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TAXTALK

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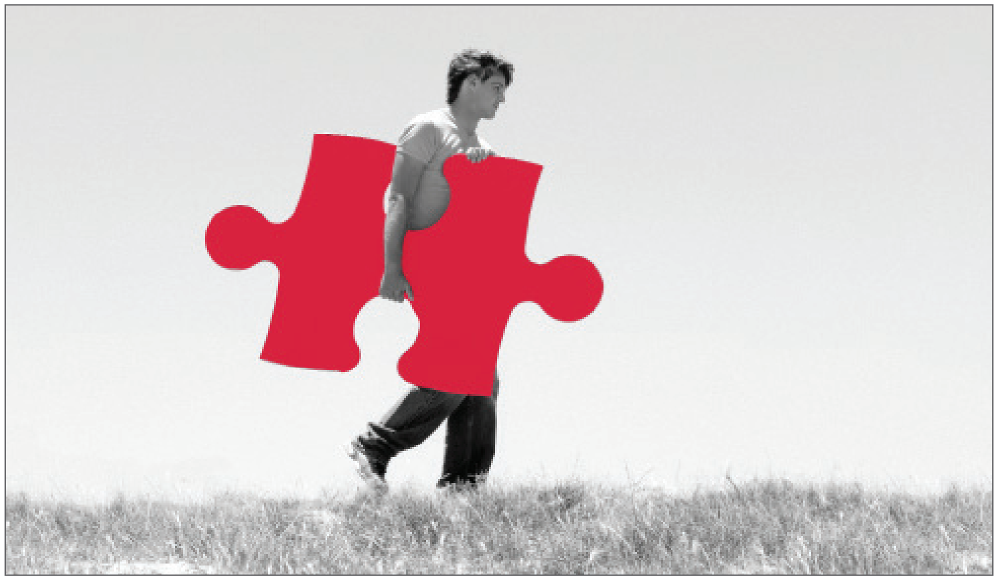

EDITOR'S NOTE

Although 2015 is already under way, we can't quite ring in the new year without sharing some of the more noteworthy tax items of Q4 2014 (and, admittedly, a few from this year as well) in this issue of Tax Talk.

Predictably, as 2014 drew to a close, Congress was busy trying to squeeze in a few last-minute tax bills. With just days left in the year, the 113th Congress passed legislation to extend a number of important tax breaks that were slated to expire at the end of 2013. And, as the New Year dawned and the 114th Congress gathered in Washington, D.C., House Republicans muscled through new rule changes designed to impact the way legislation would be evaluated—so-called "dynamic scoring." Indeed, with a GOP-majority in the House and Senate, it remains to be seen whether Republicans will be able to galvanize and begin the process of passing comprehensive tax reform. We bring you the salient details below.

Turning from the political to the substantive, this issue of Tax Talk also highlights IRS private guidance that addresses REITs, which continued to be hot in 2014. On the international tax front, we also summarize IRS private guidance that holds that a foreign fund engaged in lending and stock distribution could not take advantage of the "trading in stock or securities" safe harbor, as well as guidance that recharacterizes certain loans among related companies for purposes of the Section 956 income inclusion rules. Finally, we conclude Tax Talk with a few developments that impact the taxation of financial instruments and our usual column, MoFo in the News.

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CONGRESS PASSES YEAR-END TAX EXTENDERS BILL

On December 19, just days before the end of 2014, President Obama signed into law the Tax Increase Prevention Act of 2014 (TIPA). TIPA retroactively extended a number of tax breaks for 2014 that had expired at the end of 2013. While we won't bore our readers by reciting chapter and verse, there are a few key provisions of the tax extender's bill worth mentioning. Specifically, taxpayers will still enjoy the benefit of the following tax breaks for 2014:

- bonus depreciation;
- certain interest-related and short-term capital gain dividends from a RIC;
- RIC-qualified investment entity treatment under FIRPTA;
- subpart F exception for active financing income;
- look-thru treatment of payments between related controlled foreign corporations under foreign personal holding company rules; and
- temporary exclusion of 100% of gain on certain small business stock.

HOUSE ADOPTS NEW "DYNAMIC SCORING" RULE

On January 6, 2015, House Republicans pushed through a new rule that would require more macroeconomic projections be included by the Congressional Budget Office and Joint Committee on Taxation when providing cost estimates for major legislation. This new methodology, referred to as "dynamic scoring," essentially requires budget estimates to also take into account how the proposed legislation could impact the economy at large. While the rule only affects House bills, it has drawn wide-spread criticism from Democrats and the White House. These critics claim that the new rule will make it easier to pass legislation that could increase the deficit, while simultaneously making it more difficult to determine the legislation's cost. In other words, Democrats cry that dynamic scoring will only make it easier for Republicans to pass tax cuts, without disclosing the true financial impact of the cuts in a "fair" and "accurate" manner. While the immediate impact of the new rule remains to be seen, with Republicans in control of Congress, one can only speculate whether it will be the platform from which the GOP will attempt to launch a series of bills designed to overhaul the tax code.

