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TAXTALK

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EDITOR'S NOTE

As our readers are no doubt well aware, increasing political gridlock at the close of Q3 over the debt ceiling, among other points of Congressional disagreement, ultimately culminated in partial closure of the government. Most relevant to our corner of the world, although some of our readers may not have even noticed it, was the suspension of many Internal Revenue Service ("IRS") operations due to the resulting "lapse in appropriations." Now, after more than two weeks of stalemate, the House and Senate finally approved legislation to fund federal agencies and temporarily suspend the federal debt limit through February 7, 2014, staving off a potential debt default and reopening the government. As thousands of federal employees get back to work, including more than 85,000 furloughed IRS employees, it's time we, too, get busy and bring you Tax Talk 6.3.

One of the key bargaining chips in play during the negotiations between Democrats and the GOP during the shutdown was a potential repeal and/or postponement of the 2.3% medical device excise tax, which generally applies to sales of certain medical devices beginning this year. If you are unfamiliar with this excise tax (or didn't even know it existed), don't worry; this issue of Tax Talk provides the perfect mix of high-level perspective and detail to make you the center of attention (hopefully, in a good way) at your next cocktail party. By the way, the excise tax remains untouched by the legislation ultimately signed by President Obama on October 17, 2013 to end the government shutdown.

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As usual, we bring you the latest Foreign Account Tax Compliance Act ("FATCA") developments from the preceding quarter. In August, the IRS announced the opening of an online registration website, enabling financial institutions to register online and begin the process of meeting their FATCA registration obligations. Let's hope this website works better than healthcare.gov, the website for "Obamacare's" federally-sponsored insurance exchange. As other FATCA developments come down the pipeline, we'll be sure to keep you up to speed. Of course, you can always visit our FATCA website (www.KNOWFatca.com) for the latest FATCA-related news and information.

Continuing our theme of bankruptcy cases with a decidedly tax flavor, this issue of Tax Talk discusses three recent decisions addressing whether a tax sharing agreement between a parent corporation in bankruptcy and its operating subsidiary created a debtor-creditor relationship. Two of these decisions – *In re BankUnited Financial Corp.* and *In re NetBank, Inc.* – from the United States Court of Appeals for the Eleventh Circuit said it did not. Meanwhile, over in the United States Bankruptcy Court for the District of Delaware, the court in *In re: Downey Financial Corp.* held the other way. We discuss the pertinent details and the potential implications of these cases.

Finally, we round out this issue of Tax Talk with a trio of international tax-related pieces. In recent private guidance, the IRS disallowed deductions for certain payments made by a parent corporation of a group of affiliated corporations to related foreign entities. Next, the Tax Court in *Barnes Group v. Commissioner*, concluded that an elaborate "reinvestment plan" designed to repatriate offshore cash from a foreign subsidiary tax free was in substance a taxable dividend. And, lastly, as the United States and Switzerland continue to strive for enhanced tax transparency, they announced a "Joint Statement" designed to encourage Swiss banks to cooperate in the U.S. Department of Justice's ongoing investigations of the use of foreign bank accounts to commit tax evasion.

As always, our regular section, MoFo in the News, concludes this issue of Tax Talk.

A PRIMER ON THE MEDICAL DEVICE EXCISE TAX

The Medical Device Excise Tax was enacted in 2010 as part of the plan to fund the Affordable Care Act (affectionately known as "Obamacare").[1] It imposes an excise tax on the sale of certain medical devices by the manufacturer or importer of the device, effective January 1, 2013. The tax is 2.3% of the sale price of the "taxable medical device," which is defined as a device that is listed as a device with the Food and Drug Administration under the Federal, Food, Drug, and Cosmetic Act, as well as in certain regulations. Examples of medical devices covered by the tax run the gamut from the mundane (tongue depressors and latex gloves) to the exotic (artificial hearts and pacemakers). Not all medical devices, however, are subject to the tax. There is an exemption for eyeglasses, contact lenses, and hearing aids, which is a relief, because, as far as we are concerned, few of us have ever referred to our glasses or contact lenses as a "medical device." There are also other exemptions for devices that are purchased by the general public at retail for individual use (i.e., the retail exception). Whether a device falls within the retail exception turns on a fuzzy facts and circumstances test, although certain categories of devices (such as prosthetics and orthotics) may qualify for the retail exemption so that manufacturers and importers do not have to apply the facts and circumstances test. For our readers who are keen to learn even more about this excise tax, the IRS has already anticipated your questions and has provided a handy set of answers to your most "Frequently Asked Questions." This FAQ is available online.[2]

