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TAXTALK

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IN THIS ISSUE

IRS Releases Notices Designating Certain "Basket Contracts" as Listed Transactions and Others as Reportable Transactions of Interest
Page 2

Final and Temporary Regulations on Notional Principal Contract Nonperiodic Payments
Page 2

Validus Reinsurance Ltd. v. United States: Insurance Excise Tax Doesn't Apply to Foreign-to-Foreign Retrocessions
Page 3

Webber v. Commissioner: Investor Control Doctrine in Life Insurance Contracts
Page 3

Treatment of Noteholder Consent Payment
Page 4

Sen. Rand Paul Files Suit Challenging FATCA
Page 5

Publicly Traded Partnership Proposed Regulations
Page 5

Senate Finance Committee Reports on Tax Reform
Page 7

MoFo in the News
Page 8

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EDITOR'S NOTE

It was only a matter of time before "transactions of interest" ("TOIs") found their way to Wall Street. Way back in 2006, the IRS added a new category of "reportable transaction" (reported on IRS Form 8886): a "transaction of interest." Unlike the other reportables, *e.g.*, "listed" transactions, conditions of confidentiality, etc., a TOI wasn't per se bad. It was just something the IRS suspected might be bad but needed more information. Since 2006, the IRS has announced four relatively narrow TOIs involving charitable contributions of real estate, termination and re-creation of grantor trust status, sale of interests in charitable remainder trusts, and use of domestic partnerships to prevent inclusion of subpart F income. None of them had much to do with financial instruments.

That all changed right after the end of 2015 Q2 when the IRS announced that "basket contracts," *e.g.*, certain derivatives based on a basket of stocks, were TOIs. This, coupled with a July weekend NYSBA Tax Section panel featuring the IRS's Associate Chief Counsel (Financial Institutions and Products), has led to much confusion about what a "basket contract" is. Unfortunately, tax lawyers have a quaint notion that stock "indices" are static—they never change. Put aside the fact that even the DJIA is administered by a three-person committee. Are they money managers? Are they journalists? What are they? And should this affect the tax treatment of someone who buys a DJIA derivative? Probably not, however, this month's Tax Talk explains the IRS notice in question and the resulting market confusion.

continued on page 2

In other news, Tax Talk reports on proposed regulations on publicly traded partnerships and final and temporary regulations on nonperiodic payments under notional principal contracts. We also discuss two tax cases—a circuit court case regarding the applicability of an excise tax to retrocessions and a tax court case regarding "investor control" of separate accounts for variable life insurance contracts—and review a (heavily redacted) field service advice memorandum regarding consent payments to noteholders. Finally, Tax Talk checks in with our elected officials in Washington, where tax reform remains a topic. Bipartisan working groups on the Senate Finance Committee published five separate reports on tax reform, and Sen. Rand Paul filed a lawsuit challenging FATCA. Enjoy!

IRS RELEASES NOTICES DESIGNATING CERTAIN "BASKET CONTRACTS" AS LISTED TRANSACTIONS AND OTHERS AS REPORTABLE TRANSACTIONS OF INTEREST

On Wednesday, July 8, the IRS released two notices addressing "basket contracts," which are generally derivative instruments linked to a basket of reference assets that, among other things, allow the holder to vary the basket over the instrument's life. According to the IRS, these types of contracts have the potential for tax avoidance because taxpayers account for gain or loss on the contract once the contract terminates instead of when changes to the underlying assets are made. This may result in deferral and conversion of short-term capital gain into long-term capital gain and other tax discontinuities. Basket contracts were first scrutinized in AM 2015-005, where the IRS recharacterized option contracts as direct ownership in the underlying assets.[1]

The two notices denominate certain basket contract transactions as "listed transactions," and others as "transactions of interest." Both listed transactions and transactions of interest are "reportable transactions," requiring the taxpayer and the taxpayer's material advisors to disclose the transaction on their tax returns. Among other things, penalties for failing to disclose a listed transaction are more severe than penalties for failing to disclose other types of reportable transactions.

Under Notice 2015-47, transactions are listed transactions if (1) the transaction is denominated as an option contract, (2) the underlying assets are publicly traded, (3) the purchaser of the option (or the purchaser's designee) has the right to determine (or select or use a controlled algorithm to determine) the assets in the reference basket both at inception and periodically over the term of the transaction, and (4) the purchaser (or the purchaser's designee) actually exercises such control.

Notice 2015-48, which describes transactions that are transactions of interest, does not specifically enumerate factors that cause a transaction to be a transaction of interest. However, the transactions described in Notice 2015-48 are similar to those described in Notice 2015-47 in that they are contracts that allow the holder to vary the assets in the reference basket over the life of the contract. Notably, however, contracts do not have to be denominated as options in order to be transactions of interest under Notice 2015-48.

Notice 2015-48 thus describes a basket contract as an option, notional principal contract, forward contract, or other derivative contract through which a taxpayer "attempts to defer income recognition and may attempt to convert short-term capital gain and ordinary income into long-term capital gain." The underlying assets may include securities, commodities, foreign currencies, or similar properties, as well as interests in entities that trade these properties. The taxpayer or its designee has the right to determine (or select or use a controlled algorithm to determine) the assets in the reference basket and to request changes to the assets in the reference basket (or to the algorithm). Notice 2015-48 also includes characteristics typical of a basket contract. For example, the taxpayer typically pays upfront between 10% and 40% of the value of the underlying assets, and the basket contract typically terminates if the value of underlying assets decreases by the amount of the upfront payment.