FOREIGN FUND ENGAGED IN LENDING AND STOCK DISTRIBUTION NOT PROTECTED BY "TRADING IN STOCK OR SECURITIES" SAFE HARBOR

For decades, U.S. taxpayers (or non-taxpayers) have been bedeviled by the distinction between trading in stocks and securities and lending. Today, many foreign corporations purchase bank loans in the secondary market. Over time, however, the distinction between secondary market purchase and loan origination has been tested as the foreign corporation steps closer and closer to the loan's origination. Much has been written about this; during the Financial Crisis, industry groups attempted to get the Treasury to loosen the rules but to no avail.

In CCA 201501013, the Office of the IRS Chief Counsel concluded that Fund, a foreign partnership, and Foreign Feeder, a foreign corporation and partner of (Fund), engaged in lending and stock distribution activities that qualified as a trade or business within the U.S., and that did not constitute "trading in stock or securities" under the Trading Safe Harbors (defined below).

Fund entered into a management agreement with Fund Manager under which Fund Manager acted as Fund's agent and maintained full power to buy, sell, and deal in securities and related contracts for Fund's accounts. Through an office in the U.S., Fund Manager conducted extensive lending and stock distribution/underwriting activities on behalf of Fund. Lending activities included conducting due diligence, negotiating with borrowers, and lending money in return for convertible debt instruments and promissory notes. Stock distribution/underwriting activities included negotiating with issuers, purchasing stock at a discount from the issuers, and selling the stock to both U.S. and foreign investors.

Fund argued that the activities constituted investment activity and, thus, did not constitute a trade or business within the U.S. Fund also argued in the alternative that the activities fell within the Trading Safe Harbors.

First, the IRS concluded that Fund engaged in a trade or business within the U.S. Pursuant to Section 882, a foreign corporation that engages in a trade or business within the U.S. is taxable on its income that is effectively connected with such trade or business within the U.S. Activities performed by an agent on behalf of a foreign

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person are considered to be performed by the foreign person.[1] To determine whether activities constitute a U.S. trade or business, courts and the IRS have applied a facts and circumstances test—the profit-oriented activities must be considerable, continuous, and regular. For instance, activities must go beyond passive management of investments.[2] The IRS concluded that Fund's activities were considerable, continuous, and regular because Fund dedicated significant time, energy, and resources to making numerous loans to borrowers and entering into dozens of stock distribution agreements with issuers.

Second, the IRS concluded that Fund's activities did not constitute "trading in stocks or securities" and, thus, did not fall within the Trading Safe Harbors. Pursuant to Section 864(b), a trade or business within the U.S. does not include, *inter alia*, "trading in stock or securities." Section 864(b)(2)(A) include two safe harbors (the "Trading Safe Harbors") for which certain trading activities performed by or on behalf of a foreign person that would otherwise constitute a trade or business within the U.S. are considered not to be a trade or business within the U.S. The first Trading Safe Harbor (the "First Safe Harbor") provides that a trade or business within the U.S. does not include trading stocks or securities through a "resident broker, commission agent, custodian, or other independent agent."[3] The First Safe Harbor does not apply if the foreign person has an office or fixed place of business in the U.S. The second Trading Safe Harbor (the "Second Safe Harbor") provides that a trade or business within the U.S. does not include "[t]rading in stocks or securities for a taxpayer's own account, whether by the taxpayer or his employees or through a resident broker, commission agent, custodian, or other agent, and whether or not any such employee or agent has discretionary authority to make decisions in effecting the transactions."[4] Unlike the First Safe Harbor, the Second Safe Harbor cannot be used by foreign dealers, but can be used by other foreign persons who have offices or fixed places of business in the U.S.

Pursuant to the Treasury Regulations for the Trading Safe Harbors, "trading in stock or securities" means "the effecting of transaction in stock or securities" including buying, selling or trading in stocks, securities, or contracts or options to buy stocks or securities.[5] The IRS concluded that neither Fund's lending nor underwriting activities constitute "trading in stock or securities." The IRS referred to Treas. Reg. § 1.864-4(c)(5) to conclude that lending is not "trading in stock or securities" because a foreign person who makes a loan in the U.S. engages in the active conduct of banking or financing within the U.S. A narrow exception, which allows a foreign underwriter to qualify for the Trading Safe Harbors if it sells only to foreign buyers,[6] does not apply to Fund, which sold shares to both U.S. and foreign buyers. Furthermore, courts have defined "trading" as profiting from fluctuations in the price of assets, as opposed to profiting from services provided.[7] The IRS determined Fund's activities were not trading because Fund profited not from a change in value of securities but from earning fees, a spread, and interest on its lending and underwriting activities.

