripping and inversion transactions are dealt with in other parts of the Internal Revenue Code, the Proposed Regulations have co-opted Section 385 for uses other than what Congress intended. Senator Bernie Sanders (I-VT) however, supports the regulations and stated that the proposed rules "focus only on the most blatant abuses."

Although it is impossible to tell whether and to what extent the Treasury Department will address the concerns raised in these comment letters, there is some evidence that these criticisms have not gone unnoticed. On July 16, Treasury deputy assistant secretary Robert Stack acknowledged that the Proposed Regulations were a "blunt instrument" that "might have overdone it" with respect to cash pooling arrangements, foreign-to-foreign intragroup loans, and transactions by banks and S corporations. Taxpayers eagerly await the next piece of guidance by the Treasury Department, with particular attention paid to the effective date of any final regulations.

PLR 201614009: REIT'S LIKE-KIND EXCHANGES NOT SALES FOR PROHIBITED TRANSACTION SAFE HARBOR

In Private Letter Ruling 2016-14-014, the IRS considered the application of Section 857(b)(6)(C). Section 857(b)(6)(C) provides a safe harbor from the 100% REIT excise tax on net income from "prohibited transactions." Generally, a prohibited transaction is a sale or other disposition of dealer property (i.e., any property held by a REIT primarily for sale to customers in the ordinary course of business) that is not foreclosure property. One of the safe harbors generally limits a REIT to no more than seven sales each year. In Private Letter Ruling 2016-22-009, a self-administered and self-managed REIT proposes to engage in a series of dispositions to realign its portfolio of properties including outright sales, like-kind exchanges under Section 1031 (some of which included boot), and asset sales. The IRS reasoned that Section 1031 transactions are consistent with the Congressional intent of the safe harbor to allow REITs to modify their portfolios without incurring the excise tax and held that Section 1031 exchanges are not treated as a sale for prohibited transaction purposes. The IRS held that each of the proposed 1031 like-kind exchange, would not be treated as a sale for purposes of the prohibited transactions limitation but, to the extent that gain is recognized by the REIT on boot received, that portion of the 1031 transaction may be treated as a sale for purposes of the safe harbor. This is similar to past private letter rulings such as PLR 2007-02-021.

PROPOSED CHANGES TO QUALIFIED INTERMEDIARY AGREEMENT

On July 1, 2016, the IRS issued Notice 2016-42 proposing changes to the model Qualified Intermediary ("QI") agreement published in Rev. Proc. 2014-39 that expires on December 31, 2016. Generally, a QI is a qualifying entity (typically a foreign bank or other foreign financial institution) that is a party to a withholding agreement with the IRS. A QI provides a QI certificate to the IRS (Form W-8IMY) in which the QI may agree to undertake responsibility for income reporting and tax withholding on payments to beneficial owners of payments made to that entity. As a result, payments made to the QI do not require withholding. Thus, the QI assumes certain documentation and withholding responsibilities in exchange for simplified information reporting for its foreign account holders and the ability not to disclose proprietary account holder information to a withholding agent that might be a competitor.

Most importantly, the new proposed QI agreement in Notice 2016-42 provides guidance and operational procedures for implementing the new qualified derivative dealer ("QDD") regime under the final Section 871(m) regulations.[6] The issue the regime addresses is the possibility of cascading withholding: if a foreign bank holds U.S. stock and enters into a derivative contract with respect to that stock with another foreign bank, it would generally be subject to withholding tax on dividends paid on the stock and would also have to withhold on payments made under the derivative contract.

Under the Section 871(m) regulations, generally, payments made to a foreign securities dealer or a foreign bank on U.S.-source dividend equivalent payments are subject to withholding. The Section 871(m) regulations allow foreign securities dealers and foreign banks to avoid being subject to withholding by agreeing to assume

6 For a more detailed discussion of the final Section 871(m) regulations, see our Client Alert, available at http://www.mofo.com/~/media/Files/ClientAlert/2015/09/150921DividendEquivalent.pdf.

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primary withholding and reporting responsibility when those amounts are then paid to their customers. In order to act as a QDD, an entity must (1) furnish to withholding agents a QI withholding certificate affirming that the recipient is acting as a QDD for dividends and dividend equivalents; (2) agree to assume primary withholding and reporting responsibilities on all payments associated with the withholding certificate the QDD receives and makes as dealer; (3) agree to remain liable for tax on any dividends and dividend equivalents it receives unless the QDD is obligated to make an offsetting dividend equivalent payment as the short party on the same securities; and (4) comply with any compliance review procedures that are applicable to a QI acting as a QDD, as specified in the QI agreement.