Both notices require that either the taxpayer or the taxpayer's designee be able to control the contract's underlying assets. However, it is not clear from the notices what it means for one to be a taxpayer's designee. Notably, at an NYSBA Tax Section panel on July 12, IRS Associate Chief Counsel (Financial Institutions and Products) Helen Hubbard said that, in her personal view, an unrelated investment advisor managing a basket might be an investor's "designee."[2] The meaning of "designee" may be crucial for determining the scope of the notices, given that, in the case of index-linked contracts, there may always be someone that controls the composition of the underlying assets (e.g., the index sponsor).

continued on page 3

FINAL AND TEMPORARY REGULATIONS ON NOTIONAL PRINCIPAL CONTRACT NONPERIODIC PAYMENTS

Background

A notional principal contract ("NPC") is a financial instrument under which one party pays amounts to another at certain intervals by looking to a specified index on a notional principal amount. In return, the counterparty agrees to pay a certain amount of consideration or promises to pay similar amounts. Any payments in addition to those prescribed in the intervals, like upfront payments, are nonperiodic payments. Under rules found in Treasury Regulation Section 1.446-3, when an NPC includes a "significant" nonperiodic payment, the contract is bifurcated into two separate transactions: an on-market, level payment swap and a loan. This is referred to as the embedded loan rule. The loan must be accounted for separately from the swap, and the time-value component of the loan is treated as interest for all purposes of the Code.

The Dodd-Frank Act of 2010 changed some requirements for NPCs. Specifically, the Act imposes clearing and trade execution requirements, creates rigorous recordkeeping and real-time reporting regimes, and enhances rulemaking abilities of the federal regulators. In response, the Commodity Futures Trading Commission mandated that certain swap contracts (cleared contracts), which include NPCs under Section 1.446-3, be cleared through U.S.-registered clearing organizations. The issue that these regulations aim to correct is that clearing NPCs through clearinghouses often gives rise to upfront payments because of clearinghouse requirements to post collateral, and the regulations required those payments to be bifurcated. These rules lead to additional administrative complexity for parties entering NPCs.

Temporary Regulations

On May 8, 2015, the Treasury issued final and proposed regulations changing the treatment of nonperiodic payments with respect to NPCs. The new temporary regulations simplify the embedded loan rule by removing the requirement that nonperiodic payments be significant, and narrowing the rule by adding two exceptions under Section 1.446-3T. Under the first exception, a nonperiodic payment made under an NPC with a term of one year or less does not have to be bifurcated (the "short-term exception"). The anti-abuse rule for the short-term exception provides that the IRS may treat two or more contracts as a single contract if a principal purpose of entering into separate contracts is to qualify for the exception. The second exception applies to NPCs cleared by a derivatives clearing organization or certain other clearing agencies, as well as swaps that have a collateralization arrangement ensuring a full cash margin for the duration of the swap. To qualify for the margin exception, all collateral must be paid in cash. If the collateral posted is less than a full 100%, the exception will not apply.

Additionally, the Treasury issued temporary regulations in conjunction with the new rules described above under Section 956. Under those regulations, certain obligations of U.S. persons arising from upfront payments on NPCs that qualify for the margin exception to the embedded loan rule are exempted from the definition of U.S. property. Only an upfront payment made by a controlled foreign corporation that is either a dealer in securities under Section 475(c)(1) or a dealer in commodities will qualify for the exception.

Practitioner Concerns

While practitioners are relieved to have the exceptions to the rule, the Regulations have also caused some concern. First, since the regulations remove "significant" from the description of nonperiodic payments subject to the embedded loan rule, there is no longer a *de minimis* exception. If an NPC has a small upfront payment and no collateral, the NPC is still subject to the embedded loan rule, while under the old rules it would not be. Second, the margin exception's requirement that all collateral be posted in cash limits the scope of that exception.

VALIDUS REINSURANCE LTD. V. UNITED STATES: INSURANCE EXCISE TAX DOESN'T APPLY TO FOREIGN-TO-FOREIGN RETROCESSIONS

In *Validus Reinsurance, Ltd. v. U.S.*, No. 14-5081, the D.C. Circuit held that the excise tax imposed under Section 4371 does not apply to retrocessions between foreign reinsurers.

Validus Reinsurance, Ltd. is a corporation organized in Bermuda that sells reinsurance to insurance companies that sell policies in the United States. Validus also purchases retrocessions (*i.e.*, insurance on reinsurance) from foreign retrocessionaires. The IRS determined that Validus owed Section 4371 excise tax on the premiums paid on the retrocessions.[3] Validus paid the tax and filed a claim for refund in the federal district court challenging the tax. Validus argued that the tax does not apply to retrocessions and, in the alternative, that Congress did not intend for the tax to apply to retrocessions between

continued on page 4

foreign parties. The federal district court granted summary judgment for Validus, holding that the excise tax did not apply to retrocessions.