Alternatively, the IRS concluded that, even if Fund's lending and stock distribution activities were "trading in stock and securities," Fund could not have used the Trading Safe Harbors. The First Safe Harbor did not apply because Fund's management agreement provided discretionary authority to Fund Manager. The IRS concluded that the language of Section 864(b), its legislative history, and its regulations disallow protection under the First Safe Harbor if the taxpayer gives discretionary authority to a U.S. resident agent. Specifically, in the Foreign Investor's Tax Act of 1966 (P.L. 89-809) (FITA), Congress made two amendments to the safe harbor in the Internal Revenue Code of 1939 (the "1939 Safe Harbor"). The 1939 Safe Harbor permitted trading in the U.S. through a "resident broker, commission agent or custodian." FITA added "or other independent agent" to the 1939 Safe Harbor (now, the First Safe Harbor), and added the Second Safe Harbor, which expressly permits foreign non-dealers to trade through resident agents who have discretionary authority. Thus, the IRS concluded that by including discretionary authority in the Second Safe Harbor, the First Safe Harbor implicitly excludes discretionary authority from the meaning of independent agent.[8] What's more, the Treasury Regulations provide an exception under the Second Safe Harbor where a foreign bank authorizes discretionary authority for a U.S. broker trading on behalf of the foreign bank's customers. If a foreign dealer could grant discretionary authority under the First Safe Harbor, then this narrow exception under the Second Safe Harbor would not be necessary. Thus, because Fund's management agreement provides for discretionary authority, the First Safe Harbor is not available to Fund.

Finally, the Second Safe Harbor did not apply to Fund because its underwriting activities fit within the definition of a "dealer in stock or securities." Pursuant to Treas. Reg. § 1.864-2(c)(2)(iv)*(a)*, a dealer has an "established place of business" and "regularly engage[s] as a merchant in purchasing stocks or securities and sell[s] them to customers with a view of the gains and profits that may be derived therefrom." The IRS concluded that Fund had an established place of business and, through its underwriting activities, regularly engaged in purchasing stocks and selling them to customers with the intent of earning gains and profits.

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In sum, the IRS determined that Fund and Foreign Feeder, as a partner of Fund, were engaged in a trade or business within the U.S. Fund's lending and stock distribution activities were considerable, continuous, and regular, and did not constitute "trading in stock and securities" under the Trading Safe Harbors.

IRS ADDRESSES DISTRIBUTION BY CORPORATION ELECTING TO BE TREATED AS REIT

Investment bankers have been scouring the country for U.S. corporations that are interested in a tax-free spin-off of their real estate, using a real estate investment trust (REIT). For example, Pinnacle Entertainment, a gaming company, recently announced that it was exploring a REIT. One aspect of these REIT spin-offs is that, post-spin-off, the REIT must distribute any accumulated profits earned as a C corporation. In some cases, this would require substantial cash to be distributed to shareholders by the new company. This is where the IRS has been helpful in permitting cash plus stock distributions. This practice began during the Financial Crisis when REITs were running out of cash. Unfortunately, the IRS has not issued a revenue procedure; accordingly, tax payers are required to obtain private letter rulings. The most recent example is Private Letter Ruling 201447019.

In that ruling, the taxpayer was a corporation incorporated in a state of the United States. The taxpayer intended to elect under Section 856 of the Code to be treated as a REIT. In connection with the REIT election, the taxpayer proposed to make distributions to its shareholders of its earnings and profits that were accumulated by the taxpayer for all taxable years that ended prior to the end of the REIT's first taxable year ("First REIT Taxable Year").

Pursuant to Section 857(a)(2)(B), an entity is eligible to make a REIT election only if it has no earnings and profits from any year in which it was not taxed as a REIT. The taxpayer intended to provide its shareholders with an election to receive the proposed distributions in the form of cash, stock, or a combination of both cash and stock. Without giving a reasoned opinion, the IRS held that all the cash and stock to be distributed in the proposed distributions by taxpayer to its stockholders will be treated as distributions under Sections 301 and 305(b), provided that (a) the taxpayer elects to be taxed as, and qualifies as, a REIT as of the First REIT Taxable Year and (b) the proposed distributions occur prior to the end of the First REIT Taxable Year and the amount of the distribution paid in stock is the fair market value of such stock on the date of distribution.

REIT PREFERENTIAL DIVIDEND

In Private Letter Ruling 201444022, the taxpayer was a limited liability company organized under a state of the United States and had, since its first taxable year, elected to be treated as a corporation and a REIT for U.S. federal income tax purposes. The taxpayer's investments and operations were managed externally by an outside advisor for a quarterly management fee based on a percentage of the taxpayer's net asset value as of the beginning of the relevant quarter.

The taxpayer wanted a bigger portion of the cost of such management fees to be borne by smaller shareholders, as opposed to larger shareholders. Therefore, the taxpayer proposed to split its common shares into two classes of common shares: Class A and Class B. Only Class A shareholders of a certain threshold percentage would be eligible to subscribe to Class B shares. Class B shareholders, by contrast, would be entitled to receive an additional special dividend. The special dividend would, in effect, reduce the portion of the management fee borne by these larger investors.