In Notice 2016-42, the IRS proposes changes to the QI agreement to allow a QI that is an eligible entity[7] to act as a QDD. The proposed QI agreement provides that a QI may only act as a QDD for payments on potential 871(m) transactions or underlying securities that it receives and payments regarding potential 871(m) transactions that it makes as principal, regardless of whether those payments are received or made in the QDD's capacity as a dealer.

A QDD (other than a foreign branch of a U.S. financial institution) must determine and pay its "QDD tax liability," which is the sum of a QDD's liability under Sections 871(a) and 881 for (1) its "section 871(m) amount"; (2) its dividends that are not on underlying securities associated with potential Section 871(m) transactions and its dividend equivalent payments received as a QDD in its non-dealer capacity; and (3) any other U.S.-source fixed and determinable annual and periodic income payments received as a QDD with respect to potential Section 871(m) transactions or underlying securities that are not dividend or dividend equivalent payments. For this purpose, the QDD's "section 871(m) amount" is the excess of its dividends and dividend equivalent payments received in a dealer capacity over the sum of dividend equivalent payments made in its dealer capacity and the amount of dividend equivalent payments the QDD is contractually obligated to make acting as a QDD in dealer capacity. A QDD will have to report its tax liability on Form 1042 and make any required payments and deposits with respect to its tax liability.

If finalized, the proposed changes will apply to QI agreements in effect after December 31, 2016. The IRS intends to modify the Section 871(m) regulations to coordinate with the provisions of the proposed QI agreement relevant to the requirements of QDDs and withholding agents making payments to QDDs.

TD 9766: PARTNERS IN A PARTNERSHIP OWNING A DRE SUBJECT TO SELF-EMPLOYMENT TAX

Under Treasury Regulations Section 301.7701-2(b), a business entity that has a single owner can elect to be treated as disregarded as an entity separate from its owner for federal income tax purposes (a "DRE"). Treasury Regulations Section 301.7701-2(c)(2)(iv)(B) provides an exception to this status and states that a DRE is treated as a corporation for purposes of federal employment taxes. Thus, the DRE rather than the owner is considered to be the employer of the DRE's employees for federal employment tax purposes. However, Treasury Regulations Section 301.7701-2(c)(2)(iv)(C)(2) provides that a DRE is not treated as a corporation for selfemployment tax purposes. The Regulations contain an example illustrating the mechanics of this rule; however, none of the examples include a DRE owned by a partnership. Because the Regulations do not mention disregarded entities owned by partnerships, some taxpayers have taken the position that the Regulations permit the treatment of individual partners in a partnership that own a DRE as employees of the DRE. This reading might allow a taxpayer to circumvent the IRS' position in Rev. Rul. 69-184 that partners in a partnership cannot also be employees of the partnership and, in turn, permit partners to participate in certain tax-favored employee benefit plans.

One May 4, 2016, the IRS issued Temporary Regulations to clarify that the self-employment tax rule of Treasury Regulations Section 301.7701-2(c)(2)(iv)(C)(2) also applies when a DRE is owned by a partnership. Thus under the new Temporary Regulations, a DRE owned by a partnership is not treated as a corporation, and the partners of the partnership are subject to the self-employment tax.

In the Preamble to the Temporary Regulations, the IRS noted its belief that that the existing Regulations did not create a distinction between a DRE owned by an individual and a DRE owned by a partnership in the application of the self-employment tax rule. In addition, the IRS does not believe the existing Regulations alter the holding of Rev. Rul. 69-184 which provides that: 1) members of a partnership are not employees of the partnership for FICA, FUTA, or income tax withholding purposes; and 2) a partner who devotes time and energy

7 For this purpose, an "eligible entity" includes (1) government-regulated securities dealers; (2) governmentregulated banks that issue potential 871(m) transactions to customers and receive dividends or dividend equivalent payments pursuant to such transactions; or (3) entities wholly-owned by an entity described in (2).

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in the conduct of the trade or business of the partnership is a self-employed individual rather than an employee.

The Temporary Regulations will apply on the later of 1) Aug. 1, 2016, or 2) the first day of the latest starting plan year following May 4, 2016, of an affected plan sponsored by an entity that is a disregard entity.

REV PROC 2016-31: RELIEF FOR MONEY MARKET FUNDS RECEIVING AMOUNTS TO COMPLY WITH NEW SEC RULES

The Internal Revenue Service has cleared the way for investment advisers to "top off" money market fund ("MMF") assets to bring them in compliance with the new rules that require certain funds to adopt "floating rate" structures beginning October 14, 2016. Rev. Proc. 2016-31 provides that receipt by a MMF of a contribution from an adviser by itself will not disqualify the MMF from relying on status as a "regulated investment company" under Section 852, or result in excise tax under Section 4982.