FATCA REGISTRATION BEGINS

On August 19, 2013, the IRS announced the opening of the FATCA registration website (the "Portal").[3] The Portal, which was originally slated to open July 15, 2013,[4] enables financial institutions to register online with the IRS and begin the process of meeting their FATCA registration obligations.

Through the Portal, financial institutions will be able to create an account and upload the required information. A financial institution may also provide the requested information for its branch operations, as well as other members of its expanded affiliated group for which it serves as a "lead" financial institution. The Portal allows financial institutions around-the-clock access to their accounts, and provides a secure channel to update contact information, receive notices from the IRS, and manage member and/or branch information.

Any information input by the financial institution through the end of 2013, however, will not be regarded as a final submission. As a result, the IRS has encouraged financial institutions "to become familiar with the system." Beginning January 1, 2014, financial institutions are expected to finalize their registration. After approval of its registration, a financial institution will be assigned a Global Intermediary Identification

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Number, which may be provided to withholding agents to avoid FATCA withholding and comply with other FATCA-related reporting requirements.

In early June 2014, the IRS will also automatically post the first list of registered foreign financial institutions. To be included in the June 2014 list (and to avoid FATCA withholding, which begins July 1, 2014), financial institutions will need to complete their registration by April 25, 2014.

Instead of using the online Portal, financial institutions may file IRS Form 8957. Financial institutions opting to register using IRS Form 8957 may not mail the paper form before January 1, 2014. If a financial institution chooses to file a paper registration form, the IRS will establish an online FATCA account for the financial institution and provide the financial institution with information on how to access the online FATCA account to view, manage, and edit its FATCA information.

For more information on FATCA, please visit our website at www.KNOWFatca.com.

COURTS REACH OPPOSITE CONCLUSIONS ON TAX REFUNDS AS PROPERTY OF HOLDING COMPANY'S BANKRUPTCY ESTATE

In a pair of recent bankruptcy tax cases, *In re BankUnited Fin. Corp.*[5] and *In re NetBank, Inc.*, [6] the United States Court of Appeals for the Eleventh Circuit rejected two lower courts' view that a tax refund received by a bank holding company in bankruptcy was property of its bankruptcy estate. Just weeks later, over in the United States Bankruptcy Court for the District of Delaware, the court in *In re Downey Financial Corp.*[7] came to the opposite conclusion.

Although the facts of each case were slightly different, the legal issues addressed by both the Eleventh Circuit and the Delaware bankruptcy court were basically the same. In each case, the courts were called on to decide whether a tax sharing agreement ("TSA") between a bankrupt bank holding company and its operating subsidiary gave rise to a debtor-creditor relationship. The Delaware bankruptcy court held that the TSA did; the Eleventh Circuit held that it did not.

By way of background, under federal tax law, a parent company is authorized to file a consolidated tax return on behalf of its affiliated group, which consists of the parent corporation and all of its subsidiaries that are corporations for federal income tax purposes. In turn, the members typically enter into a TSA to address the method by which the group's tax liabilities will be allocated and paid. Under federal tax law, any tax refunds due to the group are paid by the IRS to the parent corporation, as the agent for the consolidated group.

Consistent with these principles, the bank holding company in each case filed a consolidated tax return on behalf of itself and its subsidiaries. And, as directed by the TSA, the holding company was required to allocate any tax liabilities and payments among the group's members. Notably, because the bank operating subsidiary was, in each case, the group's chief operating business, the lion's share of any refunds paid by the IRS to the holding company would have been generally allocated to the operating subsidiary under the TSA. This normally straight-forward process of implementing the TSA, however, was complicated by the fact that the bank holding company had declared bankruptcy and, in its capacity as a debtor, asserted that the refunds were part of its bankruptcy estate.