The taxpayer asked the IRS to rule as to whether such an arrangement would be treated as preferential dividends within the meaning of Section 562 of the Code.

Under Section 857(a)(1) of the Code, a REIT's deduction of dividends paid for a tax year must equal or exceed 90% of its REIT-taxable income for the tax year. Section 562 provides that a distribution with a preference for one class of stock as compared with another class, except to the extent that the former is entitled to such preference, is not eligible for the dividends paid deduction. Examining the Class A and Class B shares, the IRS concluded that the Class A and Class B shares are not appropriately recognized as separate classes for purposes of Section 562, notwithstanding that the taxpayer's governing documents recognize the two as separate classes of stock. The Class A and Class B shares have identical voting, dividend, redemption, and liquidation rights, except that Class B shareholders are entitled to receive an additional special dividend, as described above.

The IRS examined the legislative history behind Section 562 and noted that, in the regulated investment company context, the conference report explains that a preference is allowed under Section 562 where "the differences reflect savings in administrative costs (but no

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differences in management fees)." Since the preference in the taxpayer's case is for management fees rather than for administrative costs, the IRS held that such an arrangement would be treated as preferential dividends within the meaning of Section 562.

The ruling is reminiscent of a ruling in the early 1980s where a regulated investment company tried to charge management fees at the shareholder level in order to charge different management fee amounts. The IRS ruled that this "sliding scale" fee structure resulted in a "preferential" dividend under Section 562(c).[9]

REPORTING REQUIREMENT FOR PAYMENTS TO LLCS

In CCA 201447025, the Office of the IRS Chief Counsel concluded that payments to Limited Liability Companies (LLCs) are exempt from Section 6041 reporting requirements only if the LLC has elected to be treated as a corporation for U.S. federal income tax purposes.

Pursuant to Section 6041, a person engaged in a trade or business must report of $600 or more made in the course of such trade or business to the IRS payments. However, the Treasury Regulations exempt certain payments, including payments to corporations.[10] Pursuant to Section 7701(a)(3), a corporation "includes associations, joint-stock companies, and insurance companies."

The taxpayer argued that payments to LLCs are not reportable transactions under Section 6041 because LLCs are exempt payees. Thus, the taxpayer claimed that no backup withholding was required on such payments.

Generally, the default federal income tax classification for an LLC is either a partnership (for a multi-member LLC) or a disregarded entity (for a single-member LLC).[11] However, LLCs can elect to be classified as associations, and, thus, corporations, by filing Form 8832.[12]

Here, there were no records that any of the LLC payees filed Form 8832. Therefore, the Office of the IRS Chief Counsel concluded that, by default, the LLCs were either partnerships or disregarded entities, and payments to such entities are not excluded from Section 6041 reporting requirements.

IRS RECHARACTERIZES OFFSETTING CONTRACTS

In CCA 201501012, the IRS used the substance over form doctrine to recharacterize a combined position in a loan (the Loan) and prepaid derivative contracts (the Contracts). According to the CCA, the Taxpayers (a married couple filing jointly) were investors that purchased an interest in the transaction, marketed as a "leveraged forward contract," from a promoter.

The particulars of the transaction are complicated (in the words of the CCA, "needlessly complex")—but described briefly—the Taxpayers were obligors on the Loan but were entitled to receive payments on the Contracts from a broker counterparty ("Broker"). The payments on the Loan and the Contracts were "designed to create offsetting rights and obligations," except that, if interest rates increased above a particular threshold, the Broker would be obligated to make additional payments. In order to offset this risk, the Broker entered into a swaption contract (an option to purchase a fixed-to-floating rate swap). The amount paid for the Contracts exceeded the amount of the Loan by exactly the cost of the swaption.

For tax purposes, however, the Taxpayers took the position that the Loan generated ordinary interest deductions, while the Contracts generated capital gain income. According to the CCA, the Taxpayers relied on an unsigned draft opinion by a law firm and a signed opinion by a solo practitioner. The opinions (neither one of which was specifically addressed to the Taxpayers) conclude, at a "more likely than not" level, that (1) the Loan will be treated as indebtedness for federal income tax purposes; (2) the Contracts will not generate taxable income until the forward sales are executed and any gain or loss recognized on the Contracts will be capital gain or loss; and (3) the interest deductions will be respected and the separate treatment of the Loan and the Contracts will not be disallowed under the economic substance doctrine.