A MMF is an investment company registered under the Investment Company Act of 1940. Under existing rules, MMFs may maintain a fixed price of $1.00 per share by using the "amortized cost method" or "penny rounding method" of valuation.

In 2014, the SEC amended Rule 2a-7 to require MMFs other than those that limit their investors to natural persons (retail MMFs) or limit their investments to government securities (government MMFs) to adopt a floating-rate structure. That is, effective October 14, 2016, the net asset value ("NAV") of all MMFs other than retail MMFs and government MMFs will float up or down, depending on the market value of their portfolio holdings (floating rate MMFs).

It is expected that many investment advisers may want to contribute capital, so that when the MMF transitions to a floating NAV all shareholders receive the same value per share at the time of the transition (a top up contribution). However, the distribution requirements under Section 852 pose a potential hurdle to the use of top up contributions to raise an MMF's NAV to $1.0000.

In order for an MMF to be taxed as a regulated investment company ("RIC"), the MMF must meet certain requirements detailed in Section 852. Section 852(a)(1) requires the MMF's deduction for dividends paid to equal or exceed 1) the sum of 90% of the RIC's investment company taxable income ("ICTI") for the tax year, and 2) 90% of the excess of the RIC's interest income excludable from gross income under Section 103(a) over the RIC's deductions disallowed under Section 265 and Section 171(a)(2). In addition, Section 852(b)(1) imposes a tax on a RIC's ICTI, which is taxable income excluding net capital gain and deductions for dividends paid.

If the distribution requirements of Section 852(a) apply to a top up contribution, it may be impossible for the advisers of MMFs to make contributions that raise an MMF's NAV. To increase the value of an MMF's portfolio by a given amount, an adviser would need to contribute more than ten times that amount to "gross up" the contribution for both a 90% distribution requirement and tax on the undistributed amount.

To facilitate a smooth transition to compliance with the new SEC MMF rules, on May 23, 2016 the IRS issued Rev Proc 2016-31 which provides temporary relief for certain MMFs that receive contributions from their advisers as the MMF transitions to comply with the new SEC rule. Under Rev Proc 2016-31, certain adviser contributions are excluded from ICTI for purposes of the distribution requirements of Section 852(a); however, the contributions are still included in the RIC's income for other federal tax purposes including Section 852(b). Rev Proc 2016-31 applies to a top up contribution that is received by an MMF as part of a transition to implement the floating NAV reform before the Oct. 14, 2016, compliance deadline. If an MMF receives such a contribution, the IRS will not challenge the MMF's treatment of the contribution as an amount that is included in ICTI for purposes of Code Sec. 852(b) but is excluded from ICTI for purposes of Code Sec. 852(a)(1). Rev Proc 2016-31 is effective for all contributions that are described in the Rev Proc.

T.D. 9771: FINAL REGULATIONS ON THE APPLICATION OF THE SECTION 108 BANKRUPTCY AND INSOLVENCY EXCLUSIONS TO GRANTOR TRUSTS AND DRES

On June 10, 2016, the IRS issued final regulations (the "Regulations") that provide guidance on how the exclusion from gross income of cancellation of debt income ("CODI") applies in the case of debt issued by a taxpayer's DRE or grantor trust.

Under general tax principles, a debtor that incurs indebtedness does not include the debt proceeds in

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income because the taxpayer incurs an offsetting obligation to repay the indebtedness. As a result, if the taxpayer is relieved of the obligation to repay the indebtedness, the taxpayer is required to include CODI in income.

Section 108 of the Code provides exceptions to the general rule that CODI is included in a taxpayer's income. Two exceptions found in Section 108 apply if the taxpayer is in bankruptcy or the taxpayer is insolvent. While applications of the Section 108 exclusions can be relatively straightforward in the case of indebtedness incurred by a taxpayer directly, it has been unclear whether Section 108 applies to a taxpayer that incurs CODI as a result of debt issued by the taxpayer's DRE or grantor trust where the entity (but not the taxpayer himself/herself) is bankrupt or insolvent.

The Regulations provide that the bankruptcy exclusion is available to a taxpayer only if the taxpayer is the debtor in bankruptcy and that it is insufficient if the taxpayer's DRE or grantor trust is in bankruptcy. According to the preamble of the Regulations, "Congress did not intend that a solvent, non-debtor owner of a grantor trust or a disregarded entity, which has committed some but not all of its nonexempt assets to the bankruptcy court's jurisdiction, have an exclusion from discharge of indebtedness income merely by virtue of having some of its assets subject to the jurisdiction of the bankruptcy court." Where the grantor trust or DRE is owned by a partnership, the Regulations provide that the partner(s) to whom the income is allocable must be in bankruptcy.