The linchpin of the decisions, however, revolved around the courts' interpretations of the provisions of the various TSAs, essentially an exercise in contract interpretation under state law.

Unlike the Delaware bankruptcy court, in the decisions issued by the Eleventh Circuit, the court considered the language in the TSAs and concluded that the holding companies held the tax refund on behalf of their operating subsidiaries, more akin to a principal-agent relationship than debtor-creditor. The absence of specific language demonstrating a debtor-credit relationship steered the Eleventh Circuit to a conclusion that no such relationship existed.

To bolster this conclusion, the Eleventh Circuit specifically mentioned in *In re BankUnited* that, when the holding company received a tax refund, it was required to hold the refund (as if in an escrow account) for later distribution to its members, including the operating subsidiary. Critically, the TSA failed to state when the holding company was required to forward the tax refunds to its members and whether the holding company "owned" the refunds before distributing them. From this, the Eleventh Circuit concluded that the parties only intended for the holding company to receive a tax refund on behalf of the members, as if the holding company were only a temporary place of lodging for the refund before it continued its journey to the operating subsidiary.

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The Eleventh Circuit in *In re NetBank* applied similar reasoning and, not surprisingly, reached the same result. There, the Eleventh Circuit cited language in the TSA characterizing the holding company as an "agent" for its subsidiaries. The TSA also referenced the Interagency Policy Statement On Income Tax Allocation in a Holding Company Structure (developed by the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of the Comptroller of the Currency), which contains language specifically stating that a parent receives a refund as an "agent" on behalf of the group members.

The Delaware bankruptcy court, likewise applying principles of contract interpretation, concluded that the applicable TSA unambiguously provided for a debtor-creditor relationship. To support its decision, the court cited three decisive factors. First, drawing on prior case law, the court found that the use of words in the TSA such as "refund" and "payment" evidenced a debtor-creditor relationship between the holding company and its subsidiaries. Second, the absence of any escrow, segregation requirement, or use restrictions on the tax refunds received by the holding company was indicative of ownership. Finally, the TSA delegated absolute authority to the holding company for any tax-related decisions.

Aware of the recent Eleventh Circuit decisions, however, the Delaware bankruptcy court took special care to distinguish the TSAs in those cases. Although the Delaware bankruptcy court enumerated a number of factual differences to distinguish the TSA at issue in *In re BankUnited*, it especially focused on the fact that the operating subsidiary in that case was obligated under its TSA to make any payments of consolidated income tax on behalf of the group to the IRS, while the holding company was authorized to file the group's consolidated return and receive any tax refunds.

With respect to the Eleventh Circuit's decision in *In re NetBank*, the Delaware bankruptcy court noted that the TSA at issue in its case did not reference the Interagency Policy Statement, nor did it specifically describe that the holding company as acting in an agency capacity on behalf of the group.

The practical consequences of the courts' decisions, however, are really more important than the factual minutiae. These consequences become even more acute, because in all three cases the operating subsidiaries were shut down and placed into receivership with the FDIC.

Thus, if as the Delaware bankruptcy court held, a debtor-creditor relationship existed between a bank holding company and its operating subsidiary, any tax refunds issued by the IRS would be property of the bank holding company's bankruptcy estate. As a result, the operating subsidiary would now be forced to sue its parent under the TSA as a "creditor" to obtain any tax refunds, refunds that were economically attributable to the subsidiary's banking activities (i.e., refunds attributable to massive NOLs racked up by the operating subsidiary during the credit crisis). Such claims would be on a par with other claims of the bankrupt parent's creditors.