In the CCA, the IRS attacked the transaction and collapsed the Loan with the portions of the Contracts that offset the Loan payments. The IRS did not accept the Taxpayers' argument that they had purchased an interest in the transaction in order to obtain a potential benefit if interest rates exceed the Contract threshold: "Taxpayers made a relatively small out-of-pocket payment for an arguably profitable element of the Transaction, and then claimed interest deductions on the Loan that far exceeded Taxpayer's out-of-pocket payment." The IRS concluded that "the practical effect of this transaction is no different than if Taxpayer had simply purchased the swaption directly from [the swaption counterparty], except that Taxpayer paid substantial fees to Promoter to access interest deductions that would be otherwise unavailable." Accordingly, the IRS recharacterized the transaction as "in substance the purchase of a swaption contract" and disregarded the Loan and the offsetting portions of the Contracts.

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IRS APPLIES SECTION 956 ANTI-ABUSE RULE (AGAIN) TO RECHARACTERIZE BACK-TO-BACK LOANS

In recent private guidance, CCA 201446020, the IRS addressed whether loans made by several corporate subsidiaries to one of their parent's shareholders should be treated as if actually made by the parent corporations, where both the subsidiaries and their parents were controlled foreign corporations (CFCs). Applying the anti-abuse rule under the Section 956 regulations, the IRS concluded that, based on the facts and circumstances, the loans should be treated as if made by the parent CFCs.13 As a result, because the parent CFCs had substantial earnings and profits (E&P), whereas the subsidiary CFCs did not, the parent CFCs' shareholder, the borrower, was required to include a greater amount of income under Section 956.

By way of brief background, Section 956 generally requires a "United States Shareholder" to include an amount in income that is the lesser of (a) the excess of the shareholder's pro rata share of the average of the amounts of United States property held by the CFC as of the close of each quarter of the amount of any previously taxed income with respect to the shareholder, or (b) the shareholder's pro rata share of the CFC's applicable earnings. For these purposes, United States property includes "an obligation of a United States person" — that is, the loan held by the subsidiary CFCs. While these definitions are complex, the principle behind them is not. In short, Section 956 provides that a United States shareholder must include in income any E&P of the CFC that are loaned to the shareholder, provided that the E&P have not been previously taxed.

In turn, the Section 956 anti-abuse rules target investments in United States property by CFCs designed to avoid the income inclusion provided by Section 956. For example, the Treasury regulation at issue in the private guidance provides that investments in United States property by another foreign corporation that is controlled by a CFC may be recharacterized if one of the principal purposes for funding the foreign corporation is to avoid the purpose of Section 956.

Here, the subsidiary CFCs were controlled by the parent CFCs, and the loans from the subsidiary CFCs to the shareholder of the parent CFCs, a United States shareholder as defined in Section 951(b), qualified as United States property for purposes of Section 956. As a result, the loans could be recharacterized as having been issued by the parent CFCs if one of the principal purposes in funding the subsidiary CFCs (through the loans) was to avoid the application of Section 956.

The IRS found several facts supporting its conclusion that one of the principal purposes of the loans was to avoid the application of Section 956. First, the subsidiary CFCs' E&P were insignificant, whereas the parent CFC's were not. Thus, had the loans been made by the parent CFCs, the Section 956 inclusion by the shareholder would have been much larger. Second, the shareholder was able to claim a larger foreign tax credit by using the subsidiary CFCs as subsidiaries. Third, the amount of the funds transferred by the parent CFCs to the subsidiary CFCs to fund the loans was virtually identical. In other words, almost the entire amount of the funds transferred by the parent CFCs to the subsidiary CFCs was loaned to the parent CFC's shareholder. Finally, the funds provided by the parent CFCs to the subsidiary CFCs were loaned to the shareholder on the same day, indicating that there was no valid business reason for the subsidiary CFCs to loan the money, other than to diminish the impact of Section 956.

IRS REVISITS PRIOR LETTER RULINGS; DISAPPROVES OF "COSTLESS COLLAR" TRANSACTION

Letter Ruling LAFA 20145102F (12/19/2014) shows a conflicted IRS attempting to limit the historical doctrine that a "short sale against the box" does not result in a taxable event. In the ruling, in the early 2000s the taxpayer entered into two variable forward contracts over publicly traded technology company common stock. The variable forward contracts provided for delivery of a variable number of shares at settlement in exchange for a cash payment at settlement. At maturity, to settle the contracts, the taxpayer borrowed shares pursuant to a securities loan and delivered the borrowed shares receiving the cash payment. It treated the settlement under the forward contract as a sale of the borrowed shares and, accordingly, did not recognize gain on the forward contract under short sale tax principles. The taxpayer did, however, recognize gain on its long stock position under section 1259 when it borrowed the shares. Of course, by the time the forwards were settled, one can surmise the technology company stock had substantially depreciated from its value when the forward contract was originally entered into.

The Internal Revenue Service originally agreed with the taxpayer's approach in PLR 200440005. However, in PLR 201109017, the IRS withdrew the 2004 ruling without retroactive effect. In other words, the IRS grandfathered the taxpayer. In the most recent advice,

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the Internal Revenue Service argues that grandfathering was inappropriate and that the taxpayer recognized gain on the transaction.