On appeal, the D.C. Circuit found that each party presented a plausible argument based on a plain reading of the statute, and that the statute was therefore ambiguous. The D.C. Circuit resolved this ambiguity by relying on the presumption against an extraterritoriality application of the statute. The presumption assumes a statute does not apply outside the U.S. unless clearly intended by Congress. After reviewing the statute and the legislative history, the D.C. Circuit found no clear evidence that Congress intended the statute to reach outside the U.S., and so decided in favor of Validus. By concluding that Section 4371 does not apply to retrocessions between foreign parties, the D.C. Circuit narrowed the federal district court's ruling.

WEBBER V. COMMISSIONER: INVESTOR CONTROL DOCTRINE IN LIFE INSURANCE CONTRACTS

In *Webber v. Commissioner,* 144 T.C. No. 17, the U.S. Tax Court invoked the "investor control" doctrine in finding that a taxpayer was the true owner of the assets held in segregated accounts for variable life insurance policies.

Taxpayer, a venture capital investor, established a grantor trust to purchase "private placement" variable life insurance contracts on two elderly relatives. The premiums paid on these investments were placed in separate accounts, segregated from the assets of the insurance company. Taxpayer intended for the investment strategy to defer income and capital gains on the investments in the separate accounts, and ultimately to pass the funds to beneficiaries without incurring income and estate tax.

The money in the separate accounts was used to purchase investments in start-up companies in which Taxpayer had financial interests. The record showed that Taxpayer effectively directed the investment manager of the separate accounts to invest in these companies.

The Tax Court applied the "investor control" doctrine, first set forth in Rev. Rul. 77-85. Under the investor control doctrine, an investor that has sufficient "incidents of ownership" is deemed the true owner of the assets despite the fact that the assets are nominally owned in a separate account. The Tax Court held that Taxpayer had sufficient "incidents of ownership" because Taxpayer had the unfettered ability to select investments by directing the investment manager to buy, sell, and exchange assets. The Tax Court looked beyond the written policies of the separate accounts which gave the investment manager complete discretion to select investments. In reality, the investment manager complied with Taxpayer's investment directives. In addition to directing investments in the separate accounts, Taxpayer, through his agents, directed what actions the investment manager should take in its capacity as shareholder. Taxpayer also had various methods of extracting cash from the separate accounts, including by selling assets to the separate accounts.

Because Taxpayer was held to be the owner of the investments in the separate account for federal income tax purposes, Taxpayer was liable for the taxable income earned on those investments during the taxable years at issue. However, the Tax Court find did not hold Taxpayer liable for the accuracy-related penalty under Section 6662(a) because the Tax Court found that Taxpayer relied in good faith on professional advice from a competent tax professional.

Notably, the Tax Court rejected Petitioner's argument that Congress eliminated the "investor control" doctrine when Congress added Section 817(h) to the Code in 1984. Section 817(h) provides that a variable contract based on a separate account shall not be treated as an annuity, endowment or life insurance contract for any period for which the investments in the separate account are not adequately diversified in accordance with treasury regulations. Legislative history shows Congress directed that the new diversification standards apply where investments are made "in effect, at the direction of the investor." The Tax Court noted that this language refers to situations where investments are actually selected by an insurance company, but are so narrowly focused and undiversified as to be a proxy for investments that are publicly available to investors. In contrast, the "investor control" doctrine applies to situations where investment decisions are made at the actual direction of an investor. Furthermore, the Tax Court noted that the preamble to the final regulations regarding Section 817(h) states that the diversification standards do not provide guidance regarding the "investor control" doctrine. Thus, the Tax Court concluded that Section 817(h) does not displace the "investor control" doctrine.

TREATMENT OF NOTEHOLDER CONSENT PAYMENT

On May 8, the IRS released a field service advice memorandum (20151704F) that concluded that a payment (the "Consent Payment") made by a company

continued on page 5

to holders of a certain percentage of the company's outstanding notes to induce the holders to consent to amendments to the notes' indenture was first a payment of original issue discount ("OID"), and second a payment of principal.

Generally, taxpayers may not deduct capital expenditures. Pursuant to Section 1.263(a)-5, capital expenditures include amounts paid to facilitate a restructuring, recapitalization, or reorganization of the capital structure of a business entity, as well as amounts paid to facilitate a borrowing. Pursuant to Section 1.263(a)-4, capital expenditures also include amounts paid to facilitate the acquisition, creation, renewal, or renegotiation of intangibles. An amount facilitates a transaction if the amount is paid in the process of investigating or pursuing the transaction. Sections 1.263(a)-4 and -5 do not change the treatment of any amount specifically provided for under any other provision of the Code or regulations.

The IRS determined that the Consent Payment was a payment on the notes pursuant to Section 1.1275-2(a), and that this section supersedes sections 1.263(a)-4 and -5. Pursuant to Section 1.1275-2(a), a payment on a debt instrument with accrued but unpaid OID is treated first as OID to the extent accrued and not allocated to prior payments, and second as payment of principal.

The IRS redacted the "Facts" and "Analysis" sections of the field service memorandum, and so the reasons for the conclusion were not explicit.

In Tax Talk Volume 7 No. 3, we covered PLR 201431003, in which the IRS also ruled on a consent payment. In both the field service advice memorandum and the private letter ruling, the IRS determined that the consent payments were payments on the notes. In the private letter ruling, the IRS further determined that Section 1.1001-3 applied to the consent payments. Section 1.1001-3 provides guidance for whether a modification of the terms of a debt instrument so materially alters the debt instrument that a deemed exchange occurs. The field service advice memorandum summarizes Section 1.1001-3 and PLR 201431003. However, because the IRS redacted the "Analysis" section of the field service advice memorandum, we do not know whether or how the IRS analyzed the consent payment under Section 1.1001-3.