Unless the Delaware bankruptcy court's decision is appealed and reversed, the FDIC will effectively be responsible to engage in (and underwrite) any litigation on behalf of the operating subsidiary to enforce its rights as a "creditor" (and, in these cases, an unsecured creditor) under the TSA. This will no doubt take a financial toll on the FDIC as the new owner of the tax refund, and may even result in it losing out on a potentially valuable cash recovery. For the time being, operating subsidiaries and, where applicable, the FDIC can breathe a bit easier in the Eleventh Circuit.

There is another take away message from these cases, however. If the parties to a TSA intend to create a debtor-creditor relationship, they will be well advised to admonish their lawyers to carefully draft the applicable provisions of the TSA, so that the parties' intent is memorialized in a clear, concise and unambiguous fashion, as the court found in *In re Downey Financial*.

CCA 201334037: IRS DISALLOWS DEDUCTION FOR PAYMENTS TO RELATED FOREIGN ENTITIES

In CCA 201334037, the IRS addressed a series of questions presented by a domestic corporation's (the "Taxpayer") financing arrangements with its foreign parent. At issue was whether the Taxpayer could deduct amounts denominated as interest payments to its foreign parent, or whether these amounts were subject to deferral under Section 267(a)(3).

Generally, Section 267(a)(3) and the regulations thereunder force certain taxpayers into the cash method of accounting when paying foreign related parties. Domestic corporations that accrue a deductible liability to a foreign related party in one year and actually pay the liability in a later year must take the deduction in the later year.

According to the facts of the CCA, the Taxpayer received advances from its foreign parent in order to fund its general business operations. During the tax years at issue, the Taxpayer made payments to its foreign parent that it denominated as interest. The Taxpayer obtained

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the funds necessary to make these payments through additional loans from the foreign parent. The Taxpayer's position was that these payments were payments of interest not subject to deferral under Section 267(a)(3). The IRS challenged whether interest was actually paid by the Taxpayer, or whether the financing arrangement was a circular flow of funds that did not in substance include an actual payment of interest to the foreign parent.

The IRS's concern with the arrangement can be illustrated with the following example from the CCA: Suppose that the Taxpayer owed $20x to its foreign parent under a pre-existing loan and that $1x of interest accrued on this liability. Economically, the Taxpayer is indebted to its foreign parent in the amount of $21x. If the Taxpayer borrows an additional $1x from its foreign parent and uses the proceeds of this new loan to pay interest on the old loan, the Taxpayer's economic situation has not changed. The Taxpayer is still indebted to its foreign parent in the amount of $21x. According to the CCA, "The taxpayer has in essence 'paid' with an IOU. What it has not done is made a payment within the meaning of the cash method of accounting, since a promise to pay is not a payment within either the common-sense meaning of the term or the cash method of accounting."

The CCA concludes that the Taxpayer's borrowed funds were, in substance, the same funds used to satisfy the interest obligation. Therefore, the Taxpayer was not entitled to deduct payments of interest because, under Section 263(a)(3), payments of interest were not actually made under a cash method of accounting.

BARNES: STEPS WITHOUT SUBSTANCE LEAD TO TAXABLE DIVIDEND

In *Barnes Group v. Commissioner*, TC Memo 2013-109, the Tax Court concluded that a "reinvestment plan" designed by a U.S. corporation to repatriate offshore cash from a foreign subsidiary tax free was in substance a taxable dividend.

The Barnes Group, Inc. ("Barnes") manufactures and distributes precision metal parts and industrial supplies. Its operations were conducted through three separate business segments comprised of domestic and foreign subsidiary corporations with significant operations in the U.S., Canada, Europe, Latin America, and Asia. Barnes acquired a new management team with the strategic objective to expand the company through corporate acquisitions. In order to facilitate an efficient internal financing structure for acquisitions and since the majority of the company's cash sat offshore with its foreign subsidiaries, Barnes with the assistance of its tax advisors created a "reinvestment plan" using both domestic and foreign subsidiaries.