The most recent ruling makes two different arguments. First, when the taxpayer borrowed the shares and delivered them under the forward contracts, the ruling argues that gain was recognized under Code § 1001. According to the IRS, the closing of the forward contracts converted them into cash and required gain recognition. The taxpayer argued that the law regarding a short sale of securities protected it from gain recognition. That law holds that, if a taxpayer is long-appreciated securities and then borrows and delivers stock in a sale, that sale is not a sale of the long position.[14] This is the classic "short against the box" transaction. The taxpayer cited Revenue Ruling 72-478 for this proposition. However, the IRS concluded that Rev. Rul. 72-478 should be limited to "standard short sale transactions and is not applicable to the closing of a contract, which terminates all rights and obligations of the parties with respect to that contract."

Second, the ruling also argues the financial contracts were open transactions and that, even though borrowed shares were delivered under the contracts, the contracts were closed and a completed transaction occurred for federal income tax purposes, requiring the recognition of gain.

The ruling, therefore, argues that the entire cash paid on the financial contracts should be recognized and included in the calculation of gain under § 1259.

Finally, as to the grandfathering point, the IRS argues that the 2004 private letter ruling failed to consider the economic substance of the transaction. The IRS asserted that "once issued, a PLR may be revoked for a number of reasons, for example, due to a different or clearer perception of an issue and its ramifications or errors in law."

It also appears that the year of closing the forward contracts had itself closed under the statute of limitations. To reach back, the ruling also holds that gain recognition when the forward was closed was a change in the method of accounting because it involved the time for inclusion of gain on the shares. Accordingly, the Commissioner applied § 481 to spread the income over a four-year period. This effectively allowed it to reach back into years closed by the statute of limitations.

We expect this PLR will attract some attention as time goes by. As a legal matter there is little difference between a market short sale and the taxpayer's transaction; it is likely commentators will view limiting Rev. Rul. 72-478 to "classic" short sales unsatisfying from a theoretical standpoint.

PLI WEBINAR: MOVING AWAY FROM THE C-CORPORATION: UNDERSTANDING REITS, MLPS, AND PTPS

Please join Morrison & Foerster LLP on February 17, 2015 for a one hour briefing hosted by Practising Law Institute, titled "Moving Away From The C-Corporation: Understanding REITs, MLPs, and PTPs." Federal Tax Partners Thomas Humphreys and Remmelt Reigersman will explain the structures, restrictions, and pitfalls in this evolving hybrid world of C-corporations mixed with tax pass-throughs. Specifically, they will discuss:

- Master limited partnerships;
- REITs and alternative assets that may qualify as 'real estate';
- Using REITs to unlock real estate currently held in corporate form;
- Consolidated groups of corporations and disregarded entities; and
- Up-C structures.

For more information about this event, or to register, click here.

MOFO IN THE NEWS; AWARDS

Please note that materials from any of the sessions listed are available on our website, or upon request from Carlos Juarez or Harrison Lawrence.

- **PLI Webinar: SEC Guidance Regarding Investment Advisors and Proxy Firms –** December 16, 2014
  Webinar – Marty Dunn, David Lynn, and Scott Lesmes
  Partners Marty Dunn, David Lynn, and Scott Lesmes took a close look at the joint guidelines and their related impact on compliance with fiduciary duty; voting every proxy not required; selecting a proxy advisory firm; ongoing oversight of proxy advisory firms; application of proxy rules to proxy advisory firms; Rule 14a-2(b)(1); and Rule 14a-2(b)(3).

- **Understanding the Securities Laws Fall 2014** – December 11, 2014
  Speaking Engagement – Anna Pinedo
  Partner Anna Pinedo led a presentation entitled "Securities Act Exemptions/Private Placements." Topics of discussion included exempt securities versus exempt transactions; Regulation-D offerings and recent changes; the new "crowdfunding" exemption rules; intrastate offerings; the new Regulation

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"A+" exemption rules; Rule 144A high-yield and other offerings; Regulation S offerings to "non-U.S. persons"; and exempt offerings in the new era that allows general advertising.

- **IFLR Webinar: Green Bonds and Social Impact Investing –** December 9, 2014
Webinar – Anna Pinedo and Susan Mac Cormac
Partners Anna Pinedo and Susan Mac Cormac discussed the green bond market; considerations in structuring and offering green bonds; disclosure and reporting requirements; green bond principles; and outlining an approach for designating, disclosing, managing, and reporting on the proceeds of a green bond.

- **Raising Capital in 2015 –** December 8, 2014
Seminar – James Tanenbaum and Anna Pinedo
Partner James Tanenbaum discussed financing opportunities and choices for small cap companies in light of changing markets, and partner Anna Pinedo spoke about communications issues related to offerings and to life as a U.S. public company.