SEN. RAND PAUL FILES SUIT CHALLENGING FATCA

On July 14, 2015, Sen. Rand Paul (R-KY) and several other complainants filed suit in the Southern District of Ohio seeking to strike down FATCA (and other information reporting rules) as unconstitutional. In the complaint, the plaintiffs allege that FATCA "deprives individuals of the right to privacy of their financial affairs" and, as a result, U.S. citizens living abroad are losing access to financial services and being denied promotions at work because banks and employers are worried about compliance burdens. Furthermore, FATCA may be having an effect on Americans' personal lives. According to the complaint, 2.4% of Americans surveyed abroad reported that they have considered or are considering separating or divorcing as a result of FATCA. In addition to striking down FATCA, the complaint also seeks to strike down the FATCA IGAs, specified foreign financial asset reporting, and the FBAR.

The plaintiffs raise several grounds for relief. First, the complaint alleges that the heightened reporting requirements for foreign financial accounts violates the Equal Protection Clause (as incorporated under the Due Process Clause of the Fifth Amendment) because "U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States." The complaint also alleges that fines imposed under FATCA and the FBAR are excessive, in violation of the Eighth Amendment. IGAs under FATCA are unconstitutional, according to the complaint, because they exceed the president's powers to conduct executive agreements with other nations and have not been ratified by Congress as Article II treaties. Finally, the complaint alleges that the information reporting requirements imposed by FATCA, the IGAs, the FBAR, and Section 6038D specified foreign financial asset reporting violate the Fourth Amendment's prohibition on unreasonable searches and seizures.

PUBLICLY TRADED PARTNERSHIP PROPOSED REGULATIONS

Background

Under Section 7704 of the Code, a publicly traded partnership is taxed as a corporation unless 90% or more of the partnership's gross income is from qualifying sources. Qualifying income mostly includes passive type income: interest, rents, and royalties; however, Section 7704(d)(1)(E) expands the definition of qualifying income to include income and gains derived from the exploration, development, mining or production, processing, refining, transportation, or marketing of minerals ("Section 7704(d)(1)(E) activities"). Until recently, no regulations have been issued under Section 7704(d)(1)(E); any questions about its application were resolved by IRS private letter rulings. Many of the requests sought a ruling as to whether certain income from support services provided to businesses engaged in Section 7704(d)(1)(E)

continued on page 6

activities was qualifying income. In an effort to minimize ruling requests and provide further guidance, the IRS has introduced proposed regulation Section 1.7704-4.

The proposed regulations classify qualifying activities relating to mineral or natural resources into two categories: 1) Section 7704(d)(1)(E) activities or 2) certain limited support activities that are intrinsic to Section 7704(d)(1)(E) (an "intrinsic activity").

Section 7704 Activities

The regulations contain an exclusive list of activities that comprise section 7704(d)(1)(E) activities; this list may be expanded by published guidance. The regulations provide definitions for each Section 7704(d)(1)(E) activity. They are as follows:

1. Exploration is defined as an activity performed to ascertain the existence, location, extent, or quality of any deposit of mineral or natural resource before the beginning of the development stage of the natural deposit.

2. Development is an activity performed to make minerals or natural resources accessible.

3. Mining or production activities are defined as activities performed to extract minerals or other natural resources from the ground.

4. Processing or refining activities are generally defined as activities that are done to purify, separate, or eliminate impurities. However, these activities can vary with respect to different minerals or natural resources; therefore, the regulations include industry-specific rules for when an activity qualifies as processing or refining.

    a. With respect to natural gas, an activity is processing or refining only if the activity purifies natural gas.

    b. With respect to crude oil, an activity is processing or refining if the activity is performed to physically separate crude oil into its component parts. Additionally, physically separating any product that is itself generated by the processing or refining of crude oil is a qualifying activity. A notable exclusion from this definition is the production of plastics and similar derivatives.

    c. With respect to timber, an activity is processing or refining if it merely modifies the physical form of timber. But processing does not include activities that use chemicals or foreign substances to manipulate timber's physical or chemical properties.

5. Transportation is defined as the movement of minerals or natural resources and products produced from processing and refining including by pipeline, barge, rail, or truck. However, transportation does not include transport of oil or gas to a place that sells or dispenses to retail customers.

6. Marketing is defined as activities undertaken to facilitate the sale of minerals or natural resources, or products produced from processing or refining.

Intrinsic Activities

An activity will qualify only as an intrinsic activity if the activity is specialized to support the Section 7704(d)(1)(E) activity, is essential to completion of the activity, and requires the provision of significant services to support the Section 7704(d)(1)(E) activity.

1. An activity is specialized if both the personnel performing the activity and any property used in the activity or sold to the customer performing the activity are specialized. Personnel are specialized if they have received training unique to the mineral or natural resource industries that is of limited utility other than to perform or support a Section 7704(d)(1)(E) activity.

    a. If an activity involves the sale, provision, or use of property, then the property must qualify as specialized. The regulations provide two tests to determine if property is specialized: a) if it is only used in connection with Section 7704(d)(1)(E) activities and has limited other uses or b) if the property has other uses, it may still qualify to the extent the property is an injectant to perform a Section 7704(d)(1)(E) activity and the partnership also collects and cleans, recycles, or otherwise disposes of the injectant after use in accordance with federal and state laws.