While the Regulations provided some clarity on the Section 108 bankruptcy exception, the Regulations declined to explicitly promulgate a rule that addressed how indebtedness of a DRE or grantor trust is taken into account in determining the extent to which a taxpayer is insolvent. For example, it is unclear whether indebtedness issued by a taxpayer's DRE or grantor trust that is nominally recourse with respect to the DRE or grantor trust should be considered recourse indebtedness or, because the entity's creditors can only look to the assets owned by the entity itself, the indebtedness should be viewed as nonrecourse as to the taxpayer. Although the Regulations do not contain a rule addressing these issues, the preamble to the Regulations states that it is the IRS's view that indebtedness of a DRE or grantor trust is indebtedness of its owner for tax purposes and, unless the owner has guaranteed the debt or is otherwise liable for the debt, the debt should be viewed as nonrecourse. According to the preamble, the IRS is continuing to study these issues and anticipate publishing additional guidance in the future.

PROPOSED REGULATIONS ON FOREIGN-OWNED DRES

On May 10, 2016, the IRS proposed new regulations that would generally treat a DRE wholly owned by a foreign person as a domestic corporation separate from its owner for the limited purposes of reporting, record maintenance, and associated compliance requirements under Code Section 6038A.[8] Under current law, certain U.S. entities treated as DREs by default, rather than by an election, do not generally need to acquire a U.S. employer identification number, or EIN. However, the DRE rules in Treas. Reg. Section 301.7701-2(c) treat a DRE as separate from its owner for the limited purposes of employment and excise taxes. The proposed regulations would add DREs wholly owned by a foreign person to this exception. As a result, these DREs would be treated as foreign-owned domestic corporations separate from their owners for the purposes of information reporting, and affected entities would be required to file the Form 5472 information return with respect to transactions reportable under 6038A[9] between the entity and its foreign owner. Additionally, affected entities would be required to maintain records sufficient to establish the accuracy of the information return and the correct U.S. tax treatment of such transactions.

Interestingly, the proposed regulations would impose a filing obligation on a foreign-owned disregarded entity for transactions reportable under Section 6038A even if the entity's foreign owner already has an obligation to report the income resulting from those transactions. For example, if a foreign-owned disregarded entity engages in a transaction reportable under Section 6038A that is also a transaction effectively connected with a U.S. trade or business, the owner would already have an obligation to report that transaction on his or her tax return, but the proposed regulations would require that owner to also file a Form 5472 information return for those transactions.

An affected entity required to file Form 5472 under the regulations would be liable for penalties of at least $10,000 for each Form 5472 that is not filed or is filed inaccurately. The proposed regulations would be

8 Generally, Section 6038A imposes reporting and recordkeeping requirements on domestic corporations that are 25percent foreign owned. Under that section, such a domestic corporation must file Form 5472 for each related party with which the reporting corporation has had any reportable transactions.

9 A "reportable transaction" is generally defined in the Regulations as either a foreign related party transaction for which only monetary consideration is paid or received by the reporting corporation, or a foreign related party transaction involving nonmonetary consideration or less than full consideration.

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effective for taxable years ending on or after the date that is 12 months after the date the regulations are published as final in the Federal Register.

HOUSE REPUBLICAN TAX REFORM PLAN

On June 24, 2016, the House Republicans released a tax reform plan entitled "A Better Way: Our Vision for a Confident America" (the "Plan").[10] In February of 2016, House Speaker Paul Ryan (R-WI) announced the creation of six committee-led task forces to develop a pro-growth policy agenda for addressing top concerns of the American people. Ways and Means Committee Chairman Kevin Brady (R-TX) leads one of these committees, the Tax Reform Tax Force, which, through four months of House member-driven idea forums and multiple public hearings, created the Plan. Below, Tax Talk covers some of the Plan's highlights, including changes to the corporate and individual tax rates, the allowance of full expensing for newly purchased assets, changes to interest deductions, and changes to the United States system of international taxation.

First, the Plan would make changes to current tax rates for individuals. Today, there are seven tax brackets for individuals, with a top individual income tax rate of 39.6 percent. The Plan would reduce these brackets to three brackets: (1) 0/12%; (2) 25%; and (3) 33%, each indexed for inflation. Further, the Plan would change the capital gains tax rate from the current rates (0%-20% depending on a taxpayer's tax bracket) to allowing individuals to deduct half of their capital gains. For example, an individual in the 25 percent tax bracket would be allowed to deduct 12.5 percent capital gains income such as corporate dividends and therefore have a capital gains tax rate of 12.5%. The Plan would also reduce the complexity and compliance burdens of the current system, making a tax filing for most Americans "simple enough to fit on a postcard," an example of which from the Plan is below.