- **Financing in Close Proximity to an Acquisition –** December 2, 2014
Teleconference – James Tanenbaum and Anna Pinedo
Partners James Tanenbaum and Anna Pinedo spoke on public companies that would like to raise capital in connection with a proposed acquisition. Depending upon the significance of the acquisition, its probability, and the timing of various announcements, the company and its advisers may face a number of challenges in devising a capital-raising plan.

- **ABA Business Law Section –** November 21, 2014
Sponsorship – Jay Baris and David Lynn
Partners Jay Baris and David Lynn spoke on the popularity of social media among investors and the growth, issuers, broker-dealers, investment advisors, and investment funds that are developing social media strategies. With the SEC and FINRA weighing in too, this panel explored new challenges faced by the regulators and the regulated with respect to fast-evolving world of social media.

- **ALI-CLE Webinar: Banks' Credit Risk Retention: New Rules from Multiple Agencies –** November 21, 2014
Webinar – Kenneth Kohler and Jerry Marlatt
Senior Of Counsels Kenneth Kohler and Jerry Marlatt provided succinct analysis of the final credit risk retention rule after regulators from the FDIC, OCC, Federal Reserve, SEC, HUD, and FHFA have finalized the rule to require banks issuing securitized loans to retain 5% of the credit risk—with a variety of exceptions, including one for "qualified residential mortgages.

- **Master Class: ETNs –** November 20, 2014
Seminar – Bradley Berman
Of Counsel Bradley Berman examined some timely issues for structured products market participants. Topics of discussion included NYSE Arca listing requirements; regulatory issues; ETNs in the news; recent SEC and FINRA guidance on ETNs; and drafting issues.

- **The Growth Capital Summit –** November 19, 2014
Sponsorship – Anna Pinedo and David Lynn
Partner Anna Pinedo spoke on a panel entitled "Challenges for Public Emerging Growth Companies." Topics included Tick size pilot implementation; Primary shelf registration limit expansion; and DTC "chill" relief. Partner David Lynn participated on a panel entitled "JOBS Act: Title II Implementation," which discussed proposed changes to "accredited investor" eligibility and definitions and expected impacts on Reg D offerings; Rule 506(c) offerings and the use of general solicitation in equity crowd finance; investor verification best practices for Title II funding platforms; open issues relating to the "bad actor" definition; and CFTC limited relief for general solicitation by certain investment funds.

- **Structured Products Europe 2014 –** November 18, 2014
Sponsorship – Peter Green and Jeremy Jennings-Mares
Partners Peter Green and Jeremy Jennings-Mares spoke on "Regulatory Developments in the EU and UK." Topics of discussion included MiFID II; finalisation of UCITS V and possible UCITS VI; the ongoing effect of amendments to the Prospectus Directive; regulators' views generally on 'complex' products; and an overview of regulatory approach in individual EU jurisdictions and a look at developments in the U.S. and Asia.

- **PRIIPS and Regulation of Structured Products in the EU –** November 13, 2014
Webinar – Peter Green and Jeremy Jennings-Mares
Partners Peter Green and Jeremy Jennings-Mares spoke on the finalization of the PRIIPs regulation in early 2014, as well as the recently adopted MiFID II legislation, and the important changes that it introduces. They also discussed the debate within EU member states and other international regulators as to the best approach for regulation of 'complex'

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products, and the circumstances in which they should be sold to retail investors.

- **PLI Webinar: Simplifying the World of Complex Financings –** November 11, 2014
  Webinar – Anna Pinedo
  Partner Anna Pinedo focused on equity-linked instruments that may be offered in securities financing and other strategic transactions, including warrants and convertible securities. Ms. Pinedo also discussed the principal negotiating issues in connection with such instruments and the associated accounting and financial reporting consequences.

- **Structured Products Washington Conference –** November 12, 2014
  Sponsorship – Anna Pinedo, Bradley Berman and Lloyd Harmetz
  Of Counsel Bradley Berman and Partners Anna Pinedo and Lloyd Harmetz focused on developments in the legal, regulatory, and compliance landscape for structured products. This comprehensive event brings together the regulatory community with structuring, marketing, legal, and compliance personnel within the structured products and derivatives industry.

- **IFLR Webinar: Moving away from the C-Corporation: Understanding REITs, MLPs, PTPs, and BDCs –** November 11, 2014
  Webinar – Remmelt Reigersman and Thomas Humphreys
  Tax Department Chair Thomas Humphreys and Partner Remmelt Reigersman explained the structures, restrictions, and pitfalls in this evolving hybrid world of C-corporations mixed with tax pass-throughs.

- **Arizona Bankers Association CEO and Directors' College –** October 30, 2014
  Speaking Engagement – Anna Pinedo
  Partner Anna Pinedo focused on what has been accomplished and what is yet to come for the Dodd-Frank Act. This session provided an inside look as to what companies can expect to see from the SEC on transparency regulation for the derivatives and asset-backed securities markets, as well as rules for credit rating firms. The presentation also gave a synopsis of the work the SEC has done related to the hedge fund industry and protections for brokerage customers.