2. An activity is essential if it is necessary to either physically complete the Section 7704(d)(1)(E) activity or comply with federal, state, or local law relating to the Section 7704(d)(1)(E) activity.

3. Significant services are provided if a partnership's personnel have an ongoing presence at the site of the Section 7704(d)(1)(E) activity and the activities of those personnel are necessary for the partnership to provide its services or to support the Section 7704(d)(1)(E) activity.

Transition

The regulations provide for a transition period that is 10 years after the date the regulations become finalized. During this 10-year period, a partnership may treat income from an activity as qualifying income if the partnership

continued on page 7

received a private letter ruling from the IRS holding that income from the activity is qualifying income. In addition, a partnership may treat income from an activity as qualifying income if, prior to May 6, 2015, the partnership was publicly traded, engaged in the activity, and treated the activity as giving rise to qualifying income under Section 7704(d)(1)(E), and that income was qualifying income under the statute as reasonably interpreted prior to the issuance of the proposed regulations.

Conclusion

The regulations have added bright line rules that should aid in classifying income in the future; however, there remain some concerns. Because the regulations contain an exclusive list of mineral and natural resource-related activities, they may limit the availability of the PTP structure for companies that develop new activities, approaches, and methods, unless additional guidance is released. In addition, the regulations codify many prior letter rulings; however, they also indicate a reversal of position with respect to previous rulings. For instance, the regulations exclude activities that add chemicals or other foreign substances to timber to manipulate its physical or chemical properties. This is contrary to a prior PLR that concludes pulpmaking generates qualifying income.[4] The comment period expires on August 4, 2015.[5]

SENATE FINANCE COMMITTEE REPORTS ON TAX REFORM

On July 8, 2015, the Senate Finance Committee released reports from five bipartisan tax reform working groups. The five reports are summarized below.

The Business Income Bipartisan Tax Working Group Report

The Business Income Bipartisan Tax Working Group Report highlights four principles that should drive reform. First, business tax reform should create an internationally competitive business tax code. The working group noted that the U.S. corporate tax rate is well above the median corporate tax rate among OECD countries of 25%, and called for the U.S. to "significantly" reduce its corporate tax rate. Second, business tax reform should address structural biases and promote investment. The working group does not want a low corporate tax rate to affect choice of entity. Additionally, the working group noted a need to address the structural bias of debt financing over equity financing and spending over savings and investment. Third, business tax reform should promote American innovation. The working group suggested strengthening the research and experimentation tax credit and creating an innovation box that rewards domestically developed and held intellectual property. Finally, business tax reform should create certainty. The working group noted that tax extenders are harmful to businesses that need consistent tax treatment for planning future investments.

The Community Development & Infrastructure Bipartisan Tax Working Group Report

The Highway Trust Fund ("HTF") is instrumental in funding infrastructure in the United States. The main source of revenue comes from excise taxes on motor fuels. However, under March 2015 CBO baseline projections, revenues from fuel taxes are predicted to decline as a result of a number of factors including: decline in total miles driven, improved fuel economy, and modest growth in vehicles that are powered by fuels not subject to HTF taxes. The report proposes two solutions to address the decline in revenues. First, an interim solution involves declaring a deemed repatriation to U.S. multinational parent corporations. It is estimated multinationals have $2 trillion in deferred earnings in CFCs; the deemed repatriation would eliminate the corporate tax expenditure that deferral affords these earnings and produce additional tax revenue.

The long-term solution involves implanting a mileage-based tax system ("VMT"). A VMT taxes users based on the number of miles traveled. An additional benefit of a VMT is its potential to improve highway efficiency because the tax can be calibrated to the costs that vehicles impose in terms of congestion and road damage. Evaluating the effects of VMT has been limited, but a number of states have passed laws creating similar programs to evaluate the feasibility of a VMT. The committee has expressed an interest in working with the Secretary of Transportation to develop a nationwide program.

The Individual Tax Bipartisan Tax Working Group Report

The Individual Income Bipartisan Tax Working Group Report highlights a couple of tax incentives on the agenda, as well as some proposals for tax administration and simplification.

The report first discusses tax incentives for charitable giving. One plan to incentivize charitable giving is to put into law and make permanent an exclusion which expired in 2014, namely an exclusion from gross income for qualified charitable distributions from an IRA. The working group noted that one issue with this plan is that some retired IRA owners might donate more of their savings than they should in order to have security for the long term. Another proposal to incentivize charitable giving is to allow for a charitable deduction for a partial contribution of property to a charity, which current law does not allow for. Second, the report discusses tax incentives for higher education. One proposal would repeal the Lifetime Learning credit and

continued on page 8

modify the American Opportunity Tax Credit (AOTC) so that the credit is permanent. The president's 2016 budget proposal would also modify the AOTC and make it permanent, while keeping the Lifetime Learning credit intact. The American Institute of Certified Public Accountants proposed combined the AOTC, Hope, and Lifetime Learning credit into one credit for all post-secondary education. This proposal also calls for a uniform definition of higher education expenses. All three proposals aim to simplify credits for post-secondary education, but the working group notes that consolidation also brings new complexities, including the requirement for taxpayers to track the value of their credits from year to year.