Second, many small and closely held business are organized as pass-through entities, such as partnerships and S corporations, which, in the case of individual partners or shareholders, are currently taxed at the tax rates for individuals because of their pass-through nature. The Plan would create a new business tax rate for small business organized as sole proprietorships or passthrough entities, topping out at a maximum rate of 25%.

Third, the Plan would change the current top U.S. federal corporate tax rate from 35% to 20% in order to make the U.S. corporate tax system more "internationally competitive." In addition, the Plan would repeal the corporate-level alternative minimum tax.

Fourth, the Plan would allow the cost of capital investment to be fully and immediately deductible

10 House Republicans, A Better Way: Our Vision for a Confident America (June 24, 2016), available at http://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf. All quotations and tables in this article are quoted from the Plan, except as otherwise indicated.

SAMPLE POSTCARD FROM PLAN

SIMPLE, FAIR "POSTCARD" TAX FILING

1	Wage and compensation income	1	
2	Add 1/2 of investment income	2	
3	Subtract contributions to specified savings plans	3	
4	Subtract standard deduction OR	4	
5	Subtract mortgage interest deduction	5	
6	Subtract charitable contribution deduction	6	
7	Taxable income	7	
8	Preliminary tax (from tax table)	8	
9	Subtract child credit	9	
10	Subtract earned income credit	10	
11	Subtract higher education credit	11	
12	Total tax	12	
13	Subtract taxes withheld	13	
14	**Refund due / taxes owed**	14	

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instead of depreciated over time. Under current law, if a business purchases a car, it will generally be able to deduct the cost of that car over the car's useful life (generally over 5 years). The Plan would allow that same business to deduct the full cost of the car in the first year of purchase. This change would eliminate our current depreciation system, which has different depreciation periods for different classes of assets. This new system would apply to both investments in tangible property (i.e. equipment and buildings) as well as intangible assets like intellectual property. As under current law, the Plan would not allow a deduction for the cost of land.

Fifth, the Plan would eliminate deductions for net interest expenses on future loans. Under current law, businesses can deduct any net interest expense from their operating income, but the Plan would only allow an interest expense deduction against interest income (with an indefinite carryforward to allow for a deduction against net interest income in future years). According to the Plan, the benefit of immediate expensing of business investments discussed above would serve as a substitute for the net interest expense deduction and "equalize the tax treatment of different types of financing." The Plan states the Committee on Ways and Means would work to develop special rules for interest expenses for financial services companies that take the role of interest income and interest expense into their business models (i.e., banks, insurance companies, and leasing companies).

Finally, the Plan would overhaul the structure of U.S. international taxation. Under current law, a U.S. citizen or corporation is generally taxed on all income generated anywhere in the world, with U.S. federal tax credits for foreign taxes paid. The Plan would replace our worldwide system with a territorial system. The Plan states that "trillions of dollars in foreign earnings of American-based companies" are stranded overseas because the current tax rules discourage companies from bringing those earnings back home. To alleviate this, the Plan provides for a 100% exemption for dividends from foreign subsidiaries. Foreign earnings that have accumulated overseas under the current U.S. system would be subject to a one-time repatriation tax at a rate of 8.75% to the extent held in cash or cash equivalents and otherwise at a rate of 3.5%.

The Plan aims to revamp the Code, which it states has become "completely and totally broken." The plan has already been called a House Republican "wish list,"[11] and it joins the growing list of tax reform proposals that await a future Congress and president able to agree on fundamental changes to the U.S. tax system.

11 Calvin H. Johnson, Where's the Rest of Me? Ryan's Republican Wish List, 2016 TNT 129-9 (July 6, 2016).

MOFO IN THE NEWS; AWARDS – Q2 2016

Morrison & Foerster has been shortlisted for Global Law Firm of the Year and for European Law Firm of the Year – Regulatory by *GlobalCapital* for its 2016 Global Derivatives Awards. Morrison & Foerster was named 2016 Americas Law Firm of the Year for the second year in a row by *GlobalCapital* for 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 June 28, 2016, Partner Anna Pinedo spoke on a panel entitled "BDC Regulatory Items — A Conversation with SEC Leadership" at the 2016 BDCs & Small Business Capital Formation Forum at the Four Seasons Hotel in Washington, D.C. The Forum was hosted by U.S. Small Business Administration, the Small Business Investor Alliance, the Milken Institute, and Morrison & Foerster. The program focused on the key issues facing business development companies and small business investment companies.