- **SIFMA Complex Products Forum –** October 29, 2014
  Sponsorship – Anna Pinedo
  Partner Anna Pinedo discussed reasonable-basis suitability and innovative investment products; due diligence processes when onboarding new products; ongoing supervision and oversight best practices; and new product training and how it can create a culture of compliance.

- **Communications Rules and Public Companies –** October 28, 2014
  Seminar – David Lynn and Marty Dunn
  Partners David Lynn and Marty Dunn focused on the existing communications safe harbors under the Securities Act available to private companies contemplating an IPO or other financing and those available to seasoned public companies.

- **West LegalEdcenter Webinar: Understanding the Offering Process, Disclosure and Periodic Reporting Requirements for Asset-Backed Securities –** October 16, 2014
  Webinar – Jerry Marlatt and Kenneth Kohler
  Senior Of Counsels Jerry Marlatt and Kenneth Kohler examined some of the significant changes that were adopted by the Commission, including the "speed bump" provision; asset review for compliance; asset-level information for securitizations involving residential mortgage loans, commercial mortgage loans, auto loans and debt securities among other assets; a requirement to report periodically demands by the trustee to repurchase assets for breach of representations and warranties, and any such assets not repurchased; CEO certifications; and new forms for registration of asset-backed securities.

- **EU Bail-In Power and Transaction Structuring –** October 16, 2014
  Webinar – Peter Green and Jeremy Jennings-Mares
  Partners Peter Green and Jeremy Jennings-Mares focused on the scope of the bail-in power and how it might be applied in practice, as well as discussing how this might affect the structuring of financial instruments issued by banks.

- **IFLR Webinar: The Cross-Border Private Placement Market –** October 14, 2014
  Webinar – Scott Ashton and Brian Bates
  Of Counsel Scott Ashton and Partner Brain Bates discussed the global private placement market and recent trends; market participants; documentation requirements; traditional covenants and model forms; marketing process; ratings and the NAIC; and secondary transfers.

- **Developments in Private Placements –** October 8, 2014
  Seminar – Anna Pinedo
  Partner Anna Pinedo, along with James Waldinger of Artivest, Tymour Okasha of Bank of America Merrill

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Lynch, and Kiran Lingam of SeedInvest, discussed investor verification, including best practices. They also discussed how different participants are using accredited investor crowdfunding and matchmaking sites.

- **The Morgan Stanley No-Action Letter at Age 18: Is it Time to Rethink? –** October 7, 2014
Seminar – Bradley Berman and Lloyd Harmetz
Partners Bradley Berman and Lloyd Harmetz joined the Structured Products Association for a roundtable to review market developments since the Morgan Stanley no-action letter was granted. This session elicited a lively dialogue regarding potential changes and industry action.

- **The 3rd Annual Liquid Alternative Strategies-East Conference –** October 6, 2014
Sponsorship
This event focused on the distribution and growth strategies for mature liquid alternative funds and pathways for creation and compliance for funds looking to launch.

- **Shadow Banking Reform –** October 1, 2014
Webinar – Peter Green and Jeremy Jennings-Mares
Partners Peter Green and Jeremy Jennings-Mares took a look at recent regulatory developments in this area including legislative proposals in the EU and the U.S. and consider likely future action by regulators and legislators.

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1. *See Adda v. Commissioner,* 10 T.C. 273, 277-78 (1948).
2. *Higgins v. Commissioner*, 312 U.S. 212 (1941).
3. IRC Section 864(b)(2)(A)(i).
4. IRC Section 864(b)(2)(A)(ii).
5. *See* Treas. Reg. § 1.864-2(c)(2).
6. Treas. Reg. § 1.864-2(c)(2)(iv)(b).
7. *See, e.g.*, *Bielfeldt v. Commissioner*, 231 F.3d 1035 (7th Cir. 2000).
8. As a policy matter, Congress sought to prevent foreign dealers from gaining a competitive advantage—if the First Safe Harbor permitted discretionary authority, foreign dealers could directly compete with U.S. dealers while avoiding tax on their U.S. income.
9. PLR 8552063 (Sept. 30, 1985).
10. Treas. Reg. § 1.6049-(4)(c)(1)(A).
11. Treas. Reg. § 301.7701-3(b)(1).
12. Treas. Reg. § 301.7701-3(c).
13. This is not the first instance in which the IRS has applied the anti-abuse rule under Section 956. For another application of the anti-abuse rule, see our article entitled "IRS Applies Section 956 Anti-Abuse
14. Rule," at page 7, of Tax Talk, available at http://www.mofo.com/~/media/Files/Newsletter/2014/07/140729TaxTalk.pdf (Volume 7, No. 2 July 2014).
15. *See* Rev. rul. 72-478, 1972-2 C.B. 487.

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 11 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.

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