The report also discusses tax administration and simplification proposals, starting with proposals to prevent identity theft in filing tax returns. Throughout three different proposals, some themes are similar. The proposals all have policy themes aimed at deterring identity fraud, such as increasing the penalty, making it a felony under the Code, and adding a civil penalty applicable to the person filing the return. Finally, the report reviews some proposals for simplifying the rules for tax return due dates. While each proposal is unique, they all involve moving the return due date for partnerships or C corporations or both to the same due date as individual returns.

The International Tax Bipartisan Tax Working Group Report

The International Tax Bipartisan Working Group Report summarizes the framework for international tax reform as the group sees it. The working group has four main issues it would like to include in a reformed system. First, the working group aims to end the lock-out effect by greatly diminishing the repatriation tax. Most of the other OECD countries have some form of a hybrid territorial system, and the working group believes the U.S. should have the same. Second, other countries have special rules providing substantially discounted rates on certain forms of intangibles, and the group feels we must do the same in order to keep U.S. companies from moving these intangibles offshore. Third, the group would like the new international framework to include an interest expense limitation to prevent profit shifting through interest deductions. Finally, upon transition to the new international regime, the working group is discussing enacting a deemed repatriation resulting in a one-time toll charge for U.S. corporations. The amount would be based on each company's assets outside of U.S. borders. Proposals for this deemed repatriation include features like a lower rate for brick-and-mortar assets overseas and a credit for foreign taxes. While the toll charge would be a one-time cost, proposals allow it to be paid ratably over a number of years.

The Savings & Investment Bipartisan Tax Working Group Report

Finally, the Savings & Investment Bipartisan Tax Working Group Report highlights some proposals to increase retirement plan access and participation. Currently, only 65% of workers have access to retirement plans, and only 75% of those workers are taking up those plans. Several proposals were in the report aimed at increasing those rates. First, under existing law there is a $500 tax credit per year, for three years, for start-up costs related to qualified small employer retirement plans. The Savings & Investment report discusses a proposal to increase that to $1,500. Second, the president's budget proposal protects long-term part-time employees by preventing them from being excluded under 401(k) plans on the basis of not having completed a year of service. Third, under current law, a nonrefundable tax credit is available to individuals who make qualified retirement savings contributions, and the proposals would make that credit refundable in order to increase participation. Finally, regulations as written today require employees to be prohibited from making contributions for any period after the receipt of a hardship distribution in order for the distribution to be deemed necessary to satisfy an immediate and heavy financial need; recent proposals call for the elimination of that requirement to make participation in plans easier.

MOFO IN THE NEWS

Please note that materials from any of the sessions listed are available on our website, or upon request by e-mailing cjuarez@mofo.com.

Canadian Issuers and Regulation A+ –
June 25, 2015
Teleconference – Anna Pinedo
Partners Anna Pinedo and Pamela Hughes of *Blakes* examined Regulation A+ as it applies to Canadian Issuers and how it provides an important capital-raising alternative for private companies in the United States and Canada, as well as for Canadian companies with securities listed on a domestic exchange. Pinedo and Hughes discussed how an A+ offering may be used in connection with a primary offering of newly issued shares by a company or to resell securities held by existing stockholders.

Structured Thoughts Master Class: TLAC, Bail-in, BRRD, and other Regulatory Capital Issues Affecting Structured Products Issuance –
June 23, 2015
Seminar – Anna Pinedo and Oliver Ireland
Partners Anna Pinedo and Oliver Ireland provided a

continued on page 9

focused overview and discussed the principal regulatory capital and liquidity issues that affect issuers of structured products, which are financial institutions generally subject to the Dodd-Frank Act (in the United States) and to Basel III requirements. The partners discussed how certain of the new liquidity measures may influence an issuer's decisions with respect to call features, tenor, and related matters. Pinedo and Ireland also discussed the "bail-in" feature already effective for European issuers as a result of the Bank Recovery & Resolution Directive, as well as the Financial Stability Board's TLAC proposal and expectations for similar measures in the United States.

PLI Webinar: Abbreviated Debt Tender Offers and Other Liability Management Developments – June 22, 2015
Webinar – Anna Pinedo and David Lynn
Partners Anna Pinedo and David Lynn spoke on the recently issued SEC no-action letter and how it provides for an abbreviated approach to tender offers and exchange offers involving non-convertible debt securities provided certain conditions are met. Pinedo and Lynn discussed how the new guidance may offer increased flexibility to issuers that are considering restructuring their liabilities as well as how issuers considering a restructuring also should consider recent court decisions related to the application of the Trust Indenture Act.

IFLR Webinar: Derivatives and Cross-Border Issues – June 17, 2015
Webinar – Julian Hammar and James Schwartz
Of Counsels Julian Hammar and James Schwartz provided an update regarding recent actions by the CFTC and SEC with respect to derivatives, and discussed a number of derivatives and cross-border issues. Topics included proposed Form TO relief and the forward with embedded volumetric optionality final interpretation; CFTC no-action relief and guidance for swap execution facilities; uncleared swaps margin rules; status of cross-border harmonization; and SEC's cross border proposal and reporting rules.