The primary steps of the "reinvestment plan" are summarized as follows:

(1) Barnes formed two new wholly-owned subsidiaries – "Delaware" and "Bermuda,"

(2) Barnes' Singapore subsidiary ("ASA") held a cash balance of SGD$ 62 million from its accumulated retained earnings, proceeds from a bank loan, and collection of intercompany receivables,

(3) ASA and Barnes transferred foreign currency to Bermuda in exchange for Bermuda's common stock in a tax-free 351 transaction,

(4) Bermuda and Barnes transferred foreign currency to Delaware in exchange for Delaware's preferred and common stock, respectively, in a tax-free 351 transaction, and

(5) Delaware converted the foreign currency received into U.S. dollars and loaned the funds to Barnes.

In connection with the reinvestment plan, Barnes received an opinion from its tax advisors that focused on the steps occurring between the Delaware and Bermuda subsidiaries. The opinion letter concluded that no amount should be included in Barnes' federal taxable income as a result of Bermuda's receipt of the Delaware preferred stock in reliance on IRS guidance contained in Revenue Ruling 74-503, section 269 of the Internal Revenue Code should not apply to the reinvestment plan, the transaction should not result in a deemed repatriation of the funds under section 301 of the Code, and the conclusions of the opinion letter should not be altered by step transaction principles.

At trial, Barnes argued that they had reasonably relied upon Revenue Ruling 74-503 and that Revenue Ruling 2006-2 precluded the IRS from challenging situations in which a taxpayer had reasonably relied upon the prior Revenue Ruling. The Tax Court dismissed this argument finding that the facts in the Barnes case materially differed from the facts contained in the Revenue Ruling. The Tax Court further concluded that the "interdependence test" of the step transaction doctrine applied to these facts, and the Tax Court failed to find a legitimate nontax business purpose for incorporating the Bermuda and Delaware entities. Therefore, the Tax Court collapsed the intermediate steps of the reinvestment plan into a single transaction and found that the reinvestment plan was in substance

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a dividend payment from ASA to Barnes. The Tax Court additionally found Barnes liable for a 20% section 6662(a) accuracy-related penalty.

U.S.-SWITZERLAND JOINT STATEMENT

On August 29, 2013, the U.S. Department of Justice and the Swiss Federal Department of Finance signed a joint statement (the "Joint Statement") relating to U.S. tax evasion investigations. The Joint Statement establishes a program (the "Program") whereby Swiss banks that are not currently the target of a U.S. criminal investigation may obtain resolution of their status relating to the U.S. Department of Justice's tax evasion investigations provided that they deliver to the United States certain banking information (e.g. complete disclosure of cross-border activities, detailed information on an account-by-account basis, etc.) and pay certain fines, where applicable.

The Program is in addition to FATCA but borrows heavily from the definitions and procedures in the United States-Switzerland intergovernmental agreement (the "IGA"). For example, the definition of Swiss Bank is generally the definition of "Swiss Financial Institution" as defined in the IGA and the concept of "local business" is also borrowed from the IGA.

More specifically, the Program divides Swiss Banks into four categories: (1) Category 1 – Swiss Banks that are subject to a U.S. criminal investigation as of August 29, 2013; (2) Category 2 – Swiss Banks that are not yet subject to U.S. criminal investigation but have reasons to believe that they have violated U.S. tax law in their dealings with clients; (3) Category 3 – Swiss Banks that have no reason to believe that they have violated U.S. tax law in their dealing with clients; and (4) Category 4 – Swiss Banks that are "local financial institutions" within the definition of the IGA.

Category 1 Swiss Banks are not eligible for the Program. Category 2 Swiss Banks may request a non-prosecution agreement under the Program. Categories 3 and 4 Swiss banks may request a non-target letter under the Program. The information requirements vary depending on the category. In addition, only Category 2 Swiss Banks are subject to fines under the Program. No fines are prescribed for Categories 3 and 4 Swiss Banks that participate.

Swiss Banks should consider whether they wish to participate in the Program. For certain Swiss Banks, the deadline for participating in the Program is as early as December 9, 2013.