- On June 22, 2016, Partner Anna Pinedo and Partner Remmelt Reigersman were joined by Jonathan Willson, Partner at Stikeman Elliott LLP in hosting a joint briefing session entitled "Toronto Seminar Series" at the Fairmont Royal York Hotel in Toronto, Canada. Partner Remmelt Reigersman and Jonathan Willson hosted a panel entitled "Canadian and U.S. Tax Developments." This session addressed Canadian tax developments that affect structured notes, derivatives, and financial products, including tax proposals applicable to: (i) dispositions of linked notes in a secondary market; (ii) the valuation of certain derivatives; (iii) shareholders of certain multi-class mutual fund corporations; and (iv) transactions characterized as synthetic equity arrangements. The presentation also addressed US tax developments regarding structured products, including the rules addressing "dividend equivalent" transactions and the IRS "basket option" notices. In addition, the presentation touched on possible legislative proposals

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affecting the taxation of structured products. Partner Anna Pinedo hosted a panel entitled "U.S. Securities Law Updates." This session addressed recent U.S. securities Law developments affecting U.S. broker-dealers as well as non-U.S. broker-dealers conducting business in the United States, including: Section 4(a)(7) and the resale of securities; the SEC's Concept Release on Regulation S-K and Disclosure Effectiveness; use of non-GAAP measures; and final implementation of the JOBS Act.

- On June 16, 2016, Partner Anna Pinedo moderated a panel entitled "Complex Products: Changing Regulatory Focus" at the SIFMA Complex Products Forum in New York, NY. Panelists included: Sarah Gill (LPL Financial), Laura H. Posner (New Jersey Bureau of Securities), Mike Rufino (FINRA), and Robert N. Sobol (TD Ameritrade). The panel emphasized the importance of how customer suitability, financial advisor and investor education, and due diligence play in the sale of complex products to individual investors and addressed how the industry prepares for continued regulation of complex products. Partner Jay Baris spoke on a panel entitled "Regulatory Enforcement Overview: Complex Products 4.5 Years Later." This session addressed regulation, compliance, and responsibility of firms creating and distributing complex investment products to suit the financial needs of retail investors.
- On June 15, 2016, Partner Peter Green and Partner Jeremy Jennings-Mares hosted a teleconference entitled "Setting the New Benchmark: EU Regulation on Financial Benchmarks." The program focused on the relevant provisions of the new EU Regulation on indices used as benchmarks in financial instruments and contracts. The speakers also covered its practical implications for benchmark administrators, users, and contributors.
- On June 14, 2016, Partner Oliver Ireland hosted a PLI webcast entitled "Another Brick in the Wall: The Fed Reproposes Single-Counterparty Credit Limits for Large Banking Organizations." Topics included: Exposure limits for bank holding companies and foreign banking organizations; limit tiers; who is a counterparty; economic interdependence; risk mitigants—net credit exposure; look through for investment funds, securitizations and SPVs; and exemptions.
- On June 8, 2016, Partner Oliver Ireland and Partner Jeremy Jennings-Mares were joined by Doncho Donchev, Head of Long- and Medium-Term Funding London at Crédit Agricole Corporate and Investment Bank in hosting an IFLR webinar entitled "Ending Too Big to Fail: Bank Resolution Strategies and Counterparty Impacts." The session provided an overview of comparative bank resolution regimes and the stated strategies of the resolution authorities under those regimes. The speakers also covered "pre-emptive" measures such as structural changes and changes to the terms of bank instruments. From a market point of view, the speakers discussed the effect that the above factors, the possibility of bail-in, and how the need to raise TLAC/MREL/PLAC, will affect the market for bank capital and debt instruments as well as other banking transactions
- On June 2, 2016, Partner Jay Baris, Partner Oliver Ireland, Partner Anna Pinedo, Of Counsel James Schwartz and Associate Jeremy Mandell hosted a seminar in New York City entitled "Financial Regulatory Briefing." Topics included: the SEC's focus on the use of derivatives by funds; asset management and financial stability; Fed's long term debt, TLAC, and clean holding company requirement and its effects on financial institutions issuers and the debt capital markets; the single counterparty exposure reproposal, the net stable funding rule proposal, and incentive compensation at covered financial institution; and a fintech discussion: an overview of legal and regulatory issues that arise when banks work with fintech companies.
- On May 26, 2016, Partner Anna Pinedo spoke on a panel entitled "The Path Ahead: Regulation Affecting Equity Derivatives" at EQDerivatives' Equity & Volatility Forum in Las Vegas, NV. This presentation provided a brief overview of how the current state of implementation of Dodd-Frank Title VII requirements affect swaps and security-based swaps. This included a discussion of the status of the CFTC's rulemaking, the status of the SEC's rulemaking, and cross-border issues, such as margin. Finally, the session covered the SEC's proposed rules affecting the use of derivatives by registered funds, proposed legislation affecting ownership reporting (and its effects on equity derivatives), and related matters.
- On May 25, 2016, Partner Peter Green and Partner Jeremy Jennings-Mares hosted a teleconference entitled "Shining a Light on the SFT Regulation and an Update on Shadow Banking Reform." The session provided an overview of the provisions of the SFT Regulation and the effect it is having on financial markets. Additionally, the speakers covered the current status of other aspects of global shadow banking reform.
- On May 19, 2016, Partner Anna Pinedo spoke on a panel entitled "Editor's Roundtable: Key Trends