4th Annual Americas Structured Products & Derivatives Conference 2015 – June 11-12, 2015
Speaking Engagements – Bradley Berman and Lloyd Harmetz
Partner Lloyd Harmetz and Of Counsel Brad Berman spoke at the 4th Annual Americas Structured Products & Derivatives Conference, which brought senior representatives from retail banks, insurance companies, investment banks, and fund managers as well as law firms, regulatory bodies, and independent investment advisors together to discuss the major challenges in the world of structured retail products and derivatives. Mr Harmetz spoke on legal roundtable titled "Working with the Regulator and Unfathoming the Plethora of Relevant Global Legislation," and Mr. Berman moderated a panel titled "Independent Valuation, Disclosure & Transparency."

Regulatory Developments Relevant to Structured Notes and Products in the EU and UK – May 28, 2015
Teleconference – Peter Green and Jeremy Jennings-Mares
Partners Peter Green and Jeremy Jennings-Mares provided an overview of recent and ongoing EU and UK regulatory developments that will impact structured notes and other structured products. Discussion included drafting of significant rulemaking and guidance and some primary regulation that is still under consultation or being developed. The partners also examined the current state of the PRIIPs legislation (primarily focused on product disclosure), MiFID II, and the BRRD.

IFLR Webinar: Regulating Liquidity – May 21, 2015
Webinar – Oliver Ireland
Partner Oliver Ireland discussed how the liquidity coverage ratio and the proposed net stable funding ratio, as well as the emphasis in the U.S. on wholesale funding, have caused financial institutions to place increased focus on the maturities of their assets and liabilities. Mr. Ireland also discussed the new requirements' adoption in the U.S. and abroad in respect to their impact on financial institutions.

MBA's National Secondary Market Conference & Expo 2015 – May 17-20, 2015
Speaking Engagement – Kenneth Kohler
Senior Of Counsel Ken Kohler participated on a panel entitled "The Three R's – Navigating Reg AB, Risk Retention, and Ratings." The session discussed finalized significant new regulations impacting the market for non-agency mortgage-backed securities; the final risk retention rule and significant new pre-issuance disclosure requirements; regulation AB's detailed loan-level disclosures pre-issuance and ongoing; and rating agencies' adjustments to the post-crisis landscape.

Fragmentation or Integration? An Overview of EU and U.S. Financial Regulation Relating to Derivatives and Structured Products – May 14, 2015
Teleconference – Peter Green, Julian Hammar, Jeremy Jennings-Mares, and James Schwartz
This presentation looked at some of the key regulatory developments relevant to the derivatives and structured products markets in the EU and U.S., including Dodd-Frank Title VII, Volcker, EMIR, and MiFID II and ongoing implementation of the new rules. The panelists focused on some of the key cross-border issues in relation

continued on page 10

to such regulation and considered whether there is scope for a workable system of mutual recognition of relevant regulation between the two systems or whether an ongoing fragmentation of markets is inevitable.

Choreographing Your Financings – May 5, 2015
Seminar – Anna Pinedo and James Tanenbaum
Partners Anna Pinedo and James Tanenbaum presented on a series of topics in Tel Aviv, Israel. The partners discussed financing strategies specific to technology and life sciences companies and focused on the special disclosure considerations and financing approaches that are most significant when either planning an IPO or for public companies. Topics included "Preparing for an IPO for the IP-Based Issuer," "Ongoing Disclosure Issues for IP-Based Companies," and "Financing Trends for Tech and Biotech Companies."

Structured Thoughts Master Class: Taxation – May 5, 2015
Seminar – Remmelt Reigersman
Tax Partner Remmelt Reigersman led a focused master class which discussed timely issues for structured products market participants. The class focused on the taxation of structured products (in particular structured notes) and emerging tax developments.

IFLR Webinar: BRRD and Bail-in – April 28, 2015
Webinar – Jeremy Jennings-Mares
London Partner Jeremy Jennings-Mares was joined by Isaac Alonso from UniCredit Bank for this session that considered 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 and the possible attitudes of investors in bank liabilities.

U.S. Legal Considerations for Canadian Banks – April 28, 2015
Seminar – Jerry Marlatt, James Schwartz, Julian Hammar, Oliver Ireland, Remmelt Reigersman and Thomas Humphreys
Morrison & Foerster hosted a one-day seminar in Toronto, Ontario, which addressed some of the key issues for Canadian firms doing business in the United States. The three sessions were titled "Tax Update: U.S. Capital Markets," "Roundtable Discussion of Volcker Rule Compliance Considerations for non-U.S. Banks," and "Resolution Schemes for U.S. and Canadian Banks."

2015 NSCP New York Regional Conference – April 28, 2015
Speaking Engagement – Anna Pinedo
Partner Anna Pinedo spoke at this one-day conference which provided a comprehensive review and clarification on current regulatory issues for both compliance industry professionals and service providers in the financial services industry. Ms. Pinedo spoke on two panels. The first was titled "What You Need to Know About Suitability and Working with Customers," and the second was titled "How to Facilitate Communications with the Public."

Uncleared Swaps Margin Proposed Rules – April 23, 2015
Teleconference – Julian Hammar and James Schwartz
Of Counsels Julian Hammar and James Schwartz discussed the proposed rules that require margin to be posted in connection with many uncleared swaps and security-based swaps. Topics of their discussion included the entities and uncleared transactions that could be subject to margin requirements; initial margin requirements, including applicable thresholds (Material Swaps Exposure and Initial Margin Threshold Amount) and issues in connection with same; variation margin requirements; and likely timeframe for finalization and implementation.