MOFO IN THE NEWS

MoFo partner Anna Pinedo presented a WestLegalEdcenter webcast called "Contingent Capital and New Bank Rules: Are CoCos the Answer?" The webcast explored how financial institutions in Europe and the U.S. are considering a range of products to address their funding needs in an environment where it is still not known which products will receive beneficial regulatory capital treatment. The webcast also addressed guidance from national regulators on additional or so-called buffer capital, as well as contingent capital products.

MoFo partners Jay Baris, David Lynn and Anna Pinedo conducted a teleconference on July 11, 2013 that focused on Rule 506 Rulemaking pursuant to the JOBS Act. The webcast discussed the "bad actor" provisions that are now applicable for Rule 506 offerings (required by the Dodd-Frank Act) as well as the relaxation of the prohibition against general solicitation required under Title II of the JOBS Act.

On July 16, 2013, MoFo partners Tom Humphreys and Remmelt Reigersman gave an IFLR webcast entitled "US Taxation of Financial Products: A Mid-Year Update." They provided a general update on recent federal income tax developments, and also examined the mark-to-market system for financial derivatives that is being floated in Congress as part of fundamental tax reform, and discussed what it might mean for various types of financial products.

MoFo partner Anna Pinedo and MoFo of counsel James Schwartz presented a seminar in conjunction with Fordham Law School called "Recent Developments in U.S. Law 2013." The seminar was targeted at foreign lawyers and included panels that provided an overview of the Dodd-Frank Act at three, the post-Dodd-Frank derivatives regulatory environment, and the regulation of foreign banks conducting business in the U.S. as a result of Dodd-Frank.

Practical Law Company hosted a webcast on July 18, 2013 entitled "What Do the New General Solicitation Rules Really Mean for Private Capital Raising?" MoFo partners David Lynn and Anna Pinedo presented the webcast, which analyzed the impact of the SEC's removal of the ban on general solicitation as required by the JOBS Act.

On July 22, 2013, MoFo partner Anna Pinedo spoke on an ALI CLE webcast called "Cross-Border Swaps: SEC and CFTC Developments." The webcast focused on the SEC's recently-proposed rules for cross-border security-based swaps, and addressed the SEC framework for these swaps, how they differ from CFTC guidelines, and what the CFTC will do when its exemptive order expires.

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MoFo partner Anna Pinedo participated in a Practising Law Institute conference on July 25-26, 2013 entitled "Understanding the Securities Laws 2013." She spoke on a panel that focused on derivatives, structured notes and other alternatives to traditional securities offerings.

MoFo partners Jay Baris and Anna Pinedo presented a webcast for West LegalEdcenter on August 1, 2013 called "SEC Implements Title II of the JOBS Act; the 'Bad Actor' Provisions." The webcast focused on the elimination of the prohibition against general solicitation and general advertising, the bad actor rules and market impacts resulting from the new rules.

Practising Law Institute conducted a webcast on August 7, 2013 called "Basel III: Complying with the New Rules." The webcast featured MoFo partner Oliver Ireland, who discussed the revised minimum capital requirements and the new definitions of "capital," required deductions and adjustments to capital, the new "standardized approach" framework for the risk-weighting of on-balance sheet assets and off-balance sheet exposures, the proposed supplemental leverage ratio requirements for the largest U.S. banks, and other recent and prospective regulatory capital developments.

On August 8, 2013, MoFo partners Lloyd Harmetz and Anna Pinedo and MoFo senior of counsel Jerry Marlatt presented a seminar to a Canadian audience in Toronto entitled "Canadian Issuers Accessing the US Capital Markets." The seminar consisted of three sessions, including key developments for Canadian issuers in US securities regulation; opportunities and issues for Canadian banks in the U.S. capital markets; and current issues impacting U.S. structured note offerings.

MoFo partners Henry Fields and Oliver Ireland presented a webcast for Western Independent Bankers, a community bank trade association, on August 20, 2013 called "Dodd-Frank Three Years Later: What's Happened and What Will Happen." The webcast analyzed the status of the Dodd-Frank Act three years after its enactment and covered the new regulatory capital requirements, enhanced prudential standards, consumer financial reform, interchange fees, mortgage regulation, the Volcker Rule, and other Dodd-Frank developments.