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for 2016 and Beyond" at the Structured Products Americas conference in Miami, FL. Topics included: implications of rising rates on SP, rush out of fixed income; mitigating the risk of rising rates; creating liquidity in the marketplace; what to expect from regulators; slowing world growth and emerging market slowdown; and security concerns. The conference provided participants with an in-depth and unique insight into the evolving world of structured products and covers the latest developments in regulation, marketing strategies, risk management, product innovation, and best practices.

- On May 17, 2016, Partner Thomas Humphreys, Partner David Lynn, and Partner Anna Pinedo hosted a teleconference on best practices for liability management and relevant alternatives. Topics included: disclosure issues; concerns regarding material non-public information; the tender offer rules; no-action letter relief for non-convertible debt securities; Court decisions on the TIA; accounting considerations; and tax considerations.

- On May 6, 2016, Of Counsel Julian Hammar spoke on a panel entitled "Regulation AT" at the FIA Law & Compliance 2016 Conference in Baltimore, Maryland. The panel explored the recently proposed CFTC rule, Regulation Algorithmic Trading. The conference delivered tailored sessions from leading experts on regulatory developments and their practical implications, professional development opportunities, and ample networking activities.

- On May 5, 2016, Partner Peter Green spoke on a panel entitled "PRIIPs regulation and impact on the structured products market in the EU" at the Structured Products Breakfast Briefing: Getting to grips with Priips conference in London, U.K. Topics included: product descriptions; updates of KIDs; MRM and the categorization of PRIIPs; Performance scenarios; and compliance deadline & grandfathering.

- On May 4, 2016, Partner Paul Borden and Senior Of Counsel Hillel Cohn hosted a teleconference entitled "Final Department of Labor Fiduciary Rule." The presentation focused on the final fiduciary rule adopted by the Department of Labor in April 2016, which will have a major impact on broker-dealers whose clients include retirement plans and IRAs. Topics included: what actions will cause you to be deemed a fiduciary under the DOL Rule; what are the consequences of being deemed a fiduciary; the exclusion for dealing with certain institutional or professionally managed retirements accounts; scope and requirements of the Best Interests Contract exemption ("BIC"); scope and requirements of the Principal Exemption; special requirements for proprietary products; and implications for future compliance.

- On April 28, 2016, Partner Peter Green and Partner Jeremy Jennings-Mares hosted a teleconference entitled "Proposed Overhaul of the EU Prospectus Directive." The session provided an overview of the proposed changes of the EU Prospectus Directive, market reaction to date and the likely impact of the proposals on the EU securities market. Topics included: Removal of the existing "wholesale exemption" for securities with a denomination of at least €100,000; shorter prospectus summaries; more specific requirements for risk factors; less onerous prospectus requirements for SMEs; and central electronic database for prospectuses.

- On April 27, 2016, Partner Susan Mac Cormac and Partner Anna Pinedo were joined by Anand Subramanian (Qatalyst Partners), Barb Izzo (former Managing Director at a Fortune 100 public company, advisor to several successful Silicon Valley tech companies), and Jeff Thomas (NASDAQ Private Market) in hosting a seminar entitled "Late Stage Financings – Palo Alto Session" in Palo Alto, CA. Topics included: timing and process; how are the terms of late stage private placements different; diligence, projections, and information sharing; providing liquidity to early investors and founders through a secondary component; IPO and acquisition ratchets; governance issues; valuation issues; the placement agent's role; and planning for a sale or an IPO in your negotiations.

- On April 27, 2016, Partner David Lynn served as Co-Chair of PLI's "Global Capital Markets & the U.S. Securities Laws 2016" with Paul M. Dudek – Chief, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission in New York, NY. The Co-Chairs provided opening remarks. Partner Marty Dunn spoke on a panel entitled "Hot Topics in Capital Markets." Topics included: disclosure developments; the latest developments with Rule 144A and Regulation S offering; the impact of the JOBS Act; and global offering techniques. This program provided securities lawyers with up-to-date information on domestic and international regulatory and market developments, bringing together an engaging group of expert practitioners and senior regulators for an in-depth look at how

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the U.S. securities laws work in the context of a rapidly evolving global regulatory environment.