Private Placements Forum – April 22, 2015
Speaking Engagement – Scott Ashton
Of Counsel Scott Ashton spoke at this one-day gathering which provided an opportunity to assess what is holding European Investors back from lending and what makes Private Placements attractive for them. The event focused on the regulatory and legal framework as well as efforts to create a "Pan-European Private Placement Market" with insights into particular regional initiatives. Mr. Ashton's panel was titled "Standardization & Documentation."

ABA Business Law Section Spring Meeting – April 17, 2015
Speaking Engagement – Jay Baris
Partner Jay Baris participated on a panel entitled "Still Spry at 75: Reflections on the Investment Company Act and the Investment Advisers Act" at the ABA Business Law Section's spring meeting in San Francisco. Mr. Baris also moderated a panel titled "Investment Company Use of Derivatives and Leverage Task Force."

Foreign Banks Raising Capital in the U.S. – April 16, 2015
Teleconference – Bradley Berman and Jerry Marlatt
Of Counsel Bradley Berman and Senior Of Counsel Jerry Marlatt were joined by Ryan Minetti of Bank of America Merrill Lynch, to speak about the financing options of foreign banks. Speakers discussed the ability to access U.S. investors without subjecting themselves to the securities registration requirements applicable to public offerings, or the ongoing disclosure and governance requirements applicable to U.S. reporting companies. This teleconference explained how non-U.S. banks can pursue these funding avenues.

continued on page 11

IFLR European Capital Markets Forum 2015 – April 15, 2015
Speaking Engagement – Peter Green
Partner Peter Green spoke on the panel titled "Regulation in 2015/16," where he discussed the European Banking Union; practicalities of the SSM; the Prospectus Directive; and what to expect from MiFID II. Attendees of the conference benefitted from a focus on the most recent activity happening in European capital markets.

Current Issues in Securitization – April 14, 2015
Speaking Engagement – Jerry Marlatt
The panel consisted of leading securitization attorneys who are members of the Structured Finance Committee of the NYC Bar Association who discussed recent regulatory developments affecting securitization as well as recent developments relating to specific sectors of the securitization market (*e.g.*, auto loan securitizations, CMBS, CLOs, and more).

Structuring Your Regulation A+ Offering – April 14, 2015
Teleconference – David Lynn, Anna Pinedo, and Marty Dunn
Partners David Lynn, Anna Pinedo, and Marty Dunn provided an overview of the new rules and focused on Tier 2 offerings, which permits an issuer to raise up to $50 million in proceeds. The speakers also addressed eligibility requirements; preparation of disclosure materials; testing-the-waters and other communications issues; integration of offerings in close proximity; Regulation A as a precursor to an IPO; use by selling stockholders; and obtaining a concurrent stock exchange listing.

Treatment of Commercial End-Users of Swaps – April 7, 2015
PLI Webinar – Julian Hammar and James Schwartz
Of Counsels Julian Hammar and James Schwartz reviewed the status and responsibilities of commercial end users of swaps under Title VII of Dodd-Frank and the regulations thereunder. The speakers analyzed the impact of Title VII on commercial end users, and reviewed the ways in which the regulators have distinguished between commercial end-users and other types of swap market participants, including with respect to clearing, swap execution, margin, reporting, and recordkeeping requirements.

Capital-Raising Using Regulation A+ – April 6, 2015
PLI Webinar – David Lynn and Anna Pinedo
Partners David Lynn and Anna Pinedo, and Zachary O. Fallon, Special Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission, discussed Regulation A+ as it relates to Tier 1 and Tier 2 offerings; eligible issuers and eligible securities; availability for selling securityholders; communications rules and testing the waters; disclosure, financial statement, and other filing requirements; ongoing reporting requirements for Tier 2 issuers; and concurrent Regulation A+ and Exchange listings.

Rule 144A and Regulation S Offerings – April 2, 2015
Seminar – Lloyd Harmetz
Partner Lloyd Harmetz and Peter Carbone of Bank of America Merrill Lynch reviewed the SEC regulations that govern Rule 144A and Regulation S offerings, and the transaction documents that are used. The speakers focused on how the offerings are structured; the practical impact that SEC rules and interpretations have on disclosure documents and agreements; the impact of recent changes to the federal securities laws; and evolution in market practices.

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1 For our client alert addressing AM 2015-005, please see http://media.mofo.com/files/Uploads/Images/101115-Knock-Out-Option.pdf; for prior Tax Talk coverage of basket contracts, please see Tax Talk 7.2, available at http://www.mofo.com/~/media/Files/Newsletter/2014/07/140729TaxTalk.pdf.

2 For a report on that meeting, please see Lee A. Sheppard, *News Analysis: Hubbard Addresses Basket Contract Notices and Other Developments*, Tax Notes, 148 Tax Notes 255 (July 20, 2015).

3 In Rev. Rul. 2008-15, the IRS took the position that Section 4371 applies to retrocessions between foreign parties where the underlying risk resides in the United States.

4 Priv. Ltr. Rul. 9008035 (November 24, 1989).

5 On July 20, 2015, eight members of Congress wrote a letter to the Secretary of the Treasury expressing concern that unduly restricting the definition of "processing or refining" relative to the statute and legislative history and reversing previously issued private letter rulings will unnecessarily harm businesses and investors.

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 12 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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