Fordham Law School hosted a forum on the JOBS Act on August 22, 2013. MoFo partner Anna Pinedo spoke at the forum and provided an overview of the JOBS Act provisions and discussed specifically the IPO on-ramp for emerging growth companies.

On September 4, 2013, MoFo partners Jay Baris and Anna Pinedo hosted a teleconference entitled "SEC and CFTC – Living in Peace and Harmony?" The teleconference focused on the CFTC's rules to harmonize the compliance obligations of investment advisers of registered investment companies that are commodity pools. The speakers also discussed the SEC's guidance for registered funds that use derivatives.

On September 17, 2013, MoFo partners Peter Green and Jeremy Jennings-Mares participated in a WestLegalEdcenter webcast called "Shadow Banking: Out of the Shadows and Into the Light." The speakers provided an overview of the types of activities likely to fall within the remit of "shadow banking," an overview of the Financial Stability Board and EU Commission work in the area, and an update as to the scope of the draft EU Regulation that was published in early September.

On September 25, 2013, MoFo partner Anna Pinedo participated in a Lexis Practice Advisor CLE seminar focusing on the JOBS Act. She presented on a panel entitled "The Impact of the JOBS Act on the Capital-Raising Process," which examined both the positive and negative implications of the JOBS Act and how the JOBS Act has changed the capital-raising process.

MoFo partner Daniel Nathan presented a seminar called "Enduring a FINRA Examination" on September 25, 2013. The seminar focused on preparing for cycle examinations, both in process – how to make sure your house is in order before the inspector comes knocking – and substance –the hot topics for FINRA when reviewing a firm's procedures and policies. The seminar also provided tips on how to head-off potential adverse findings when examiners are on site and asking difficult questions.

At a Risk Seminars event on September 26, 2013, MoFo partner Anna Pinedo and MoFo of counsel James Schwartz presented a session during an event that dealt with the legal operation and extraterritorial challenges presented by Title VII of Dodd-Frank. The session focused specifically on derivatives regulation under Dodd-Frank vs. regulation in Europe and examined both the similarities and differences between the two approaches to derivatives regulation, as well as the extraterritorial application of each regulatory regime.

On October 2, 2013, MoFo partners Lloyd Harmetz, Ze'-ev Eiger, Daniel Nathan and MoFo of counsel Bradley Berman presented a seminar called "Private Placements: What to Expect." Over the past year, the SEC and FINRA have made significant changes to their rules relating to private placements, while at the same time intensifying their scrutiny of these transactions. The presenters discussed these changes, as well as FINRA's recent enforcement actions relating to private placements.

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AWARDS

Morrison & Foerster was recognized at the 2013 Global Derivatives Awards on September 19 in London. The awards, which are hosted by *Derivatives Week* magazine, recognize banks, firms and individuals that have impacted the global derivatives market, and are based solely on client feedback. Morrison & Foerster was named European Law Firm of the Year.

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1 I.R.C. § 4191. All section references are to the Internal Revenue Code of 1986, as amended (the "Code"), and the Treasury regulations promulgated thereunder.

2 *See* http://www.irs.gov/uac/Medical-Device-Excise-Tax:-Frequently-Asked-Questions.

3 *See* http://www.irs.gov/Businesses/Corporations/FATCA-Registration.

4 For further information on IRS Notice 2013-43, which provided a revised FATCA implementation timeline, see our July 12, 2013 client alert, at http://www.mofo.com/files/Uploads/Images/130712-IRS-Delays-FATCA-Implementation.pdf.

5 2013 U.S. App. LEXIS 16896 (11th Cir. Aug. 15, 2013).

6 2013 U.S. App. LEXIS 18774 (11th Cir. Sept. 10, 2013).

7 Case No. 08-13041 (CSS), 112 AFTR 2d 2013-XXXX (Oct. 8, 2013).

About Morrison & Foerster

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for 10 consecutive years. *Chambers Global* named MoFo its 2013 USA Law 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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Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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