- On April 27, 2016, Of Counsel Julian Hammar spoke on a panel entitled "The Regulation of Futures & Exchange-Traded Commodity Options" at the New York City Bar Association's "Commodity Exchange Act Basics for Lawyers" program. Topics included: the CFTC's "exclusive" jurisdiction & what it means; the oligopoly of designated contract markets; bankruptcy "safe harbors" for derivatives; and a brief overview of the market's regulatory architecture. This program provided all the basics a lawyer needs to be conversant in and familiar with the Commodity Exchange Act and the regulatory framework for futures, commodity options, swaps, and retail foreign exchange.

- On April 26, 2016, Partner Susan Mac Cormac and Partner Anna Pinedo were joined by Anand Subramanian (Qatalyst Partners), Barb Izzo (former Managing Director at a Fortune 100 public company, advisor to several successful Silicon Valley tech companies), and Jeff Thomas (NASDAQ Private Market) in hosting a seminar entitled "Late Stage Financings – San Francisco Session" in San Francisco, CA. Topics included: timing and process; how are the terms of late stage private placements different; diligence, projections, and information sharing; providing liquidity to early investors and founders through a secondary component; IPO and acquisition ratchets; governance issues; valuation issues; the placement agent's role; and planning for a sale or an IPO in your negotiations.

- On April 21, 2016, Partner Geoffrey Peck, Partner Anna Pinedo, and Partner James Tanenbaum led a seminar entitled "Calling an Audible: Financing Alternatives in Rapidly Changing Markets" in New York, NY. Topics included: current market conditions; financing alternatives for pre-IPO companies; the market for venture debt; the late-stage private placement market; options to consider on the way to an IPO; and financing alternatives for recently public companies.

- On April 19, 2016, Of Counsel Julian Hammar and Of Counsel James Schwartz were joined by Robert Dilworth (Bank of America Merrill Lynch) in hosting an IFLR webinar entitled "Cross-Border and Recent Developments in Derivatives." The program addressed certain issues arising from Title VII of Dodd-Frank and the ongoing regulation of the derivatives markets in the U.S. and elsewhere. Topics included: the "common approach" of the United States and the EU with respect to central counterparties; the prudential regulators' and CFTC's final margin rules for uncleared swaps; the CFTC, SEC, and prudential regulator rules and guidance relating to the cross-border application of the requirements of Title VII of DoddFrank, including for margin; and the challenges that lie ahead in relation to cross-border harmonization.

- On April 12, 2016, Partner Oliver Ireland, Of Counsel James Schwartz, and Of Counsel Sean Ruff hosted a briefing session entitled "Toronto Seminar Series" at the Fairmont Royal York Hotel in Toronto, Canada. Partner Oliver Ireland spoke on the "Bank Regulatory Developments" panel. Topics included: the Federal Reserve Board's proposed long-term debt, TLAC, and clean holding company requirements and industry comments regarding the proposal; the proposed countercyclical buffer rules; and the reproposed single counterparty exposure regulations. Of Counsel James Schwartz spoke on a panel entitled "A Derivatives Update." Topics included: The final margin rules for uncleared swaps; cross-border developments, including the "common approach" of the United States and the EU with respect to central counterparties; the ISDA 2015 Universal Resolution Stay Protocol and related matters; and status of the SEC's rules for security-based swaps and what's ahead. Of Counsel Sean Ruff hosted a panel entitled "A FinTech Discussion." Topics included: alternate lending platforms (e.g., marketplace lending, etc.); money transmission; digital wallets and related topics; an update on virtual currencies, cryptocurrencies, and ledgerrelated technologies (e.g., Blockchain); and partnerships between non-bank FinTech companies and banks.

- On April 7, 2016, Partner Anna Pinedo spoke on a panel entitled "#Crowdfunding: The Future of Raising Capital Online via Reg D & Reg A+" at the 80th Annual Security Traders Association of New York, Inc. (STANY) Capital Markets Insights Conference.

- On April 7, 2016, Of Counsel Bradley Berman participated on a panel entitled "Structured Solutions Showcase" at the "10th Anniversary mtn-i Americas Structured Note Showcase & Awards" in Miami, FL. The showcase combined regional trends, investor solutions, & issuer credits with expert analysis & commentary plus an evening of celebration recognizing the innovations and success stories of the last year.

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ABOUT MORRISON & FOERSTER

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. We've been included on *The American Lawyer*'s A-List for 13 straight years, and the *Financial Times* named the firm number six on its 2013 list of the 40 most innovative firms in the United States. *Chambers USA* honored the firm as its sole 2014 Corporate/M&A Client Service Award winner, and recognized us as both the 2013 Intellectual Property and Bankruptcy Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.